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Jana L. Grauberger

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Jana L. Grauberger
Shareholder
Liskow & Lewis
Houston, Texas

I. Introduction.
Change is perhaps the most consistent feature of doing business offshore over the past two years. The “who” has changed with the Department of Interior’s former Minerals Management Service (“MMS”) just completing a major reorganization designed to separate a long-standing single entity into multiple independent, yet, coordinated ones. The “what, where, when, and how” have also changed with new Notices to Lessees (“NTLs”), Interim Final Rules, informal guidance, and workshops adding regulatory requirements for drilling safety, subsea containment, decommissioning of aging and unused facilities, workplace safety programs, suspensions of production, and on and on.

Increased costs are a certainty. Recent NTLs provide for increased civil penalties and assessment of mandatory inspection fees. Delays in obtaining permits and ongoing litigation over the validity of some deepwater leases are certain to increase the time required to achieve first oil on Gulf of Mexico projects, which will result in substantial additional costs. The Energy Information Administration’s (“EIA”) February 2012 “Short-Term Energy Outlook” estimates federal Gulf of Mexico production to be down 21 percent this year from 2010.¹ Based on identified, mostly deepwater prospects, the offshore oil and gas industry was expected to grow significantly over the past two years. However, according to a recent report prepared for the American Petroleum Institute (“API”), the moratorium and ensuing overall permitting slowdown led to an estimated $18.3 billion of previously planned capital and operational expenditures not occurring in 2010 and

¹ See Mark Green, The State of Gulf Production ENERGYTOMORROW BLOG (Feb. 29, 2012), http://energytomorrow.org/blog/the-state-of-gulf-production#type/all.
2011.2 With all this in mind, it is as important now as ever for companies, their employees, and their attorneys to work with regulators to successfully and efficiently navigate this new world.

II. Facts and Figures.

In Fiscal Year 2011, the Office of Natural Resources Revenues (“ONRR”), the new office within the Department of Interior charged with collecting royalties for all federal and Indian leases, collected and distributed $11.2 billion from the federal onshore and offshore leasing programs. Overall, $6.5 billion of the $11.2 billion total collected by ONRR came from offshore federal leasing, with $6 billion of that amount from the Gulf of Mexico offshore region. A total of $2 billion was distributed among 37 states. Of the states, Wyoming received the most revenues from federal lands in the amount of $971 million, and New Mexico was the second highest earning state with $434 million. Louisiana received $166 million, with $145 million of that amount from the offshore federal leasing program.3

The 2010 moratorium on deepwater drilling in the Gulf of Mexico and delays in permit approval led to few announcements of substantial discoveries in 2011. However, not long after the first deepwater permits were issued in early 2011, ExxonMobil announced one of the largest Gulf of Mexico discoveries in a decade at a group of Keathley Canyon blocks, comprised of its two Hadrian prospects and its new KC919-3 wildcat well (7,000 feet), which contain an estimated 700 million recoverable barrels of oil equivalent and are located approximately 250 miles southwest of New Orleans.4 In addition, deepwater projects just online and

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4 Business Wire, ExxonMobil Announces Three Discoveries in Deepwater Gulf of Mexico (June 8, 2011), http://www.businesswire.com/news/home/20110608005901/en/ExxonMobil-
expected to begin production in the next few years include Chevron’s St. Malo (7,000 feet), Jack (7,000 feet), and Big Foot (5,000 feet), targeted to reach first production in 2014, Shell’s Mars B (3,000 feet) in 2015 and Stones (9,500 feet), Anadarko and ExxonMobil’s adjoining Lucius and Hadrian fields (7,000 feet) in 2014, LLOG’s Who Dat (3,000 feet), achieving first production in December 2011, and Hess’ Tubular Bells (4,000 feet) in 2014. BP’s Kaskida and Tiber fields are in the appraisal stage. And, two wells in McMoRan’s Davy Jones shelf deepwater gas development (water depth of 20 feet, drilled to a depth of approximately 30,000 feet subsea) are targeted to be completed in 2012.

III. Re-Organization Basics.

Following the Deepwater Horizon incident, the MMS was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”) in June 2010. ONRR became a separate office on October 1, 2010. On October 1, 2011, BOEMRE was disbanded and replaced by the Bureau of Safety and Environmental Enforcement (“BSEE”) and the Bureau of Ocean Energy Management (“BOEM”). This completes the effort to reorganize the MMS.

ONRR is responsible for the management of revenues associated with federal offshore and federal and American Indian onshore mineral leases, as well as revenues received as a result of offshore renewable energy efforts. Headquartered in Lakewood, Colorado, it is comprised of three program areas including asset management, audit and compliance management, and financial and program management.

BSEE is charged with safety and environmental oversight of offshore oil and gas operations, including permitting and inspections. Its functions include the development and enforcement of safety and environmental regulations; permitting offshore exploration, development, and production; inspections; offshore regulatory programs; oil spill response; and newly formed training and environmental compliance programs.
BOEM manages the development of offshore resources, including offshore leasing, resource evaluation, review of oil and gas exploration and development plans, renewable energy development, NEPA analysis, and environmental studies.

IV. Permitting.

Permitting delays have been one of the biggest areas of concern for companies doing business offshore since the end of the drilling moratorium in October 2010. As of November 2011, deepwater drilling permits were being issued at less than half the rate of permits before the moratorium.\(^5\) Shallow water permits were being issued at rates 40 percent slower than previously. One sign of the shift in offshore oil and gas investment from the Gulf of Mexico due, in part, to the inability to develop resources located there is that eleven mobile drilling rigs have left the Gulf for other parts of the world since April 2010.\(^6\)

However, based on the latest information from BSEE,\(^7\) there is no longer a substantial backlog of Gulf of Mexico permits, in either shallow or deep water, awaiting approval. In the year since the first deepwater drilling permit was approved following the moratorium on February 28, 2011, 61 permits to drill new wells in more than 500 feet of water were issued. That is slightly less than the 67 permits issue for the same type of activity for the same one-year period prior to the Deepwater Horizon incident – February 2009-2010.\(^8\) As of March 5, 2012, the BSEE website reported 723 approved drilling permits for shallow water since June 8, 2010, with 15 remaining pending, and 378 approved drilling permits for deep water (depths greater than 500 feet) since October 12, 2010, with 35 remaining pending.

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\(^5\) Quest Offshore Resources, Inc., *supra* note 2, at 22.

\(^6\) *Id* at VI.

\(^7\) BSEE’s website displays facts and figures regarding ongoing permitting efforts that are updated daily. See STATUS OF GULF OF MEXICO WELL PERMITS, http://www.bsee.gov/Exploration-and-Production/Permits/Status-of-Gulf-of-Mexico-Well-Permits.aspx.

Permit requirements now call for compliance with NTL 2010-N06, which requires operators to demonstrate that they are prepared to deal with the potential for a blowout and worse case discharge, and NTL 2010-N10, which requires a corporate compliance statement and review of subsea blowout containment resources for deepwater drilling. Permits applications must also meet new standards for well design, casing, and cementing, and be independently certified by a professional engineer in accordance with the new Drilling Safety Rule, issued under emergency rulemaking authority as an Interim Final Rule.

V. Lease Sale Litigation.

Pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, et seq. ("OCSLA"), Interior follows a five-step process for federal offshore oil and gas leasing, exploration, and development on the Outer Continental Shelf ("OCS"): (1) the Secretary develops a five-year leasing program, prepares a lease sale schedule, and completes a programmatic environmental impact statement ("EIS"); (2) after preparation of an EIS applicable to multiple sales, leases conveying an exclusive right to explore, develop, and produce on a specific tract for a limited period of time are offered and awarded through a bidding process; (3) the lessee submits an exploration plan to BOEM for approval that sets out its plans for exploration, including drilling methods and information about exploratory wells; (4) if exploration is successful, the lessee submits to BOEM for approval a development operations coordination document that shows the number and location of production wells, type of platform, and other information; and (5) the lessee sells the oil and gas that is produced.

Following the Deepwater Horizon incident, various lawsuits have been filed addressing environmental issues and leasing, particularly the first and second stages of the OCSLA process. Two such cases that are currently pending are discussed below, along with a third case challenging approval of a supplemental exploration plan, which falls under OCSLA stage three.

Plaintiffs in this lawsuit challenge Interior’s practice of granting “categorical exclusions” from the National Environmental Policy Act (“NEPA”) review of exploratory drilling operations for Gulf of Mexico oil and gas leases. Plaintiffs claim that the MMS has violated NEPA, the Administrative Procedure Act, and the Endangered Species Act (“ESA”) by failing to prepare a supplemental environmental impact statement (“EIS”) and environmental assessment (“EA”) for leases sales following the Deepwater Horizon incident, in accepting bids for new leases after the Deepwater Horizon spill without first supplementing the existing EIS, by proceeding with lease sales without reinitiating consultation with the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“USFWS”), and by failing to ensure that no endangered or threatened species is in jeopardy as a result of its actions with respect to offshore drilling. The relief sought includes that MMS/BOEMRE’s decisions to accept bids on more than 200 for new deepwater leases in Lease Sale 213 after April 20, 2010 be vacated, and that all future lease sales under the 2007-2012 Lease Sale Program be enjoined pending preparation of a supplemental EIS.

Intervenors include industry groups such as API, as well as holders of leases awarded in Lease Sale 213 – Chevron, Anadarko, and Apache. These companies paid the full bid price, as well as at least the first annual rental payments, amounting to millions of

9 Categorical exclusions are actions that do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental assessment nor an environmental impact statement is required. The categorical exclusion process was established to reduce the amount of unnecessary paperwork and delay associated with NEPA compliance. If a certain type of federal action would not normally result in any environmental effects that are potentially significant, it is unnecessary to expend resources to repeatedly document that fact. In 1986, Interior adopted a categorical exclusion to cover the approval of exploration plans and development and production plans, thus, essentially exempting the approval of such plans from the NEPA process. MMS, however, did undertake NEPA review at the five-year lease sale program stage and at the individual lease sale stage of the OCSLA leasing process.
dollars. In petitioning to intervene, the lessees asserted that, if the post-April 20th leases were vacated, they would be deprived of leases for which they had already paid, exploration and development activities would cease, and they would be in a position to lose millions more in lost production opportunities.

The timeline for Lease Sale 213 was as follows. MMS prepared an initial EIS for the 2007-2012 Lease Sale Program in 2007, a supplemental EIS in 2008, and an EA in October 2009 specifically for Lease Sale 213. A final notice of sale as to Lease Sale 213 was published announcing that public bid reading would take place in New Orleans on March 17, 2010 and specifying the criteria under which the bids would be evaluated. A total of 642 bids were submitted on 468 tracts. All high bids were subject to an evaluation for fair market value before the leases were to be awarded. MMS subsequently accepted bids on 85 tracts approximately three weeks before the Deepwater Horizon spill. And, in June 2010, MMS/BOEMRE accepted bids on an additional 385 tracts.

In August 2010 – three months after this lawsuit was filed – BOEMRE Director Bromwich announced that BOEMRE would restrict its use of categorical exclusions for offshore oil and gas development to activities involving limited environmental risk, while undertaking a comprehensive review of the NEPA process and the use of categorical exclusions for exploration and drilling on the OCS: “BOEM[RE] will issue a Federal Register notice announcing a formal process for the comprehensive review and evaluation of its use of categorical exclusions in relation to offshore oil and gas exploration and drilling activities. While this review is underway, Director Bromwich noted, BOEM[RE] will be using categorical exclusions on a more limited basis. For actions that potentially involve more significant environmental risk, Interior officials intend to subject more decisions to environmental assessments.”

BOEMRE subsequently published a notice in the

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Federal Register giving notice of its intent to prepare a supplemental EIS to consider new information arising out of the Deepwater Horizon incident and to update its environmental analyses in connection with the 2007-2012 Lease Sale Program for lease sales in the Gulf of Mexico. BOEMRE stated that no additional Gulf of Mexico lease sales would be held until the supplemental EIS was complete. Based on these facts, the district court granted, in part, a motion to dismiss plaintiff’s claim related to this issue, as well as plaintiff’s claim that BOEMRE had failed to reinitiate consultation with NMFS and USFWS because, in fact, BOEMRE had done so.

The claims remaining against BOEM are plaintiff’s NEPA claim for failure to prepare a supplemental EIS in association with Lease Sale 213, which was taking place at the time of the Deepwater Horizon incident, and its ESA claim regarding the adequacy of the biological opinions prepared in conjunction with past lease sales. In November 2011, plaintiff moved for summary judgment on the remaining claims. A supplemental EIS is required whenever “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). A determination of whether new circumstances are significant depends on a variety of factors, including “[t]he degree to which the proposed action affects public health or safety,” “the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,” “[t]he degree to which the action . . . may cause loss or destruction” of significant resources, and “[t]he degree to which the action may adversely affect an endangered or threatened species” or critical habitat. Id. § 1508.27(b). Plaintiff claims that the 2007 EIS covering Lease Sale 213 largely dismissed the significance of potential environmental impacts and grossly underestimated the maximum amount of oil likely to be spilled in offshore waters as compared to the actual spill volumes from the Deepwater Horizon incident. The consultation with NMFS resulted in a biological opinion that concluded that the effect of offshore exploration and production activities on species such as whales, Gulf sturgeon, and sea turtles – including from the threat of an oil spill – would not be significant. Again, plaintiff claims that the Deepwater Horizon spill proved this opinion to be incorrect with significant impacts to
the ecology of the Gulf, including injured and dead listed species. While BOEMRE issued a notice of intent to prepare a supplemental EIS for the remaining sales in the 2007-2012 Lease Sale Program, plaintiff asserts that MMS/BOEMRE should not have issued leases in connection with Lease Sale 213 after the Deepwater Horizon incident without first performing a supplemental EIS. Plaintiff also claims MMS/BOEMRE relied on outdated ESA consultations, which failed to ensure that the actions it authorized in connection with issuing leases in connection with Lease Sale 213 were not likely to jeopardize the continued existence of an endangered or threatened species. Plaintiff cites in support *Blanco v. Burton*, 2006 U.S. Dist. LEXIS 55633 (E.D. La. Aug. 14, 2006), in which a Louisiana district court denied a temporary injunction as to a lease sale following Hurricanes Katrina and Rita based on a finding of no irreparable harm, but indicated that Louisiana had established “a substantial likelihood of prevailing on the merits on one or more of its claims,” one of which was a NEPA claim. Louisiana argued that an EA for the lease sale, stating that no supplemental EIS was needed to assess the impacts of those storms, was insufficient and demonstrated that MMS had failed to discharge its NEPA obligations.

In summary judgment opposition and reply briefs filed in January and February 2012, defendants counter that a supplemental EIS was not required as to Lease Sale 213 because (1) a supplemental EIS is only required “[i]f there remains ‘major Federal action[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect[ ] the quality of the human environment’ in a significant manner or to a significant extent not already considered.” Because issuance of leases does not involve drilling (which requires approval of exploration and production plans as a subsequent step in the OCSLA process and issuance of drilling permits), defendants assert that plaintiff has failed to identify any significant effect on the environment that will occur simply as a result of MMS/BOEMRE issuing leases. Defendants also rely on the fact that BOEMRE suspended its practice of allowing most environmental reviews of exploration plans and development plans to proceed under a “categorical exclusion.” Information available as a result of the Deepwater Horizon spill will be addressed in the EAs required by BOEM for each deepwater drilling permit.
application, as well as exploration and development plans. Defendants further assert that the Deepwater Horizon incident occurred at the stage where MMS/BOEMRE was evaluating bids – a later stage in the process than evaluation of environmental impacts associated with pre-issuance steps in the lease sale process. Defendants acknowledge that the agency retains the authority to reject a bid for any reason, but argue that MMS/BOEMRE’s exclusive focus is on bid adequacy following bid acceptance. With respect to plaintiff’s ESA claim, defendants make the same argument that, if anything, drilling (not issuance of leases) is the activity that may threaten an endangered or threatened species, and that “BOEM/BSEE have ample authority to deny or modify exploration plans, deny or modify drilling permits, suspend lease operations, or cancel leases where necessary.”

The intervenor companies assert that vacating or setting aside the leases awarded in Lease Sale 213 is not a viable remedy, and that remand for BOEM to cure any NEPA or ESA issues would be appropriate if plaintiff’s claims are found to have any merit. The intervenors claim that vacatur would cause significant disruption, including loss of competitive advantage (even if bonus payments were returned) due to public disclosure of companies’ bids for a particular tract and loss of substantial dollars and man-hours associated with planning for future exploration activities incurred by the companies in connection with the leases awarded. Intervenors argue that vacatur would constitute injunctive relief, which requires, inter alia, a showing of irreparable injury.


Similar plaintiffs make similar claims in this recently filed lawsuit, but with respect to Lease Sale 218 held on December 14, 2011, which was the first Gulf of Mexico lease sale since the Deepwater Horizon incident. Lease Sale 218 involved 20 companies submitting 241 bids on 191 tracts comprising over a million acres in the Western Gulf of Mexico area located offshore Texas. In a news release issued on the day of the sale by Interior, BOEM Director Beaudreau stated that “[b]efore moving forward with Sale 218, we conducted a rigorous analysis of the environmental effects of the Deepwater Horizon oil spill on the
Western Gulf of Mexico.” Lease Sale 218 also included new lease terms, including escalating rental rates to encourage faster exploration and development, shorter lease terms for shallower water, increased minimum bids of $100/acre up from $37.50/acre in prior sales, and a series of environmental stipulations requiring operators to protect biologically sensitive features, marine mammals, sea turtles, and to employ trained observers to ensure compliance. 11

Plaintiffs contend that approval of Lease Sale 218 was unlawful based on the failure to take into account lessons from the Deepwater Horizon incident concerning the likelihood of oil spills, the difficulty in clean up, and their environmental impact on Gulf of Mexico resources and species. Specifically, plaintiffs allege that BOEM violated NEPA in relying on a supplemental EIS that fails to adequately consider impacts of the oil spill, does not incorporate new understandings of the risks posed by deepwater drilling, ignores new information on oil spill containment and industry response capabilities, and fails to assess a new baseline for species and habitats in the Gulf. Plaintiffs also assert violation of the ESA in failing to complete consultation with the NMFS and USFWS prior to approving Lease Sale 218, and in relying on an outdated biological opinion that is no longer valid. Plaintiffs seek a vacatur of the EIS and a remand for compliance with NEPA and the ESA.

Following the Deepwater Horizon spill, in July 2010, BOEMRE requested that the NMFS and USFWS reinitiate consultation under the ESA to address the effects of Gulf of Mexico lease sales. The basis for consultation was that assumptions in the government’s oil spill modeling had been called into question and may have affected the status of listed species and critical habitats. NMFS and USFWS agreed. In November 2010, BOEMRE issued a notice of intent to prepare a supplemental EIS for Lease Sale 218 with the stated purpose of considering new circumstances and information arising from the spill. The final supplemental EIS was issued in August 2011. According to

plaintiffs, the final supplemental EIS relies on and tiers off of the pre-spill 2007 EIS for the 2007-2012 Lease Sale Program and its 2008 supplement. In addition, it states that “[n]one of the additional information analyzed in this [supplemental EIS] was found to alter the environmental concerns and impact conclusions as presented” in the original EIS and the supplemental EIS for multiple sales. An appendix to the supplemental EIS did estimate that a deepwater catastrophic blowout would result in a flow rate of 30,000-60,000 barrels/day, that it would take 3-4 months to stop the spill, and that multiple threatened and endangered species could be affected, but it goes on to state that there was not sufficient information to understand the effects on marine mammals. A similar analysis was employed regarding oil spill response and containment. In comments to the draft supplemental EIS, one of the plaintiffs, Oceania, recommended that BOEMRE consider an alternative of delaying Lease Sale 218 until adequate impact assessments could be completed. However, this was not among the alternatives considered by BOEMRE (which were go through with the lease sale as planned; go ahead, but exclude certain blocks located near biologically sensitive topographic features; or cancel the lease sale). BOEMRE’s rationale was that it could be years before information on impacts of the Deepwater Horizon spill are available, which is well beyond the contemplated timeframe of the NEPA process. As a result, plaintiffs claim that the supplemental EIS failed to take a “hard look,” as required, at the direct, indirect, and cumulative impacts of the proposed action as mandated by NEPA. Plaintiffs’ ESA claim is similar.

Defendants, BOEM and Interior, have yet to answer the suit. In February 2012, API, the Independent Petroleum Association of America, the U.S. Oil & Gas Association, and the International Association of Drilling Contractors sought leave to intervene.


Plaintiffs assert the same type of NEPA and ESA violations, but with respect to BOEMRE’s approval of a supplemental exploration plan (“EP”) for offshore drilling submitted by Shell. Among the relief requested is that the court set aside approval of the plan. Plaintiffs’ challenges all focus on
whether BOEMRE adequately took into account information arising from the Deepwater Horizon incident. Prior to the spill, Shell had already drilled one exploratory well in its Appomattox Field and discovered oil. The supplemental EP, submitted by Shell in September 2010, and revised multiple times by Shell in order to satisfy new regulatory requirements, was approved by BOEMRE in May 2011. After receiving a well-specific permit in July 2011, Shell drilled its first well under the supplemental EP. Shell, the states of Louisiana, Mississippi, and Alabama, and industry groups have all intervened in this lawsuit.

After lease issuance, a lessee has the exclusive right to submit for approval an EP, and if that exploration is successful, a development operations coordination document. OCSLA requires that Interior approve an EP, as submitted or modified, within thirty days of its submission. 43 U.S.C. § 1340(c)(1). An EP must be disapproved if any activity under the plan “would probably cause serious harm or damage” to the marine, coastal, or human environment, and the plan cannot be modified to avoid the harm. Id. Following approval of an EP, the operator must obtain permits and other approvals to begin drilling any planned exploratory wells. Such permits will be issued absent a finding that the proposed activity will harm aquatic life, create hazardous or unsafe conditions, interfere unreasonably with other uses in the area, or disturb a historical or archeological site. Id. § 1340(g)(3).

Shell’s EP contained site-specific information regarding potential impacts of its proposed drilling, including an 80-page environmental impact analysis that considered impacts on endangered and threatened species. BOEMRE did a site-specific EA in evaluating Shell’s proposal. The EA considered potential impacts from both routine operations and unexpected accidents such as a blowout. A spill analysis attached to the EA contained information from the Deepwater Horizon spill, as well as the earlier Ixtoc spill in the Mexican waters of the Gulf. BOEMRE concluded that there was “no information to indicate that the proposed actions will significantly affect the quality of the human environment” as set forth in NEPA. As noted previously, BOEMRE also reinitiated consultation with NMFS and USFWS following the Deepwater Horizon incident, and that consultation is ongoing.
Plaintiffs argue that BOEMRE violated NEPA and the ESA in approving Shell’s supplemental EP for drilling in the same canyon as the Deepwater Horizon spill without a thorough site-specific analysis of potential environmental impacts (in either an EA or an EIS) and in reliance on a 2007 biological opinion that BOEMRE has acknowledged as invalid. Plaintiffs assert that this BOEMRE site-specific EA, as well as others approved since the Deepwater Horizon spill are strikingly similar even though they involve exploration in different water depths, in different areas of the Gulf, with different habitats and species. They rely on this as evidence that the EA is generic, and not truly site-specific.

Defendants and Intervenors contend that BOEMRE’s EA complied with NEPA, and that BOEMRE properly relied on the 2007 biological opinion in satisfaction of the ESA, regardless of the fact that it reinitiated consultation in 2010. Moreover, the 2010 reinitiation of consultation does not mean BOEMRE violated the ESA in approving Shell’s supplemental EP because the agency did not make an irreversible or irretrievable commitment of resources that precludes implementation of alternatives that would avoid jeopardy to the listed species. Even with BOEMRE’s approvals, BOEM still has authority to impose conditions, suspend, or even cancel approved activities, if necessary. Defendants and Intervenors also assert that BOEMRE/BOEM cannot perform a full-blow EIS even if it finds that an EP would have a significant impact on the environment because of timing – the EP must be approved under OCSLA within thirty days. In this respect, they argue that NEPA must give way to the OCSLA framework.

Briefing is now complete and oral argument is scheduled before the Eleventh Circuit in April.

VI. Suspensions of Production.

Offshore federal leases – like typical onshore oil and gas leases – terminate at the end of their primary term in the absence of continuous production or well operations. However, Congress recognized that it would be necessary to provide relief from lease maintenance requirements to accommodate the challenges of conducting operations in an often hostile offshore maritime environment. Accordingly, OCSLA expressly directs the Department of Interior to adopt regulations “for the suspension or
temporary prohibition of any operation or activity, including production, pursuant to any lease or permit . . . at the request of the lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities.” 43 U.S.C. § 1334(a)(1).

Pursuant to this statutory directive, MMS adopted a series of regulations providing for “suspensions of operations” – SOOs – and “suspensions of production” – SOPs. See 30 C.F.R. § 250.168, et seq. In addition, MMS has issued a series of Letters to Lessees (“LTLs”) and NTLs setting forth the agency’s policies concerning the granting of SOOs and SOPs and related lease maintenance topics.\(^{12}\) Over the past few years, denials of requested suspensions have been the focus of litigation, including a recently settled matter involving ExxonMobil’s Julia Prospect.

*Exxon Mobil Corp.*, 178 IBLA 244 (Dec. 22, 2009).

Exxon Mobil Corporation and Statoil Gulf of Mexico LLC filed this challenge to a decision by the MMS denying ExxonMobil’s request for an SOP for the Walker Ridge Block 627 Unit (a/k/a the Julia Prospect), a Lower Tertiary prospect which is comprised of five offshore federal leases located in remote deepwater areas of the Gulf of Mexico. ExxonMobil had based its request, in part, on a proposal to tie-back the deepwater subsea wells to a host facility being planned by the owners of the Jack and St. Malo prospects, two other Lower Tertiary prospects in the Walker Ridge area. MMS based its denial on the conclusion that ExxonMobil had not demonstrated a “commitment to produce” as required by 30 C.F.R. § 250.171, concluding that ExxonMobil’s proposal to tie-back the Julia Prospect to an as-yet unbuilt host facility to be operated by others subjected ExxonMobil to factors that were beyond the company’s control.

\(^{12}\) *E.g.*, NTL No. 98-15 (Time Allowed Between Lease Holding Operations); NTL No. 98-11N (SOPs due to uneconomic market conditions); NTL No. 2000-G17 (Suspension of Production/Operations Overview); NTL No. 2000-G22 (Subsalt Lease Term Extension); NTL No. 2004-G16 (SOOs for Ultra-Deep Wells); NTL No. 2007-G22 (SOOs for Subsalt and Ultradeep Geophysical Work); NTL No. 2009-NO2 (Timely Submission of Suspension Requests), available at http://www.ocsbbs.com/ntls.asp.
Pursuant to 30 C.F.R. Part 290, Subpart A, ExxonMobil and Statoil (a co-owner of the unit) appealed MMS’ denial of the SOP request to the Interior Board of Land Appeals (“IBLA”). On December 22, 2009, the IBLA granted the appeal, finding that that MMS had failed accurately to interpret the controlling statutory and regulatory provisions, had failed to articulate a rational basis for its decision, and had based its decision on factual premises that were inconsistent with the record. Also, based on evidence that MMS had routinely granted SOPs for other remote deep water prospects, the IBLA found that the MMS had held ExxonMobil’s request for an SOP to a different (and more onerous) standard than it had applied to other similarly situated applicants. In addition, the IBLA concluded that it did not owe MMS Chevron-style deference, and that it could take into account factual developments that occurred after MMS issued its decision denying the request for an SOP.

Exxon Mobil Corp., 42 OHA 261 (May 31, 2011).

Following the IBLA decision, MMS filed a motion requesting the Director of the Department of Interior Office of Hearings and Appeals (“OHA”) assume jurisdiction, review portions of the IBLA decision, and direct reconsideration of portions of the IBLA decision. On May 31, 2011, the Director of OHA issued a decision (the “Interior Decision”) assuming jurisdiction, reversing the IBLA decision, and reinstating the MMS decision from 2009 upholding denial of ExxonMobil’s SOP request.

The Interior Decision held that ExxonMobil did not demonstrate a “commitment to production” as required by MMS regulations, that MMS’ 2009 decision provided ExxonMobil with adequate notice of the agency’s standards for granting an SOP (though that decision came after ExxonMobil submitted its SOP application), that the Jack/St. Malo host facility is a “production facility” and would not serve a “transportation” function, and that neither OCSLA, nor the MMS regulations provide for an SOP in connection with construction or negotiation for use of a “production facility,” that an SOP cannot be granted to allow a lessee time to tie-back to a deepwater host facility unless the lessee plans to build its own host facility or has executed a contract with the owner of a host facility prior to lease expiration, that the
thousands of SOPs granted by MMS before ExxonMobil’s request was denied were not issued by an official with authority to bind the agency and, therefore, are not binding, and that the IBLA failed to consider whether the Julia Prospect is in “the national interest.”

On November 15, 2011, BSEE issued NTL No. 2011-N10, which became effective immediately and applies the Interior Decision to SOP requests submitted after the date of the decision, May 31, 2011.


ExxonMobil and Statoil both challenged the Interior Decision in lawsuits filed in federal district court in the Western District of Louisiana. Plaintiffs asserted that the Interior Decision erroneously interpreted the applicable OCSLA provisions, including the terms “development,” “transportation,” and “national interest,” and ignored uncontroverted evidence that supported the fact that ExxonMobil had satisfied the statutory provisions. Plaintiffs also claimed that the Interior Decision substantially altered the agency’s well-established regulatory interpretation and retroactively applied new standards and criteria for obtaining an SOP. This was based, in part, on the fact that even the former MMS Regional Supervisor, who spent approximately 300 hours reviewing MMS records dating back to 1979 pertaining to SOPs for deepwater leases, testified that he could find no situation in which MMS had denied a request for an SOP under circumstances similar to those ExxonMobil presented in support of its request in connection with the Julia Prospect.

In January 2012, ExxonMobil, Statoil, and defendants settled this matter, and the cases were dismissed. The settlement was approved by the district court and is filed in the record of those proceedings. It provides that Interior and BSEE will issue SOPs for the five leases that make up the Julia Prospect, subject to agreed-upon terms and a schedule of activities toward achieving oil production, and that the leases will be amended to incorporate such terms. The agreed-upon terms include a production incentive fee on the leases that are entitled to royalty relief of $650/acre each year until the royalty-free barrels are produced (87.5 million barrels).
barrels of oil equivalent), an increased royalty rate, and increased rental rates for the same leases.

VII. Decommissioning Idle Iron.

In 2007, MMS issued a study report titled, *Idle Iron in the Gulf of Mexico*. While federal regulations require that offshore oil and gas leases be cleared of structures within one year after production on the lease ceases, this report was the beginning of MMS encouraging lessees to remove structures on still-producing leases to the extent that those structures are no longer “economically viable.” According to the report, at the end of 2003, a total of 1,227 structures were idle, representing about one-third of all structures residing in the Gulf of Mexico. The majority were located on active leases, which meant that they were allowed to remain so long as the lease is producing.

On September 15, 2010, BOEMRE issued NTL No. 2010-G05, effective October 15, 2010, setting forth guidelines for decommissioning offshore wells and platforms. At that time, its impact was stated as requiring operators and lessees to set permanent plugs in nearly 3,500 nonproducing wells and to dismantle about 650 production platforms that were not being used. BOEMRE stated its rationale behind the NTL as follows:

Findings indicate that there are a significant number of idle platforms that have not been removed and idle wells that have not been permanently plugged. This idle infrastructure poses a potential threat to the OCS environment and is a financial liability to you and possibly the Federal government if subsequently destroyed or damaged in a future event such as a hurricane. The cost and time to permanently plug wells and remove storm-damaged infrastructure (including pipelines) is significantly higher.

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than decommissioning assets that are not damaged when decommissioned.

NTL No. 2010-G05 mandates that any well that has not been used during the past five years for exploration and production be plugged, and the associated production platforms and pipelines must be decommissioned unless they continue to be used in exploration and production activities. In addition, wells on active leases that are not useful for operations and are no longer capable of producing in paying quantities must be permanently plugged, temporarily abandoned, or provided with a downhole zonal isolation within three years of the effective date of the NTL or the date the well meets this criteria, whichever is later. Companies were given 120 days from issuance of the NTL to submit a detailed plan for decommissioning all facilities and wells that met the identified criteria of not being in use for five years (including specific dates for submission of permits and for commencing and completing decommissioning work for each well/facility). Following approval, BOEMRE/BSEE are tracking progress on each plan, and has the authority to assess fines and penalties in the event that wells and facilities are not timely decommissioned.

NTL No. 2010-G05 defines “capable of production in paying quantities” as producing enough oil or gas to provide a positive income stream after subtracting expenses, including royalty payments and direct lease operating costs attributable to the well. “No longer useful for operations” is defined as not been used in the past five years and with no plans for use and, for a platform, the definition includes toppled and destroyed facilities regardless of use. A “toppled platform” is one that has collapsed, fallen, or been displaced by a storm or other external force such that it is no longer visible above the water line, and is, therefore, partially or completely destroyed.

With an October 15, 2013 deadline for something to be done with all preexisting wells not useful and not producing in paying quantities, and given that Hurricanes Katrina and Rita in 2005 and Hurricanes Ike and Gustav in 2008 had substantial impacts on Gulf of Mexico oil and gas operations and resulted in many facilities being toppled, a large number of wells and downed structures must be decommissioned, per NTL No. 2010-G05, between 2013-2015. As a result, 2011 was a record year for
decommissioning activity in the Gulf of Mexico. An industry source reports that more than 200 platforms were decommissioned over the course of the year, with 2012 predicted to have a similar level of activity.\(^\text{15}\)

VIII. SEMS.

In October 2010, BOEMRE issued the Workplace Safety Rule, requiring offshore oil and gas operators to maintain a Safety and Environmental Management System ("SEMS"). See 30 C.F.R. § 250.1900, \textit{et seq.} SEMS is a comprehensive safety and environmental management program designed to reduce human and organizational errors causing work-related accidents and offshore oil spills. The Workplace Safety Rule applies to all OCS oil, gas, and sulphur operations and facilities under BSEE jurisdiction, including drilling, production, construction, well workover, well completion, well servicing, and Department of Interior pipeline activities. Operators were required to implement SEMS by November 15, 2011.

The Workplace Safety Rule makes mandatory the 13 elements of API Recommended Practice 75, including:

- General provisions for implementation, planning and management review of SEMS programs,
- Safety and environmental information (design data; facility process such as flow diagrams; piping and instrument diagrams etc.),
- Hazards analysis: facility-level risk assessment,
- Program for addressing facility/operational changes,
- Operating procedures,
- Safe Work Practices,

Training,

Auditing of SEMS program elements.

In September 2011, (76 Fed. Reg. 56683), BOEMRE proposed to modify the Workplace Safety Rule to require six additional items in SEMS programs:

- Additional requirements for conducting Job Safety Analysis,
- Procedures to authorize employees to implement a Stop Work Authority when witnessing activity creating a threat of danger to an individual, property, and/or the environment,
- Requirements establishing who has ultimate work authority for operational safety and decision-making,
- An employee participation program for SEMS implementation,
- Guidelines for reporting unsafe work conditions,
- Requirement that audits be conducted by independent third parties.

Comments on the proposed rule were due by November 14, 2011, and it is expected that these additional requirements will go into effect sometime in 2012.

SEMS is comprehensive and requires a substantial company effort to ensure that a company’s current programs and safety practices are fully in compliance with each element of the new federal regulations. Documentation is another challenge. The regulations require documentation of all program elements, and that such documents be kept “in an orderly manner, readily identifiable, retrievable and legible.” 30 C.F.R. § 250.1928(f). SEMS also imposes significant requirements on companies as to contractors – defined as anyone performing work for the lessee. See id. § 250.1914. Lessees and operators are required to ensure that any and all contractors have written safe work practices and the company must evaluate information about a contractor’s safety and environmental performance. Agreements as to contractor safety and environmental practices must be documented before
work commences. Documentation must also be done to show that each contracted employee is qualified to perform his/her job in a safe and environmentally sound manner.

In addition to third-party audits, SEMS compliance will be determined by regulatory on-site visits or evaluations done randomly or based upon an operator’s or contractor’s performance. *Id.* § 250.1924. Failure to comply with SEMS may result in an Incident of Noncompliance (“INC”), assessment of civil penalties, or initiation of probationary or disqualification procedures. *Id.* § 250.1927.

Moreover, NTL No. 2010-N10, issued November 8, 2010, requires lessees and operators conducting operations using subsea blowout preventers (“BOPs”) or surface BOPs on floating facilities, to provide a statement, signed by an authorized company official stating that the operator will conduct all activities in compliance with all applicable regulations, including (but not limited to) certain increased safety measures. There is the possibility for civil penalties against a company and civil and criminal penalties against a certifying company official who provides a false certification – containing information that is knowingly or willfully false, inaccurate, or misleading – as to SEMS compliance. *Id.* § 250.1460(b)(1) & 250.1480. This certification must be submitted with each well permit application.

**IX. Civil Penalties, Inspection Fees.**

In addition to the costs associated with compliance with new requirements and regulations, two recent NTLs directly assess additional costs upon Gulf of Mexico lessees and operators. NLT No. 2011-N06, issued on July 30, 2011, is a revised assessment matrix for civil penalties. In it, BOEMRE increased the maximum amount of a civil penalty to $40,000/day for each violation. NTL No. 2012-N02, issued on February 17, 2012, imposes new inspection fees on all facilities above the waterline, including all bottom-founded structures and floating production facilities, as well as drilling rigs. Excluded are pipeline ROW accessories, such as pump and compressor platforms, associated with transmission pipelines under Department of Transportation regulatory authority, and structures in state waters that have bottom-founded wells in Federal waters. Fees for facilities vary by the number of wells, if
any, and range from $10,500-$31,500. Fees for drilling rigs range according to water depths of operations from $16,700-$30,500. Such fees will be required to be paid annually, beginning with 2012.

X. Personal Liability.

Following the Deepwater Horizon spill, there has been renewed interest about the potential for personal liability that corporate management and employees can face following a major oil spill. It is worth revisiting the statutory provisions set up in the Clean Water Act (“CWA”), as amended by the Oil Pollution Act of 1990, for oil spill responder liability. The CWA creates the framework for oil spill responses and requires the development of a National Contingency Plan (“NCP”). 33 U.S.C. § 1321(d)(1). The NCP includes a requirement to manage the response under an Incident Command System structure with pre-determined roles and responsibilities for oil spill responders. See 40 C.F.R. § 300, Appendix E. Pursuant to the CWA, responders are immune from personal liability for oil removal costs or damages resulting from actions taken or not taken so long as the responder’s conduct is consistent with the NCP, or is otherwise directed by federal officials. 33 U.S.C. § 1321(c)(4). This immunity does not apply with respect to personal injury or wrongful death, or if the responder is grossly negligent or engages in willful misconduct. Id. Most states have statutes that are similar to the CWA in regard to oil spill responder liability.

Beyond oil spill response activities, employees may be subject to personal liability (including criminal liability) for actions taken before a spill or other catastrophic event under circumstances where they were acting within their normal job responsibilities. Employees are individually liable for their own tortious acts, even when performed within their scope of employment. In many situations, claimants may choose to pursue the employer only (who is vicariously liable) because it has more resources. However, a major incident may result in significant public and political pressure to hold individuals accountable for causing the incident. In most cases, personal liability will attach where employees were grossly negligent or willfully performed a wrongful act. However, simple negligence may be enough in some cases. See, e.g., Hazelwood v. State, 962 P.2d 196 (Alaska Ct. App. 1998).
One area in particular where individual employees are at risk of personal liability (before, during, and after a spill) is with respect to false statements. The Federal Oil and Gas Royalty Management Act ("FOGRMA") and related BSEE regulations provide for civil and criminal liability for individuals that provide false information in relation to OCS leases. 30 C.F.R. §§ 250.1460(b)(1) & 250.1480. Civil penalties for false statements can be as high as $25,000 per day. 30 U.S.C. §1719(d)(1). Potential criminal penalties, upon conviction, may include up to $50,000 in fines, two years imprisonment, or both. 30 U.S.C. § 1720.