United States Department of the Interior

OFFICE OF THE SOLICITOR
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Memorandum

To: Director, Minerals Management Service

From: Solicitor

Subject: What are "Significant" Revisions in the Five-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program?

The five-year oil and gas leasing program required by section 18 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1344, is a "schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which [the Secretary] determines will best meet national energy needs ...." 43 U.S.C. § 1344 (a). It is to be based on a consideration of factors outlined in section 18(a) (2), to obtain the balance described in section 18(a) (3), and to assure receipt of fair market value for the lands leased. See 43 U.S.C. § 1344(a) (2) through (4).

You have asked whether, once a five-year leasing program is completed and promulgated, the Secretary may add an additional planning area[1] without the full review required of the five-year program. In particular you ask whether a Secretary may add sales in areas analyzed in an alternative in the environmental impact statement (EIS) prepared on the five-year program under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, without undertaking the entire section 18 process.

After careful review of the applicable legal principles, I have concluded that the Secretary may not add an additional planning area without the full review required for the five-year program.

[1] MMS has divided the OCS into 26 broad planning areas for purposes of performing the comparative analyses required by section 18. See Outer Continental Shelf Draft Proposed Oil and Gas Leasing Program 1997 to 2002 (July 1995). The term "planning area" comports with the term "oil- and gas-bearing physiographic regions of the outer Continental Shelf," used in section 18(a) (2), which requires the Secretary to evaluate the timing and location of exploration, development and production of oil and gas among such regions based on eight enumerated criteria. 43 U.S.C. §§ 1344(a) (2) (A) through (H). See Natural Resources Defense Council. Inc., et al. v. Hodel, 865 F.2d 288, 300 (D.C. Cir. 1988).

Section 18(e) provides (emphasis added):

> The Secretary shall review the leasing program approved under this section at least once each year. He may revise and reapprove such program, at any time, and such revision and reapproval, except in the case of a revision which is not significant, shall be in the same manner as originally developed.

The plain textual meaning is that the same process is required for revisions as for original development of the plan unless a revision is "not significant." The structure of this paragraph suggests that the exception is narrow. See, e.g., Phillips v. Walling, 324 U.S. 490, 493 (1945); Sutherland, Statutes and Statutory Construction, § 47.08 at 135, Sands Fourth Edition (Callaghan, 1984) (an exception to a positive statement of primary legislative policy should be narrowly construed).

The full section 18 process, together with the applicable requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321 (NEPA), requires that the Secretary:

--Invite and consider suggestions for the proposed leasing program from federal agencies and governors of affected states, and in his discretion, other persons, and begin the NEPA scoping process.

--Update the section 18 analysis, consider the suggestions received, and no later than sixty days prior to publication of the proposed program, submit a draft proposed leasing program to the Governor of each affected state for review and comment.

--Prepare a draft programmatic environmental impact statement.

--Reply in writing to any Governor who has requested a modification of the program, granting or denying such a request and stating reasons therefor.

--Submit a proposed program with a section 18 analysis to the Congress, the Attorney General, the governors of affected states and the Federal Register for a 90 day comment period.

--Following consideration of the environmental impact statement, submit a proposed final program to the President and the Congress, together with the comments received and statements as to why specific recommendations of the Attorney General or state and local governments were not accepted.

--After the program has been before the Congress for sixty days, approve the program.

Congress attached considerable importance to the five-year planning process in adopting OCSLA. The inclusion of section 18 in the 1978 overhaul of the OCSLA reflected congressional concern that the original version, adopted in 1953, had given the Secretary too much unilateral control over the process of deciding the location and timing of OCS oil and gas lease sales. See, e.g., H.R. Rep. No. 590, 95th Cong., 1st Sess. at 102-03 (1977). Conversely, it failed to give coastal states and other affected interests a formal process for input in these leasing decisions, or sufficient time to plan to ameliorate onshore impacts of offshore sales. The House Report on the 1978 amendments that added section 18 put it this way:

> [B]ecause . . . [OCS development] may cause adverse impacts on certain States, and local areas within those States, these States and affected local areas must be able to develop policies, plans and programs to anticipate and ameliorate any adverse impacts. Thus, they must be provided with timely access to information as to OCS activities, and an opportunity to review and comment on policy decisions.

Id. at 122.

The full process is, in other words, intended to provide states, prospective lessees, and the public ample time and opportunity to petition for, comment on, anticipate, plan for, and take steps to mitigate adverse impacts of development. It is designed to settle expectations of the many interests affected, and to avoid surprises.

Section 18's full process also requires that Congress be notified 60 days before the effective date of any extension or significant revision of an existing program. See 43 U.S.C. § 1844(d) (2). The Senate Energy Committee explained that Congress wanted the opportunity to "adopt appropriate legislation, or take any other measures, as to that leasing program." S. Rep. No. 284, 95th Cong., 1st Sess. 76 (1977). The requirement of congressional notice underscores the political significance of the location and timing of these lease sale decisions, which is also reflected in the rather rich history of litigation and congressional and presidential moratoria triggered by OCS leasing decisions in the past. See Presidential statement of June 26, 1990; State of California v. Watt, 683 F.2d 1253 (D.C. Cir. 1982); Commonwealth of Massachusetts v. Clark, 594 F. Supp. 1373 (D. Mass. 1984); Tribal Village of Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988); Pub. L. No. 99-591, § 101(h); Pub. L. No. 101-512, §§ 110-113; and Pub. L. No. 103-332, §§ 107-110.

For these reasons, the congressional objective in enacting section 18 strongly supports reading it to constrain the Secretary's discretion to make substantive changes in the five-year plan without following the full process.

My office addressed section 18 in an earlier Opinion, 88 I.D. 20 (1981), which said cryptically that the Secretary has "considerable discretion to determine whether the deletion, delay or advancement of sales or milestones within an approved 5-year program is significant or not," if the Secretary's decision was "supported by an administrative record demonstrating the appropriateness of the determination." 88 I.D. at 23 (emphasis added). I agree with this conclusion. I find it significant, however, that this Opinion did not extend the Secretary's "considerable discretion" to a decision to add sales to a previously approved five-year program. This suggests that it was my predecessor's view, as it is mine, that Congress has seriously constrained the Secretary's ability to add sales to a five-year program without going through the full process.

The conference report on section 18 explains that "significant revisions" to the five-year leasing program are ones "affecting [its] substance." See H.R. Conf. Rep. No. 1474, 95th Cong., 2nd Sess. 106 (1977). What "affects" the "substance" of the program should properly be determined by considering the purpose and context of the five-year plan itself. If the full process is not made available before substantive revisions are adopted, settled expectations could be unsettled. Moreover, the more important the revisions that could be made without following the full process, the less the incentive for the Department, state and local officials, industry and the public to devote the substantial effort that goes into developing a five-year program.

Given the emphasis of section 18 on balancing the satisfaction of energy needs with the protection of environmental and coastal resources, on the equitable sharing of those risks and benefits, and on consultation with affected interests, I believe that the following considerations are key in determining whether a proposed change in the five-year planning program is significant:

--whether it significantly changes the potential for discovery of oil and gas;

--whether it significantly increases the potential for environmental or other impacts in coastal areas;

--whether it significantly changes the sharing of the developmental benefits and environmental risks of offshore development.

Adding a sale in a new planning area arguably meets all three criteria. Among other things, it may significantly increase the potential for environmental damage or adverse coastal impacts and alter the equitable sharing of environmental benefits and environmental risks. Even if the overall risks do not change, the geographical distribution of the risks would differ considerably. This is particularly the case if the planning area for which a new sale were proposed were far removed from the scheduled areas included in the final program the Secretary had previously adopted.

The last issue to consider is how the NEPA process associated with adopting a five-year program affects the determination whether a full section 18 process is required for proposed revisions. As noted earlier, five-year OCS leasing programs are accompanied by EISs prepared under NEPA. An EIS prepared on a particular program may have considered, but rejected, an alternative that included sales in a particular planning area. If a sale in that planning area is subsequently proposed to be added to the five-year program, the question is whether this prior consideration of a sale in a NEPA alternative affects the determination whether adding the sale constitutes a significant revision in the program.

Considering the context and political significance of the five-year leasing program, and the public notice and consultation process that it embodies, I believe the correct answer is no. The significance of a proposed revision should properly be measured against the five-year program selected by the Secretary, not against alternatives the Secretary rejected after they were analyzed in an EIS. Otherwise, if the selected program could be so easily altered later, the expectations of the affected interests could never truly be settled by the Secretary's decision. Put another way, if the result were otherwise, the Secretary could easily avoid the procedural -limitations Congress so carefully crafted in section 18, merely by including an analysis of a wide spectrum of alternatives in the EIS accompanying the original five-year program.

This is not to say that the analysis of a proposed sale in a prior EIS can never have any-utility in considering subsequent revisions to the five year program. The existence of a recent NEPA analysis of a sale in the contemplated new planning area might allow the Secretary to conclude that a proposed revision need not be accompanied by a new or supplemental EIS (assuming not enough new information had emerged in the interim to warrant a new analysis). Likewise, the fact that other planning areas were analyzed as part of the section 18 process, but not included in the final five-year program, could lessen the analytical demands of proposing subsequent revisions. But neither of these avoids the need to comply with section 18's multi-stage consultation requirements, for these stand. separate and apart from NEPA and the analytical requirements.

For the foregoing reasons, I believe that scheduling a Sale in a planning area in which no sales were scheduled in the five-year program would constitute a significant revision. Accordingly, in addition to whatever NEPA documentation would be required, the Secretary would be obligated to follow the full process described above before adding a sale in a new planning area.

This opinion was prepared with the substantial assistance of Dennis Daugherty and Milo Mason of the Division of Mineral Resources, office of the Solicitor.

John D. Leshy
Solicitor