



MARINE MAMMAL COMMISSION

8 November 2010

Mr. J. F. Bennett, Chief
Environmental Assessment Branch
Environmental Division (MS 4042)
Bureau of Ocean Energy Management, Regulation, and Enforcement
381 Elden Street
Herndon, Virginia 20170

Re: Comments on the Review of Categorical Exclusions for Outer Continental Shelf Decisions
(75 Fed. Reg. 62418, 8 October 2010)

Dear Mr. Bennett:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Bureau of Ocean Energy Management, Regulation, and Enforcement's request for comments regarding a broad review of categorical exclusions for outer continental shelf decisions (75 Fed. Reg. 62418). The Commission offers the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the Bureau of Ocean Energy Management, Regulation, and Enforcement—

- discontinue the use of categorical exclusions for exploration, development, and production plans for proposed oil and gas activities on the outer continental shelf in the central or western Gulf of Mexico;
- review its requirements for safety and environmental management systems and its practices for inspecting those systems to ensure that they are functioning as designed and expected; and,
- work with the National Marine Fisheries Service and the Fish and Wildlife Service to expedite implementation of the incidental take provisions of the Marine Mammal Protection Act in the Gulf of Mexico, including collection and analysis of the information needed to assess accurately the impact of oil and gas operations on marine mammals and other marine resources.

RATIONALE

The Council on Environmental Quality issues and periodically revises regulations that determine how federal agencies implement the National Environmental Policy Act of 1969. Among other things, those regulations help distinguish between actions that do or do not require preparation of an environmental review document, the latter treated as categorical exclusions. When used judiciously, categorical exclusions eliminate the need to expend agency resources evaluating classes of federal actions that will not have significant effects on the human environment. On 16 August 2010 the Council issued a report reviewing the Bureau's National Environmental Policy Act

policies, practices, and procedures as they relate to outer continental shelf oil and gas exploration and development. In the report, the Council recommended a review of the Bureau's use of categorical exclusions for oil and gas operations.

Categories of Actions Considered for Categorical Exclusion

In the *Federal Register* notice, the Bureau listed categories of actions for which categorical exclusions have been issued and sought comments on them. In general, a review of the appropriateness of the categorical exclusions is difficult without further information concerning the basis for their establishment or the rationale for their continued use. Nonetheless, the Commission provides the following comments.

A.(2) "Actions for which [the Bureau] has concurrence or co-approval with another Bureau if the action is a categorical exclusion of that Bureau." Although the Bureau should have the flexibility to agree with a cooperating agency, the Marine Mammal Commission infers from this statement that the Bureau could treat an action as properly subject to a categorical exclusion based solely on its designation as such by another agency. In this situation, however, the Marine Mammal Commission believes that the Bureau still must assume responsibility for making its own judgment regarding whether a proposed action qualifies as a categorical exclusion. To do otherwise would be to defer the Bureau's responsibility to another agency, and the Commission does not believe such a deferral would be appropriate.

B.(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." The basis for evaluating this type of categorical exclusion is not clear. The implication is that drilling to these limits poses no environmental risk, but without further information, it is not possible for the reader to evaluate that implication. Therefore, it would be useful for the Bureau to supplement this list to provide additional justification, or at least reference materials where the reader can find the justification for identifying certain actions as being subject to a categorical exclusion. For example, it would be useful to know how often oil reserves occur and are exploited at depths of less than 300 feet under unconsolidated rock. It also would be useful to know if these activities include seismic studies, which are presently a matter of some controversy regarding their effects on marine life, including marine mammals.

B.(7), C.(1), C.(11) These items use the terms "insignificant," "minimal," and "minor" to describe types of activities or their effects. Unfortunately, what may be insignificant, minimal, or minor to one person may be too important to dismiss as such to another. In effect, the use of such terms requires an assumption about the very thing that is in question. Although reason must be applied here, it would behoove the Bureau to quantify or otherwise provide more definitive standards for these terms. Otherwise, it is not possible for the reader to make an informed assessment regarding the risk associated with different activities without having to rely entirely on the Bureau's application of these subjective standards in particular instances. Had someone asked BP or the Bureau about the risk of failure of a blowout preventer prior to the Deepwater Horizon oil spill, the answer might well

have been that the risk was minimal and insignificant. Not only are such terms highly subjective, but in this case they turned out to be very wrong.

B.(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.” Here, too, it is not possible for the reader to judge just exactly what might be included under this category of activities. For example, offshore geological and geophysical mineral exploration activities might be interpreted by some to include seismic studies that are used to search for and assess mineral deposits, but the Commission doubts that resource managers or the public would consider such activities fit for categorical exclusion. Here, too, this item uses terms that should be clarified and explained (e.g., what constitutes drilling of “deep” holes) if the Bureau expects meaningful input on these categories of activity.

B.(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.” If this description would include such things as exploration drilling, such as the drilling that led to the Deepwater Horizon oil spill, then the Commission sees no basis for continuing an exclusion for this category of activities. It does not seem reasonable to have just experienced or witnessed the worst oil spill in U.S. history and the associated stresses imposed on the Gulf’s ecological, social, and economic environments and then conclude that the types of actions described in this category do not warrant environmental review under the National Environmental Policy Act. That does not necessarily mean that an environmental assessment or impact statement is necessary for every operation or drill site. The Service may be able to use programmatic assessments or impact statements to address multiple projects that are similar in nature and location. The key requirement at this stage of development is that the risks of each proposed operation be well analyzed and understood. With that need in mind, the Marine Mammal Commission recommends that the Bureau of Ocean Energy Management, Regulation, and Enforcement discontinue the use of categorical exclusions for exploration, development, and production plans for proposed oil and gas activities on the outer continental shelf in the central or western Gulf of Mexico.

Safety and Environmental Management Systems and Safety Cases

Once the risks of a proposed action are described and analyzed, the Bureau also must ensure that the industry applicant has taken the necessary steps to manage those risks safely. On 17 June 2009 the Bureau sought public comment on a proposed requirement that all oil and gas operations on the outer continental shelf be required to have in place a safety and environmental management system. The Marine Mammal Commission wrote to the Bureau on 15 September 2009 recommending that the Bureau impose that requirement on all oil and gas operations. In its May 2010 report entitled “Increased Safety Measures for Energy Development on the Outer Continental Shelf,” the Department of the Interior recommended the development of a “safety case” for each

individual vessel or platform. A safety case is a comprehensive, vessel- or platform-specific set of safety documents that provide a basis for evaluating whether each major operating system on the vessel or platform can be operated safely as expected and in the proposed environment. As noted by the Bureau, “[a] drilling safety case would establish risk assessment and mitigation processes to manage a drilling contractor’s controls related to health, safety, and environmental aspects of operations.” On 14 October 2010 the Bureau published an interim final rule on increased safety measures for energy development on the outer continental shelf (75 Fed. Reg. 63346). Although it accepted a number of the Department’s recommendations, the Bureau did not include the recommendation regarding safety cases. The notice indicated that the Bureau is still evaluating how to integrate a drilling safety case with an overall Safety and Environmental Management System approach and that it may address that matter in future rulemaking. On 15 October 2010 the Bureau implemented a final rule requiring Safety and Environmental Management Systems (75 Fed. Reg. 63610).

Environmental analyses are conducted prior to the onset of oil and gas operations to inform decision-makers and regulators as to how they might minimize the safety and environmental risks associated with a proposed project. Once an environmental assessment or impact statement has been completed and a project is allowed to proceed, safety and environmental management systems become the primary means of preventing accidents. Those systems are particularly important because operations at a given site may continue for decades, ensuring substantial turnover in leadership and frontline personnel, changes in company structure and financing, and variability in market conditions. The probability of an accident hinges largely on how well safety and environmental management systems are developed, implemented, and maintained over the duration of the operation. That being the case, the Bureau would enhance its ability to ensure safe operations by conducting regular and frequent (i.e., yearly), well-structured reviews of all components of the safety and environmental management system at each site where a significant accident may occur. Not to conduct such reviews would be tantamount to a categorical exclusion for a project once it has been approved. Presumably, the Bureau conducts such reviews, but the details of how it does so (e.g., frequency, thoroughness) are not clear. Because of the importance to accident prevention and response over the lifetime of a drill site, the Marine Mammal Commission recommends that the Bureau of Ocean Energy, Management, Regulation, and Enforcement review its requirements for safety and environmental management systems and its practices for inspecting those systems to ensure that they are functioning as designed and expected. Such a review should take into account the frequency and thoroughness of inspections, the adequacy of preventative measures and their implementation, the maintenance of response equipment, the training and competence of personnel with regard to their duties in managing all aspects of their safety and environmental systems, and all other factors relevant to preventing and responding to accidents. This may be the area where the Bureau can make the most substantial improvements in safety measures for oil and gas operations on the outer continental shelf.

Incidental Take Authorizations under the Marine Mammal Protection Act

The taking of marine mammals incidental to oil and gas operations and other activities (other than commercial fishing) should be authorized under section 101(a)(5) of the Marine

Mammal Protection Act (16 U.S.C. § 1371(a)(5)) and then only if the National Marine Fisheries Service or the Fish and Wildlife Service (depending on the species involved) determines that the taking will have a negligible impact on the affected species or stocks. In the Gulf of Mexico, oil and gas operations may result in the taking of cetaceans from 21 species comprising 58 stocks.¹ However, with one exception, oil and gas operators in the Gulf of Mexico generally opt not to apply for and obtain incidental take authorizations under the Marine Mammal Protection Act for their operations. The exception pertains to explosive removal of platforms and related structures.²

The Marine Mammal Commission is unclear as to why the regulatory agencies have not required operators in the Gulf of Mexico to obtain authorizations for operations other than platform removals, at least to cover the species most likely to be encountered or taken during oil and gas operations. The Commission understands that the National Marine Fisheries Service and the Bureau are working toward implementing the incidental take provisions of the Marine Mammal Protection Act for the other oil and gas-related activities in the Gulf. However, it remains unclear when authorizations will be sought or issued. Such authorizations must be based on a thorough environmental review of potential impacts associated with oil and gas operations, the anticipated take levels of marine mammals, and an assessment of the impacts of such taking on the affected species and stocks.

Although oil and gas operators in the Gulf of Mexico generally do not obtain authorizations under the Marine Mammal Protection Act, the Bureau consults with the National Marine Fisheries Service and the Fish and Wildlife Service to develop “Notices to Lessees.” Those notices establish the requirements for various aspects of oil and gas operations designed to protect marine resources, including marine mammals. Four notices pertain to protection of marine mammals³; two of these require operators to report marine mammal sightings and observed behavior to the Bureau (notices on vessel strikes and seismic surveys). However, the information sent to the National Marine Fisheries Service is in summary form and applies only to Gulf species listed under the Endangered Species Act (i.e., the sperm whale). Therefore, it does not provide a sufficient basis for determining the level of exposure or the number of takes for most marine mammal species. In Alaska waters,⁴ the Bureau also uses Notices to Lessees to establish requirements for oil and gas operations. However, oil and gas operators conducting activities offshore of Alaska generally apply to the National Marine Fisheries Service and the Fish and Wildlife Service for incidental take authorizations associated with various operations (e.g., seismic surveys, exploratory drilling).

¹ See Waring, G., E. Josephson, K. Maze-Foley, and P.E. Rosel (eds.). 2009. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2009. NOAA Tech. Memo. NMFS-NE-213. 540 pp.

² Regulations for removal of offshore oil and gas structures are codified at 50 C.F.R. § 216.211

³ Regional and Subregional Oil Spill Response Plans (NTL 2006-G21); Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program (NTL 2007-G02); Marine Trash and Debris Awareness and Elimination (NTL 2007-G03); Vessel Strike Avoidance and Injured/Dead Protected Species Reporting (NTL2007-G04)

⁴ In Alaska waters, oil and gas operations may result in the taking of 17 marine mammal species (see Allen, B.M., and R.P. Angliss. 2010. Alaska marine mammal stock assessments, 2009. U.S. Dep. Commer., NOAA Tech. Memo, NMFS AFSC-206, 276 pp.)

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The issuance of an incidental take authorization requires that the National Marine Fisheries Service or the Fish and Wildlife Service set forth permissible methods of taking and other means of achieving the least practicable adverse impact on the marine mammal species or stocks and their habitat. However, the two key questions facing scientists and managers responsible for reviewing and issuing incidental take authorizations are how many marine mammals are taken in the course of an activity and what is the biological significance of those takes. The information currently collected from oil and gas operators in the Gulf of Mexico under the Notice to Lessees process is not adequate to answer these questions. In contrast, the data collected in the course of oil and gas activities in Alaska waters are more extensive and amenable to meaningful analyses. Those data thus provide some basis for informing and improving the incidental take authorization process. Given the large number of oil and gas operations in the Gulf, the most effective means for addressing the shortcomings of the present arrangement may be through a coordinated mitigation, monitoring, and reporting program established under a programmatic authorization process.

To improve environmental reviews of oil and gas operations in the Gulf of Mexico, the Marine Mammal Commission recommends that the Bureau of Ocean Energy Management, Regulation, and Enforcement work with the National Marine Fisheries Service and the Fish and Wildlife Service to expedite implementation of the incidental take provisions of the Marine Mammal Protection Act in the Gulf, including enhanced information collection and analysis requirements to provide a more accurate assessment of the direct and indirect effects of oil and gas operations on marine mammals and other marine resources. Such implementation should improve substantially information on the marine mammal species taken, the approximate number and types of takes, and the biological significance of those takes.

The Marine Mammal Commission gratefully acknowledges the important work of the Bureau and the critical role it plays in oversight and regulation of oil and gas operations on the outer continental shelf. Please contact me if you have any questions regarding these recommendations or rationale or if we can provide any additional assistance.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director