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NATURAL RESOURCES DEFENSE COUNCIL

December 16, 2004

Minerals Management Service
Attn: Suspension – EA Comments
Office of Environmental Evaluation
770 Paseo Camarillo
Camarillo, CA 93010-6064

To the Minerals Management Service:

On behalf of the Natural Resources Defense Council and the League for Coastal Protection, we write to comment on the draft environmental assessments ("EAs") concerning the Minerals Management Service's ("MMS's") proposal to grant suspensions of production or operations for 36 oil-and-gas leases off the central California coast.

The draft EAs on the proposed suspensions violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. First, MMS illegally has refused to consider the environmental consequences of future exploration and development activities on the leases. Second, because significant impacts may result from the activities proposed during the terms of the proposed suspensions, MMS cannot rely on a suite of EAs but must instead prepare a comprehensive environmental impact statement ("EIS") on the proposed suspensions. Third, MMS has failed to consider a reasonable range of alternatives. Fourth, the draft EAs fail to present an adequate environmental analysis of the alternatives under consideration, including the alternative of denying the requested suspensions and allowing the leases to expire. Fifth, MMS has improperly segmented its pending lease-suspension decisions into a series of individual EAs, in an apparent effort to avoid preparing an EIS, and has failed to conduct an adequate analysis of the cumulative impacts of granting suspensions for 36 leases in total.

In order to comply with NEPA, MMS must prepare a comprehensive EIS that fully analyzes the proposed suspensions and future exploration and development activities on the leases.

I. NEPA Requires Consideration of Future Exploration and Production Activities as Part of MMS's NEPA Analysis of the Proposed Suspensions.

MMS has violated NEPA by failing to consider future exploration and development activities in its NEPA analysis on the proposed suspensions. The suspensions requested by the leaseholders here are closely tied to future exploration and development activities on the leases. Indeed, suspensions cannot be granted here unless they are necessary "to facilitate proper development" of the lease in question. 43 U.S.C. § 1334(a)(1)(A). The suspensions proposed here are tied especially closely to exploratory drilling intended to commence on some of the leases at the expiration of the suspensions. Given these relationships between

the proposed suspensions and future exploration and development activities, NEPA's requirements for comprehensive, forward-looking environmental analysis demand that future exploration and development activities be analyzed as part of MMS's NEPA analysis on the proposed suspensions. Since these future exploration and development activities present substantial risks to the environment, including risks of oil spills during oil drilling or transport, MMS must prepare an EIS on the proposed suspensions.

A. Future Exploration and Development Activities Must Be Analyzed As Indirect Effects of the Proposed Suspensions.

NEPA requires evaluation of the indirect effects of an agency action so long as those effects are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Future exploration and development activities are a reasonably foreseeable consequence of the lease suspensions under consideration by MMS here. Indeed, making such future activities possible is the very purpose of the requested suspensions. As the Ninth Circuit held earlier in this case, "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production." California v. Norton, 311 F.3d 1162, 1173 (9th Cir. 2002). In order to grant the suspensions requested by these particular leaseholders, MMS must demonstrate, inter alia, that the suspensions are necessary "to facilitate proper development" of the leases in question. 43 U.S.C. § 1334(a)(1)(A).[1] Thus, the very purpose of the suspensions and the legal criteria for issuing them demonstrate the close nexus between the suspensions and subsequent exploration and development activities. As such, these future exploration and development activities are reasonably foreseeable consequences of granting the proposed suspensions and must be considered in MMS's NEPA analysis of the suspensions.

The suspensions at issue here are linked especially closely to exploratory drilling planned for the near future on several of the leases. MMS acknowledges that the acoustic surveys planned for certain Aera and Samedan leases during the requested suspensions are intended "to determine geohazards associated with the potential drilling of delineation wells" and that the biological surveys planned for certain Aera leases are intended "to identify hard bottom habitat that could be impacted by the potential drilling of delineation wells." Aera EA at 1-2. See also Aera's Request for Suspension for Point Sal Unit at 4 (Aug. 20, 2004) ("To prepare a revised [exploration plan] ..., Aera would have to acquire shallow hazards data" during the proposed suspension period.). In other words, these activities are directly linked to the exploratory drilling that would follow the proposed suspensions and are intended to facilitate that drilling. From a temporal standpoint, the separation between the proposed suspensions and the planned exploratory drilling is virtually non-existent. Aera's suspension requests, for example, indicate that the requested suspensions would end on the very same day on which exploratory drilling would commence on at least some of the leases. See, e.g., id. at 7. In an obvious effort to make the proposed suspensions look as insignificant as possible, MMS wrote Aera last

[1] MMS also must demonstrate that granting the requested suspensions is "in the national interest ..." 43 U.S.C. § 1334(a)(1)(A).

month to "clarify" that "drilling operations" themselves will not occur during the proposed suspension periods themselves. Letter from Peter Tweedt, MMS, to T. E. Enders, Aera Energy (Nov. 1, 2004) (attached to Aera EA as App. 3). The agency's stated rationale for this "clarification" is revealing. According to MMS, since "drilling is an activity that will hold the unit" in which the drilling is occurring, "a suspension is not needed" where drilling is occurring. Id. The implications of this rationale, though, are that a suspension is needed up until the exact point that drilling actually commences and that the proposed suspension would be in place until the very minute or even second before the exploratory drilling commences. Among their many other flaws, MMS's EAs fail to explain how much time would elapse between the end of the proposed suspension periods and the commencement of exploratory drilling on the leases. We specifically ask MMS to state the amount of time that would elapse between the end of the proposed suspension periods and the beginning of exploratory drilling. The record indicates already, though, that little time would elapse between the end of the proposed suspensions and the beginning of delineation drilling. This close temporal relationship between the suspensions and the planned drilling is further evidence that this exploratory drilling is a reasonably foreseeable effect of granting the proposed suspensions.

In its draft EAs, MMS offers two reasons for refusing to consider future exploration and development activities in its NEPA analysis on the suspensions. First, MMS notes that those future exploration and development activities "will not occur while the [leases] are under suspension ..." E.g., Aera EA at 3-3. That fact is legally irrelevant to MMS's duty to analyze those activities here, since NEPA requires future, indirect effects to be considered in a NEPA analysis so long as those effects are reasonably foreseeable. The governing NEPA regulation specifically requires consideration of indirect effects that occur "later in time" than the immediate action under review, so long as those "later in time" indirect effects are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Thus, the fact that exploration and development activities will occur after the close of the proposed suspension periods does not exempt MMS from addressing these future activities in its NEPA analysis of the suspensions. Also, from a factual standpoint, MMS is at best splitting hairs when it stresses that exploration and development activities will occur after the suspension periods, since the record indicates that exploratory drilling will occur on at least some of the leases immediately upon the close of the suspension periods. See supra.

Second, MMS notes that future exploration and development activities would "require separate review and approval by MMS and other appropriate agencies before they may occur." E.g., Aera EA 3-3. That fact is also legally irrelevant to MMS's duty to consider these future activities now, since the law is clear that future environmental-review obligations do not release an agency from its NEPA obligation to consider reasonably foreseeable future effects of the agency action directly at hand. For example, in Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984), the Ninth Circuit considered the NEPA obligations that apply to a lease sale pursuant to the Outer Continental Shelf Lands Act ("OCSLA"). The court held: "The lease sale itself does not directly mandate further activity that would raise an oil spill problem, [citation omitted],

but it does require an overview of those future [oil spill] possibilities" under NEPA. Id. at 616 (emphasis added). The court then specifically relied on the EIS's analysis of a potential oil spill of 10,000 barrels or more as providing a sufficiently detailed analysis of oil-spill issues to satisfy NEPA at that stage of the oil-leasing process. Id. In other words, the court held that a NEPA analysis on the sale of an oil lease, a sale which did not mandate actual production of oil from the lease and which would be followed by additional NEPA compliance at the exploration and development stages, had to analyze the consequences of an oil spill during potential future oil-production operations on the lease – just not in as much detail as the plaintiffs there argued was required at that stage of the leasing process. Thus, MMS's obligation to conduct additional environmental review before allowing future exploration and development activities on the leases does not excuse the agency from addressing those future activities in its NEPA analysis of the proposed suspensions. "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done." Kern v. United States Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002).

Tellingly, MMS did analyze future exploration and development activities in the EISs it prepared on the lease sales for these leases decades ago. See, e.g., Bureau of Land Management, Final EIS for OCS Lease Sale 53 (Sept. 1980) (analyzing, inter alia, effects of oil spills, onshore and offshore manmade structures, vessel traffic, noise, effluents, and air emissions). It was equally true then that future exploration and development activities on the leases would "require separate review and approval by MMS and other appropriate agencies before they may occur" – but that fact did not interfere with MMS's obligation to analyze those future exploration and development activities in its lease-sale EISs. Moreover, the Ninth Circuit has analogized the lease suspensions in this case to a lease sale, stating: "Although a lease suspension is not identical to a lease sale, the very broad and long term effects of these suspensions more closely resemble the effects of a sale than they do [certain] highly specific activities ..." California v. Norton, 311 F.3d at 1174. Just as MMS was required to consider future exploration and development activities in its NEPA analysis of the proposed lease sales for these leases, MMS must analyze future exploration and development activities in its NEPA analysis of the proposed suspensions for these leases.

It is especially important that MMS update the analysis from its lease-sale EISs about future exploration and development activities on the leases in light of the important circumstances that have changed since that analysis was performed many years ago. The administrative record for California v. Norton is replete with examples of such changed circumstances. For example, the threatened southern sea otter has extended its range over the past 20 years into areas within and nearby many OCS leases while continuing to struggle to rebuild. See Letter from California Coastal Commission to Secretary of the Interior and Director of MMS, July 27, 1999 (3 AR 0746). Other examples of circumstances that have changed since the original lease sale EISs include: changes in laws that protect ocean and coastal environments, including the Oil Pollution Act of 1990; new oil spill contingency standards; the listing of federal endangered marine

species; and the establishment of new National Marine Sanctuaries, including the Channel Islands and Monterey Bay National Marine Sanctuaries. See Letter from Senators Barbara Boxer and Dianne Feinstein and Congresswoman Lois Capps to Secretary of the Interior, July 28 1999 (3 AR 0748). MMS's limited discussion in its EAs of the effects of the proposed suspension activities on ocean life is insufficient to meet NEPA's requirements, especially in light of these changes.

The state of the region's fisheries is another example of significantly changed circumstances since the initial environmental reviews were conducted for these leases. Federal fisheries management was in its nascent stage at the time of the lease sale EISs. For example, the initial fishery management plan ("FMP") for Pacific Coast Groundfish was not approved and implemented until October 5, 1982. Prior to that time, management of Pacific groundfish was regulated by the states of Washington, Oregon, and California. Since 1999, eight of the 24 species of Pacific groundfish that have been fully assessed have been declared overfished. Moreover, it was not until the 1996 Sustainable Fisheries Act amendments to the Magnuson-Stevens Fishery Conservation and Management Act that FMPs were required to identify essential fish habitat, actively seek to reduce bycatch, implement conservation measures to prevent overfishing, and to promote rebuilding of already overfished species. MMS makes no mention of the impacts of the proposed suspensions on these overfished species or on the efforts towards attaining more sustainable fisheries, as federal law now requires.

Future exploration and development activities are a reasonably foreseeable indirect effect of the lease suspension proposed by MMS here. As such, they must be fully analyzed under NEPA in an EIS on the proposed suspensions.

B. Future Exploration and Development Activities Must Be Analyzed as Cumulative Effects of the Proposed Suspensions.

NEPA requires evaluation of the cumulative impact "which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (emphasis added). For similar reasons to those stated above, future exploration and development activities are "reasonably foreseeable future actions" that MMS must evaluate within its NEPA review of the suspensions themselves. Courts have consistently enforced the requirement to consider cumulative impacts in analogous situations. See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) (requiring Forest Service to include cumulative impact assessments for all future road density amendments within the EAs for each individual timber sale); see also Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (requiring BLM to quantify the cumulative emissions from potential development of BLM land in Las Vegas Valley); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1434 (C.D. Cal. 1985) (criticizing the Corps of Engineers for having "tunnel vision" for not originally considering the secondary and cumulative effects of approving a permit to place large boulders along the banks of the Colorado River as part of a residential development project). MMS is obligated to consider the cumulative impacts

of post-suspension exploration and development activities as part of the review of the suspensions themselves. Such impacts are reasonably foreseeable, especially where several of the suspension requests include specific plans to spud delineation wells on the very day the suspensions expire.

"Nor is it appropriate to defer consideration of cumulative impacts to a future date." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998) (holding that Forest Service timber sale EIS must consider the cumulative impacts on old growth habitat of all reasonably foreseeable future timber sales in the area in addition to the impacts of the sale being reviewed). MMS may not shirk its responsibilities under NEPA to consider the impacts of exploration and development activities by asserting that such review will occur at a later stage. In Neighbors of Cuddy Mountain, the Ninth Circuit held that the cumulative effect of future timber sales in the region must be considered regardless of the fact that such sales were unrelated to the immediate sale being reviewed. In this case, future exploration and development activities on these leases are not merely related to the grant of the suspensions but are utterly dependent on them. NEPA requires that MMS analyze these cumulative impacts at this stage in the process.

C. The Proposed Suspensions and Future Exploration and Development Activities are Connected Actions.

MMS' failure to consider the effects of post-suspension activities violates NEPA's requirement that the environmental effects of "connected actions" be considered together in a comprehensive environmental review. "Connected actions" are those that:

i. Automatically trigger other actions which may require environmental impact statements.
ii. Cannot or will not proceed unless other actions are taken previously or simultaneously.
iii. Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). NEPA does not permit "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir.1985) (requiring Forest Service EIS to consider both a federal road and the federal timber sales that the road would facilitate); see also Save the Yaak Committee v. Block, 840 F.2d 714, 719-721 (9th Cir. 1988) (applying analysis from Thomas to conclude the same). MMS is attempting to do what courts interpreting NEPA have explicitly held cannot be done: fail to consider the effects of actions connected to the more limited action it chooses to review.

The Thomas court concluded "that the road construction and the contemplated timber sales are *inextricably intertwined*, and that they are 'connected actions.'"

Thomas, 753 F.2d at 759 (emphasis added). The lease suspensions being sought in this case and the future exploration and development activities they will enable are similarly intertwined. MMS explains that "the suspensions would allow . . . time to conduct shallow hazards and biological surveys . . . and to conduct administrative activities leading to the submittal of revised [exploration plans]." See, e.g., Aera EA at ES-2. MMS also explains that the denial of the suspensions "would result in the expiration of the leases" and "the need for the proposed action would not be achieved." See, e.g., Aera EA at 2-6. Because the proposes suspensions are connected in this way to subsequent exploration and development activities, those subsequent activities must be evaluated as part of NEPA compliance on the suspensions.

II. The Activities Planned During the Proposed Suspensions May Cause Significant Environmental Impacts and Must Be Analyzed in an EIS.

In order to sustain its decision to prepare an EA rather than an EIS on the proposed suspensions, MMS must produce "a convincing statement of reasons" showing why the impacts of the proposed suspensions are insignificant. National Parks & Conservation Ass'n v. Babbitt, 241 F.2d 722, 730 (9th Cir. 2001). If "the agency's action may have a significant impact upon the environment, an EIS must be prepared." Id. (emphasis in original; internal quotation marks omitted). Put another way, if "there are substantial questions whether a project may have a significant effect on the environment," the agency must prepare an EIS. Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004) (emphasis in original; internal quotation marks omitted). Because the actions planned during the suspension period may cause significant impacts, because MMS has failed to produce a convincing statement of reasons showing why these impacts must be insignificant, and because there are at the very least substantial questions about whether the suspensions may result in significant impacts, MMS must prepare an EIS on the suspensions.

Even without considering the exploration and development activities intended to take place after the proposed suspensions, MMS has failed to present convincing statements of reasons showing why the suspensions cannot have a significant impact on the environment. In particular, MMS has failed to show that the acoustic surveys planned for the Aera and Samedan leases cannot have a significant environmental impact. Since evidence within and apart from the EAs indicates these acoustic surveys may cause significant impacts, NEPA requires MMS to prepare an EIS on the proposed suspensions.

While MMS seeks to minimize the effects of the acoustic surveys, a bare recitation of the facts shows those effects to be substantial. MMS is proposing to operate acoustic surveys during each day of a 14-17 day period over an area of 10 square miles or more in size. During this lengthy and extensive operation, the lessees would fire an air gun repeatedly under water, approximately every 7-8 seconds, over and over again. "Air-guns release a volume of air under high pressure, creating a sound pressure wave that is capable of penetrating the seafloor to determine substrata structure." National Research

Council, Ocean Noise and Marine Mammals 58-59 (2003).[2] The air gun MMS proposes to use for the acoustic surveys here is an extremely powerful noise source. MMS acknowledges the air gun has the capacity to generate geotechnical information at depths of up to 1,475 feet below the sea floor. Over the lengthy survey period, the air gun would be fired for up to 36 hours total, with the individual noises again coming every 7-8 seconds, over and over again.

MMS acknowledges that the air gun produces sound at 218 decibels and would yield received sound levels by marine mammals and fish of 160-190 decibels or more, depending on distance from the source. Aera EA at 2-5, 4-19. The EAs do an extremely poor job of placing these very loud noise levels in context. For example, while the EAs make no mention of it, the air gun's sound level appears to be as loud or louder than a jet airplane. See, e.g., National Research Council, For Greener Skies: Reducing Environmental Impacts of Aviation (2002). The potential for adverse consequences from such a loud noise source seems obvious, particularly since the noise would be repeated in abrupt shots spaced seconds apart over many hours.

There is limited data about the effect of underwater noise on sea life, a fact that by itself argues for preparing an EIS here, as we discuss below. What is known is that marine mammals and fish are sensitive to underwater noise, which can travel large distances underwater; that they rely on their noise perception for activities that include communicating between individuals; and that there is evidence showing damage to underwater life from noise sources on the sound order of the air gun. See, e.g., Ocean Noise and Marine Mammals, supra; S.L. Nieukirk et al., Low-frequency whale and seismic airgun sounds recorded in the mid-Atlantic Ocean, J. Acoust. Soc. Am. 115 (2004); D.A. Croll et al., Bioacoustics: Only male fin whales sing loud songs, Nature 417 (2002): p. 809 (observing that rise in noise levels from seismic surveys, oceanographic research, and other activities could impede recovery in fin and blue whale populations); P. Tyack, Acoustic communication under the sea, in Animal Acoustic Communication: Recent Technical Advances 163-220 (S.L. Hopp et al. eds., Springer-Verlag 1998); Hearing by Whales and Dolphins (W.L. Au, et al. eds., Springer-Verlag 2000); A. Popper, Effects of anthropogenic sounds on fishes, 28 Fisheries 24-31 (Oct. 2003). MMS's EAs contain an inadequate discussion of the adverse effect of human-caused noise on underwater life. Among other things, they fail to discuss with specificity the potential impacts on all sensitive species in California waters, including but not limited to the 34 species of marine mammals.

The EAs do admit that the acoustic surveys "have the potential for harassing or harming protected marine mammals and sea turtles" and that "[a]coustic harassment" by the planned surveys "could potentially occur" for certain whale species. Aera EA at 4-26, 3-6. Given the potential seriousness of these impacts and the vulnerable nature of many marine mammal and sea turtle species, this potential for harmful impacts is more than enough to justify preparation of an EIS. MMS, however, relies principally on two

[2] We hereby incorporate by reference this and all other publications and documents cited in this comment letter.

arguments in an effort to avoid preparing an EIS. First, MMS argues that the sound levels marine mammals and sea turtles would experience from the acoustic surveys do not rise to the level of significant impacts. Second, MMS claims its mitigation measures will be sufficient to guarantee an absence of significant impacts from the acoustic surveys. Neither of the arguments are adequately supported in the EAs, and neither provides an adequate basis for refusing to prepare an EIS.

MMS apparently assumes that exposing marine mammals or sea turtles to received sound levels of 160 decibels or less cannot cause a significant impact on these animals. E.g., Aera EA at 4-15, 4-22. Nowhere does MMS support this critical assumption in its EAs. Next, MMS concludes that a received sound level of greater than 160 decibels would constitute a "taking" of a marine mammal under the Marine Mammal Protection Act but that such a taking would constitute only an "insignificant, adverse impact." Id. at 4-15, 4-22. Nowhere does MMS explain why such harassment of a depleted marine mammal species necessarily constitutes an insignificant impact.[3] Outside the EAs, there is considerable evidence that tends either to undercut these assumptions or to suggest they rest on an inadequate basis. The National Academy of Sciences reports that "[s]hort- and long-term effects on marine mammals of ambient and identifiable components of ocean noise are poorly understood," that "marine mammals have been shown to change their vocalization patterns in the presence of background and anthropogenic noise," and that potential effects of underwater noise "include changes in hearing sensitivity and behavioral patterns, as well as acoustically induced stress and impacts on the marine ecosystem." Ocean Noise and Marine Mammals, supra, at 3-6. The EAs discuss none of these issues adequately, and the presence of these potential effects means that significant impacts may result from granting the proposed suspensions.

The inadequate discussion of these issues in the EAs suffers from many flaws, including improper efforts by MMS to incorporate previous analyses by reference as well as citations to documents that do not appear in the EA's list of references and hence are unidentifiable. See, e.g., Aera EA at 4-19. In addition, MMS's analysis of hearing impacts on marine mammals appears to rely on an older (1991) study about the sound level that could cause immediate damage to marine mammals. The EAs omit an adequate discussion of issues such as the relevance of newer studies; the issue of non-immediate hearing injury; and the issue of harm to things other than an individual's

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[3] The EAs present a set of "significance criteria" that MMS apparently relies on to determine whether an impact is significant or not. See, e.g., Aera EA at 4-15. These so-called "significance criteria" are extremely poorly supported: MMS has not come close to showing that impacts less severe or different than these criteria are necessarily insignificant. In addition to being unsupported substantively, the criteria are vague and seemingly arbitrary. For example, MMS presents as one criterion for marine mammals "any change in population that is likely to hinder the recovery of a species" but fails entirely to explain what "hindering" means in this context. Similarly vague is the criterion that discusses "[d]isplacement of a major part of the population ..." What constitutes a "major" part of a population in this context? Another criterion sets a seemingly arbitrary threshold of harm to at least 10 percent of the habitat in an area before that habitat harm is deemed significant. In addition, the criteria fail to address behavioral changes that could have an adverse effect on individual members of a species – for example, underwater noise diverting individual animals into less-ideal habitat than they would have occupied in the absence of the acoustic surveys.

hearing acuity. The EAs also fail to discuss adequately the issue of masking, which seems especially relevant since the air gun is louder than many marine mammal vocalizations. The inadequate analysis that is presented in the EAs relies on vague characterizations and hedge words that fail to present an adequately informative picture of the suspensions' likely impact. See, e.g., Aera EA at 4-23 ("It is believed that most protected species would avoid the ... air gun sound by making minor adjustments in their positions ... . The shallow hazard surveys are not likely to ... displace the population from a major part of either feeding or breeding areas or migratory routes for a biologically significant length of time.") (emphasis added).

MMS admits that marine mammals exposed to received sound levels of 180 decibels or greater "may be harassed or harmed; it is possible that acoustic injury may lead to stranding and mortality and potentially significant impacts depending on the number of animals involved." Aera EA at 4-22. MMS claims, though, that its mitigation measures for the acoustic surveys "make impacts on marine protected species unlikely and negligible." Id. The agency's analysis of the efficacy of these mitigation measures falls well short of NEPA's requirements, and MMS's EAs fail to demonstrate that the mitigation measures exclude the possibility of significant impacts from the acoustic surveys.

MMS relies heavily on a mitigation measure relating to the seasonal timing of the acoustic surveys. E.g., Aera EA at 4-22. According to MMS, restricting the surveys to the period between mid-October and mid-December will render the impacts of the surveys insignificant. There are many problems with MMS's reliance on this mitigation measure, and MMS discusses none of these problems adequately in its EAs. First, the mitigation measure does not actually limit the acoustic surveys to this period but instead allows them to take place at another time so long as doing so would have "negligible impact to large whales," Aera EA at 4-25, a criterion that is not developed or defined in any way and that also ignores potential increased impacts to animals other than large whales. Second, the mitigation measure is presented as having been selected because it will assertedly benefit four species of whales as well as all sea turtles, but MMS fails to explain why it is focusing on impacts to these four whale species to the exclusion of other marine mammals, including other marine mammals that are listed as threatened or endangered under the Endangered Species Act. Third, MMS claims this mitigation measure is valuable because the October-December period "lies outside, or on the cusp of," the "predictable periods of occurrence" for four whale species in the area. The problems with this assertion go well beyond MMS's use of the vague phrase "on the cusp of," the meaning of which is nowhere explained in the EAs. According to the EAs, gray whales (one of the four species specified by MMS) actually are at their peak abundance in the area in December. Aera EA at 4-12. Aera's suspension requests indicate that gray whale migration occurs between November and May. E.g., Purisima Point Suspension Request 8 (April 20, 2004) (attached to Aera EA as App. 1). Humpback whales, another of the four species assertedly benefited by the seasonal "restriction," are regularly present in the area in October, November, and December. Aera EA at 4-12. Fourth, there is no support in the EAs for MMS's claim that sea turtles are not located in the area between

October and December. Indeed, the EAs admit that little is known about the distribution of sea turtles in the Southern California Bight. Aera EA at 4-14. MMS has failed to discuss the effects of this mitigation measure adequately and to substantiate the agency's claims of environmental benefit from it.

Many of the rest of the mitigation measures on which MMS relies are poorly analyzed in the EAs. For example, MMS claims the lessees will use observers to detect any marine mammals that enter within a half mile of the air gun and to shut down the air gun if an animal enters that area. Nowhere in the EAs does MMS discuss the feasibility of observers accurately and effectively identifying all marine protected species that could enter within a half mile of the air gun, particularly species such as sea turtles, which are relatively small and capable of remaining submerged (and hence undetected by observers) for long periods of time. Other mitigation measures suffer from other serious problems, none of which are adequately discussed in the EAs. For example, the mitigation measure about "ramping up" the air gun only requires the lessees to do so "as possible," Aera EA at 4-25, a key point that escapes adequate discussion in the EAs.

The EAs' discussion of impacts on sea turtles is notably poor, particularly in light of evidence showing adverse reaction by sea turtles to noise from air guns at the levels at issue here. See Aera EA at 4-21 to -22. Similarly poor is the documents' analysis of impacts on the southern sea otter, a threatened species. MMS's no-effect assertions are based on the agency's belief that otters tend to locate close to shore and on a single 1983 study concluding that sea otters were not disturbed by an air gun. Aera EA at 3-5 to -6. This inadequate analysis ignores the ability of sound to travel underwater; potential adverse impacts to sea otter food sources; and all relevant post-1983 data.

Just as serious as the potential impacts on marine mammals from the acoustic surveys are the potential impacts on fish, but the EAs' analysis of these impacts is extremely poor and falls far short of NEPA's requirements. The National Marine Fisheries Service ("NMFS") has designated eight species of Pacific groundfish as overfished, and MMS admits that all eight of these species "could be present in the survey areas," Aera EA at 4-29. The EAs contain no recognition of the current overfished condition of these species and no analysis of the impacts on these specific species of the acoustic surveys planned for the Aera leases. To make matters worse, it appears that the acoustic surveys would be located in or near rockfish conservation areas established by the Pacific Fishery Management Council and NMFS for these species, yet the EAs omit any discussion of these potential impacts. In order to comply with NEPA, MMS must analyze with specificity the potential impacts of the acoustic surveys on all eight overfished Pacific groundfish species.

The EAs' general discussion of impacts on fish from the acoustic surveys is conclusory and inadequate and fails to take adequate account of the latest science. MMS admits that "[a]coustic energy has the potential for direct damage (lethal, potentially lethal, or sub-lethal effects) to any fish or shellfish life stage," Area EA at 4-30, yet the EAs present only a thin discussion of these potential impacts on fish, a discussion which

consumes less than two pages and focuses much more on eggs and larvae than later life stages. Among other things, the EAs attempt to dismiss a recent study by McCauley et al. by arguing that fish disturbed by underwater noise would likely seek to move away from the noise source. See Aera EA at 4-31 to -32. That argument fails to recognize that fish within range of the air gun could well suffer damage before they could move away from the noise source. The EAs pretend that a fish would need to be within 20 feet of an air gun in order to suffer damage, but that is not what the best and most recent science says. As the National Academy of Sciences has recently noted, McCauley's studies "show that exposure to air-guns with a maximum received level of 180 [decibels relative to 1 micropascal] over 20-100Hz causes major damage to sensory cells of the ear in at least one species" and suggest that "air-guns damage sensory hair cells in fishes." Ocean Noise and Marine Mammals, supra, at 107. Thus, in contrast to MMS's claim that fish would have to be within 20 feet of the air gun to suffer harm, McCauley's studies show that fish located 261 feet or more from the air gun in MMS's planned acoustic surveys could suffer damage. The National Academy also notes that McCauley's studies "could also have implications for marine mammals exposed to air-guns, particularly since the hair cells in fishes and marine mammals are so similar to one another;" that additional scientific data "suggest that sounds may change the behavior of fish;" and that behavioral changes in fish "could have an adverse impact on the higher members of a food chain [such as marine mammals] and therefore have long-term implications despite the fish not being killed or maimed." Id. at 107-08. MMS's EAs analyze none of these issues or data adequately and fail to present a convincing statement of reasons why the impacts of the acoustic surveys cannot be significant for fish and other animals that depend on fish for food. To the extent MMS's conclusions of insignificant impact on fish rest on the so-called "significance criteria" the agency presents in the EAs, these significance criteria are insufficiently supported, conclusory, and arbitrary in significant respects. For example, these criteria claim that fish displacement is significant only if 10 percent or more of the population is displaced, Aera EA at 4-30, but the EA fails entirely to explain the basis for this 10-percent threshold.

NEPA's implementing regulations establish a set of significance factors that help determine whether substantial questions exist about an agency action causing a significant impact, thus necessitating preparation of an EIS. 40 C.F.R. § 1508.27(b). See also Anderson v. Evans, 371 F.3d at 488 (discussing "significance factors"). Several of these significance factors are implicated by the proposed suspension and thus require preparation of an EIS. For example, one such factor asks whether there are "[u]nique characteristics of the geographic area, such as proximity to ... ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). The areas subject to the proposed acoustic survey are located in the habitat of sensitive marine mammals and overfished species, are in or near conservation areas established for overfished Pacific groundfish species, and are near other ecologically critical areas such as the Channel Islands National Marine Sanctuary and the Monterey Bay National Marine Sanctuary. Another significance factor assesses "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.28(b)(4). "Agencies must prepare [EISs] whenever a federal action is 'controversial,' that is, when substantial questions are raised

as to whether a project may cause a significant degradation of some human environmental factor or there is a substantial dispute about the size, nature, or effect of the major federal action." National Parks & Conservation Ass'n, 241 F.3d at 736 (internal citation, ellipsis, brackets, and quotation marks omitted). While MMS maintains that the proposed suspensions cannot affect the environment significantly, the draft EAs, this letter, and the evidence cited therein raise substantial questions about environmental degradation from the proposed acoustic surveys and make out a substantial dispute about the effect of the surveys. A third significance factor is satisfied where "the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). If one thing is clear here, it is that "remarkably few details are known about the characteristics of ocean noise, whether it be of human or natural origin, and much less is understood of the impact of noise on the short- and long-term well-being of marine mammals and the ecosystems on which they depend." Ocean Noise and Marine Mammals, supra, at 1. The same is true for effects of ocean noise on fish. See, e.g., id. at 10 ("effects of anthropogenic noise on fish and other nonmammalian species .. are largely unknown"). Another significance factor considers "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat ..." 40 C.F.R. § 1508.27(b)(9). MMS admits that numerous threatened and endangered species may be affected by the proposed acoustic surveys.[4]

Other significance factors may be affected by the proposed suspensions, but any one is sufficient to require preparation of an EIS. Because there are at least substantial questions about whether the proposed suspensions may have a significant impact on the environment, MMS must prepare a comprehensive EIS on the proposed suspensions. The draft EAs contain an inadequate environmental analysis and cannot meet MMS's obligations under NEPA.

III. MMS Fails to Consider a Reasonable Range of Alternatives.

NEPA requires MMS to consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). The Council on Environmental Quality regulations describes this section as the "heart" of the environmental review process, explaining that agencies must "rigorously explore and objectively evaluate all reasonable alternatives" and explain why alternatives were eliminated. 40 C.F.R. § 1502.14. The same requirement applies no matter whether the agency is preparing an EIS or an EA. 40 C.F.R. § 1508(9)(b). MMS failed to consider a reasonable range of alternatives to the proposed action of granting the suspensions.

MMS' statement of need for the proposed action is improperly narrow and vague. "The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms." City of Carmel-By-The-Sea v. United States Dep't. of Transp., 123 F.3d 1142, 1155 (9th

[4] The EAs fail to address specifically the critical habitat of listed species that may be affected by the proposed suspensions.

Cir. 1997). MMS unreasonably attempts to define the need here as a period of time to allow for the updating of exploration plans ("EP") and development and production plans ("DPPs"). This thinly veiled attempt to narrow the scope of the project and, in turn, the required NEPA analysis is belied by MMS' own admission that the goal beyond the suspension period is "to drill exploratory (delineation) wells . . . and to plan for the development and production" of the leases. Aera EA at 1-2. MMS must acknowledge that the suspensions are not merely an opportunity for administrative revisions to EPs and DPPs but are indispensable linchpins in the development of the leases. After all, absent the suspensions, the leases would expire and so too would any near-term opportunity for oil and gas development in the area. Accordingly, MMS must broaden the stated need and conduct an appropriate review of alternatives and impacts commensurate with the true nature and scope of the proposal. The actual need for MMS to act here is to decide whether or not to extend these old leases and, if so, under what terms.

MMS must look at every reasonable alternative within "the range dictated by the nature and scope of the proposal." See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995) (quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992)). Accordingly, MMS is obligated to consider other reasonable alternatives that fit squarely within the scope of deciding whether to extend the leases and, if so, under what terms. These include:

- Granting the suspensions but disallowing the acoustic and biological surveys and any other impacting activities;
- Granting the suspensions only for those leases and/or units in which exploratory drilling is being immediately planned.
- Denying the suspensions while adopting measures to encourage energy-use efficiency and the development of renewable energy sources.

IV. MMS Fails to Present Adequate Environmental Analysis of the Alternatives Under Consideration.

NEPA requires that agencies discuss "the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). Environmental impacts are defined to include "both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8(b). MMS's cursory and conclusory description of Alternative 2 fails to discuss adequately the environmental impacts of denying the requested suspensions. MMS summarily concludes that "no environmental impacts would result." Aera EA at 5-1. NEPA requires that MMS explore and discuss the environmental benefits of not granting the suspensions and allowing the leases to expire. These benefits include but are by no means limited to: increased health and productivity of fisheries in the region; expanded opportunities for endangered and threatened marine mammals, sea turtles, and birds; enhanced recreational activities; and decreased risk of oil spills and other hazardous events.

V. MMS Fails to Analyze Adequately the Cumulative Impacts of the Proposed Suspension Activities.

NEPA requires MMS comprehensively to analyze the cumulative effects of all suspension-related activities "when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. The cumulative impacts analysis must contain "quantified and detailed information," Neighbors of Cuddy Mountain, 137 F.3d 1372 at 1379-80, must provide a "useful analysis of the cumulative impacts," Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 810 (9th Cir. 1999), and must not "defer consideration of cumulative impacts to a future date when meaningful consideration can be given now," Kern, 284 F.3d at 1075.

MMS improperly chose to segment its cumulative impacts analysis amongst separate EAs and, within each EA, amongst the separate sections considering impacts to various natural resources. Such "perfunctory" analysis is wholly inadequate. See Kern, 284 F.3d at 1075 (finding BLM's analysis of the spread of root fungus from timber project inadequate for failure to consider the cumulative impact of future timber sales and other activities outside of the project area). By so doing, MMS avoids any comprehensive consideration of the cumulative effects of the suspension activities together with all other "reasonably foreseeable" activities, as required by NEPA.

A. MMS' Inadequately Analyzes Cumulative Impacts to Marine Mammals and Sea Turtles.

MMS' cumulative impacts analyses are cursory and inadequate. "To 'consider' cumulative effects, some quantified or detailed information is required." Neighbors of Cuddy Mountain, 137 F.3d at 1379-80 (holding that Forest Service timber sale EIS analysis failed to adequately consider how the sale would cumulatively impact and reduce old growth habitat). The information provided by MMS in its cumulative impacts analysis is neither quantified nor detailed.

For example, the brief section concerning suspension-related impacts to protected species of marine mammals and sea turtles merely lists the various sources of "anthropogenic harm" to such species. E.g., Aera EA at 4-27. Instead of analyzing how the impacts resulting from suspension-related activities might exacerbate or compound harm being caused from other sources, as NEPA requires, MMS simply concludes that "there is no evidence that these activities have resulted in significant impacts on marine mammals and sea turtle populations." Id. MMS then concludes that because the individual impacts of the proposed shallow water surveys are themselves negligible, the cumulative impacts attributable to the combined Aera and Samedan surveys "are not believed to be more than negligible." E.g., Aera EA at 4-27. NEPA requires more than the rote addition of purportedly negligible activities. Indeed, the whole purpose of the consideration of cumulative impacts is to avoid "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but

which collectively have a substantial impact." Native Ecosystems Council, 304 F.3d at 894 (requiring Forest Service EIS to consider both a federal road and the federal timber sales that the road would facilitate) (quoting Thomas, 753 F.2d at 758). Indeed, as MMS acknowledged in the FEISs for the sale of some of these very leases, "cumulative impacts on marine and coastal resources may exceed a simple arithmetic addition of one impact with another due to synergistic effects which remain unknown or unsuspected at the present level of knowledge." BLM, Final EIS for OCS Lease Sale 53 (Sept. 1980), at 4-128. MMS has failed to follow that admonition here.

MMS admits that "overall vessel traffic" off southern California "is increasing," resulting in "increasing levels of noise and disturbance" underwater. Aera EA at 4-27. In a remarkable non-sequitur, MMS claims no significant impacts from these activities because "marine mammal populations in California waters have generally been growing in recent decades." Id. The fact that populations have "generally" been growing does not exclude the possibility of significant cumulative impacts, either because some populations may be doing less well than others or because marine mammals populations, many of which are in poor condition, might do markedly better in the absence of these cumulatively adverse impacts.

B. MMS' Inadequately Analyzes Cumulative Impacts to Fish Resources, Managed Species, and Essential Fish Habitat.

Unlike its assessment of cumulative impacts to marine mammals – where MMS fails to acknowledge any source of significant impacts to marine mammals (suspension-related or otherwise) – MMS does acknowledge that the cumulative effects of pollution, overfishing, and other human sources "has had a major influence on fish resources, managed species, and EFH." E.g., Aera EA 4-32 to -33. MMS also acknowledges that "that acoustic energy/sound from an air gun can temporarily or irreversibly damage hearing in fish which could lead to sub-lethal behavioral changes not conducive to survival." Id. at 4-31. Nonetheless, MMS describes these effects as mere "incremental contribution[s]" relative to the myriad other sources of adverse effects to fish, managed species, and EFH. Id. Without any further discussion, MMS concludes that "the additional effect of the impact-producing agents related to [the suspension-related activities] are not expected to add significantly to cumulative impacts on fish resources, managed species, and EFH." Id. at 4-33. MMS cannot merely disregard the impacts of the suspension activities as insignificant just because they represent a relatively small portion of the overall threat to fish resources. See 40 C.F.R. § 1508.7 ("Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time.").

Another deficiency with MMS' cumulative impacts analysis related to fish impacts is its failure even to mention, much less adequately consider, the combined effects of both the Aera and Samedan shallow water surveys. Neither the Aera EA nor the Samedan EA considers the cumulative effects on fish of all of the shallow water surveys together. See Aera EA at 4-32 to -33; Samedan EA 4-32 to -33. MMS must

consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). In Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214-1215 (9th Cir.1998), the Forest Service was found to have violated this requirement by failing to analyze five distinct timber sales in a single NEPA analysis. The five timber sales were located in the same watershed, were announced simultaneously, and were part of a single timber salvage project. Id. The suspensions and their concomitant environmental impacts must similarly be considered in a comprehensive fashion. Failure to do so would render NEPA meaningless.

C. MMS' Inadequately Analyzes Cumulative Impacts to Commercial Fishing.

MMS inexplicably and arbitrarily limits its consideration of cumulative impacts to commercial fishing only to those non-suspension activities and natural events that "overlap temporally and spatially with the proposed surveys." Aera EA at 4-43. Indeed, this self-imposed limitation contradicts NEPA's requirement that cumulative impacts include "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (emphasis added). Amazingly, MMS quotes this definition in the sentence immediately preceding its unsupported proclamation that only concurrent temporal and spatial impacts be considered. E.g., Aera EA at 4-43. MMS' transparent desire to conduct an inadequate analysis of cumulative impacts to commercial fishing does not authorize such a blatant disregard of NEPA's regulations.

MMS's analysis of cumulative impacts to commercial fishing also fails to consider the combined impact of the suspension activities that are planned for both the Aera and Samedan units. Neither EA makes any reference to the shallow water surveys that are being planned in immediate sequence with each other. Aera EA at 4-43; Samedan EA at 4-43. This omission violates NEPA for the same reasons given in the preceding section.

D. MMS' Inadequately Analyzes Cumulative Impacts to Recreational Fishing and Diving.

The analysis of cumulative impacts to recreational fishing and diving contained within the Samedan EA is also improperly limited to consideration of only those impacts that overlap in time and space with the proposed suspension activities. See the preceding section for a fuller explanation of why this approach violates NEPA.

E. MMS' Inadequately Analyzes Cumulative Impacts to Military Operations.

Unlike all of the other cumulative impact discussions contained within the EAs, the section dedicated to impacts to military operations contained within the Aera EA

completely fails to discuss the impacts of the military operations on natural resources and the environment. See Aera EA at 4-43 to -48. Such consideration is necessary for a complete cumulative impacts analysis. Instead, the section is entirely devoted to consideration of the "insignificance" of the proposed suspension activities on military operations. MMS correctly considers this impact to military operations but fails to remember that the fundamental purpose of the task at hand is to conduct an "environmental assessment," as opposed to a "military assessment."

VI. The Draft EAs Omit Discussion of Other Important Issues.

The Aera EA fails to discuss the implications of the re-unitization requests filed by Aera earlier this year.

The EAs as a group fail to discuss whether many of the units and/or leases can qualify for a suspension in light of the lack of physical activities proposed for those leases or units during the proposed suspension periods.

VII. Conclusion.

The draft EAs on the proposed suspensions fall well short of NEPA's requirements. MMS must prepare a comprehensive EIS before making a decision on whether to proceed with the proposed suspensions.

Sincerely,

Drew Caputo
Attorney

David Newman
Attorney

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

December 16, 2004

Minerals Management Service
Attn: Suspension – EA Comments
Office of Environmental Evaluation
770 Paseo Camarillo
Camarillo, CA 93010-6064

To the Minerals Management Service:

On behalf of the Natural Resources Defense Council and the League for Coastal Protection, we write to comment on the draft environmental assessments ("EAs") concerning the Minerals Management Service's ("MMS's") proposal to grant suspensions of production or operations for 36 oil-and-gas leases off the central California coast.

The draft EAs on the proposed suspensions violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. First, MMS illegally has refused to consider the environmental consequences of future exploration and development activities on the leases. Second, because significant impacts may result from the activities proposed during the terms of the proposed suspensions, MMS cannot rely on a suite of EAs but must instead prepare a comprehensive environmental impact statement ("EIS") on the proposed suspensions. Third, MMS has failed to consider a reasonable range of alternatives. Fourth, the draft EAs fail to present an adequate environmental analysis of the alternatives under consideration, including the alternative of denying the requested suspensions and allowing the leases to expire. Fifth, MMS has improperly segmented its pending lease-suspension decisions into a series of individual EAs, in an apparent effort to avoid preparing an EIS, and has failed to conduct an adequate analysis of the cumulative impacts of granting suspensions for 36 leases in total.

In order to comply with NEPA, MMS must prepare a comprehensive EIS that fully analyzes the proposed suspensions and future exploration and development activities on the leases.

I. NEPA Requires Consideration of Future Exploration and Production Activities as Part of MMS's NEPA Analysis of the Proposed Suspensions.

MMS has violated NEPA by failing to consider future exploration and development activities in its NEPA analysis on the proposed suspensions. The suspensions requested by the leaseholders here are closely tied to future exploration and development activities on the leases. Indeed, suspensions cannot be granted here unless they are necessary "to facilitate proper development" of the lease in question. 43 U.S.C. § 1334(a)(1)(A). The suspensions proposed here are tied especially closely to exploratory drilling intended to commence on some of the leases at the expiration of the suspensions. Given these relationships between

the proposed suspensions and future exploration and development activities, NEPA's requirements for comprehensive, forward-looking environmental analysis demand that future exploration and development activities be analyzed as part of MMS's NEPA analysis on the proposed suspensions. Since these future exploration and development activities present substantial risks to the environment, including risks of oil spills during oil drilling or transport, MMS must prepare an EIS on the proposed suspensions.

A. Future Exploration and Development Activities Must Be Analyzed As Indirect Effects of the Proposed Suspensions.

NEPA requires evaluation of the indirect effects of an agency action so long as those effects are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Future exploration and development activities are a reasonably foreseeable consequence of the lease suspensions under consideration by MMS here. Indeed, making such future activities possible is the very purpose of the requested suspensions. As the Ninth Circuit held earlier in this case, "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production." California v. Norton, 311 F.3d 1162, 1173 (9th Cir. 2002). In order to grant the suspensions requested by these particular leaseholders, MMS must demonstrate, inter alia, that the suspensions are necessary "to facilitate proper development" of the leases in question. 43 U.S.C. § 1334(a)(1)(A).[1] Thus, the very purpose of the suspensions and the legal criteria for issuing them demonstrate the close nexus between the suspensions and subsequent exploration and development activities. As such, these future exploration and development activities are reasonably foreseeable consequences of granting the proposed suspensions and must be considered in MMS's NEPA analysis of the suspensions.

The suspensions at issue here are linked especially closely to exploratory drilling planned for the near future on several of the leases. MMS acknowledges that the acoustic surveys planned for certain Aera and Samedan leases during the requested suspensions are intended "to determine geohazards associated with the potential drilling of delineation wells" and that the biological surveys planned for certain Aera leases are intended "to identify hard bottom habitat that could be impacted by the potential drilling of delineation wells." Aera EA at 1-2. See also Aera's Request for Suspension for Point Sal Unit at 4 (Aug. 20, 2004) ("To prepare a revised [exploration plan] ..., Aera would have to acquire shallow hazards data" during the proposed suspension period.). In other words, these activities are directly linked to the exploratory drilling that would follow the proposed suspensions and are intended to facilitate that drilling. From a temporal standpoint, the separation between the proposed suspensions and the planned exploratory drilling is virtually non-existent. Aera's suspension requests, for example, indicate that the requested suspensions would end on the very same day on which exploratory drilling would commence on at least some of the leases. See, e.g., id. at 7. In an obvious effort to make the proposed suspensions look as insignificant as possible, MMS wrote Aera last

[1] MMS also must demonstrate that granting the requested suspensions is "in the national interest ..." 43 U.S.C. § 1334(a)(1)(A).

month to "clarify" that "drilling operations" themselves will not occur during the proposed suspension periods themselves. Letter from Peter Tweedt, MMS, to T. E. Enders, Aera Energy (Nov. 1, 2004) (attached to Aera EA as App. 3). The agency's stated rationale for this "clarification" is revealing. According to MMS, since "drilling is an activity that will hold the unit" in which the drilling is occurring, "a suspension is not needed" where drilling is occurring. Id. The implications of this rationale, though, are that a suspension is needed up until the exact point that drilling actually commences and that the proposed suspension would be in place until the very minute or even second before the exploratory drilling commences. Among their many other flaws, MMS's EAs fail to explain how much time would elapse between the end of the proposed suspension periods and the commencement of exploratory drilling on the leases. We specifically ask MMS to state the amount of time that would elapse between the end of the proposed suspension periods and the beginning of exploratory drilling. The record indicates already, though, that little time would elapse between the end of the proposed suspensions and the beginning of delineation drilling. This close temporal relationship between the suspensions and the planned drilling is further evidence that this exploratory drilling is a reasonably foreseeable effect of granting the proposed suspensions.

In its draft EAs, MMS offers two reasons for refusing to consider future exploration and development activities in its NEPA analysis on the suspensions. First, MMS notes that those future exploration and development activities "will not occur while the [leases] are under suspension ..." E.g., Aera EA at 3-3. That fact is legally irrelevant to MMS's duty to analyze those activities here, since NEPA requires future, indirect effects to be considered in a NEPA analysis so long as those effects are reasonably foreseeable. The governing NEPA regulation specifically requires consideration of indirect effects that occur "later in time" than the immediate action under review, so long as those "later in time" indirect effects are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Thus, the fact that exploration and development activities will occur after the close of the proposed suspension periods does not exempt MMS from addressing these future activities in its NEPA analysis of the suspensions. Also, from a factual standpoint, MMS is at best splitting hairs when it stresses that exploration and development activities will occur after the suspension periods, since the record indicates that exploratory drilling will occur on at least some of the leases immediately upon the close of the suspension periods. See supra.

Second, MMS notes that future exploration and development activities would "require separate review and approval by MMS and other appropriate agencies before they may occur." E.g., Aera EA 3-3. That fact is also legally irrelevant to MMS's duty to consider these future activities now, since the law is clear that future environmental-review obligations do not release an agency from its NEPA obligation to consider reasonably foreseeable future effects of the agency action directly at hand. For example, in Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984), the Ninth Circuit considered the NEPA obligations that apply to a lease sale pursuant to the Outer Continental Shelf Lands Act ("OCSLA"). The court held: "The lease sale itself does not directly mandate further activity that would raise an oil spill problem, [citation omitted],

but it does require an overview of those future [oil spill] possibilities" under NEPA. Id. at 616 (emphasis added). The court then specifically relied on the EIS's analysis of a potential oil spill of 10,000 barrels or more as providing a sufficiently detailed analysis of oil-spill issues to satisfy NEPA at that stage of the oil-leasing process. Id. In other words, the court held that a NEPA analysis on the sale of an oil lease, a sale which did not mandate actual production of oil from the lease and which would be followed by additional NEPA compliance at the exploration and development stages, had to analyze the consequences of an oil spill during potential future oil-production operations on the lease – just not in as much detail as the plaintiffs there argued was required at that stage of the leasing process. Thus, MMS's obligation to conduct additional environmental review before allowing future exploration and development activities on the leases does not excuse the agency from addressing those future activities in its NEPA analysis of the proposed suspensions. "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done." Kern v. United States Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002).

Tellingly, MMS did analyze future exploration and development activities in the EISs it prepared on the lease sales for these leases decades ago. See, e.g., Bureau of Land Management, Final EIS for OCS Lease Sale 53 (Sept. 1980) (analyzing, inter alia, effects of oil spills, onshore and offshore manmade structures, vessel traffic, noise, effluents, and air emissions). It was equally true then that future exploration and development activities on the leases would "require separate review and approval by MMS and other appropriate agencies before they may occur" – but that fact did not interfere with MMS's obligation to analyze those future exploration and development activities in its lease-sale EISs. Moreover, the Ninth Circuit has analogized the lease suspensions in this case to a lease sale, stating: "Although a lease suspension is not identical to a lease sale, the very broad and long term effects of these suspensions more closely resemble the effects of a sale than they do [certain] highly specific activities ..." California v. Norton, 311 F.3d at 1174. Just as MMS was required to consider future exploration and development activities in its NEPA analysis of the proposed lease sales for these leases, MMS must analyze future exploration and development activities in its NEPA analysis of the proposed suspensions for these leases.

It is especially important that MMS update the analysis from its lease-sale EISs about future exploration and development activities on the leases in light of the important circumstances that have changed since that analysis was performed many years ago. The administrative record for California v. Norton is replete with examples of such changed circumstances. For example, the threatened southern sea otter has extended its range over the past 20 years into areas within and nearby many OCS leases while continuing to struggle to rebuild. See Letter from California Coastal Commission to Secretary of the Interior and Director of MMS, July 27, 1999 (3 AR 0746). Other examples of circumstances that have changed since the original lease sale EISs include: changes in laws that protect ocean and coastal environments, including the Oil Pollution Act of 1990; new oil spill contingency standards; the listing of federal endangered marine

species; and the establishment of new National Marine Sanctuaries, including the Channel Islands and Monterey Bay National Marine Sanctuaries. See Letter from Senators Barbara Boxer and Dianne Feinstein and Congresswoman Lois Capps to Secretary of the Interior, July 28 1999 (3 AR 0748). MMS's limited discussion in its EAs of the effects of the proposed suspension activities on ocean life is insufficient to meet NEPA's requirements, especially in light of these changes.

The state of the region's fisheries is another example of significantly changed circumstances since the initial environmental reviews were conducted for these leases. Federal fisheries management was in its nascent stage at the time of the lease sale EISs. For example, the initial fishery management plan ("FMP") for Pacific Coast Groundfish was not approved and implemented until October 5, 1982. Prior to that time, management of Pacific groundfish was regulated by the states of Washington, Oregon, and California. Since 1999, eight of the 24 species of Pacific groundfish that have been fully assessed have been declared overfished. Moreover, it was not until the 1996 Sustainable Fisheries Act amendments to the Magnuson-Stevens Fishery Conservation and Management Act that FMPs were required to identify essential fish habitat, actively seek to reduce bycatch, implement conservation measures to prevent overfishing, and to promote rebuilding of already overfished species. MMS makes no mention of the impacts of the proposed suspensions on these overfished species or on the efforts towards attaining more sustainable fisheries, as federal law now requires.

Future exploration and development activities are a reasonably foreseeable indirect effect of the lease suspension proposed by MMS here. As such, they must be fully analyzed under NEPA in an EIS on the proposed suspensions.

B. Future Exploration and Development Activities Must Be Analyzed as Cumulative Effects of the Proposed Suspensions.

NEPA requires evaluation of the cumulative impact "which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (emphasis added). For similar reasons to those stated above, future exploration and development activities are "reasonably foreseeable future actions" that MMS must evaluate within its NEPA review of the suspensions themselves. Courts have consistently enforced the requirement to consider cumulative impacts in analogous situations. See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) (requiring Forest Service to include cumulative impact assessments for all future road density amendments within the EAs for each individual timber sale); see also Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (requiring BLM to quantify the cumulative emissions from potential development of BLM land in Las Vegas Valley); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1434 (C.D. Cal. 1985) (criticizing the Corps of Engineers for having "tunnel vision" for not originally considering the secondary and cumulative effects of approving a permit to place large boulders along the banks of the Colorado River as part of a residential development project). MMS is obligated to consider the cumulative impacts

of post-suspension exploration and development activities as part of the review of the suspensions themselves. Such impacts are reasonably foreseeable, especially where several of the suspension requests include specific plans to spud delineation wells on the very day the suspensions expire.

"Nor is it appropriate to defer consideration of cumulative impacts to a future date." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998) (holding that Forest Service timber sale EIS must consider the cumulative impacts on old growth habitat of all reasonably foreseeable future timber sales in the area in addition to the impacts of the sale being reviewed). MMS may not shirk its responsibilities under NEPA to consider the impacts of exploration and development activities by asserting that such review will occur at a later stage. In Neighbors of Cuddy Mountain, the Ninth Circuit held that the cumulative effect of future timber sales in the region must be considered regardless of the fact that such sales were unrelated to the immediate sale being reviewed. In this case, future exploration and development activities on these leases are not merely related to the grant of the suspensions but are utterly dependent on them. NEPA requires that MMS analyze these cumulative impacts at this stage in the process.

C. The Proposed Suspensions and Future Exploration and Development Activities are Connected Actions.

MMS' failure to consider the effects of post-suspension activities violates NEPA's requirement that the environmental effects of "connected actions" be considered together in a comprehensive environmental review. "Connected actions" are those that:

i. Automatically trigger other actions which may require environmental impact statements.
ii. Cannot or will not proceed unless other actions are taken previously or simultaneously.
iii. Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). NEPA does not permit "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir.1985) (requiring Forest Service EIS to consider both a federal road and the federal timber sales that the road would facilitate); see also Save the Yaak Committee v. Block, 840 F.2d 714, 719-721 (9th Cir. 1988) (applying analysis from Thomas to conclude the same). MMS is attempting to do what courts interpreting NEPA have explicitly held cannot be done: fail to consider the effects of actions connected to the more limited action it chooses to review.

The Thomas court concluded "that the road construction and the contemplated timber sales are *inextricably intertwined*, and that they are 'connected actions.'"

Thomas, 753 F.2d at 759 (emphasis added). The lease suspensions being sought in this case and the future exploration and development activities they will enable are similarly intertwined. MMS explains that "the suspensions would allow . . . time to conduct shallow hazards and biological surveys . . . and to conduct administrative activities leading to the submittal of revised [exploration plans]." See, e.g., Aera EA at ES-2. MMS also explains that the denial of the suspensions "would result in the expiration of the leases" and "the need for the proposed action would not be achieved." See, e.g., Aera EA at 2-6. Because the proposes suspensions are connected in this way to subsequent exploration and development activities, those subsequent activities must be evaluated as part of NEPA compliance on the suspensions.

II. The Activities Planned During the Proposed Suspensions May Cause Significant Environmental Impacts and Must Be Analyzed in an EIS.

In order to sustain its decision to prepare an EA rather than an EIS on the proposed suspensions, MMS must produce "a convincing statement of reasons" showing why the impacts of the proposed suspensions are insignificant. National Parks & Conservation Ass'n v. Babbitt, 241 F.2d 722, 730 (9th Cir. 2001). If "the agency's action may have a significant impact upon the environment, an EIS must be prepared." Id. (emphasis in original; internal quotation marks omitted). Put another way, if "there are substantial questions whether a project may have a significant effect on the environment," the agency must prepare an EIS. Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004) (emphasis in original; internal quotation marks omitted). Because the actions planned during the suspension period may cause significant impacts, because MMS has failed to produce a convincing statement of reasons showing why these impacts must be insignificant, and because there are at the very least substantial questions about whether the suspensions may result in significant impacts, MMS must prepare an EIS on the suspensions.

Even without considering the exploration and development activities intended to take place after the proposed suspensions, MMS has failed to present convincing statements of reasons showing why the suspensions cannot have a significant impact on the environment. In particular, MMS has failed to show that the acoustic surveys planned for the Aera and Samedan leases cannot have a significant environmental impact. Since evidence within and apart from the EAs indicates these acoustic surveys may cause significant impacts, NEPA requires MMS to prepare an EIS on the proposed suspensions.

While MMS seeks to minimize the effects of the acoustic surveys, a bare recitation of the facts shows those effects to be substantial. MMS is proposing to operate acoustic surveys during each day of a 14-17 day period over an area of 10 square miles or more in size. During this lengthy and extensive operation, the lessees would fire an air gun repeatedly under water, approximately every 7-8 seconds, over and over again. "Air-guns release a volume of air under high pressure, creating a sound pressure wave that is capable of penetrating the seafloor to determine substrata structure." National Research

Council, Ocean Noise and Marine Mammals 58-59 (2003).[2] The air gun MMS proposes to use for the acoustic surveys here is an extremely powerful noise source. MMS acknowledges the air gun has the capacity to generate geotechnical information at depths of up to 1,475 feet below the sea floor. Over the lengthy survey period, the air gun would be fired for up to 36 hours total, with the individual noises again coming every 7-8 seconds, over and over again.

MMS acknowledges that the air gun produces sound at 218 decibels and would yield received sound levels by marine mammals and fish of 160-190 decibels or more, depending on distance from the source. Aera EA at 2-5, 4-19. The EAs do an extremely poor job of placing these very loud noise levels in context. For example, while the EAs make no mention of it, the air gun's sound level appears to be as loud or louder than a jet airplane. See, e.g., National Research Council, For Greener Skies: Reducing Environmental Impacts of Aviation (2002). The potential for adverse consequences from such a loud noise source seems obvious, particularly since the noise would be repeated in abrupt shots spaced seconds apart over many hours.

There is limited data about the effect of underwater noise on sea life, a fact that by itself argues for preparing an EIS here, as we discuss below. What is known is that marine mammals and fish are sensitive to underwater noise, which can travel large distances underwater; that they rely on their noise perception for activities that include communicating between individuals; and that there is evidence showing damage to underwater life from noise sources on the sound order of the air gun. See, e.g., Ocean Noise and Marine Mammals, supra; S.L. Nieukirk et al., Low-frequency whale and seismic airgun sounds recorded in the mid-Atlantic Ocean, J. Acoust. Soc. Am. 115 (2004); D.A. Croll et al., Bioacoustics: Only male fin whales sing loud songs, Nature 417 (2002): p. 809 (observing that rise in noise levels from seismic surveys, oceanographic research, and other activities could impede recovery in fin and blue whale populations); P. Tyack, Acoustic communication under the sea, in Animal Acoustic Communication: Recent Technical Advances 163-220 (S.L. Hopp et al. eds., Springer-Verlag 1998); Hearing by Whales and Dolphins (W.L. Au, et al. eds., Springer-Verlag 2000); A. Popper, Effects of anthropogenic sounds on fishes, 28 Fisheries 24-31 (Oct. 2003). MMS's EAs contain an inadequate discussion of the adverse effect of human-caused noise on underwater life. Among other things, they fail to discuss with specificity the potential impacts on all sensitive species in California waters, including but not limited to the 34 species of marine mammals.

The EAs do admit that the acoustic surveys "have the potential for harassing or harming protected marine mammals and sea turtles" and that "[a]coustic harassment" by the planned surveys "could potentially occur" for certain whale species. Aera EA at 4-26, 3-6. Given the potential seriousness of these impacts and the vulnerable nature of many marine mammal and sea turtle species, this potential for harmful impacts is more than enough to justify preparation of an EIS. MMS, however, relies principally on two

[2] We hereby incorporate by reference this and all other publications and documents cited in this comment letter.

arguments in an effort to avoid preparing an EIS. First, MMS argues that the sound levels marine mammals and sea turtles would experience from the acoustic surveys do not rise to the level of significant impacts. Second, MMS claims its mitigation measures will be sufficient to guarantee an absence of significant impacts from the acoustic surveys. Neither of the arguments are adequately supported in the EAs, and neither provides an adequate basis for refusing to prepare an EIS.

MMS apparently assumes that exposing marine mammals or sea turtles to received sound levels of 160 decibels or less cannot cause a significant impact on these animals. E.g., Aera EA at 4-15, 4-22. Nowhere does MMS support this critical assumption in its EAs. Next, MMS concludes that a received sound level of greater than 160 decibels would constitute a "taking" of a marine mammal under the Marine Mammal Protection Act but that such a taking would constitute only an "insignificant, adverse impact." Id. at 4-15, 4-22. Nowhere does MMS explain why such harassment of a depleted marine mammal species necessarily constitutes an insignificant impact.[3] Outside the EAs, there is considerable evidence that tends either to undercut these assumptions or to suggest they rest on an inadequate basis. The National Academy of Sciences reports that "[s]hort- and long-term effects on marine mammals of ambient and identifiable components of ocean noise are poorly understood," that "marine mammals have been shown to change their vocalization patterns in the presence of background and anthropogenic noise," and that potential effects of underwater noise "include changes in hearing sensitivity and behavioral patterns, as well as acoustically induced stress and impacts on the marine ecosystem." Ocean Noise and Marine Mammals, supra, at 3-6. The EAs discuss none of these issues adequately, and the presence of these potential effects means that significant impacts may result from granting the proposed suspensions.

The inadequate discussion of these issues in the EAs suffers from many flaws, including improper efforts by MMS to incorporate previous analyses by reference as well as citations to documents that do not appear in the EA's list of references and hence are unidentifiable. See, e.g., Aera EA at 4-19. In addition, MMS's analysis of hearing impacts on marine mammals appears to rely on an older (1991) study about the sound level that could cause immediate damage to marine mammals. The EAs omit an adequate discussion of issues such as the relevance of newer studies; the issue of non-immediate hearing injury; and the issue of harm to things other than an individual's

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[3] The EAs present a set of "significance criteria" that MMS apparently relies on to determine whether an impact is significant or not. See, e.g., Aera EA at 4-15. These so-called "significance criteria" are extremely poorly supported: MMS has not come close to showing that impacts less severe or different than these criteria are necessarily insignificant. In addition to being unsupported substantively, the criteria are vague and seemingly arbitrary. For example, MMS presents as one criterion for marine mammals "any change in population that is likely to hinder the recovery of a species" but fails entirely to explain what "hindering" means in this context. Similarly vague is the criterion that discusses "[d]isplacement of a major part of the population ..." What constitutes a "major" part of a population in this context? Another criterion sets a seemingly arbitrary threshold of harm to at least 10 percent of the habitat in an area before that habitat harm is deemed significant. In addition, the criteria fail to address behavioral changes that could have an adverse effect on individual members of a species – for example, underwater noise diverting individual animals into less-ideal habitat than they would have occupied in the absence of the acoustic surveys.

hearing acuity. The EAs also fail to discuss adequately the issue of masking, which seems especially relevant since the air gun is louder than many marine mammal vocalizations. The inadequate analysis that is presented in the EAs relies on vague characterizations and hedge words that fail to present an adequately informative picture of the suspensions' likely impact. See, e.g., Aera EA at 4-23 ("It is believed that most protected species would avoid the ... air gun sound by making minor adjustments in their positions ... . The shallow hazard surveys are not likely to ... displace the population from a major part of either feeding or breeding areas or migratory routes for a biologically significant length of time.") (emphasis added).

MMS admits that marine mammals exposed to received sound levels of 180 decibels or greater "may be harassed or harmed; it is possible that acoustic injury may lead to stranding and mortality and potentially significant impacts depending on the number of animals involved." Aera EA at 4-22. MMS claims, though, that its mitigation measures for the acoustic surveys "make impacts on marine protected species unlikely and negligible." Id. The agency's analysis of the efficacy of these mitigation measures falls well short of NEPA's requirements, and MMS's EAs fail to demonstrate that the mitigation measures exclude the possibility of significant impacts from the acoustic surveys.

MMS relies heavily on a mitigation measure relating to the seasonal timing of the acoustic surveys. E.g., Aera EA at 4-22. According to MMS, restricting the surveys to the period between mid-October and mid-December will render the impacts of the surveys insignificant. There are many problems with MMS's reliance on this mitigation measure, and MMS discusses none of these problems adequately in its EAs. First, the mitigation measure does not actually limit the acoustic surveys to this period but instead allows them to take place at another time so long as doing so would have "negligible impact to large whales," Aera EA at 4-25, a criterion that is not developed or defined in any way and that also ignores potential increased impacts to animals other than large whales. Second, the mitigation measure is presented as having been selected because it will assertedly benefit four species of whales as well as all sea turtles, but MMS fails to explain why it is focusing on impacts to these four whale species to the exclusion of other marine mammals, including other marine mammals that are listed as threatened or endangered under the Endangered Species Act. Third, MMS claims this mitigation measure is valuable because the October-December period "lies outside, or on the cusp of," the "predictable periods of occurrence" for four whale species in the area. The problems with this assertion go well beyond MMS's use of the vague phrase "on the cusp of," the meaning of which is nowhere explained in the EAs. According to the EAs, gray whales (one of the four species specified by MMS) actually are at their peak abundance in the area in December. Aera EA at 4-12. Aera's suspension requests indicate that gray whale migration occurs between November and May. E.g., Purisima Point Suspension Request 8 (April 20, 2004) (attached to Aera EA as App. 1). Humpback whales, another of the four species assertedly benefited by the seasonal "restriction," are regularly present in the area in October, November, and December. Aera EA at 4-12. Fourth, there is no support in the EAs for MMS's claim that sea turtles are not located in the area between

October and December. Indeed, the EAs admit that little is known about the distribution of sea turtles in the Southern California Bight. Aera EA at 4-14. MMS has failed to discuss the effects of this mitigation measure adequately and to substantiate the agency's claims of environmental benefit from it.

Many of the rest of the mitigation measures on which MMS relies are poorly analyzed in the EAs. For example, MMS claims the lessees will use observers to detect any marine mammals that enter within a half mile of the air gun and to shut down the air gun if an animal enters that area. Nowhere in the EAs does MMS discuss the feasibility of observers accurately and effectively identifying all marine protected species that could enter within a half mile of the air gun, particularly species such as sea turtles, which are relatively small and capable of remaining submerged (and hence undetected by observers) for long periods of time. Other mitigation measures suffer from other serious problems, none of which are adequately discussed in the EAs. For example, the mitigation measure about "ramping up" the air gun only requires the lessees to do so "as possible," Aera EA at 4-25, a key point that escapes adequate discussion in the EAs.

The EAs' discussion of impacts on sea turtles is notably poor, particularly in light of evidence showing adverse reaction by sea turtles to noise from air guns at the levels at issue here. See Aera EA at 4-21 to -22. Similarly poor is the documents' analysis of impacts on the southern sea otter, a threatened species. MMS's no-effect assertions are based on the agency's belief that otters tend to locate close to shore and on a single 1983 study concluding that sea otters were not disturbed by an air gun. Aera EA at 3-5 to -6. This inadequate analysis ignores the ability of sound to travel underwater; potential adverse impacts to sea otter food sources; and all relevant post-1983 data.

Just as serious as the potential impacts on marine mammals from the acoustic surveys are the potential impacts on fish, but the EAs' analysis of these impacts is extremely poor and falls far short of NEPA's requirements. The National Marine Fisheries Service ("NMFS") has designated eight species of Pacific groundfish as overfished, and MMS admits that all eight of these species "could be present in the survey areas," Aera EA at 4-29. The EAs contain no recognition of the current overfished condition of these species and no analysis of the impacts on these specific species of the acoustic surveys planned for the Aera leases. To make matters worse, it appears that the acoustic surveys would be located in or near rockfish conservation areas established by the Pacific Fishery Management Council and NMFS for these species, yet the EAs omit any discussion of these potential impacts. In order to comply with NEPA, MMS must analyze with specificity the potential impacts of the acoustic surveys on all eight overfished Pacific groundfish species.

The EAs' general discussion of impacts on fish from the acoustic surveys is conclusory and inadequate and fails to take adequate account of the latest science. MMS admits that "[a]coustic energy has the potential for direct damage (lethal, potentially lethal, or sub-lethal effects) to any fish or shellfish life stage," Area EA at 4-30, yet the EAs present only a thin discussion of these potential impacts on fish, a discussion which

consumes less than two pages and focuses much more on eggs and larvae than later life stages. Among other things, the EAs attempt to dismiss a recent study by McCauley et al. by arguing that fish disturbed by underwater noise would likely seek to move away from the noise source. See Aera EA at 4-31 to -32. That argument fails to recognize that fish within range of the air gun could well suffer damage before they could move away from the noise source. The EAs pretend that a fish would need to be within 20 feet of an air gun in order to suffer damage, but that is not what the best and most recent science says. As the National Academy of Sciences has recently noted, McCauley's studies "show that exposure to air-guns with a maximum received level of 180 [decibels relative to 1 micropascal] over 20-100Hz causes major damage to sensory cells of the ear in at least one species" and suggest that "air-guns damage sensory hair cells in fishes." Ocean Noise and Marine Mammals, supra, at 107. Thus, in contrast to MMS's claim that fish would have to be within 20 feet of the air gun to suffer harm, McCauley's studies show that fish located 261 feet or more from the air gun in MMS's planned acoustic surveys could suffer damage. The National Academy also notes that McCauley's studies "could also have implications for marine mammals exposed to air-guns, particularly since the hair cells in fishes and marine mammals are so similar to one another;" that additional scientific data "suggest that sounds may change the behavior of fish;" and that behavioral changes in fish "could have an adverse impact on the higher members of a food chain [such as marine mammals] and therefore have long-term implications despite the fish not being killed or maimed." Id. at 107-08. MMS's EAs analyze none of these issues or data adequately and fail to present a convincing statement of reasons why the impacts of the acoustic surveys cannot be significant for fish and other animals that depend on fish for food. To the extent MMS's conclusions of insignificant impact on fish rest on the so-called "significance criteria" the agency presents in the EAs, these significance criteria are insufficiently supported, conclusory, and arbitrary in significant respects. For example, these criteria claim that fish displacement is significant only if 10 percent or more of the population is displaced, Aera EA at 4-30, but the EA fails entirely to explain the basis for this 10-percent threshold.

NEPA's implementing regulations establish a set of significance factors that help determine whether substantial questions exist about an agency action causing a significant impact, thus necessitating preparation of an EIS. 40 C.F.R. § 1508.27(b). See also Anderson v. Evans, 371 F.3d at 488 (discussing "significance factors"). Several of these significance factors are implicated by the proposed suspension and thus require preparation of an EIS. For example, one such factor asks whether there are "[u]nique characteristics of the geographic area, such as proximity to ... ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). The areas subject to the proposed acoustic survey are located in the habitat of sensitive marine mammals and overfished species, are in or near conservation areas established for overfished Pacific groundfish species, and are near other ecologically critical areas such as the Channel Islands National Marine Sanctuary and the Monterey Bay National Marine Sanctuary. Another significance factor assesses "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.28(b)(4). "Agencies must prepare [EISs] whenever a federal action is 'controversial,' that is, when substantial questions are raised

as to whether a project may cause a significant degradation of some human environmental factor or there is a substantial dispute about the size, nature, or effect of the major federal action." National Parks & Conservation Ass'n, 241 F.3d at 736 (internal citation, ellipsis, brackets, and quotation marks omitted). While MMS maintains that the proposed suspensions cannot affect the environment significantly, the draft EAs, this letter, and the evidence cited therein raise substantial questions about environmental degradation from the proposed acoustic surveys and make out a substantial dispute about the effect of the surveys. A third significance factor is satisfied where "the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). If one thing is clear here, it is that "remarkably few details are known about the characteristics of ocean noise, whether it be of human or natural origin, and much less is understood of the impact of noise on the short- and long-term well-being of marine mammals and the ecosystems on which they depend." Ocean Noise and Marine Mammals, supra, at 1. The same is true for effects of ocean noise on fish. See, e.g., id. at 10 ("effects of anthropogenic noise on fish and other nonmammalian species .. are largely unknown"). Another significance factor considers "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat ..." 40 C.F.R. § 1508.27(b)(9). MMS admits that numerous threatened and endangered species may be affected by the proposed acoustic surveys.[4]

Other significance factors may be affected by the proposed suspensions, but any one is sufficient to require preparation of an EIS. Because there are at least substantial questions about whether the proposed suspensions may have a significant impact on the environment, MMS must prepare a comprehensive EIS on the proposed suspensions. The draft EAs contain an inadequate environmental analysis and cannot meet MMS's obligations under NEPA.

III. MMS Fails to Consider a Reasonable Range of Alternatives.

NEPA requires MMS to consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). The Council on Environmental Quality regulations describes this section as the "heart" of the environmental review process, explaining that agencies must "rigorously explore and objectively evaluate all reasonable alternatives" and explain why alternatives were eliminated. 40 C.F.R. § 1502.14. The same requirement applies no matter whether the agency is preparing an EIS or an EA. 40 C.F.R. § 1508(9)(b). MMS failed to consider a reasonable range of alternatives to the proposed action of granting the suspensions.

MMS' statement of need for the proposed action is improperly narrow and vague. "The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms." City of Carmel-By-The-Sea v. United States Dep't. of Transp., 123 F.3d 1142, 1155 (9th

[4] The EAs fail to address specifically the critical habitat of listed species that may be affected by the proposed suspensions.

Cir. 1997). MMS unreasonably attempts to define the need here as a period of time to allow for the updating of exploration plans ("EP") and development and production plans ("DPPs"). This thinly veiled attempt to narrow the scope of the project and, in turn, the required NEPA analysis is belied by MMS' own admission that the goal beyond the suspension period is "to drill exploratory (delineation) wells . . . and to plan for the development and production" of the leases. Aera EA at 1-2. MMS must acknowledge that the suspensions are not merely an opportunity for administrative revisions to EPs and DPPs but are indispensable linchpins in the development of the leases. After all, absent the suspensions, the leases would expire and so too would any near-term opportunity for oil and gas development in the area. Accordingly, MMS must broaden the stated need and conduct an appropriate review of alternatives and impacts commensurate with the true nature and scope of the proposal. The actual need for MMS to act here is to decide whether or not to extend these old leases and, if so, under what terms.

MMS must look at every reasonable alternative within "the range dictated by the nature and scope of the proposal." See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995) (quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992)). Accordingly, MMS is obligated to consider other reasonable alternatives that fit squarely within the scope of deciding whether to extend the leases and, if so, under what terms. These include:

- Granting the suspensions but disallowing the acoustic and biological surveys and any other impacting activities;
- Granting the suspensions only for those leases and/or units in which exploratory drilling is being immediately planned.
- Denying the suspensions while adopting measures to encourage energy-use efficiency and the development of renewable energy sources.

IV. MMS Fails to Present Adequate Environmental Analysis of the Alternatives Under Consideration.

NEPA requires that agencies discuss "the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). Environmental impacts are defined to include "both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8(b). MMS's cursory and conclusory description of Alternative 2 fails to discuss adequately the environmental impacts of denying the requested suspensions. MMS summarily concludes that "no environmental impacts would result." Aera EA at 5-1. NEPA requires that MMS explore and discuss the environmental benefits of not granting the suspensions and allowing the leases to expire. These benefits include but are by no means limited to: increased health and productivity of fisheries in the region; expanded opportunities for endangered and threatened marine mammals, sea turtles, and birds; enhanced recreational activities; and decreased risk of oil spills and other hazardous events.

V. MMS Fails to Analyze Adequately the Cumulative Impacts of the Proposed Suspension Activities.

NEPA requires MMS comprehensively to analyze the cumulative effects of all suspension-related activities "when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. The cumulative impacts analysis must contain "quantified and detailed information," Neighbors of Cuddy Mountain, 137 F.3d 1372 at 1379-80, must provide a "useful analysis of the cumulative impacts," Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 810 (9th Cir. 1999), and must not "defer consideration of cumulative impacts to a future date when meaningful consideration can be given now," Kern, 284 F.3d at 1075.

MMS improperly chose to segment its cumulative impacts analysis amongst separate EAs and, within each EA, amongst the separate sections considering impacts to various natural resources. Such "perfunctory" analysis is wholly inadequate. See Kern, 284 F.3d at 1075 (finding BLM's analysis of the spread of root fungus from timber project inadequate for failure to consider the cumulative impact of future timber sales and other activities outside of the project area). By so doing, MMS avoids any comprehensive consideration of the cumulative effects of the suspension activities together with all other "reasonably foreseeable" activities, as required by NEPA.

A. MMS' Inadequately Analyzes Cumulative Impacts to Marine Mammals and Sea Turtles.

MMS' cumulative impacts analyses are cursory and inadequate. "To 'consider' cumulative effects, some quantified or detailed information is required." Neighbors of Cuddy Mountain, 137 F.3d at 1379-80 (holding that Forest Service timber sale EIS analysis failed to adequately consider how the sale would cumulatively impact and reduce old growth habitat). The information provided by MMS in its cumulative impacts analysis is neither quantified nor detailed.

For example, the brief section concerning suspension-related impacts to protected species of marine mammals and sea turtles merely lists the various sources of "anthropogenic harm" to such species. E.g., Aera EA at 4-27. Instead of analyzing how the impacts resulting from suspension-related activities might exacerbate or compound harm being caused from other sources, as NEPA requires, MMS simply concludes that "there is no evidence that these activities have resulted in significant impacts on marine mammals and sea turtle populations." Id. MMS then concludes that because the individual impacts of the proposed shallow water surveys are themselves negligible, the cumulative impacts attributable to the combined Aera and Samedan surveys "are not believed to be more than negligible." E.g., Aera EA at 4-27. NEPA requires more than the rote addition of purportedly negligible activities. Indeed, the whole purpose of the consideration of cumulative impacts is to avoid "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but

which collectively have a substantial impact." Native Ecosystems Council, 304 F.3d at 894 (requiring Forest Service EIS to consider both a federal road and the federal timber sales that the road would facilitate) (quoting Thomas, 753 F.2d at 758). Indeed, as MMS acknowledged in the FEISs for the sale of some of these very leases, "cumulative impacts on marine and coastal resources may exceed a simple arithmetic addition of one impact with another due to synergistic effects which remain unknown or unsuspected at the present level of knowledge." BLM, Final EIS for OCS Lease Sale 53 (Sept. 1980), at 4-128. MMS has failed to follow that admonition here.

MMS admits that "overall vessel traffic" off southern California "is increasing," resulting in "increasing levels of noise and disturbance" underwater. Aera EA at 4-27. In a remarkable non-sequitur, MMS claims no significant impacts from these activities because "marine mammal populations in California waters have generally been growing in recent decades." Id. The fact that populations have "generally" been growing does not exclude the possibility of significant cumulative impacts, either because some populations may be doing less well than others or because marine mammals populations, many of which are in poor condition, might do markedly better in the absence of these cumulatively adverse impacts.

B. MMS' Inadequately Analyzes Cumulative Impacts to Fish Resources, Managed Species, and Essential Fish Habitat.

Unlike its assessment of cumulative impacts to marine mammals – where MMS fails to acknowledge any source of significant impacts to marine mammals (suspension-related or otherwise) – MMS does acknowledge that the cumulative effects of pollution, overfishing, and other human sources "has had a major influence on fish resources, managed species, and EFH." E.g., Aera EA 4-32 to -33. MMS also acknowledges that "that acoustic energy/sound from an air gun can temporarily or irreversibly damage hearing in fish which could lead to sub-lethal behavioral changes not conducive to survival." Id. at 4-31. Nonetheless, MMS describes these effects as mere "incremental contribution[s]" relative to the myriad other sources of adverse effects to fish, managed species, and EFH. Id. Without any further discussion, MMS concludes that "the additional effect of the impact-producing agents related to [the suspension-related activities] are not expected to add significantly to cumulative impacts on fish resources, managed species, and EFH." Id. at 4-33. MMS cannot merely disregard the impacts of the suspension activities as insignificant just because they represent a relatively small portion of the overall threat to fish resources. See 40 C.F.R. § 1508.7 ("Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time.").

Another deficiency with MMS' cumulative impacts analysis related to fish impacts is its failure even to mention, much less adequately consider, the combined effects of both the Aera and Samedan shallow water surveys. Neither the Aera EA nor the Samedan EA considers the cumulative effects on fish of all of the shallow water surveys together. See Aera EA at 4-32 to -33; Samedan EA 4-32 to -33. MMS must

consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). In Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214-1215 (9th Cir.1998), the Forest Service was found to have violated this requirement by failing to analyze five distinct timber sales in a single NEPA analysis. The five timber sales were located in the same watershed, were announced simultaneously, and were part of a single timber salvage project. Id. The suspensions and their concomitant environmental impacts must similarly be considered in a comprehensive fashion. Failure to do so would render NEPA meaningless.

C. MMS' Inadequately Analyzes Cumulative Impacts to Commercial Fishing.

MMS inexplicably and arbitrarily limits its consideration of cumulative impacts to commercial fishing only to those non-suspension activities and natural events that "overlap temporally and spatially with the proposed surveys." Aera EA at 4-43. Indeed, this self-imposed limitation contradicts NEPA's requirement that cumulative impacts include "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (emphasis added). Amazingly, MMS quotes this definition in the sentence immediately preceding its unsupported proclamation that only concurrent temporal and spatial impacts be considered. E.g., Aera EA at 4-43. MMS' transparent desire to conduct an inadequate analysis of cumulative impacts to commercial fishing does not authorize such a blatant disregard of NEPA's regulations.

MMS's analysis of cumulative impacts to commercial fishing also fails to consider the combined impact of the suspension activities that are planned for both the Aera and Samedan units. Neither EA makes any reference to the shallow water surveys that are being planned in immediate sequence with each other. Aera EA at 4-43; Samedan EA at 4-43. This omission violates NEPA for the same reasons given in the preceding section.

D. MMS' Inadequately Analyzes Cumulative Impacts to Recreational Fishing and Diving.

The analysis of cumulative impacts to recreational fishing and diving contained within the Samedan EA is also improperly limited to consideration of only those impacts that overlap in time and space with the proposed suspension activities. See the preceding section for a fuller explanation of why this approach violates NEPA.

E. MMS' Inadequately Analyzes Cumulative Impacts to Military Operations.

Unlike all of the other cumulative impact discussions contained within the EAs, the section dedicated to impacts to military operations contained within the Aera EA

completely fails to discuss the impacts of the military operations on natural resources and the environment. See Aera EA at 4-43 to -48. Such consideration is necessary for a complete cumulative impacts analysis. Instead, the section is entirely devoted to consideration of the "insignificance" of the proposed suspension activities on military operations. MMS correctly considers this impact to military operations but fails to remember that the fundamental purpose of the task at hand is to conduct an "environmental assessment," as opposed to a "military assessment."

VI. The Draft EAs Omit Discussion of Other Important Issues.

The Aera EA fails to discuss the implications of the re-unitization requests filed by Aera earlier this year.

The EAs as a group fail to discuss whether many of the units and/or leases can qualify for a suspension in light of the lack of physical activities proposed for those leases or units during the proposed suspension periods.

VII. Conclusion.

The draft EAs on the proposed suspensions fall well short of NEPA's requirements. MMS must prepare a comprehensive EIS before making a decision on whether to proceed with the proposed suspensions.

Sincerely,

Drew Caputo
Attorney

David Newman
Attorney

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

December 16, 2004

Minerals Management Service
Attn: Suspension – EA Comments
Office of Environmental Evaluation
770 Paseo Camarillo
Camarillo, CA 93010-6064

To the Minerals Management Service:

On behalf of the Natural Resources Defense Council and the League for Coastal Protection, we write to comment on the draft environmental assessments ("EAs") concerning the Minerals Management Service's ("MMS's") proposal to grant suspensions of production or operations for 36 oil-and-gas leases off the central California coast.

The draft EAs on the proposed suspensions violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. First, MMS illegally has refused to consider the environmental consequences of future exploration and development activities on the leases. Second, because significant impacts may result from the activities proposed during the terms of the proposed suspensions, MMS cannot rely on a suite of EAs but must instead prepare a comprehensive environmental impact statement ("EIS") on the proposed suspensions. Third, MMS has failed to consider a reasonable range of alternatives. Fourth, the draft EAs fail to present an adequate environmental analysis of the alternatives under consideration, including the alternative of denying the requested suspensions and allowing the leases to expire. Fifth, MMS has improperly segmented its pending lease-suspension decisions into a series of individual EAs, in an apparent effort to avoid preparing an EIS, and has failed to conduct an adequate analysis of the cumulative impacts of granting suspensions for 36 leases in total.

In order to comply with NEPA, MMS must prepare a comprehensive EIS that fully analyzes the proposed suspensions and future exploration and development activities on the leases.

I. NEPA Requires Consideration of Future Exploration and Production Activities as Part of MMS's NEPA Analysis of the Proposed Suspensions.

MMS has violated NEPA by failing to consider future exploration and development activities in its NEPA analysis on the proposed suspensions. The suspensions requested by the leaseholders here are closely tied to future exploration and development activities on the leases. Indeed, suspensions cannot be granted here unless they are necessary "to facilitate proper development" of the lease in question. 43 U.S.C. § 1334(a)(1)(A). The suspensions proposed here are tied especially closely to exploratory drilling intended to commence on some of the leases at the expiration of the suspensions. Given these relationships between

the proposed suspensions and future exploration and development activities, NEPA's requirements for comprehensive, forward-looking environmental analysis demand that future exploration and development activities be analyzed as part of MMS's NEPA analysis on the proposed suspensions. Since these future exploration and development activities present substantial risks to the environment, including risks of oil spills during oil drilling or transport, MMS must prepare an EIS on the proposed suspensions.

A. Future Exploration and Development Activities Must Be Analyzed As Indirect Effects of the Proposed Suspensions.

NEPA requires evaluation of the indirect effects of an agency action so long as those effects are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Future exploration and development activities are a reasonably foreseeable consequence of the lease suspensions under consideration by MMS here. Indeed, making such future activities possible is the very purpose of the requested suspensions. As the Ninth Circuit held earlier in this case, "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production." California v. Norton, 311 F.3d 1162, 1173 (9th Cir. 2002). In order to grant the suspensions requested by these particular leaseholders, MMS must demonstrate, inter alia, that the suspensions are necessary "to facilitate proper development" of the leases in question. 43 U.S.C. § 1334(a)(1)(A).[1] Thus, the very purpose of the suspensions and the legal criteria for issuing them demonstrate the close nexus between the suspensions and subsequent exploration and development activities. As such, these future exploration and development activities are reasonably foreseeable consequences of granting the proposed suspensions and must be considered in MMS's NEPA analysis of the suspensions.

The suspensions at issue here are linked especially closely to exploratory drilling planned for the near future on several of the leases. MMS acknowledges that the acoustic surveys planned for certain Aera and Samedan leases during the requested suspensions are intended "to determine geohazards associated with the potential drilling of delineation wells" and that the biological surveys planned for certain Aera leases are intended "to identify hard bottom habitat that could be impacted by the potential drilling of delineation wells." Aera EA at 1-2. See also Aera's Request for Suspension for Point Sal Unit at 4 (Aug. 20, 2004) ("To prepare a revised [exploration plan] ..., Aera would have to acquire shallow hazards data" during the proposed suspension period.). In other words, these activities are directly linked to the exploratory drilling that would follow the proposed suspensions and are intended to facilitate that drilling. From a temporal standpoint, the separation between the proposed suspensions and the planned exploratory drilling is virtually non-existent. Aera's suspension requests, for example, indicate that the requested suspensions would end on the very same day on which exploratory drilling would commence on at least some of the leases. See, e.g., id. at 7. In an obvious effort to make the proposed suspensions look as insignificant as possible, MMS wrote Aera last

[1] MMS also must demonstrate that granting the requested suspensions is "in the national interest ..." 43 U.S.C. § 1334(a)(1)(A).

month to "clarify" that "drilling operations" themselves will not occur during the proposed suspension periods themselves. Letter from Peter Tweedt, MMS, to T. E. Enders, Aera Energy (Nov. 1, 2004) (attached to Aera EA as App. 3). The agency's stated rationale for this "clarification" is revealing. According to MMS, since "drilling is an activity that will hold the unit" in which the drilling is occurring, "a suspension is not needed" where drilling is occurring. Id. The implications of this rationale, though, are that a suspension is needed up until the exact point that drilling actually commences and that the proposed suspension would be in place until the very minute or even second before the exploratory drilling commences. Among their many other flaws, MMS's EAs fail to explain how much time would elapse between the end of the proposed suspension periods and the commencement of exploratory drilling on the leases. We specifically ask MMS to state the amount of time that would elapse between the end of the proposed suspension periods and the beginning of exploratory drilling. The record indicates already, though, that little time would elapse between the end of the proposed suspensions and the beginning of delineation drilling. This close temporal relationship between the suspensions and the planned drilling is further evidence that this exploratory drilling is a reasonably foreseeable effect of granting the proposed suspensions.

In its draft EAs, MMS offers two reasons for refusing to consider future exploration and development activities in its NEPA analysis on the suspensions. First, MMS notes that those future exploration and development activities "will not occur while the [leases] are under suspension ..." E.g., Aera EA at 3-3. That fact is legally irrelevant to MMS's duty to analyze those activities here, since NEPA requires future, indirect effects to be considered in a NEPA analysis so long as those effects are reasonably foreseeable. The governing NEPA regulation specifically requires consideration of indirect effects that occur "later in time" than the immediate action under review, so long as those "later in time" indirect effects are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Thus, the fact that exploration and development activities will occur after the close of the proposed suspension periods does not exempt MMS from addressing these future activities in its NEPA analysis of the suspensions. Also, from a factual standpoint, MMS is at best splitting hairs when it stresses that exploration and development activities will occur after the suspension periods, since the record indicates that exploratory drilling will occur on at least some of the leases immediately upon the close of the suspension periods. See supra.

Second, MMS notes that future exploration and development activities would "require separate review and approval by MMS and other appropriate agencies before they may occur." E.g., Aera EA 3-3. That fact is also legally irrelevant to MMS's duty to consider these future activities now, since the law is clear that future environmental-review obligations do not release an agency from its NEPA obligation to consider reasonably foreseeable future effects of the agency action directly at hand. For example, in Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984), the Ninth Circuit considered the NEPA obligations that apply to a lease sale pursuant to the Outer Continental Shelf Lands Act ("OCSLA"). The court held: "The lease sale itself does not directly mandate further activity that would raise an oil spill problem, [citation omitted],

but it does require an overview of those future [oil spill] possibilities" under NEPA. Id. at 616 (emphasis added). The court then specifically relied on the EIS's analysis of a potential oil spill of 10,000 barrels or more as providing a sufficiently detailed analysis of oil-spill issues to satisfy NEPA at that stage of the oil-leasing process. Id. In other words, the court held that a NEPA analysis on the sale of an oil lease, a sale which did not mandate actual production of oil from the lease and which would be followed by additional NEPA compliance at the exploration and development stages, had to analyze the consequences of an oil spill during potential future oil-production operations on the lease – just not in as much detail as the plaintiffs there argued was required at that stage of the leasing process. Thus, MMS's obligation to conduct additional environmental review before allowing future exploration and development activities on the leases does not excuse the agency from addressing those future activities in its NEPA analysis of the proposed suspensions. "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done." Kern v. United States Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002).

Tellingly, MMS did analyze future exploration and development activities in the EISs it prepared on the lease sales for these leases decades ago. See, e.g., Bureau of Land Management, Final EIS for OCS Lease Sale 53 (Sept. 1980) (analyzing, inter alia, effects of oil spills, onshore and offshore manmade structures, vessel traffic, noise, effluents, and air emissions). It was equally true then that future exploration and development activities on the leases would "require separate review and approval by MMS and other appropriate agencies before they may occur" – but that fact did not interfere with MMS's obligation to analyze those future exploration and development activities in its lease-sale EISs. Moreover, the Ninth Circuit has analogized the lease suspensions in this case to a lease sale, stating: "Although a lease suspension is not identical to a lease sale, the very broad and long term effects of these suspensions more closely resemble the effects of a sale than they do [certain] highly specific activities ..." California v. Norton, 311 F.3d at 1174. Just as MMS was required to consider future exploration and development activities in its NEPA analysis of the proposed lease sales for these leases, MMS must analyze future exploration and development activities in its NEPA analysis of the proposed suspensions for these leases.

It is especially important that MMS update the analysis from its lease-sale EISs about future exploration and development activities on the leases in light of the important circumstances that have changed since that analysis was performed many years ago. The administrative record for California v. Norton is replete with examples of such changed circumstances. For example, the threatened southern sea otter has extended its range over the past 20 years into areas within and nearby many OCS leases while continuing to struggle to rebuild. See Letter from California Coastal Commission to Secretary of the Interior and Director of MMS, July 27, 1999 (3 AR 0746). Other examples of circumstances that have changed since the original lease sale EISs include: changes in laws that protect ocean and coastal environments, including the Oil Pollution Act of 1990; new oil spill contingency standards; the listing of federal endangered marine

species; and the establishment of new National Marine Sanctuaries, including the Channel Islands and Monterey Bay National Marine Sanctuaries. See Letter from Senators Barbara Boxer and Dianne Feinstein and Congresswoman Lois Capps to Secretary of the Interior, July 28 1999 (3 AR 0748). MMS's limited discussion in its EAs of the effects of the proposed suspension activities on ocean life is insufficient to meet NEPA's requirements, especially in light of these changes.

The state of the region's fisheries is another example of significantly changed circumstances since the initial environmental reviews were conducted for these leases. Federal fisheries management was in its nascent stage at the time of the lease sale EISs. For example, the initial fishery management plan ("FMP") for Pacific Coast Groundfish was not approved and implemented until October 5, 1982. Prior to that time, management of Pacific groundfish was regulated by the states of Washington, Oregon, and California. Since 1999, eight of the 24 species of Pacific groundfish that have been fully assessed have been declared overfished. Moreover, it was not until the 1996 Sustainable Fisheries Act amendments to the Magnuson-Stevens Fishery Conservation and Management Act that FMPs were required to identify essential fish habitat, actively seek to reduce bycatch, implement conservation measures to prevent overfishing, and to promote rebuilding of already overfished species. MMS makes no mention of the impacts of the proposed suspensions on these overfished species or on the efforts towards attaining more sustainable fisheries, as federal law now requires.

Future exploration and development activities are a reasonably foreseeable indirect effect of the lease suspension proposed by MMS here. As such, they must be fully analyzed under NEPA in an EIS on the proposed suspensions.

B. Future Exploration and Development Activities Must Be Analyzed as Cumulative Effects of the Proposed Suspensions.

NEPA requires evaluation of the cumulative impact "which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (emphasis added). For similar reasons to those stated above, future exploration and development activities are "reasonably foreseeable future actions" that MMS must evaluate within its NEPA review of the suspensions themselves. Courts have consistently enforced the requirement to consider cumulative impacts in analogous situations. See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) (requiring Forest Service to include cumulative impact assessments for all future road density amendments within the EAs for each individual timber sale); see also Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (requiring BLM to quantify the cumulative emissions from potential development of BLM land in Las Vegas Valley); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1434 (C.D. Cal. 1985) (criticizing the Corps of Engineers for having "tunnel vision" for not originally considering the secondary and cumulative effects of approving a permit to place large boulders along the banks of the Colorado River as part of a residential development project). MMS is obligated to consider the cumulative impacts

of post-suspension exploration and development activities as part of the review of the suspensions themselves. Such impacts are reasonably foreseeable, especially where several of the suspension requests include specific plans to spud delineation wells on the very day the suspensions expire.

"Nor is it appropriate to defer consideration of cumulative impacts to a future date." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998) (holding that Forest Service timber sale EIS must consider the cumulative impacts on old growth habitat of all reasonably foreseeable future timber sales in the area in addition to the impacts of the sale being reviewed). MMS may not shirk its responsibilities under NEPA to consider the impacts of exploration and development activities by asserting that such review will occur at a later stage. In Neighbors of Cuddy Mountain, the Ninth Circuit held that the cumulative effect of future timber sales in the region must be considered regardless of the fact that such sales were unrelated to the immediate sale being reviewed. In this case, future exploration and development activities on these leases are not merely related to the grant of the suspensions but are utterly dependent on them. NEPA requires that MMS analyze these cumulative impacts at this stage in the process.

C. The Proposed Suspensions and Future Exploration and Development Activities are Connected Actions.

MMS' failure to consider the effects of post-suspension activities violates NEPA's requirement that the environmental effects of "connected actions" be considered together in a comprehensive environmental review. "Connected actions" are those that:

i. Automatically trigger other actions which may require environmental impact statements.
ii. Cannot or will not proceed unless other actions are taken previously or simultaneously.
iii. Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). NEPA does not permit "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir.1985) (requiring Forest Service EIS to consider both a federal road and the federal timber sales that the road would facilitate); see also Save the Yaak Committee v. Block, 840 F.2d 714, 719-721 (9th Cir. 1988) (applying analysis from Thomas to conclude the same). MMS is attempting to do what courts interpreting NEPA have explicitly held cannot be done: fail to consider the effects of actions connected to the more limited action it chooses to review.

The Thomas court concluded "that the road construction and the contemplated timber sales are *inextricably intertwined*, and that they are 'connected actions.'"

Thomas, 753 F.2d at 759 (emphasis added). The lease suspensions being sought in this case and the future exploration and development activities they will enable are similarly intertwined. MMS explains that "the suspensions would allow . . . time to conduct shallow hazards and biological surveys . . . and to conduct administrative activities leading to the submittal of revised [exploration plans]." See, e.g., Aera EA at ES-2. MMS also explains that the denial of the suspensions "would result in the expiration of the leases" and "the need for the proposed action would not be achieved." See, e.g., Aera EA at 2-6. Because the proposes suspensions are connected in this way to subsequent exploration and development activities, those subsequent activities must be evaluated as part of NEPA compliance on the suspensions.

II. The Activities Planned During the Proposed Suspensions May Cause Significant Environmental Impacts and Must Be Analyzed in an EIS.

In order to sustain its decision to prepare an EA rather than an EIS on the proposed suspensions, MMS must produce "a convincing statement of reasons" showing why the impacts of the proposed suspensions are insignificant. National Parks & Conservation Ass'n v. Babbitt, 241 F.2d 722, 730 (9th Cir. 2001). If "the agency's action may have a significant impact upon the environment, an EIS must be prepared." Id. (emphasis in original; internal quotation marks omitted). Put another way, if "there are substantial questions whether a project may have a significant effect on the environment," the agency must prepare an EIS. Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004) (emphasis in original; internal quotation marks omitted). Because the actions planned during the suspension period may cause significant impacts, because MMS has failed to produce a convincing statement of reasons showing why these impacts must be insignificant, and because there are at the very least substantial questions about whether the suspensions may result in significant impacts, MMS must prepare an EIS on the suspensions.

Even without considering the exploration and development activities intended to take place after the proposed suspensions, MMS has failed to present convincing statements of reasons showing why the suspensions cannot have a significant impact on the environment. In particular, MMS has failed to show that the acoustic surveys planned for the Aera and Samedan leases cannot have a significant environmental impact. Since evidence within and apart from the EAs indicates these acoustic surveys may cause significant impacts, NEPA requires MMS to prepare an EIS on the proposed suspensions.

While MMS seeks to minimize the effects of the acoustic surveys, a bare recitation of the facts shows those effects to be substantial. MMS is proposing to operate acoustic surveys during each day of a 14-17 day period over an area of 10 square miles or more in size. During this lengthy and extensive operation, the lessees would fire an air gun repeatedly under water, approximately every 7-8 seconds, over and over again. "Air-guns release a volume of air under high pressure, creating a sound pressure wave that is capable of penetrating the seafloor to determine substrata structure." National Research

Council, Ocean Noise and Marine Mammals 58-59 (2003).[2] The air gun MMS proposes to use for the acoustic surveys here is an extremely powerful noise source. MMS acknowledges the air gun has the capacity to generate geotechnical information at depths of up to 1,475 feet below the sea floor. Over the lengthy survey period, the air gun would be fired for up to 36 hours total, with the individual noises again coming every 7-8 seconds, over and over again.

MMS acknowledges that the air gun produces sound at 218 decibels and would yield received sound levels by marine mammals and fish of 160-190 decibels or more, depending on distance from the source. Aera EA at 2-5, 4-19. The EAs do an extremely poor job of placing these very loud noise levels in context. For example, while the EAs make no mention of it, the air gun's sound level appears to be as loud or louder than a jet airplane. See, e.g., National Research Council, For Greener Skies: Reducing Environmental Impacts of Aviation (2002). The potential for adverse consequences from such a loud noise source seems obvious, particularly since the noise would be repeated in abrupt shots spaced seconds apart over many hours.

There is limited data about the effect of underwater noise on sea life, a fact that by itself argues for preparing an EIS here, as we discuss below. What is known is that marine mammals and fish are sensitive to underwater noise, which can travel large distances underwater; that they rely on their noise perception for activities that include communicating between individuals; and that there is evidence showing damage to underwater life from noise sources on the sound order of the air gun. See, e.g., Ocean Noise and Marine Mammals, supra; S.L. Nieukirk et al., Low-frequency whale and seismic airgun sounds recorded in the mid-Atlantic Ocean, J. Acoust. Soc. Am. 115 (2004); D.A. Croll et al., Bioacoustics: Only male fin whales sing loud songs, Nature 417 (2002): p. 809 (observing that rise in noise levels from seismic surveys, oceanographic research, and other activities could impede recovery in fin and blue whale populations); P. Tyack, Acoustic communication under the sea, in Animal Acoustic Communication: Recent Technical Advances 163-220 (S.L. Hopp et al. eds., Springer-Verlag 1998); Hearing by Whales and Dolphins (W.L. Au, et al. eds., Springer-Verlag 2000); A. Popper, Effects of anthropogenic sounds on fishes, 28 Fisheries 24-31 (Oct. 2003). MMS's EAs contain an inadequate discussion of the adverse effect of human-caused noise on underwater life. Among other things, they fail to discuss with specificity the potential impacts on all sensitive species in California waters, including but not limited to the 34 species of marine mammals.

The EAs do admit that the acoustic surveys "have the potential for harassing or harming protected marine mammals and sea turtles" and that "[a]coustic harassment" by the planned surveys "could potentially occur" for certain whale species. Aera EA at 4-26, 3-6. Given the potential seriousness of these impacts and the vulnerable nature of many marine mammal and sea turtle species, this potential for harmful impacts is more than enough to justify preparation of an EIS. MMS, however, relies principally on two

[2] We hereby incorporate by reference this and all other publications and documents cited in this comment letter.

arguments in an effort to avoid preparing an EIS. First, MMS argues that the sound levels marine mammals and sea turtles would experience from the acoustic surveys do not rise to the level of significant impacts. Second, MMS claims its mitigation measures will be sufficient to guarantee an absence of significant impacts from the acoustic surveys. Neither of the arguments are adequately supported in the EAs, and neither provides an adequate basis for refusing to prepare an EIS.

MMS apparently assumes that exposing marine mammals or sea turtles to received sound levels of 160 decibels or less cannot cause a significant impact on these animals. E.g., Aera EA at 4-15, 4-22. Nowhere does MMS support this critical assumption in its EAs. Next, MMS concludes that a received sound level of greater than 160 decibels would constitute a "taking" of a marine mammal under the Marine Mammal Protection Act but that such a taking would constitute only an "insignificant, adverse impact." Id. at 4-15, 4-22. Nowhere does MMS explain why such harassment of a depleted marine mammal species necessarily constitutes an insignificant impact.[3] Outside the EAs, there is considerable evidence that tends either to undercut these assumptions or to suggest they rest on an inadequate basis. The National Academy of Sciences reports that "[s]hort- and long-term effects on marine mammals of ambient and identifiable components of ocean noise are poorly understood," that "marine mammals have been shown to change their vocalization patterns in the presence of background and anthropogenic noise," and that potential effects of underwater noise "include changes in hearing sensitivity and behavioral patterns, as well as acoustically induced stress and impacts on the marine ecosystem." Ocean Noise and Marine Mammals, supra, at 3-6. The EAs discuss none of these issues adequately, and the presence of these potential effects means that significant impacts may result from granting the proposed suspensions.

The inadequate discussion of these issues in the EAs suffers from many flaws, including improper efforts by MMS to incorporate previous analyses by reference as well as citations to documents that do not appear in the EA's list of references and hence are unidentifiable. See, e.g., Aera EA at 4-19. In addition, MMS's analysis of hearing impacts on marine mammals appears to rely on an older (1991) study about the sound level that could cause immediate damage to marine mammals. The EAs omit an adequate discussion of issues such as the relevance of newer studies; the issue of non-immediate hearing injury; and the issue of harm to things other than an individual's

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[3] The EAs present a set of "significance criteria" that MMS apparently relies on to determine whether an impact is significant or not. See, e.g., Aera EA at 4-15. These so-called "significance criteria" are extremely poorly supported: MMS has not come close to showing that impacts less severe or different than these criteria are necessarily insignificant. In addition to being unsupported substantively, the criteria are vague and seemingly arbitrary. For example, MMS presents as one criterion for marine mammals "any change in population that is likely to hinder the recovery of a species" but fails entirely to explain what "hindering" means in this context. Similarly vague is the criterion that discusses "[d]isplacement of a major part of the population ..." What constitutes a "major" part of a population in this context? Another criterion sets a seemingly arbitrary threshold of harm to at least 10 percent of the habitat in an area before that habitat harm is deemed significant. In addition, the criteria fail to address behavioral changes that could have an adverse effect on individual members of a species – for example, underwater noise diverting individual animals into less-ideal habitat than they would have occupied in the absence of the acoustic surveys.

hearing acuity. The EAs also fail to discuss adequately the issue of masking, which seems especially relevant since the air gun is louder than many marine mammal vocalizations. The inadequate analysis that is presented in the EAs relies on vague characterizations and hedge words that fail to present an adequately informative picture of the suspensions' likely impact. See, e.g., Aera EA at 4-23 ("It is believed that most protected species would avoid the ... air gun sound by making minor adjustments in their positions ... . The shallow hazard surveys are not likely to ... displace the population from a major part of either feeding or breeding areas or migratory routes for a biologically significant length of time.") (emphasis added).

MMS admits that marine mammals exposed to received sound levels of 180 decibels or greater "may be harassed or harmed; it is possible that acoustic injury may lead to stranding and mortality and potentially significant impacts depending on the number of animals involved." Aera EA at 4-22. MMS claims, though, that its mitigation measures for the acoustic surveys "make impacts on marine protected species unlikely and negligible." Id. The agency's analysis of the efficacy of these mitigation measures falls well short of NEPA's requirements, and MMS's EAs fail to demonstrate that the mitigation measures exclude the possibility of significant impacts from the acoustic surveys.

MMS relies heavily on a mitigation measure relating to the seasonal timing of the acoustic surveys. E.g., Aera EA at 4-22. According to MMS, restricting the surveys to the period between mid-October and mid-December will render the impacts of the surveys insignificant. There are many problems with MMS's reliance on this mitigation measure, and MMS discusses none of these problems adequately in its EAs. First, the mitigation measure does not actually limit the acoustic surveys to this period but instead allows them to take place at another time so long as doing so would have "negligible impact to large whales," Aera EA at 4-25, a criterion that is not developed or defined in any way and that also ignores potential increased impacts to animals other than large whales. Second, the mitigation measure is presented as having been selected because it will assertedly benefit four species of whales as well as all sea turtles, but MMS fails to explain why it is focusing on impacts to these four whale species to the exclusion of other marine mammals, including other marine mammals that are listed as threatened or endangered under the Endangered Species Act. Third, MMS claims this mitigation measure is valuable because the October-December period "lies outside, or on the cusp of," the "predictable periods of occurrence" for four whale species in the area. The problems with this assertion go well beyond MMS's use of the vague phrase "on the cusp of," the meaning of which is nowhere explained in the EAs. According to the EAs, gray whales (one of the four species specified by MMS) actually are at their peak abundance in the area in December. Aera EA at 4-12. Aera's suspension requests indicate that gray whale migration occurs between November and May. E.g., Purisima Point Suspension Request 8 (April 20, 2004) (attached to Aera EA as App. 1). Humpback whales, another of the four species assertedly benefited by the seasonal "restriction," are regularly present in the area in October, November, and December. Aera EA at 4-12. Fourth, there is no support in the EAs for MMS's claim that sea turtles are not located in the area between

October and December. Indeed, the EAs admit that little is known about the distribution of sea turtles in the Southern California Bight. Aera EA at 4-14. MMS has failed to discuss the effects of this mitigation measure adequately and to substantiate the agency's claims of environmental benefit from it.

Many of the rest of the mitigation measures on which MMS relies are poorly analyzed in the EAs. For example, MMS claims the lessees will use observers to detect any marine mammals that enter within a half mile of the air gun and to shut down the air gun if an animal enters that area. Nowhere in the EAs does MMS discuss the feasibility of observers accurately and effectively identifying all marine protected species that could enter within a half mile of the air gun, particularly species such as sea turtles, which are relatively small and capable of remaining submerged (and hence undetected by observers) for long periods of time. Other mitigation measures suffer from other serious problems, none of which are adequately discussed in the EAs. For example, the mitigation measure about "ramping up" the air gun only requires the lessees to do so "as possible," Aera EA at 4-25, a key point that escapes adequate discussion in the EAs.

The EAs' discussion of impacts on sea turtles is notably poor, particularly in light of evidence showing adverse reaction by sea turtles to noise from air guns at the levels at issue here. See Aera EA at 4-21 to -22. Similarly poor is the documents' analysis of impacts on the southern sea otter, a threatened species. MMS's no-effect assertions are based on the agency's belief that otters tend to locate close to shore and on a single 1983 study concluding that sea otters were not disturbed by an air gun. Aera EA at 3-5 to -6. This inadequate analysis ignores the ability of sound to travel underwater; potential adverse impacts to sea otter food sources; and all relevant post-1983 data.

Just as serious as the potential impacts on marine mammals from the acoustic surveys are the potential impacts on fish, but the EAs' analysis of these impacts is extremely poor and falls far short of NEPA's requirements. The National Marine Fisheries Service ("NMFS") has designated eight species of Pacific groundfish as overfished, and MMS admits that all eight of these species "could be present in the survey areas," Aera EA at 4-29. The EAs contain no recognition of the current overfished condition of these species and no analysis of the impacts on these specific species of the acoustic surveys planned for the Aera leases. To make matters worse, it appears that the acoustic surveys would be located in or near rockfish conservation areas established by the Pacific Fishery Management Council and NMFS for these species, yet the EAs omit any discussion of these potential impacts. In order to comply with NEPA, MMS must analyze with specificity the potential impacts of the acoustic surveys on all eight overfished Pacific groundfish species.

The EAs' general discussion of impacts on fish from the acoustic surveys is conclusory and inadequate and fails to take adequate account of the latest science. MMS admits that "[a]coustic energy has the potential for direct damage (lethal, potentially lethal, or sub-lethal effects) to any fish or shellfish life stage," Area EA at 4-30, yet the EAs present only a thin discussion of these potential impacts on fish, a discussion which

consumes less than two pages and focuses much more on eggs and larvae than later life stages. Among other things, the EAs attempt to dismiss a recent study by McCauley et al. by arguing that fish disturbed by underwater noise would likely seek to move away from the noise source. See Aera EA at 4-31 to -32. That argument fails to recognize that fish within range of the air gun could well suffer damage before they could move away from the noise source. The EAs pretend that a fish would need to be within 20 feet of an air gun in order to suffer damage, but that is not what the best and most recent science says. As the National Academy of Sciences has recently noted, McCauley's studies "show that exposure to air-guns with a maximum received level of 180 [decibels relative to 1 micropascal] over 20-100Hz causes major damage to sensory cells of the ear in at least one species" and suggest that "air-guns damage sensory hair cells in fishes." Ocean Noise and Marine Mammals, supra, at 107. Thus, in contrast to MMS's claim that fish would have to be within 20 feet of the air gun to suffer harm, McCauley's studies show that fish located 261 feet or more from the air gun in MMS's planned acoustic surveys could suffer damage. The National Academy also notes that McCauley's studies "could also have implications for marine mammals exposed to air-guns, particularly since the hair cells in fishes and marine mammals are so similar to one another;" that additional scientific data "suggest that sounds may change the behavior of fish;" and that behavioral changes in fish "could have an adverse impact on the higher members of a food chain [such as marine mammals] and therefore have long-term implications despite the fish not being killed or maimed." Id. at 107-08. MMS's EAs analyze none of these issues or data adequately and fail to present a convincing statement of reasons why the impacts of the acoustic surveys cannot be significant for fish and other animals that depend on fish for food. To the extent MMS's conclusions of insignificant impact on fish rest on the so-called "significance criteria" the agency presents in the EAs, these significance criteria are insufficiently supported, conclusory, and arbitrary in significant respects. For example, these criteria claim that fish displacement is significant only if 10 percent or more of the population is displaced, Aera EA at 4-30, but the EA fails entirely to explain the basis for this 10-percent threshold.

NEPA's implementing regulations establish a set of significance factors that help determine whether substantial questions exist about an agency action causing a significant impact, thus necessitating preparation of an EIS. 40 C.F.R. § 1508.27(b). See also Anderson v. Evans, 371 F.3d at 488 (discussing "significance factors"). Several of these significance factors are implicated by the proposed suspension and thus require preparation of an EIS. For example, one such factor asks whether there are "[u]nique characteristics of the geographic area, such as proximity to ... ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). The areas subject to the proposed acoustic survey are located in the habitat of sensitive marine mammals and overfished species, are in or near conservation areas established for overfished Pacific groundfish species, and are near other ecologically critical areas such as the Channel Islands National Marine Sanctuary and the Monterey Bay National Marine Sanctuary. Another significance factor assesses "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.28(b)(4). "Agencies must prepare [EISs] whenever a federal action is 'controversial,' that is, when substantial questions are raised

as to whether a project may cause a significant degradation of some human environmental factor or there is a substantial dispute about the size, nature, or effect of the major federal action." National Parks & Conservation Ass'n, 241 F.3d at 736 (internal citation, ellipsis, brackets, and quotation marks omitted). While MMS maintains that the proposed suspensions cannot affect the environment significantly, the draft EAs, this letter, and the evidence cited therein raise substantial questions about environmental degradation from the proposed acoustic surveys and make out a substantial dispute about the effect of the surveys. A third significance factor is satisfied where "the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). If one thing is clear here, it is that "remarkably few details are known about the characteristics of ocean noise, whether it be of human or natural origin, and much less is understood of the impact of noise on the short- and long-term well-being of marine mammals and the ecosystems on which they depend." Ocean Noise and Marine Mammals, supra, at 1. The same is true for effects of ocean noise on fish. See, e.g., id. at 10 ("effects of anthropogenic noise on fish and other nonmammalian species .. are largely unknown"). Another significance factor considers "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat ..." 40 C.F.R. § 1508.27(b)(9). MMS admits that numerous threatened and endangered species may be affected by the proposed acoustic surveys.[4]

Other significance factors may be affected by the proposed suspensions, but any one is sufficient to require preparation of an EIS. Because there are at least substantial questions about whether the proposed suspensions may have a significant impact on the environment, MMS must prepare a comprehensive EIS on the proposed suspensions. The draft EAs contain an inadequate environmental analysis and cannot meet MMS's obligations under NEPA.

III. MMS Fails to Consider a Reasonable Range of Alternatives.

NEPA requires MMS to consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). The Council on Environmental Quality regulations describes this section as the "heart" of the environmental review process, explaining that agencies must "rigorously explore and objectively evaluate all reasonable alternatives" and explain why alternatives were eliminated. 40 C.F.R. § 1502.14. The same requirement applies no matter whether the agency is preparing an EIS or an EA. 40 C.F.R. § 1508(9)(b). MMS failed to consider a reasonable range of alternatives to the proposed action of granting the suspensions.

MMS' statement of need for the proposed action is improperly narrow and vague. "The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms." City of Carmel-By-The-Sea v. United States Dep't. of Transp., 123 F.3d 1142, 1155 (9th

[4] The EAs fail to address specifically the critical habitat of listed species that may be affected by the proposed suspensions.

Cir. 1997). MMS unreasonably attempts to define the need here as a period of time to allow for the updating of exploration plans ("EP") and development and production plans ("DPPs"). This thinly veiled attempt to narrow the scope of the project and, in turn, the required NEPA analysis is belied by MMS' own admission that the goal beyond the suspension period is "to drill exploratory (delineation) wells . . . and to plan for the development and production" of the leases. Aera EA at 1-2. MMS must acknowledge that the suspensions are not merely an opportunity for administrative revisions to EPs and DPPs but are indispensable linchpins in the development of the leases. After all, absent the suspensions, the leases would expire and so too would any near-term opportunity for oil and gas development in the area. Accordingly, MMS must broaden the stated need and conduct an appropriate review of alternatives and impacts commensurate with the true nature and scope of the proposal. The actual need for MMS to act here is to decide whether or not to extend these old leases and, if so, under what terms.

MMS must look at every reasonable alternative within "the range dictated by the nature and scope of the proposal." See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995) (quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992)). Accordingly, MMS is obligated to consider other reasonable alternatives that fit squarely within the scope of deciding whether to extend the leases and, if so, under what terms. These include:

- Granting the suspensions but disallowing the acoustic and biological surveys and any other impacting activities;
- Granting the suspensions only for those leases and/or units in which exploratory drilling is being immediately planned.
- Denying the suspensions while adopting measures to encourage energy-use efficiency and the development of renewable energy sources.

IV. MMS Fails to Present Adequate Environmental Analysis of the Alternatives Under Consideration.

NEPA requires that agencies discuss "the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). Environmental impacts are defined to include "both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8(b). MMS's cursory and conclusory description of Alternative 2 fails to discuss adequately the environmental impacts of denying the requested suspensions. MMS summarily concludes that "no environmental impacts would result." Aera EA at 5-1. NEPA requires that MMS explore and discuss the environmental benefits of not granting the suspensions and allowing the leases to expire. These benefits include but are by no means limited to: increased health and productivity of fisheries in the region; expanded opportunities for endangered and threatened marine mammals, sea turtles, and birds; enhanced recreational activities; and decreased risk of oil spills and other hazardous events.

V. MMS Fails to Analyze Adequately the Cumulative Impacts of the Proposed Suspension Activities.

NEPA requires MMS comprehensively to analyze the cumulative effects of all suspension-related activities "when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. The cumulative impacts analysis must contain "quantified and detailed information," Neighbors of Cuddy Mountain, 137 F.3d 1372 at 1379-80, must provide a "useful analysis of the cumulative impacts," Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 810 (9th Cir. 1999), and must not "defer consideration of cumulative impacts to a future date when meaningful consideration can be given now," Kern, 284 F.3d at 1075.

MMS improperly chose to segment its cumulative impacts analysis amongst separate EAs and, within each EA, amongst the separate sections considering impacts to various natural resources. Such "perfunctory" analysis is wholly inadequate. See Kern, 284 F.3d at 1075 (finding BLM's analysis of the spread of root fungus from timber project inadequate for failure to consider the cumulative impact of future timber sales and other activities outside of the project area). By so doing, MMS avoids any comprehensive consideration of the cumulative effects of the suspension activities together with all other "reasonably foreseeable" activities, as required by NEPA.

A. MMS' Inadequately Analyzes Cumulative Impacts to Marine Mammals and Sea Turtles.

MMS' cumulative impacts analyses are cursory and inadequate. "To 'consider' cumulative effects, some quantified or detailed information is required." Neighbors of Cuddy Mountain, 137 F.3d at 1379-80 (holding that Forest Service timber sale EIS analysis failed to adequately consider how the sale would cumulatively impact and reduce old growth habitat). The information provided by MMS in its cumulative impacts analysis is neither quantified nor detailed.

For example, the brief section concerning suspension-related impacts to protected species of marine mammals and sea turtles merely lists the various sources of "anthropogenic harm" to such species. E.g., Aera EA at 4-27. Instead of analyzing how the impacts resulting from suspension-related activities might exacerbate or compound harm being caused from other sources, as NEPA requires, MMS simply concludes that "there is no evidence that these activities have resulted in significant impacts on marine mammals and sea turtle populations." Id. MMS then concludes that because the individual impacts of the proposed shallow water surveys are themselves negligible, the cumulative impacts attributable to the combined Aera and Samedan surveys "are not believed to be more than negligible." E.g., Aera EA at 4-27. NEPA requires more than the rote addition of purportedly negligible activities. Indeed, the whole purpose of the consideration of cumulative impacts is to avoid "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but

which collectively have a substantial impact." Native Ecosystems Council, 304 F.3d at 894 (requiring Forest Service EIS to consider both a federal road and the federal timber sales that the road would facilitate) (quoting Thomas, 753 F.2d at 758). Indeed, as MMS acknowledged in the FEISs for the sale of some of these very leases, "cumulative impacts on marine and coastal resources may exceed a simple arithmetic addition of one impact with another due to synergistic effects which remain unknown or unsuspected at the present level of knowledge." BLM, Final EIS for OCS Lease Sale 53 (Sept. 1980), at 4-128. MMS has failed to follow that admonition here.

MMS admits that "overall vessel traffic" off southern California "is increasing," resulting in "increasing levels of noise and disturbance" underwater. Aera EA at 4-27. In a remarkable non-sequitur, MMS claims no significant impacts from these activities because "marine mammal populations in California waters have generally been growing in recent decades." Id. The fact that populations have "generally" been growing does not exclude the possibility of significant cumulative impacts, either because some populations may be doing less well than others or because marine mammals populations, many of which are in poor condition, might do markedly better in the absence of these cumulatively adverse impacts.

B. MMS' Inadequately Analyzes Cumulative Impacts to Fish Resources, Managed Species, and Essential Fish Habitat.

Unlike its assessment of cumulative impacts to marine mammals – where MMS fails to acknowledge any source of significant impacts to marine mammals (suspension-related or otherwise) – MMS does acknowledge that the cumulative effects of pollution, overfishing, and other human sources "has had a major influence on fish resources, managed species, and EFH." E.g., Aera EA 4-32 to -33. MMS also acknowledges that "that acoustic energy/sound from an air gun can temporarily or irreversibly damage hearing in fish which could lead to sub-lethal behavioral changes not conducive to survival." Id. at 4-31. Nonetheless, MMS describes these effects as mere "incremental contribution[s]" relative to the myriad other sources of adverse effects to fish, managed species, and EFH. Id. Without any further discussion, MMS concludes that "the additional effect of the impact-producing agents related to [the suspension-related activities] are not expected to add significantly to cumulative impacts on fish resources, managed species, and EFH." Id. at 4-33. MMS cannot merely disregard the impacts of the suspension activities as insignificant just because they represent a relatively small portion of the overall threat to fish resources. See 40 C.F.R. § 1508.7 ("Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time.").

Another deficiency with MMS' cumulative impacts analysis related to fish impacts is its failure even to mention, much less adequately consider, the combined effects of both the Aera and Samedan shallow water surveys. Neither the Aera EA nor the Samedan EA considers the cumulative effects on fish of all of the shallow water surveys together. See Aera EA at 4-32 to -33; Samedan EA 4-32 to -33. MMS must

consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). In Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214-1215 (9th Cir.1998), the Forest Service was found to have violated this requirement by failing to analyze five distinct timber sales in a single NEPA analysis. The five timber sales were located in the same watershed, were announced simultaneously, and were part of a single timber salvage project. Id. The suspensions and their concomitant environmental impacts must similarly be considered in a comprehensive fashion. Failure to do so would render NEPA meaningless.

C. MMS' Inadequately Analyzes Cumulative Impacts to Commercial Fishing.

MMS inexplicably and arbitrarily limits its consideration of cumulative impacts to commercial fishing only to those non-suspension activities and natural events that "overlap temporally and spatially with the proposed surveys." Aera EA at 4-43. Indeed, this self-imposed limitation contradicts NEPA's requirement that cumulative impacts include "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (emphasis added). Amazingly, MMS quotes this definition in the sentence immediately preceding its unsupported proclamation that only concurrent temporal and spatial impacts be considered. E.g., Aera EA at 4-43. MMS' transparent desire to conduct an inadequate analysis of cumulative impacts to commercial fishing does not authorize such a blatant disregard of NEPA's regulations.

MMS's analysis of cumulative impacts to commercial fishing also fails to consider the combined impact of the suspension activities that are planned for both the Aera and Samedan units. Neither EA makes any reference to the shallow water surveys that are being planned in immediate sequence with each other. Aera EA at 4-43; Samedan EA at 4-43. This omission violates NEPA for the same reasons given in the preceding section.

D. MMS' Inadequately Analyzes Cumulative Impacts to Recreational Fishing and Diving.

The analysis of cumulative impacts to recreational fishing and diving contained within the Samedan EA is also improperly limited to consideration of only those impacts that overlap in time and space with the proposed suspension activities. See the preceding section for a fuller explanation of why this approach violates NEPA.

E. MMS' Inadequately Analyzes Cumulative Impacts to Military Operations.

Unlike all of the other cumulative impact discussions contained within the EAs, the section dedicated to impacts to military operations contained within the Aera EA

completely fails to discuss the impacts of the military operations on natural resources and the environment. See Aera EA at 4-43 to -48. Such consideration is necessary for a complete cumulative impacts analysis. Instead, the section is entirely devoted to consideration of the "insignificance" of the proposed suspension activities on military operations. MMS correctly considers this impact to military operations but fails to remember that the fundamental purpose of the task at hand is to conduct an "environmental assessment," as opposed to a "military assessment."

VI. The Draft EAs Omit Discussion of Other Important Issues.

The Aera EA fails to discuss the implications of the re-unitization requests filed by Aera earlier this year.

The EAs as a group fail to discuss whether many of the units and/or leases can qualify for a suspension in light of the lack of physical activities proposed for those leases or units during the proposed suspension periods.

VII. Conclusion.

The draft EAs on the proposed suspensions fall well short of NEPA's requirements. MMS must prepare a comprehensive EIS before making a decision on whether to proceed with the proposed suspensions.

Sincerely,

Drew Caputo
Attorney

David Newman
Attorney

Congress of the United States

Washington, DC 20515

December 16, 2004

The Honorable R.M. "Johnnie" Burton
Director
Minerals Management Service
U.S. Department of Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Comments on Six Draft Environmental Assessments for Granting Suspensions of Production or Operations on 36 Undeveloped Outer Continental Shelf Leases Offshore California

Dear Director Burton:

We are writing to express our disappointment that the Minerals Management Service (MMS) has prepared limited environmental assessments (EAs) on lease extension requests for 36 undeveloped oil and gas leases off the Central Coast of California. On August 26, 2004, we requested that comprehensive environmental impact statements (EIS) be conducted on these lease extension requests since we believe EAs provide inadequate environmental review.

We believe MMS's current approach is inconsistent with the requirements of the National Environmental Protection Act (NEPA). By failing to comply with NEPA, MMS has overlooked potentially devastating environmental impacts from operations off California's coast. An EIS is clearly warranted to evaluate the cumulative effects that will result from extending the 36 leases.

The draft EAs conclude that extension of the leases will not harm the environment because the purpose is to allow the lessees more time to prepare plans, conduct studies and submit information to MMS. This is entirely unacceptable. Extension of the 36 leases would clearly have significant adverse impacts to California's environment and economy since extensions could result in exploration, development, and production activities. These plans pose considerable risks to our coastline, including oil spills, conflicts with fishing, tourism and other coastal industries, and increased air, water and noise pollution.

As you recall, the 1969 blowout off of Santa Barbara dumped four million gallons of oil into the sea. It killed thousands of seabirds, seals, dolphin, fish, and other sea life. It damaged for years a huge swath of the beautiful coast of Central California. While we appreciate that many advances have been made in drilling technologies in recent years, serious accidents and environmental damage can and do occur at offshore drilling rigs.

Californians have repeatedly spoken out against new offshore oil drilling. Since 1969, twenty-four city and county governments have passed anti-oil drilling measures and the State has enacted a permanent ban on new offshore leasing in state waters. They realize another blowout would wreak havoc on our economy as well, especially the area's critically important tourism, fishing and recreation industries. These industries bring in over $30 billion a year to the California economy, and much of that is due to its stunning coastline.

Even the federal government has demonstrated its sensitivity to Californians' opposition to new drilling. After all, it was President George H.W. Bush who signed an executive memorandum in 1990 placing a ten-year moratorium on new leasing in federal waters off the California coast, which was renewed by President Clinton in 1998 and extended until 2012. Most recently, President George W. Bush endorsed the moratoria in his Fiscal Year 2005 budget. These actions have all been met with public acclaim as necessary steps to preserve the economic and environmental value of our coastline.

We would also note that the 36 leases are outdated. The leases were sold between 1968 and 1984. They were not developed in a timely manner, and if proposed today, they likely would not be approved. A lot has changed since these leases were approved – we now have stronger air quality and marine protection laws. Also, the 36 leases were sold and development plans approved prior to the establishment of the Channel Islands National Marine Sanctuary, which is adjacent to many of the leases. These waters are extremely sensitive and support incredible marine wildlife and biodiversity.

As you know, practically all stages and operations of offshore oil and gas production are accompanied by discharges of drilling muds, cuttings and production waters, and contaminants such as mercury, lead and arsenic. These pollutants destroy our shores and create public health hazards. Air emissions also occur at all stages of the industry's activity. According to one estimate, the average offshore platform generates more than 50 tons of nitrogen oxides, 11 tons of carbon monoxide, 8 tons of sulfur dioxide, and 38 tons of volatile organic hydrocarbons each year.

We are also concerned with industry's proposed use of seismic testing during exploration activities. Seismic testing floods the ocean with noise pollution and has been identified as a threat to marine wildlife, including whales, dolphins and seals, many of which are either endangered or threatened. Researchers have found that fishing is much less successful during and after seismic testing. The fishing industry does not need more threats to its livelihood.

Moreover, the onshore infrastructure associated with offshore oil and gas development causes significant harm to the coastal zone. Pipelines, refineries, roads, docks and other onshore buildings can fragment important coastal habitats. Platforms and associated development also disrupt scenic views and can compromise local tourism operations.

Given the failure to comply with NEPA, the overwhelming public support for termination of the 36 leases, and the devastating impacts posed by oil and gas development to California's coastal environment and economy, we strongly urge you to immediately prepare comprehensive environmental impact statements as a part of considering lease extension requests.

Thank you for your consideration of this important issue.

Sincerely,

LOIS CAPPS
Member of Congress

BARBARA BOXER
United States Senator

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SELECT COMMITTEES
CHAIR, COASTAL PROTECTION
CO-CHAIR, TITLE IX
STATE BOARDS
COASTAL CONSERVANCY
WILDLIFE CONSERVATION BOARD

November 30, 2004

Mr. Maurice Hill
Minerals Management Service
Office of Environmental Evaluation, Pacific OCS Region
770 Paseo Camarillo
Camarillo, CA 93010-6064

Re: Suspension – EA Comments

Dear Mr. Hill:

I am writing to provide comments on the Draft Environmental Assessments that Mineral Management Service (MMS) has prepared in regard to the proposed extensions of 36 undeveloped oil and gas leases in the waters off of California's Central Coast. As a legislator concerned with the long-term health of our coastline, I am disappointed to see that the Environmental Assessments do not fully address the impacts of extending these leases.

In comments to MMS that I submitted in August, I argued that a full Environmental Impact Statement was needed in order to examine the cumulative and long-term impacts of developing these leases, which are scattered in federal waters offshore from Santa Barbara, Ventura and San Luis Obispo Counties. The "suspensions" now recommended by MMS are tantamount to an extension on the life of the leases, likely to lead to expanded oil drilling and production on leases that have had no prior environmental analysis.

The Draft Environmental Assessments being circulated by MMS do not include a full analysis of the impacts associated with increased oil drilling along the Central Coast of California. Such a review is critical given that the area in question is a unique and sensitive environment that includes two Marine Sanctuaries and many marine species listed as endangered or threatened.

Any expansion of oil and gas development in this area increases the risk of oil spills, air pollution, water pollution, potential for harm to the Southern Sea Otter and migrating whales, and conflicts with local tourism and fishing industries. Long-time Santa Barbara residents will not soon forget the disastrous impacts that occurred when Union Oil's Platform A blew out in 1969, leaving our ocean and beaches covered with oil for months.

While coastal communities – including popular California tourist destinations – would have to deal with the effects of these impacts for decades, the amount of oil that could be produced from these leases amounts to only a two-month supply of fuel for the entire nation. We should be focusing on developing alternative sustainable energy technologies that will eventually free us from offshore oil and its impacts.

I respectfully request that the full consequences of extending these leases, from drilling to consumption, be analyzed in the final environmental documents.

Sincerely,

Hannah-Beth Jackson

HANNAH-BETH JACKSON
Assemblymember, 35th District

HBJ:jcr

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Michael Villegas
Air Pollution Control Officer

December 15, 2004

Mr. Maurice Hill
Office of Environmental Evaluation, Pacific OCS Region
Minerals Management Service
770 Paseo Camarillo
Camarillo, CA 93010-6064

Subject: Comments on Draft Environmental Assessments for Granting Lease Suspensions of Production or Operations, Minerals Management Service (MMS)

Dear Mr. Hill:

Air Pollution Control District staff has reviewed the draft environmental assessment for the project. The project consists of granting suspensions of production (SOP) or operations for nine units and one non-unitized undeveloped oil leases located on the federal outer continental shelf offshore California. Potential environmental impacts of granting the lease suspension requests are analyzed in six environmental assessments prepared by MMS. One of the environmental assessments addresses the Cavern Point Unit leases offshore Ventura County. The Cavern Point Unit consists of leases OCS-P 0210 and 0527, operated by Venoco Inc. The project's other five assessments address four other operators and their leases offshore in Santa Barbara County.

Action on the project will be to grant, deny, or take no action on the suspension requests. Approval of suspensions could provide an extension of a lease in certain circumstances. Some of the lease requests involve geohazards or other surveys to assist in the preparation of revised Exploration Plans. These surveys would be conducted after the suspension is granted. We recognize that the granting of a suspension will not authorize any exploration or development and production operations. The draft environmental assessment was prepared to determine if there would be any significant environmental impacts from granting the SOP.

The draft environmental assessment lists a number of issues raised by federal, state, other local agencies and the public during the scoping process. These comments include: issues pertaining to environmental impacts associated with exploration and development activities that would occur after the suspension period ends, reasonably foreseeable and connected actions, and requests for MMS to prepare an environmental impact statement to address exploration and development activities. Although the administrative activities associated with the Cavern Point Unit lease suspensions would be completed by Venoco

and/or their consultant(s) in an office setting and involve no physical activities on the unit itself, we wish to reiterate that potential air quality impacts in Ventura County may result from future activities resulting from approval of the project, based on actions following lease suspension. Section 4.1 of the environmental assessments (Air Quality) discusses air quality issues from lease suspensions, however, there is no such air quality discussion in the Cavern Point Unit environmental assessment, other than an statement that the Ventura County Air Pollution Control District would review, as needed, future Development and Production Plans.

During the public scoping process, we submitted comments on the proposed lease suspensions. As far as we can ascertain, those issues have not been addressed. We recommend that the environmental assessments be expanded to include a discussion of potential air quality impacts to Ventura County if development activities ensue, as well as other reasonably foreseeable and connected actions.

Specifically, we request that the environmental assessments discuss:

1. Potential air quality impacts on Ventura County. Ventura County is nonattainment for state and federal ozone standards and state particulate standards. Ventura County comprises a portion of the South Central Coast Air Basin adjacent to and downwind of the project sites. Because the subject leases are adjacent to and upwind of Ventura County, it is reasonable to assume that any future lease holding development and production operations will affect air quality in Ventura County, perhaps to a greater degree than Santa Barbara County. The air quality analyses should consider all emissions sources associated with any exploratory, development, or production activities that would result from approval of the revised exploration and production plans. Any significant air quality impacts identified in the environmental assessments should be mitigated pursuant to NEPA requirements.

2. The Cavern Point Unit environmental assessment should be revised to include an air quality section similar to the other lease discussions. It should contain the same regulatory and environmental setting background discussion, significance criteria, impact analysis, air emissions modeling and mitigation measures, conclusions and cumulative analysis.

If you have any questions, please call me at (805) 645-1426 or email me at alicia@vcapcd.org.

Sincerely,

Alicia Stratton

Alicia Stratton
Planning and Monitoring Division

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213

DEC 16 2004

In Reply, Refer to:
151405SWR2004PR20160:MLD

Mr. Maurice Hill
Minerals Management Service
Attn: Suspension-EA Comments
Office of Environmental Evaluation
770 Paseo Camarillo
Camarillo, California 93010-6064

Dear Mr. Hill:

This letter responds to your request for the National Marine Fisheries Service (NOAA Fisheries) to review the Draft Environmental Assessment (Draft EA) for Samedan Oil Corporation's (Samedan) Suspension of Production (SOP) for 37 months within the Gato Canyon Unit, located in the western Santa Barbara Channel offshore in Santa Barbara County. NOAA Fisheries also reviewed the Draft EA for Aera Energy LLC's (Aera) SOP for 31 months within the Point Sal Unit and for 34 months within the Purisma Point, Lion Rock and Santa Maria Units, located offshore in northern Santa Barbara County. NOAA Fisheries has prepared the following comments based under the statutory authorities of the Endangered Species Act, the Marine Mammal Protection Act, and the Magnuson-Stevens Fishery Conservation and Management Act.

Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA)

Section 7 of the ESA (16 U.S.C. § 1536(a)(2)) requires Federal agencies to consult with the Secretary of Commerce (delegated to NOAA Fisheries) to insure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ." *See also* 50 C.F.R. part 400.

In addition, whales, dolphins, seals and sea lions are protected under the MMPA and managed under the jurisdiction of NOAA Fisheries. *See* 16 U.S.C. § 1361 *et seq.* According to the MMPA, it is illegal to "take" a marine mammal without prior authorization from NOAA Fisheries. "Take" is defined as harassing, hunting, capturing, or killing, or attempting to harass, hunt, capture, or kill any marine mammal. "Harassment" is defined as any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal in the wild, or has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

In general, NOAA Fisheries concurs with the effects analysis, monitoring and mitigation measures described in the Draft EAs for Samedan and Aera to identify and minimize impacts to marine mammals and sea turtles. Please note that there have been extensive studies of the impacts of seismic surveys on pinnipeds and whales conducted in the late 1990s and beyond and should be included in the final analysis (e.g., LGL Limited environmental research associates; LGL Report TA2230-3; May 1999).

We provide the following specific recommendations for marine mammals and sea turtles based on the information provided in the Draft EA for Samedan. Note that these recommendations can be applied to the Draft EA for Aera, as well.

1. Page 4-14: "The 'taking' of a marine protected species constitutes an insignificant, adverse impact." This sentence likely refers to the number of animals "taken" as being insignificant to the overall population number, not that the activity that caused the take is insignificant. This should be described in more detail as the concept is mentioned throughout the document.

2. Page 4-21: Please note that at 160dB re 1 μPa [rms][1] marine mammals have shown a behavioral response to received sound pressure levels of underwater noise.

3. Page 4-21: "Animals entering the 160dB impact zone may be harassed, amounting to an insignificant impact." If animals are harassed, then by definition this constitutes a "take" as defined under the MMPA, and authorization from NOAA Fisheries would be required. We recommend changing the first two sentences referenced above to read as follows: If no marine mammals occur in the 160dB impact zone, then the animals are not likely to be harassed by the air gun."

4. Page 4-21: Please change the following sentence to read as: "The stranding of multiple animals of the same strategic marine mammal stock or endangered or threatened species may result in a significant impact to the overall population."

5. Page 4-22: In reference to the "appropriate harassment authorization," please note that the permitting process will take some time and we advise the applicant to apply at least 8 months prior to the intended start date.

6. Page 4-22: Please clarify if air gun will be ramped up every time it is stopped.

7. Page 4-23 (MPS-3): We recommend changing NOAA "certified" observer to NOAA "approved" observer.

8. In addition to mitigation measures proposed in the Draft EA, vessel operators should adhere to the following guidelines:

Do not:

- Move into the path of a whale;
- Move faster than a whale;
- Make rapid speed or erratic directional changes, UNLESS to avoid collision with a whale;
- Get between two whales;
- Chase whales

9. Page 4-24 (MPS-12): Please add; "In the unlikely event of a watercraft collision with a marine mammal, officials must immediately contact the NOAA Fisheries Stranding Coordinator, Joseph Cordaro, at (562) 980-4017."

In conclusion, based on the mitigation and monitoring requirements outlined in the Draft EA, NOAA Fisheries concurs with the determination that the proposed actions may affect, but are not likely to adversely affect marine mammals and sea turtle species listed under the ESA and under the jurisdiction of NOAA Fisheries.

Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA)

Pursuant to section 1855(b)(2) of the MSFCMA, Federal agencies are required to consult with the Secretary of Commerce (delegated to NOAA Fisheries) with respect to "any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act." In addition, the MSFCMA provides that the Secretary of Commerce "shall coordinate with and provide information to other Federal agencies to further the conservation and enhancement of essential fish habitat." *See* 16 U.S.C. § 1855(b)(1)(D).

The Pacific Fishery Management Council has identified and described Essential Fish Habitat (EFH) for fishes managed under the Pacific Groundfish Fishery Management Plan (FMP), the Highly Migratory Species FMP, and the Coastal Pelagic Species FMP, many of which may occur in the vicinity of the project area.

Granting the SOP would permit Samedan to conduct a shallow hazards survey on the Gato Canyon Unit and conduct administrative activities leading to the submittal of a revised Exploration Plan (EP) to MMS for subsequent technical and environmental review. The shallow hazards survey will be conducted within a two square kilometer area and will take approximately 3-4 days. A single small air gun (20-in^3) would be used as the acoustic source, which produces a sound intensity level of 218 dB re 1 µPa [rms][1] and is deployed about three meters below the surface.

Granting the SOP would permit Aera to conduct a shallow hazards survey on the Point Sal and Purisma Units and conduct administrative activities leading to the submittal of a revised Exploration Plan (EP) to MMS for subsequent technical and environmental review. The shallow hazard surveys would cover an area that totals approximately 21-26 square kilometers and would take approximately 11-13 days. A single small air gun (20-in^3) would be used as the acoustic source, which produces a sound intensity level of 218 dB re 1 µPa [rms][1] and is deployed about three meters below the surface.

The proposed shallow hazards surveys occur within EFH for Federally managed fish species in the Coastal Pelagics and Pacific Groundfish FMPs, as defined in MSFCMA. Potential adverse effects may occur as a result of the acoustic energy generated by the air gun. However, the risk of mortality or sub-lethal effects on fish and shellfish would be limited to eggs and larvae, the random juveniles or adult fish, juvenile fish associated with the occasional moving kelp mat, or small portions of fish schools that may occur within 6 meters of the air gun when shooting begins. Given the relatively small survey area and brief survey period, the proposed projects will only have minimal effects to EFH. Therefore, NOAA Fisheries does not object to the issuance of the SOPs for Samedan and Aera pursuant to the MSFCMA.

Thank you for coordinating with NOAA Fisheries regarding these marine events. Please contact Monica DeAngelis at 562-980-3232 or Monica.DeAngelis@noaa.gov if you have any questions concerning this letter.

Sincerely,

for Rodney R. McInnis
Regional Administrator

cc:

Ann Bull, MMS-Office of Environmental Evaluation, Camarillo, California
Jeff Childs, MMS-Alaska Outer Continental Shelf Region, Anchorage, Alaska
Christina Fahy, NOAA Fisheries-SWR
Bryant Chesney, NOAA Fisheries-SWR

County of Santa Barbara
Planning and Development

Valentin Alexeeff, Director
Dianne Meester, Assistant Director

December 16, 2004

Minerals Management Service
Attn: Suspension—EA Comments
Office of Environmental Evaluation
770 Paseo Camarillo
Camarillo, CA 93010-6064

RE: Comments on Draft Environmental Assessments for Suspensions of Leases Offshore Santa Barbara and San Luis Obispo Counties

To Whom It May Concern:

As a plaintiff in *California v. Norton,* the County of Santa Barbara is disappointed that the Minerals Management Service (MMS) chose not to examine the potential environmental effects of extending 36 currently undeveloped leases. Instead, the current draft environmental assessments (DEAs) focus solely on insignificant activities by the operators of these leases that would occur during the periods of suspensions, including shallow hazard surveys and administrative tasks. Such a narrow focus would appear to ignore that:

(1) Granting of suspensions represents "a significant decision to extend the life of oil exploration and production off of California's coastal, with all of the far reaching effects and perils that would go along with offshore oil production," as stated by the District Court;
(2) The MMS has previously confirmed that commercial quantities of hydrocarbons have been discovered on all these units; and
(3) The MMS has sufficient information about how these leases would be produced and developed.

A comprehensive, programmatic environmental assessment should have been prepared for each of the requests for suspension. At a minimum, those assessments would lead to a comprehensive, programmatic Environmental Impact Statement for non-unitized lease P-0409, and the Lion Rock, Point Sal, Purisima Point, Santa Maria, and Gato Canyon Units, because production and development would require substantial new infrastructure, including new offshore platforms. Anything short of a more comprehensive review of environmental impacts fails to meet the intent and spirit of the Federal Consistency Review process and the Court rulings in *California v. Norton.*

Our detailed comments on each DEA are attached. Please direct any questions to Mr. Doug Anthony or Mr. Steve Chase at (805) 568-2040 of my department.

Sincerely,

Valentin Alexeeff
Director

123 East Anapamu Street · Santa Barbara, CA 93101-2058
Phone: (805) 568-2000 Fax: (805) 568-2030

Attachment 1

Comments on the Draft Environmental Assessment of the Cavern Point Unit (Leases OCS-P 0210 and 0527)

The County of Santa Barbara ("County") requests that the Minerals Management Service ("MMS") expand the scope of the Draft Environmental Assessment (DEA) and revise its analysis of potential impacts. This revised DEA should address the connected activities of production and development that should reasonably be expected to result from any approval of a suspension. County further requests that a new DEA with an expanded scope be re-circulated for public comment. County reserves judgment as to the conclusions of DEA for granting suspensions of Cavern Point Unit leases until a revised DEA with adequate scope and analysis has been issued.

Venoco, the unit operator, requests suspensions of these leases so that it may produce and develop oil and gas, employing extended-reach techniques from Platform Gail. This platform is situated on an adjacent unit. Wherein granting of these suspensions extends to Venoco all rights to produce and develop these leases under the Outer Continental Shelf Lands Act, denial would terminate such rights.

The DEA identifies two proposed actions: (1) an extension to the terms of leases that would otherwise expire,[1] and (2) preparation by Venoco, the unit operator, of an updated application for an Exploration Plan and interpretation of seismic data from previous surveys. The first action, formally termed as a Suspension of Production, is a federal activity, as defined under the Coastal Zone Management Act (CZMA, 16 U.S.C. § 1456 (c)(1)(A))[2] The second action represents partial steps towards production and development. This second action does not, in and of itself, represent a Federal activity pursuant to the CZMA or private activity that requires a Federal permit or license; however, it establishes the reasonable intent by the operator to extend the term of the two leases located in the Cavern Point Unit to produce and develop them.

The DEA considers only potential environmental effects of the second action, arriving at an obvious conclusion that preparation of applications and analysis of previously obtained seismic date do not result in a significant effect on the environment. However, the DEA completely ignores any consideration of environmental effects that may result from production, and development of the leases that a prudent person would conclude connected to the suspensions of leases. Therefore, we find the draft Environmental Assessment (DEA) to be seriously flawed as to its scope of analysis and conclusions.

Both the Distict Court and the Ninth Circuit Court of Appeals in *California v. Norton* stressed the far-reaching effects of lease extensions, particularly where the leasing of such tracts were not previously subject to Federal Consistency Review. "These lease suspensions represent a

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[1] "What is referred to as a suspension of the lease is actually a suspension of the running of the term of the lease, that is, in effect an extension of the lease." (*California v. Norton*, No. 99-4964 (CW) N.D. Cal., p. 5.)

[2], "The Court finds that the MMS's grant of these suspensions is a federal activity, as defined by the CZMA in 16 U.S.C. § 1456(c) (1). (*California v. Norton*, No. 99-4964 (CW) N.D. Cal, p. 13.) "We are therefore convinced that section (c)(1) applies to these lease suspensions." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 27.)

significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production. Because the decision to extend these leases through the suspension process is discretionary, it does grant new rights to the lessees to produce oil and derive revenues therefrom for many years when absent the suspensions all rights would have terminated." (*California v. Norton,* No. 01-16637 Ninth Circuit, p. 24, including footnote 6.) Anything short of this level of analysis would undermine the spirit and purpose of the CZMA Federal Consistency Review and the previous legal challenge of plaintiffs in *California v. Norton*.. "Defendants' claims that the future review of the EPs or DPPs that will be submitted for the milestone activities obviates the need to review the lease suspensions for consistency is not well taken. The CZMA, as amended, requires consistency review of leases when they are sold and requires review again later when the EPs and DPPs are submitted. ... Thus, under CZMA, as amended, the later review of the EPs and DPPs for consistency with the CCMP does not obviate the MMS's responsibility to provide the State with consistency determination at the earlier stage when the lease is sold. Neither does it obviate the need for a consistency determination of the suspension of these leases, which were not reviewed for consistency with the CCMP at the time of their sale." (*California v. Norton*, pp. 14-15.)

Moreover, the Council on Environmental Quality ("CEQ") has determined, and NEPA case law has reinforced, that environmental impacts must be evaluated prior to making a commitment of resources (40 C.F.R. Sec. 1502.5; *Metcalf v. Daley*, 214 F.3d 1135,1142 (9th Cir. 2000)). In this case, MMS chose to defer the environmental impact analysis to a point in time where the fundamental decision-making junctures had already come and gone. Once the suspensions are granted an environmental assessment or environmental impact statement can only serve as a post hoc rationalization of the decision to allow development and production to take place. This contravenes the CEQ regulation and the case law (*Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000)).

To do otherwise would be to artificially separate the suspensions from the development and production activity for which these suspensions are intended. Dividing the project into such multiple actions is impermissible (*Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)).

In *Thomas v. Peterson*, plaintiffs challenged Forest Service approval of a timber road designed to facilitate timber sales. The road was approved with an environmental assessment ("EA") and a finding of no significant impact ("FONSI") that considered the impacts of the road, but did not consider the combined impacts of the road and the timber sales together (*Thomas v. Peterson,* p. 757). The district court granted summary judgment for the Forest Service but the Ninth Circuit reversed, requiring the combined impacts of the road and timber sales to be addressed in an EIS:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. That purpose requires that the NEPA process be integrated with agency planning "at the earliest possible time," 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken (*Thomas*, p.760).

In *Thomas*, the court held that the Forest Service was required to prepare an EIS that analyzed the combined impacts of the road and the timber sales that the road was designed to facilitate (*Thomas v. Peterson*, p. 761). The Forest Service argued that the timber sales were too uncertain and too far in the future for their impacts to be analyzed along with that of the road. It also argued that the cumulative environmental effects of the road and the timber sales would be adequately analyzed and considered in the EAs or EISs that it would prepare later for the individual timber sales. The Ninth Circuit would not allow it. The timber sales could not go forward without the road, and the road would not be built if there were no timber sales to necessitate it (*Thomas v. Peterson*, p. 759). The series of interrelated projects was "connected" for the purposes of environmental review.

The granting of the requested suspensions is essentially "connected actions" to the eventual development of these leases. In the Council on Environmental Quality ("CEQ") regulations "connected actions" include those that "(i) automatically trigger other actions which may require environmental impact statements" and those that "(ii) cannot or will not proceed unless other actions are taken previously or simultaneously" (40 C.F.R. § 1508.25(a)(1)). Development and production of the leases granted suspensions satisfy each of these criteria.

It is undisputed that if there were no lease suspensions there would be no further development of the tracts in question unless they were leased again. The leases would expire. The lease suspensions have no utility independent of the subsequent production and development (*Wetlands Action Network v. U.S. Army Corps of Engineers*, 2000 U.S. App. LEXIS 21071 (9th Cir. August 21, 2000)). They are "connected actions" within the meaning of the CEQ regulations and so NEPA review must occur prior to the first of the actions.

We disagree with the assertion that a suspension is granted for a limited purpose, or that the MMS lacks substantive detail to examine the potential environmental effects of development and production as may be the case prior to initial leasing. Again, the suspension is, in essence, an extension of the lease term, with all rights to development. If not extended, those rights are forfeited or compensated. Moreover, the MMS has sufficient detail about how these leases would be developed and produced – i.e., extended-reach drilling from Platform Gail, transport of production to Platform Grace and, from there, onshore via existing pipelines – to analyze potential environmental impacts at a programmatic level of review.

In conclusion, we understand from the DEA that Venoco plans to produce and develop the Cavern Point Unit from existing Platform Gail. Accordingly, we request that the scope of the DEA be expanded to address, at a programmatic level of analysis, potential new significant impacts, or increase in existing significant impacts on the environment from producing the Cavern Point Unit from existing Platform Gail and any potential new pipeline infrastructure that may be required should Platform Grace be converted to an LNG terminal. This expanded scope should address activities which are reasonably expected to occur as a result of renewing these leases.

The County reserves its judgment as to whether a programmatic EIS required, or a Finding of No Significant Impacts is sufficient, to address the action of extending a lease, until a revised DEA

with adequate scope and analysis is made available. Such judgment cannot reasonably be rendered now because the scope and analysis of the current is seriously inadequate.

Attachment 2

Comments on the Draft Environmental Assessment of the Gato Canyon Unit (Leases OCS-P 0460, & 0464)

The County of Santa Barbara ("County") requests that the Minerals Management Service ("MMS") expand the scope of the Draft Environmental Assessment (DEA) and revise its analysis of potential impacts. This revised DEA should address the connected activities of production and development that should reasonably be expected to result from any approval of a suspension. We further request that the MMS prepare a comprehensive, programmatic Environmental Impact Statement (EIS) to properly analyze the potential environmental effects of installing and operating a new offshore platform and associated pipelines offshore California. The County believes an EIS is appropriate because the requested suspension would extend the life of the Gato Canyon Unit so that commercial quantities of oil and gas may be produced and developed from a new offshore platform.

Samedan, the unit operator, requests suspensions of these leases so that it may produce and develop oil and gas, from a new offshore platform. Wherein granting of these suspensions extends to Samedan all rights to produce and develop these leases under the Outer Continental Shelf Lands Act, denial would terminate such rights.

The DEA identifies two proposed actions: (1) an extension to the terms of leases that would otherwise expire,[1] and (2) conduct a shallow-hazards survey and prepare an application to revise its Exploration Plan. The first action, formally termed as a Suspension of Production, is a federal activity, as defined under the Coastal Zone Management Act (CZMA, 16 U.S.C. § 1456 (c)(1)(A))[2] The second action represents steps toward production and development. It does not, in and of itself, represent a Federal activity pursuant to the CZMA) or private activity that requires a Federal permit or license; however, it establishes the reasonable intent by the operator to extend the term of the leases located in the Cavern Point Unit for the purpose of development and production.[3]

The DEA considers only potential environmental effects of the second action, while completely ignoring any consideration of environmental effects that may result from production, and development of the leases that a prudent person would conclude connected to the suspensions of

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[1] "What is referred to as a suspension of the lease is actually a suspension of the running of the term of the lease, that is, in effect an extension of the lease." (*California v. Norton*, No. 99-4964 (CW) N.D. Cal., p. 5.)

[2], "The Court finds that the MMS's grant of these suspensions is a federal activity, as defined by the CZMA in 16 U.S.C. § 1456(c) (1). (*California v. Norton*, No. 99-4964 (CW) N.D. Cal, p. 13.) "We are therefore convinced that section (c)(1) applies to these lease suspensions." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 27.)

[3] We note that exploration of the Gato Canyon Unit has already been performed and commercial quantities of oil and gas have been discovered; therefore, the delineation well is proposed to determine how best to tap discovered hydrocarbon reserves. See Minerals Management Service, *Delineation Drilling Activities in Federal Waters Offshore Santa Barbara County, California: Draft Environmental Impact Statement*, Camarillo, Pacific OCS Region, June 2001, pp. 1-8 and 1-9. For example: *"Delineation drilling is a form of exploration drilling used to delineated any hydrocarbon reservoir to enable the lessee to decide how to proceed with development and production. Previously announced discoveries of commercially recoverable oil and gas resources have been made on each of the subject units."*

leases. Therefore, we find the draft Environmental Assessment (DEA) to be seriously flawed as to its scope of analysis and conclusions.

Both the Distict Court and the Ninth Circuit Court of Appeals in *California v. Norton* stressed the far-reaching effects of lease extensions, particularly where the leasing of such tracts were not previously subject to Federal Consistency Review. "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production. Because the decision to extend these leases through the suspension process is discretionary, it does grant new rights to the lessees to produce oil and derive revenues therefrom for many years when absent the suspensions all rights would have terminated." (*California v. Norton,* No. 01-16637 Ninth Circuit, p. 24, including footnote 6.) Anything short of this level of analysis would undermine the spirit and purpose of the CZMA Federal Consistency Review and the previous legal challenge of plaintiffs in *Cal. v. Norton.*. "Defendants' claims that the future review of the EPs or DPPs that will be submitted for the milestone activities obviates the need to review the lease suspensions for consistency is not well taken. The CZMA, as amended, requires consistency review of leases when they are sold and requires review again later when the EPs and DPPs are submitted. ... Thus, under CZMA, as amended, the later review of the EPs and DPPs for consistency with the CCMP does not obviate the MMS's responsibility to provide the State with consistency determination at the earlier stage when the lease is sold. Neither does it obviate the need for a consistency determination of the suspension of these leases, which were not reviewed for consistency with the CCMP at the time of their sale." (*California v. Norton,* pp. 14-15.)

Moreover, the Council on Environmental Quality ("CEQ") has determined, and NEPA case law has reinforced, that environmental impacts must be evaluated prior to making a commitment of resources (40 C.F.R. Sec. 1502.5; *Metcalf v. Daley*, 214 F.3d 1135,1142 (9th Cir. 2000)). In this case, MMS chose to defer the environmental impact analysis to a point in time where the fundamental decision-making junctures had already come and gone. Once the suspensions are granted an environmental assessment or environmental impact statement can only serve as a post hoc rationalization of the decision to allow development and production to take place. This contravenes the CEQ regulation and the case law (Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 567 (9th Cir. 2000)).

To do otherwise would be to artificially separate the suspensions from the development and production activity they mandate. Dividing the project into such multiple actions is impermissible (*Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)).

In *Thomas v. Peterson*, plaintiffs challenged Forest Service approval of a timber road designed to facilitate timber sales. The road was approved with an environmental assessment ("EA") and a finding of no significant impact ("FONSI") that considered the impacts of the road, but did not consider the combined impacts of the road and the timber sales together (*Thomas v. Peterson*, p. 757). The district court granted summary judgment for the Forest Service but the Ninth Circuit reversed, requiring the combined impacts of the road and timber sales to be addressed in an EIS:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. That purpose requires that the NEPA process be integrated with agency planning "at the earliest possible time," (40 C.F.R. § 1501.2), and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken (*Thomas v. Peterson*, p. 760).

In *Thomas v. Peterson*, the court held that the Forest Service was required to prepare an EIS that analyzed the combined impacts of the road and the timber sales that the road was designed to facilitate (*Thomas v. Peterson*, p. 761). The Forest Service argued that the timber sales were too uncertain and too far in the future for their impacts to be analyzed along with that of the road. It also argued that the cumulative environmental effects of the road and the timber sales would be adequately analyzed and considered in the EAs or EISs that it would prepare later for the individual timber sales. The Ninth Circuit would not allow it. The timber sales could not go forward without the road, and the road would not be built if there were no timber sales to necessitate it (*Thomas v. Peterson*, p. 759). The series of interrelated projects was "connected" for the purposes of environmental review.

The granting of the requested lease suspensions is essentially "connected actions" to the eventual development of these leases. In the Council on Environmental Quality ("CEQ") regulations "connected actions" include those that "(i) automatically trigger other actions which may require environmental impact statements" and those that "(ii) cannot or will not proceed unless other actions are taken previously or simultaneously." (40 C.F.R. § 1508.25(a)(1). Development and production of the leases granted suspensions satisfy each of these criteria.

It is undisputed that if there were no lease suspensions there would be no further development of the tracts in question unless they were leased again. The leases would expire. The lease suspensions have no utility independent of the subsequent development and production (*Wetlands Action Network v. U.S. Army Corps of Engineers*, 2000 U.S. App. LEXIS 21071 (9th Cir. August 21, 2000)). They are "connected actions" within the meaning of the CEQ regulations and so NEPA review must occur prior to the first of the actions.

We disagree with the assertion that a suspension is granted for a limited purpose, or that the MMS lacks substantive detail to examine the potential environmental effects of development and production as may be the case prior to initial leasing. Again, the suspension is, in essence, an extension of the lease term, with all rights to development. If not extended, those rights are forfeited or compensated. Moreover, the MMS has sufficient detail about how these leases would be developed and produced – installation of a new offshore platform and offshore pipelines connecting the platform to the Los Flores Canyon processing site or to Platform Hondo – to analyze potential environmental impacts at a programmatic level of review.

In conclusion, we understand that Samedan, the Gato Canyon Unit operator, would construct and install a new offshore platform, with pipelines connecting that platform to shore or to Platform

Hondo, in order to produce oil and gas from the unit.[4] This level of information is sufficient to adequately identify and address activities which are reasonably expected to occur as a result of renewing these leases – production and development of commercial quantities of hydrocarbons from the unit. Among other things, the Environmental Impact Statement should address impacts of installing and operating the new infrastructure, including a new offshore platform and pipelines.

[4] Samedan Oil Corporation, Letter to Maher Ibrahim of the Minerals Management Service requesting a Suspension of Production, dated May 13, 1999 and signed by J.M. Ables, Land Manager – Offshore, item 15 on page two of the table titled "Samedan Oil Corporation, Gato Canyon Unit – Santa Barbara Channel, Suspension of Production – Proposed Schedule of Events Leading to Production."

Attachment 3

Comments on the Draft Environmental Assessment of the Sword Unit (Leases OCS-P 0319, 0320, 0322, and 0323A)

The County of Santa Barbara ("County") requests that the Minerals Management Service ("MMS") expand the scope of the Draft Environmental Assessment (DEA) and revise its analysis of potential impacts. This revised DEA should address the connected activities of production and development that should reasonably be expected to result from any approval of a suspension. County further requests that a new DEA with an expanded scope be re-circulated for public comment. County reserves judgment as to the conclusions of DEA for granting suspensions of Sword Unit leases until a revised DEA with adequate scope and analysis has been issued.

Samedan, the unit operator, requests suspensions of these leases so that it may produce and develop oil and gas, employing extended-reach techniques from Platform Hermosa. This platform is situated on an adjacent unit. Wherein granting of these suspensions extends to Samedan all rights to produce and develop these leases under the Outer Continental Shelf Lands Act, denial would terminate such rights.

The Draft Environmental Assessment (DEA) identifies two proposed actions: (1) an extension to the terms of leases that would otherwise expire,[1] and (2) preparation of an application to revise the Exploration Plan to delineate the oil and gas reservoir. The first action, formally termed as a Suspension of Production, is a federal activity, as defined under the Coastal Zone Management Act (16 U.S.C. § 1456 (c)(1)(A))[2] The second action represents a step towards production and development. It does not, in and of itself, represent a Federal activity pursuant to the CZMA) or private activity that requires a Federal permit or license; however, it establishes the reasonable intent by the operator to extend the term of the four leases located in the Sword Unit for the purpose of development and production.

The DEA considers only potential environmental effects of the second action, arriving at an obvious conclusion that preparation of applications does not result in a significant effect on the environment. However, the DEA completely ignores any consideration of environmental effects that may result from production, and development of the leases that a prudent person would conclude connected to the suspensions of leases. Therefore, we find the draft Environmental Assessment (DEA) to be seriously flawed as to its scope of analysis and conclusions.

Both the Distict Court and the Ninth Circuit Court of Appeals in *California v. Norton* stressed the far-reaching effects of lease extensions, particularly where the leasing of such tracts were not previously subject to Federal Consistency Review. "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast,

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[1] "What is referred to as a suspension of the lease is actually a suspension of the running of the term of the lease, that is, in effect an extension of the lease." (*California v. Norton*, No. 99-4964 (CW) N.D. Cal., p. 5.)

[2] "The Court finds that the MMS's grant of these suspensions is a federal activity, as defined by the CZMA in 16 U.S.C. § 1456(c) (1). (*California v. Norton*, No. 99-4964 (CW) N.D. Cal, p. 13.) "We are therefore convinced that section (c)(1) applies to these lease suspensions." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 27.)

with all of the far reaching effects and perils that go along with offshore oil production. Because the decision to extend these leases through the suspension process is discretionary, it does grant new rights to the lessees to produce oil and derive revenues therefrom for many years when absent the suspensions all rights would have terminated." (*California v. Norton,* No. 01-16637 Ninth Circuit, p. 24, including footnote 6.) Anything short of this level of analysis would undermine the spirit and purpose of the CZMA Federal Consistency Review and the previous legal challenge of plaintiffs in *California v. Norton.*. "Defendants' claims that the future review of the EPs or DPPs that will be submitted for the milestone activities obviates the need to review the lease suspensions for consistency is not well taken. The CZMA, as amended, requires consistency review of leases when they are sold and requires review again later when the EPs and DPPs are submitted. ... Thus, under CZMA, as amended, the later review of the EPs and DPPs for consistency with the CCMP does not obviate the MMS's responsibility to provide the State with consistency determination at the earlier stage when the lease is sold. Neither does it obviate the need for a consistency determination of the suspension of these leases, which were not reviewed for consistency with the CCMP at the time of their sale." (*California v. Norton*, pp. 14-15)

Moreover, the Council on Environmental Quality ("CEQ") has determined, and NEPA case law has reinforced, that environmental impacts must be evaluated prior to making a commitment of resources (40 C.F.R. Sec. 1502.5; *Metcalf v. Daley*, 214 F.3d 1135,1142 (9th Cir. 2000)). In this case, MMS chose to defer the environmental impact analysis to a point in time where the fundamental decision-making junctures had already come and gone. Once the suspensions are granted an environmental assessment or environmental impact statement can only serve as a post hoc rationalization of the decision to allow development and production to take place. This contravenes the CEQ regulation and the case law (*Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000)).

To do otherwise would be to artificially separate the suspensions from the development and production activity they mandate. Dividing the project into such multiple actions is impermissible (*Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)).

In *Thomas v. Peterson*, plaintiffs challenged Forest Service approval of a timber road designed to facilitate timber sales. The road was approved with an environmental assessment ("EA") and a finding of no significant impact ("FONSI") that considered the impacts of the road, but did not consider the combined impacts of the road and the timber sales together (*Thomas v. Peterson,* p. 757). The district court granted summary judgment for the Forest Service but the Ninth Circuit reversed, requiring the combined impacts of the road and timber sales to be addressed in an EIS:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. That purpose requires that the NEPA process be integrated with agency planning "at the earliest possible time," 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken (*Thomas*, p.760).

In *Thomas*, the court held that the Forest Service was required to prepare an EIS that analyzed the combined impacts of the road and the timber sales that the road was designed to facilitate

(*Thomas v. Peterson*, p. 761). The Forest Service argued that the timber sales were too uncertain and too far in the future for their impacts to be analyzed along with that of the road. It also argued that the cumulative environmental effects of the road and the timber sales would be adequately analyzed and considered in the EAs or EISs that it would prepare later for the individual timber sales. The Ninth Circuit would not allow it. The timber sales could not go forward without the road, and the road would not be built if there were no timber sales to necessitate it (*Thomas v. Peterson*, p. 759). The series of interrelated projects was "connected" for the purposes of environmental review.

The granting of the requested suspensions is essentially "connected actions" to the eventual development of these leases. In the Council on Environmental Quality ("CEQ") regulations "connected actions" include those that "(i) automatically trigger other actions which may require environmental impact statements" and those that "(ii) cannot or will not proceed unless other actions are taken previously or simultaneously"(40 C.F.R. § 1508.25(a)(1)). Development and production of the leases granted suspensions satisfy each of these criteria.

It is undisputed that if there were no lease suspensions there would be no further development of the tracts in question unless they were leased again. The leases would expire. The lease suspensions have no utility independent of the subsequent production and development (*Wetlands Action Network v. U.S. Army Corps of Engineers*, 2000 U.S. App. LEXIS 21071 (9th Cir. August 21, 2000)). They are "connected actions" within the meaning of the CEQ regulations and so NEPA review must occur prior to the first of the actions.

We disagree with the assertion that a suspension is granted for a limited purpose, or that the MMS lacks substantive detail to examine the potential environmental effects of development and production as may be the case prior to initial leasing. Again, the suspension is, in essence, an extension of the lease term, with all rights to development. If not extended, those rights are forfeited or compensated. Moreover, the MMS has sufficient detail about how these leases would be developed and produced – extended reach drilling from an existing platform – to analyze potential environmental impacts at a programmatic level of review.

In conclusion, we understand from the DEA that Samedan plans to develop fields in the Bonito Unit from existing Platforms Hermosa. Accordingly, we request that the scope of the DEA be expanded to address, at a programmatic level of analysis, potential new significant impacts, or increase in existing significant impacts on the environment from producing fields in the Bonito Unit from existing platforms. This expanded scope would be sufficient to adequately address activities which are reasonably expected to occur as a result of renewing these leases. Among other things, the DEA should address impacts without modifications to existing infrastructure, and impacts with increased capacity of existing infrastructure, particularly focusing on increased oil processing offshore.

Attachment 4

Comments on the Draft Environmental Assessment of the Rocky Point Unit (Leases OCS-P 0452 and 0453)

The County of Santa Barbara ("County") requests that the Minerals Management Service ("MMS") expand the scope of the Draft Environmental Assessment (DEA) and revise its analysis of potential impacts. This revised DEA should address the connected activities of production and development that should reasonably be expected to result from any approval of a suspension. County further requests that a new DEA with an expanded scope be re-circulated for public comment. County reserves judgment as to the conclusions of DEA for granting suspensions of Rocky Point Unit leases until a revised DEA with adequate scope and analysis has been issued.

Arguello, the unit operator, requests suspensions of these leases so that it may produce and develop oil and gas, employing extended-reach techniques from Platform Hermosa and Hidalgo. These platforms are situated on an adjacent unit. Wherein granting of these suspensions extends to Venoco all rights to produce and develop these leases under the Outer Continental Shelf Lands Act, denial would terminate such rights.

The DEA identifies two proposed actions: (1) an extension to the terms of leases that would otherwise expire,[1] and (2) preparation by Arguello of applications to revise Point Arguello project DPPS. The first action, formally termed as a Suspension of Production, is a federal activity, as defined under the Coastal Zone Management Act (CZMA, 16 U.S.C. § 1456 (c)(1)(A))[2] The second action represents a step towards production and development. It does not, in and of itself, represent a Federal activity pursuant to the CZMA) or private activity that requires a Federal permit or license; however, it establishes the reasonable intent by the operator to extend the term of the two leases located in the Rocky Point Unit for the purpose of development and production.

The DEA considers only potential environmental effects of the second action, arriving at an obvious conclusion that preparation of applications and analysis of previously obtained seismic date do not result in a significant effect on the environment. However, the DEA completely ignores any consideration of environmental effects that may result from production and development of the leases as connected to the granting of lease suspensions. Therefore, we find the draft Environmental Assessment (DEA) to be seriously flawed as to its scope of analysis and conclusions.

Both the Distict Court and the Ninth Circuit Court of Appeals in *California v. Norton* stressed the far-reaching effects of lease extensions, particularly where the leasing of such tracts were not previously subject to Federal Consistency Review. "These lease suspensions represent a

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[1] "What is referred to as a suspension of the lease is actually a suspension of the running of the term of the lease, that is, in effect an extension of the lease." (*California v. Norton*, No. 99-4964 (CW) N.D. Cal., p. 5.)

[2], "The Court finds that the MMS's grant of these suspensions is a federal activity, as defined by the CZMA in 16 U.S.C. § 1456(c)(1). (*California v. Norton*, No. 99-4964 (CW) N.D. Cal, p. 13.) "We are therefore convinced that section (c)(1) applies to these lease suspensions." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 27.)

significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production. Because the decision to extend these leases through the suspension process is discretionary, it does grant new rights to the lessees to produce oil and derive revenues therefrom for many years when absent the suspensions all rights would have terminated." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 24, including footnote 6.) Anything short of this level of analysis would undermine the spirit and purpose of the CZMA Federal Consistency Review and the previous legal challenge of plaintiffs in *California v. Norton*. "Defendants' claims that the future review of the EPs or DPPs that will be submitted for the milestone activities obviates the need to review the lease suspensions for consistency is not well taken. The CZMA, as amended, requires consistency review of leases when they are sold and requires review again later when the EPs and DPPs are submitted. ... Thus, under CZMA, as amended, the later review of the EPs and DPPs for consistency with the CCMP does not obviate the MMS's responsibility to provide the State with consistency determination at the earlier stage when the lease is sold. Neither does it obviate the need for a consistency determination of the suspension of these leases, which were not reviewed for consistency with the CCMP at the time of their sale." (*California v. Norton*, pp. 14-15)

Moreover, the Council on Environmental Quality ("CEQ") has determined, and NEPA case law has reinforced, that environmental impacts must be evaluated prior to making a commitment of resources (40 C.F.R. Sec. 1502.5; *Metcalf v. Daley*, 214 F.3d 1135,1142 (9th Cir. 2000)). In this case, MMS chose to defer the environmental impact analysis to a point in time where the fundamental decision-making junctures had already come and gone. Once the suspensions are granted an environmental assessment or environmental impact statement can only serve as a post hoc rationalization of the decision to allow development and production to take place. This contravenes the CEQ regulation and the case law (*Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000)).

To do otherwise would be to artificially separate the suspensions from the development and production activity they mandate. Dividing the project into such multiple actions is impermissible (*Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)).

In *Thomas v. Peterson*, plaintiffs challenged Forest Service approval of a timber road designed to facilitate timber sales. The road was approved with an environmental assessment ("EA") and a finding of no significant impact ("FONSI") that considered the impacts of the road, but did not consider the combined impacts of the road and the timber sales together (*Thomas v. Peterson*, p. 757). The district court granted summary judgment for the Forest Service but the Ninth Circuit reversed, requiring the combined impacts of the road and timber sales to be addressed in an EIS:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. That purpose requires that the NEPA process be integrated with agency planning "at the earliest possible time," 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken (*Thomas*, p.760).

In *Thomas,* the court held that the Forest Service was required to prepare an EIS that analyzed the combined impacts of the road and the timber sales that the road was designed to facilitate (*Thomas v. Peterson,* p. 761). The Forest Service argued that the timber sales were too uncertain and too far in the future for their impacts to be analyzed along with that of the road. It also argued that the cumulative environmental effects of the road and the timber sales would be adequately analyzed and considered in the EAs or EISs that it would prepare later for the individual timber sales. The Ninth Circuit would not allow it. The timber sales could not go forward without the road, and the road would not be built if there were no timber sales to necessitate it (*Thomas v. Peterson,* p. 759). The series of interrelated projects was "connected" for the purposes of environmental review.

The granting of the requested suspensions is essentially "connected actions" to the eventual development of these leases. In the Council on Environmental Quality ("CEQ") regulations "connected actions" include those that "(i) automatically trigger other actions which may require environmental impact statements" and those that "(ii) cannot or will not proceed unless other actions are taken previously or simultaneously"(40 C.F.R. § 1508.25(a)(1)). Development and production of the leases granted suspensions satisfy each of these criteria.

It is undisputed that if there were no lease suspensions there would be no further development of the tracts in question unless they were leased again. The leases would expire. The lease suspensions have no utility independent of the subsequent production and development (*Wetlands Action Network v. U.S. Army Corps of Engineers,* 2000 U.S. App. LEXIS 21071 (9th Cir. August 21, 2000)). They are "connected actions" within the meaning of the CEQ regulations and so NEPA review must occur prior to the first of the actions.

We disagree with the assertion that a suspension is granted for a limited purpose, or that the MMS lacks substantive detail to examine the potential environmental effects of development and production as may be the case prior to initial leasing. Again, the suspension is, in essence, an extension of the lease term, with all rights to development. If not extended, those rights are forfeited or compensated. Moreover, the MMS has sufficient detail about how these leases would be developed and produced – i.e., extended-reach drilling from Platforms Hermosa and Hidalgo, processing offshore and transport onshore via existing pipelines – to analyze potential environmental impacts at a programmatic level of review.

In conclusion, we understand from the DEA that Arguello plans to produce and develop the Rocky Point Unit from existing platforms. Accordingly, we request that the scope of the DEA be expanded to address, at a programmatic level of analysis, potential new significant impacts, or increase in existing significant impacts on the environment from producing the Rocky Point Unit from existing platforms and any potential expanded offshore processing capacity that may be required. This expanded scope should address activities which are reasonably expected to occur as a result of renewing these leases.

The County reserves its judgment as to whether a programmatic EIS required, or a Finding of No Significant Impacts is sufficient, to address the action of extending a lease, until a revised DEA with adequate scope and analysis is made available. Such judgment cannot reasonably be rendered now because the scope and analysis of the current is seriously inadequate.

Attachment 5

Comments on the Draft Environmental Assessment Of the Bonito Unit (Leases OCS-P 0443, 0445, 0446, 0449, 0499, and 0500)

The County of Santa Barbara ("County") requests that the Minerals Management Service ("MMS") expand the scope of the Draft Environmental Assessment (DEA) and revise its analysis of potential impacts. This revised DEA should address the connected activities of production and development that should reasonably be expected to result from any approval of a suspension. County further requests that a new DEA with an expanded scope be re-circulated for public comment. County reserves judgment as to the conclusions of DEA for granting suspensions of Bonito Unit leases until a revised DEA with adequate scope and analysis has been issued.

Plains, the unit operator, requests suspensions of these leases so that it may produce and develop oil and gas, employing extended-reach techniques from Platforms Hidalgo and Irene. These platforms are situated on adjacent units. Wherein granting of these suspensions extends to Venoco all rights to produce and develop these leases under the Outer Continental Shelf Lands Act, denial would terminate such rights.

The Draft Environmental Assessment (DEA) identifies two proposed actions: (1) an extension to the terms of leases that would otherwise expire,[1] and (2) preparation of amendments to the DPPs for the Point Arguello and Point Pedernales projects. The first action, formally termed as a Suspension of Production, is a federal activity, as defined under the Coastal Zone Management Act (16 U.S.C. § 1456 (c)(1)(A))[2] The second action represents a step towards production and development. The preparation of applications for DPP modifications do not, in and of themselves, represent a private activity that requires a Federal permit or license; however, it establishes a clear intent by the operator to extend the term of the leases located in the Bonito Unit for the purpose of development and production.

The DEA considers only potential environmental effects of the second action, arriving at an obvious conclusion that preparation of applications does not result in a significant effect on the environment. However, the DEA completely ignores any consideration of environmental effects that may result from production, and development of the leases that a prudent person would conclude connected to the suspensions of leases. Therefore, we find the draft Environmental Assessment (DEA) to be seriously flawed as to its scope of analysis and conclusions.

Both the Distict Court and the Ninth Circuit Court of Appeals in *California v. Norton* stressed the far-reaching effects of lease extensions, particularly where the leasing of such tracts were not previously subject to Federal Consistency Review. "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast,

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[1] "What is referred to as a suspension of the lease is actually a suspension of the running of the term of the lease, that is, in effect an extension of the lease." (*California v. Norton*, No. 99-4964 (CW) N.D. Cal., p. 5.)

[2] "The Court finds that the MMS's grant of these suspensions is a federal activity, as defined by the CZMA in 16 U.S.C. § 1456(c) (1). (*California v. Norton*, No. 99-4964 (CW) N.D. Cal, p. 13.) "We are therefore convinced that section (c)(1) applies to these lease suspensions." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 27.)

with all of the far reaching effects and perils that go along with offshore oil production. Because the decision to extend these leases through the suspension process is discretionary, it does grant new rights to the lessees to produce oil and derive revenues therefrom for many years when absent the suspensions all rights would have terminated." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 24, including footnote 6.) Anything short of this level of analysis would undermine the spirit and purpose of the CZMA Federal Consistency Review and the previous legal challenge of plaintiffs in *California v. Norton.*. "Defendants' claims that the future review of the EPs or DPPs that will be submitted for the milestone activities obviates the need to review the lease suspensions for consistency is not well taken. The CZMA, as amended, requires consistency review of leases when they are sold and requires review again later when the EPs and DPPs are submitted. ... Thus, under CZMA, as amended, the later review of the EPs and DPPs for consistency with the CCMP does not obviate the MMS's responsibility to provide the State with consistency determination at the earlier stage when the lease is sold. Neither does it obviate the need for a consistency determination of the suspension of these leases, which were not reviewed for consistency with the CCMP at the time of their sale." (*California v. Norton*, pp. 14-15)

Moreover, the Council on Environmental Quality ("CEQ") has determined, and NEPA case law has reinforced, that environmental impacts must be evaluated prior to making a commitment of resources (40 C.F.R. Sec. 1502.5; *Metcalf v. Daley*, 214 F.3d 1135,1142 (9th Cir. 2000)). In this case, MMS chose to defer the environmental impact analysis to a point in time where the fundamental decision-making junctures had already come and gone. Once the suspensions are granted an environmental assessment or environmental impact statement can only serve as a post hoc rationalization of the decision to allow development and production to take place. This contravenes the CEQ regulation and the case law (*Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000)).

To do otherwise would be to artificially separate the suspensions from the development and production activity they mandate. Dividing the project into such multiple actions is impermissible (*Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)).

In *Thomas v. Peterson*, plaintiffs challenged Forest Service approval of a timber road designed to facilitate timber sales. The road was approved with an environmental assessment ("EA") and a finding of no significant impact ("FONSI") that considered the impacts of the road, but did not consider the combined impacts of the road and the timber sales together (*Thomas v. Peterson*, p. 757). The district court granted summary judgment for the Forest Service but the Ninth Circuit reversed, requiring the combined impacts of the road and timber sales to be addressed in an EIS:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. That purpose requires that the NEPA process be integrated with agency planning "at the earliest possible time," 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken (*Thomas*, p.760).

In *Thomas,* the court held that the Forest Service was required to prepare an EIS that analyzed the combined impacts of the road and the timber sales that the road was designed to facilitate (*Thomas v. Peterson,* p. 761). The Forest Service argued that the timber sales were too uncertain and too far in the future for their impacts to be analyzed along with that of the road. It also argued that the cumulative environmental effects of the road and the timber sales would be adequately analyzed and considered in the EAs or EISs that it would prepare later for the individual timber sales. The Ninth Circuit would not allow it. The timber sales could not go forward without the road, and the road would not be built if there were no timber sales to necessitate it (*Thomas v. Peterson,* p. 759). The series of interrelated projects was "connected" for the purposes of environmental review.

The granting of the requested suspensions is essentially "connected actions" to the eventual development of these leases. In the Council on Environmental Quality ("CEQ") regulations "connected actions" include those that "(i) automatically trigger other actions which may require environmental impact statements" and those that "(ii) cannot or will not proceed unless other actions are taken previously or simultaneously"(40 C.F.R. § 1508.25(a)(1)). Development and production of the leases granted suspensions satisfy each of these criteria.

It is undisputed that if there were no lease suspensions there would be no further development of the tracts in question unless they were leased again. The leases would expire. The lease suspensions have no utility independent of the subsequent production and development (*Wetlands Action Network v. U.S. Army Corps of Engineers*, 2000 U.S. App. LEXIS 21071 (9th Cir. August 21, 2000)). They are "connected actions" within the meaning of the CEQ regulations and so NEPA review must occur prior to the first of the actions.

We disagree with the assertion that a suspension is granted for a limited purpose, or that the MMS lacks substantive detail to examine the potential environmental effects of development and production as may be the case prior to initial leasing. Again, the suspension is, in essence, an extension of the lease term, with all rights to development. If not extended, those rights are forfeited or compensated. The MMS has sufficient information about the operator's plans for production and development – i.e., extended-reach drilling from Platforms Hidalgo and Irene – to conduct a comprehensive, programmatic examination of potential environmental effects that may result from such production and development.

In conclusion, we understand from the DEA that Plains plans to produce and develop the Bonito Unit fields from existing Platforms Hidalgo and Irene. Accordingly, we request that the scope of the DEA be expanded to address, at a programmatic level of analysis, potential new significant impacts, or increase in existing significant impacts on the environment from producing the Bonito Unit from existing platforms and any potential new pipeline infrastructure that may be required. This expanded scope should address activities which are reasonably expected to occur as a result of renewing these leases.

The County reserves its judgment as to whether a programmatic EIS required, or a Finding of No Significant Impacts is sufficient, to address the action of extending a lease, until a revised DEA

with adequate scope and analysis is made available. Such judgment cannot reasonably be rendered now because the scope and analysis of the current is seriously inadequate.

Attachment 6

Comments on the Draft Environmental Assessment of the Non-Unitized Lease p=0409 Lion Rock Unit (Leases OCS-P 0396, 0397, 0402, 0403, 0408 & 0414) Purisima Point Unit (Leases OCS-P 0426, 0427, 0432 &0435) Point Sal Unit (Leases OCS-P 0415, 0416, 0421 & 0422) Santa Maria Unit (Leases OCS-P 0425, 0430, 0431, 0433 & 0434)

The County of Santa Barbara ("County") requests that the Minerals Management Service ("MMS") expand the scope of the Draft Environmental Assessment (DEA) and revise its analysis of potential impacts. This revised DEA should address the connected activities of production and development that should reasonably be expected to result from any approval of a suspension. We further request that the MMS prepare a comprehensive, programmatic Environmental Impact Statement (EIS) to properly analyze the potential environmental effects of installing and operating three new offshore platforms offshore California, associated offshore and onshore pipelines, and onshore processing and refining facilities. The County believes an EIS is appropriate because the requested suspension would extend the life of the AERA leases so that commercial quantities of oil and gas may be produced and developed from new offshore platforms.

AERA, the unit operator, requests suspensions of these leases so that it may produce and develop oil and gas, from a new offshore platform. Wherein granting of these suspensions extends to AERA all rights to produce and develop these leases under the Outer Continental Shelf Lands Act, denial would terminate such rights.

The Draft Environmental Assessment (DEA) identifies two proposed actions: (1) an extension to the terms of leases that would otherwise expire,[1] and (2) conduct a shallow-hazards and biological surveys and prepare application to revise its Exploration Plan to perform delineation drilling. The first action, formally termed as a Suspension of Production, is a federal activity, as defined under the Coastal Zone Management Act (16 U.S.C. § 1456 (c)(1)(A))[2] The second action represents partial steps towards production and development. It does not, in and of itself, represent a Federal activity pursuant to the CZMA) or private activity that requires a Federal permit or license; however, it establishes the reasonable intent by the operator to extend the term of the two leases located in the Cavern Point Unit for the purpose of development and production.[3]

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[1] "What is referred to as a suspension of the lease is actually a suspension of the running of the term of the lease, that is, in effect an extension of the lease." (*California v. Norton*, No. 99-4964 (CW) N.D. Cal., p. 5.)

[2] "The Court finds that the MMS's grant of these suspensions is a federal activity, as defined by the CZMA in 16 U.S.C. § 1456(c) (1). (*California v. Norton*, No. 99-4964 (CW) N.D. Cal, p. 13.) "We are therefore convinced that section (c)(1) applies to these lease suspensions." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 27.)

[3] See Minerals Management Service, *Delineation Drilling Activities in Federal Waters Offshore Santa Barbara County, California: Draft Environmental Impact Statement*, Camarillo, Pacific OCS Region, June 2001, pp. 1-8 and 1-9. For example: *"Delineation drilling is a form of exploration drilling used to delineated any hydrocarbon reservoir to enable the lessee to decide how to proceed with development and production. Previously announced discoveries of commercially recoverable oil and gas resources have been made on each of the subject units."*

The DEA considers only potential environmental effects of the second action, while completely ignoring any consideration of environmental effects that may result from production, and development of the leases that a prudent person would conclude connected to the suspensions of leases. Therefore, we find the draft Environmental Assessment (DEA) to be seriously flawed as to its scope of analysis and conclusions.

Both the Distict Court and the Ninth Circuit Court of Appeals in *California v. Norton* stressed the far-reaching effects of lease extensions, particularly where the leasing of such tracts were not previously subject to Federal Consistency Review. "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production. Because the decision to extend these leases through the suspension process is discretionary, it does grant new rights to the lessees to produce oil and derive revenues therefrom for many years when absent the suspensions all rights would have terminated." (*California v. Norton*, No. 01-16637 Ninth Circuit, p. 24, including footnote 6.) Anything short of this level of analysis would undermine the spirit and purpose of the CZMA Federal Consistency Review and the previous legal challenge of plaintiffs in *California v. Norton*.. "Defendants' claims that the future review of the EPs or DPPs that will be submitted for the milestone activities obviates the need to review the lease suspensions for consistency is not well taken. The CZMA, as amended, requires consistency review of leases when they are sold and requires review again later when the EPs and DPPs are submitted. ... Thus, under CZMA, as amended, the later review of the EPs and DPPs for consistency with the CCMP does not obviate the MMS's responsibility to provide the State with consistency determination at the earlier stage when the lease is sold. Neither does it obviate the need for a consistency determination of the suspension of these leases, which were not reviewed for consistency with the CCMP at the time of their sale." (*California v. Norton*, pp. 14-15)

Moreover, the Council on Environmental Quality ("CEQ") has determined, and NEPA case law has reinforced, that environmental impacts must be evaluated prior to making a commitment of resources (40 C.F.R. Sec. 1502.5; *Metcalf v. Daley*, 214 F.3d 1135,1142 (9th Cir. 2000)). In this case, MMS chose to defer the environmental impact analysis to a point in time where the fundamental decision-making junctures had already come and gone. Once the suspensions are granted an environmental assessment or environmental impact statement can only serve as a post hoc rationalization of the decision to allow development and production to take place. This contravenes the CEQ regulation and the case law (*Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000)).

To do otherwise would be to artificially separate the suspensions from the development and production activity they mandate. Dividing the project into such multiple actions is impermissible (*Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985)).

In *Thomas v. Peterson*, plaintiffs challenged Forest Service approval of a timber road designed to facilitate timber sales. The road was approved with an environmental assessment ("EA") and a finding of no significant impact ("FONSI") that considered the impacts of the road, but did not consider the combined impacts of the road and the timber sales together (*Thomas v. Peterson*, p.

757). The district court granted summary judgment for the Forest Service but the Ninth Circuit reversed, requiring the combined impacts of the road and timber sales to be addressed in an EIS:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. That purpose requires that the NEPA process be integrated with agency planning "at the earliest possible time," 40 C.F.R. § 1501.2, and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken (*Thomas*, p.760).

In *Thomas*, the court held that the Forest Service was required to prepare an EIS that analyzed the combined impacts of the road and the timber sales that the road was designed to facilitate (*Thomas v. Peterson*, p. 761). The Forest Service argued that the timber sales were too uncertain and too far in the future for their impacts to be analyzed along with that of the road. It also argued that the cumulative environmental effects of the road and the timber sales would be adequately analyzed and considered in the EAs or EISs that it would prepare later for the individual timber sales. The Ninth Circuit would not allow it. The timber sales could not go forward without the road, and the road would not be built if there were no timber sales to necessitate it (*Thomas v. Peterson*, p. 759). The series of interrelated projects was "connected" for the purposes of environmental review.

The granting of the requested suspensions is essentially "connected actions" to the eventual development of these leases. In the Council on Environmental Quality ("CEQ") regulations "connected actions" include those that "(i) automatically trigger other actions which may require environmental impact statements" and those that "(ii) cannot or will not proceed unless other actions are taken previously or simultaneously"(40 C.F.R. § 1508.25(a)(1)). Development and production of the leases granted suspensions satisfy each of these criteria.

It is undisputed that if there were no lease suspensions there would be no further development of the tracts in question unless they were leased again. The leases would expire. The lease suspensions have no utility independent of the subsequent production and development (*Wetlands Action Network v. U.S. Army Corps of Engineers*, 2000 U.S. App. LEXIS 21071 (9th Cir. August 21, 2000)). They are "connected actions" within the meaning of the CEQ regulations and so NEPA review must occur prior to the first of the actions.

We disagree with the assertion that a suspension is granted for a limited purpose, or that the MMS lacks substantive detail to examine the potential environmental effects of development and production as may be the case prior to initial leasing. Again, the suspension is, in essence, an extension of the lease term, with all rights to development. If not extended, those rights are forfeited or compensated. Moreover, the MMS has sufficient detail about how these leases would be developed and produced – installation of three new offshore platforms, pipelines, and onshore facilities – to analyze potential environmental impacts at a programmatic level of review. We refer you to the Draft EIS released by the MMS in 2001 for public review, which provides a reasonable expectation of how the AERA leases will be developed.[4]

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[4] Minerals Management Service, *Delineation Drilling Activities in Federal Waters Offshore Santa Barbara County, California: Draft Environmental Impact Statement*, MMS 2001-046m June 2001. Chapter 6 provides broad project

In conclusion, we understand that AERA would construct and install three newoffshore platform, with pipelines connecting that platform to shore or to Platform Hondo, in order to produce oil and gas from the unit.[5] This level of information is sufficient to adequately identify and address activities which are reasonably expected to occur as a result of renewing these leases – production and development of commercial quantities of hydrocarbons from the unit. Among other things, the DEA should address impacts of installing and operating the new infrastructure, including a new offshore platform and pipelines.

Lastly, we reiterated our confusion about the consolidation of the requested suspensions into a single environmental review. Specifically, as we understand it, the operator desires more time to conduct surveys and prepare application to revise its Exploration Plan on the Point Sal and Purisima Point Units. The MMS has not explained how these activities would qualify approval of suspensions for the Lion Rock and Santa Maria Units or the non-unitized lease 0409. It would appear that the MMS is treating all the AERA leases as if they were a single unit. Please explain why, and how such treatment conforms to the due diligence provisions of the Outer Continental Shelf Lands Act and the Federal regulations that govern the granting of suspensions for specific reasons.

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descriptions for future activities on these leases, including reasonably estimated platform locations, proposed oil and gas pipelines, and onshore facilities.

[5] Samedan Oil Corporation, Letter to Maher Ibrahim of the Minerals Management Service requesting a Suspension of Production, dated May 13, 1999 and signed by J.M. Ables, Land Manager – Offshore, item 15 on page two of the table titled "Samedan Oil Corporation, Gato Canyon Unit – Santa Barbara Channel, Suspension of Production – Proposed Schedule of Events Leading to Production."

STATE OF CALIFORNIA – THE RESOURCES AGENCY
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December 13, 2004

Minerals Management Service
Attn: Suspension ---EA Comments
Office of Environmental Evaluation
770 Paseo Camarillo
Camarillo, CA 93010-6064

RE: **Comments on Environmental Assessments ("EAs") Prepared for Granting Lease Suspensions on the 36 Undeveloped OCS Leases**

To Whom it May Concern:

By letter dated August 25, 2004, Coastal Commission staff urged the Minerals Management Service ("MMS") to prepare a comprehensive, programmatic level environmental impact statement ("EIS") in response to applications for lease suspensions filed by the lessees of 36 undeveloped California OCS oil and gas leases. We are therefore disappointed that the MMS has instead prepared environmental assessments ("EAs") that cover only the environmental effects of those activities proposed to occur during the suspension period -- shallow hazard surveys and in-office administrative tasks -- especially given the conclusion of the Ninth Circuit Court in *California v. Norton* that the granting of a lease suspension results in a "significant decision to extend the life and oil exploration and production off of California's coast, with all the far reaching effects and perils that go along with offshore production." 311 F.3d 1162, 1173 (9th Cir. 2002). The granting of a lease suspension will lead to future activities (e.g., oil and gas exploration and development) that will have a significant effect on the environment. An EIS is clearly warranted. We believe MMS's current approach is inconsistent with the requirements of the National Environmental Protection Act ("NEPA") and the intent of the *California v. Norton* decision.

For the reasons set forth above and in our August 25, 2004 letter (enclosed herein), we urge you to prepare an EIS to cover those leases that would require new or expanded platforms, pipelines, or other infrastructure to be developed. To do otherwise is to ignore your obligation under NEPA to consider the reasonably foreseeable and cumulative impacts of granting the lease suspension requests.

Below we offer comments on the two EAs prepared in response to lease suspension requests submitted by Aera Energy LLC and Samedan Oil Corporation. These two EAs evaluate the environmental effects of conducting shallow hazard surveys during the suspension period.

1. Please explain why aerial surveys are not proposed for the shallow hazards surveys, given that this is a recommendation of the *High Energy Seismic Survey Review Process and*

Interim Operational Guidelines for Marine Surveys Offshore Southern California, February 18, 1999.

2. Both Aera and Samedan propose to conduct the shallow hazard surveys during the mid-October to mid-December window to avoid gray whale migration. We recommend that MMS require that work cease by either December 1 or 5 (since some whales are known to traverse that area earlier than mid-December). Another option for Aera is for MMS to require that the survey work start near the three-mile limit and then survey outward to reduce any conflicts with whales that could be early arrivers to this section of coast.

3. Page ES-7/8 of Aera's EA states that acoustic mitigation will be in place whenever the surveys are conducted, but Page 4-23 of the EA implies mitigation only if activities occur outside the mid-October to mid-December 'window.' We recommend that the identified mitigation measures be required regardless of survey timing.

4. On Page 4-24 of Aera's EA, MPS-15 states that Aera shall, "as possible", ramp up the air gun. The EA needs to describe specifically the constraints when ramp-up would not be possible and then relieve them on the "ramp-up" protocol only when the constraints are present.

5. In each EA, please add the Coastal Commission as recipient of the various monitoring/reporting documents identified, for example, in Aera mitigation measures MPS-8, MPS-13, and MPS-22.

6. Since Aera and Samedan are using hydrophones to collect seismic information, do they also have the ability to perform passive acoustic monitoring for whale calls, as not all whales surface and can be visually observed?

7. Please consider requiring field-testing to corroborate the estimated 0.5 mile 160 dB preclusion radius.

8. On page 4.27 of the Aera EA, it states that the two shallow hazard surveys are "likely" to not be concurrent. Under what circumstances might they be concurrent?

9. Can MMS confirm that there will be no seismic surveying when the ship is turning around in State waters?

Thank you for considering these comments.

Sincerely,

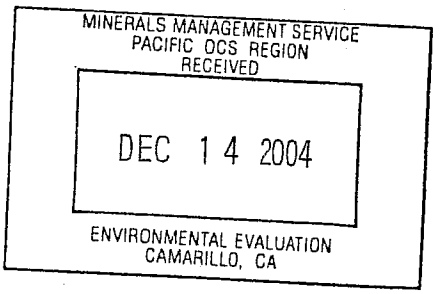
Alison Dettmer

ALISON J. DETTMER
Manager
Energy and Ocean Resources Unit

RESOURCE MANAGEMENT AGENCY
county of ventura

Planning Division
Christopher Stephens
Director

December 14, 2004



Minerals Management Service
Attn: Suspension-EA Comments
Office of Environmental Evaluation
770 Paseo Camarillo
Camarillo, CA 93010-6064

Subject: DRAFT Environmental Assessments for Granting Suspensions of Production or Operations

Thank you for the opportunity to review the six DRAFT Environmental Assessments of the potential impacts of suspending production or operations for nine units and one non-unitized lease located on the Federal Outer Continental Shelf offshore California.

Ventura County Planning Division staff concentrated on two documents: the EA on suspension of Cavern Point Unit and the EA on suspension of Gato Canyon Unit. These two units are geographically closest to Ventura County and activities on these units potentially could affect Ventura County and its residents and visitors.

Cavern Point Unit is located in the eastern Santa Barbara Channel, offshore Ventura County. Activities to be undertaken during the suspension of the Cavern Point Unit are administrative and would be completed in an office setting. The activities involve interpretation and analysis of seismic data from previous surveys. The DRAFT EA has determined that the potential impacts of these activities will be insignificant. Ventura County staff concurs.

Activities to be undertaken during the suspension of the Gato Canyon Unit will include administrative activities leading to the submittal of a revised Exploration Plan and a shallow hazards survey in the western Santa Barbara Channel offshore Santa Barbara County, where the Gato Canyon Unit is located. During a typical shallow hazards survey, an air gun towed behind a vessel is fired every 7-8 seconds. The firing process involves the release of compressed air that creates a strong sound impulse followed by a period of silence.

The mitigation measures delineated in the DRAFT EA should be able to render potential impacts to marine mammals, sea turtles, fish resources, managed species and essential fish habitat to less than significant. These measures include a Marine Wildlife Contingency Plan, the use of observers during vessel operations, the creation of a noise impact zone, restricting air gun use to clear, daylight times, and restriction of anchoring.

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Although the shallow hazards survey area is approximately 35 miles from Ventura County marinas, it is conceivable that recreational and commercial fishing and diving boats will venture into the area while the survey is taking place. However, since the survey will involve one vessel and entail firing one air gun for no more than 6 (six) hours over a 3 to 4 day period, it appears that potential impacts to fishing and diving would be less than significant. Further, the mitigation measures proposed by the operator (Samedan) and those required by Minerals Management Service will minimize the potential impacts to Ventura County commercial and recreational fishing and diving activities to insignificant.

Again, thank you for the opportunity to review these documents. It is evident that considerable effort was expended to prepare the assessments and we appreciate being included in the review process. If you have any questions or require clarification of this letter, please call Julie Ward at (805) 654-3588 or Nancy Settle at (805) 654-2465.

Christopher Stephens, Director
Planning Division

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