



The 2010 Oil Spill: MMS/BOEMRE and NEPA

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August 19, 2010

Congressional Research Service

7-5700

www.crs.gov

R41265

Summary

On April 20, 2010, an exploratory oil well in the Gulf of Mexico exploded, killing 11 people and causing the worst oil spill in American history. The oil well was on a tract leased by BP, having obtained a lease and the relevant permits from the federal government. Under relevant federal law, federal actions that may have adverse environmental effects are required to be reviewed for potential environmental harm under the National Environmental Policy Act (NEPA). This report will review those environmental procedures. While there are additional environmental obligations imposed on Outer Continental Shelf (OCS) drilling by other acts, this report will not review those requirements.

Multiple environmental reviews were conducted by the Minerals Management Service (MMS) at each stage of OCS development. (MMS was reorganized in May 2010, and the relevant office for the environmental reviews is the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). This report will refer to MMS for actions before the reorganization and BOEMRE going forward.) For the particular well in question, MMS addressed the environmental impacts on four occasions, including two full environmental impact statements, an environmental assessment, and a categorical exclusion. The fact that MMS categorically excluded the exploration plan from a NEPA analysis is controversial, since that is the first step in which drilling would be conducted. It appears MMS followed its internal procedure for NEPA reviews in the western and central areas of the Gulf of Mexico by employing a categorical exclusion for an exploration plan. However, that procedure has never been reviewed by a court to see if it is consistent with the law or whether an exception to the categorical exclusion may apply in this case. Had this project occurred in a different geographical area, including the eastern area of the Gulf of Mexico, it likely would have undergone a higher level of environmental scrutiny. Following a White House report suggesting that BOEMRE review its NEPA exclusions, BOEMRE announced it would not apply the categorical exclusion used in the Gulf until its review was complete.

Congress has addressed the issue of MMS/BOEMRE categorical exclusions in legislation. The Consolidated Land, Energy, and Aquatic Resources Act of 2010 (CLEAR) (H.R. 3534) would require certain levels of environmental reviews for exploration, development, and production plans, and would change the 30-day statutory deadline for approving exploration plans to 90 days.

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Background and Context

On April 20, 2010, an exploratory oil well in the Gulf of Mexico exploded, killing 11 people and causing the worst spill in United States history at approximately 4.1 million barrels (bbl).¹ It was capped in mid-July. The oil well was on a tract leased by BP, having obtained an oil and gas lease and the relevant permits from the federal government. The spill was at the Mississippi Canyon Block 252, which is one block obtained by BP under Lease Sale 206. Under applicable federal law, federal actions that may have adverse environmental effects are required to be reviewed for potential environmental harm under the National Environmental Policy Act (NEPA). Additional environmental obligations are imposed by the Outer Continental Shelf Lands Act (OCSLA),² Endangered Species Act,³ Marine Mammal Protection Act,⁴ and the Coastal Zone Management Act⁵ but will not be examined within this report. Rather, this report focuses on the environmental analyses conducted by MMS and their compliance with NEPA. MMS was reorganized in May 2010,⁶ and the relevant successor office is the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). This report will refer to MMS for events prior to the reorganization.

NEPA

NEPA states that for all “major Federal actions significantly affecting the quality of the human environment” federal agencies shall prepare a “detailed statement” of “the environmental impact of a proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] alternatives to the proposed action.”⁷ Agencies must comply to “the fullest extent possible.”

The Minerals Management Service (MMS) of the Department of the Interior is the federal agency charged with overseeing oil and gas exploration of the Outer Continental Shelf (OCS). MMS issued the lease to and approved the exploration plan of BP for the oil well that caused the spill. Under NEPA terminology, MMS is the *lead agency* for any environmental reviews.⁸

¹ Department of the Interior Press Release, *Flow Rate Group Provides Preliminary Best Estimate Of Oil Flowing from BP Oil Well* (May 27, 2010). Available at <http://www.doi.gov/news/pressreleases/Flow-Rate-Group-Provides-Preliminary-Best-Estimate-Of-Oil-Flowing-from-BP-Oil-Well.cfm>. Estimates were revised from 5,000 bbl a day to 62,000 bbl a day, decreasing toward the end of the leak to 53,000 bbl. An estimated total of 4.1 million bbl were released into the Gulf (4.9 million bbl leaked, but 800,000 bbl captured before it leaked into the Gulf). See Official Site of the Deepwater Horizon Unified Command, at <http://www.deepwaterhorizonresponse.com/go/doc/2931/840475>.

² 43 U.S.C. §§ 1331 – 1356a. For analysis of the OCSLA, see CRS Report RL33404, *Offshore Oil and Gas Development: Legal Framework*, by Adam Vann.

³ 16 U.S.C. §§ 1531 – 1544. See Section 1536 for consultation obligations of federal agencies.

⁴ 16 U.S.C. §§ 1361 – 1384. See Section 1371(a)(5)(A) for incidental takes of marine mammals.

⁵ 16 U.S.C. §§ 1451 – 1456. See Section 1456(c) for federal actions affecting coasts.

⁶ Secretarial Order 3299 (May 19, 2010), available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475>.

⁷ 42 U.S.C. § 4332. The act also requires consideration of “(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.”

⁸ As referenced above, MMS was reorganized, effective May 19, 2010. Secretary of the Interior Order No. 3299.

NEPA includes three types of environmental reviews with different levels of scrutiny into the environmental effects of an action. The goal of the reviews is for an agency to be able to demonstrate that it has taken an appropriately *hard look* at the environmental consequences of its planned activity.⁹ The environmental review is also supposed to involve the public.¹⁰ The most comprehensive review is concluded by an environmental impact statement (EIS). It is required by NEPA for all agency actions that will significantly affect the environment. An EIS should demonstrate that the agency considered a reasonable range of alternatives that took a hard look at the environmental consequences of a proposed action. An EIS also requires extensive public involvement, including a public comment period for a draft EIS and consideration of those comments in the final document.

Where an action may not have significant effects, or when an agency is unsure of the degree to which an action may have significant impacts, a review called an environmental assessment (EA) is conducted. An EA also requires consideration of alternatives to the action and a review of the effects, but it is intended to be an abbreviated review. The public comment period is limited and could occur only upon completion of a final document.

The third type of review is for actions that agencies have pre-determined have no significant impact, typically because an agency routinely conducts the activity. This type of review is a categorical exclusion (CE, sometimes known as a Cat Ex). Technically, it means a formal review is not required because the agency has already determined that the environmental consequences of the action will not be significant.¹¹ Agencies prepare lists of CEs and may exclude a particular action if it is on that list. The decision to invoke a CE for a project must be documented in some way.¹² CEs are not allowed when there are extraordinary circumstances surrounding a proposed action, which generally include the presence of endangered species or significant resources of some type, such as archeological sites. This is consistent with the purpose of CEs—they do not apply when there could be a significant environmental impact.

Aside from the interpretive case law, the requirements for NEPA reviews can be found in two places: the regulations issued by the Council on Environmental Quality (CEQ);¹³ and within agency-specific regulations or guidelines. Generally speaking, the CEQ regulations provide the foundation for NEPA compliance, while the agency guidelines provide for more specific application to the circumstances of a particular agency. In the case of MMS, NEPA procedures are found within the Department of the Interior agency-wide NEPA guidelines in the Departmental Manual (DM),¹⁴ as well as in MMS guidelines within the DM.¹⁵

⁹ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (the role of a court is to ensure than an agency took a “hard look” at the environmental consequences); *National Audubon Society v. Department of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (a hard look “encompasses a thorough investigation into the environmental impacts of an agency’s action and a candid acknowledgement of the risks that those impacts entail”); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992) (courts review whether an EIS “contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences”); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, at 838 (D.C. Cir. 1972) (an environmental review complies with NEPA “so long as the officials and agencies have taken the ‘hard look’ at environmental consequences mandated by Congress”).

¹⁰ 40 C.F.R. § 1506.6. See *California v. Block*, 590 F.2d 753 (9th Cir. 1982) (informed public participation is a goal of NEPA).

¹¹ 40 C.F.R. § 1508.4.

¹² *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

¹³ 40 C.F.R. part 1500.

¹⁴ 516 DM 1-15, available at http://206.131.241.18/app_DM/index.cfm?fuseaction=searchDM&keyword= (continued...)

MMS NEPA Reviews

MMS's summary of its OCS program indicates there are four different stages at which it performs an environmental review for OCS leasing.¹⁶ The summary indicates what type of environmental review is typically done at each stage. Those stages, and the typical environmental reviews, are:

- develop a 5-year program—EIS;
- plan for a specific lease sale—EIS;
- approve the exploration plan—EA; and
- approve development and production plan—EIS.

The four stages are based on the OCSLA.¹⁷

Records indicate that MMS conducted four separate environmental reviews related to the oil well known as Mississippi Canyon Block 252, including two EISs, one EA, and a CE. These four documents relate to the first three stages described above; two reviews were conducted at the lease sale stage, and the development and production stage had not been reached. Mississippi Canyon Block 252 was at the exploration stage. Briefly, those four documents are as follows:

- April 2007: MMS issued an EIS for the OCS Five Year Leasing Program, the 2007-2012 Outer Continental Shelf (OCS) Oil and Gas Leasing Program. This document considered environmental impacts related to off shore drilling, not just within the Gulf of Mexico, but for the two other areas in which off shore drilling is conducted: around Alaska and along the Atlantic coast.
- April 2007: MMS issued an EIS for the lease sale in the western and central portion of the Gulf of Mexico.
- October 2007: MMS issued an EA for Lease Sale 206, which included Mississippi Canyon Block 252, finding no new significant impact. This document was intended by MMS to supplement the other environmental reviews, which is why instead of the accepted NEPA terminology of “finding of no significant impact” (FONSI) it referred to no “new” significant impacts.
- April 2009: MMS issued a CE for the exploration plan that authorized BP to begin exploratory drilling on its site.

Additionally, two other environmental reviews were conducted that relate to drilling in the Gulf. Both were programmatic environmental assessments, meaning they were designed to consider broad impacts from a type of federal action and not just the impacts from one action. Programmatic environmental reviews are viewed as an efficient way to consider impacts without creating redundant reviews.¹⁸ In July 2004, MMS announced completion of a programmatic EA

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516%20DM%201-15.

¹⁵ 516 DM 15.

¹⁶ A copy of this is available at http://www.boemre.gov/PDFs/5BOEMRE_Leasing101.pdf.

¹⁷ 43 U.S.C. § 1344—5-year plan; 43 U.S.C. § 1337(a)—lease sale; 43 U.S.C. § 1340—exploration plan; and 43 U.S.C. § 1351—development and production.

¹⁸ 40 C.F.R. § 1500.4: “Agencies shall reduce excessive paperwork by ... (i) using program, policy, or plan (continued...)”

that evaluated potential impacts of geological and geophysical testing in the Gulf.¹⁹ That testing included seismic testing. A different programmatic EA was announced in March 2005 for Structure-Removal Operations in the Gulf,²⁰ which typically involve the use of explosives.

The 2007-2012 Outer Continental Shelf Oil and Gas Leasing Program

In February 2006, and again in August 2006, MMS sought comments on its proposed 5-year lease plan for 2007-2012 that would expand OCS leasing areas. The proposed plan addressed 21 OCS areas, including two in the Gulf of Mexico.²¹ An EIS for this plan was prepared, and the final 5-year Plan EIS was completed in April 2007.²² The 2007-2012 OCS Oil and Gas Leasing Program became effective on July 1, 2007. However, a federal court of appeals determined that MMS had not complied with all of the environmental requirements, and the program was returned to MMS for revision.²³ A preliminary revised 5-year plan was announced in March 2010.²⁴

The EIS for the 5-year Plan

The EIS for the 5-year Plan for 2007-2012²⁵ describes its scope as being regional and programmatic, and it also describes the assumptions made when evaluating the environmental effects of the proposed action. It divides the environmental effects based on the three geographical areas within the 5-year Plan: Gulf of Mexico, Atlantic, and Alaska. Different assumptions are made for each area, and the environmental effects are premised on that. One assumption for the Gulf of Mexico is the scale of oil spills that could be expected to occur.²⁶ The estimates were made for potential spills during production and transportation, and do not appear to consider oil spills at the exploration stage. A large oil spill, according to the 5-year Plan EIS, would be one of 1,000 barrels (bbl) or greater. Based on historical modeling, MMS calculated a probable large oil spill from a platform to be 1,500 bbl and 4,600 bbl from a pipeline.²⁷ The spill from the current Mississippi Canyon exploration well is categorized as a platform-related spill, even though the leak occurred far below the surface of the water. The 5-year Plan EIS estimates

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environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues.”

¹⁹ MMS, Geological and Geophysical Exploration for Mineral Resources on the Gulf of Mexico Outer Continental Shelf - Final Programmatic Environmental Assessment, MMS 2004-054 (July 2004). 69 Fed. Reg. 45851 (July 30, 2004).

²⁰ MMS, Structure-Removal Operations on the Gulf of Mexico Outer Continental Shelf Programmatic Environmental Assessment, MMS 2005-013 (February 2005). 70 Fed. Reg. 9965 (March 1, 2005).

²¹ 71 Fed. Reg. 50457, 50458 (Aug. 25, 2006).

²² 72 Fed. Reg. 24326 (May 2, 2007).

²³ Center for Biological Diversity v. U.S. Department of the Interior, 563 F.3d 466 (D.C. Cir. 2009).

²⁴ 75 Fed. Reg. 16833 (April 2, 2010). Available at <http://www.boemre.gov/5-year/2007-2012FEIS.htm>. On that same date, MMS announced intent to prepare an EIS for the next 5-year plan, from 2012 to 2017. 75 Fed. Reg. 16828 (April 2, 2010).

²⁵ MMS, Outer Continental Shelf Oil & Gas Leasing Program: 2007-2012, Final Environmental Impact Statement MMS 2007-003 (hereinafter 5-year Plan EIS). Available at <http://www.boemre.gov/5-year/2007-2012FEIS.htm>.

²⁶ 5-year Plan EIS, Ch. IV, pp. IV-28 – IV-31.

²⁷ 5-year Plan EIS, Ch. IV, pp. IV-29.

that the Gulf of Mexico wells would produce 4 to 8 billion bbl of oil and have nine large oil spills (four from pipelines; four from platforms; and one from a tanker).²⁸ These numbers are for deepwater and near-shore drilling combined. Approximately 75% of the leasing activity is planned for deepwater.

The programmatic environmental effects for the preferred alternative for the Gulf Coast included impacts on the following: air and water quality; mammals and birds; fish, fisheries, and fish habitat; sea turtles; coastal and seafloor habitats; areas of special concern; socioeconomic impacts; archeological resources; tourism and recreation; and land use.²⁹ Some protected resources in the area include the following endangered species:

- Northern Right Whale,
- Blue Whale,
- Fin Whale,
- Sei Whale,
- Humpback Whale,
- Sperm Whale,
- West Indian Manatee,
- Leatherback turtle,
- Green turtle,
- Hawksbill turtle,
- Kemp's Ridley turtle,
- Loggerhead turtle,
- Gulf Sturgeon,
- Whooping crane,
- Piping plover,
- Alabama beach mouse,
- Choctawhatchee beach mouse,
- St. Andrew beach mouse, and
- Perdido Key beach mouse.

The baseline data described above largely influence the discussion of environmental impacts within this EIS. The data contemplate four platform spills across the entire 40-year lease term (and not just the five years of the 5-year Plan) that would produce spills of approximately 1,500 bbl each, and only three of those spills would be in deepwater. Accordingly, the analysis of the effects from the spills is limited to considering how a 1,500 bbl spill could affect the environment. There is no extrapolation or other hypothesis for what would happen if the spill

²⁸ 5-year Plan EIS, Table IV-4.

²⁹ 5-year Plan EIS, Ch. IV, pp. IV-33 – IV-102.

were larger. Based on the assumptions of limited spill quantities, the conclusion for the environmental consequences tends to be in one of two camps: one, that the magnitude of harm would depend on the timing and quantity of the oil spill (see, for example, Coastal Waters, Marine Waters, Marine Mammals, Marine and Coastal Birds, Essential Fish Habitat, Sea Turtles); or two, that because a deepwater spill is calculated to be at 1,500 bbl, it is unlikely to reach areas where significant impacts could occur (see, for example, Marine and Coastal Birds, Terrestrial Mammals, Coastal Barrier Beaches, Sea turtle nesting, Seafloor Habitat and Live Bottom and Pinnacle Areas).

Environmental groups argued that the agency failed to take a hard look at the environmental consequences of its action. Limiting the size of a potential spill could limit the size of impacts that are reviewed. However, the court that reviewed this matter, the D.C. Circuit Court of Appeals,³⁰ has determined that challenges to the sufficiency of that NEPA process for the 5-year plan could not be reviewed.³¹ The court said that the 5-year Plan NEPA review had “not yet reached that ‘critical stage’ where an ‘irreversible and irretrievable commitment of resources’ has occurred that will adversely affect the environment.”³² The court suggested that the appropriate time for such claims would be at the leasing stage. Accordingly, this ruling bars any challenge to the 5-year Plan NEPA review.

This position is consistent with other courts that have reviewed NEPA challenges of multiple stage administrative programs. The Second Circuit has held that a federal action, in that case an administrative hearing involving Mobil Oil, is not subject to NEPA until that point where there might be irreversible and irretrievable commitments of resources.³³ Similarly, the D.C. Circuit held that a Forest Service procedure for identifying areas for oil and gas leases was not ripe because it could prove unnecessary if no leases were ever issued.³⁴ No irreversible or irretrievable commitment of resources had been made.

The EIS for 11 Gulf of Mexico Lease Sales

In April 2007, MMS also completed the EIS for the 11 lease sales for the Gulf of Mexico, the Multisale EIS.³⁵ For the lease sales, the MMS divided the Gulf of Mexico into three regions: western (the Texas coast); central (the coasts of Louisiana, Mississippi and Alabama); and eastern (the Florida coast). Eleven lease sales were planned for the western and central areas and none for the eastern area.³⁶ A number of leases could be issued within each of the 11 lease sales, typically

³⁰ 43 U.S.C. § 1349(c)(1) gives this court exclusive jurisdiction for review of OCSLA leasing program approvals. This exclusive jurisdiction has been found to apply only to OCSLA claims and not to NEPA claims related to OCSLA approval. See *Get Out Oil, Inc. v. Andrus*, 477 F. Supp. 40, 42 (C.D. Cal. 1979).

³¹ *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009).

³² *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009).

³³ *Mobil Oil Corp. v. FTC*, 562 F.2d 170, 173 (2d Cir. 1977) (finding that certain adjudicatory proceedings were not subject to NEPA because the final order was still speculative).

³⁴ *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999). See also *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (holding that no EIS was required where lease was issued forbidding surface occupancy (and therefore oil drilling)).

³⁵ MMS, Gulf of Mexico OCS Oil and Gas Lease Sales: 2007-2012; Western Planning Area Sales 204, 207, 210, 215, and 218; Central Planning Area Sales 205, 206, 208, 213, 216, and 222; Final Environmental Impact Statement, MMS 2007-018 (April 2007) (hereinafter Multisale EIS). Available at <http://www.gomr.boemre.gov/homepg/regulate/environment/nepa/nepaprocess.html>.

³⁶ Approximately 5.8 million acres located in the southeastern part of the Central Planning Area (CPA) are not included (continued...)

over 300, based on the amount of resources an area is estimated to produce. For more details on the facts underlying the western and central lease sales, see **Appendix A**.

The Multisale EIS evaluated the environmental impacts from routine operations as well as accidents such as oil spills. It reviewed all of the different steps involved in extracting oil—seismic testing, exploratory drilling, development and production, transportation, and removing structures at the end of the lease.

Blowouts and other spills were evaluated, first, on the probability of such events occurring, and then analyzing the probable resulting environmental effects. Like the 5-year Plan EIS, the Multisale EIS used historical data as the basis for the size of an oil spill. According to MMS, the most likely size of an oil spill that was greater than 1,000 bbl would be 4,600 bbl.³⁷ However, MMS states that large oil spills (meaning spills greater than 1,000 bbl) are “low-probability events.”³⁸

MMS used modeling to see how a 4,600 bbl spill would dissipate when on the surface. (Although it studied both surface and subsurface spills, MMS noted that subsurface spills would behave the same as surface spills once they reached the top.) MMS found that natural weathering would dissipate 32% to 74% of the slick; between 30% and 32% would be lost to the atmosphere via evaporation; and about 2% to 42% would be lost into the water column via natural dispersion.³⁹ No modeling was done on a larger spill.

The Multisale EIS did consider the possibility of a larger offshore spill for the leases, although it did not analyze impacts from such a spill. It found that a spill larger than 10,000 bbl had greater than a 99% chance of occurring during the 40-year period.⁴⁰ A mean number of spills of that size was estimated between 11 and 13 for that time period.⁴¹ MMS analyzed the environmental effects of a spill of 4,600 bbl, the “most likely size of a spill greater than 1,000 bbl.”⁴²

In general, the probability of an offshore oil spill greater than 1,000 bbl (but not larger than 4,600 bbl) reaching an environmentally sensitive resource was found to be small, ranging from less than 0.5% (for example, reaching Gulf communities, listed beach mice, or Gulf Sturgeon habitat), but greater for other resources (for example, the probability of such a spill reaching waters used by coastal sea turtles ranged from 6% to 35%, while the odds of a spill reaching sea turtle nesting and mating habitat were 4%).⁴³ Thus, an offshore spill larger than 1,000 bbl was not found to be a significant environmental impact.

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in the lease sale area, despite being opened to leasing by the Gulf of Mexico Energy Security Act of 2006 after years of leasing moratoria in appropriations acts. 71 Fed. Reg. 35258 (June 27, 2007).

³⁷ Multisale EIS, p. 4-232.

³⁸ Multisale EIS, p. 4-228. Ninety-four percent of all spills in the Gulf were found to be less than 1 bbl, contributing 5% by volume to all spills. Multisale EIS, p. 4-235.

³⁹ Multisale EIS, p. 4-233.

⁴⁰ Multisale EIS, p. 4-75.

⁴¹ *Id.*

⁴² Multisale EIS, p. 4-232.

⁴³ Multisale EIS, p. 4-243.

The Multisale EIS includes a discussion of blowouts as a *Loss of Well Control* (LWC), of which a blowout is the most severe form. Most LWC events were found to last half a day.⁴⁴ Therefore, MMS concluded impacts to marine water quality were not estimated to be significant.⁴⁵ However, it is noted that the noise from a blowout explosion could injure marine mammals, depending on their proximity.⁴⁶

Adequacy of the Environmental Review of the Multiple Lease Sales

It could be questioned whether the review within the Multisale EIS was comprehensive enough to satisfy a court that MMS fully complied with NEPA. The act requires “a detailed statement” on “any adverse environmental effects which cannot be avoided should the proposal be implemented.”⁴⁷ A court could consider the adequacy of not reviewing the environmental effects of spills over 10,000 bbl when MMS calculated a greater than 99% probability that such a spill would occur. On the other hand, the court could find that reviewing spills of 4,600 bbl met NEPA’s standards. There is no court decision reviewing this document.

NEPA requires an agency to consider the environmental consequences of its actions during the development of a proposal.⁴⁸ Courts apply the “rule of reason” to see if the document is sufficient. One court described that review as finding whether an EIS “contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.”⁴⁹ In general, courts have held that the goals of NEPA are satisfied when an EIS “sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved.”⁵⁰

In the case of OCS leases, courts have accepted that there are staged analyses with different degrees of scrutiny matching the different OCSLA steps. In a suit challenging an EIS prepared for one lease sale in the Arctic,⁵¹ the plaintiffs argued that the NEPA analysis was flawed because it significantly underestimated the amount of oil that might be spilled.⁵² The Ninth Circuit held that they were “least troubled by what may seem to be incomplete or speculative data at the lease sale stage,” noting that prior to exploration “an oil spill risk analysis can never be more than speculative.”⁵³ The court’s comfort with the data was based on the fact that OCSLA had tiered analyses: “the amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA’s stages.”⁵⁴ It referred to the U.S. Supreme Court decision regarding the tiered environmental analysis of OCSLA, *Secretary of the Interior v. California*.⁵⁵ In that case, which

⁴⁴ Multisale EIS, p. 4-239.

⁴⁵ Multisale EIS, p. 4-260.

⁴⁶ Multisale EIS, p. 4-275.

⁴⁷ 42 U.S.C. § 4332(2)(C)(ii).

⁴⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

⁴⁹ *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992).

⁵⁰ *County of Suffolk v. Dept. of the Interior*, 562 F.2d 1368 (2d Cir. 1977) (holding that an EIS for OCS drilling proposal was not inadequate).

⁵¹ The Multisale EIS for the Gulf reviewed 11 lease sales.

⁵² *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1988).

⁵³ *Id.* at 1192.

⁵⁴ *Id.*

⁵⁵ *Secretary of the Interior v. California*, 464 U.S. 312 (1984) (holding that an adverse effects analysis under the CZMA was not required at the lease sale stage).

did not consider NEPA, the Supreme Court said that a lease sale on its own “does not directly mandate further activity that would raise an oil spill problem,” and therefore, there was no need to perform a CZMA environmental analysis at that point.⁵⁶ The Supreme Court and the Ninth Circuit predicated their decisions on the fact that the desired environmental review could occur at a later stage in the OCSLA process.

Other courts have considered the argument that an environmental document at the lease sale stage should have considered the potential effects of a larger spill, ultimately rejecting that claim.⁵⁷ In a dispute in the Ninth Circuit, the NEPA document had discussed impacts from spills exceeding 1,000 barrels and those exceeding 10,000 barrels for OCS drilling in the Arctic. The plaintiff wanted consideration of spills of greater than 100,000 bbl, based on the Amoco Cadiz spill of 1.6 million barrels in 1978, and the 3.5 million bbl exploratory well blowout in the Gulf of Mexico in Mexican waters in 1979. The district court held that plaintiff had not made its argument well, failing to show how impacts from a 100,000 bbl spill would be different from those discussed for a 10,000 bbl spill. Additionally, the court noted that an EIS does not have to consider every possible impact: “The rule of reason applicable to environmental impact statements does not require an inquiry into every conceivable situation that may occur no matter how remote or speculative it may be.”⁵⁸

The Ninth Circuit agreed with the conclusion of the district court, but for different reasons. It found that the tiered environmental reviews under the OCSLA would mean that as drilling became more likely, the impacts of a 100,000 bbl spill may be considered. The lease sale stage was a preliminary stage, according to the court: “Further information about the probability and location of a 100,000 barrel spill will become available as lessees survey their tracts, or test them, or plan for production and development.”⁵⁹

While NEPA requires consideration of a range of alternatives, it does not require consideration of a worst case scenario, such as another 3.5 million bbl spill.⁶⁰ An earlier version of the CEQ regulations did require such an evaluation when an agency had “incomplete or unavailable information” regarding the effects of an action. In that case, an agency was required to “include a worst case analysis and an indication of the probability or improbability of its occurrence.”⁶¹ In general, courts have held that an EIS “is not required to discuss every conceivable consequence of an agency’s actions. Under the rule of reason, the environmental impact statement is not required to consider alternatives or consequences that are only speculative or are too remote.”⁶² It would

⁵⁶ Secretary of the Interior v. California, 464 U.S. 312, 317 (1984).

⁵⁷ Village of False Pass v. Watt, 565 F. Supp. 1123 (D.C. Alaska 1983), *aff’d sub nom.*, Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).

⁵⁸ Village of False Pass v. Watt, 565 F. Supp. 1123, 1147 (D.C. Alaska 1983).

⁵⁹ Village of False Pass v. Clark, 733 F.2d 605, 616 (9th Cir. 1984).

⁶⁰ Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983) (holding the Corps of Engineers did not have to consider the worst case scenario of a tanker losing all of its cargo when considering the impacts of a dredging permit basing its holding in significant part on a now-revised CEQ regulation).

⁶¹ 40 C.F.R. § 1502.22(b) (revised in 1986). The current regulations require an agency to prepare a statement regarding unavailable information that includes *reasonably foreseeable significant adverse impacts*, which is defined as including “impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence.”

⁶² Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1074 (1st Cir.1980).

be up to a court to consider whether a blowout spill from Lease Sale 206 was too remote and speculative for MMS to consider in its environmental review.

Lease Sale 206 Environmental Assessment

The third environmental review in the OCS process is the environmental assessment (EA) prepared for Lease Sale 206 in the Gulf (Lease Sale 206 EA).⁶³ The oil spill occurred in Mississippi Canyon Block 252 of this lease sale. MMS prepared environmental assessments for other particular lease sales in the western and central Gulf, such as Lease Sale 207, although a Supplemental EIS was prepared for Lease Sale 224 in the eastern Gulf.

Typically, an EA leads to one of two conclusions: discovery of a significant impact and then preparation of an EIS, or a finding of no significant impact (FONSI). MMS terms its EAs differently. It issues an EA-FONNSI, meaning finding of no *new* significant impact, reflecting the tiered environmental analyses for the OCS process. Lease Sale 206 EA recognizes that it “tiers off the Multisale EIS and incorporates much of the material by reference.”⁶⁴ According to MMS, new information related to the lease sale was discovered, but did not change the conclusions reached within the Multisale EIS.⁶⁵

The EA appears to back off some of the environmental impacts considered in the EIS. It states that because activity was overestimated, the environmental impacts “may have been overstated.”⁶⁶ While new information was considered within the EA, MMS found it supports the conclusions made in the Multisale EIS, and so no new conclusions are made within the EA.⁶⁷ The Lease Sale 206 EA refers to the Multisale EIS review of spills greater than 1,000 bbl.⁶⁸ No reference to larger spills was found, such as a 4,600 bbl spill. In fact, oil spills were discussed in more general terms throughout the document than in either of the EISs, which were incorporated by reference.

No legal challenge to the Lease Sale 206 EA has been found. However, challenges to other EAs for OCS drilling have been found for EAs issued for particular lease sales in the Arctic. Courts have found EAs should be used in these circumstances to determine whether “the new circumstance must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.”⁶⁹ If those different impacts are found, an EIS or Supplemental EIS is warranted. A federal district court considered whether a Supplemental EIS should have been prepared three years after conclusion of a multisale EIS for the Arctic region, instead of an EA. It found that the multisale EIS in that case had considered scenarios that

⁶³ MMS, Proposed Gulf of Mexico OCS Oil and Gas Lease Sale 206; Central Planning Area; Environmental Assessment, MMS 2007-059 (Oct. 2007) (hereinafter Lease 206 EA). Available at <http://www.gomr.boemre.gov/PDFs/2007/2007-059.pdf>.

⁶⁴ EA FONNSI, introduction.

⁶⁵ EA FONNSI, p. 1.

⁶⁶ Lease 206 EA, p. 14.

⁶⁷ Lease 206 EA, p. 18.

⁶⁸ Lease 206 EA, p. 24.

⁶⁹ *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987); *North Slope Borough v. Minerals Management Service*, No. 3:07-cv-0045-RRB, *2 (D. Alaska April 12, 2007); *Oregon Natural Resources Council v. Devlin*, 776 F. Supp. 1440, 1449 (D. Ore. 1991).

included the new data addressed by the EA.⁷⁰ As this conclusion is fact-specific, it cannot be used to predict whether a court may reach the same decision regarding the Lease Sale 206 EA.

Categorical Exclusion for the Exploration Plan

The final environmental document to date for the Mississippi Canyon Block 252 oil well is a categorical exclusion for the exploration plan (EP) submitted by BP (EP CE). As discussed above, a categorical exclusion may be used by an agency when a category of actions has been determined to have no significant effect on the environment either individually or cumulatively.⁷¹ The CEQ regulations provide that any procedures allowing CEs must also include “extraordinary circumstances” for when a CE would not apply.⁷²

In 1986, MMS issued its list of categories of activities excluded from further NEPA review within the DOI Departmental Manual.⁷³ The list was revised in 2004. The Departmental Manual states that a CE does not apply if “the action qualifies as an exception under Appendix 2 of 516 DM.” A copy of the MMS categorical exclusions and the exceptions is available as **Appendix B** to this report.⁷⁴

MMS recorded its decision to invoke a categorical exclusion for the BP EP in a Categorical Exclusion Review (CER) with Analysis and included reviews for specific environmental harms. The CE process begins when a leaseholder (in this case BP) submits an exploration plan for MMS approval.⁷⁵ MMS reviews the plan to see if it fits any of the published categorical exclusions. The agency must also see whether any exceptions to those CEs apply. The decision must be documented. MMS uses forms that include check lists to document the CERs.

Under 43 U.S.C. § 1340(c), MMS is required to approve an exploration plan within 30 days of submission. The Secretary of the Interior, in testimony before the Senate Committee on Environment and Public Works, asked Congress to extend this deadline to 90 days.⁷⁶ This may suggest that a CE for the exploration plan was invoked because MMS had only 30 days to complete an environmental review. However, MMS prepares EAs (which require more analysis than a CE) for exploration plans that are not in the western or central Gulf of Mexico.⁷⁷

⁷⁰ North Slope Borough v. Minerals Management Service, No. 3:07-cv-0045-RRB, *2 (D. Alaska April 12, 2007).

⁷¹ 40 C.F.R. § 1508.4.

⁷² 40 C.F.R. § 1508.4.

⁷³ The *Federal Register* notice announcing these CEs refers to them as being functions transferred from the Geological Survey (GS) and the Bureau of Land Management (BLM) to the MMS upon its establishment. 51 Fed. Reg. 1855 (Jan. 15, 1986).

⁷⁴ It is also available at http://206.131.241.18/app_DM/act_getfiles.cfm?relnum=3625.

⁷⁵ In practice, multiple versions of an EP may be submitted, such as an initial EP, or an amended EP. The CER for BP shows separate reviews were conducted for archaeological resources, chemosynthetic communities, and what was referred to as a NEPA (1) determination. Copies of these documents (either the I-EP (Initial Exploration Plan) with a NEPA final date of April 15, 2009, or the A-EP (Amended Exploration Plan) with a NEPA final date of April 3, 2009) are available from the author.

⁷⁶ Senate EPW Hearing, *Federal Response to the Recent Oil Spill in the Gulf of Mexico* (May 18, 2010).

⁷⁷ For example, MMS prepared an EA for an exploration plan in the Arctic that was rejected by a court and ultimately withdrawn by the agency. *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), *withdrawn and vacated as moot* 559 F.3d 916 (9th Cir. 2009), *and superseded sub nom. Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009) (upon rescission by MMS of the EP approval).

Arguably, a 1976 U.S. Supreme Court decision supports the Secretary of the Interior's position that the deadline is too short.⁷⁸ In that decision, *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, the Court held that a 30-day statutory deadline meant that the federal agency could not complete an EIS, and therefore NEPA did not require it. The Court noted that NEPA only required agencies to comply "to the fullest extent possible." The Court considered the fact that the 30-day deadline for the federal agency in *Flint Ridge* did not begin until the submission was completed. The Ninth Circuit made a similar observation regarding the MMS 30-day deadline for exploration plan approval, finding some flexibility in the fact that a NEPA review could begin while the agency sought further information from an applicant.⁷⁹ However, that Ninth Circuit decision was withdrawn and vacated. *Flint Ridge* could be distinguished from the Mississippi Canyon EP in that the *Flint Ridge* plaintiffs sought to have a full EIS prepared, whereas for Mississippi Canyon the argument is that a CE was not enough, leaving open the possibility that an EA would suffice within the time frame.

According to MMS, CEs are available when "the impacts from the common operations are expected to be negligible to non-existent based upon general information gathered during past environmental analyses."⁸⁰ This means that based on its experience, MMS has found that those operations have at most negligible environmental impacts, and therefore, additional review is not required.

The CER documents from MMS do not indicate which CE was used. However, it seems likely that MMS invoked CE 15.4(C)(10), which is a CE that applies to exploration plans:

Approval of an offshore lease or unit exploration development/production plan or a Development Operation Coordination Document in the central or western Gulf of Mexico (30 CFR 250.2) except those proposing facilities: (1) In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas, or (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or (3) in areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology.⁸¹

This CE appears to have been created in 1978 in guidelines for MMS's predecessor. It is the only CE that makes specific reference to an OCS area, or, in fact, contains any geographical restriction. It excludes two of the four stages of OCSLA actions from further NEPA review. It excludes both exploration plans in the western and central Gulf of Mexico and development and production plans in those areas. In contrast, the other CEs exclude what appear to be more general, administrative activities such as "issuance and modification of regulations, Orders, Standards, Notices to Lessees and Operators, Guidelines, and field rules" (C)(1); "approval of unitization agreements, pooling, or communitization agreements" (C)(4); and "approval of suspension of operations and suspensions of productions" (C)(6).

⁷⁸ *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976) (holding that 30 days after filing was not enough time to complete a NEPA review and therefore one was not required).

⁷⁹ *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), *withdrawn and vacated as moot*, 559 F.3d 916 (9th Cir. 2009), *and superseded sub nom.* *Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009) (upon rescission by MMS of the EP approval).

⁸⁰ MMS, Discussion of Categorical Exclusion Reviews (undated). A copy of this document is included as **Appendix C**.

⁸¹ 516 DM 15.4(C)(10).

The CE for Gulf plans could be based on the OCSLA amendments of 1978.⁸² Those amendments address certain NEPA requirements, giving exemptions to activities in the Gulf of Mexico. The relevant section of that law, Section 25 (codified at 43 U.S.C. § 1351(e)(1)), states that “at least once the Secretary shall declare the approval of a development and production plan in any area or region ... of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action.”⁸³ While this language contains some ambiguity as to whether the “at least once” requirement must be used by the Secretary for all development plans or on a plan-by-plan basis, this suggests that approval of a development and production plan in the Gulf of Mexico might never need to be declared a *major federal action* (key words in NEPA to mandate preparation of an EIS).⁸⁴ No similar statutory reference to exploration plans exists, but this may be the foundation for excluding Gulf of Mexico plans from environmental analyses at certain stages.

BP discussed a Worst Case Scenario Response in its initial EP for Mississippi Canyon Block 252, indicating it considered a potential large-scale spill. The EP states that for exploratory wells A and B at Block 252, the worst case scenario would be a blowout at the exploratory stage, leading to a spill of 162,000 gallons (3,857 bbl) of crude oil a day.⁸⁵ The EP indicates that BP’s regional oil spill response plan for a worst case scenario had been approved by MMS.⁸⁶ There is no indication that MMS conducted a NEPA review for approving the regional oil spill response plan (OSPR). This suggests that the methods for responding to a massive spill—such as in situ burning, or chemical dispersant—were not scrutinized for environmental impacts other than within the Multisale EIS and the Lease Sale 206 EA, and those documents considered much smaller leaks.

Despite referring to a blowout in the context of a response plan, no blowout scenario was included in the EP. This appears to be based on MMS policy for the area. Section 2.7 of the EP states: “A scenario for a potential blowout of the well from which BP would expect to have the highest volume of liquid hydrocarbons is not required for the operations proposed in this EP.”⁸⁷ While MMS regulations require disclosure of a blowout scenario in EPs,⁸⁸ MMS provided an exception in a 2008 Notice to Lessees. The exception exempts OCS actions in the Gulf from blowout scenario requirements under certain conditions.⁸⁹ On June 18, 2010, this exception was

⁸² P.L. 95-372, § 25, 92 Stat. 659 (1978).

⁸³ The legislative history for this amendment does not discuss why the Gulf was exempted from this provision. However, the Conference Report suggests that the exception was for efficiency: “to limit bureaucratic redtape and otherwise minimize delays in the search for and production of oil and gas” which had been “going on for a number of years” in the Gulf. H. Rep. 95-1474, at 115 (Aug. 10, 1978). The Gulf exclusion was within the Senate language, while the House had no exclusion. *Id.*

⁸⁴ As referenced earlier in this report, MMS policy is that development and production plans undergo a full EIS. However, the MMS allows a CE for development and production plans in the western and central areas of the Gulf of Mexico, essentially exempting those plans from that policy. Because it was still in exploration, the Mississippi Canyon Block had not reached the stage of development and production. It is not known whether MMS would have issued a CE for that plan as well.

⁸⁵ EP, § 7.1.

⁸⁶ EP, § 7.1.

⁸⁷ BP, Initial Exploration Plan, Mississippi Canyon Block 252, OCS-G 32306 (received by MMS Feb. 23, 2009) (hereinafter EP). A copy of this document is available from the author.

⁸⁸ 30 C.F.R. § 250.213(g). A lawsuit challenging the DOI’s issuance of the Notice was filed in federal court. *Gulf Restoration Network v. Salazar*, No. 2:10-cv-01497 (E.D. La. filed May 18, 2010).

⁸⁹ MMS, Notice to Lessee 2008-G04 (May 1, 2008). Available at <http://www.gomr.mms.gov/homepg/regulate/regs/ntls/2008NTLs/08-g04.pdf>. Under this Notice, a blowout scenario is only required for OCS drilling if 1) Florida is an affected state; 2) the activity occurs within protective zones of Flower Garden Banks or Stetson Bank; 3) activity includes installation of surface facility at greater than 400 meters; 4) initial Development Operations Coordination (continued...)

revoked by another Notice. The 2010 Notice to Lessees expressly rescinds portions of the 2008 Notice; lessees not already having approved Applications for Permit to Drill are required to submit blowout scenarios and worst case discharge scenarios.⁹⁰

Even if a blowout scenario was not prepared, it seems there would be significant amounts of oil released if the worst case scenario of a blowout occurred, oil at quantities greater than considered in the Multisale EIS or the Lease Sale 206 EA. However, because a CE was used for the EP, instead of an EIS or an EA, a review of the environmental impacts for a spill of this size was not conducted. They were not considered within the previous EISs or the EA either.

Adequacy of the Environmental Review of the Exploration Plan

No court has reviewed this categorical exclusion (516 DM 15.4(C)(10)), either to determine whether on its face it meets the standards for a CE—actions that either individually or cumulatively are found not to have a significant effect on the environment—or as it has been applied to any exploration or development plan. However, the Ninth Circuit considered whether MMS had properly used a different CE in California when approving lease suspensions. The court found the use of that CE was not adequately justified by MMS.⁹¹ In that case 36 lease suspensions were sought nearly 30 years after a large oil spill near Santa Barbara. Under the OCLSA, MMS may suspend the term of a lease when a lessee is not able to begin production within the term of the lease, thus avoiding expiration of the lease.⁹² The court found that there was no documentation of the CE, and that some exceptions to a CE could have applied that MMS did not consider. Accordingly, the court remanded the NEPA review to MMS.

It is possible a court may find that exceptions to CEs apply in the case of the EP CE, in which case the BP CE would be invalid. (The exceptions are included as part of **Appendix B**.) One exception that may apply addresses effects on ESA-listed species, meaning a CE could not be used if an action may “have adverse effects on species listed or proposed to be listed on the List of Endangered or Threatened Species, or have adverse effects on designated Critical Habitat for these species.”⁹³ All of the environmental documents address the effects of an oil spill on listed species and the critical habitat of the Gulf Sturgeon. For example, the Lease Sale 206 EA states that over the 40-year term of the lease, 119 loggerhead, 10 leatherback, 1 hawksbill, 13 Kemp’s ridley, and 38 green turtles will be killed.⁹⁴ It is possible a court could find that these effects could be considered “adverse.” Another exception to the CEs addresses actions when the impacts cannot be known, perhaps due to the fact that the harm depends on the scale, timing, and location of an oil spill: “2.4 - Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.”

(...continued)

Documents (DOCs) and supplemental DOCs with new multiwell structures if either Texas or Louisiana is an affected state; and 5) initial EPs if Texas is an affected state. Notice 2008 G-4, p. 6.

⁹⁰ MMS, Notice to Lessee No. 2010-N06. Available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=35724>.

⁹¹ *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

⁹² 43 U.S.C. § 1334(a)(1).

⁹³ 516 DM Appx. 2, exception 2.8.

⁹⁴ Lease 206 EA, p. 41.

Even if the exceptions do not apply, MMS may be required to explain in the CE why they do not. Under accepted law, if there is substantial evidence that an exception *may* apply, an agency must document why an exception to a CE does *not* apply in order to support the CE.⁹⁵ While the CER documents specifically address exceptions regarding archeological resources and chemosynthetic communities, finding that neither exception applies, there is no explicit reference to any other exception.

The fact that this project was in the Gulf of Mexico made a difference in the type of review MMS conducted. Arguably, a heightened level of review might have reached a different conclusion as to the probable environmental impacts. If the EP had been in the Arctic, the CE for the Gulf plans would not apply and consideration of a blowout scenario also would have been required. Instead, EAs are used, which must sufficiently analyze the environmental impacts of the action. When the Ninth Circuit reviewed an EA for an exploration plan in the Beaufort Sea in the Arctic (hereinafter the Beaufort Sea EP), it found that an EA was not adequate.⁹⁶ The BP EP and the Beaufort Sea EP are factually similar in that they result from a nearly identical set of tiered NEPA analyses. The Beaufort Sea EP also came after an EIS for a 5-year plan (for 2002-2007), an EIS for the multiple lease sale, and a series of EAs for particular lease sales. Like the EP CE, endangered species were present at the planned drilling site. In the case of the Beaufort Sea EP the court indicated experts expressed concern that the exploration plan could have significant impacts on polar bears and whales. An EA-FONNSI was issued, meaning no new significant impacts were found. The court held that the Beaufort Sea EA did not indicate MMS took a “hard look” at the environmental impacts of the exploration plan since substantial questions remained regarding the harm to wildlife and the people in the area.⁹⁷ MMS revoked its approval of the EP.⁹⁸

The EP CE, perhaps, could be justified as a fourth environmental review, implying that all of the environmental impacts had been considered in the earlier, more expansive documents. Technically, however, that is not how a CE is intended to be applied. The NEPA regulations do not provide that CEs may be used to exclude reviews on the basis that previous analyses already considered impacts. A CE is supposed to be invoked because the project would not have any impacts. NEPA allows tiered environmental reviews⁹⁹ when the impacts have already been considered.

Additionally, this rationale runs counter to the OCSLA staging justification used by courts as to why environmental reviews at the lease sale stage or earlier did not need to be in depth. Those courts held that a more intense environmental review was not needed at the early stages of the OCSLA because it would occur when actual drilling was imminent.¹⁰⁰ For example, the justification used by the District Court of Alaska for why a 100,000 bbl spill did not have to be analyzed may not apply when a CE is used at the exploration stage instead of a more in-depth analysis: “Congress has decided to allow key decisions having serious environmental

⁹⁵ Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986).

⁹⁶ Alaska Wilderness League v. Kempthorne, 548 F.3d 815 (9th Cir. 2008), *vacated as moot*, 571 F.3d 859 (9th Cir. 2009) (upon rescission by MMS of the EP approval).

⁹⁷ Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 825 (9th Cir. 2008), *vacated as moot*, 571 F.3d 859 (9th Cir. 2009).

⁹⁸ See Alaska Wilderness League v. Kempthorne, 571 F.3d 859 (9th Cir. 2009).

⁹⁹ 40 C.F.R. § 1500.4(i).

¹⁰⁰ Center for Biological Diversity v. U.S. Department of the Interior, 563 F.3d 466, 480 (D.C. Cir. 2009).

consequences to be made at the exploration and production and development stages instead of requiring all decisions to be made at the pre-leasing and leasing stages.”¹⁰¹

The Ninth Circuit’s rationale for why a larger oil spill was not examined at the lease sale stage was that environmentally significant activities did not occur then. A more thorough review would be conducted later:

by purchasing a lease, lessees acquire no right to do anything more. Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production ... the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.¹⁰²

If no review were conducted later, this justification may not seem to be supportable. The Ninth Circuit had suggested in another case that the exploration stage was where a spill analysis would be most appropriate.¹⁰³

The U.S. Supreme Court also emphasized the importance of administrative review of the post-lease actions: “an OCS lease authorizes the holder to engage only in preliminary exploration; further administrative approval is required before full exploration or development may begin.”¹⁰⁴ It could be argued that the EP CE is the inverse result of what is supposed to happen with tiered environmental reviews. Instead of the process described by the courts where the environmental review becomes more exacting as the drilling becomes imminent, the opposite has happened and no additional environmental analysis was conducted.

The Council on Environmental Quality Report on MMS and NEPA

In August 2010, CEQ issued a report on MMS/BOEMRE and its NEPA procedures for OCS drilling.¹⁰⁵ The report recommends that BOEMRE policies could be revised to reflect the purposes of NEPA more closely. Many of the recommendations address issues discussed within this report. For example, CEQ recommends that BOEMRE seek a statutory revision to OCSLA to extend the 30-day limit for considering EPs.

It also questions the propriety of allowing CEs for exploration and drilling and production plans. For one thing, it suggests that those CEs were developed before OCS activities were conducted at such depths, saying that there is a “progressively more complex environment” for deepwater operations than there was at the time of the CEs’ creation. According to an MMS report, drilling at 1,000 feet began in the late 1970s, although drilling at 3,000 to 5,000 feet did not occur until the late 1990s.¹⁰⁶

¹⁰¹ Village of False Pass v. Watt, 565 F. Supp. 1123 (D.C. Alaska 1983).

¹⁰² Village of False Pass v. Clark, 733 F.2d 605, 608 (9th Cir. 1984).

¹⁰³ Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1192 (9th Cir. 1988).

¹⁰⁴ Secretary of the Interior v. California, 464 U.S. 312, 321 (1984).

¹⁰⁵ CEQ, Report Regarding the Minerals Management Service’s National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development (Aug. 16, 2010) (hereinafter CEQ Report). Available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf>.

¹⁰⁶ MMS, Deepwater Gulf of Mexico 2008: America’s Offshore Energy Future, Appx. A (CS Report MMS 2008-013).

Another point the CEQ Report makes is that BOEMRE should review how it perceives “extraordinary circumstances.” Under NEPA practice, finding an extraordinary circumstance indicates that a CE should not be used. The CEQ Report suggests that MMS was not properly evaluating those factors, stating that BOEMRE “intends to review its interpretation of the threshold requirement of ‘extraordinary circumstances.’”¹⁰⁷

Additionally, the CEQ Report points to the lack of consideration of massive oil spills in any of the environmental documents. While MMS found that a large spill had a low probability, the report still recommends that the agency consider reasonably foreseeable impacts associated with a catastrophic spill, despite the predicted low risk. The reasonably foreseeable impacts would include cumulative impacts. The cumulative impacts analysis for other Gulf projects should be different following the 4.1 million bbl spill.

On the same day as the CEQ Report was issued, the Department of the Interior announced it was not going to use certain CEs until it completed a review of all its CEs for OCS exploration and drilling activities.¹⁰⁸ The directive specifically prohibits using the CE that allows exclusion of exploration and development and production plans in the western and central Gulf (516 DM 15.4(C)(10)) if the project involves a subsea blowout preventer.

Congressional Attention to Categorical Exclusions

Congress has also focused on the use of CEs for exploration and development in the Gulf. H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2010 (CLEAR), passed the House. It would require BOEMRE approval of exploration plans to include either an EA or an EIS, effectively eliminating the CE for exploration plans.¹⁰⁹ Section 215 of H.R. 3534 requires the same for development and production plans. CLEAR would amend the requirement for approval of EPs from 30 days to 90 days.¹¹⁰

Other bills that have not passed the House address similar issues. H.R. 5506 would go further than H.R. 3534 by requiring an EIS (and not an EA) for those plans’ approval. It, too, would remove the 30-day deadline. H.R. 5572 refers to categorical *exemptions* and states that the Department of the Interior could not exempt any OCS activity from legal requirements, but since CEs are legal when used properly, it is not clear whether this would have the effect of banning CEs for the stated activities.

Conclusion

The exploration well blowout in the Gulf of Mexico appears to have major, and potentially catastrophic, environmental effects. None of the environmental reviews under NEPA considered an oil spill of this magnitude. However, it is unclear whether that violates NEPA, which has no requirement for analysis of a worst case scenario. The use of a categorical exclusion at the

¹⁰⁷ CEQ Report, at 31.

¹⁰⁸ BOEMRE Directive, Use of Categorical Exclusions in Gulf of Mexico Region (Aug. 16, 2010). Available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=42011>.

¹⁰⁹ H.R. 3534, § 208(f).

¹¹⁰ H.R. 3534, § 208(b)(2).

exploration stage appears to be procedurally correct under MMS policy, provided there were no applicable exceptions. However, the legality of that CE has never been examined by a court, which could consider whether an exemption from a NEPA review at the point where drilling is imminent violates NEPA either because extraordinary circumstances existed in the case, or because, in general, the tiered OCSLA process envisioned more scrutiny of environmental consequences after the lease stage. BOEMRE has indicated it will take a closer look at its CEs and how they are applied.

Appendix A. Background Facts

Source: MMS, Gulf of Mexico OCS Oil and Gas Lease Sales: Final Environmental Impact Statement (MMS 2007-018) (April 2007).

Duration of Gulf of Mexico OCS Oil and Gas Activity—40 years (p. 4-5):

- Exploratory drilling activity can take place over an 8-year period, beginning within one year after the lease sale.
- Development activity takes place over a 39-year period, beginning with the installation of the first production platform and ending with the drilling of the last development wells.
- Production of oil and gas begins by the third year after the lease sale and continues through the 40th year.
- Final abandonment and removal activities occur in the 40th year.

Amount of oil and gas expected to be produced (p. 4-5):

Western Gulf:

- Oil = 242-423 million bbl
- Gas = 1.644-2,647 trillion cubic feet

Central Gulf:

- Oil = 776-1,292 million bbl
- Gas = 3.236-5.229 trillion cubic feet

Amount of seismic testing expected (p. 4-7):

- Western Gulf—400-800 blocks
- Central Gulf—1,000-2,000 blocks

Number of exploration and delineation wells from this lease sale expected during 40-year period (p. 4-10):

- Western Gulf—42-66
- Central Gulf—65-96

Number of development wells from this lease sale anticipated during 40-year period (p. 4-13):

- Western Gulf—155-221
- Central Gulf—330-468

Number of loss of well control events (including blowouts) from this lease sale estimated during 40-year period (p. 4-250):

- Western Gulf—1-2
- Central Gulf—2-3

Number of offshore oil spills estimated from this lease sale during 40-year period (p. 4-241):

- Western Gulf—800-1,500 spills/ 400-21,000 bbl of oil
- Central Gulf—2,700-4,500 spills/ 5,500-26,500 bbl of oil

Natural seeps of oil, annual average (1990-1999) (Table 4-12):

- Western Gulf—490,000 bbl
- Eastern Gulf¹¹¹—490,000 bbl

Probability of spills greater than 10,000 bbl occurring (Table 4-15):

Western Gulf:

- Mean number of spills from all sources (facilities, pipelines, shuttle tankers)—3
- Probability of occurrence—92%-96%

Central Gulf:

- Mean number of spills from all sources (facilities, pipelines, shuttle tankers)—9
- Probability of occurrence—99+%

Historical data on offshore spills greater than 10,000 bbl in the Gulf of Mexico from 1985-1999 (Table 4-16):

- From pipelines: 2 spills; 30,000 bbl spilled in total
- From platforms: 0 spills

¹¹¹ Data not available for Central Gulf.

Appendix B. MMS Categorical Exclusions

Source: 516 DM

15.4 Categorical Exclusions. In addition to the actions listed in the Departmental categorical exclusions outlined in Appendix 1 of 516 DM 2, many of which the MMS also performs, the following MMS actions are designated categorical exclusions unless the action qualifies as an exception under Appendix 2 of 516 DM 2:

A. General.

- (1) Inventory, data, and information collection, including the conduct of environmental monitoring and nondestructive research programs.
- (2) Actions for which MMS has concurrence or co-approval with another Bureau if the action is a categorical exclusion for that Bureau.

B. Internal Program Initiatives.

- (1) All resource evaluation activities including surveying, mapping, and geophysical surveying which do not use solid or liquid explosives.
- (2) Collection of geologic data and samples including geologic, paleontologic, mineralogic, geochemical, and geophysical investigations which does not involve drilling beyond 50 feet of consolidated rock or beyond 300 feet of unconsolidated rock, including contracts therefor.
- (3) Acquisition of existing geological or geophysical data from otherwise private exploration ventures.
- (4) Well logging, digital modeling, inventory of existing wells, and installation of recording devices in wells.
- (5) Establishment and installation of any research/monitoring devices.
- (6) Test or exploration drilling and downhole testing included in a project previously subject to the NEPA process.
- (7) Insignificant revisions to the approved 5-year leasing program.
- (8) Prelease planning steps such as the Call for Information and Area Identification.

C. Permit and Regulatory Functions.

- (1) Issuance and modification of regulations, Orders, Standards, Notices to Lessees and Operators. Guidelines and field rules for which the impacts are limited to administrative, economic, or technological effects and the environmental impacts are minimal.
- (2) Approval of production measurement methods, facilities, and procedures.
- (3) Approval of off-lease storage in existing facilities.

- (4) Approval of unitization agreements, pooling, or communitization agreements.
- (5) Approval of commingling of production.
- (6) Approval of suspensions of operations and suspensions of production.
- (7) Approval of lease consolidation applications, lease assignments or transfers, operating rights, operating agreements, lease extensions, lease relinquishments, and bond terminations.
- (8) Administration decisions and actions and record keeping such as:
 - (a) Approval of applications for pricing determinations under the Natural Gas Policy Act.
 - (b) Approval of underground gas storage agreements from a presently or formerly productive reservoir.
 - (c) Issuance of paying well determinations and participating area approvals.
 - (d) Issuance of drainage determinations.
- (9) Approval of offshore geological and geophysical mineral exploration activities, except when the proposed activity includes the drilling of deep stratigraphic test holes or uses solid or liquid explosives.
- (10) Approval of an offshore lease or unit exploration, development/production plan or a Development Operation Coordination Document in the central or western Gulf of Mexico (30 CFR 250.2) except those proposing facilities: (1) In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas, or (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or (3) in areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology.
- (11) Approval of minor revisions of or minor variances from activities described in an approved offshore exploration or development/production plan, including pipeline applications.
- (12) Approval of an Application for Permit to Drill (APD) an offshore oil and gas exploration or development well, when said well and appropriate mitigation measures are described in an approved exploration plan, development plan, production plan, or Development Operations Coordination Document.
- (13) Preliminary activities conducted on a lease prior to approval of an exploration or development/production plan or a Development Operations Coordination Plan. These are activities such as geological, geophysical, and other surveys necessary to develop a comprehensive exploration plan, development/production plan, or Development Operations Coordination Plan.
- (14) Approval of Sundry Notices and Reports on Wells.
- (15) Rights-of-ways, easements, temporary use permits, and any revisions thereto that do not result in a new pipeline corridor to shore.

D. Royalty Functions. All functions of the Associate Director for Royalty Management including, but not limited to, such activities as: approval of royalty payment procedures, including royalty oil contracts; and determinations concerning royalty quantities and values, such as audits, royalty reductions, collection procedures, reporting procedures, and any actions taken with regard to royalty collections (including similar actions relating to net profit and windfall profit taxes).

Exceptions To Categorical Exclusions

516 DM 2 Appendix 2

The following exceptions apply to individual actions within categorical exclusions (CX). Environmental documents must be prepared for actions which may:

- 2.1 Have significant adverse effects on public health or safety.
- 2.2 Have adverse effects on such unique geographic characteristics as historic or cultural resources, park, recreation or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.
- 2.3 Have highly controversial environmental effects.
- 2.4 Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- 2.5 Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
- 2.6 Be directly related to other actions with individually insignificant but cumulatively significant environmental effects.
- 2.7 Have adverse effects on properties listed or eligible for listing on the National Register of Historic Places.
- 2.8 Have adverse effects on species listed or proposed to be listed on the List of Endangered or Threatened Species, or have adverse effects on designated Critical Habitat for these species.
- 2.9 Require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act.
- 2.10 Threaten to violate a Federal, State, local or tribal law or requirement imposed for the protection of the environment.

Appendix C. The MMS Categorical Exclusion Review Process

Source: Minerals Management Service

A more detailed discussion of Categorical Exclusion Reviews (CERs) and the NEPA process for review of Industry Submittals follows:

Descriptions for the “NEPA Determination Type” field under FastFacts?

The **NEPA Determination Type** is identified in a **NEPA Determination Type Review** at the very beginning of the Categorical Exclusion Review (CER) process and it establishes the level of NEPA analyses that should be conducted for a particular proposal. Based upon details about the proposed action, policy, and programmatic NEPA analyses, the NEPA Determination Type could be either:

- **CER with no further Analyses**; i.e., finalize the CER with no additional reviews/conditions of approval (COAs)
- **CER with Analyses**; i.e., continue processing/review under a CER with the applicable protected resource reviews assigned; or
- **Prepare an Environmental Assessment (EA)** or an **Environmental Impact Statement (EIS)**

When it’s a categorical exclusion [review] with analysis, what kind of analysis is it?

Though not a document in the same sense as an EA or EIS, the CERs ultimately consist of a series of procedures and activity-specific reviews that are conducted and compiled so that MMS is assured that the activity can remain Categorical-Excluded from review under an EA or EIS. The CERs are completely digital and therefore, stored within TIMS as part of the Administrative Record along with all documentation related to the proposed action (in this case, the EPs on MC252) and all associated surveys/reports. Even though central and western Gulf of Mexico drilling and production activities are Categorical-Excluded from any additional review, MMS GOMR prepares CERs on each proposal to ensure that “**extraordinary circumstances**” do not exist and to ensure that the agency has the ability to consider the best-available data/technology on a case-by-case basis, which in turn affords real-time adaptive management of assessment triggers, reviewing standards, and conditions of approval/mitigation.

When an exception criteria [now called an “extraordinary circumstance”] is identified during analysis, what exactly does that mean?

An “extraordinary circumstance” (EC) is an identified condition that could exist within an action that could be Categorical-Excluded from additional NEPA analysis. MMS has 12 ECs identified under 43 CFR § 46.215 (see last page) that it reviews the proposed action against to determine if any of the activities proposed by the operator may “trigger” or cause an EC condition to occur. If an EC is identified for a proposal that cannot be avoided (either in the NEPA Determination Review or protected resource reviews), an EA must be prepared. The EA, in turn, could result in a Finding of Significant Impact (FOSI), which would then require preparation of an EIS.

Detailed Discussion:

The DOI and MMS can categorically-exclude (CatEx) certain actions from further NEPA analyses if it is determined that they would not have a significant effect on the environment (individually or cumulatively). The MMS CatEx list is currently found in the Departmental Manual (see 516DM15.4) and it not only contains administrative actions, but also common OCS operations. The impacts from the common operations are expected to be negligible to non-existent based upon general information gathered during past environmental analyses about the type of activities, the area of the proposed action, programmatic NEPA analyses (Program/Sale EISs/EAs), and the past actions as conducted and observed. The specific MMS operational CatEx corresponding to the submittal of an Exploration Plan (EP) is below:

MMS Categorical Exclusion

under 516 DM 15.4

C. Permit and Regulatory Functions.

10. Approval of an offshore lease or unit exploration plan (EP), development/production plan (DPP), or a Development Operation Coordination Document (DOCD) in the central or western Gulf of Mexico (30CFR250.2) except those proposing facilities:

In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas, or

within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or

in areas of hazardous natural bottom conditions; or

utilizing new or unusual technology.

Since the CatEx list is based upon general/historical information and generalized/programmatic information, GOMR goes the extra step and prepares a Categorical Exclusion Review (CER) for each action to determine if site-specific details of the proposed operations will not result in an Extraordinary Circumstance (EC), which would require that an EA be prepared. Coordinators in GOMR's Environmental Compliance Section (ECS) follow a set of submittal-specific SOPs and utilize a detailed GIS application, PMT GIS, that addresses the activity being proposed and compares information with established business rules/EC triggers based upon the specific resources to determine if the action should be reviewed under an Environmental Assessment (EA) and which, if any, protected resource reviews should be assigned for the CER/EA.

When the NEPA coordinator is finished following the SOP, their NEPA Determination Review and associated *PMT GIS* report will identify the Initial **NEPA Determination Type**, which could include;

- **CER with no further Analyses**; i.e., finalize the CER with no additional reviews/conditions of approval (COAs)
- **CER with Analyses**; i.e., continue processing/review under a CER with the applicable protected resource reviews assigned; or
- **Prepare an EA/EIS.**

All of the applicable information related to the NEPA Determination and/or any resource reviews is recorded in the Technical Information Management System (TIMS) and the *PMT GIS* Report is attached in the respective NEPA Determination Type Review. A copy of the plan/application is provided to the NEPA Decision Maker for a concurrence review of the TIMS information and *PMT GIS* Report. If the Decision Maker concurs with the coordinator, **NEPA Determination Type** is also recorded in TIMS for the specified submittal. If the Chief has any questions about the NEPA determination type, the information will be reviewed together until a decision can be made.

Once concurrence is given, all necessary reviews are assigned to resource specialists (i.e., marine archaeologists, benthic biologists, meteorologists, oceanographers, etc.) and tracked in TIMS. The SME informs the NEPA Coordinator if additional information or a clarification is required and/or when the review is completed. The completed review will note one of the following:

- The proposed action will have no impact on the protected resource.
- The proposed action requires a condition of approval (COA) to ensure that an extraordinary circumstance (EC) will not be met/triggered.
- The proposed action may cause a significant impact and an EA is recommended.

When all of the applicable reviews are completed, the SME's conclusions, and any suggested conditions of approval/mitigation (if necessary), are recorded in TIMS and compiled by the NEPA Coordinator for presentation to the NEPA Decision Maker. The NEPA decision maker will review the findings and choose from the following **Final NEPA Actions**:

- **CER Approved;** (Action can be CatExed with no COAs—an EC will not be triggered/occur); or
- **CER Approved;** (Action can be CatExed with COAs—to ensure that an EC will not be triggered/occur);
- **Prepare an EA/EIS.**

43 CFR § 46.215 Categorical Exclusions: Extraordinary circumstances

Extraordinary circumstances (see paragraph 46.205(c)) exist for individual actions within categorical exclusions that may meet any of the criteria listed in paragraphs (a) through (l) of this section. Applicability of extraordinary circumstances to categorical exclusions is determined by the Responsible Official.

- Have significant impacts on public health or safety.
- Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas.
- Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].

- Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
- Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.
- Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau.
- Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.
- Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.
- Have a disproportionately high and adverse effect on low income or minority populations (EO 12898).
- Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (EO 13007).

Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and EO 13112). Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and EO 13112).

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