

## **National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling**

### **THE NATIONAL ENVIRONMENTAL POLICY ACT AND OUTER CONTINENTAL SHELF OIL AND GAS ACTIVITIES**

Staff Working Paper No. 12

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This staff working paper focuses on the National Environmental Policy Act of 1969 (NEPA) and its application to offshore oil and gas activities. The paper is divided into three sections. The first section is a general discussion of NEPA as it applies to Federal agencies. The second section addresses the Department of the Interior's (DOI) NEPA regulations and portions of its Departmental Manual that relate to the implementation of those rules for oil and gas activities. The third section focuses on NEPA questions specific to the Deepwater Horizon oil spill.

#### **I. Operation of NEPA**

##### **A. Procedural Nature of NEPA**

NEPA establishes a process by which federal agencies are obligated to review the environmental effects of their proposed agency actions during the decision-making process. While NEPA's underlying purpose is to reduce environmental degradation, the nature of the obligation that the statute imposes on agencies to review the impacts of their decisions is essentially procedural. The statute is designed to require federal agencies to prepare formal "statements" in which proposed agency actions are analyzed in a way that promotes informed decision-making rather than a substantive result. Thus, NEPA's goal is not to prevent federal approval of actions that might have environmental consequences, but instead to ensure that agency actions are undertaken knowingly and made in consideration of potential environmental consequences.

The Supreme Court articulated this statutory purpose in the early decades of NEPA's implementation, in the context of its review of NEPA-compelled agency statements. The Court made clear that NEPA is designed to "insure a fully informed and well-considered decision."<sup>1</sup> The statute requires agencies to take a "hard look" at environmental effects of a major federal action,<sup>2</sup> but it does not require agencies "to elevate environmental concerns over other appropriate considerations."<sup>3</sup> NEPA does not bar environmentally-destructive actions,<sup>4</sup> but seeks

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<sup>1</sup> Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

<sup>2</sup> Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

<sup>3</sup> Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983).

<sup>4</sup> Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

to promote environmental protection by ensuring rigorous and timely consideration of environmental consequences:

NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to “prevent or eliminate damage to the environment and biosphere” by focusing Government and public attention on the environmental effects of proposed agency action.<sup>5</sup> By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.<sup>6</sup>

The Court also clarified that NEPA is about process and informed decision-making:

NEPA does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values may outweigh environmental costs. . . . Other statutes may impose substantive environmental obligations on Federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.<sup>7</sup>

## **B. NEPA’s Action-Forcing Requirement—a Detailed Statement**

Section 102(2) is the operative provision with respect to NEPA documents.<sup>8</sup> Subsection (A) directs agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.” The directive for preparation of NEPA documents in association with agency action appears in subsection (C), which requires a “detailed statement by the responsible official.” Specifically, subsection (C) requires an agency to consider potential environmental impacts of a proposed action if that action is a “major Federal action[] significantly affecting the quality of the human environment.”<sup>9</sup> The agency must adequately discuss not only the environmental impact of the proposed action, but also its unavoidable adverse impacts, alternatives to it, the relationship between short-term uses of the environment and long-term productivity, and any irreversible commitments of resources resulting from the proposed action.<sup>10</sup> In addition, subsection (E) requires the agency to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involve[] unresolved conflicts concerning alternative uses of available resources.”<sup>11</sup>

Non-federal action is not subject to NEPA, but can fall under the statute’s purview if an agency approves some aspect of the action. Actions that do not have the potential for significant environmental effects are, however, not subject to NEPA’s requirement that a federal agency

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<sup>5</sup> 42 U.S.C. § 4321.

<sup>6</sup> See *Robertson*, 490 U.S. at 349.

<sup>7</sup> *Id.* at 350-51 (citations, footnote omitted); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

<sup>88</sup> 42 U.S.C. § 4332(2).

<sup>9</sup> 42 U.S.C. § 4332(2)(C).

<sup>10</sup> 42 U.S.C. § 4332(2)(C)(i)-(v).

<sup>11</sup> 42 U.S.C. § 4332(2)(E).

prepare a detailed statement that considers the environmental impacts of the agency's proposed action.<sup>12</sup>

### **C. CEQ Regulations**

Title II of NEPA established the Council on Environmental Quality (CEQ) within the Executive Office of the President. By Executive Order 11991 (May 24, 1977), President Jimmy Carter directed CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions” of NEPA. The resulting regulations, first promulgated on November 28, 1978, and later amended, set forth the manner by which agencies implement NEPA section 102(2).<sup>13</sup> The regulations, which are binding “except where compliance would be inconsistent with other statutory requirements,”<sup>14</sup> require agencies to establish their own procedures to implement NEPA in consultation with CEQ.<sup>15</sup>

### **D. NEPA Documents**

Under NEPA section 102(2)(C), any agency action that has a potential to significantly affect the quality of the human environment must be accompanied by NEPA review. CEQ regulations employ two documents that outline environmental impacts: an environmental impact statement (EIS) and an environmental assessment (EA).<sup>16</sup> The EIS is the “detailed statement” identified in NEPA to address a major Federal action that has significant impacts on the human environment.<sup>17</sup> By contrast, an EA is a “concise public document” that serves to (1) briefly provide sufficient evidence and analysis for determining whether to prepare an EIS; (2) aid an agency's compliance with NEPA when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary.<sup>18</sup>

The point of an EA is to document whether an EIS is required for a proposed action. If an agency knows that an action will generate significant environmental effects, an EIS is required and there is no basis for preparing an EA. But if the agency is unsure, or if the proposed action is of the sort that does not always require an EIS,<sup>19</sup> the agency may prepare an EA. If, as a result of an EA, the agency determines that no significant impact will likely result from the proposed action, the agency issues a “finding of no significant impact” (FONSI).<sup>20</sup> A FONSI may include the discussion underlying its conclusion, or may attach an EA.<sup>21</sup> If an agency issues a FONSI, NEPA compliance is complete because, as a statutory matter, the proposed action will not significantly affect the human environment, and thus a detailed EIS is unnecessary.<sup>22</sup> By

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<sup>12</sup> See, e.g., *Sabine River Authority v. U.S. Department of the Interior*, 951 F.2d 669, 675 (5th Cir. 1992), *citing* *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (NEPA is triggered by “physical change in the environment”).

<sup>13</sup> 40 C.F.R. § 1500 *et seq.*

<sup>14</sup> 40 C.F.R. § 1500.3.

<sup>15</sup> 40 C.F.R. § 1500.2(b); 1507.3(a).

<sup>16</sup> 40 C.F.R. § 1501.3; 1501.4.

<sup>17</sup> 40 C.F.R. § 1508.11.

<sup>18</sup> 40 C.F.R. § 1508.9.

<sup>19</sup> See 40 C.F.R. § 1507.3(b).

<sup>20</sup> 40 C.F.R. § 1508.13.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

contrast, if the analysis in an EA projects a significant impact, an agency cannot issue a FONSI. If an agency wishes to move forward with a proposed action, it must choose an alternative that mitigates impacts such that a FONSI is warranted,<sup>23</sup> or it must prepare a full EIS.<sup>24</sup>

The EIS, EA, and FONSI, are three of four “environmental documents” which effectuate NEPA’s mandatory review.<sup>25</sup> The fourth is a Notice of Intent, which is a public notice that an EIS will be prepared.<sup>26</sup> No other NEPA documents exist in the CEQ rules to accomplish the NEPA review required in section 102(2).

### **E. When and How to Prepare an EIS or an EA**

An agency can always choose to prepare an EIS, and must do so if the action is one “normally requiring” an EIS.<sup>27</sup> The scope and format of the EIS is controlled by regulations that require a summary, a section describing the purpose and need for the proposed action, alternatives to it, the affected environment, environmental consequences from the action, and a list of preparers.<sup>28</sup> The EIS generally must be circulated to other agencies and is subject to consultation with relevant members of the public and governmental entities.<sup>29</sup> An EA is less detailed, more concise, and prepared for actions that might have no significant impacts, or ones that can be reduced to a level of “not significant” with mitigation. Considerably less of an investment than an EIS, EAs include “brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.”<sup>30</sup>

The distinctions between an EA and an EIS give rise to common misconceptions about them. One misconception is that when an agency prepares a full EIS, its work is devoted to preventing all significant impacts. However, by its nature, although an EIS considers significant impacts, it is not a prescription for avoiding them.<sup>31</sup> An agency prepares an EIS *because* significant impacts are anticipated.<sup>32</sup> Therefore, the fact that an EIS identifies adverse impacts is not tantamount to a failure of NEPA compliance. Indeed, in *Robertson v. Methow Valley Citizens Council*, the Supreme Court rejected the idea that an EIS can only be sustained if it provides for detailed mitigation of all potential impacts:

There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. . . . [I]t would be inconsistent with NEPA’s reliance on procedural

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<sup>23</sup> See 40 C.F.R. § 1508.20.

<sup>24</sup> 40 C.F.R. § 1508.9(a)(3).

<sup>25</sup> 40 C.F.R. § 1508.10.

<sup>26</sup> 40 C.F.R. § 1508.22.

<sup>27</sup> 40 C.F.R. § 1501.4(a)(2).

<sup>28</sup> 40 C.F.R. § 1502.

<sup>29</sup> *Id.* C.F.R. § 1502.19 and 1502.25.

<sup>30</sup> 40 C.F.R. § 1508.9(b).

<sup>31</sup> 42 U.S.C. § 4332(2)(C) (EIS required when significant impacts are found).

<sup>32</sup> 40 C.F.R. § 1502.16 (EIS includes discussion of “adverse environmental effects which cannot be avoided”).

mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.<sup>33</sup>

Another misconception is that if an EA is prepared, a FONSI necessarily must result because the EA/FONSI together identify any significant impacts from the proposed action. However, an EA can never constitute final NEPA compliance if it is the vehicle for identifying significant impacts that cannot be mitigated. While it is enough that significant impacts have been fully vetted in an EIS, they must be reduced to a level of “not significant” in an EA for a FONSI to result. An EA is sufficient to conclude NEPA compliance and to lead to a FONSI *only* if it justifies a conclusion that no significant impacts will occur as incremental effects of the proposed action. If this is not the result then further NEPA documentation is required.

The sufficiency of NEPA documentation is determined ultimately by the federal courts in challenges to agency action under the Administrative Procedure Act.<sup>34</sup> A party challenging a NEPA document must demonstrate with objective proof that the agency failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2) of NEPA. Proof of arbitrary or inconsistent conclusions, or a failure to consider relevant information, demonstrates a lack of compliance with NEPA because it proves an “arbitrary and capricious” action under the Administrative Procedure Act.<sup>35</sup>

An EIS is judged by whether it constitutes a “detailed statement” that takes a “hard look” at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern.<sup>36</sup> The question is whether the EIS contains a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action and alternatives.<sup>37</sup> Significant impacts do not defeat an EIS under the Administrative Procedure Act.

By contrast, if an EA projects significant effects, a FONSI cannot be sustained and a challenge under the Administrative Procedure Act<sup>38</sup> will prevail. An EA for which a FONSI has been issued will be affirmed when the record demonstrates that the agency has considered relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result or that any impact will be reduced to insignificance by the adoption of appropriate mitigation measures.<sup>39</sup>

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<sup>33</sup> 490 U.S. at 352-53 (footnote and citation omitted).

<sup>34</sup> 5 U.S.C. §§ 704-06.

<sup>35</sup> Marsh, 490 U.S. 360; *see also* 40 C.F.R. § 1502.24 (agencies must “insure the professional integrity, including scientific integrity” of analyses in EISs).

<sup>36</sup> 42 U.S.C. § 4332(2)(C), (E); 40 C.F.R. § 1502.1; Kleppe, 427 U.S. at 410 n.21; *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927, 929 (9th Cir. 1987).

<sup>37</sup> *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982), *quoting* *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Scientists’ Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

<sup>38</sup> 5 U.S.C. § 706.

<sup>39</sup> *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982); *Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

## F. Categorical Exclusions—Agency Actions Exempt from the Action-Forcing Requirements of NEPA

Preparation of an EA or EIS that analyzes the effects of a proposed action and its reasonable alternatives is a procedural line an agency must cross before it can move forward with an action. CEQ has only included the EIS, EA, resulting FONSI (EA), and Notice of Intent (of an EIS) on its list of NEPA documents.<sup>40</sup> CEQ understood, however, that NEPA does not, and should not, compel unnecessary paperwork.<sup>41</sup> Therefore, CEQ identified “categorical exclusions” (CE)—sets of agency actions that do not generate environmental effects and thus are exempt from the case by case application of section 102(2). CEQ allows each agency to establish exceptions from the NEPA process for entire categories of actions, “which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt.”<sup>42</sup> CEQ defines a CE as that “category of actions which do not . . . have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of the regulations<sup>43</sup> and for which, therefore, neither an [EA] nor an [EIS] is required. . . . Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”<sup>44</sup> A CE is thus *not* a level of NEPA review, but rather a defined category of agency action that does not require NEPA review apart from the development of the CE itself..

CEs represent the common sense notion that agencies routinely “act” in ways that do not create environmental effects requiring a “hard look.” For example, employee performance evaluations or organizational changes do not generate impacts on the physical world and thus are not subject to NEPA. In *Sabine River Authority v. Department of the Interior*,<sup>45</sup> the Fifth Circuit held that “the acquisition of a negative easement which by its terms prohibits any change in the status quo does not amount to ‘major Federal action[] significantly affecting the quality of the human environment.’” Although, in this case, the court did not specifically define an agency-asserted CE, it did define a subset of actions exempt from NEPA as actions that do not change the physical world. The fact that an agency must examine a proposed action to determine whether it may properly be within a defined CE is an activity occasioned by NEPA, but the examination itself is not NEPA review in a NEPA document as defined by CEQ.

Agencies must establish a list of their own CEs, which are defined to be “categories of actions which do not individually or cumulatively have a significant impact on the human environment and are therefore exempt” from NEPA.<sup>46</sup> Environmental documentation in the form of an EIS or EA is required unless an agency has established a procedure that includes

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<sup>40</sup> 40 C.F.R. § 1508.10.

<sup>41</sup> 40 C.F.R. § 1500.4 (“Reducing paperwork”).

<sup>42</sup> 40 C.F.R. § 1500.4(p) (*citing* 40 C.F.R. § 1508.4).

<sup>43</sup> 40 C.F.R. § 1507.3.

<sup>44</sup> 40 C.F.R. § 1508.4.

<sup>45</sup> 951 F.2d at 679.

<sup>46</sup> 40 C.F.R. § 1500.4(p).

identification of “typical classes of action . . . [w]hich normally do not require either an [EIS] or an [EA].”<sup>47</sup>

## **G. Effects/Impacts**

In addressing the environmental consequences of a proposed action in an EIS, an agency must discuss both its direct and indirect effects as well as alternatives to the proposed action in order to offer meaningful comparisons to other actions that may also be implemented.<sup>48</sup> Among the effects to be addressed are cumulative impacts<sup>49</sup> and ways to mitigate effects.<sup>50</sup> Similarly, EAs must include brief statements of “environmental impacts” of a proposed action.<sup>51</sup>

“Effects and impacts as used in these regulations are synonymous” and include “direct,” “indirect,” and “cumulative” effects.<sup>52</sup> Direct effects are “caused by the action and occur at the same time and place.”<sup>53</sup> Indirect effects are “caused by the action and are later in time or further removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”<sup>54</sup> A “reasonably close causal relationship” between the Federal action and the effects at issue is critical; where the chain of causation is unduly remote, an effect will not be deemed to be an indirect effect of a proposed action.<sup>55</sup> A cumulative impact is the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions.<sup>56</sup> Cumulative impacts can result from individually minor but collectively significant actions taking place over time.<sup>57</sup>

When certain impacts are to be analyzed depends on whether they may be reasonably foreseeable.

## **H. Worst Case Analysis**

There is general confusion about whether agencies are required to consider a “worst case scenario” in their NEPA documents. At one time, regulations did require EISs to include worst case scenario analyses in certain circumstances. But CEQ eliminated this requirement in 1986 by revising its NEPA regulations. Worst case scenarios are not currently required in the NEPA regulations.

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<sup>47</sup> 40 C.F.R. § 1507.3(b)(2)(ii).

<sup>48</sup> 40 C.F.R. § 1502.16; 1502.14.

<sup>49</sup> 40 C.F.R. § 1508.7.

<sup>50</sup> 40 C.F.R. § 1502.16(h).

<sup>51</sup> 40 C.F.R. § 1508.9(b).

<sup>52</sup> 40 C.F.R. § 1508.8; 1508.25(c).

<sup>53</sup> 40 C.F.R. § 1508.8(a).

<sup>54</sup> 40 C.F.R. § 1508.8(b).

<sup>55</sup> *Metropolitan Edison*, 460 U.S. at 774-75.

<sup>56</sup> 40 C.F.R. § 1508.7.

<sup>57</sup> *Id.*

The worst case analysis requirement first arose in the 1978 CEQ regulations. CEQ was attempting to resolve how an agency should handle situations in which the impacts of an action were uncertain or unknown. It instructed federal agencies to obtain additional data when addressing “scientific uncertainty” or “gaps in relevant information” regarding significant adverse environmental effects that were “essential to a reasoned choice among alternatives” or “important to the decision.”<sup>58</sup> The problem was that some such data was usually not available at all, or if available, unreasonably costly to obtain. Accordingly, if additional and necessary scientific information could not be acquired because the “overall costs of obtaining it were exorbitant,” or “the means for obtaining it were beyond the state of the art,” the agency was required to “include a worst case analysis and an indication of the probability or improbability of its occurrence.”<sup>59</sup>

CEQ amended the regulation in 1986. The change was controversial and generated considerable public comment. CEQ responded by explaining that it believed the 1978 regulation was “flawed” and that it needed to provide “better and more logical” requirements for agencies to deal with situations involving incomplete information.<sup>60</sup> CEQ disagreed with the view expressed by certain commenters that removing the worst case scenario requirement would weaken NEPA compliance, instead stating that a “less sensational” and “more careful and professional approach” was a “better” way of dealing with incomplete and unavailable information in an EIS.<sup>61</sup>

In *Robertson v. Methow Valley Citizens Council*, the Supreme Court reversed a circuit court that had insisted the 1978 regulation’s demand for a worst case analysis be followed even after amendment of that regulation. The Supreme Court gave “substantial deference” to the 1986 regulatory amendment, citing the fact that the 1978 regulation had been subject to considerable criticism. Citing the 1985 proposed rule that became the 1986 amendments, the Court stated:

CEQ explained that by requiring that an EIS focus on reasonably foreseeable impacts, the new regulation “will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency’s decision,” 50 Fed. Reg. 32237 (1985), rather than distorting the decision-making process by overemphasizing highly speculative harms, 51 Fed. Reg. 15624-15625 (1986); 50 Fed. Reg. 32236 (1985). In light of this well-considered basis for the change, the new regulation is entitled to substantial deference. Accordingly, the Court of Appeals erred in concluding that the [relevant EIS] is inadequate because it failed to include a “worst case analysis.”<sup>62</sup>

The regulation in place today states that if “information relevant to reasonably foreseeable significant adverse impacts cannot be obtained” because it is too costly to get or unavailable, the agency must include a four-part statement regarding the information, including “the agency’s evaluation of such impacts based on theoretical approaches or research methods

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<sup>58</sup> 40 C.F.R. § 1502.22.

<sup>59</sup> *Id.*

<sup>60</sup> 51 Fed. Reg. 15624.

<sup>61</sup> *Id.*

<sup>62</sup> 490 U.S. at 356.

generally accepted in the scientific community.”<sup>63</sup> “Reasonably foreseeable” environmental effects include “impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.”<sup>64</sup>

## I. Consultation

CEQ regulations establish extensive requirements for including other agencies and the public in the EIS process. CEQ’s stated policy is to encourage and facilitate “public involvement in decisions which affect the quality of the human environment.”<sup>65</sup> The rules “emphasize agency cooperation early in the NEPA process.”<sup>66</sup> In addition, they require “diligent efforts to involve the public in preparing and implementing their NEPA procedures.”<sup>67</sup>

The requirements for public and agency review of a pending EIS are demanding. The lead agency responsible for the proposed action may request “any other Federal agency which has jurisdiction by law,” or any such agency “which has special expertise with respect to any environmental issue” to be addressed in the EIS, to be a “cooperating agency.”<sup>68</sup> The cooperating agency’s involvement and participation should be solicited at the earliest possible time.<sup>69</sup> The regulations call for “scoping,” which is the “early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.”<sup>70</sup> As soon as it decides to prepare an EIS, the agency must publish a “notice of intent” in the Federal Register, subject to limited exceptions.<sup>71</sup> The notice of intent invites “participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons.”<sup>72</sup>

After the scoping process, the EIS is issued in two stages. A draft environmental impact statement (DEIS) will issue “in accordance with the scope decided upon in the scoping process.”<sup>73</sup> The DEIS should discuss “all major points of view on the environmental impacts of the alternatives including the proposed action.”<sup>74</sup> At this juncture, the agency must invite comments.<sup>75</sup> With respect to “any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved, or which is authorized to develop and enforce environmental standards,” the lead agency shall obtain comments.”<sup>76</sup> It “shall request” comments of appropriate state and local agencies authorized to develop and enforce environmental standards; Indian tribes with a reservation that may suffer impacts; any agency

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<sup>63</sup> 40 C.F.R. § 1502.22(b)(1).

<sup>64</sup> *Id.*

<sup>65</sup> 40 C.F.R. § 1500.2(d).

<sup>66</sup> 40 C.F.R. § 1501.6.

<sup>67</sup> 40 C.F.R. § 1506.6(a).

<sup>68</sup> 40 C.F.R. § 1501.6.

<sup>69</sup> 40 C.F.R. § 1501.6(b).

<sup>70</sup> 40 C.F.R. § 1501.7.

<sup>71</sup> *Id.* (see 1507.3(e) (notice may be issued closer to the time the EIS is prepared)).

<sup>72</sup> 40 C.F.R. § 1501.7(a).

<sup>73</sup> 40 C.F.R. § 1502.9(a).

<sup>74</sup> *Id.*

<sup>75</sup> 40 C.F.R. § 1503.1.

<sup>76</sup> 40 C.F.R. § 1503.1(a)(1).

which has requested statements on actions of the kind proposed; any applicant; and the public.<sup>77</sup> The agency must “affirmatively solicit[] comments from those persons or organizations who may be interested or affected.”<sup>78</sup>

The agency then prepares the final environmental impact statement (FEIS). In doing so, the agency must “assess and consider comments both individually and collectively, and shall respond in one or more” of the following ways: (1) modify alternatives including the proposed action; (2) develop and evaluate alternatives not previously considered; (3) supplement, improve, or modify analyses; (4) make factual corrections; or (5) give a reasoned explanation for why the comments do not warrant further response.<sup>79</sup>

Several directives are clear from CEQ regulations regarding consultation with respect to an EIS. The agency is required to include federal, state, local, and tribal agencies, and the public, as well as to respond to commenters.<sup>80</sup> The agency is not required to agree with the commenter, so long as the agency discloses an opposing point of view and reasonably responds to it. On the one hand, “disagreement among experts will not serve to invalidate an EIS.”<sup>81</sup> On the other, a failure to disclose and respond to a commenter’s evidence and opinions directly challenging the scientific basis upon which the EIS rests will defeat it.<sup>82</sup> The Ninth Circuit has explained that the NEPA requirement to address opposing viewpoints in an FEIS “reflects the paramount Congressional desire to internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision.”<sup>83</sup> Once again, the NEPA burden is procedural: the agency must disclose and respond. The Administrative Procedure Act requires that the response must make sense; otherwise, the agency would reasonably be accused of acting in an arbitrary and capricious manner. Accordingly, a federal agency’s comments may be given extra weight over and above that of an ordinary citizen, depending on the agency’s expertise in the topic.

The obligations for public disclosure and comment with respect to an EA are entirely different. Unlike the rigid public/governmental comment requirements with respect to an EIS, agencies need only involve “environmental agencies, applicants, and the public” in preparing EAs “to the extent practicable.”<sup>84</sup> Normally, the obligation of the agency in preparing a FONSI is to disseminate it to the affected public.<sup>85</sup> In “certain limited circumstances,” however, the agency must make the FONSI “available for public review (including [through] State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an [EIS] and before the action may begin.”<sup>86</sup> There are two “limited circumstances”:

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<sup>77</sup> 40 C.F.R. § 1503.1(a)(2)-(4).

<sup>78</sup> 40 C.F.R. § 1503.1(a)(4).

<sup>79</sup> 40 C.F.R. § 1503.4(a).

<sup>80</sup> *E.g.*, *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1168-69 (9th Cir. 2003).

<sup>81</sup> *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973).

<sup>82</sup> *Center for Biological Diversity*, 349 F.3d at 1169.

<sup>83</sup> *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982).

<sup>84</sup> 40 C.F.R. § 1501.4(b).

<sup>85</sup> 40 C.F.R. § 1501.4(e)(1).

<sup>86</sup> 40 C.F.R. § 1501.4(e)(2).

where the proposed action “is, or is closely similar to, one which normally requires the preparation” of an EIS, or where its nature is “without precedent.”<sup>87</sup>

The federal courts have been inconsistent in their interpretations of the CEQ regulations with respect to public involvement in the EA process. On more than one occasion, the Ninth Circuit has held that a failure to involve the public constitutes a violation of the CEQ regulations. In *Citizens for Better Forestry v. U.S. Department of Agriculture*, the court stated: “Although we have not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process, we clearly have held that the regulations at issue must mean something. . . . It is evident, therefore, that a complete failure to involve or even inform the public about an agency’s preparation of an EA and a FONSI, as was the case here, violates these regulations.”<sup>88</sup> And in *Anderson v. Evans*, the Ninth Circuit held that “[t]he public must be given an opportunity to comment on draft EAs and EISs.”<sup>89</sup>

By contrast, the First Circuit has held that CEQ’s public participation requirements are satisfied even when an agency has not offered a draft or final EA for public comment on grounds that “[n]othing in the CEQ regulations requires circulation of a draft EA for public comment, except under certain ‘limited circumstances.’”<sup>90</sup> Similarly, the Tenth Circuit upheld an agency’s publication of an EA when the agency issued public notice of the proposed action and provided a comment period, even though the record did not clarify whether the EA was made available to the public before the agency issued its decision.<sup>91</sup> And in *Pogliani v. U.S. Army Corps of Engineers*,<sup>92</sup> the Second Circuit found that the plaintiffs were unlikely to succeed on their claim that the Corps erred by failing to release a draft EA and FONSI for public comment prior to its issuance in final form.

The District of Columbia federal district courts have inconsistently interpreted CEQ regulations. In *Fund for Animals v. Norton*,<sup>93</sup> the U.S. District Court for the District of Columbia struck down as inadequate the publication by the U.S. Fish and Wildlife Service of the notice of the availability of a draft EA in the Federal Register, which afforded the public a two-week comment period followed two weeks later by finalization of the EA, and a week later by issuance of the FONSI. By contrast, the same court concluded that “an agency is *not* expressly required to circulate a draft EA for public comment before adopting its final decision, except in limited circumstances that do not apply here.”<sup>94</sup> The court rejected the plaintiff’s argument that the agency was required to provide public opportunity to comment on a draft EA, noting that the CEQ regulation only required publication “to the extent practicable.”<sup>95</sup> Accordingly, the court focused on the factual inquiry as to what had been “practicable” for the agency to accomplish in the EA process.

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<sup>87</sup> *Id.*

<sup>88</sup> 341 F.3d 961, 970 (9th Cir. 2003).

<sup>89</sup> 314 F.3d 1006, 1016 (9th Cir. 2002).

<sup>90</sup> *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of Army*, 398 F.3d 105, 115 (1st Cir. 2005).

<sup>91</sup> *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004).

<sup>92</sup> 306 F.3d 1235, 1238-39 (2d Cir. 2002)

<sup>93</sup> 281 F. Supp. 2d 209, 226-27 (D.D.C. 2003)

<sup>94</sup> *Biodiversity Conservation Alliance v. U.S. Bureau of Land Management*, 404 F. Supp. 2d 212, 220 (D.D.C. 2005).

<sup>95</sup> 404 F. Supp. at 220, *citing* 40 C.F.R. § 1501.4(b).

## J. Timing—Supplemental Statements and Tiering

Generally, the appropriate time for preparing a NEPA document is prior to a decision, when the decision-maker has the widest range of options.<sup>96</sup> When the decision results in an “irreversible and irretrievable commitment of resources,” NEPA review is required.<sup>97</sup> One of the most difficult NEPA compliance questions presented to an agency is how to approach agency action that is ongoing, repetitive, or takes place in stages. Arguably, the largest federal programs with impacts on the physical world are always ongoing. The CEQ regulations address the process of considering impacts in consecutive NEPA documents as “supplementing” NEPA review or “tiering” one NEPA document to another. In such cases, an earlier NEPA document is incorporated into a latter one.

Agencies must prepare “supplements to either draft or final [EISs]” if the agency “makes changes in the proposed action that are relevant to environmental concerns” or if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”<sup>98</sup> The supplementing process is further described as follows:

[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision-making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand, and as the petitioners concede, NEPA does require that agencies take a “hard look” at the environmental effects of their planned action, even after a proposal has received initial approval. . . . Application of the “rule of reason” thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains “major Federal action” to occur, and if the new information is sufficient to show that the remaining action will “affect the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.<sup>99</sup>

If information uncovered after a NEPA statement is sufficiently new and significant when compared to the information upon which the NEPA statement was based, a new NEPA statement is required.

The related concept of “tiering” addresses the sequencing of environmental statements generally from broad documents to narrower statements or analyses, or from a broad programmatic to a site-specific analysis. Tiering is defined in the CEQ regulations as “coverage of general matters in broader [EISs] . . . with subsequent narrower statements or environmental

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<sup>96</sup> *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852-53 (9th Cir. 1979).

<sup>97</sup> *Mobil Oil Corp. v. FTC*, 562 F.2d 170, 173 (2nd Cir. 1977); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983).

<sup>98</sup> 40 C.F.R. § 1502.9(c)(1).

<sup>99</sup> *Cf.* 42 U.S.C. § 4332(2)(C).; *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 373-74 (footnotes omitted).

analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.”<sup>100</sup> The point of tiering is to allow an agency to avoid duplicating paper and effort. Assuming a broader NEPA document considers impacts, a narrower NEPA document can incorporate such consideration by reference. Impacts must be considered in some document, however, and if the agency does tier, the question is whether the analysis in the first NEPA document is sufficient to support tiering in the second one. In *Kern v. Bureau of Land Management*,<sup>101</sup> the Ninth Circuit held that an environmental impact, consideration of which is eschewed in an EA, must necessarily have been addressed adequately in a NEPA document to which the EA is tiered.

As long as the necessary analysis of a particular action is undertaken at a relevant action point, supplementation and tiering are entirely accepted and common practices. In either case, a NEPA statement that is tiered to a final EIS, or which is supplemental to one, need not restate impacts analysis or alternatives that were already considered in the document it supplements or to which it is tiered. Nonetheless, a NEPA document may only be tiered under the CEQ regulations to a document that has itself been issued as a document under NEPA.<sup>102</sup> Likewise, supplementation of NEPA documents can only occur in NEPA documents.

Because broad Federal programs are ongoing, tiering and supplementation can often become the rule rather than the exception. Questions surrounding such programs include when to begin a new programmatic review, when a new NEPA review may be required, and what requirements are imposed when supplemental or new information arises. In simplistic terms, if significant new information comes to light, a supplemental review document is required that could be tiered to a prior document. The staging of NEPA review cannot ultimately be employed to evade NEPA review of a particular impact or action. As sensible as these concepts may sound, the staging of NEPA review, and the avoidance of review that staging may unwittingly permit, are difficult questions for agencies to resolve.

#### **K. Agency-Formulated Documents That Result From NEPA Compliance But Do Not Constitute NEPA Review**

NEPA compliance in the context of ongoing agency actions has given rise to certain practical problems for agencies attempting to determine whether they need to supplement NEPA analysis when NEPA documents already exist. If an agency undertakes actions that have already been subject to NEPA review and therefore do not require further NEPA analysis, the agency may nonetheless be challenged for moving forward without preparing any NEPA document. For this reason, agencies have established procedures outside the scope of the CEQ regulations to determine whether NEPA analysis already undertaken is sufficient such that no further review is required. Federal courts have upheld such agency procedures. In *Pennaco Energy v. U.S. Department of the Interior*,<sup>103</sup> the Tenth Circuit addressed such a document—in this case, a Documentation of NEPA Adequacy—that had been prepared by DOI’s Bureau of Land Management (BLM) to determine what NEPA analysis existed, and whether more NEPA review

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<sup>100</sup> 40 C.F.R. § 1508.28.

<sup>101</sup> 284 F.3d 1062, 1074 (9th Cir. 2002).

<sup>102</sup> *Kern*, 284 F.2d at 1074.

<sup>103</sup> 377 F.3d 1147, 1162 (10th Cir. 2004).

should be undertaken to supplement it. While noting that “[Documentation of NEPA Adequacy], unlike EAs and FONSI, are not mentioned in the NEPA or in the regulations implementing the NEPA,” the court upheld BLM’s use of “non-NEPA procedures to determine whether new NEPA documentation is required.”<sup>104</sup> Though such documents cannot supplement previous EAs or EISs or address site-specific effects not previously considered in them, they identify for the decision-maker the location of existing NEPA analysis, and allow the decision-maker to determine whether more is needed.

Other agencies employ different terms for procedures to assess NEPA analysis.<sup>105</sup> The critical point to note about these approaches is that, although they are legal means to assess the sufficiency of existing NEPA review; these procedures and documents are not NEPA documents and do not constitute NEPA review. Whether NEPA review is sufficient, preparation of a Documentation of NEPA Adequacy-type document depends on whether NEPA supplementation is required.

## II. DOI’s Implementation of NEPA Procedures

Consistent with CEQ’s directives, DOI has promulgated regulations and guidance to ensure proper application of NEPA and CEQ’s binding rules. The regulations appear at 43 C.F.R. § 46, and generally reproduce and supplement CEQ’s directions. In addition, DOI has prepared a Departmental Manual that establishes guidance, direction, and requirements for, *inter alia*, the proper application of NEPA requirements to Departmental action. In addition to general Departmental guidance, the Departmental Manual gives specific direction to each bureau within the Department, including the former Minerals Management Service (MMS), which has been succeeded since the Macondo well blowout last spring by the Bureau of Ocean Energy Management and Regulatory Enforcement (BOEMRE).<sup>106</sup> The regulations and Manual provisions are detailed and lengthy. To avoid repeating the above analysis of NEPA, the following section mentions only provisions of note or interest to the Commission’s work.

### A. DOI NEPA Rules

The regulations at 43 C.F.R. § 46 (“Implementation of [NEPA]”) generally repeat the requirements outlined in the CEQ rules. The Departmental rules make clear that use of pre-existing NEPA documentation, when further NEPA review would merely duplicate prior statements, should be a priority.<sup>107</sup> The regulations address “incorporation of NEPA documents” and “tiered documents.”<sup>108</sup> They also identify a document not mentioned in the CEQ regulations—a Finding of No New Significant Impacts (FONNSI). This document must follow

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<sup>104</sup> *Id.*

<sup>105</sup> The U.S. Forest Service uses a “validation and verification” procedure.

<sup>106</sup> On June 18, 2010, Secretary of the Interior Ken Salazar ordered that the Minerals Management Service be officially renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). For consistency, throughout this paper, we will refer to the agency as the Minerals Management Service. As of the writing of this paper, the Departmental Manual has not been changed to acknowledge the BOEMRE.

<sup>107</sup> 43 C.F.R. § 46.120(d) (“Responsible Officials should make the best use of existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork.”)

<sup>108</sup> 43 C.F.R. § 46.135; 46.140.

the preparation of an EA and is distinguished from a FONSI in that it signifies the EA is tiered to a prior NEPA document (specifically an EIS), and the EA process has revealed that all significant environmental impacts were studied and any new impacts identified are not significant. The full text of this regulation is as follows:

An environmental assessment prepared in support of an individual proposed action can be *tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects.* Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a “finding of no *new* significant impact.”<sup>109</sup>

In its entirety, the regulation is accurate, but the italicized portion could be read as inconsistent with the CEQ regulations if taken out of context. It is not accurate to say that a FONSI can be reached for a proposed action with significant effects, even though it is true that a FONSI can be reached if all effects from the proposed action are addressed in a document to which the EA is tiered. By contrast, if incremental effects specifically caused only by the proposed action addressed in the EA are significant, and are not directly addressed in the EIS, a FONSI cannot be issued. The regulation’s creation of a new type of document (FONNSI) may confuse the proper application of NEPA in the case of tiering or supplementation for the public and for agency employees obligated to implement NEPA. Whether an effect of the action studied in the second NEPA document is fully addressed in the first NEPA document may be subject to debate.

The DOI’s rules also address “[c]onsultation, coordination, and cooperation with the agencies.”<sup>110</sup> They appear to expand the consultation requirement established in the CEQ rules by directing consultation “whenever possible” for all NEPA documentation, not just EISs:

The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities.<sup>111</sup>

The DOI NEPA rules provide specific requirements for consultation and notification in association with a Notice of Intent, the precursor to the EIS.<sup>112</sup> Nonetheless, regulations

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<sup>109</sup> 40 C.F.R. § 46.140(c) (first italics added; second in original).

<sup>110</sup> 43 C.F.R. § 46.155.

<sup>111</sup> *Id.*

<sup>112</sup> 43 C.F.R. § 46.435.

specifically addressing EAs avoid any suggestion that these rules expand the CEQ consultation requirements for EAs. Instead, 43 C.F.R. § 46.305 repeats CEQ’s requirement that consultation is necessary only “to the extent practicable”; specifies that doing so is at the discretion of the Responsible Official<sup>113</sup>; ensures that the Department is not required to issue draft EAs and may do so only if the Official believes it to be “appropriate”; and permits the decision-maker to consult with Cooperating Agencies. The only mandatory requirements in the rules are to consider comments given, even if not solicited, and to “notify” the public of the final EA and FONSI. Comments on a FONSI generally do not need to be solicited, except as required by 40 C.F.R. § 1501.4(e)(2), a CEQ regulation that requires a 30-day notice for a FONSI to be published in “limited circumstances” defined by individual agencies.<sup>114</sup>

DOI’s rules detail the preparation of EAs and EISs in ways more extensive than the CEQ rules. Subpart D addresses EAs.<sup>115</sup> Subpart E addresses EISs.<sup>116</sup>

The regulations also address CEs. Like the CEQ regulations, the Department defines a CE as “a category or kind of action that has no significant individual or cumulative effect on the quality of the human environment.”<sup>117</sup> The rule goes on to note that “[e]xcept as provided in paragraph (c) of this section, if an action is covered by a Departmental CE, the bureau is not required to prepare” an EA or EIS.<sup>118</sup> The reference to paragraph (c) is to the “extraordinary circumstances under which actions otherwise covered by a categorical exclusion require analyses under NEPA,” which are identified at 43 C.F.R. § 46.215. “Any action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances in section 46.215; if it does, further analysis and environmental documents must be prepared for the action.”<sup>119</sup> Section 46.210 lists actions that constitute “Department-wide” CEs. Though the list is extensive, and includes personnel decisions and organizational changes, no items on the list pertain to management of oil and gas resources by any bureau.

The Departmental regulations establish the extraordinary circumstances that make an action otherwise a potential CE subject to NEPA review. “Extraordinary circumstances” exist for actions that:

- (a) Have significant impacts on public health or safety.
- (b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; . . . wetlands (EO 11990); floodplains (EO 11988); . . . migratory birds; and other ecologically significant or critical areas.
- (c) Have highly controversial environmental effects . . .
- (d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.

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<sup>113</sup> *Id.*

<sup>114</sup> 43 C.F.R. § 46.305(c).

<sup>115</sup> 43 C.F.R. § 46.310; 46.315; 46.320; 46.325.

<sup>116</sup> 43 C.F.R. § 46.400; 46.405; 46.415; 46.420; 46.425.

<sup>117</sup> 43 C.F.R. § 46.205.

<sup>118</sup> 43 C.F.R. § 46.205(a).

<sup>119</sup> 43 C.F.R. § 46.205(c)(1).

- (e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
- (f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.
- (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.<sup>120</sup>

Notably, the Department’s regulations add a category of exclusions from NEPA review not found in the CEQ rules—actions excluded by statute. “Congress may establish categorical exclusions by legislation, in which case the terms of the legislation determine how to apply those categorical exclusions.”<sup>121</sup>

## **B. Departmental Manual**

For decades, DOI has issued “instructions, policies, and procedures that have general and continuing applicability to Departmental activities, or that are important to the management of the Department” in a Departmental Manual.<sup>122</sup> The Departmental Manual describes the organizations and functions of the Department’s bureaus and offices, delegations of the Secretary’s authority, and the policies and general procedures for administrative activities and the operations of specific programs. It is used to communicate the instructions of the Office of the Secretary throughout the Department, to provide guidance to the bureaus and offices in their administrative and program operations, and to serve as the primary source of information on organization structure, authority to function, and policy as well as general procedures. Bureaus and offices must comply with the provisions of the Departmental Manual, except to the extent that the provisions are superseded by appropriate authority (e.g., a change in statute, regulation, an executive order; a secretary’s order, or a court decision).<sup>123</sup>

### **i. NEPA Procedures at Part 516 of the Departmental Manual**

The Department first proposed draft procedures to implement NEPA and the CEQ regulations on July 10, 1979.<sup>124</sup> The first procedures were adopted as Part 516 of the Departmental Manual on March 18, 1980, to provide “policy and procedural directions to all elements of the Department for complying with the mandate of NEPA and the CEQ regulations.”<sup>125</sup> The Department adopted a broad list of “Departmental Categorical Exclusions” in the Departmental Manual, but explained that “[i]nstructions specific to bureaus will be issued [subsequently] as appendices to these procedures.”<sup>126</sup> Adopting the language from the

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<sup>120</sup> 43 C.F.R. § 46.215.

<sup>121</sup> 43 C.F.R. §. 46.205(d).

<sup>122</sup> 11 Departmental Manual 1.1.

<sup>123</sup> 11 Departmental Manual 1.2.

<sup>124</sup> 44 Fed. Reg. 40436.

<sup>125</sup> 45 Fed. Reg. 27541.

<sup>126</sup> 45 Fed. Reg. 27542.

procedures proposed in 1979, the Department established criteria “to determine actions to be categorically excluded from the NEPA process.”<sup>127</sup> The criteria are as follows:

- (a) The action or group of actions would have no significant effect on the quality of the human environment.
- (b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.<sup>128</sup>

The Departmental Manual goes on to note:

Based on the above criteria, the classes of actions listed in Appendix 1 to this Chapter are categorically excluded Department-wide from the NEPA process, Bureaus shall list categorical exclusions specific to their programs in the Bureau Appendix to Chapter 6.<sup>129</sup>

In Chapter 6, the Departmental Manual directs “heads of Bureaus and offices to “propose categorical exclusions.”<sup>130</sup> As described below, these provisions remained in place until 2009, when Chapters 1-6 of the Departmental Manual were amended and all references to CEs and exceptions to their use were removed.

## **ii. Departmental Manual Offshore CEs**

From the first Departmental oil and gas NEPA compliance review, the United States Geological Survey (USGS) defined certain key approvals in the Western and Central Gulf of Mexico as categorically excluded from NEPA review, including: applications for permits to drill (APD); exploration plans (EP); and development and production plans (DPP); and then, as amended later, development operations and coordination documents defined by MMS.<sup>131</sup>

The USGS’s decision to treat Gulf of Mexico planning documents and the drilling of wells in this region as exempt from NEPA review appears to have stemmed from statutory provisions in, and congressional commentary associated with, passage of the Outer Continental Shelf Lands Act (OCSLA) amendments of 1978. Although USGS has never explained its decision to treat EPs as categorically excluded, USGS may have believed that DPPs were statutory CEs, which could not be subject to regulatory exception. USGS also treated APDs in the Western Gulf region the same as it treated other applications for the Outer Continental Shelf—categorically excluded as effectively “tiered” to approved planning documents. This conclusion was a questionable application of the CE, as defined by CEQ, for the entire Outer Continental Shelf, but improper in the Western Gulf because no tiering to a CE (a non-NEPA document) is allowed. MMS later came to believe that planning documents in the Western Gulf were categorically excluded from NEPA review because they met the CEQ definition of a CE,

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<sup>127</sup> 516 Departmental Manual 2.3.A(1) (1980). 44 Fed. Reg. 40439 (July 10, 1979) (copied in final at 45 Fed. Reg. 27544 (Apr. 23, 1980)).

<sup>128</sup> 516 Departmental Manual 2.3.A(1) (1980).

<sup>129</sup> *Id.* at 2.3A(2).

<sup>130</sup> *Id.* at 6.4.A(3).

<sup>131</sup> Ultimately, MMS created three Gulf of Mexico areas: Western, Central, and Eastern. For purposes of NEPA, MMS grouped the Western and Central areas together.

even though MMS regulations acknowledged that such planning document approvals *did* have significant impacts on the human environment in other Outer Continental Shelf regions. MMS squared neither its understanding of how the USGS CEs came into being nor its contradictory description of the effects on the human environment of approvals of the same planning documents, as occurring or not occurring depending on a geographic boundary.

By the time the relevant approvals were given for the Macondo well, all of these problems undercut the use of CEs. Even if the categorical exceptions, as applied to APDs and planning documents in the Western Gulf, could be squared today, it is questionable whether MMS properly applied these exceptions to the circumstances presented by deepwater wells.

The convoluted history of defined CEs for offshore oil and gas development stems from a statute, is developed through the Departmental Manual, and coincides with regulations enacted by relevant bureaus. The basis for the Department's determination that the APDs, EPs, DPPs, and DOCs in the Western Gulf are categorically excluded from NEPA review seems to have been poorly understood by the MMS. In particular, Notices to Lessees changed the application of the rules in critical ways.<sup>132</sup> Provisions of regulations cited in the Departmental Manual have been superseded, compounding problems with interpreting what does and does not apply offshore. The following discussion attempts to extract the story of the creation and maintenance of the CEs by examining the text and legislative history of the OCSLA 1978 amendments, the pertinent parts of the Departmental Manual, and the Departmental regulations. The discussion reveals seeming inconsistencies with the discussion of NEPA in Part 1 of this paper. Accordingly, the following points must be kept in mind:

- (1) Other than citing to the 1978 amendments to OCSLA and regulations implementing that statute, how the Department derived CEs for DPPs (or DOCs) in the Western Gulf region was not articulated when they were created.
- (2) Staff research has not determined why the USGS concluded that approval of EPs for the Western Gulf of Mexico region should constitute a CE.
- (3) To the extent the Department defined Western Gulf EPs and DPPs as CEs based on its reading of the OCSLA amendments of 1978, this was not a result of a statutory mandate by Congress.
- (4) If MMS believed that relevant CEs were in place because of a statutory mandate, it would be inappropriate for it to undertake to review whether exception to the CE should occur because of extraordinary circumstances, because the exception could not override a statutory provision.
- (5) Approval of the planning documents defined to be CEs has not been specifically identified by any Departmental bureau not causing impacts on the environment, and therefore fitting within the CEQ definition of a CE.

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<sup>132</sup>This paper does not separately document the extensive Notices to Lessees that have applied to CEs.

(6) If the Department believed the relevant CEs were in place because they met the CE definition in the CEQ rules or Departmental regulations, then any approval (APD, EP, DPP, DOCD) would have to be reviewed to ensure that a particular action is not an unusual circumstance calling for NEPA review before being categorized as a CE.

(7) APDs are categorically excluded from NEPA review if the subject wells are identified in an approved plan (EP, DPP, DOCD) that, outside the Western Gulf region, would be subject to NEPA review. In the Western Gulf region, the plans to which an APD is “tiered” are not subject to NEPA review because they are identified as CEs. Such “tiering” to non-NEPA documents is improper.

### **C. The Source of the Western Gulf of Mexico Offshore Categorical Exclusions—OCSLA Amendments of 1978**

In 1978, Congress enacted Public Law 95-372 to amend OCSLA. A single provision, section 25, is the source of the CEs in the Departmental Manual. Section 25 (codified at 43 U.S.C. § 1351), which addresses “oil and gas development and production,” is particularly relevant for two main reasons. First, it adds a requirement that OCS lessees must submit a detailed DPP for approval by DOI, which, at least once in an area or region, shall be considered a “major Federal action significantly affecting the quality of the human environment” and thus require an EIS.<sup>133</sup> Section 25 establishes extensive consultation requirements for these plans and terms for coordination with coastal zone management provisions. Second, section 25 explicitly excepts the Gulf of Mexico region from its terms. In an exception to *that* exception, Congress added a final subsection (l) that permits the Secretary of the Interior to apply section 25 to leases in the Eastern Gulf of Mexico.<sup>134</sup> The end result is that the OCSLA, as written today, requires Outer Continental Shelf lessees to submit DPPs, and requires that at least once for each area such a plan must be subject to an EIS, except in the Western Gulf of Mexico, where these requirements do not apply.

The legislative history surrounding the OCSLA 1978 amendments shows that competing factors produced these amendments. High energy prices in the late 1970s combined with America’s increasing dependency on foreign oil prompted a call for increased development in undeveloped Outer Continental Shelf areas, and for a quick turnaround on actual production once the leases were issued. As the legislative history explained:

Until December 1975, the OCS leasing program was confined almost exclusively to the Gulf of Mexico. The only exception was a small area leased off southern California in the Santa Barbara Channel. [...] If we are to increase our OCS oil and gas development, leasing must take place in new or “frontier” areas.<sup>135</sup>

The history of the amendments further describes “steps already taken in that direction,” including President Carter’s directive that CEQ study environmental impacts of oil and gas

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<sup>133</sup> See Public Law 95-372, section 25 at subsections(a)(1), (b), and (e).

<sup>134</sup> *Id.* at section 25(l).

<sup>135</sup> Report No. 95-284, the Subcommittee on Energy and Natural Resources Report to Accompany S. 9 (June 21, 1977) at 50.

production on the Atlantic and Gulf of Alaska Outer Continental Shelf, an acceleration in leasing from 1 million acres in 1973 to 10 million acres in 1975, and a DOI Federal Register request for comment on 17 potential Outer Continental Shelf oil and gas leasing areas.<sup>136</sup> Concern also stemmed from the 1969 Santa Barbara oil spill. Congress wanted to ensure increased oversight of development and production, through the plans identified in section 25, with concomitant environmental protection, state and local consultation provisions, and coordination with Coastal Zone Management Act requirements. This was “one of the most important provisions.”<sup>137</sup> Each lessee was required to submit a DPP with “information about the nature and extent of the proposed development, including . . . environmental safeguards and safety standards to be implemented.”<sup>138</sup> The DPP was subject to consultation with the governors, local officials, and the public.<sup>139</sup>

The industry expressed concerns about additional environmental review, stating that it was a “constraint[] to expanded production.”<sup>140</sup> The Government Accounting Office reported that industry representatives demanded “timely, efficient, and effective methods for environmental assessment and realistic assessment of tradeoff[s] between energy needs and environmental hazards.”<sup>141</sup> Indeed, the American Petroleum Institute suggested that the additional NEPA and consultation requirements could add three to six years to the time between leasing and production.<sup>142</sup>

Section 25 manifested something of a compromise. In the OCSLA 1978 amendments, DPPs subject to NEPA and consultation requirements were compulsory in frontier areas, but not in the Gulf of Mexico or the Santa Barbara Channel, where development was well-established.<sup>143</sup> The legislative history includes correspondence illustrating a debate about these issues among Congress, Federal agencies, the Secretary of the Interior, and the industry. In a letter to the Senate Subcommittee on Energy and Natural Resources Chief Counsel dated May 10, 1977, the Secretary of the Interior explained the reasoning behind the exception for lessees in the Gulf and Santa Barbara Channel, but expressed concerns about this exception. He proposed alternative language that would permit DOI to make case-by-case determinations as to whether a DPP might be advisable even in the excepted regions:

One of the most significant changes in S. 9 and H.R. 1614 of existing practice is the detailed review and state participation required prior to approval of development and productions plans. Approval of these plans will in many cases require preparation of an [EIS]. An EIS would be required, for example, at least once prior to major development in any area or region of the OCS. These are addressed in section 25 of the bills. Section 25, however, excludes the Santa Barbara Channel and the Gulf of Mexico from its requirements. We believe the Secretary should have the option, where necessary, of applying the provisions of section 25 in these two areas. The

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 82.

<sup>138</sup> *Id.* at 83.

<sup>139</sup> *Id.* at 82.

<sup>140</sup> *Id.* at 62.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 144-45.

<sup>143</sup> *Id.* at 83.

Santa Barbara Channel and the Gulf of Mexico have been well developed within recent years and the purpose for the general exclusion in section 25 is understandable. There may be, however, more areas of the Channel or the Gulf where application of these provisions is advisable. Therefore, we recommend addition of the following language as section 25(k) . . . .

“An oil and gas lease issued or maintained under this Act which is located in the Gulf of Mexico or the Santa Barbara Channel shall be subject to the provisions of this section if the Secretary determines, pursuant to regulations prescribed by [him], that the likely environmental or onshore impacts of the development and production of such lease make the application of the provisions of this section in the public interest.”<sup>144</sup>

The Secretary of the Interior’s suggested provision was not adopted. In the final version of the OCSLA amendments of 1978, the Santa Barbara exception was removed, and the final subsection (l), ensuring that Department could apply section 25 in the Eastern Gulf of Mexico, was added. The Western Gulf, however, remained an exception to any requirement of a DPP, which in section 25 was “at least once” the subject of an EIS. As the August 10, 1978, Conference Report explained:

The House amendment requires a development and production plan to be submitted for all future leases in a frontier area. The Senate bill provides for a development and production plan to be submitted for all future leases anywhere. The conference report requires a plan to be submitted for all future leases except in the Gulf of Mexico.

The House amendment also requires a plan to be submitted for existing leases in frontier areas, where no oil or gas has been yet discovered. The Senate bill similarly requires a *plan to be submitted for existing leases where there has not yet been a discovery, but exempts the Gulf of Mexico. The conference report adopts the Senate language. Thus, the mandate and specific procedures of this bill that the Secretary of Interior must secure submission, and then review, approve, or disapprove a development and production plan applies to new leases or existing leases where there has not yet been a discovery and does not apply to leases, old or new, in the Gulf of Mexico.*

*The requirements of this new section are specifically made inapplicable to the Gulf of Mexico. However, there are areas in the eastern gulf that have never been developed. . . . The conferees therefore adopted a provision that gives the Secretary of the Interior the discretion to require submission of plan[s]—in accordance with this section—for development and production activities in this area which is defined as being adjacent to the State of Florida.*<sup>145</sup>

The statute, as amended by section 25 of the OCSLA amendments of 1978, remains in effect. Subsection (b) prohibits development of a lease anywhere on the OCS “other than the

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<sup>144</sup> *Id.* at 154-55.

<sup>145</sup> *Id.* at 115-16.

Gulf of Mexico” without a DPP.<sup>146</sup> Subsection (e)(1) requires a DPP everywhere else to be subject to an “at least once” EIS: “At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action.”<sup>147</sup> Likewise, the exception from the exception appears in subsection (l): “The Secretary may require the provisions of this section to apply to an oil and gas lease issued or maintained under this subchapter, which is located in that area of the Gulf of Mexico which is adjacent to the State of Florida.”<sup>148</sup>

Whatever the legislative history may reflect about Congress’s intentions with respect to additional NEPA review in the Western Gulf, the statutory language controls the proper interpretation of the OCSLA 1978 amendments. The statutory language was precise about what must happen outside the Western Gulf OCS region—mandatory DPPs for all leases and an EIS at least once rules the Department can now or could then have imposed in the Western Gulf were less obvious. But the statute did not prohibit NEPA review of Federal action there; it made the requirements of section 25 inapplicable there.

The statute also addresses EPs. The provisions codified at 43 U.S.C. § 1340(c) require lessees to submit EPs and require the Secretary to approve such plans within 30 days of submission. The statute does not address whether the plans qualify as major Federal actions significantly affecting the human environment, nor does it except or address the Gulf of Mexico.<sup>149</sup> In addition, the statute permits the Secretary to require lessees to submit an APD for a permit to drill in accordance with an approved EP.<sup>150</sup>

#### **D. Departmental Manual Offshore Categorical Exclusions**

At the time of the first publication of the Departmental Manual, responsibility for addressing Outer Continental Shelf activity fell to the USGS. The USGS proposed its NEPA compliance procedures, and also its first Departmental Manual CEs, in 1980.<sup>151</sup> From these first proposals, USGS identified all APDs as categorically excluded so long as they were described in an approved EP or DPP.

In the Western Gulf of Mexico, however, USGS also excluded the EP or DPP from the NEPA process.<sup>152</sup> The only explanation for this was a citation to USGS offshore rules implementing the OCSLA amendments of 1978. Without articulating its logic, USGS thus suggested that the statute itself prohibited NEPA review of both DPPs and EPs in the Western Gulf of Mexico. At a minimum, USGS may have believed that construing section 25’s exception for DPPs in that region in any other manner would provoke a controversy. USGS gave no reason for concluding that Western Gulf EPs would be categorically excluded. It proposed the following CEs:

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<sup>146</sup> 43 U.S.C. § 1351(b).

<sup>147</sup> 43 U.S.C. § 1351(e)(1).

<sup>148</sup> 43 U.S.C. § 1351(l).

<sup>149</sup> *Id.*

<sup>150</sup> 43 U.S.C. § 1340(d).

<sup>151</sup> 45 Fed. Reg. 75336 (Nov. 14, 1980).

<sup>152</sup> *See* 516 Departmental Manual 2.4.A(2) (1980).

- (24) Approval of an Application for Permit to Drill (APD) an OCS oil and gas exploration or development well when said well is described in an approved exploration plan, development plan, or production plan. . . .
- (36) Approval of OCS exploration plans in the Western Gulf of Mexico (30 C.F.R. § 250.2). . . .
- (37) Approval of OCS development/production plans in the Western Gulf of Mexico (30 C.F.R. § 250.2).<sup>153</sup>

Proposed CEs 27-30 addressed onshore APDs as CEs. Acknowledging that DPPs likely addressed action that would cause (according to Congress, at least) significant impacts, USGS noted that elsewhere such plans would likely require an EIS. USGS listed as “major actions normally requiring an EIS”:

Approval of an OCS oil and gas development and production plan in a frontier area, when the plan is declared to be a major Federal action in accordance with Section 25 of the OCS Lands Act Amendments of 1978 (30 C.F.R. § 250.34-4).<sup>154</sup>

The proposed USGS Departmental Manual provisions were approved as a final appendix to the Department’s NEPA procedures on January 19, 1981, and published in the Federal Register on January 23, 1981.<sup>155</sup> Without further examining differences between the Western Gulf and other areas of the Outer Continental Shelf, USGS cited the OCSLA amendments of 1978 and 30 C.F.R. § 250. It did, however, reinforce the distinctions in response to comments. One commenter requested a change requiring EISs for all DPPs *except* in the Gulf of Mexico. USGS disagreed and stated that it would “follow the environmental review process established in 30 C.F.R. § 250.34.”<sup>156</sup> USGS explained: “We will, in any area or region of the OCS, *except in the Western Gulf of Mexico*, prepare at least one development/production plan EIS pursuant to subsection 25(e) of the OCS Land[s] Act Amendments of 1978.”<sup>157</sup>

The final appendix revised the order of CEs and separated onshore oil and gas CEs from offshore ones.<sup>158</sup> But in concept the offshore CEs were unchanged. The final CEs appeared in Part 2.4 of the USGS appendix to Chapter 6 of the Departmental Manual. The offshore CEs were as follows:

- (b) Approval of an OCS exploration or development/production plan in the Western Gulf of Mexico (30 C.F.R. § 250.2) which does not require an environmental report from an operator pursuant to item 3 of [Notice to Lessee] 80-6. . . .

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<sup>153</sup> 45 Fed. Reg. 75336-37 (CEs listed in the Chapter 6, draft USGS appendix Part 2.4).

<sup>154</sup> Draft USGS appendix Part 2.3, 45 Fed. Reg. 75336 (Nov. 14, 1980).

<sup>155</sup> 46 Fed. Reg. 7485.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (emphasis added).

<sup>158</sup> Part 2.4.B(2)(a)-(h), at 46 Fed. Reg. 7487 (Jan. 23, 1981) (onshore CEs). Congress subsequently created a “rebuttable presumption” that certain *onshore* APDs are categorically excluded from NEPA review in section 390 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. 42 U.S.C. § 15942(a) and (b). The presumption exists generally if the wells are foreseeable in a NEPA document prepared in the previous five years.

(d) Approval of an APD for an oil and gas exploration or development well when said well and appropriate mitigation measures are described in an approved exploration plan, development plan, or production plan.<sup>159</sup>

The Departmental Manual was amended in 1986, after the establishment of and transfer of oil and gas responsibilities to MMS. MMS addressed oil and gas development in Appendix 10 to Chapter 6, which was approved August 12, 1986. The Departmental Manual was reorganized again on May 27, 2004. Appendices produced by individual bureaus within the Department were assigned chapter numbers, and MMS's CEs were placed in Chapter 15. The critical elements of the original USGS CEs, however, never changed: An APD for any offshore well is categorically excluded from NEPA review so long as it is described in an approved plan for exploration, development, production, or operations; and, in the Western Gulf, such plans are themselves categorically excluded from the NEPA process. Other changes were significant, however. MMS separated the Western from the Central Gulf regions but defined plans submitted for offshore leases within both to be CEs. MMS added the newly created DOCD—the counterpart to the DPP required to be submitted by Gulf lessees—as a CE. And MMS revised the CEs for planning documents to ensure that exceptions were available in particular environmental situations. As currently written, the offshore CEs are as follows:

(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 C.F.R. § 250.2) *except those proposing facilities: (1) In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas; or (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or (3) in areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology. . . .*

(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.<sup>160</sup>

The language italicized above is important. The addition of exceptions to the CEs for particular circumstances where environmental damage could be severe only makes sense if MMS necessarily recognizes that the basis for the CE is not a statutory mandate but rather the CEQ definition of a CE—an action not normally causing an effect on the quality of the human environment. If the reason for the CE is a mandatory statutory exclusion from NEPA, the statute cannot be overridden by a regulatory exception.<sup>161</sup> Previously, USGS had never suggested that approval of an EP or DPP met the definition of a CE. To the contrary, Congress defined approval of a DPP as something normally causing significant impacts that required an EIS at least once. This significant change in the language raises questions about the basis for the CEs.

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<sup>159</sup> Appendix 5 at 2.4.B(3) (1981), published at 46 Fed. Reg. 7487 (Jan. 23, 1981).

<sup>160</sup> 516 Departmental Manual 15.4.C (2004 and 2010).

<sup>161</sup> See 43 C.F.R. § 46.205(d).

It remains true that approval of plans outside portions of the Gulf of Mexico “normally” require an EIS. The OCSLA 1978 amendments continue to be the source of that Departmental Manual provision.<sup>162</sup> Nonetheless, the fact that MMS came to believe the CEs were founded in the CEQ and Departmental definitions was also reinforced elsewhere in the 2004 Departmental Manual, which specifies, consistent with the CEQ regulations and with 43 C.F.R. § 46, that a CE cannot apply to a proposed action if one of the exceptions to the application of CEs pertains. The MMS CEs, reorganized in 2004, state that “the following MMS actions are designated categorical exclusions *unless the action qualifies as an exception under Appendix 2 of 516 [Departmental Manual] 2.*”<sup>163</sup>

This statement is decidedly problematic. First, the statement would not be true, if (as USGS originally suggested) the CE was mandated by law.<sup>164</sup> Second, Chapters 1-6 of the Departmental Manual was revised in 2009 and condensed into four chapters. Nothing in the 2009 version of Chapters 1-4 defines a CE or specifies the exceptions to the application of CEs that were present in Chapter 2 in 2004 when MMS’s Chapter 15 was created.

It is important to note that the remainder of the Departmental Manual, as amended, does properly refer back, as it must, to the superior application of the CEQ regulations and Departmental regulations at 43 C.F.R. § 46. Chapter 1 states that it “supplements the CEQ and DOI regulations and must be read in conjunction with both.”<sup>165</sup> Elsewhere Chapter 1 specifies that in case of any discrepancies among Departmental guidance, “Departmental regulations at 43 CFR 46 and 516 Departmental Manual 1-4 shall govern.”<sup>166</sup> MMS’s Chapter 15, however, became more and more attenuated from its original purpose, MMS regulations, and the Departmental Manual itself. If, in fact, Department regulations govern in the case of a discrepancy between MMS regulations and the Departmental Manual, and the statute is *not* the source of the CEs for EPs, DPPs, and DOCs, then it is questionable whether the CEs are valid in the absence of some reasonable determination showing that approval of such plans is “a category or kind of action that has no significant individual or cumulative effect on the quality of the human environment.”<sup>167</sup>

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<sup>162</sup> 516 Departmental Manual 15.4 (2004 and 2010) (“Major Actions Normally Requiring an EIS”).

<sup>163</sup> Emphasis added.

<sup>164</sup> 43 C.F.R. § 46.205(d).

<sup>165</sup> 516 Departmental Manual 1.1 (2010) (Purpose).

<sup>166</sup> 516 Departmental Manual 1.8.C (2010) (Mandate).

<sup>167</sup> 43 C.F.R. § 46.205.

## E. Departmental Rules Implementing OCSLA Amendments of 1978

USGS promulgated rules applicable to offshore oil and gas operations that exempted lessees in the Western Gulf region from the requirement to prepare a DPP. In regulations incorporated into the CEs adopted by USGS and later MMS, codified at 30 C.F.R. § 250, the Department defined the Western Gulf of Mexico and addressed “compliance with [NEPA].”<sup>168</sup> In this latter regulation, which otherwise addressed NEPA review in association with EPs and DPPs, the Department made clear that USGS must “declare the approval of a development and production plan” in “the OCS, except in the western Gulf of Mexico, to be a major federal action at least once pursuant to subsection 25(e) of the Act.”<sup>169</sup> This regulation was promulgated on September 14, 1979.<sup>170</sup> USGS’s final 1981 CEs cross-referenced these rules.

Later, on several occasions, MMS redesignated and amended these regulations to incorporate extensive and specific requirements for the submission of EPs and DPPs.<sup>171</sup> These changes amended Part 250, which addresses whether the OCSLA amendments of 1978 prohibit the Department from requiring DPPs in the Western Gulf; accordingly. MMS created a “development operations coordination document,” or DOCD, which was a substitute document required only in the Western Gulf region:

Development and Production Plans are not required for leases in the western GOM. For these leases, the lessee shall submit to the Regional Supervisor for approval a Development Operations Coordination Document with all information necessary to assure conformance with the Act, other laws, applicable regulations, lease provisions, or as otherwise needed to carry out the functions and responsibilities of the Regional Supervisor.<sup>172</sup>

References to DPPs include these Gulf of Mexico DOCDs.<sup>173</sup> These regulations specified, as in the OCSLA 1978 amendments, that the Department would evaluate the environmental impacts of a DPP at least once in an EIS, except in the Western Gulf of Mexico.<sup>174</sup>

In 2005, MMS again revised Part 250. Though MMS outlined several of its changes, it explained that the purpose of the amendments was to codify directives to lessees already in place in Notices to Lessees.<sup>175</sup> This rulemaking contained particular requirements for the contents of EPs, DPPs, and also DOCDs: consultation, environmental review, addressing of direct and cumulative effects on onshore and offshore environments resulting from implementation of EPs, DPPs, and DOCDs.<sup>176</sup>

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<sup>168</sup> 30 C.F.R. § 250.34-4.

<sup>169</sup> 30 C.F.R. § 250.34-4(d).

<sup>170</sup> 44 Fed. Reg. 53700.

<sup>171</sup> See 63 Fed. Reg. 29479, 29485 (May 29, 1998).

<sup>172</sup> 30 C.F.R. § 250.204(d)(1) (2000).

<sup>173</sup> 43 C.F.R. § 250.200.

<sup>174</sup> 43 C.F.R. § 250.204(j).

<sup>175</sup> 70 Fed. Reg. 51478 (Aug. 30, 2005).

<sup>176</sup> E.g., 30 C.F.R. § 250.227 (EPs).

In the preamble to this rulemaking, MMS addressed its NEPA processes, including the CEs, in a way indicating that MMS was unaware USGS had established the CEs by citing the OCSLA 1978 amendments; of the fact that DPPs must, at some point, be subject to an EIS; or of the fact that a CE is excepted from the NEPA review process rather than a part of it. MMS correctly explained that it “must comply with” NEPA, and relevant regulations.<sup>177</sup> But it went on to state, “According to NEPA requirements, MMS must prepare an [(EA)] in connection with its review of plans for activities on the OCS . . . . The appropriate MMS Region prepares these analyses for every plan received.” However, the NEPA regulations (40 C.F.R. § 1508.4) do allow agencies to exclude categories of actions from the preparation of an EA or an EIS when agency procedures have demonstrated that these actions—individually or cumulatively—do not have a significant impact on the environment.

MMS follows the procedures outlined in the Departmental Manual<sup>178</sup> to categorically exclude routine OCS lease or unit plans in the Western and Central Gulf of Mexico areas unless certain exceptions are present. Some exceptions pertain to the nature of the proposed activity, and others to the nature of potential environmental impacts that may result from the activity. When MMS processes plans using a Categorical Exclusion Review, the agency reviews the proposed activity and the potential environmental impacts at the proposed site. These actions do not require MMS to prepare an EA, and MMS may limit the information that the lessee/operator is required to submit unless the information is required for compliance with other Federal laws. MMS prepares an EA in its review of plans that meet the criteria of the specified exceptions to the CE criteria or will prepare an EIS. Whether MMS reviews plans through the Categorical Exclusion Review or EA process, the agency requires that environmental impacts be avoided or diminished to an acceptable level through plan amendments or conditions MMS imposes during the plan approval process.<sup>179</sup>

Thus, by 2005, MMS was asserting that DOCDs submitted for portions of the Gulf are categorically excluded from NEPA review because they are “routine” and, by definition, not the sort of action that will have an impact on the quality of the human environment. At the same time, MMS believed that elsewhere planning documents normally require EAs (instead of the “at-least-once” EIS). In addition, MMS regulations at 43 C.F.R. § 250 addressed environmental requirements with respect to DOCDs, and treated them as the same as DPPs. For all planning documents, the regulations compelled submission of documents for purposes of NEPA review, reflecting the view that environmental impacts could result from the approvals. These positions about the nature of effects resulting from approval of planning documents cannot be squared.<sup>180</sup>

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<sup>177</sup> 70 Fed. Reg. 51478 (Aug. 30, 2005).

<sup>178</sup> 516 Departmental Manual 15 (2010).

<sup>179</sup> *Id.* (emphasis added).

<sup>180</sup> The Congressional Research Service’s June 4, 2010 Report on the Deepwater Horizon Oil Spill quotes MMS as stating that CEs are available when “the impacts from the common operations are expected to be negligible to non-existent based upon general information gathered during past environmental analysis.” Congressional Research Service, *The 2010 Oil Spill: The Minerals Management Service (MMS) and the National Environmental Policy Act (NEPA)* at 12 (June 4, 2010). The source of the cited MMS document at CRS’s Appendix C is unclear. To the extent the quote is from an MMS paper or statement, it reflects some confusion about the proper definition of a CE. If, in fact, MMS found during regular NEPA document review that a particular type of agency action routinely had “negligible/non-existent” impacts, it would have been necessary for MMS to officially define such action as a CE based on the CEQ definition as a direct result of such experience with NEPA review, or else continue to perform NEPA review, which presumably would result in FONSI. But no such event occurred. The CEs for DPPs and EPs

### III. NEPA Issues Surrounding the Macondo Well

#### A. Question 1—Categorical Exclusions

MMS concluded that actions in approving the Exploration Plan and APD for the Macondo well fell within CEs, and therefore were not subject to NEPA. By CEQ’s definition, these actions were therefore in a “category of actions which do not have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of the regulations (§ 1507.3) and for which, therefore, neither an [EA] nor an [EIS] is required. . . .”<sup>181</sup> Because the idea that drilling a deepwater well on the Outer Continental Shelf is the sort of action that “does not have a significant effect on the human environment” appears, with hindsight, to be inherently illogical, the question arises whether BLM properly applied the CE procedures.

DOI’s precise stance on these topics is unclear. Soon after enactment of the OCSLA 1978 amendments and the 1978 CEQ regulations, USGS created CEs in the Western Gulf. It categorically excluded from NEPA review all exploration, development, and production plans, and applications for permits to drill (so long as they were addressed in an approved plan). In doing so, USGS never identified such plans as actions, as defined by the CEQ or DOI, that are within the category of actions not having a significant impact on the human environment. Instead, by citing the OCSLA 1978 amendments, USGS implied that the law compelled CEs. That this happened in 1980-81 (as the Departmental Manual provisions moved from draft to final) is not surprising given the legislative history of the OCSLA 1978 amendments. Section 25 of the OCSLA 1978 amendments, however, addressed DPPs but excepted the Western Gulf region from its application. This is not the same thing as saying that Federal action in that region would be exempt by law from NEPA review.

By regulation, MMS later created a new planning document for approval in the Gulf—a DOCD—thus seemingly acknowledging that section 25 of the OCSLA 1978 amendments did not define the Gulf as excluded from the regulation requiring planning documents. If that is the case, by analogy it seems unlikely that NEPA exemption for the region is compelled by section 25.

As the years passed, MMS appeared to lose sight of how the CEs came into being. Without questioning whether they *were* properly defined as CEs, MMS presumed that they were properly defined, and applied exceptions to the CEs in locations where particular types of environmental effects might be felt. Thus, MMS came to act as if the CEQ and Departmental definitions of an action, which do not normally have an effect on the human environment, properly applied to approvals of EPs, DPPs, and DOCDs in the relevant Gulf regions, while enforcing regulations that made clear that the same approvals in other regions could not meet that definition and required EAs and EISs.<sup>182</sup> It seems difficult to sustain such competing views

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were put in place for the Western Gulf region almost 30 years ago, when the first NEPA Departmental Manual was established.

<sup>181</sup> 40 C.F.R. § 1508.4.

<sup>182</sup> 30 C.F.R. § 250. See also MMS, *Oil and Gas Leasing, Exploration & Development Process*, Figure 1 (depicting EAs and EISs for EPs and DPPs).

of the environmental impacts of the same planning documents based solely on lines drawn on a map. MMS has never precisely addressed the justification for its employment of CEs. By employing terms such as “Categorical Exclusions Review” for the process to decide whether an agency action should fall within a CE found in the Departmental Manual, the inference could be drawn (and may have been intended by MMS) that the Categorical Exclusion Review was a third level of NEPA review rather than a plain *exemption from* NEPA review—the quintessential definition of a CE in CEQ’s regulations.<sup>183</sup>

With respect to the Macondo well, MMS conducted NEPA review at the lease planning stage and the lease sale stage. Relevant to the use of CEs, however, MMS considered an EP for Lease 206 (the lease on which the Macondo well was drilled), an amended EP, and four APDs. In every case, MMS applied CEs.<sup>184</sup> There are several problems with these decisions by MMS.

First, it is not clear why, 29 years into the consistent agency declaration of CEs, these leases were defined as CEs in the first place. The rationale behind the CE for the exploration plans was not explained. While it has been suggested that USGS categorically excluded EPs in the Gulf because of the 30-day approval requirement of the OCSLA,<sup>185</sup> this time frame applies throughout the Outer Continent Shelf under that statute. Yet, EPs in other regions are subject to NEPA under 43 C.F.R. § 250, as discussed by MMS in the preamble to its 2005 rules. The finding that the Gulf region EPs are exempt from NEPA review seems to be inexplicable.

Second, to the extent that the agency came to believe the OCSLA 1978 amendments did not compel the CEs, there seems to be no basis for the implicit conclusion that approvals of EPS, DPPs, or DOCDs in the Gulf region are actions that do not have an impact on the human environment. The same planning documents were found to require NEPA review in agency rules at 30 C.F.R. § 250, and, therefore, without a sensible explanation for the difference, the continued employment of CEs in the Gulf region on this basis is suspect.

Third, the APDs are subject to CEs when the well to which they pertain is subject to an approved planning document. While it does not constitute NEPA review, a CE is a product of NEPA and CEQ regulations. The fact that an action is the subject of another NEPA document, and therefore does not require duplicate NEPA review, is an effect of tiering. Defining APDs as categorically excluded from NEPA (except in the context of Energy Policy Act CEs, which are identified by law) is a questionable extension of the tiering concept. Further, to the extent that defining approval of APDs as categorically excluded derives from the notion that it is unnecessary to do another NEPA review because one was already done for the planning document, this logic does not and cannot apply when the planning document was not subject to NEPA in the first place. No NEPA review can be tiered to a non-NEPA document, and a CE is not a NEPA document. Accordingly, application of the CEs for APDs to any geographical place, though long-standing, has inherent logical flaws; application in the Western Gulf of Mexico

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<sup>183</sup> 40 C.F.R. § 1500.4(p).

<sup>184</sup> See Council on Environmental Quality, *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 CEQ*, Figure 2 (Aug. 16, 2010) [hereinafter CEQ Report].

<sup>185</sup> 43 U.S.C. § 1340.

where the planning documents were never subject to NEPA review at all would seem unsustainable.

Fourth, even assuming that the planning documents were properly defined as categorically excluded from NEPA review, and the CEQ and Departmental regulations were the source for their designation as CEs, it follows that MMS was obligated by regulation to question whether any of the exceptions applied based on extraordinary circumstances.<sup>186</sup> Without reproducing the list of exceptions, it does not seem clear that MMS seriously undertook the task of examining this list carefully. The notion that the largest oil spill in American history resulted from a blowout on a well that had been defined by the agency as exempt from NEPA because it is an action “which do[es] not have a significant effect on the human environment”<sup>187</sup> indicates that the application of the CEQ definition was off-kilter and the exceptions were not sufficiently examined. The concern goes beyond after-the-fact logic. The exceptions to the application of a CE include actions which “[h]ave highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.”<sup>188</sup> The May 2000 Gulf of Mexico Deepwater Operations and Activities EA expressly discussed the potential for a deepwater spill and the length of time needed to control one (60-120 days); it concluded that “further investigation is needed” to evaluate the consequences of a deepwater blowout.<sup>189</sup> Given the actual events after the blowout took place, it is clear that such investigation was never completed. How a deepwater EP escaped NEPA review under the exception to CEs is difficult to understand.

## **B. Question 2—Consultation**

Since the blowout, much has been made of the fact that MMS did not fully appreciate or address comments of sister or local agencies in the NEPA process. Although MMS was not obligated to agree with other agencies’ comments, MMS was obligated to respond in the EISs to which the Macondo well approvals ultimately were tiered, and to “assess and consider comments . . . and respond” in one of the manners required in 40 C.F.R. § 1503.4. The question of whether MMS properly considered agency and public comments with respect to the lease sale EA should be answered on a case-by-case basis to determine whether MMS considered comments to the extent practicable.<sup>190</sup> In both cases, to the extent MMS addressed comments, its response was required to be well-reasoned, and could not be arbitrary.

The basis for much of the concern regarding the adequacy of consultation and coordination stems, as with the concern for the adequacy of NEPA review at all, from the employment of CEs for the EPs and APDs for the Macondo well. MMS’s general regulations regarding planning documents are nonspecific as to the kind of NEPA review anticipated and do not clarify how consultation will occur, instead leaving that question of compliance with the CEQ and Departmental NEPA rules. In addition, the regulations call for documents in

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<sup>186</sup> 43 C.F.R. § 46.205; 46.210; 46.215.

<sup>187</sup> 40 C.F.R. § 1508.4

<sup>188</sup> 43 C.F.R. § 46.215(d). Though MMS employed CEs for the EP, MMS’s operational regulations defined deepwater development as “non-conventional.” 30 C.F.R. § 250.286.

<sup>189</sup> CEQ Report at Chapter II, pages 16-17.

<sup>190</sup> 40 C.F.R. § 1501.4(b).

association with DPPs and DOCDs that are not, by rule, provided to the public, and so, even with NEPA compliance, it is unclear what the public or local agencies may see in the context of NEPA review. It does seem, however, that, to the extent the agency considered the action to be categorically excluded from NEPA review, no NEPA compliance would take place at all that would effectuate consultation. Accordingly, the question of MMS's compliance with consultation requirements in the context of CEs is strictly derivative. If the use of the CE was appropriate, then consultation in association with NEPA review is not at issue because there was no NEPA review.

MMS regulations governing the planning documents presume the applicability of all relevant laws, including NEPA, and do not address the CEs for planning documents in the Gulf. They do not precisely duplicate NEPA regulations, either those prepared by CEQ or DOI. For example, with respect to environmental compliance, the regulations require the lessee to submit an environment impact analysis (EIA),<sup>191</sup> for purposes of allowing MMS to “comply[] with the National Environmental Policy Act (NEPA) of 1969 and other relevant Federal laws.”<sup>192</sup> With respect to consultation, the regulations address the *lessee's* obligation to inform MMS of the lessee's consulting history: “Your EIA must include a list of agencies and persons with whom you consulted, or with whom you will be consulting, regarding potential impacts associated with your proposed exploration activities.”<sup>193</sup> The requirements for DPPs and DOCDs are the same. The lessee must submit an EIA for these planning documents,<sup>194</sup> for purposes of allowing MMS to comply with, *inter alia*, NEPA.<sup>195</sup> And, as with EPs, the regulations specify that the lessee must describe its own consultation activities with respect to DPPs or DOCDs.<sup>196</sup> In addition, deepwater operators must submit a “deepwater operations plan” that “provides sufficient information for MMS to review a deepwater development project, and any other project that uses non-conventional production or completion technology.”<sup>197</sup> The deepwater operations plan must be accompanied by a “Conceptual Plan” for the project.<sup>198</sup> The regulations at 30 C.F.R. § 250.286 through 250.295 detail the requirements for these documents, but contain no requirements pertaining to notification of the public, consultation with local agencies, or compliance with NEPA. The deepwater operations plan and Conceptual Plan do not substitute for but do supplement the DPP or DOCD. Similarly, the lessee submitting a DPP or DOCD must also submit a conservation information document.<sup>199</sup> Once again, these regulations do not describe NEPA or consultation.

From these regulations, one must surmise that MMS, when preparing appropriate NEPA reviews for EPs and DPPs or DOCDs, will conduct appropriate consultation. Much information, however, is submitted in association with DPPs and DOCDs—with the deepwater operations plans and conservation information documents—that is not, by rule, publicized to interested parties, and thus would only be publicly available if provided in association with a properly-

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<sup>191</sup> 30 C.F.R. § 250.227.

<sup>192</sup> 30 C.F.R. § 250.227(a)(3).

<sup>193</sup> 30 C.F.R. § 250.261(d).

<sup>194</sup> 30 C.F.R. § 250.261.

<sup>195</sup> 30 C.F.R. § 250.261(a)(3).

<sup>196</sup> 30 C.F.R. § 250.261(d).

<sup>197</sup> 30 C.F.R. § 250.286(a).

<sup>198</sup> 30 C.F.R. § 250.286(b).

<sup>199</sup> 30 C.F.R. § 250.296-250.299.

prepared NEPA review document. If the DPP or DOCD is only considered as an EA, such information would be provided “to the extent practicable.” By contrast, material that is a part of the DPP or DOCD is subject to specific review and consultation provisions of the MMS operations rules.

This discussion of rules relating to planning documents, and associated NEPA review, is only of tangential interest in the Western Gulf, where the agency employs CEs for their approval. The MMS operations regulations are silent about CEs, or how their use affects MMS’s decisions with respect to consultation. In the preamble to the 2005 rulemaking, MMS explained that it might choose to limit the material the lessee would otherwise be required to submit if MMS decided that a plan approval is categorically excluded. In the case of a CE, “MMS may limit the information that the lessee/operator is required to submit unless the information is required for compliance with other Federal laws.”<sup>200</sup> Accordingly, in the case of a CE, it is not entirely clear that MMS would even demand compliance with requirements of the operations rules related only to NEPA.

In conclusion, because consultation with respect to an EA or EIS is governed by NEPA rules promulgated by CEQ and the DOI, and is only necessary “to the extent practicable” for EAs, it is not at all clear what information is normally available to the public or to appropriate local agencies, how it is disseminated, or whether there is an opportunity to consult or comment in association with an EA prepared for a planning document. But in the Western Gulf of Mexico, where planning documents are categorically excluded by Departmental Manual, as indicated in Notices to Lessees, no NEPA consultation would take place at all, and MMS may, by Notice to Lessees, limit the information required to be submitted by the lessee.

### **C. Question 3—Reasonably Foreseeable Impacts**

The NEPA documents that sought to examine the risk of an oil spill considered the possibility of a blowout the size of the 2010 event to be so unforeseeable that these documents did not address it. Although MMS did not examine a type of blowout of the nature that occurred as a “worst case scenario” in the relevant NEPA documents, BP apparently did look at a worst case discharge for the purpose of its Oil Spill Response Plan, which is an appendix to the EP.<sup>201</sup> In this document, BP addressed a potential spill of up to 300,000 barrels per day. Possibly because the EP to which the Oil Spill Response Plan was appended was identified as a CE, this projection was never included in any NEPA study by MMS. As a purely NEPA question, then, this paper asks whether sufficient information was available to justify a more detailed analysis by MMS of a large-scale oil spill in relevant NEPA analyses on grounds that such an impact was reasonably foreseeable.

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<sup>200</sup> 70 Fed. Reg. 51478 (Aug. 30, 2005).

<sup>201</sup> See 30 C.F.R. § 250.213. This rule requires a lessee to append the following to its EP: “Blowout scenario. A scenario for the potential blowout of the proposed well in your EP that you expect will have the highest volume of liquid hydrocarbons. Include the estimated flow rate, total volume, and maximum duration of the potential blowout. Also, discuss the potential for the well to bridge over, the likelihood for surface intervention to stop the blowout, the availability of a rig to drill a relief well, and rig package constraints. Estimate the time it would take to drill a relief well.”

Several factors undercut MMS's decision to address potential spills in its NEPA documents (Programmatic EIS, Multi-Sale EIS, and Lease Sale 206 EA), all the while eschewing any discussion of a blowout of a significant nature before the blowout took place. To the extent such a discussion would be found to be legally required, the location of the discussion would have been in an EIS to which subsequent documents are tiered. Conversely, a FONSI for an EA, such as the Lease Sale 206 EA, may have been unwarranted if a spill of the size projected in the Oil Spill Response Plan had been addressed in an EA. If a blowout of this magnitude was reasonably foreseeable for purposes of the Oil Spill Response Plan, it is hard to imagine how such a spill would not be a reasonably foreseeable impact to be examined under NEPA.<sup>202</sup> MMS appears to have relied on geographic boundaries (in this case a geopolitical boundary) for classifying the foreseeability of impacts of the Ixtoc spill off the coast of Mexico in 1979. Whether a repeat event was reasonably foreseeable would depend on an explanation why what happened in 1979 could not happen again, or why it was too "speculative" or unduly remote.<sup>203</sup>

This question is now academic. Whatever was true about what was reasonably foreseeable to consider by way of effects before the Macondo blowout, it would be arbitrary hereafter for MMS to undertake NEPA review without considering the sort of effects that resulted from the Macondo well blowout as reasonably foreseeable. The question of what is reasonably foreseeable has two components. What must the agency consider? And does it compel an EIS?<sup>204</sup> While it can be debated whether the likelihood of another blowout of the magnitude of the Deepwater Horizon spill is so small that an EIS is unnecessary, this might be a hard sell absent the inclusion of specific mitigation measures capable of reducing the risk below that necessary to trigger an EIS. Absent such mitigation, MMS will likely be required at some stage of its decision-making process to prepare an EIS of some nature that considers such effects, to which other NEPA documents may be tiered.

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<sup>202</sup> 40 C.F.R. § 1508.8(b).

<sup>203</sup> 40 C.F.R. § 1502.22; Metropolitan Edison, 460 U.S. at 774-75.

<sup>204</sup> *Inland Empire Public Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1988) ("Both connected actions and unrelated but reasonably foreseeable future actions may result in cumulative impacts that can trigger an EIS."); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988).