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

August 16, 2010

I. Introduction

On April 20, 2010, the *Deepwater Horizon* mobile offshore drilling unit, a semi-submersible exploratory drilling rig owned by Transocean Ltd. and leased to a BP PLC affiliate, exploded and sank in 4,992 feet of water in the Gulf of Mexico. The drilling rig was in the process of temporarily abandoning an exploratory well, known as the Macondo well. The explosion and fire killed eleven crew members, and the subsequent spill of oil and release of natural gas from the compromised well (hereinafter the "BP Oil Spill") has created an unprecedented environmental disaster for the people and the fragile ecosystems of the Gulf Coast.

The Administration is committed to ensuring that oil and gas exploration and production activities undertaken on the Outer Continental Shelf (OCS) are conducted in a safe and environmentally responsible manner. As part of the Administration's ongoing efforts to reform how these activities are conducted, on May 14, 2010 Council on Environmental Quality (CEQ) Chair Nancy Sutley and Secretary of the Interior Ken Salazar announced a review of the National Environmental Policy Act (NEPA) policies, practices, and procedures applied by the Department of the Interior's Minerals Management Service (MMS), the Federal agency charged with overseeing oil and natural gas development on the OCS under the Outer Continental Shelf

Lands Act (OCSLA).[1] Subsequently, CEQ published a notice announcing the review and requesting public comments.[2] In a June 24, 2010 letter to Secretary Salazar, Chair Sutley advised that CEQ would work with the new management of MMS—which is undergoing reform and reorganization and has been renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM)—to provide them an appropriate opportunity for consultation on the review results and recommendations.[3]

For this report, CEQ reviewed relevant MMS NEPA documents and consulted with experts within the agency.[4] CEQ also considered comments submitted during the review, which are now posted on CEQ's website.[5] CEQ presented issues based on this review to the Department of the Interior (DOI) and BOEM and provided suggestions for how BOEM might address those issues. This report articulates recommendations that reflect discussions held with DOI, BOEM's own review of its NEPA practices and procedures, and actions DOI intends to adopt as guideposts for additional reforms, which will be implemented as part of BOEM's ongoing structural reorganization.

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[1] Council on Environmental Quality (CEQ), "Review of MMS NEPA Procedures for OCS Oil and Gas Exploration and Development," *available at* www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/mms-review (last visited on August 9, 2010). Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq., *available at* www.boemre.gov/aboutmms/pdffiles/ocsla.pdf (last visited on August 9, 2010).

[2] Review of MMS NEPA Policies, Practices, and Procedures for OCS Oil and Gas Exploration and Development, 75 Fed. Reg. 29,996 (May 28, 2010), *available at* www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/mms-review (last visited on August 9, 2010).

[3] The Department of the Interior (DOI) has initiated a number of reforms to address safety and environmental issues associated with drilling on the OCS. Prior to the BP Oil Spill, DOI initiated an independent study by an arm of the National Academy of Sciences to examine how to upgrade the safety inspection program for offshore rigs. DOI also launched a scientific evaluation, led by the Director of the U.S. Geological Survey, to analyze issues associated with drilling in the Arctic. After the BP Oil Spill, DOI initiated additional inspections of all deepwater oil and gas drilling operations in the Gulf of Mexico and issued a safety notice to all rig operators; drafted and implemented the 30-Day Safety Report, including the issuance of Notices to Lessees on new safety and environmental requirements, and the initiation of new rulemakings for safety and environmental protection; established a moratorium on operations utilizing certain equipment associated with deepwater drilling; and implemented new requirements that operators must submit information regarding blowout scenarios with their Exploration Plans.

[4] We use the term "agency" to refer to both MMS and its successor, BOEM.

[5] *See* Part VI below. Comment letters are available at www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/mms-review (last visited on August 9, 2010).

CEQ believes these recommendations—and the DOI and BOEM commitments to use these recommendations to review BOEM NEPA policies, practices, and procedures—will improve BOEM's NEPA practices and procedures and ensure robust environmental reviews for future oil and gas exploration and development activities.

NEPA was designed to ensure the consideration of environmental impacts as part of the Federal Government's decisionmaking.[6] As President Obama proclaimed upon NEPA's 40th Anniversary on January 1, 2010, "NEPA elevated the role of environmental considerations in proposed Federal agency actions, and it remains the cornerstone of our Nation's modern environmental protections."[7] NEPA was designed to impart transparency and accountability in Federal decisionmaking. These basic principles inform the review and reforms articulated in this report. The Obama Administration seeks to ensure that the best possible environmental reviews are conducted for Federal activities. Accordingly, CEQ has provided its expertise to DOI to broadly review the MMS's application of NEPA for offshore oil and gas exploration and development on the OCS. For this report, CEQ focused its documentary review on the permitting process for the Macondo well drilled by the *Deepwater Horizon* as a case study of MMS's approach to NEPA. The recommendations developed here are relevant to the OCSLA decisionmaking processes as a whole.

As explained below, MMS conducted numerous levels of extensive environmental reviews, relying upon the "tiering" process—a process generally sanctioned in the governing regulations for NEPA, in which prior reviews are incorporated into subsequent, site-specific analyses—to consider the environmental impacts of its OCSLA permitting decisions. This process was not transparent, however, and has led to confusion and concern about whether environmental impacts were sufficiently evaluated and disclosed. It is essential to ensure that information from one level of review is effectively carried forward to—and reflected in—subsequent reviews, that the agencies independently tests assumptions, and that there is appropriate evaluation of site-specific environmental impacts. As a result of this transparent integration and incorporation by reference, decisionmakers and the public will fully understand the environmental consequences of the agency's decisions.

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[6] National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4321 et seq., *available at* ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html (last visited on August 10, 2010).

[7] President Obama's Proclamation on the 40th Anniversary of the National Environmental Policy Act can be viewed at ceq.hss.doe.gov/nepa/2009nepa_prc_rel.pdf (last visited on August 9, 2010).

II. Summary of Recommended Guideposts for Additional Reform

In this report, the Council on Environmental Quality (CEQ) offers several recommendations to promote robust and transparent implementation of National Environmental Policy Act (NEPA) practices, procedures, and policies. These recommendations will help ensure that appropriate analysis is undertaken, so that decisionmakers and the public have a complete picture of the environmental consequences. CEQ firmly believes that this complete picture is needed to adequately inform agency decisions. The recommended reforms are designed to provide a consistent, rigorous, and transparent approach to NEPA reviews and other environmental analyses. They call for efficient preparation and utilization of broad programmatic reviews, fully integrated with site-specific assessments and mitigation approaches.

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM) has committed to using the following CEQ recommendations as guideposts as it continues its reform and reorganization activities:

A. Tiering and Site-Specific Analysis

1. **Perform careful and comprehensive NEPA review of individual deepwater exploration, operation, development, production, and decommissioning activities, including site-specific information where appropriate.**

2. **Track and take into account all mitigation commitments made in NEPA and decision documents that are relied upon in determining the significance of environmental impacts, from the initial Programmatic EIS through site-specific NEPA analyses and decisions.**

B. Transparency, Public Accountability, and Sound Decisionmaking

3. **Ensure that NEPA analyses fully inform and align with substantive decisions at all relevant decision points; that subsequent analyses accurately reflect and carry forward relevant underlying data; and that those analyses will be fully available to the public.**

4. **Ensure that NEPA documents provide decisionmakers with a robust analysis of reasonably foreseeable impacts, including an analysis of reasonably foreseeable impacts associated with low probability catastrophic spills for oil and gas activities on the Outer Continental Shelf.**

C. Categorical Exclusions

5. **Review the use of categorical exclusions for Outer Continental Shelf oil and gas exploration and development in light of the increasing levels of complexity and risk—and the consequent potential environmental impacts—associated with deepwater drilling. Determine whether to revise these categorical exclusions.**

6. **Continue to seek amendments to the Outer Continental Shelf Lands Act to eliminate the 30-day decisional timeframe for approval of submitted Exploration Plans.**

D. Changed Circumstances

7. **Consider supplementing existing NEPA practices, procedures, and analyses to reflect changed assumptions and environmental conditions, due to circumstances surrounding the BP Oil Spill.**

III. Environmental Review Framework

A. The Outer Continental Shelf Lands Act

Under authority granted by the Outer Continental Shelf Lands Act (OCSLA), the Secretary of the Interior, acting through the BOEM, manages and regulates the leasing, exploration, development, and production of resources on the Outer Continental Shelf (OCS). The OCSLA empowers BOEM to establish policies and procedures for development of OCS resources that achieve national economic and energy policy goals, protect human, marine, and coastal environments, and encourage technology development that eliminates or minimizes environmental damage. MMS has described the basic goals of the OCSLA as follows:

1. To establish policies and procedures for managing the oil and natural gas resources of the OCS that are intended to result in expedited exploration and development of the OCS in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;
2. To preserve, protect, and develop oil and natural gas resources of the OCS in a manner that is consistent with the need:
    a. To make such resources available to meet the nation's energy needs as rapidly as possible;
    b. To balance orderly resource development with protection of the human, marine, and coastal environments;
    c. To ensure the public a fair and equitable return on the resources of the OCS; and
    d. To preserve and maintain free enterprise competition; and
3. To encourage the use of the best available and safest technology for energy resource production to eliminate or minimize risk of damage to the human, marine, and coastal environments.[8]

MMS utilizes a multi-step process for oil and gas leasing, exploration, and development decisions. As required by the OCSLA, the agency prepares a nationwide five year oil and gas leasing program for the OCS (hereinafter the "5-Year Program") that outlines a schedule of

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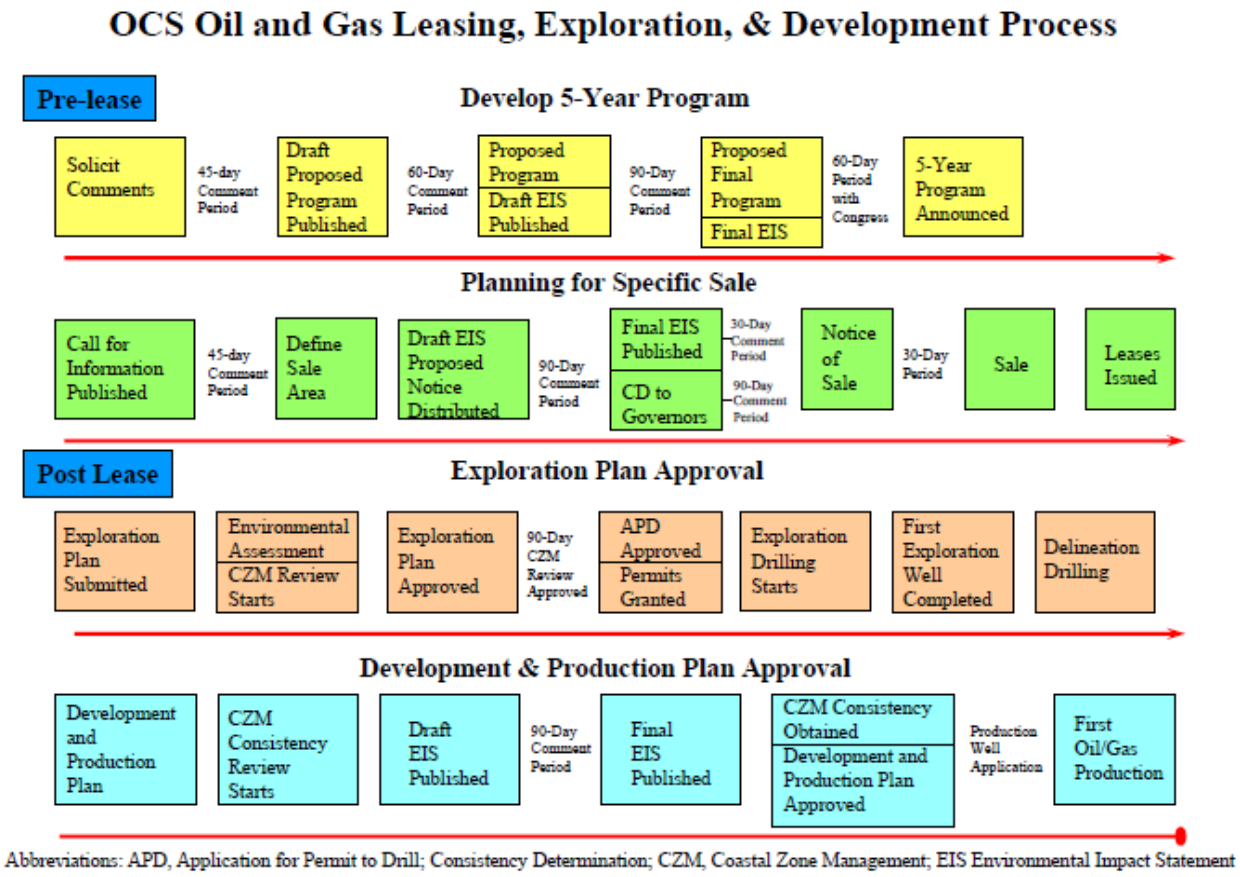
[8] A description of the OCSLA, including the Act's goals and objectives, is available on the BOEM website. *See* Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM), Outer Continental Shelf Lands Act, *available at* www.gomr.mms.gov/homepg/regulate/regs/laws/ocslasht.html (last visited on August 10, 2010).

proposed lease sales, describing the size, timing, and location of proposed leases. Individual leases listed in the 5-Year Program can then proceed to sale and issuance after a series of site-specific scoping and planning actions. Once a lease is issued, exploratory drilling cannot begin until the agency has considered and approved an operator's Exploration Plan (which details the timing, location, and other aspects of planned exploration activities) and Application for Permit to Drill (APD). If the operator discovers oil and/or natural gas, a Development Plan must be submitted for agency approval, describing the number, location, and structure of wells that will be used, and other information.[9] This overall process is illustrated in a graphic prepared by MMS, which does not reflect the processes particular to the Gulf of Mexico (*see* Figure 1).[10]

Figure 1. "OCS Oil and Gas Leasing Process" Minerals Management Service



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[9] Minerals Management Service (MMS), Oil and Gas Leasing on the Outer Continental Shelf, *available at* www.boemre.gov/PDFs/5MMS_Leasing101.pdf (last visited on August 9, 2010).

[10] *Id.* at 2.

NEPA procedures must be applied to proposals for agency action before decisions are made, beginning with the approval of nationwide OCS 5-Year Program and ending with decommissioning. The sequence of NEPA analyses is informed by the CEQ Regulations Implementing the Procedural Requirements of NEPA (hereinafter "CEQ Regulations").[11]

Under Section 11 of the OCSLA, the agency is allowed a maximum of 30 days to complete its environmental review to approve or disapprove an Exploration Plan.[12] The Administration, in its supplemental budget request sent to Congress on May 12, 2010, sought to extend that 30-day timeline; however, this report considers the existing statutory requirements currently applicable to the agency's decisions for OCS oil and gas exploration and development.

B. The National Environmental Policy Act (NEPA)

Enacted in 1970, NEPA mandates that Federal agencies consider the environmental impact of their proposed actions during all stages of decisionmaking, from broad planning decisions to implementation decisions.[13] NEPA is a fundamental decisionmaking tool used to harmonize our economic, environmental, and social aspirations and is a cornerstone of our Nation's efforts to protect the environment. NEPA applies to every stage of Federal agency decisionmaking related to offshore oil and gas exploration and development. When an agency proposes an action, it must determine if the action has the potential to affect the quality of the human environment. Agencies then apply one of three levels of NEPA analysis:

1. Prepare an **Environmental Impact Statement (EIS)** when the agency determines that the proposed action has the potential for significant environmental impacts;[14]

2. Prepare an **Environmental Assessment (EA)** to determine whether the agency can make a Finding of No Significant Impact (FONSI) or proceed to prepare an EIS; or

3. Apply a **Categorical Exclusion (CE)** when the agency determines that a proposed action falls within the categories of actions described in an established CE and that no

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[11] 40 C.F.R. §§ 1500-08. The CEQ Regulations are also available at ceq.hss.doe.gov/ceq_regulations/regulations.html (last visited on August 9, 2010).

[12] 43 U.S.C. § 1340(c).

[13] 40 C.F.R. § 1508.18(b).

[14] Preparing an EIS requires the preparation of at least three documents. A Draft EIS is published for public comment and review. This is followed by publication of a Final EIS which addresses the substantive comments received on the Draft EIS. After the Final EIS, a Record of Decision is issued.

> extraordinary circumstances apply. Agencies establish CEs through a public comment process, with a finding that the category of actions does not normally, in the absence of extraordinary circumstances, result in individually or cumulatively significant environmental effects.

NEPA charges CEQ with the authority and responsibility to guide Federal agencies in their NEPA implementation. In 1978, CEQ issued regulations implementing the procedural provisions of NEPA.[15] These regulations apply to all Federal agencies and establish the basic framework for all NEPA analyses.[16] The regulations require Federal agencies to establish their own NEPA implementing procedures,[17] and to ensure that they have the capacity, in terms of personnel and other resources, to comply with NEPA.[18]

Agencies establish their own NEPA implementing procedures, in line with CEQ requirements for the specific agency's authorities and decisionmaking processes. NEPA procedures include the designation of: (1) actions that normally require an EIS; (2) actions that normally require an EA; (3) and actions that are normally categorically excluded. An agency's NEPA procedures are not effective until the public has an opportunity to review and comment on the proposed procedures. CEQ reviews an agency's proposed procedures and determines whether the final procedures are in conformity with NEPA and the CEQ regulations. Any subsequent revision or change to any agency's procedures is subject to the same CEQ oversight process.

As relevant here, MMS and its successor agency, BOEM, apply the Department of the Interior (DOI)'s NEPA regulations[19] and the NEPA implementing procedures found in DOI's Departmental Manual.[20] As noted above, MMS (and now BOEM) applies NEPA procedures during each of the stages of OCS prescribed in the OCSLA, beginning with the initial planning

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[15] 40 C.F.R. § 1500 et seq.

[16] *Id.* § 1500.3.

[17] *Id.* § 1507.3.

[18] *Id.* § 1507.2.

[19] Implementation of the National Environmental Policy Act (NEPA) of 1969, 73 Fed. Reg. 61,292 (October 15, 2008) (codified at 43 C.F.R. § 46).

[20] DOI's Departmental Manual documents policies and procedures applicable to the Department, and is available online at elips.doi.gov/app%5FDM/. Chapter 15 of Part 516 of the Manual sets forth requirements specific to MMS NEPA implementation. Departmental Manual, Part 516, Chapter 15, Managing the NEPA Process-MMS, a*vailable at* elips.doi.gov/app_DM/act_getfiles.cfm?relnum=3625 (last visited on August 9, 2010). BOEM, as the successor to MMS, will use the MMS NEPA implementing procedures until they are revised or replaced.

of nationwide OCS leasing and ending with decommissioning. The precise sequence and scope of these NEPA procedures is shaped by the CEQ Regulations. Specifically, section 1502.20 of the regulations encourages "tiering," a strategy used to avoid repetitive discussions of the same issues, and to prevent unnecessary duplication of work by reviewers, as a NEPA analysis progresses from a broad program to a site-specific action.[21] Furthermore, section 1502.21 of the regulations encourages agencies to "incorporate by reference" information, findings, and recommendations from existing studies and NEPA analyses into subsequent NEPA analyses and documents, so as to make them more concise and focused.[22]

A Categorical Exclusion (CE) refers to an activity that has been determined through an appropriate public process not to raise environmental issues or concerns which require analysis in an EA or EIS. Once a CE is established, it can be applied to a specific proposed action if there are no "extraordinary circumstances" that raise the potential for significant impacts based on relevant site-specific analysis. So long as the proposed activity is included in the CE, and there are no "extraordinary circumstances," using a CE is an appropriate way to comply with NEPA. CEQ does not review every application of a CE, every agency project, or the NEPA documents prepared for every agency decision. Rather, CEQ reviews agencies' NEPA implementing regulations and procedures, as well as agencies' overall program implementation.

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[21] 40 C.F.R. § 1502.20.

[22] *Id.* at § 1502.21.

IV. Environmental Review Related to the Macondo Exploratory Well

The BP Oil Spill tragedy has drawn special attention to the circumstances surrounding regulatory actions associated with the drilling of the Macondo exploratory well. In conducting this high level review of the implementation of the National Environmental Policy Act (NEPA) with regard to Outer Continental Shelf (OCS) drilling activities, the Council on Environmental Quality (CEQ) examined the NEPA process associated with OCS oil and gas leasing, exploration, and development decisions leading up to the drilling of the Macondo well. Mindful of the complexities of pending and future litigation involving the BP Oil Spill, this review focused on ways to strengthen and improve BOEM's NEPA practices going forward. It did not seek to evaluate the substantive adequacy of any of MMS's specific NEPA analyses and documents.

Historically, MMS has devoted substantial resources to the preparation of analyses of potential environmental issues associated with OCS energy development. Final decisions regarding drilling activities typically are preceded by a series of environmental analyses that often include the preparation of at least two Environmental Impact Statements (EISs). The agency typically "tiered" off of these programmatic NEPA analyses and documents when making site-specific approvals. This approach is in line, as a general matter, with NEPA policy and practice.

With respect to the specific decisions leading up to the drilling of the Macondo well, MMS prepared NEPA reviews at each stage of decisionmaking, including: the development of a 5-year nationwide oil and gas leasing program for the OCS; the planning of multiple proposed lease sales in the Gulf of Mexico's Central and Western Planning Areas; the offering of a bundle of leases (referred to as "Lease Sale 206"), which included a lease for Mississippi Canyon (MC) Block 252, located in the Central Planning Area; the lease of MC Block 252 to BP; and the approval of BP's Exploration Plans and Applications for Permits to Drill the Macondo well in MC Block 252. These NEPA reviews included the following:

- Outer Continental Shelf Oil & Gas Leasing Program: 2007-2012, Final Environmental Impact Statement (April 2007) (referred to as the "Programmatic EIS");[23]

[23] *Available at* www.boemre.gov/5-year/2007-2012FEIS.htm (last visited on August 10, 2010).

- 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 (April 2007) (referred to as the "Multi-Sale EIS");[24]

- Proposed Gulf of Mexico OCS Oil and Gas Lease Sale 206 Central Planning Area Environmental Assessment (referred to as the "Lease Sale 206 EA"), with enclosed Finding of No New Significant Impact (FONNSI), signed on October 22, 2007;[25]

- Two Categorical Exclusion Reviews (CERs) for approving BP's Initial and Revised Exploration Plans and amendments for the Macondo well; and

- Records of MMS's approval of BP's Applications for Permit to Drill (APDs).[26]

For the preparation of this report, CEQ reviewed a number of documents in addition to the NEPA reviews listed above, including the following reports, documents, and NEPA reviews prepared by MMS between 2000 and 2008:[27]

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[24] *Available at* www.gomr.mms.gov/PDFs/2006/2006-062-Vol1.pdf and www.gomr.mms.gov/PDFs/2006/2006-062-Vol2.pdf (last visited on August 10, 2010).

[25] *Available at* www.gomr.mms.gov/PDFs/2007/2007-059.pdf (last visited on August 10, 2010). Typically, an Environmental Assessment concludes with either a Finding of No Significant Impacts (FONSI) or a determination that an EIS is required. The Lease Sale 206 EA was prepared to determine if there were any new or different significant impacts that had not already been addressed in the Multi-Sale EIS. Because the potentially significant impacts associated with Lease Sale 206 had been addressed in the Multi-Sale EIS, the Lease Sale 206 EA determined that there were no new significant impacts.

[26] The drilling of a single exploratory well may require multiple APDs to account for interruptions in drilling, changes in equipment, and other circumstances. A search by BOEM staff of their databases located four APDs approved with regard to the Macondo well. BOEM staff have indicated to CEQ that Categorical Exclusion 15.4 C(12) was applied to each of the APDs as of the date of approval. The four APDs located by BOEM staff are: (1) "APD for New Well" submitted May 13, 2009 and approved May 22, 2009; (2) "APD for Revised New Well" submitted January 25, 2010 and approved January 29, 2010;(3) "APD for New By-Pass" submitted March 15, 2010 and approved March 15, 2010; and (4) "APD for Revised By-Pass" submitted April 15, 2010 and approved April 15, 2010. (BOEM has also provided CEQ with a copy of an APD for Revised New Well that was submitted September 28, 2009, but never approved.) According to BOEM staff, drilling on the Macondo well began on October 7, 2009, but stopped on November 29, 2009 when Hurricane Ida damaged the drilling rig. Drilling resumed in February 2010. The "APD for Revised New Well" (submitted January 25, 2010) noted a change in drilling rigs from the *Marianas* to the *Deepwater Horizon*.

[27] The subsequent stages that involve development—Approving a Development and Production Plan or Development and Coordination Documents; Drilling Permit Applications for production wells; and

- Gulf of Mexico Deepwater Operations and Activities Environmental Assessment (May 2000) (referred to as the "Deepwater EA");[28]

- Proposed Use of Floating Production, Storage, and Offloading (FPSO) Systems on the Gulf of Mexico Outer Continental Shelf, Final Environmental Impact Statement (January 2001);[29]

- Outer Continental Shelf Oil and Gas Leasing Program 2002-2007, Final Environmental Impact Statement (April 2002);[30]

- Gulf of Mexico Oil and Gas Lease Sales 2003-2007 Central Planning Area Sales 185, 190, 194, 198, and 201; Western Planning Area Sales 187, 192, 196, and 200, (November 2002);[31]

- Programmatic Environmental Assessment for Grid 16 and Site-Specific Evaluation of BP Exploration and Production, Inc.'s Initial Development Operations Coordination Document, N-7469, Thunder Horse Project, Mississippi Canyon (December 2002);[32]

- Proposed Final Program for 2007-2012 Outer Continental Shelf Oil & Gas Leasing Program (PFP) (April 2007);[33]

- Approval of the 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program Memorandum (June 2007);

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abandonment—were not examined in detail for preparation of this report because BP and the agency had not reached those stages at the time of the BP Oil Spill.

[28] *Available at* www.gomr.mms.gov/PDFs/2000/2000-001.pdf (last visited on August 10, 2010).

[29] *Available at* www.gomr.mms.gov/PDFs/2000/2000-090.pdf (last visited on August 10, 2010).

[30] *Available at* www.boemre.gov/5-year/history2002-2007.htm (last visited on August 10, 2010).

[31] *Available at* www.gomr.mms.gov/homepg/regulate/environ/nepa/cw2003-2007.html (last visited on August 10, 2010).

[32] *Available at* www.gomr.mms.gov/homepg/regulate/environ/nepa/grid16ea.pdf (last visited on August 10, 2010).

[33] *Available at* www.boemre.gov/5-year/PDFs/MMSProposedFinalProgram2007-2012.pdf (last visited on August 10, 2010).

- Oil-Spill Risk Analysis: Gulf of Mexico Outer Continental Shelf (OCS) Lease Sales, Central Planning Area and Western Planning Area, 2007-2012 and Gulfwide OCS Program, 2007-2046 (June 2007) (referred to as the "Oil Spill Risk Analysis");[34] and

- Final Notice of Lease Sale 206 (March 2008).[35]

In May of 2000, MMS produced a Gulf of Mexico Deepwater Operations and Activities Environmental Assessment (the "Deepwater EA"), which included an assessment of what was then known about deepwater operations and activities.[36] The Deepwater EA also identified additional studies and analysis needed to address issues and data gaps. The Deepwater EA described the risk of blowouts like the one that occurred on April 20, 2010, and the problems associated with controlling deepwater blowouts.[37] Most significantly, the Deepwater EA

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[34] *Available at* www.boemre.gov/itd/pubs/2007/2007-040.pdf (last visited on August 10, 2010).

[35] *Available at* www.gomr.mms.gov/homepg/lsesale/206/cgom206.html (last visited on August 10, 2010).

[36] Drilling oil and gas wells in the Gulf of Mexico began in 1947. The first well drilled in deeper waters of the continental slope was in 1974 at 212 meters. Deepwater EA at II-4. The definition of deepwater applied in MMS documents has varied over time. Assuming that deepwater is defined as greater than 1,000 feet (304.8 meters), BOEM statistics indicate that 3,754 deepwater wells were drilled between 1974 to 2010. At least 330 of those wells were drilled by 1986, the year in which the current categorical exclusion was established. *See* BOEM, Offshore Statistics by Water Depth, *available at* www.gomr.mms.gov/homepg/fastfacts/WaterDepth/wdmaster.asp (last visited on August 10, 2010).

[37] The Deepwater EA analysis stated, "Typically, 'blowout' refers to loss of control associated with the target reservoir. No spills have occurred associated with development drilling operations . . . . Accounting for all sources of blowouts (from both exploratory and development wells) gives an average of 7 blowouts per 1,000 well starts." Deepwater EA at II-16. This was updated in the Multi-Sale EIS, which noted that of all blowouts, only 21% resulted in spilled oil or synthetic base fluid. Multi-Sale EIS, "Loss of Well Control," at 4-249. The Deepwater EA also noted,

> Of the 24,237 well starts from 1971 to 1995, 901 (3.7%) were drilled in water depths greater than 1,000 ft. No major blowouts have occurred in the Gulf[of Mexico]'s deepwater areas. Many of the wells expected in deep water will have well control equipment located at the seafloor. Water depths may complicate well control operations. Of particular concern is the ability to stop a blowout once it has begun. The availability of rigs capable of drilling in similar water depths, riser components, and associated deepwater drilling equipment may be limited. The MMS is considering a rulemaking establishing the operator's responsibility for assuring the MMS of the accessibility and availability of an intervention drilling rig.
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> In the event a blowout occurs and the surface facilities are damaged enough to preclude well re-entry operations, a relief well may be needed to regain control of the situation. Drilling an intervention well could take anywhere from 30 to 90 days (Regg, 1998; Stauffer, personal communication, 1998; McCarroll, personal communication, 1998). The actual amount of time

explained that the amount of time required to drill a relief well depended on the complexity of the intervention, the availability of a suitable drilling rig, and other factors, so that relief operations could require up to 120 days to complete.[38] The discussion was robust, including consideration of problems with methane hydrates.[39] The EA concluded that a "more detailed investigation is needed to validate the results of this preliminary study," including (1) recommendations for additional study of the consequences of a blowout in deepwater, and (2) the fate of hydrocarbons released in deepwater environments.[40] The decision document that finalized the Deepwater EA indicated that these recommendations for future studies and research would be forwarded to the MMS Environmental Studies Program or the MMS Technical Assessment and Research Program. The decision document concluded that "the accidental subsea release of oil is a very low-probability event, and extensive mitigation measures for oil-spill prevention and response are already required."[41] The decision document further concluded that "none of the suggested studies, research, or information synthesis represents a critical information need requiring suspension of decisions on specific deepwater activities."[42]

> required to drill a relief well will depend upon a variety of factors including the complexity of the intervention, the location of a suitable drilling rig, the type of operations that must be completed in order to release the rig (e.g., may need to run and cement casing before the rig may be released), and any problems mobilizing personnel and equipment to the relief well site. It is estimated that the entire intervention effort for a blowout could range from 60 to 120 days (Regg, 1998; Stauffer, personal communication, 1998; McCarroll, personal communication, 1998). . . .
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> Should a surface blowout occur at a deepwater facility (for example from a wellhead on the production deck of a TLP), spill response is expected to resemble that of a similar event in shallow water. Complications could arise because of the increased distance from shore and potentially greater spill rates. Well control efforts for a surface blowout in deepwater are expected to take approximately 60 days.

Deepwater EA at II-16 to -17.

[38] *Id.*

[39] "Further investigation is needed before the consequences of a blowout in deepwater can be fully evaluated. . . . Rapid conversion of all of the gas to hydrate is expected to occur in blowouts at this water depth; oil is expected to eventually rise to the water surface because of its buoyancy. A more detailed investigation is needed to validate the results of this preliminary study." Deepwater EA at II-17.

[40] After the Deepwater EA was prepared, several studies on these topics were published. See *infra* note 107. The Programmatic EIS, the Multi-Sale EIS, and the Lease Sale 206 EA did not incorporate these studies by reference.

[41] Deepwater EA at A-4.

[42] *Id. at* A-5.

In the course of its decisionmaking process specific to planning and issuing the Gulf of Mexico leases, MMS prepared several tiered NEPA analyses.[43] Environmental Impact Statements (the most intensive level of analysis) were prepared at two decision points in April 2007. In that month, MMS finalized a broad EIS for the Outer Continental Shelf Oil and Gas Leasing Program for 2007-2012 ("Programmatic EIS"), and finalized an EIS for the lease sales in the western and central Gulf areas ("Multi-Sale EIS").

On June 29, 2007, then-Secretary of the Interior Dirk Kempthorne approved a Proposed Final Program (PFP) for 2007-2012, which had been submitted to Congress in April 2007.[44] The PFP served as the Record of Decision for the 5-year Program (2007-2012). The PFP included decisions to conduct twenty-one sales in eight areas throughout U.S. waters. With regard to the Gulf of Mexico Central Planning Area, it included decisions to hold six sales over 2007-2012, and to conduct an analysis of alternate leasing schemes.

The PFP cross-referenced the Programmatic EIS, including options utilized in the analysis performed pursuant to Section 18 of the OCSLA and Programmatic EIS alternatives, and it summarized impacts for each Planning Area discussed in the Programmatic EIS. The PFP included limited analysis of oil spills, noting that each impact "would depend on the size of the spill, type of material or product spilled, and environmental factors at the time of the spill."[45] The PFP also contained descriptions of oil's effects on resources in general. The PFP and Programmatic EIS did not contain context or project magnitude for the effects on resources of a reasonably foreseeable spill. This information was included in the Multi-Sale EIS, which was approved and signed at the regional level after the Programmatic EIS and the PFP were completed at DOI headquarters.

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[43] A description of MMS's NEPA process is available at www.gomr.mms.gov/homepg/regulate/environ/nepa/nepaprocess.html (last visited on July 31, 2010).

[44] *Available at* www.boemre.gov/5-year/PDFs/MMSProposedFinalProgram2007-2012.pdf (last visited on August 10, 2010).

[45] PFP at 52. MMS provided the following background for the environmental discussion in the PFP:

> Each leasing option is discussed as to the anticipated benefits of the proposed leasing and ensuing production, as well as the potential environmental impacts that could be expected. Some of the potential impacts could result from an oil spill. The MMS has an extensive oil spill prevention program. Although a major oil spill is unlikely, for environmental analysis, the MMS assumes a spill in order to identify potential effects. Some of the effects are mentioned under the various leasing options that follow and are discussed more extensively in the Final EIS.

Id. at 19.

The Programmatic EIS and Multi-Sale EIS both cited a study conducted in Norway that analyzed deepwater spills, one of the research needs identified in the Deepwater EA. The Programmatic EIS cited a Norwegian study to conclude that a deepwater blowout would result in a surface slick near the source.[46] The Multi-Sale EIS also cited that study and found that, in a simulated blowout in deepwater conditions, an oil spill would quickly rise to the surface. Both NEPA documents concluded that typical oil spill response methods could be employed once the oil rose to the surface.[47] In both the Programmatic EIS and the Multi-Sale EIS, MMS concluded that oil from marine/deepwater spills (defined for the purposes of both documents as spills in water depths greater than 200 meters) would be expected to "weather" and degrade by the time it reached shore, and thus would have a "minimal" impact on the environment and wildlife.[48] These conclusions were based on MMS's analysis of the frequency and volume of historical spills in U.S. waters since 1964, the distance of the well from shore, the warm Gulf environment, and the expected cleanup efforts that would be engaged. In the Multi-Sale EIS, MMS developed conclusions about impacts from large oil spills of over 1,000 barrels, and over 10,000 barrels of oil.[49]

In October 2007, MMS prepared the Lease Sale 206 EA, tiered to the Multi-Sale EIS, for Gulf of Mexico Lease Sale 206—a sale offering of a bundle of leases that included the lease for Mississippi Canyon (MC) Block 252, the location where the Macondo well was drilled. The Lease Sale 206 EA assessed whether new information or circumstances required supplementation of the Multi-Sale EIS. MMS issued a Finding of No New Significant Impact (FONNSI) with the Lease Sale 206 EA, stating that "[b]ecause the Multi-Sale EIS examined the environmental impacts of a sale similar in size, nature, and potential level of development as proposed Lease Sale 206, the [Lease Sale 206] EA tiers off the Multi-Sale EIS and incorporates much of the material by reference."[50] The Lease Sale 206 EA evaluated all unleased blocks in

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[46] Programmatic EIS at IV-43 ("At one time, it was postulated that oil released in deepwater (>305m) could result in hydrate formation and prevention of the surfacing of the oil. An experiment conducted in Norway in 844m of water demonstrated that this would not be the case and that a deepwater blowout would result in a surface slick near the source.") (citing O. Johansen et al., Deep Spill JIP: Experimental Discharges of Gas and Oil at Helland Hansen (2006), *available at* www.mms.dov/tarprojects/377.htm (last visited on August 10, 2010)).

[47] Programmatic EIS at IV-43; Multi-Sale EIS at 4-233.

[48] Programmatic EIS at IV-39, -40, -63, -87, -128; Multi-Sale EIS at 4-236, -238, -259, -260, -271, -274, -292, -305, -324, -331, -336.

[49] Multi-Sale EIS at 4-231 to -235.

[50] Lease Sale 206 EA at ii.

the Central Planning Area previously evaluated in the Multi-Sale EIS and did not find any new information since publishing the Multi-Sale EIS.

Next, after issuing the FONNSI, MMS issued a Final Notice of Sale 206. The notice included a list of available leases, including Mississippi Canyon Block 252.[51] The notice also indicated that, of the numerous environmental mitigation and military measures and lease stipulations described in the Programmatic EIS, the Multi-Sale EIS, and the Lease Sale 206 EA,[52] only the Protected Species Stipulation was applicable to Mississippi Canyon Block 252.[53]

After receiving its lease for Mississippi Canyon Block 252, BP submitted its Exploration Plan for agency approval. As part of its authorization of the Macondo well, the agency relied on existing CEs for its decision to approve BP's Exploration Plan and its subsequent drilling permit application. Although sections 7 and 14 of the Exploration Plan included oil spill information pertinent to drilling activities that include the Macondo well, the NEPA reviewers did not prepare a site-specific analysis to determine impacts from a potential site-specific spill. Instead, they relied on the reviews of potential oil spill impacts contained in the Programmatic EIS,

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[51] *See* Final Notice of Sale 206 Package, "List of Blocks Available for Leasing," *available at* www.gomr.mms.gov/homepg/lsesale/206/206noticef.html *and* www.gomr.mms.gov/homepg/lsesale/206/206SLBLAVAL.PDF (last visited on August 10, 2010).

[52] For example, the Lease Sale 206 EA provided a summary description of mitigations considered in previous NEPA analyses to reduce the environmental consequences of oil and gas exploration and development activities:

> Site-specific mitigations are also applied by MMS during plan reviews. The MMS determined that many of these site-specific mitigations were consistently applied and used these to develop a list of 'standard' mitigations. There are currently over 120 standard mitigations. The wording of a standard mitigation is developed by MMS in advance and may be applied whenever conditions warrant. Standard mitigation text is revised as often as necessary (e.g., to reflect changes in regulatory citations, agency/personnel contact numbers, and internal policy). Site-specific mitigation categories include air quality, archaeological resources, artificial reef material, chemosynthetic communities, Flower Garden Banks, topographic features, hard bottoms/pinnacles, military warning areas and Eglin water test areas, Naval mine warfare areas, hydrogen sulfide, drilling hazards, remotely operated vehicle surveys, geophysical survey reviews, and general safety concerns. Site-specific mitigation types include advisories, conditions of approval, hazard survey reviews, inspection requirements, notifications, post-approval submittals, reminders, and safety precautions. In addition to standard mitigations, MMS may also apply nonrecurring mitigations that are developed on a case-by-case basis.

Lease Sale 206 EA at 9.

[53] *See* Final Notice of Sale 206 Package, "Lease Stipulations," *available at* www.gomr.mms.gov/homepg/lsesale/206/fstips206.pdf (last visited on August 10, 2010).

Multi-Sale EIS, Lease Sale 206 EA, and documents and analyses prepared in connection with, or referred to within, those NEPA reviews.

The decision to approve the BP Exploration Plan was based on, among other things, the Categorical Exclusion Reviews (CERs) that MMS conducted at the regional office.[54] The MMS reviewers scrutinized operational impacts on stationary resources, such as marine sanctuaries, pinnacle trends, topographic relief areas, and shipwrecks. Since the environmental impacts of accidental events, such as oil spills and blowouts, were analyzed at the lease sale stage, no analysis was prepared on oil spills and blowouts when the CER for the BP Exploration Plan approval was prepared. At the time that the Exploration Plan was approved, departmental awareness of the potential for oil spill impacts was based on previous NEPA analyses and the Oil Spill Response Plan (OSRP) referenced in the Exploration Plan.

While the MMS NEPA reviewers concluded the CER, the Plan Section in MMS's Office of Field Operations compared the worst case oil spill projection to the response and cleanup capability described in BP's OSRP,[55] which BP prepared and referenced in its Exploration Plan.[56] BP projected that its exploration activities in Mississippi Canyon Block 252 potentially could result in a worst case spill of 162,000 barrels per day.[57] The BP Exploration Plan also referenced the OSRP to show that the company was equipped to handle a worst case spill of 300,000 barrels per day.[58] This OSRP information is not reflected in MMS's NEPA or decision documents.

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[54] MMS prepared two CERs for its decision to approve the Exploration Plan, both of which used CE 15.4 C(10). The first CER, approved on March 4, 2009, was prepared for the approval of the Initial Exploration Plan (MMS Control Number: N-09349). The second CER, approved on April 19, 2009, was prepared for the approval of the Revised Exploration Plan (MMS Control Number: R-04937), which was amended because of a change in the anchor radius.

[55] In this report, the term "Oil Spill Response Plan," or OSRP, refers to the Regional OSRP BP developed for the drilling rig when it is in place at the well site.

[56] 30 C.F.R. § 250.227. A project-specific environmental impact analysis assessing the potential effects of proposed exploration activities must be included in an Exploration Plan.

[57] BP Initial Exploration Plan at 7-1.

[58] *Id*.

The CEs used by the agency for the approval of the BP Exploration Plan and the approval of the Applications for Permit to Drill (APD) for the Macondo well were established in 1981 and 1986, before deepwater drilling became widespread.[59] These CEs provide:

> **15.4 Categorical Exclusions**
>
> **C. <u>Permit and Regulatory Functions</u>.**
>
> **(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 deepwater, 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.
>
> [. . .]
>
> **(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.[60]

The complex nature of the agency NEPA reviews and other environmental evaluation, including references to a variety of environmental studies and evaluations included in separate documents and analyses, are highlighted by the following chart, which depicts the various documents and permitting steps for the Macondo exploratory well that CEQ reviewed (*see* Figure 2).

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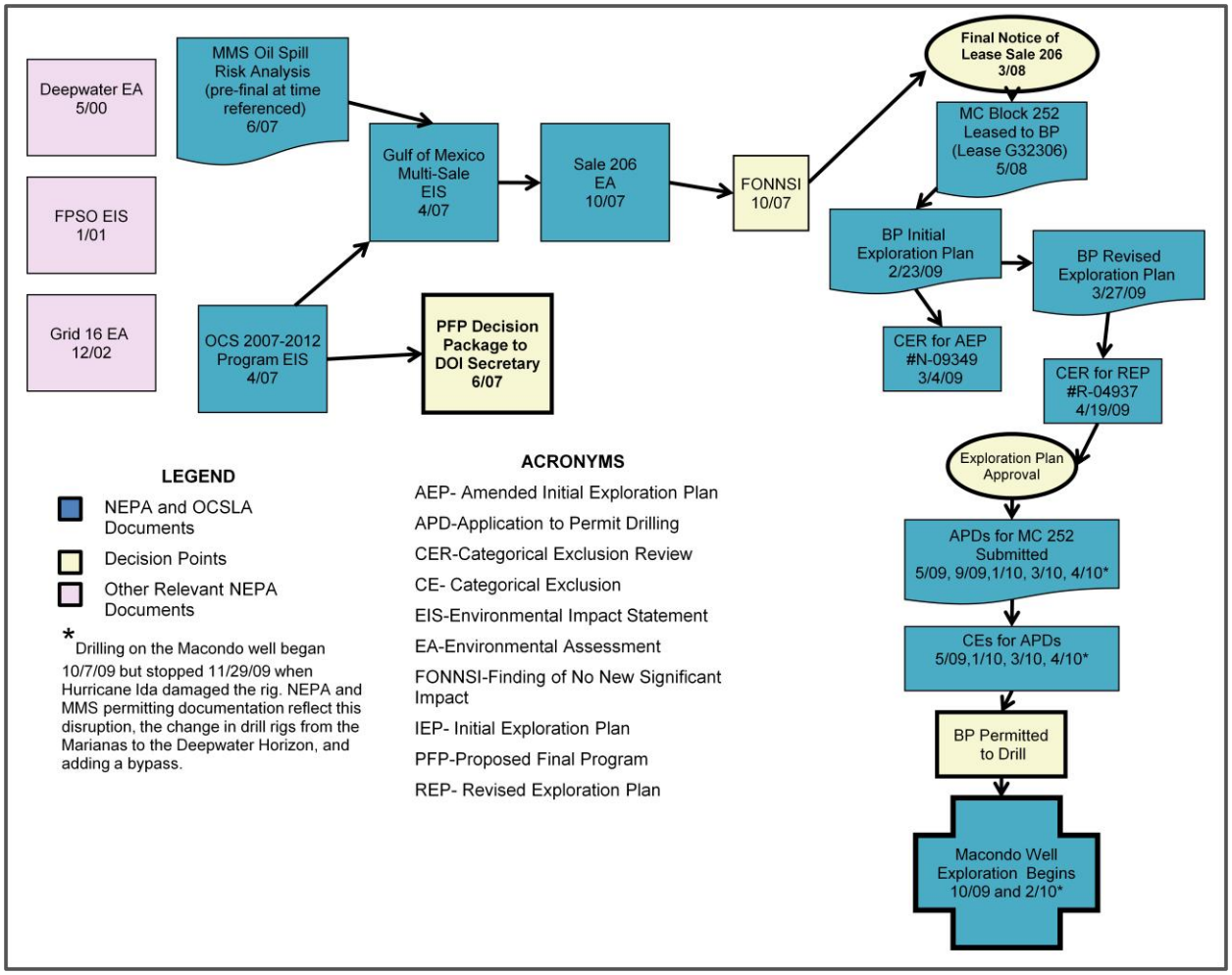
[59] For a discussion of the historical development of deepwater drilling, see *infra* note 96.

[60] As discussed above, *see supra* note 20, Chapter 15 of Part 516 of DOI's Departmental Manual sets forth supplementary requirements for MMS NEPA implementation, including a list of actions that are designated categorical exclusions. DOI Departmental Manual, Part 516, Chapter 15, Managing the NEPA Process-MMS, a*vailable at* elips.doi.gov/app_DM/act_getfiles.cfm?relnum=3625 (last visited on August 9, 2010). BOEM, as the successor to MMS, will use the MMS NEPA implementing procedures until they are revised or replaced.

Figure 2. "CEQ Analysis of Documents and Permitting Steps Related to the 2010 Macondo well."



V. Implementation of Guideposts for Additional Reform Efforts

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM) has committed to using the following CEQ recommendations as guideposts as it continues its reform and reorganization activities:

Tiering and Site-Specific Analysis:

> **Perform careful and comprehensive National Environmental Policy Act (NEPA) review of individual deepwater exploration, operation, development, production, and decommissioning activities, including site-specific information where appropriate.**
>
> **Track and take into account all mitigation commitments made in NEPA and decision documents that are relied upon in determining the significance of environmental impacts, from the initial Programmatic EIS through site-specific NEPA analyses and decisions.**

BOEM, as the successor agency to the Minerals Management Service (MMS), implements the Outer Continental Shelf Lands Act (OCSLA) procedures using a logical framework for program decisions that are tiered to support site-specific decisions regarding oil and gas operations on the Outer Continental Shelf (OCS). BOEM will ensure that each step of its NEPA process is used to assist informed decisionmaking, and that agency decisionmakers have a clear understanding of potential environmental consequences.

Programmatic NEPA analyses and decision documents and other relevant studies are important reference points for the evaluation of the degree to which environmental impacts assessment informs agency decisionmaking. It is important that these documents and their analytical bases, including NEPA documents (many of which are and were posted on the agency website), remain readily available to the public for as long as they are relied upon in subsequent decisions.

"Tiering" is defined in the Council on Environmental Quality (CEQ) NEPA regulations at 40 C.F.R. § 1508.28 as "the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." Tiering is appropriate when (1) a NEPA analysis and document moves from a general program, plan, or policy to a site-specific proposal, or (2) a NEPA analysis and document examines an action at an early stage of project development and a supplement is necessary to provide analysis at a later stage. Tiering thus provides a way for agencies to "focus on the issues which are ripe for decision and exclude from consideration

issues already decided or not yet ripe."[61] The use of tiering to reference prior analyses in an Environmental Impact Statement to address oil spill impacts at the time that subsequent, more site-specific decisions are made, is implicit in the staged development structure of the OCSLA. Such use of tiering has been validated by the case law. Tiering can be an effective means to use prior analysis to allow decisionmakers to shift their focus to new environmental information that becomes available at subsequent stages of the OCSLA decisionmaking process. However, it is important that decisionmakers are made aware of the relevant portions of the previous NEPA environmental analysis to inform their subsequent decisions.

Consistent with these principles, BOEM will reexamine its NEPA implementation policies to ensure that its use of tiering is both clear and well-defined, and is not being used to limit site-specific environmental analysis that may be appropriate in certain circumstances, despite the availability of major, prior environmental reviews and studies.

Programmatic NEPA analysis is an efficient and effective means to address an agency's obligations to assess site-specific impacts, but a site-specific review should also be undertaken in most cases.[62] One of the issues in determining whether an agency may rely on prior analyses is the significance of new information or changed circumstances relevant to the impacts of the site-specific proposal. At the Exploration Plan approval stage of OCSLA decisionmaking, BOEM must examine the environmental impacts described in information accompanying the proposed Exploration Plan and prepare documentation consistent with NEPA.[63] The NEPA analysis can be tiered back to a previous EIS, in order to eliminate "repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."[64] Where site-specific analysis indicates that tiering is not adequate to address potentially significant environmental effects of the exploration, additional environmental analysis is likely necessary to meet NEPA's requirements.[65]

Agencies are not required to prepare unnecessarily detailed discussions in NEPA analyses if the relevant detailed discussions are contained in another document and the agency incorporates that material by reference. Incorporation by reference, however, is only appropriate if "it is

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[61] 40 C.F.R. § 1508.28.

[62] *Id.* § 1502.20.

[63] 30 C.F.R. § 250.232(c).

[64] 40 C.F.R. § 1502.20.

[65] Vill. of False Pass v. Clark, 733 F.2d 605, 612-17 (9th Cir. 1984).

reasonably available for inspection by potentially interested persons within the time allowed for comment."[66]

As the decisionmaking proceeds to examine a narrower geographic scope, tiered analysis calls for the assessment of environmental impacts to be more specific to the particular activity, geography, and impacts presented by the proposal at hand.[67] MMS included an analysis of oil spill impacts as part of its programmatic reviews in the Programmatic EIS and Multi-Sale EIS. The Programmatic EIS provided a general description regarding the Gulf of Mexico.[68] The Multi-Sale EIS provided additional analysis, considering the potential for one or more spills greater than 1,000 barrels, and for one or more spills greater than 10,000 barrels, in the Gulf of Mexico. The Multi-Sale EIS broadly described large oil spills (exceeding 1,000 barrels) associated with OCS activities as "low-probability events."[69] Later in the same document, MMS provided a more specific estimate of the probability of a spill of greater than 1,000 barrels occurring for the leases in the Central Planning Area over the 40-year life of the OCS program: "Overall, there is a 69-86 percent chance of at least one or more offshore spills ≥ 1,000 [barrels] occurring."[70]

In light of this probability, MMS described significant environmental impacts that were reasonably foreseeable, but generally determined that these impacts would not be catastrophic to the region, animal populations, and ecosystem.[71] MMS then relied on tiering from these EISs

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[66] 40 C.F.R. § 1502.21. Tiering to a document that has not itself been subject to NEPA review is not permitted because it circumvents the purpose of NEPA. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002).

[67] *See, e.g.*, MMS, "Strategy for Postlease NEPA Compliance in Deepwater Areas of the Gulf of Mexico," *available at* www.gomr.mms.gov/homepg/regulate/environ/ea_grid/NEPADWSTRATEGY.pdf ("As operations moved into deeper waters, MMS recognized that both the technologies used and the potentially affected environments were not as well known.").

[68] Programmatic EIS, "Environmental Consequences," at IV-28 to IV-105.

[69] Multi-Sale EIS at 4-228.

[70] *Id.* at 4-231. The Multi-Sale EIS also referenced a then-pending publication, the "Oil Spill Risk Analysis: Gulf of Mexico Outer Continental Shelf (OCS) Lease Sales, Central Planning Area and Western Planning Area, 2007-2012." *Id.* at 4-231 to -35. The final Oil Spill Risk Analysis, published in June 2007, reported an overall 94-96% chance of one or more spills greater than 1,000 barrels occurring from offshore platforms for all the leases in the Central Planning Area over the 40-year life of the OCS program. Ji Zhen-gang, et. al., "Oil Spill Risk Analysis: Gulf of Mexico Outer Continental Shelf (OCS) Lease Sales, Central Planning Area and Western Planning Area, 2007-2012 and Gulfwide OCS Program, 2007-2046," at 51 (June 2007).

[71] Multi-Sale EIS, "Impact Conclusions," at xi-xiv.

and provided no additional details or analysis in the Lease Sale 206 Environmental Assessment (EA). Next, the agency prepared Categorical Exclusion Reviews (CERs) for its decisions on the EPs and then applied Categorical Exclusions (CEs) when approving the Applications for Permit to Drill. The process for using CERs and CEs was not designed to incorporate oil spill details or analyses from previous EIS or EA reviews. BOEM NEPA documents should efficiently and effectively report the analyses undertaken to identify accumulating potential risks, actual risks, and cumulative impacts with a clear statement of whether there has been or is expected to be an accumulation of changes that would warrant a more robust, intense look at conditions than in the past.

The CEQ regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action.[72] An agency can rely upon mitigation measures in determining whether an environmental impact is significant.[73] An agency can also consider mitigation measures when determining whether to supplement an Environmental Impact Statement (EIS).[74] In order to be effective, a mitigation measure must be supported by analytical data demonstrating why it will "constitute an adequate buffer against the negative impacts that may result from the authorized activity."[75] In order to support a Finding of No Significant Impact, a mitigation measure must render potential impacts "so minor as to not warrant an EIS."[76]

As relevant here, MMS relied on mitigation measures to address environmental impacts at the programmatic level, while later not consistently referencing those mitigation obligations in its lease- and site-specific analyses.[77] This applies to the agency's analysis of a range of impacts, including those on tourism, recreation, fisheries, and endangered species. Where future studies and mitigation measures are identified as a key component in reaching conclusions regarding

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[72] 40 C.F.R. § 1508.20(a)-(e).

[73] Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 734 (9th Cir. 2001) (holding that mitigation measures may justify a decision to forego preparing an EIS, if such measures are described and reasonably analyzed, rather than merely listed).

[74] North Slope Borough v. Minerals Mgmt. Serv., 343 Fed. Appx. 272 (9th Cir. 2009) (unpublished decision).

[75] Nat'l Parks & Conservation Ass'n, 241 F.3d at 734.

[76] *Id*.

[77] The agency does enforce mitigation committed to in prior documents, and will work to improve the transparency of this process.

environmental impacts,[78] such studies and measures should be consistently referenced and carried through in subsequent documents (e.g., leases) and decisions. The Deepwater EA included a proposal to evaluate certain mitigation measures to prevent and contain oil spills. These measures did not appear in the Programmatic EIS, the Multi-Sale EIS, the Lease Sale 206 EA, or the Lease Stipulations applicable to Lease Sale 206, the CERs, and the CEs.[79]

Transparency, Public Accountability, and Sound Decisionmaking:

> **Ensure that NEPA analyses fully inform and align with substantive decisions at all relevant decision points; that subsequent analyses accurately reflect and carry forward relevant underlying data; and that those analyses will be fully available to the public.**
>
> **Ensure that NEPA documents provide decisionmakers with a robust analysis of reasonably foreseeable impacts and include an analysis of reasonably foreseeable impacts associated with low probability catastrophic spills for oil and gas activities on the Outer Continental Shelf.**

It is important that clearly documented reasoning be accessible to present and future decisionmakers and their staff, as well as to the public. Important facts, and the conclusions that stem from them, must be accurately represented to decisionmakers and to the public in NEPA documents, decision documents, and other decision-related documents. BOEM must ensure that environmental documentation and agency management highlight information that carries significant implications for future analyses and decisions. BOEM should provide systematic, well-documented connections between the facts found in prior decisions and the conclusions drawn in subsequent decisionmaking. For example, although the risk that a single well will result in a catastrophic oil spill is very low and may not merit additional analysis, information on the environmental consequences of a spill can be valuable to a decisionmaker. The agency should evaluate better integration of this information in its NEPA documents.[80]

In identifying potentially significant adverse impacts that could result from a proposed action, an agency must foresee those consequences which have a low probability of occurrence but could

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[78] CEQ regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§ 1508.20(a)-(e). An agency can rely upon mitigation measures in determining whether an environmental impact is significant.

[79] Deepwater EA at II-60.

[80] The Programmatic EIS, the Multi-Sale EIS, and the Lease Sale 206 EA discussed the consequences of a large spill in the ranges of greater than 1,000 and greater than 10,000 barrels per day, whereas the oil spill response planning process and BP's Oil Spill Response Plan discussed spills of a much greater size, in the range of 162,000 to 300,000 barrels per day. BP Initial EP at 7-1.

be potentially catastrophic based on credible scientific support.[81] In 1986, CEQ amended its "worst case" regulation to help agencies generate information and discussion of those consequences of greatest concern to the public and of greatest relevance to the agency's decision. The 1986 amendment requires agencies to take affirmative action, not otherwise required in the EIS process, when there is missing information about a significant adverse impact.[82] This is consistent with the "rule of reason" as applied to the requirement that an agency make a good faith effort to describe the reasonably foreseeable environmental impacts of a program, even in the face of missing information.[83]

The agency did not deem a catastrophic spill, comparable to the BP Oil spill, to be a reasonably foreseeable impact, based on historical information on spills in U.S. OCS waters. Since April 20, 2010, that assumption will be revised, and BOEM will take steps to incorporate catastrophic risk analysis going forward.

Where incomplete or unavailable information regarding the effects of a catastrophic spill from exploratory drilling can be obtained without excessive costs, a Federal agency proposing to

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[81] CEQ regulations provide a specific procedure for "evaluating reasonably foreseeable significant adverse effects on the human environment" when "there is incomplete or unavailable information." 40 C.F.R. § 1502.22. First, "the agency shall always make clear that such information is lacking." *Id.* If this information is "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant," then the agency must obtain and include the information. *Id.* § 1502.22(a). "If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known," the agency must include the following in the environmental impact statement:

> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of the existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

Id. § 1502.22(b). This requirement applies to those events with potentially catastrophic consequences, "even if their probability of occurrence is low, provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." *Id.* at § 1502.22(b)(4).

[82] National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,625 (April 25, 1986).

[83] *See* Scientists Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Sierra Club v. Sigler, 695 F.2d 957, 974 (5th Cir. 1983) (holding that the probable remoteness of an impact does not excuse an agency from an evaluation of those impacts when there is a body of data with which an evaluation can be made which is not unreasonably speculative).

approve such activity is obliged to consider such information.[84] The "overall costs for obtaining" information should be interpreted as including financial and other costs, such as cost in terms of time.[85] The applicable CEQ regulation "retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'"[86] The regulation applies to those situations in which the nature of the effect is reasonably foreseeable but its extent is not.[87]

A Finding of No Significant Impact can also be supported by risk assessment in an Environmental Assessment disclosing that the possibility of impact is remote.[88] However, NEPA is designed to assure that adequate information exists regarding a proposed agency action so that a decisionmaker can assess whether or not there are relevant impacts. A proposed action where "the possible effects on the human environment are highly uncertain or involve unique or unknown risks" is a factor in favor of a finding that its effects are "significant" under the NEPA implementing regulations.[89]

BOEM should identify potentially catastrophic environmental consequences and accurately assess them as part of its decisionmaking. As the CEQ regulations state, "[t]he agency shall independently evaluate the information submitted and shall be responsible for its accuracy"[90] and "[a]gencies shall [e]nsure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements."[91] As relevant here, MMS identified significant catastrophes—such as "Ixtoc I," a Mexican offshore well blowout in 1979 that leaked 10,000-30,000 barrels of oil per day for nine months—and their impacts. The Multi-

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[84] 40 C.F.R. § 1502.22. *See, e.g.*, Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1192 (9th Cir. 1988); North Slope Borough v. Andrus, 642 F.2d 589, 605–06 (D.C. Cir. 1980); Vill. of False Pass v. Clark, 733 F.2d 605, 614 (9th Cir. 1984).

[85] National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. at 15,622.

[86] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354–55 (1989) (quoting National Environmental Policy Act Regulations; 50 Fed. Reg. 32,234, 32,237 (Aug. 9, 1985)).

[87] Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549 (8th Cir. 2003).

[88] City of New York v. U.S. Dep't. of Transp., 715 F.2d 732, 745 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

[89] 40 C.F.R. § 1508.27(b)(5).

[90] *Id.* § 1506.5.

[91] *Id.* § 1502.24.

Sale EIS discussed Ixtoc I when analyzing the impacts of oil spills on individual resources.[92] The Ixtoc I spill was not included as part of the spill probability analysis because it occurred outside U.S. waters.[93]

BOEM will ensure that potentially catastrophic consequences will be identified, assessed, and considered as part of its decisionmaking. Already, in June 2010, BOEM has issued a Notice to Lessees and Operators (NTL) No. 2010-N06 rescinding provisions of a previous NTL (NTL No. 2008-G04) that had limited the amount of information that operators and lessees were required to submit with their exploration and development plans, including information regarding blowout scenarios and worst case discharge scenarios.[94] Pursuant to NTL No. 2010-N06, blowout scenarios and worst case discharge scenarios must be provided to BOEM for new and previously-submitted plans.[95]

Categorical Exclusions:

> **Review the use of categorical exclusions for OCS oil and gas exploration and development in light of the increasing levels of complexity and risk—and the consequent potential environmental impacts—associated with deepwater drilling. Determine whether to revise these categorical exclusions.**
>
> **Continue efforts to seek amendments to the OCSLA to eliminate the 30-day decisional timeframe for approval of submitted Exploration Plans.**

BOEM will review the use of the CEs set forth in Section 15.4 of the Department of the Interior's Departmental Manual. This review will begin with the applicability of a CE for Exploration Plans, which closely precedes seabed-disturbing activities in deepwater areas of the central or western Gulf of Mexico, and will determine if the process:

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[92] Multi-Sale EIS at 4-238, -259 (Marine Waters), -281(Sea Turtles), -286 (Coastal and Marine Birds), -350 (Endangered and Threatened Fish).

[93] As such, the Ixtoc spill does not appear in a chart of historical spills MMS compiled in the Multi-Sale EIS. Multi-Sale EIS, vol. II at 132, table 4-33.

[94] Information Requirements for Exploration Plans and Development Operations Coordination Documents, NTL No. 2008-G04 *available at* www.gomr.mms.gov/homepg/regulate/regs/ntls/2008NTLs/08-g04.pdf (last visited on August 11, 2010).

[95] Information Requirements for Exploration Plans, Development and Production Plans, and Development Operations Coordination Documents on the OCS, NTL No. 2010-N06 (June 18, 2010) *available at* www.gomr.mms.gov/homepg/regulate/regs/ntls/2010NTLs/10-n06.pdf (last visited on August 11, 2010).

1. Brings before the decisionmaker(s) the environmental analysis, including that pertaining to risk assessments and oil spill effects, set forth in the governing EIS;

2. Considers whether new information or circumstances have arisen since the original analysis that require supplementation of that analysis;

3. Addresses whether any aspect of the proposed deepwater drilling constitutes grounds for applying one or more of the Extraordinary Circumstances set forth at 43 C.F.R. § 46.215; and

4. Adequately documents the foregoing.

As oil exploration and production moves further offshore, with an increasing number of wills drilled in deeper waters with more complex technologies and concomitant risk, BOEM recognizes that the basis for a categorical exclusion for these deepwater activities needs to be reexamined in light of the increasing number of deepwater wells drilled over time.[96] Furthermore, the technology for drilling deepwater wells evolved substantially in the 1990s.

The establishment of a categorical exclusion requires the agency to make a reasoned decision based on all the relevant factors and information. Establishment of a categorical exclusion must be supported by documentation showing that the categorized actions have neither individually nor cumulatively significant effects on the environment.[97] This may require a cumulative impact analysis.[98] Where the actions sought to be included within a category are not routine administrative matters but carry the potential for environmental effects, the agency should document: adequate consideration of the unique characteristics of the applicable geographic areas; the degree to which effects on the quality of the environment are controversial or the risks are unknown; the degree to which the categorical exclusions might establish a precedent for future actions with significant effects or represent a decision in principle about future considerations; the degree to which the actions might affect endangered species; and whether there are cumulative impacts.[99]

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[96] *See* statistics on deepwater drilling *supra* note 36.

[97] 40 C.F.R. § 1508.4.

[98] *See* Sierra Club v. Bosworth, 510 F.3d 1016, 1027

[99] *Id.* The Department of the Interior extraordinary circumstances are codified at 43 C.F.R. § 46.215, and are available at www.doi.gov/oepc/nepafr.html (last visited on July 26, 2010).

An agency's CE procedures must "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."[100] As a general matter, an "agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation."[101] When an action falls within a CE, and an agency reasonably uses an established CE and determines that a proposed action falls within the activities described in a CE and that there are no extraordinary circumstances, further NEPA analysis is unnecessary.[102] An agency satisfies NEPA if it applies its CEs and determines that neither an EA nor an EIS is required, so long as the application of the CE to the facts of the particular action is not arbitrary and capricious.[103]

The decision to apply the CE will require documentation in circumstances where a record is necessary for agency, public, or judicial review.[104] The agency must be prepared to furnish a documented explanation for why the action does not fall within any of its identified extraordinary circumstances.[105] In this regard, BOEM will ensure that it has an adequate system for reviewing the continued validity of its CE for the western and central Gulf in the progressively more complex environment of deepwater operations. The agency should also address not only the bases for this CE (i.e., whether exploration has individually or cumulatively significant environmental consequences), but also its reliance on tiering and previous environmental documents during the extraordinary circumstances review and analysis.

The agency had in place a CER process intended to determine whether "extraordinary circumstances" are present such that an Environmental Assessment should be prepared in connection with the review of plans. Going forward, BOEM intends to review its interpretation of the threshold requirement of "extraordinary circumstances," which is likely to increase the number of plans and APDs that are subjected to additional environmental reviews prior to approval. It is anticipated, for example, that for the foreseeable future, Exploration Plans

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[100] 40 C.F.R. § 1508.4.

[101] Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 857 (9th Cir. 1999).

[102] California v. Norton, 311 F.3d 1162, 1176-77 (9th Cir. 2002).

[103] Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1456 & n.5 (9th Cir. 1996).

[104] California v. Norton, 311 F.3d at 1176.

[105] *Id.* at 1177 ("Where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions.").

associated with deepwater drilling activities will be evaluated through preparation of an EA. This will require an additional commitment of resources by BOEM.

Both CEQ and DOI recognize that the statutory requirement that the Secretary of Interior approve Exploration Plans within thirty days, as set forth in the Outer Continental Shelf Lands Act (OCSLA), may impose constraints on the agency's ability to undertake a more complete environmental review in every instance.[106] That is why the Administration has requested that Congress amend the OCSLA to provide more time to conduct additional environmental reviews, when appropriate. While BOEM should continue its efforts to secure relief from this very short timeframe, even under current law rigorous NEPA analysis is needed. BOEM may have discretion under the existing regulatory structure to establish when an application is complete and the thirty-day review period begins. BOEM will work with operators to ensure that the required information is complete and enables BOEM to perform all appropriate NEPA analysis. In some instances this may require new information in order for plans to be deemed complete. BOEM should consistently avail itself of this flexibility where needed.

Changed Circumstances:

> **Consider supplementing existing NEPA practices, procedures, and analyses to reflect changed assumptions and environmental conditions, due to circumstances surrounding the BP Oil Spill.**

The BP Oil Spill constitutes significant new information and circumstances that may require reevaluation of some conclusions reached in prior NEPA reviews and other environmental analyses and studies. Specifically, conclusions may change about the likelihood, magnitude, and environmental impacts of a major spill in connection with OCS oil and gas drilling activities. The results of investigations into the cause of the spill and the impact of additional safety requirements that are being imposed in the wake of the BP Oil Spill undoubtedly will play a role in evaluating the nature and scope of additional environmental analysis that may be required. The Deepwater EA, completed in May 2000, recommended that additional analysis associated with potential deepwater drilling-related risks be undertaken.[107]

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[106] 43 U.S.C. § 1340(c)(1).

[107] Deepwater EA at II-16 to -17. After the Deepwater EA was prepared, the following studies and reports were published: William W. Schroeder & Carolyn F. Woods, eds., *Workshop On Deepwater Environmental Studies Strategy: A Five-Year Follow-Up and Planning for the Future* (2002), *available at* www.gomr.mms.gov/PI/PDFImages/ESPIS/2/2108.pdf (last visited on August 10, 2010); Mark C. Benfield & Richard F. Shaw, *Potential Spatial and Temporal Vulnerability Of Pelagic Fish Assemblages in the Gulf of Mexico to Surface Oil Spills Associated with Deepwater Petroleum Development* (Coastal Marine Inst., 2005), *available at* www.gomr.mms.gov/PI/PDFImages/ESPIS/2/2957.pdf (last visited on August 10, 2010); Thomas M. Grieb, et al., *Effects Of Subsea Processing On Deepwater Environments In*

BOEM agrees that additional environmental analysis should be undertaken to address these issues, including a review of the types of impacts that should be evaluated in environmental documents (e.g., the types of catastrophic events analysis that should be undertaken).

Agencies are required to prepare supplements to either draft or final Environmental Impact Statements if major federal action remains and either "(i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[108] As the Supreme Court has held, supplementation is not necessary "every time new information comes to light after the EIS is finalized," but rather "an agency should apply a 'rule of reason'" and determine if supplementation is necessary by considering "the value of the new information to the still pending decisionmaking process."[109] A supplemental EIS must be prepared "[i]f 'major Federal actio[ns]' remain, 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."[110]

Agencies are required to make "a reasoned evaluation of the relevant information," and substantial deference is due the agency's expertise in resolving scientific factual disputes regarding the information's significance.[111] Significant new circumstances or information is identified by applying a factor test considering aspects of the effect's context and "intensity."[112] Among the "intensity" factors is "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks."[113] To require

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The Gulf Of Mexico (2008), *available at* www.gomr.mms.gov/PI/PDFImages/ESPIS/4/4310.pdf (last visited on August 10, 2010); and Stephen Matsutani & E. Eric Adams, *Experimental and Analytical Study of Multi-phase Plumes in a Stratified Ocean with Application to Deep Ocean Spills*, (2005), *available at* www.boemre.gov/tarprojects/324.htm (last visited on August 10, 2010). The Programmatic EIS, the Multi-Sale EIS, and the Lease Sale 206 EA did not incorporate any of these studies by reference.

[108] 40 C.F.R. § 1502.9(c). *See also* Commonwealth of Massachusetts v. Watt, 716 F.2d 946, 949-50 (1st Cir. 1983) (upholding district court injunction of oil lease sale, and requiring DOI to supplement lease sale EIS in order to present decisionmaker with significant new information regarding estimate of amount of oil in tracts to be leased).

[109] Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989).

[110] *Id.* at 374.

[111] *Id.* at 385.

[112] 40 C.F.R. § 1508.27.

[113] *Id.* § 1508.27(b)(5).

supplementation, the new information must provide "a seriously different picture of the environmental landscape such that another hard look is necessary."[114]

The duty to supplement applies equally to Environmental Impact Statements and Environmental Assessments.[115] Case law has characterized the leasing, exploration, production, and development of oil and gas sites and facilities, and the production and decommissioning stages as independent, self-contained stages of the OCSLA process with distinct NEPA requirements.[116] Where circumstances have changed or new information has been obtained that significantly alters the conclusions of existing NEPA analyses, decisions at later stages must rest on new NEPA analyses.[117]

BOEM considers the fact and effects of the BP Oil Spill requires revisiting prior assessments of the risk of catastrophic spills and their probability analysis. The significance of this information and the effects of the BP Oil Spill will need to be assessed throughout the OCSLA decisionmaking process. To the extent that the effects of a catastrophic spill have been projected or modeled, that analysis would have to be compared to the effects of this spill to provide current information to the decisionmaker.

Additional Considerations

Ultimately, the goals under NEPA will not be achieved without the full participation of other Federal agencies. One of NEPA's great strengths is the opportunity it provides for all agencies with jurisdictional interest to involve themselves in the Federal decisionmaking process. Active involvement by external agencies overseeing natural resources held in public trust, through their NEPA programs, is often where "the rubber meets the road" under the NEPA process. Without this involvement, decisions are allowed to be made in an agency vacuum. Because NEPA mandates an open and inclusive process, relevant information that might otherwise be overlooked by an action agency is brought to the table and an invaluable opportunity to exchange and address contrasting points of view is realized. Better project decisions and better environmental decisions are made as a result. Further, Federal agencies are appropriately held accountable for meeting their regulatory obligations through the exercise of their roles in these

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[114] Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir. 1984).

[115] Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1152 (9th Cir. 1998).

[116] *See, e.g.*, Vill. of False Pass, 733 F.2d at 614.

[117] *See* Blanco v. Burton, 2006 WL 2366046 (E.D. La. 2006) slip op. at 12-13.

decisions. The NEPA process documents this Federal agency decision process. The Administration encourages Federal agencies to review their NEPA programs to ensure that they have the resources and institutional support needed to maintain a strong involvement in Federal action agency decisionmaking and that those Federal agencies ensure that NEPA resources are available to fulfill this effort.

VI. Public Views

Public comments were solicited for CEQ's thirty-day review period of the Minerals Management Service's NEPA policies, practices, and procedures regarding Outer Continental Shelf (OCS) oil and gas exploration and development. The following questions were provided to assist CEQ's review:

- What are substantive issues that should be analyzed in each of the tiered NEPA submissions, from 5-year plan to well permit?
- Does this sequence of permitting stages (and associated NEPA submissions) allow for comprehensive evaluation of all relevant issues?
- What have been past industry and agency experiences with categorical exclusions?
- Has the categorical exclusion designation been an effective tool for reducing unnecessary paperwork without compromising the robustness of the NEPA analysis?
- To what degree has public engagement been a part of the agency NEPA practice, particularly as it deals with categorical exclusions?
- What resources are available in Federal, tribal, state, and local government agencies with a stake in OCS oil and gas exploration and development?

As of August 9, 2010, CEQ has received thirty comments on a number of specific issues including: the agency tiered environmental analysis process; the use of categorical exclusions; and increased involvement from other agencies and the general public.

A. Tiered Process

General comments on the agency tiered environmental analyses state that EISs need to be prepared with a higher level of specificity. With proper analysis, tiering can be used to avoid unnecessary repetition in documents and provide for more focused, site-specific, analyses that are appropriate for the later stages of the Outer Continental Shelf Lands Act (OCSLA) process. While the agency's reliance on a tiered NEPA analysis is consistent with the approach used by a number of other Federal agencies, comments stated that environmental assessments at the planning stages were too general and provided only minimal NEPA review for individual lease sales and the exploration and production plans that followed.

Public comments included statements that individual lease sales should require an EIS that comprehensively evaluates all stages of OCS activity. Comments suggested that this would evaluate the risk of oil spills at each tier of the NEPA process, would provide a thorough cumulative impacts analysis, and would facilitate preparing a containment and cleanup plan to handle a worst-case scenario oil spill.

B. Categorical Exclusions

Comments received stated that under NEPA and the OCSLA, environmental review is required at every stage of oil and gas development. The public commented on the approval of exploration and development plans without an Environmental Assessment or Environmental Impact Statement. Commenters asserted that Categorical Exclusions (CEs) have been applied without good judgment and proper implementation of NEPA. Comments stated that the 1986 CEs note the following exceptions for the use of CEs involving offshore leasing and development when the facility is proposed for the central or western Gulf of Mexico: relatively untested deepwater, within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity, and when the facility is utilizing new or unusual technology. Comments suggest the agency has avoided further analyses and public participation by its use of CEs.

Public comments recommended that CEQ clarify CE reviews to help the agency comply with NEPA. Comments pointed out that CEs are only applicable to "actions which do not individually or cumulatively have a significant effect on the human environment."[118]

C. 30-Day Comment Period

Concerns were expressed regarding the limited thirty-day time frame for commenting on the CEQ review of agency NEPA documents and practices. Commenters asserted that they did not have enough time to adequately examine, understand, and comment on the environmental documents associated with OCS oil and gas exploration and development plans. Although the public comment period was scheduled to end on June 17, 2010, later comments were received and considered.

D. Participation among Federal Agencies

Commenters asserted that increased participation among other Federal agencies and the public would allow for greater transparency and more substantive analyses. General recommendations include: a greater presence from the National Oceanic and Atmospheric Administration (NOAA); a recommendation that NOAA should receive funds to collect biological and oceanographic information in the OCS regions; and a recommendation that, consistent with 42 C.F.R. § 1502.22, such information be required to be produced before new areas are opened for seismic exploration and leasing.

NOAA's role as a cooperating agency should extend beyond EIS preparation by adopting regulations requiring BOEM to justify deviation from recommendations made by its sister agency, and suggest that Congress amend the OCSLA to accord NOAA further deference,

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[118] 40 C.F.R. § 1508.4.

particularly at the planning and leasing stages of OCS review. According to commenters, by encouraging cooperation among agencies, all the agencies can develop standard protocols for data collection during construction, operation, and decommissioning.

E. General Comments

Comments were also received regarding the role of the Department of the Interior and the promulgation of specific regulations for NEPA implementation. Commenters suggested that procedures should be published as rules rather than as guidelines to ensure compliance. Some public comments also stated that requiring standard data collection methods for all proposed facilities is essential to establishing consistency in all facilities' NEPA implementation.

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Appendix A

Acronyms

APD- Application for Permit to Drill

BOEM- Bureau of Ocean Energy Management, Regulation and Enforcement

CE- Categorical Exclusion

CER- Categorical Exclusion Review

CEQ- Council on Environmental Quality

CFR- Code of Federal Regulations

DOI- Department of the Interior

EA- Environmental Assessment

EP- Exploration Plan

EIS- Environmental Impact Statement

FONSI- Finding of No Significant Impact

FONNSI- Finding of No New Significant Impact

FPSO- Floating Production, Storage, and Offloading

GOM- Gulf of Mexico

MMS- Minerals Management Service

NEPA- National Environmental Policy Act

NOAA- National Oceanic and Atmospheric Administration

NTL- Notice to Lessees

OCS- Outer Continental Shelf

OCSLA- Outer Continental Shelf Lands Act

OSRP- Oil Spill Response Plan

PFP- Proposed Final Program

Appendix B

List of Preparers

Horst Greczmiel has served as the Associate Director for NEPA Oversight at the Council on Environmental Quality for the past eleven years. He earned a law degree from Rutgers Law School-Camden and an L.L.M. from George Washington University in Environmental Law. Mr. Greczmiel worked as an environmental attorney with the U.S. Army for several years before moving to the Office of Environmental Law at U.S. Coast Guard Headquarters, where he led policy development for NEPA compliance. Mr. Greczmiel is one of the country's leading experts on NEPA.

Gary Guzy serves as the Deputy Director and General Counsel at the Council on Environmental Quality. He received his law degree from Cornell University and served as both Senior Counsel at the U.S. Department of Justice and General Counsel at the Environmental Protection Agency before his appointment at CEQ. Mr. Guzy has over twenty years of environmental experience.

Edward Boling served as Senior Counsel for Environmental Policy and Public Involvement at CEQ. He received his law degree from the Washington University School of Law, served in the Environment and Natural Resources Division of the U.S. Department of Justice, and detailed as the Department of the Interior's Counsel to the Assistant Secretary before joining CEQ in 2000. Mr. Boling lectures on NEPA at the Duke University School of Law and has over twenty years of environmental experience.

Theodore Rockwell serves as the Senior Advisor for Oil and Gas at the Environmental Protection Agency Region 10. Mr. Rockwell has prepared several NEPA documents and has more than 32 years of NEPA experience.

Kimberley DePaul serves as Deputy Director of the Office of Federal Activities at EPA and has more than 29 years of NEPA experience. She was the former head of Navy's NEPA Compliance and Environmental Planning Program.

Wells Burgess serves as Assistant Chief at the Department of Justice and as Special Counsel to the Natural Resources Section of the Environmental and Natural Resources Division. Mr. Burgess has more than 35 years of relevant NEPA and environmental experience.

Nicole Buffa serves as the Associate Director for Communities, Environmental Protection & Green Jobs. She received her J.D. from the University of California, Los Angeles, served at the Environmental Protection Agency for five years, and worked in the environmental field in both

the private and non-profit sectors before joining CEQ. Ms. Buffa has over ten years of environmental experience.

Tara Radosevich serves as the Deputy Associate Director for Communities and Environmental Protection. Mrs. Radosevich received an M.S. in Environmental Science and Policy from Johns Hopkins University and has over fourteen years of environmental experience.

Michael Panfil is a legal intern with CEQ and is currently a student at Columbia Law School. Mr. Panfil works on the school's Environmental Law Journal and Environmental Law Clinic.

Briana Collier is a legal intern with CEQ and is currently a student at Vermont Law School. Ms. Collier is the Editor-in-Chief of the Vermont Law Review.

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Davie Nguyen is an intern with CEQ and is currently a Master of Environmental Management student at Duke University. Mr. Nguyen graduated from the University of California, Irvine with a degree in Social Ecology and has more than two years of NEPA and environmental experience.

The preparers of this review received assistance from the leadership and staff of the Environmental Protection Agency, the Department of Justice, the U.S. Coast Guard, the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and the Fish and Wildlife Service in addressing the National Environmental Policy Act environmental review, analyses and documents, for Outer Continental Shelf oil and gas exploration and development decisions in the Central Planning Area of the Gulf of Mexico.