

Ocean Commission Additional Follow-up Questions

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Question 1. I understand that, in recent years, production from the shallower-water Shelf in the Gulf of Mexico has started to diminish and that our production in deeper waters has been increasing. However, I have also heard that there is some concern in MMS that deep water production may be leveling off. Can the Gulf continue to play such a dominant role in providing our offshore oil and gas resources to the Nation or are we going to have to look elsewhere? Will you please clarify this for the Commission and give us a general idea of your oil and gas production projections for over the next few years?

Answer. When discussing the future oil and gas production potential of the Gulf of Mexico (GOM) it is appropriate to discuss oil potential and gas potential separately. From 1995 to 2001, shallow water oil production declined approximately 22 percent (from 290 to 226 million barrels per year). During this same period deepwater oil production increased over 500 percent (from 55 to 339 million barrels of oil per year). The combination of these two totals shows that in 1995 total federal GOM oil production was 345 million barrels and in 2001 it was 565 million barrels. The GOM office recently completed (soon to be published) a GOM oil and gas production projection report from 2002 through 2006. Oil production is expected to be in a range from 730 million barrels to 900 million barrels of oil per year by 2006. Therefore, the 2001 annual production of 565 million barrels is expected to increase in a range from a minimum of 29 to a maximum of 59 percent. So, with respect to GOM oil production, the GOM can continue to play a dominant role in providing offshore oil resources to the Nation.

Gas, however, is a somewhat different story. From 1995 to 2001 shallow water gas production declined approximately 15 percent (from 4.6 to 3.9 trillion cubic feet per year). During this same period deepwater gas production also increased over 500 percent (from .2 to 1.1 trillion cubic feet per year). The combination of these two totals shows that the 1995 total federal GOM gas production was 4.8 trillion cubic feet and in 2001 it was 5.0 trillion cubic feet, almost no increase. The production projection report indicates that GOM gas production will be in a range from 4.0 to 6.0 trillion cubic feet per year by 2006. So, with respect to gas production, the GOM will probably maintain its current production level and in the most optimistic scenario could increase by 20 percent to 6.0 trillion cubic feet per year by 2006. Given projections that indicate gas demand will increase substantially in the coming decade, it does not appear that the GOM will be able to increase gas production to fulfill this capacity.

In recognition of this gas production problem, the MMS began a shallow water deep gas incentive for the leases sold in 2001 and 2002 (expected to continue in 2003, 2004, and perhaps 2005) to encourage lessees to drill below 15,000 feet true vertical depth to produce gas. This incentive was necessary because of the higher cost to drill deeper wells and the higher geologic risk. Shallow water deep gas was also chosen because of the existing infrastructure, lack of exploration at this depth, and potential high flow rates which could offset the declining gas production.

The GOM will continue to play a dominant role in offshore gas production also, but may not be able to meet the future projected increases in gas demand.

Question 2. Since the mandatory relief provision of the Deep Water Royalty Relief Act expired at the end of 2000, has the Administration used its discretionary authority to continue some form of relief in subsequent lease sales? What is the position of the Administration with respect to royalty relief in the deep water of the Gulf?

Answer. Yes, the MMS has used its regulatory authority to help stimulate exploration and production activity for oil and gas in the Gulf of Mexico (GOM) by offering royalty suspension incentives, beginning in 2001, similar to the provisions mandated by the Deep Water Royalty Relief Act of 1995. Royalty suspensions were offered for leases in designated water depths. The volume of production that can be produced royalty free, subject to limitations based on average annual product price levels, now applies to OCS blocks offered for sale in the Western, Central, and Eastern GOM planning areas where the water depth is 400 meters or greater. Moreover, any lease sold by the MMS after year 2000 in greater than 200 meters is eligible to apply for new or added royalty relief under our application program for supplemental royalty relief. In addition to our incentives that are geared to stimulate leasing, exploration, and production in deep and ultra-deep water, we have also initiated a royalty suspension provision to enhance industry's ability to explore for natural gas deposits that are situated in shallow water (less than 200 meters) but at very deep depths below the surface; i.e., greater than 15,000 feet subsea.

We currently have four deepwater royalty suspension areas and one shallow water deep drill depth suspension area in the GOM. The automatic royalty suspension volumes outlined below apply unless product prices exceed a base level price threshold. A summary of the provisions as employed in 2001 lease sales is offered below:

A lease in water depths 200 meters or greater will receive royalty suspension as follows:
200 to 399 meters: no automatic relief (but eligible for relief through application)
400 to 799 meters: 5 million barrels of oil equivalent (BOE) production is automatically royalty free
800 to 1599 meters: 9 million BOE production is automatic royalty free
1600 meters and deeper: 12 million BOE production is automatic royalty free

A lease in less than 200 meters of water where the lessee drills a new deep natural gas reservoir (15,000 feet subsea or greater) and commences production within the first 5 years of the lease term will receive royalty suspension on the first 20 billion cubic feet of deep gas production.

As is the case in deep water, the relief is conditional on product prices, in this case natural gas, being below a stipulated level.

The Administration is enthusiastic about our efforts to help stimulate leasing activity and enhance industry's ability to reduce our reliance on imported oil and gas. The President's National Energy Policy calls for "economic incentives for environmentally sound offshore oil and gas development where warranted by specific circumstances," including "reduction of risk associated with production in frontier areas or deep gas formations."

Question 3. In your written testimony, you stated that the MMS has "...merged the constraints of at least 10 major laws to produce a growing level of energy production." Can you provide more specifics about what MMS has done to harmonize these

potentially conflicting mandates and how you have accomplished it?

Answer. The diversity of laws and regulations that affect regulatory activities for which the MMS is responsible, directly or indirectly, were written at different times for various purposes. Some were in response to a specific incident or event, such as the Oil Pollution Act of 1990 and the Exxon Valdez spill. Some have developed over the years as the environmental conscience of the nation has heightened, and as information transfer has improved. They were not necessarily designed to mesh. If compliance were approached as a matter of listing what one set of regulations required, then separately, what another set of regulations required, there would be difficulties with redundancy, applicability, contradictions, organization, and timeliness on the part of the applicant. As the regulatory agency, each of these problems would be mirrored in the review process. A tool that the MMS uses as a device to communicate the regulatory requirements is the NTL (Notice to Lessees). This is a plain-language description of the collective requirements of all relevant laws and regulations, organized so similar or related material is presented together, and to allow a single answer to meet multiple, similar requirements. This tool, combined with workshops, leads to a coherent and efficient program. This effort supports energy production by decreasing the costs for industry compliance with the application process, providing a predictable timeline, and it shortening the waiting period for industry.

Specific examples of how the MMS avoids “conflicting mandates”:

- To ensure consistent analysis for the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Fishery Conservation and Management Act (FCMA), we use the Draft EIS for proposed lease sales to satisfy the environmental analysis requirements for ESA Section 7 consultations and for Essential Fish Habitat (EFH) consultations required by the FCMA. We recently signed an agreement with the National Marine Fisheries Service (NMFS) for EFH consultation purposes.
- The U.S. Environmental Protection Agency (EPA) is a cooperating agency in the preparation of some lease sale EIS's. Therefore, EPA is able to use the EIS to meet their NEPA requirements for the issuance of National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act for discharges associated with exploration, development, and production of oil and gas on the OCS.
- EPA and the U. S. Army Corps of Engineers were cooperating agencies on the MMS EIS for the Destin Dome 56 Unit Development and Production Plan which allows these agencies to use the EIS as their NEPA document for regulatory purposes.
- The MMS was a cooperating agency for the Federal Energy Regulatory Commission (FERC) EIS for the Gulfstream Natural Gas Pipeline that crosses the Eastern GOM from Mobile County, Alabama to Tampa, Florida. The MMS is also serving as a cooperating agency for the FERC EIS on the ANR (El Paso) Gas pipeline from the Bahamas to Florida.
- The MMS and Department of Defense coordinated closely to develop stipulations designed to prevent space-use conflicts between oil and gas operations and military equipment and weapons testing activities in the Eastern GOM.

- We are preparing a single EIS for nine proposed lease sales in the Central and Western GOM, and we will use the DEIS to initiate ESA Section 7 consultations with the Fish and Wildlife Service (FWS) and NMFS for the first sale. Then we will prepare an EA for each of the eight subsequent sales and ask FWS and NMFS to uphold the Biological Opinions prepared for the first sale. This results in greater continuity and consistency in the analysis and consultations from sale to sale. The same approach is also being used for three proposed sales in the Beaufort Sea.
- We are also preparing a single EIS for two proposed lease sales in the Eastern GOM, and we will use the DEIS to initiate ESA Section 7 consultations with FWS and NMFS for the first sale. Then we will prepare an EA for the subsequent sale and ask FWS and NMFS to uphold the Biological Opinions prepared for the first sale. This results in greater continuity and consistency in the analysis and consultations from sale to sale.
- Oil and gas activities in the Western GOM could potentially conflict with the requirement of the Marine Protection, Research, and Sanctuaries Act to protect the Flower Garden Banks National Marine Sanctuary, which was established in 1992. The MMS has effectively avoided this conflict by excluding leasing in two blocks on the Flower Garden Banks and restricting oil and gas activities, such as by shunting discharges elsewhere around the Banks to ensure protection of the sanctuary.
- Requirements of OCS Lands Act regulations to remove OCS structures once operations are completed can conflict with requirements of the ESA and Marine Mammal Protection Act (MMPA) to protect endangered species and marine mammals if explosives are used to remove the structures. We work closely with NMFS to promulgate regulations that ensure procedures for the explosive removal of platforms do not violate the ESA or MMPA.
- The MMS requirements for the siting and emplacement of offshore oil and gas structures, including pipelines, can conflict with the requirements of the National Historic Preservation Act to protect underwater archaeological resources. The MMS has regulations that require operators to conduct surveys if archaeological resources may be present on a lease, and to modify operations if necessary to protect any archaeological resources.
- It is essential that we have adequate environmental information to fully analyze issues and resolve conflicts. To accomplish this, we conduct environmental studies as required by OCSLA Section 20 to gather scientific data to meet a range of environmental compliance obligations for proposed OCS activities. These studies provide environmental information for NEPA analyses, ESA and EFH consultations, compliance with MMPA regulations, air quality regulations, environmental justice requirements of Executive Order 12898, and other legal requirements.

Question 4. Please provide more specifics about your statement that conditional concurrence by states is not allowed by the CZMA and that it is problematic.

Answer: The new 15 C.F.R. 930.4 provides for the issuance by the state of a “conditional” concurrence if the state decides that conditions or stipulations are needed to ensure

consistency with its enforceable policies. The federal agency is then required to incorporate those conditions into its decision or its approval of the proposed action, or immediately notify the state if the terms are not acceptable. If the agency does not accept the state's conditions, the conditional concurrence is treated as an objection. If a proponent of an exploration plan or a development plan, or an applicant for a license or permit, is unwilling to accept the state's conditions, the conditional concurrence is treated as an objection. A conditional concurrence does not appear to be authorized or permissible under the CZMA.

Section 307(c)(3)(A) of the CZMA requires that once a consistency certification is submitted to the state for concurrence, the state must concur with or object to the applicant's certification within six months. If the state does not respond within the six-month period, there is a presumption of concurrence. Further, section 307(c)(3)(A) prohibits a federal official from approving any license or permit until such concurrence is obtained. Section 307(c)(3)(B) contains an analogous requirement — *i.e.*, that an agency may not issue a license or permit for an activity described in an OCS exploration or development plan until the state has concurred with the consistency certification for the plan. By its very nature, and as demonstrated below, a conditional concurrence is not a concurrence that the CZMA contemplates. It acknowledges that the state believes that the proposed activity or plan, as submitted, is not consistent with the enforceable policies of the state's approved program, but then prescribes conditions that purportedly must be met to achieve consistency.

Before the new regulations, the consistency process with regard to licenses and permits was one that generally involved the applicant and the state. That is, the applicant was required to certify that the proposed licensed activity was consistent with the enforceable policies of the state, and if the state concurred, the federal agency could go forward with the issuance of the permit or license. If the state did not concur, the applicant could appeal that decision to the Secretary of Commerce. The new regulations convolute an otherwise straightforward process in two distinct ways.

First, by requiring the applicant and the federal agency to either adopt the state's conditional language in full or reject it, resulting in a state objection, NOAA has created a process by which a state in many cases, as a practical matter, will have enough leverage to impose its will on the federal agency and usurp the federal agency's authority to oversee the content of OCS plans and licenses and permits by simply loading a concurrence with terms and conditions. When confronted with a conditional concurrence, the applicant is forced either to accept the conditions or face the consequence of an extremely time-consuming and costly appeal process through the Secretary of Commerce. In many instances, such a process could have dire financial consequences to an applicant. When a state issues a conditional concurrence, the issue of whether the terms and conditions are logically derived from or rationally related to enforceable policies becomes secondary. The process becomes one of a cost-benefit analysis on the part of the applicant.

Second, the new regulations redefine the role of the MMS in CZMA process, with potentially confusing results. Previously, when the state concurred with the consistency determination of an applicant, the MMS simply moved forward to the issuance of licenses or permits (whether under an exploration or development plan or standing alone). If the state did not concur, the

MMS was legally prohibited from issuing the license or permit until the dispute between the state and the applicant was resolved by an appeal to the Secretary of Commerce.

In the case of a conditional concurrence, however, the MMS's role has changed. Under the new regulations, if a state issues a conditional concurrence, the likely result is that the MMS will have to conduct an adjudication. The regulations require the MMS to accept the conditions in total and incorporate them into the exploration or development plan or license or permit, or issue a determination that the conditions are unacceptable. If the MMS chooses the former, the decision by the state is deemed to be a concurrence. If the MMS refuses to accept even one of the conditions, the decision by the state is deemed to be an objection. In effect, the MMS would be directing the outcome of the consistency process based upon its willingness to accept or reject the conditions. That is the first reason why the decision, when the state issues it, is neither a concurrence nor an objection, but rather a hybrid declaration that does not find its origin or authorization in the CZMA.

But that is not the end of the convolution of the process. If the state were to issue a conditional concurrence, with a number of conditions attached, it is foreseeable that the applicant, although it may have misgivings about whether the conditions are actually related to the enforceable policies of the state, nonetheless may agree to accept them to avoid the lengthy and costly appeals process. If the MMS, as required by the new regulations, issues a determination that the conditions are unacceptable because they do not follow from the state's enforceable policies, then the conditional concurrence is treated as an objection by the state. The applicant then is forced into the appeal process, notwithstanding the fact that the applicant was willing to accept the terms and conditions based upon time and monetary considerations.

Taking this scenario to the next step, the process becomes further confused by the question of which administrative tribunal has the authority to resolve the appellant's dilemma. Under the regulations before December 2000, because only the state issued a decision with regard to consistency, the applicant appealed the state's objection to the Secretary of Commerce. However, under the new regulations, it is the MMS (an agency of the DOI) and not the state that has issued a decision that has resulted in an adverse impact on the applicant. It is the determination that the conditions required by the state are not tied to an enforceable policy that has led the MMS to reject the conditions, thus resulting in an objection to the consistency of the proposed plan or activity. Generally, it is the Interior Board of Land Appeals (IBLA) that has the administrative jurisdiction to review decisions made by the MMS. There seems to be no question that the MMS decision had an adverse impact on the applicant, because but for the MMS determination the state's decision would have been deemed a concurrence, and the applicant would have been granted a permit. Given that the IBLA has the jurisdiction to review decisions of the MMS, and assuming that the issue to be resolved is whether the MMS determination that the conditions were not tied to an enforceable policy of the state is correct, then it would appear that the new regulations, at least in the case of conditional concurrences, in effect have delegated some of the authority previously vested in the Secretary of Commerce to the Secretary of the Interior. Obviously, the invention of the "conditional concurrence" by NOAA has created complicated issues of administrative economic demands and conflicting jurisdiction and authority. Even aside from these problems there is little, if any, evidence to indicate that conditional concurrences will facilitate the consistency process. The process

before the new rules encouraged states and applicants to informally discuss issues, resolve consistency problems, and develop modifications during the state's consistency review period, prior to decision. Therefore, the development of conditional concurrences adds nothing to the process, but confuses the issue by creating a "hybrid" finding that is neither a complete concurrence nor a complete objection and which only serves to confuse the issue. The terms and conditions of the CZMA do not contemplate or authorize such a process.