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OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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M-37061

Memorandum

To: Director, Bureau of Safety and Environmental Enforcement
Acting Director, Bureau of Ocean Energy Management

From: Solicitor

Subject: Bureau of Safety and Environmental Enforcement's Obligations to Consider
Applications for Permits to Drill/Modify in a Timely Manner

I. Introduction

The Bureau of Safety and Environmental Enforcement (BSEE) and the Bureau of Ocean Energy Management (BOEM) have asked me to advise them on whether BSEE must issue a determination on a complete application for permit to drill (APD) and application for permit to modify (APM)¹ and, if so, whether such a determination must be made within a specific timeframe. I conclude, based on the Administrative Procedure Act (APA) and relevant case law, that lessees likely have a reasonable expectation that their complete applications will receive a timely determination and that the government has a duty to issue a timely determination. I further conclude, based on case law and BSEE's current practices, that 75 days is an appropriate and legally defensible benchmark for issuing timely determinations on APDs and APMs, absent a compelling justification for a longer period.

II. Background

A. Outer Continental Shelf Development Process

The outer continental shelf development process consists of four stages: (1) planning for a five-year national oil and gas program (National Program); (2) preleasing activity and lease sale; (3) post-lease exploration; and (4) development and production. Before engaging in any exploratory drilling, an operator must first submit an exploration plan and receive approval from BOEM. Likewise, before engaging in any development drilling, an operator must submit a development and production plan, or, in areas of the Gulf of Mexico not adjacent to Florida, a development operations coordination document, and receive approval from BOEM. Once approved, or oftentimes contemporaneously, an operator must submit and receive approval from BSEE of an APD, which focuses on the specifics of particular wells and associated equipment. BOEM or

¹ Generally, references in this memorandum to APDs should be read to also include APMs.

BSEE must ensure that the agency actions at each stage comply with the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and any other applicable laws.

To comply with NEPA, BOEM conducts tiered environmental analyses to support each relevant stage with an appropriate degree of analysis.² See 40 C.F.R. §§ 1500 *et seq.* At the lease sale stage, BOEM prepares an environmental impact statement (EIS) analyzing the potential impacts of anticipated activities on the leases, including exploration, development, and decommissioning. At the exploration stage, BOEM typically prepares site-specific environmental assessments (EAs) analyzing the impacts of specific exploration plans. Similarly, at the development and production stage, BOEM typically prepares site-specific EAs for development and production plans. Finally, for APDs submitted at either the third or fourth stage (e.g., for exploratory drilling or for well completion and production), BSEE tailors its NEPA review based on the nature of the activity for which approval is requested and may tier to analyses from prior stages as appropriate. If the requested activity is already described in an underlying plan and in a prior NEPA analysis, then BSEE may prepare a Determination of NEPA Adequacy, or if there is an available categorical exclusion, then BSEE may perform a Categorical Exclusion Review. If the requested activity is not described in the underlying plan and a revised or supplemental plan is required, then BOEM may prepare further NEPA analysis for the revised or supplemental plan, if existing analysis is not adequate.

To comply with the CZMA, BOEM and the relevant coastal state agencies undertake a consistency determination review process for proposed federal agency activities, such as holding a lease sale. 16 U.S.C. § 1456(c)(1)(C). Consistency reviews also occur at the plan approval stages (e.g., the third stage for exploration plans, and the fourth stage for development and production plans). 16 U.S.C. § 1456(c)(3)(B). At this plan stage, the operator submits a consistency certification to the relevant coastal state for its concurrence. Once an operator has received a state concurrence or such concurrence is presumed due to the passage of time, the CZMA does not require any further actions at the permitting stage for activities described in the plan. However, if an APD triggers the requirement to submit a supplemental plan, the CZMA's implementing regulations require consistency review with the affected states for that supplemental plan. 15 C.F.R. § 930.76; 30 C.F.R. §§ 550.285(c), 550.267.

While the Outer Continental Shelf Lands Act (OCSLA) and its implementing regulations provide timeframes within which BOEM must review and make a decision on an exploration plan or a development and production plan, no such timeframes are provided for BSEE's review and decision on APDs. See 43 U.S.C. § 1340(c)(1) (providing that the Secretary must approve (if warranted) an exploration plan within 30 days of submission); 30 C.F.R. § 550.233 (providing that BOEM will take action on an exploration plan within 30 days of submission); 30 C.F.R. § 550.270 (providing timeframes for decisions on development and production plans and development operations coordination documents). At least one court has found that, "[a]lthough OCSLA grants the Secretary discretion to decide whether to review permit applications, . . . once

² The D.C. Circuit has twice ruled that NEPA is not ripe for review at the National Program stage, as there is no irreversible and irretrievable commitment at this stage. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 599 (D.C. Cir. 2015); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 480–82 (D.C. Cir. 2009). The lack of such commitment has been relied on in other D.C. Circuit cases to conclude no NEPA analysis is required. See *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999).

the Secretary exercises that discretion, the government is under a duty to act by either granting or denying a permit application within a reasonable time.” *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 336 (E.D. La. 2011).

B. Administrative Procedure Act

Section 555 of the APA provides that “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Section 706(1) of the APA requires a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1). The APA defines “agency action” as “the whole or a part of an agency rule, order, license, sanction [or] relief” *Id.* § 551(13). And the term “license” includes “the whole or a part of an agency permit” *Id.* § 551(8).

C. Current Practice

Even without an express maximum timeframe within which it must decide on APDs, it is BSEE’s practice nevertheless to approve more than 90% of APDs within 70 days from receipt of the application, and routinely within 30 days. BSEE has informed me that the primary reason some application determinations take longer than 70 days is because the application was missing information. Based on BSEE’s average timing to process APDs, BOEM included a stipulation for all lease parcels in Gulf of Mexico Regionwide Lease Sale 256 (November 18, 2020) that would require BSEE to make a decision on complete APDs not later than 75 days after they are received. BOEM also recently made a similar amendment available to existing Gulf of Mexico lessees.

III. Analysis

Based on lessees’ contractual expectations, BSEE’s duty under the APA and OCSLA, and the case law construing these, as described in this section, I conclude that lessees have a reasonable expectation that their complete applications will receive a timely determination and that the government has a duty to issue a timely determination.

A. Lessee’s Expectation

In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), the Supreme Court considered whether oil companies were entitled to restitution of payments to the government for leases off the coast of North Carolina that the Department of the Interior (Interior) breached following passage of the Outer Banks Protection Act, which prohibited Interior from approving any Exploration Plan until a statutorily created panel reported to the Secretary and provided that in no event could Interior approve any Plan for 13 months. This 13-month timeframe is in contrast to OCSLA’s requirement for Interior to take action on an Exploration Plan within 30 days of its submission if the Plan meets specified criteria. 43 U.S.C. § 1340(c)(1). Ultimately, North Carolina objected to the companies’ CZMA consistency certification and the Secretary of Commerce rejected the companies’ request to override that objection. *Mobil Oil*, 530 U.S. at 613. The Supreme Court held, *inter alia*, that:

[T]he lease contracts gave the companies more than rights to obtain approvals. They also gave the companies rights to explore for, and to develop, oil. But the

need to obtain Government approvals so qualified the likely future enjoyment of the exploration and development rights that the contract, in practice, amounted primarily to an *opportunity* to try to obtain exploration and development rights in accordance with the procedures and under the standards specified in the cross-referenced statutes and regulations. *Under these circumstances, if the companies did not at least buy a promise that the Government would not deviate significantly from those procedures and standards, then what did they buy?*

Id. at 620–21 (first emphasis in original, second emphasis added). The Court went on to note that “lengthy delays matter, particularly where several successive agency approvals are at stake. . . . [T]he incorporated procedures and standards amounted to a gateway to the companies’ enjoyment of all other rights. To significantly narrow that gateway violated material conditions in the contracts.” *Id.* at 621. The Court held that the United States breached its contracts and had to return the companies’ money. *Id.* at 624.

With respect to APDs, the applicable statutory scheme includes OCSLA’s policy for expeditious development, though there is no timeframe—statutory, regulatory, or otherwise—that would be clearly incorporated. *See* 43 U.S.C. § 1340(d) (providing simply that, “The Secretary may, by regulation, require any lessee operating under an approved exploration plan to obtain a permit prior to drilling any well in accordance with such plan.”). Nevertheless, the reasoning in *Mobil Oil* could conceivably be extended to assert that lessees bid on leases with the expectation that BSEE’s timing practices will not deviate substantially from those in place at the time of the lease sale. Lessees may therefore be able to assert a non-frivolous argument that they bought an implicit promise that BSEE would not dramatically alter its APD processing timelines, which are driven, at least in part, by the statutory policy for expeditious development. *But see Statoil Gulf of Mexico LLC*, 42 O.H.A. 261, 305 (May 31, 2011) (“IBLA has recognized that, when subordinate officials have taken actions that were favorable and thus provided no basis for appeal . . . the issue is properly treated as a matter of first impression, since the issue has ‘never reached the level of administrative appeal at which authoritative departmental determinations on behalf of the Secretary are made.’ When an appeal raises a matter of first impression with IBLA, it ‘may certainly take cognizance of actions taken by Departmental officials in other cases, [but its] determination of [an] appeal is governed only by the pertinent statutory and regulatory provisions.’” (internal citations omitted)).

B. Government’s Duty

As described above, section 555 of the APA, 5 U.S.C. § 555(b), requires the government to conclude a matter presented to it within a reasonable time, while section 706(1) of the APA, *id.* at § 706(1), requires a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed” without reference to the existence of a contractual relationship with the government. OCSLA’s declaration of congressional policy, moreover, contemplates that the outer continental shelf should be made available for “expeditious” development. 43 U.S.C. § 1332(3).

It is apparent that Interior has a duty under the APA to make a determination about complete APDs within a reasonable time. Indeed, not acting on permit applications would be contrary to OCSLA’s “command that drilling development be ‘expeditious’ . . . and the APA’s command that a permit must be processed ‘within a reasonable time.’” *Ensco*, 781 F. Supp. 2d at 336–37.

Accordingly, while BSEE has discretion as to the outcome, BSEE must render a determination on a complete APD within a reasonable time.³

C. Determining a Reasonable Timeframe for a Decision

There is no bright line rule to determine what constitutes a reasonable amount of time for an agency to complete a required action. But, as noted above, BSEE's current practice is to decide on almost all complete APDs within 70 days, and routinely within 30 days. BSEE's internal metrics reflect that practice. Indeed, leases issued pursuant to Lease Sale 256 contain a stipulation committing BSEE to a 75-day timeline to decide on complete APDs and future leases will presumably contain the same stipulation. As noted above, BOEM recently offered a similar amendment to clarify the timing practice for existing lessees.

The only district court to have addressed this issue directly held that the "thirty-day action period Congress imposed on the approval of drilling exploration plans, and the fact that Congress, through OCSLA, commands development to be expeditious, as a national policy, indicate that Congress gave its blessing to a time frame for action [on drilling permits] no longer than thirty days." *Enesco*, 781 F. Supp. 2d at 339. But while the *Enesco* court found the 30-day statutory timeline for exploration plans to be informative with respect to APDs, a different court could find that Congress's specificity in limiting the time to consider the former weighs against any inference about congressional intent to impose a deadline on the latter. I do not consider *Enesco*'s 30-day time limit to be a binding ceiling. By contrast, the so-called "TRAC factors" set forth by the U.S. Court of Appeals for the District of Columbia Circuit, and applied by other circuits as well, provide a useful perspective. For agency actions where there are no statutory deadlines, the D.C. Circuit has noted that "[t]here is no per se rule as to how long is too long to wait for agency action." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (citing *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992)). The D.C. Circuit has therefore established several factors to consider when determining whether an agency delay warrants mandamus compelling the agency to act. These are:

- (1) the time agencies take to make decisions must be governed by a "rule of reason;"
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
- (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
- (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) ("TRAC") (internal citations omitted); see also *In re Pub. Emps. for Env'tl Resp.*, 957 F.3d 267, 273–74 (D.C. Cir. 2020) (applying TRAC factors in finding mandamus relief warranted for unreasonable agency

³ The U.S. Constitution's Fifth Amendment takings clause may also be implicated. Having concluded that the government has a statutory duty to issue determinations on APDs, the Constitutional question is beyond the scope of this memorandum, but may warrant future consideration.

delay). Courts have noted that the most important factor is the rule of reason and observed that “[r]epeatedly, courts in this and other circuits have concluded that ‘a reasonable time for agency action is typically counted in weeks or months, not years.’” *In re Nat. Res. Def. Council, Inc. v. Wheeler*, 956 F.3d 1134, 1139 (9th Cir. 2020) (citation omitted) (10-year delay by the Environmental Protection Agency was unreasonable). The inquiry is fact-specific in nature, however. *See Khan v. Johnson*, 65 F. Supp. 3d 918, 928–29 (C.D. Cal. 2014) (reviewing, in the immigration context, a range of delays and reasonability determinations). BSEE’s past and current practice in reviewing and making determinations on APDs weighs heavily in favor of concluding that a 75-day time limit is reasonable for complete applications absent compelling circumstances justifying additional delay.

The other *TRAC* factors reflect mixed applicability. In relation to the second *TRAC* factor, Congress has not provided a timetable for agency action on APDs, though OCSLA identifies expeditious development as a purpose. 43 U.S.C. § 1332(3); *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (“[W]hen an agency is required to act—either by organic statute or by the APA—within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable.”). Regarding the third *TRAC* factor, delayed APD determinations may affect human health and welfare in an attenuated manner, such as in connection with economic development and employment, but not directly. As to the fourth *TRAC* factor, BSEE is in the best position to determine whether it has higher or competing priorities. I understand that other priorities are not a common cause of delay at this time, but it is possible that competing priorities will need to be weighed in the future. With regard to the fifth *TRAC* factor, the interests prejudiced by the delay are significant; APDs and APMs are submitted in connection with leases for which lessees have already paid the government significant sums of money and in which, as discussed above, lessees may be found to have obtained at least implicit government promises to act on requests to develop those leases. Indeed, leases may expire if a paying well is not drilled within the primary term. Finally, the sixth *TRAC* factor is simply an admonition that the court need not find impropriety to conclude that agency action has been unreasonably delayed.

IV. Conclusion

Given the current practice of issuing almost all determinations within 70 days, and the application of the *TRAC* factors—particularly the rule of reason—I conclude that lessees likely have a reasonable expectation that their complete APDs and APMs will receive a timely determination, and, more importantly, that the government has a duty to issue a timely determination, and that delays could result in litigation risk and a potential adverse ruling absent a compelling reason that justifies the delay. Based on past and present agency practice, I further conclude that, absent a compelling reason documented in BSEE’s decision file demonstrating that a longer time period is necessary, 75 days is an appropriate and legally defensible benchmark for issuing timely determinations on complete APDs and APMs and therefore ensuring compliance with the agency’s duty to act in a timely manner.



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