



September 11, 2009

Ms. Renee Orr  
Chief, Leasing Division  
Minerals Management Service, MS 4010  
381 Elden Street  
Herndon, VA 20170-4817

**Re: 2010–2015 Oil and Gas Leasing in the Outer Continental Shelf: Draft Proposed OCS Leasing Program**

Dear Ms. Orr:

This letter is submitted by the Environmental Defense Center (EDC) regarding the Minerals Management Service's (MMS) Draft Proposed 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2010-2015. The EDC is a non-profit organization that protects and enhances the environment through education, advocacy and legal action. Since 1977 we have represented many groups concerned about the impacts caused by offshore oil and gas development. We primarily work within Santa Barbara, Ventura, and San Luis Obispo Counties – areas that have already absorbed more than their share of offshore oil development and borne the ill effects that result from such development, including the infamous 1969 oil spill.

As explained in more detail below, EDC opposes the Draft Proposed Leasing Program because it is premature, threatens the ecologically rich California coast, unnecessarily perpetuates our nation's reliance on fossil fuels, and will exacerbate global climate change and ocean acidification. Under separate cover, we are submitting comments regarding the Notice of Intent to Prepare an Environmental Impact Statement (EIS) for the Proposed 5-Year Program.

The 2010-2015 Leasing Program includes four planning areas within the Pacific Region: Washington-Oregon, Northern California, Central California, and Southern California. There is one proposed lease sale in the Northern California Planning Area and

two in the Southern California Planning Area (one in the Santa Maria and Santa Barbara/Ventura Basins in 2012, and one in the Oceanside Basin in 2015). The proposed program area for the first sale in the Southern California Planning Area includes the Federal Ecological Preserve offshore Santa Barbara.

As we stated in our September 17, 2008 letter (attached hereto), we urge the MMS to refrain from issuing any new oil and gas leases offshore California. Our State has taken numerous steps to wean ourselves of fossil fuel production and move towards a sustainable, clean energy future. Our Governor, State Legislature, State Lands Commission and Coastal Commission all oppose new federal oil and gas leasing. In 1999, our State undertook litigation (in partnership with EDC and other environmental groups and local Counties) that successfully blocked the extension of 36 undeveloped federal leases located offshore Santa Barbara, Ventura and San Luis Obispo Counties. *State of California v. Norton*, 311 F.3d 1162 (9th Cir. 2002). In addition, our State has enacted strong laws requiring aggressive increases in renewable portfolio standards and reductions in greenhouse gas emissions.

These efforts are a direct result of our experience with the impacts of offshore oil and gas development, including oil spills, toxic gas releases, air and water pollution, impacts to marine wildlife from exploration and development activities, conflicts with commercial fishing, and impacts to our local communities caused by the onshore infrastructure (e.g. processing facilities and refineries) necessary to support offshore oil and gas production. Studies confirm that oil spills are unavoidable,<sup>1</sup> and that it remains impossible to adequately clean up an oil spill that occurs offshore.

Accordingly, we urge MMS to withdraw the Draft Proposed 5-Year Leasing Program for 2010-2015. We also urge the President to reinstate the Executive Moratorium that was established in 1990 by President H.W. Bush, then extended until 2012 by President Clinton, and subsequently rescinded by President G.W. Bush in 2008. As discussed below, the proposed 2010-2015 Leasing Program is premature, unnecessary, and would point this nation down the wrong energy path.

We believe that the 5-Year Leasing Program should be withdrawn pending approval of a new National Energy Policy, one that prioritizes clean energy options. This new Policy will necessarily engender a change in leasing policy from that developed by the Bush Administration, thus rendering the proposed 2010-2015 Program obsolete.

Finally, with respect to Alternative Energy, we believe that additional information is necessary to inform a new plan. As noted in the Draft Proposed Program (Part II) (DPP), little is known about either offshore resources or technology. MMS should continue its research in this area, looking at the potential for offshore energy resources as well as the potential impacts and conflicts with other ocean uses and environmental protection.

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<sup>1</sup> Minerals Management Service, *Safety and Environmental Management Systems for Outer Continental Shelf Oil and Gas Operations*, Federal Register, Vol. 74, No. 115, 28643 (June 17, 2009).

The following comments address specific parts of the DPP.

## **PART I: SUMMARY OF DECISION - DRAFT PROPOSED PROGRAM FOR 2010-2015**

### The 2010-2015 Leasing Program is Premature.

Under the Outer Continental Shelf Lands Act (OCSLA, 43 U.S.C. §1331 *et seq.*), MMS is required to prepare Five-Year Leasing Programs. The current Program covers the period from 2007-2012. The next Program would normally apply to the five-year period starting in 2013. Notwithstanding the fact that the current Program does not expire until after 2012, the DPP states that “[w]ith the President’s 2008 lifting of the withdrawal on offshore oil and gas exploration, areas of the OCS are now available for leasing that were not included in the 2007-2012 5-Year Program.” (DPP, p.1.)

However, just because additional areas may be “available” for leasing does not mean that the normal planning process should be averted. There is no need to expedite the next 5-Year Program; in fact, there are millions of acres of leases that already exist that have not been developed. We see no reason to press forward with opening new areas for leasing when existing areas are available for exploration and production.

**In addition, waiting for the normal cycle will allow for consideration of additional information regarding alternative energy technologies and proposals, and – hopefully – a new National Energy Policy. More emphasis and an aggressive policy in support of increased energy conservation, efficiency and renewable sources of energy will reduce the need for new fossil fuel production and oil and gas leasing.**

Therefore, MMS should withdraw the Bush-era 2010-2015 Leasing Program and instead proceed towards a new 2013-2018 Program that is less based in fossil fuel production and more geared towards clean energy alternatives.

## **PART II: INFORMATION ON LEASING AND DEVELOPMENT OF ALTERNATIVE ENERGY RESOURCES ON THE OCS DURING THE 2010-2015 TIME FRAME**

On February 10, 2009, the Secretary of the Interior directed MMS and USGS to prepare a report on conventional and renewable offshore energy resources. According to the report, issued April 22, 2009, “there is a high degree of uncertainty in estimating the actual extractable or developable amount of [renewable] energy given the many uncertainties in societal preferences, technological development, environmental sensitivities, transmission capacity, grid connection availability, and potential space-use conflicts in the ocean environment.”<sup>2</sup>

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<sup>2</sup> OCS Report MMS 2009-015. *Report to the Secretary, U.S. Department of the Interior: Survey of Available Data on OCS Resources and Identification of Data Gaps.* April 2009.

EDC recognizes that renewable energy technology embodies great promise for the production of clean energy that does not threaten our marine environment with oil spills, or put our common future at risk with global climate change. However, this suite of technologies also embodies tremendous uncertainty, especially with respect to offshore projects. Most forms of alternative energy technologies are completely untested offshore of the West Coast and all are unknown at a commercial scale. Many uncertainties still surround potential effects to humans and the natural environment. Accordingly, EDC supports a policy that incorporates precaution and conservatism when considering offshore renewable energy projects.

To ensure that sensitive marine areas and resources are not negatively impacted, preplanning for any proposed offshore renewable energy development should include identifying and mapping: ocean energy resources, marine topography, oceanography, environmentally sensitive areas, distribution of marine communities, and other proposed ocean uses. It may also be useful to invest in research and development to test ocean-based renewable energy technology. Small scale pilot projects sited in appropriate locations may serve as a reasonable way to evaluate potential impacts. Marine spatial planning may be useful to set aside protected areas and also identify areas that are appropriate for renewable energy development.

Finally, we urge the federal government to work closely with coastal states, communities, and stakeholders. Linking inter-agency and stakeholder based planning will facilitate the incorporation of local knowledge in the decision-making process. Joint efforts and collaboration should be used to collect spatial information, standardize new and best available data and technologies, and assess environmental impacts.

## **PART IV: DRAFT PROPOSED PROGRAM OPTIONS**

### **A. Size, Timing, and Location Options**

The Southern California Proposed Option involves two oil and gas lease sales, one in the Santa Maria Basin and one covering the Santa Barbara/Ventura Basins. The second area includes the Santa Barbara Ecological Preserve, with access via directional drilling. (DPP, p.50.)

The DPP acknowledges the tremendous opposition to new leasing offshore California, based on comments last fall by the Governor of California, California Congressional delegation, environmental organizations, and a majority of the public. (DPP, pp.46-48.) Based on this widespread opposition, all areas offshore California should be withdrawn from the 5-Year Leasing Program.

Notwithstanding our strong opposition to new federal leasing, we will take this opportunity to respond to the specific questions raised in the DPP.

*(1) Should there be buffer zones? If so, how large should they be? What criteria should be used for setting them (e.g., visual impacts, infrastructure, etc.)? Should they be uniform in all new areas, or vary geographically?*

Experience shows that no buffers are large enough to avoid the many impacts caused by OCS development: oil spills, toxic releases, air pollution, water pollution, visual blight, conflicts with other ocean uses, and threats to marine wildlife. Oil spills alone can cover hundreds of miles of ocean and coastline.

*(2) Are there places that should be excluded because they are particularly sensitive? Or because they are more suited to other uses (e.g., alternative energy)?*

There are several areas that should be excluded, both for environmental and economic reasons. At a minimum, the entire California coast should be excluded. This exclusion would be consistent with the California Coastal Sanctuary Act, which bans oil and gas leasing in State waters.<sup>3</sup> It is also consistent with the California Coastal Commission's objections to the renewal of 36 undeveloped federal leases located offshore California in 1999 and other opposition registered by the State of California and its residents.

*(3) This Administration views revenue sharing as a strong feature of state participation in coastal resource development. When the President modified the presidential withdrawal, he called upon Congress to address new legislation to enhance current revenue sharing laws, to allow broader state participation in fiscal planning related to future coastal resource development. Please provide your views on what policies and programs MMS, Congress and the Administration should consider relative to OCS revenue sharing.*

While revenue sharing for existing production may make sense, to compensate states and local communities for the impacts that have resulted from nearby OCS development, we are concerned that revenue sharing can also be used to generate support for new offshore oil and gas development. In our experience, promises of money can overshadow environmental and other concerns, and incentivize new industrial projects.

*(4) For those areas proposed for leasing consideration in the Southern California Planning Area, in deciding the next steps in the 5-year program preparation, should MMS include a requirement for mandatory unitization to potentially limit the number of structures in one or more of these areas?*

We oppose unitization, because it can be used to undermine the due diligence requirements of OCSLA. With unitization, an oil lessee need only pursue development of a small portion of the units to preserve all of the leases.

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<sup>3</sup> California Public Resources Code § 6244.

## **PART V: DRAFT PROPOSED PROGRAM ANALYSIS**

### **A. Analysis of Energy Needs**

The analysis of energy needs fails to maximize energy conservation and efficiency. The dramatic decline in gasoline demand that followed high gas prices in mid-2008 demonstrates the untapped potential for greater energy conservation. In addition, the projections in the DPP rely on current CAFE standards, which are extremely unambitious and do not reflect current potential for enhancing energy efficiency through increased standards. *For example, in California, raising vehicle mileage standards by less than 2% would obviate the need for any additional leasing off our coast.* Developing all of the oil projected in the DPP for offshore California would provide energy for the country for only about six months, and yet would impact the environment and our State for several decades.

In the analysis of the alternatives to new leasing, the DPP concludes that without any new leasing, consumption of oil would only drop 5% and consumption of natural gas would only drop 9%. (DPP, p.78.) Clearly, much greater declines in consumption are possible through a combination of conservation, efficiency, and renewable supplies. Until we have a new National Energy Policy, one that prioritizes a clean energy path, we should not be considering any new leasing.

In sum, the analysis of energy needs should be revised to reflect the true potential for reducing demand through increased energy conservation and efficiency. Our nation's energy policy should emphasize conservation, efficiency and renewable supplies, not increased production and use of fossil fuels. Raising CAFE standards is just a start; advancing technologies, and incentives to use alternative modes of transportation and drive less, must be the central focus of our energy planning.

### **B. Analysis of Environmental Concerns**

#### *Climate Change*

The DPP offers a cursory mention of climate change, without analyzing the actual climate change effects that would result under the proposal to lease new areas for oil and gas development. Although the DPP references the fact that environmental review for prior 5-Year Lease Programs has addressed climate change, new information reveals that such analyses are out-of-date and woefully underestimate the trajectory and effects of greenhouse gas emissions on the environment.

For example, *recent scientific information reveals that to achieve climate stabilization will require that we reduce greenhouse gas emissions from current levels.* Although the 2007 IPCC report relied on a target of 450 ppm for carbon emissions, it has

now been determined that the target should be 350 ppm.<sup>4</sup> Given current levels of 385 ppm, we are already on a trajectory that is not sustainable, and we must decrease GHG emissions more rapidly and to a greater extent than previously thought. This new information requires an immediate change in energy policy: one that suspends our reliance on fossil fuels and instead focuses on a carbon-free energy future.

The DPP also states that secondary impacts of climate change “will not be considered in the EIS because they are too speculative at this time.” (DPP, p.82.) Under NEPA, however, MMS has a clear duty to consider, in quantitative fashion, the direct, indirect, and cumulative effects of its proposed action on global warming. 40 CFR §§ 1502.16(b), 1508.8; *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1216 (9th Cir. 2008) (finding NEPA analysis of proposed CAFE standards unlawful under NEPA: “While the EA quantifies the expected amount of CO<sub>2</sub> emitted from light trucks [in years] 2005-2011, it does not evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment generally in light of other past, present, and reasonably foreseeable actions...”).

Several scientific sources discuss how climate change will impact the environment, on a state, national and global scale.<sup>5</sup> Such impacts include: sea level rise, reductions in snowpack, increases in water and atmospheric temperatures, increases in the intensity and frequency of storms, effects on ecosystems and individual species, increases in the risk of wildfires, increased ozone formation, melting of sea ice, spreading of pests and diseases, damage to agriculture and forests, flooding and loss of coastal properties and resources. The EIS must address all of the potential effects of increasing greenhouse gas emissions and carbon consumption with respect to climate change.

The EIS must also address the “other” climate change – increasing ocean acidification. Rising atmospheric CO<sub>2</sub> levels correspond to a higher CO<sub>2</sub> concentration in the ocean. Scientific evidence demonstrates that oceanic CO<sub>2</sub> uptake results in chemical changes in seawater, and directly impacts the calcification cycle in the array of the oceans calcifying organisms. This change leads to a series of chemical reactions resulting in decreased pH levels in the oceans. The shift in pH directly impacts marine calcifying organisms such as coral, coralline algae, urchins and oyster and makes it difficult for

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<sup>4</sup> Matthews H.D., and K. Caldeira (2008), *Stabilizing climate requires near-zero emissions*, *Geophys. Res. Lett.*, 35, L04705, doi:10.1029/2007GL032388; James Hansen, et al., *Target Atmospheric CO<sub>2</sub>: Where Should Humanity Aim?* *The Open Atmospheric Science Journal*, 2008, 2, 217-231; Statements of Dr. Chris Field, Carnegie Institution for Science, *Decisive Action Needed as Warming Predictions Worsen*, Says Carnegie Scientist, available at [http://www.ciw.edu/news/decisive\\_action\\_needed\\_warming\\_predictions\\_worsen\\_says\\_carnegie\\_scientist](http://www.ciw.edu/news/decisive_action_needed_warming_predictions_worsen_says_carnegie_scientist) (last visited September 9, 2009).

<sup>5</sup> See, e.g., California Climate Action Team reports, including *The Impacts of Sea Level Rise on the California Coast*, by Heberger, et al.; *IPCC Fourth Assessment Report: Climate Change 2007*; CCSP, *Analyses of the Effects of Global Change on Human Health and Welfare and Human Systems (SAP 4.6)*, U.S. Environmental Protection Agency, Washington, D.C., 2008; Union of Concerned Scientists reports, available at [http://www.ucsusa.org/global\\_warming/](http://www.ucsusa.org/global_warming/); California Coastal Commission report: *A Summary of the Coastal Commission’s Involvement in Climate Change and Global Warming Issues for a Briefing to the Coastal Commission (prepared by Commission Staff Climate Change Task Force)*, December 12, 2008.

them to develop their calcium carbonate (CaCO<sub>3</sub>) shells. In addition, more acidic oceans can lead to the dissolution of existing shells that species depend on for survival. Shell dissolution has been observed in pteropods-an ecologically significant group of planktonic swimming snails.<sup>6</sup> Pteropods are ecologically important as they provide the base for many marine foodwebs.<sup>7</sup> For example, pteropods make up over half the diet of Pacific Northwest salmon.

### ***Consultation and Coordination***

Lease sales are subject to state consistency review under the Coastal Zone Management Act. *State of California v. Norton*, 311 F.2d 1162, 1173, citing 16 U.S.C. § 1456(c)(1) (9<sup>th</sup> Cir. 2002). Consultation is also required under Section 7 of the Endangered Species Act.

### ***Risks of Accidental Oil Spills***

The DPP states that “It has been many years since any substantial environmental impacts have been observed as a result of an oil spill caused by the OCS production and transportation activities.” (DPP, p.83.) The report goes on to state that “The result of all of these efforts is an excellent record that has been documented in detail in previous 5-year program analyses and in several MMS publications.” (DPP, p.84.) We take exception to these statements. The recent hurricanes in the Gulf of Mexico caused massive oil spills in that area. Here in California, we continue to experience the impacts of oil spills associated with OCS production as well. For example, in 1997, an oil spill occurred in northern Santa Barbara County when an offshore pipeline developed a leak and an operator on the platform overrode the automatic shutdown system and restarted production. This spill affected 40 miles of pristine coastline at Vandenberg Air Force Base, damaging two coastal estuaries and killing seabirds and other wildlife.

MMS recently completed a study that confirmed that the “majority of incidents occurring in the OCS were related to operational and maintenance procedures or human error,” not equipment or technological failure. 74 FR 28642 (June 17, 2009). This report confirmed that even advances in technology cannot reduce the risk of an oil spill.

Not only is it impossible to prevent a spill, due to natural disasters and human error, but it is also impossible to effectively clean up an offshore oil spill. Sea and weather conditions make it difficult to contain spills before the oil sinks or dissipates. Clean up methodologies have proven to be ineffective and may create impacts of their own.<sup>8</sup>

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<sup>6</sup> Orr, J.C., V. J. Fabry, O. Aumont, L. Bopp, S. C. Doney, R. A. Feely, A. Gnanadesikan, N. Gruber, A. Ishida, F. Joos, R. M. Key, K. Lindsay, E. Maier-Reimer, R. Matear, P. Monfray, A. Mouchet, R. G. Najjar, G. Plattner, K. B. Rodgers, C. L. Sabine, J. L. Sarmiento, R. Schlitzer, R. D. Slater, I. J. Totterdell, M. Weirig, Y. Yamanaka, and A. Yool. 2005. “Anthropogenic ocean acidification over the twenty-first century and its impact on calcifying organisms.” *Nature* 437:681-686.

<sup>7</sup> Fabry et al. 2008.

<sup>8</sup> According to *No Safe Harbor: Tanker Safety in America's Ports*:



In sum, requiring oil spill contingency plans and inspections are not sufficient to prevent and respond to an actual spill. The fact of the matter is that most spills occur as a result of a natural disaster or human error, and cannot be avoided. The devastation caused by oil spills is long-lasting and sometimes irreversible.<sup>9</sup>

### ***Ecological Issues***

As noted in the DPP, there are many adverse effects of offshore oil and gas development, including: air and water pollution, noise, and harm to marine wildlife and coastal habitats. In addition, OCS development results in increased climate change and ocean acidification, which threaten irreversible ecological harm.

### ***Social and Economic Issues***

According to the California Resources Agency, tourism provides almost 50% of the state's coastal revenue, whereas oil, gas and mineral production combined provide less than 5%.<sup>10</sup> Our state's tourist economy is threatened by increased offshore oil drilling. As such, the potential cost to our environment *and economy* are too great to bear.

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“The record of oil spill containment and cleanup is nothing less than dismal. Only 10 to 15 percent of spilled oil is typically recovered....On the technology side, current spill-containment and cleanup equipment quickly become inoperative in anything other than calm weather and seas. For example, most booms – floating barriers intended to prevent oil from spreading – lose effectiveness when wave heights reach three to four feet and currents exceed one knot....Skimmers – devices that skim oil off the water's surface – also lose effectiveness with increasing wave height, with one to five feet the operational limit for most. Dispersants have demonstrated low effectiveness in actual spill situations, and some of them are toxic to marine life. When they work, they merely shift the location of spill impacts from the surface to the water column – the water between the surface and the bottom – and the ocean bottom.” (Page 3.) Natural sorbents are also problematic because they “soak up water along with oil and sink to the bottom, complicating the cleanup and transporting oil to bottom-dwellers. Synthetic sorbents are not biodegradable and create a disposal problem. Mineral-based sorbents tend to be very lightweight and are difficult to distribute in windy weather.” (Page 31.) Burning has many disadvantages as well. “First and foremost, combustion of oil releases toxic compounds into the atmosphere....Second, combustion of oil is never complete. Third, burning is usually most effective if it takes place within a stable and fireproof boom. Because stability of the boom is dependent on weather conditions, use of burning as a cleanup method is limited to predictable periods of calm waters. Fourth, burning after a tanker spill is limited by the potential for fire damage to the tanker, explosions and further spillage. Finally, burning is problematic because it is often difficult to raise the temperature of a thin sheet of oil floating on a generally cold body of water high enough to cause ignition. (Pages 31-32.) Sinking agents are problematic because they “simply contaminate[] bottom-dwelling marine organisms.” (Page 32.)

<sup>9</sup> Ott, Riki, *Sound Truth and Corporate Myth*. Dragonfly Sisters Press, 2005. This book chronicles the long-lasting environmental and human health effects of the 1989 Exxon Valdez oil spill.

<sup>10</sup> California Resources Agency, *California's Ocean Resources: An Agenda for the Future*, 1997.

## **Environmental Analyses**

### ***The OCS Record***

The DPP again downplays the risk of oil spills as a result of increased leasing and development. As noted above, MMS itself has released the results of a study showing that the majority of spills occur as a result of human error and organizational failure. Therefore, the risk of an oil spill is always a concern and can lead to long-term, devastating impacts.

In our County alone, we continue to experience oil spills, toxic gas releases, and assorted unplanned incidents. Even the most stringent technological, inspection and training requirements cannot prevent accidents from happening.

### ***Findings of EIS's Prepared for Previous 5-Year Programs***

The DPP grossly understates the impacts of offshore oil and gas development, finding that new leasing will result in virtually no impacts to air and water quality, and wildlife. In reality, oil development and related processing, refining, transportation and consumption result in significant impacts to air and water quality, public safety, wildlife, recreation, views, fishing, and land use (from onshore support and transportation facilities).

Leasing also affects nearby coastal communities. As noted in the September 1, 2009 letter from the County of Santa Barbara, the proposed new leasing “far exceeds this region’s capacity to accommodate it without commensurate mass industrialization in offshore and onshore areas.”

### ***Preparation of an EIS for the New 5-Year Program***

Please see attached comments regarding the Notice of Intent to Prepare an EIS for the proposed 5-Year Leasing Program. To summarize, the EIS must adequately describe the affected region offshore Santa Barbara County. This area is especially rich from an ecological standpoint because it is located in the transition zone between cool northern and warm southern Pacific waters. Because of this transition zone, the area has the highest level of biodiversity in and offshore the mainland United States.

The EIS must also adequately address all of the impacts of new leasing, including indirect effects related to the full life-cycle aspects of oil and gas development and consumption. The EIR must consider the impacts of continued fossil fuel reliance on climate change and ocean acidification.

Finally, the EIS must consider clean and safe energy alternatives such as conservation, efficiency and renewable sources of energy.

### **C. Comparative Analysis of OCS Planning Areas**

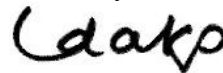
The DPP ranks Northern and Southern California as two of the lowest areas in terms of relative environmental sensitivity. (DPP, p. 99.) This surprising ranking ignores the ecological significance of this area. Four national marine sanctuaries and several protected ecological preserves and estuaries are located in this area. The Santa Barbara Channel is a particularly important bioregion, due to its location in the middle of the Pacific Ocean transition zone and thus its extremely high level of biodiversity.

### **CONCLUSION**

MMS should refrain from considering any leasing until the 2007-2012 Leasing Program period has ended, and until a new National Energy Policy is adopted. Such a policy will hopefully change the nation's focus from more fossil fuel production to increases in conservation, efficiency and clean sources of energy.

In particular, California should be eliminated from the proposed 2010-2015 Leasing Program due to our State's formal opposition to more leasing and mandates to decrease greenhouse gas emissions and increase our renewable portfolio of supplies. Now is not the time to continue down a path of dirty, polluting sources of energy. Now is the time to reverse the direction of the Bush Administration and chart a new course for a clean and sustainable energy future.

Sincerely,



Linda Krop,  
Chief Counsel

Att: EDC letter re Request for Comments on the Preparation of a 5-Year OCS Oil and Gas Leasing Program, September 17, 2008

EDC letter re Notice of Intent (NOI) to Prepare an Environmental Impact Statement (EIS) for the Proposed 5-Year Program, September 11, 2009

cc: Secretary of Interior Salazar  
U.S. Senator Boxer  
U.S. Senator Feinstein  
U.S. Congresswoman Capps  
Governor Schwarzenegger  
California State Lands Commission  
California Coastal Commission  
County of Santa Barbara  
City of Santa Barbara



September 17, 2008

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**Re: Request for Comments on the Preparation of a 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program**

Dear Ms. Orr and Mr. Bennett:

This letter is submitted by the Environmental Defense Center (EDC) in response to the Minerals Management Service's Request for Comments on the Preparation of a 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2010-2015. (73 Fed.Reg. 45065, August 1, 2008.) The EDC is a non-profit organization that protects and enhances the environment through education, advocacy and legal action. Since 1977 we have represented several groups concerned about the impacts caused by offshore oil and gas development. We primarily work within Santa Barbara, Ventura, and San Luis Obispo Counties – areas that have already absorbed more than our share of offshore oil development and borne the ill effects that result from such development, including the infamous 1969 oil spill.

**1. The proposal to prepare a new 5-Year Leasing Program is premature.**

First and foremost, we note that this proposal is premature because the Congressional moratorium for Fiscal Year 2008 explicitly precludes the expenditure of appropriated funds by the Department of the Interior for OCS leasing, preleasing and related activities along most of the Pacific and Atlantic coasts. Including any areas that are protected from leasing under the current Congressional moratorium must be deleted from the proposed 5-Year Leasing Program.

Second, MMS has already adopted a 5-Year Program that extends from 2007 to 2012. There is no reason to circumvent the normal planning process and modify the current plan.

Third, we see no reason to consider opening up new areas for offshore oil and gas development so long as there are millions of acres of existing leases that have not been developed.

**2. California should be excluded from the proposed Program.**

The California Coastal Sanctuary Act prohibits the state from entering into any new leases within state tidelands. (CA Public Resources Code §6240 et seq.) MMS should not take any action that is inconsistent with established state law.

In addition, the California State Legislature recently passed AJR 51, which requests that Congress continue the federal offshore oil and gas leasing moratorium for the 2009 fiscal year and beyond.

The California Coastal Commission has consistently raised concerns about offshore oil and gas development, pursuant to the Coastal Zone Management Act. Most recently, in August 2005, the Commission objected to the extension of 36 federal leases off the coast of California. As part of the state's objection, the Commission noted the many adverse effects of offshore oil development, including the unacceptable risk of oil spills.

In addition, the state has noted the economic impacts of more offshore oil and gas development. The California Resources Agency published a report in 1997 titled "California's Ocean Resources: An Agenda for the Future." The report evaluates the state's coastal resources and economy. As noted in the report, tourism provides almost 50% of the state's coastal revenue, whereas oil, gas and mineral production combined provide less than 5%. Our state's tourist economy is threatened by increase offshore oil drilling. As such, the potential cost to our environment *and economy* are too great to bear.

Moreover, California's Global Warming Solutions Act of 2006 requires our state to reduce greenhouse gas emissions to 1990 levels by 2020. Any additional oil and gas

production activities will add new greenhouse gas emissions and undermine California's ability to meet its legal mandates.

### **3. The proposed Program would exacerbate global climate change.**

For that matter, our nation as a whole should be concerned about increasing fossil fuel production and consumption, given the dire state of global climate change and ocean acidification. The IPCC, Union of Concerned Scientists, and the California Climate Change Center have published several studies that identify how climate change will affect the environment.<sup>1</sup> These impacts include an increase in water temperatures, rise in sea level, reduction of the Sierra snowpack, increase in severity and frequency of storms, increased droughts, famine, changes in ecosystems, increase in heat waves, increases in pests and diseases, flooding, retreating glaciers, ozone formation, and the potential for wildfires.<sup>2</sup> In *The Winds of Change*, environmental journalist Eugene Linden notes the significant economic repercussions that global warming is already having on our society, both in terms of actual damages from intense storms and hurricanes, but also through rising insurance rates in coastal areas.<sup>3</sup>

As noted by the IPCC, there is overwhelming scientific consensus that not only is climate change occurring, but also that human activities are a significant contributing factor.<sup>4</sup> In fact, some scientists attribute the largest changes in climate to human-made greenhouse gases,<sup>5</sup> and several note that "most of the observed warming over the last 50

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<sup>1</sup> Union of Concerned Scientists. 2006. California Global Warming Impacts and Solutions, available at [http://www.ucsusa.org/clean\\_california/ca-global-warming-impacts.html](http://www.ucsusa.org/clean_california/ca-global-warming-impacts.html). California Climate Change Center reports include: Baldocchi and Wong, 2006; Battles et al., 2006; Cavagnaro et al., 2006; Cayan et al., 2006a; Cayan et al., 2006b; Cayan et al., 2006c; Drechsler et al., 2006; Franco and Sanstad, 2006; Fried et al., 2006; Gutierrez et al., 2006; Joyce et al., 2006; Lenihan et al., 2006; Luers et al., 2006; Luers and Moser, 2006; Medellin et al., 2006; Miller and Schlegel, 2006; Moritz and Stephens, 2006; Vicuña, 2006; Vicuña et al., 2006; Westerling and Bryant, 2006.

<sup>2</sup> Karl, T.R., *supra*; Levin, K., *supra*, citing Emanuel, K., *Increasing Destructiveness of Tropical Cyclones Over the Past 30 Years* (Nature, vol 436, August 4, 2005), P.J. Webster, et al., *Changes in Tropical Cyclone Number, Duration, and Intensity in a Warming Environment* (Science, vol. 309, September 16, 2005), NASA Earth Observatory, *Record Low for June Arctic Sea Ice* (June 2005 at [earthobservatory.nasa.gov/Newsroom/NewImages/images.php3?img\\_id=16978](http://earthobservatory.nasa.gov/Newsroom/NewImages/images.php3?img_id=16978)), A.J. Cook et al., *Retreating Glacier Fronts on the Antarctic Peninsula Over the Past Half-Century* (Science, vol. 308, April 22, 2005), R.B. Alley et al., *Ice-Sheet and Sea-Level Changes* (Science, vol. 310, October 21, 2005), E.D. Domack, et al., *Stability of the Larsen B Ice Shelf on the Antarctic Peninsula During the Holocene Epoch* (Nature, vol. 436, August 4, 2005), F.S. Chapin III, et al., *Role of Land Surface Changes in Arctic Summer Warming* (Science, vol. 310, October 28, 2005), M. Hopkin, *Amazon Hit by Worst Drought for 40 Years: Warming Atlantic Linked to Both US Hurricanes and Rainforest Drought* (Nature, October 11, 2005), I.T. Stewart, et al., *Changes Toward Earlier Streamflow Timing Across Western North America* (Journal of Climate, vol. 18, April 2005).

<sup>3</sup> Newsweek, *Tides Turning: A new book predicts that climate change is likely to be abrupt and cataclysmic – and that these sudden shifts could cripple national economies*, March 25, 2006.

<sup>4</sup> Karl, T.R. and Trenberth, K.E., *Modern Global Climate Change*, Science, vol. 32, December 5, 2003; Hasselmann, K., et al., *The Challenge of Long-Term Climate Change*, Science, vol. 302, December 12, 2003.

<sup>5</sup> Hansen, J., *Defusing the Global Warming Time Bomb*, Scientific American, March 2004; Levin, K. and Pershing, J., *Climate Science 2005: Major New Discoveries* (World Resources Institute, March 2006),

years is likely to have been due to the increase in greenhouse gas concentrations.”<sup>6</sup> According to Dr. James Hansen, “[t]he two most important greenhouse gases...are carbon dioxide and methane.”<sup>7</sup> The increases in carbon dioxide and methane are attributable to the increased rate of fossil fuel (i.e., coal, oil, gas) use.<sup>8</sup>

The concern about climate change has increased recently due to the realization that there is a “lag time” between the changes in the environment and the warming effect. Scientists now agree that “the climate system will continue to change for many decades (centuries for sea level) even in the absence of future changes in atmospheric composition.”<sup>9</sup> Some warn that we may be approaching the “point of no return.”<sup>10</sup> Others note that global temperatures can “change substantially in only a decade or two” and that we could be on the path to another rapid change in climate temperatures and resulting effects.<sup>11</sup> Accordingly, the pressure on modern society to cease contributing to climate change through greenhouse gas emissions is even greater than previously thought.

***Instead of fostering activities that will increase global environmental concerns, we should be developing plans to advance energy conservation, efficiency and renewable sources of energy.***

#### **4. Opening new areas for leasing will not affect gas prices.**

Much of the debate about lifting the oil moratorium has focused on the recent rise in gasoline prices. However, lifting the moratorium and considering new leasing will not affect gas prices. First, any new development will not occur for a long time, given the extensive leasing, exploration and development processes.

In addition, any amount of oil developed as a result of new leasing will represent a very small amount in global terms, and will not affect gas prices which are set by the global market. As noted by the federal Energy Information Administration, increased drilling will have an insignificant effect on oil prices, even by 2030.

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citing Barnett, T., et al., *Penetration of Human-Induced Warming into the World's Oceans*, Science, vol. 309, July 8, 2005.

<sup>6</sup> McCarthy, J.J., et al, Eds., *Climate Change 2001: Impacts, Adaptation, and Vulnerability*, Cambridge Univ. Press, Cambridge, 2001 [not attached, but incorporated by reference]; see also Oreskes, N. *The Scientific Consensus on Climate Change*, Science, Vol. 36, December 3, 2004, and Karl, T.R., *supra*.

<sup>7</sup> Hansen, J. *supra*.

<sup>8</sup> *Id.*

<sup>9</sup> Wigley, T.M.L., *The Climate Change Commitment*, Science, vol. 37, March 18, 2005; Meehl, G.A., et al, *How Much More Global Warming and Sea Level Rise?* Science, vol. 307, March 18, 2005; Karl, T.R. *supra*; Hasselmann, K., *supra*, Levin, K., *supra*.

<sup>10</sup> Alley, R.B., *Abrupt Climate Change*, Scientific American, November 2004.

<sup>11</sup> Broecker, W.S., *Chaotic Climate: Global temperatures have been known to change substantially in only a decade or two. Could another jump be in the offing?* Scientific American, November 1995.

5. **MMS must consult with resource agencies as required by the Endangered Species Act.**

MMS must consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service before proceeding with this Plan. Offshore oil and gas development, and the onshore infrastructure and operations that support such development, affects many endangered and threatened species by increasing the risk of oil spills, noise, air and water pollution, and habitat destruction.

6. **Ecologically sensitive areas should be protected from oil development.**

No leasing should be allowed that would adversely affect state or federally protected areas, including sanctuaries, seashores, parks, ecological reserves, and other sensitive areas.

As such, we support the efforts of other conservation groups who are working to protect sensitive areas throughout the country, including Alaska and other coastal states.

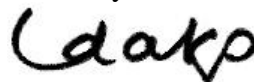
7. **The Program should not incentivize new development by offering royalty sharing.**

Finally, EDC opposes any proposal that would include royalty sharing with coastal states, because in our experience such policies tend to elevate financial interests over environmental concerns, and can lead to irreversible impacts to coastal communities and the environment.

In conclusion, we oppose MMS's proposal to prepare a new 5-Year Leasing Program while the Congressional moratorium and the 2007-2012 Leasing Program are still in effect. Even looking longer term, we believe that concerns about climate change and other environmental and economic issues warrant against considering new leasing for offshore oil and gas development. Instead, we should pursue a clean, safe energy future that relies on conservation, efficiency and renewable sources of energy.

Thank you for this opportunity to comment.

Sincerely,



Linda Krop,  
Chief Counsel

[LKrop@edcnet.org](mailto:LKrop@edcnet.org)

cc: U.S. Senators Boxer and Feinstein  
U.S. Representative Capps





September 11, 2009

Mr. James F. Bennett  
Chief, Branch of Environmental Assessment  
Minerals Management Service, MS-4042  
381 Elden Street  
Herndon, VA 20170

**Re: 2010-2015 Oil and Gas Leasing in the Outer Continental Shelf: Notice of Intent (NOI) to Prepare an EIS**

Dear Mr. Bennett:

This letter is submitted by the Environmental Defense Center (EDC) regarding the Minerals Management Service's (MMS) Notice of Intent (NOI) to Prepare an Environmental Impact Statement (EIS) for the Draft Proposed 5-Year Leasing Program for 2010-2015. The EDC is a non-profit organization that protects and enhances the environment through education, advocacy and legal action. Since 1977 we have represented many groups concerned about the impacts caused by offshore oil and gas development. We primarily work within Santa Barbara, Ventura, and San Luis Obispo Counties – areas that have already absorbed more than their share of offshore oil development and borne the ill effects that result from such development, including the infamous 1969 oil spill.

Under separate cover, we are submitting comments in opposition to any new leasing offshore California. However, to the extent MMS decides to proceed with this proposal and prepare an EIS, we ask you to consider the following comments, which focus on ensuring an adequate baseline, analysis of project impacts, and evaluation of alternatives. In addition, we request that MMS hold a scoping hearing in Santa Barbara, California, per the NOI.

**I. Affected Environment**

NEPA requires that an EIS describe the environment of the area affected by the proposed action. 40 CFR 1502.15. The areas proposed for leasing in the Southern

California region are located in the middle of one of the most ecologically important bio-regions on the planet. In fact, this area, which encompasses the transition zone for cool northern Pacific waters and warm southern Pacific waters, boasts the highest level of biodiversity in and offshore the mainland United States.

Due to the region's incredible natural attributes, the Channel Islands National Marine Sanctuary (CINMS) and National Park were established in 1980. In designating the CINMS, oil development was sited as one of the primary threats to the important ecology of the area.<sup>1</sup> The CINMS recently completed a Biogeographic Assessment of the area from Pt. Sal to Pt. Dume.<sup>2</sup> This study, along with the National Park Service study of the Gaviota Coast,<sup>3</sup> confirms the incredible importance of this region. The EIS should incorporate information from these two federal documents, as well as the 2009 CINMS Management Plan and related EIS, Channel Islands marine reserves 5-year report,<sup>4</sup> and scientific information related to the California Marine Life Protection Act (MLPA) process.

## **II. Impact Analysis**

In *State of California v Norton*, 311 F.3d 1162 (9<sup>th</sup> Cir. 2002), the Court of Appeals acknowledged the many impacts that may result from new oil and gas leasing, including harm to ecologically significant or critical areas, and threatened and endangered species. In particular, the Court noted the risks of oil spills. In that case, the Court rejected MMS' categorical exclusion for 36 lease suspensions. Following that decision, MMS prepared EA's for the suspensions. The District Court again found MMS at fault, pointing out that MMS had failed to analyze the impacts of future exploration and development activities. *League for Coastal Protection v. Norton*, (N.D.CA, 2005), opinion attached hereto. Citing 40 CFR 1508.8 (the requirement that federal agencies consider not just the "direct effects" of an action, but also the "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable"), the Court found that future exploration and development activities were reasonably foreseeable consequences of a leasing action and must be analyzed under NEPA.

In addition to addressing the impacts associated with site-specific future activities, the EIS must analyze the indirect effects of fossil fuel production and consumption. In particular, the EIS must analyze the impacts, including from greenhouse gas emissions, which will result from the full life-cycle of oil and gas exploration, development, production, refining, transportation and end-use.

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<sup>1</sup> *Final Environmental Impact Statement on the Proposed Channel Islands Marine Sanctuary*. May 1980.

<sup>2</sup> NOAA Technical Memorandum NOS NCCOS 21. *A Biogeographic Assessment of the Channel Islands National Marine Sanctuary*. November 2005.

<sup>3</sup> National Park Service. *Gaviota Cost Feasibility Study*. 2003.

<sup>4</sup> California Department of Fish and Game, Partnership for Interdisciplinary Studies of Coastal Oceans, Channel Islands National Marine Sanctuary, and Channel Islands National Park. 2008. *Channel Islands Marine Protected Areas: First 5 Years of Monitoring: 2003-2008*. Airame, S. and J. Ugoetz [Eds.]. 20 pp. [www.dfg.ca.gov/marine](http://www.dfg.ca.gov/marine).

The Draft Proposed Program (DPP) states that secondary impacts of climate change “will not be considered in the EIS because they are too speculative at this time.” (DPP, p.82.) Under NEPA, however, MMS has a clear duty to consider, in quantitative fashion, the direct, indirect, and cumulative effects of its proposed action on global warming. 40 CFR §§ 1502.16(b), 1508.8; *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1216 (9th Cir. 2008) (finding NEPA analysis of proposed CAFE standards unlawful under NEPA: “While the EA quantifies the expected amount of CO<sub>2</sub> emitted from light trucks [in years] 2005-2011, it does not evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment generally in light of other past, present, and reasonably foreseeable actions...”). Therefore, the EIS must include a complete analysis of the impacts of the proposed leasing program on climate change and ocean acidification.

### **III. Alternatives**

An EIS must “rigorously explore and objectively evaluate all reasonable alternatives,” including the No Action alternative. 40 CFR 1502.14(a), (d). In this case, the No Action alternative of no leasing offshore California is particularly relevant, given the opposition of the Governor, State Legislature, State Lands Commission, California Coastal Commission, and affected local communities. In addition, the ecological significance and sensitivity of the areas proposed for leasing, the potential for significant and irreversible harm to important natural resources, the proximity to the Channel Islands National Marine Sanctuary and Park, increasing concerns and knowledge about climate change and ocean acidification and the need to drastically decrease carbon emissions, all warrant serious consideration of this alternative.

There are many alternatives that can provide the same amount of energy without the negative impacts. The EIS should evaluate alternatives that will reduce energy demand (conservation and efficiency), as well as alternatives that will provide energy supplies from clean, renewable sources.

### **Conclusion**

As stated in our companion comments on the Draft Proposed OCS Leasing Program, we believe that the 2010-2015 Program is premature and unnecessary. MMS should refrain from proposing a new program until approval of a new National Energy Policy that focuses less on fossil fuels and more on clean energy alternatives. Such an Energy Policy will dictate changes in policy that will guide future leasing plans. Such a Policy will also reduce the perceived need to drill for more oil and gas off our nation’s coasts.

Accordingly, we urge MMS to withdraw the proposed 2010-2015 Proposed OCS Leasing Program. However, should MMS decide to proceed with this Program, we ask that the EIS address the issues raised in this comment letter.


September 11, 2009

EDC Comments re NOI to Prepare an EIS: Proposed 5-Year Leasing Program

Page 4

Thank you for your attention to these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Lkrop".

Linda Krop,  
Chief Counsel

Att: *League for Coastal Protection v. Norton*, Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Cross-Motion (N.D. CA, No. C 05-0991, Filed 8/31/05).

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEAGUE FOR COASTAL PROTECTION, et  
al.,

Plaintiffs,

v.

GALE NORTON, Secretary of the  
Interior; UNITED STATES DEPARTMENT OF  
THE INTERIOR; and MINERALS MANAGEMENT  
SERVICE and PETER TWEEDT, Regional  
Manager;

Defendants.

No. C 05-0991 CW

ORDER GRANTING  
PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT  
AND DENYING  
DEFENDANTS' CROSS-  
MOTION

\_\_\_\_\_ /

Plaintiffs League for Coastal Protection, The Otter Project, Sierra Club, Citizens Planning Association of Santa Barbara County, Defenders of Wildlife, Environment California, Get Oil Out, Natural Resources Defense Council, Santa Barbara Channel Keeper, and Surfrider Foundation move for summary adjudication of their complaint against Defendants Gale Norton, the United States Department of the Interior, Minerals Management Service (MMS) and Peter Tweedt. Defendants oppose the motion and cross-move for summary judgment. The matter was heard on August 12, 2005. Having considered the parties' papers, the evidence cited therein and oral argument on the motions, the Court GRANTS Plaintiffs' motion for

1 summary judgment and DENIES Defendants' cross-motion.

2 BACKGROUND

3 Oil and gas leases on the Outer Continental Shelf (OSC) are  
4 governed by the Outer Continental Shelf Lands Act (OCSLA). Under  
5 OCSLA, the Department of the Interior may issue and administer  
6 leases for exploration for and production of oil and gas on the  
7 OCS. These leases may have a primary term of five to ten years,  
8 and may continue after the primary term for as long as there is  
9 production of oil or gas in paying quantities, approved drilling or  
10 well-reworking operations. The MMS has the authority to grant  
11 suspensions of the primary lease term upon request of the lessee  
12 for reasons such as facilitating the development of the lease or  
13 making arrangements for transportation facilities. A suspension of  
14 a lease suspends the running of its term; thus, a lease suspension  
15 functions as an extension of the primary lease term.

16 In November, 1999, MMS granted suspensions for thirty-six oil  
17 and gas leases located off of the central California coast. These  
18 leases were originally sold between 1968 and 1984. In granting the  
19 lease suspensions, MMS did not conduct environmental analyses or  
20 engage in consistency review processes with the California Coastal  
21 Commission. This Court deemed those suspensions invalid because  
22 MMS had failed to comply with the Coastal Zone Management Act and  
23 the National Environmental Policy Act (NEPA). California ex rel.  
24 California Coastal Comm'n v. Norton, 150 F. Supp. 2d 1046 (N.D.  
25 Cal. 2001), aff'd, 311 F.3d 1162 (9th Cir. 2002).

26 On February 11, 2005, MMS issued six final Environmental  
27 Assessments (EAs) on new proposed suspensions for the thirty-six  
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1 leases involved in the prior litigation and an adjacent lease.  
2 None of the EAs considered the potential environmental impact of  
3 post-suspension exploration and development activities. Also on  
4 February 11, MMS issued a finding of no significant impact (FONSI)  
5 on these thirty-seven proposed suspensions. MMS did not prepare an  
6 environmental impact statement (EIS) for any of the proposed lease  
7 suspensions.

8 The stated purpose of the suspensions is to prevent the leases  
9 from expiring and "to facilitate proper development" of the leases.  
10 Future exploration and development activities under the thirty-  
11 seven leases could not occur absent the granting of the proposed  
12 suspensions.

13 MMS plans to allow acoustic surveys under several of the  
14 leases during the suspension period, including several in the Santa  
15 Barbara Channel. The surveys are designed to produce information  
16 to assist in planning and implementing future exploratory drilling  
17 under the leases. The surveys would involve the regular underwater  
18 firing of an air gun producing sound at 218 decibels. Sound levels  
19 exceeding 160 decibels may be harmful to some marine life,  
20 including marine mammals and sea turtles. The EAs prepared by MMS  
21 concluded that decibel levels would exceed 160 only within a one-  
22 half mile radius of the air gun, known as the "impact zone." MMS  
23 declared in its EAs that it would institute as a mitigation measure  
24 shipboard human observers who would visually scan the impact zone  
25 for, among other things, marine mammals and sea turtles. If such a  
26 creature was seen entering the impact zone, the observer could  
27 direct MMS to turn the air gun off. MMS used a "spherical

1 spreading model" to calculate the size of the impact zone.  
2 However, the EAs did not disclose that research from several MMS  
3 scientists suggested that the model was not accurate for the Santa  
4 Barbara Channel because the water there is too shallow, and that  
5 the impact zone in the channel is potentially much larger than  
6 disclosed in the EAs. Nevertheless, MMS also relied upon field  
7 data, including a report from Exxon, to conclude that the model had  
8 accurately calculated the size of the impact zone in the Channel.

9 On March 9, 2005, Plaintiffs filed their complaint, which  
10 alleges that Defendants violated NEPA and the Administrative  
11 Procedures Act (APA) by failing to conduct adequate environmental  
12 analyses on the thirty-seven proposed lease suspensions at issue.  
13 Plaintiffs seek declaratory judgment that Defendants violated NEPA,  
14 and request that the Court remand the EAs and FONISs to MMS with  
15 instructions to complete adequate NEPA environmental analyses of  
16 the proposed suspensions.

17 LEGAL STANDARD

18 I. Summary Judgment

19 Summary judgment is properly granted when no genuine and  
20 disputed issues of material fact remain and when, viewing the  
21 evidence most favorably to the non-moving party, the movant is  
22 clearly entitled to prevail as a matter of law. See Fed. R. Civ.  
23 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
24 Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1288-89  
25 (9th Cir. 1987).

26 A motion for summary judgment may properly be brought in  
27 litigation challenging decisions and actions of federal agencies



1 under the APA. See Muckleshoot Indian Tribe v. U.S. Forest  
2 Service, 177 F.3d 800 (9th Cir. 1999); see also 5 U.S.C.  
3 §§ 702-706. In deciding such a motion for summary judgment, the  
4 Court reviews the record of the federal agency and determines  
5 whether the agency's decision was based on a consideration of the  
6 relevant factors or whether its actions were arbitrary, capricious,  
7 an abuse of discretion or otherwise not in accordance with the law.  
8 See Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208  
9 (9th Cir. 1998). However, questions of law are reviewed de novo by  
10 the Court. See Wagner v. National Transp. Safety Bd., 86 F.3d 928,  
11 930 (9th Cir. 1996).

12 II. Administrative Procedures Act

13 Challenges to final agency actions taken pursuant to NEPA are  
14 subject to the review provisions of the APA. Southwest Center for  
15 Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 522  
16 (9th Cir. 1998). MMS's decision not to prepare an EIS is a final  
17 agency action subject to review pursuant to the APA. Under the  
18 APA, agency decisions may be set aside only if "arbitrary,  
19 capricious, an abuse of discretion, or otherwise not in accordance  
20 with law." 5 U.S.C. § 706(2)(A); Ariz. Cattle Growers' Ass'n v.  
21 U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001).

22 To determine whether an agency action was arbitrary and  
23 capricious, the court must "determine whether the agency  
24 articulated a rational connection between the facts found and the  
25 choice made." Ariz. Cattle Growers' Ass'n, 273 F.3d at 1236. As  
26 long as the agency decision was based on a consideration of  
27 relevant factors and there is no clear error of judgment, the  
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1 reviewing court may not overturn the agency's action. Id. (citing  
2 Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991)). In particular, the  
3 reviewing court must defer to the agency's decision when the  
4 resolution of the dispute involves issues of fact or requires a  
5 high level of technical expertise. Marsh v. Or. Natural Res.  
6 Council, 490 U.S. 360, 377 (1989); Gen. Ariz. Water Conservation  
7 Dist. v. EPA, 990 F.2d 1531, 1539-40 (9th Cir. 1993). Accordingly,  
8 the court may set aside only those conclusions that do not have a  
9 basis in fact, not those with which it merely disagrees. Ariz.  
10 Cattle Growers' Ass'n, 273 F.3d at 1236.

#### 11 DISCUSSION

##### 12 I. Future Exploration and Production Activities

13 Plaintiffs argue that Defendants violated NEPA by failing to  
14 prepare environmental analyses of future exploration and  
15 development activities under the leases. NEPA, Title 42 U.S.C.  
16 section 4331, et seq., requires federal agencies to consider the  
17 environmental consequences of their actions. Metcalf v. Daley, 214  
18 F.3d 1135, 1141 (9th Cir. 2000) (quoting Robertson v. Methow Valley  
19 Citizens Council, 490 U.S. 332, 348 (1989)). NEPA provides that  
20 federal agencies are to identify and develop methods for  
21 implementing NEPA in consultation with the Council on Environmental  
22 Quality. See 42 U.S.C. § 4332(B); see also, 40 C.F.R. § 1500 et  
23 seq. Title 40 C.F.R. section 1500 et seq., enacted pursuant to  
24 NEPA, are the "action-forcing provisions to make sure that the  
25 federal agencies act according to the Act." 40 C.F.R. § 1500.1(a).

26 NEPA requires federal agencies to prepare an EIS for any  
27 action that will significantly affect the environment. See 42

1 U.S.C. § 4332(C). In determining whether an action will  
2 significantly affect the environment, some factors that should be  
3 considered are "(1) the degree to which the proposed action affects  
4 public health or safety, (2) the degree to which the effects will  
5 be highly controversial, (3) whether the action establishes a  
6 precedent for further action with significant effects, and  
7 (4) whether the action is related to other action which has  
8 individually insignificant, but cumulatively significant impacts."  
9 Alaska Ctr for the Env't v. U.S. Forest Service, 189 F.3d 851, 859  
10 (9th Cir. 1999); see also 40 C.F.R. § 1508.27(b).

11 Under Title 40 C.F.R. section 1508.9, when determining whether  
12 to prepare an EIS, a federal agency may prepare an EA in order to  
13 "provide sufficient evidence and analysis for determining whether  
14 to prepare an environmental impact statement (EIS) or finding of no  
15 significant impact." Pursuant to Title 40 C.F.R. section 1508.13,  
16 if the agency finds that the proposed action would have no  
17 significant impact on the environment, the agency may issue a  
18 FONSI, which eliminates the agency's requirement to prepare an EIS.

19 Here, it is not disputed that the EAs prepared for the lease  
20 suspensions addressed only the potential environmental impact of  
21 activities planned during the lease suspensions, and did not  
22 address the environmental impact of future exploration and  
23 development activities under the leases. NEPA requires federal  
24 agencies to consider not just the "direct effects" of an action,  
25 but also the "indirect effects, which are caused by the action and  
26 are later in time or farther removed in distance, but are still  
27 reasonably foreseeable." 40 C.F.R. § 1508.8. The Supreme Court  
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1 has ruled that this test is analogous to a "reasonably close causal  
2 relationship" test. Dep't of Transp. v. Public Citizen, 541 U.S.  
3 752, 767 (2004).

4 Plaintiffs argue that future exploration and development  
5 activities are reasonably foreseeable as a result of MMS's proposed  
6 lease suspensions, and that there is a reasonably close causal  
7 relationship between the suspensions and future oil and gas  
8 production. Plaintiffs note that the stated purpose of the  
9 suspensions is to facilitate future development of the leases, and  
10 that activities undertaken during the suspension are aimed at  
11 providing information for exploratory drilling. Plaintiffs cite  
12 one operations plan pursuant to which the lessee intends to "spud a  
13 delineation well" on the very date that the suspension for that  
14 lease expires. Pl.'s Mot., Ex. C.

15 In further support of their argument, Plaintiffs cite Village  
16 of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984), and Thomas v.  
17 Peterson, 753 F.2d 754 (9th Cir. 1985). In False Pass, the Ninth  
18 Circuit ruled that the Secretary of the Interior had not abused his  
19 discretion when he decided to consider a less serious oil-spill  
20 scenario instead of a much worse hypothetical scenario in  
21 conducting environmental analysis for an oil exploration and  
22 production lease. 733 F.2d at 616-17. However, the court held as  
23 follows: "The lease sale itself does not directly mandate further  
24 activity that would raise an oil spill problem, but it does require  
25 an overview of those future possibilities." Id. at 616 (internal  
26 citations omitted). The Ninth Circuit has analogized the lease  
27 suspensions in this case to a lease sale. California v. Norton,

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1 311 F.3d at 1174.

2 In Thomas, the plaintiffs challenged an EA and FONSI prepared  
3 by the United States Forest Service for its approval of a timber  
4 road that was planned in a national forest. 753 F.2d at 756-57.  
5 The Ninth Circuit ruled that the EA was insufficient because it  
6 considered only the potential environmental impact of the road, and  
7 did not consider the impact of potential timber sales that would  
8 result; the court held that the building of the road and the sale  
9 of the timber were "inextricably intertwined," and thus connected  
10 actions, and would likely have cumulative environmental effects.  
11 Id. at 758-59.

12 Defendants argue that MMS was not required to consider the  
13 environmental impact of future exploration and development in  
14 issuing the EAs on the proposed lease suspensions. First,  
15 Defendants contend that the lease suspensions themselves cause only  
16 further planning and review of already-established development  
17 plans, rather than future development. Defendants note that MMS  
18 prepared an EIS in connection with the original lease sales and  
19 that further EISs would be required for future exploration and  
20 development plans. They argue that the suspensions do not  
21 necessarily implicate further activity that would have any  
22 environmental impact, and that the lease suspensions merely  
23 maintain the status quo. Second, Defendants argue that Plaintiffs'  
24 reliance upon Thomas is misplaced because, in that case, the timber  
25 road and timber sales proposals were finalized, whereas in this  
26 case Plaintiffs are arguing that the lease suspensions are  
27 connected to and have cumulative effect with potential exploration  
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1 and development activity for which there is no proposal or plan.

2       However, even if Thomas is distinguishable, Defendants have  
3 not disputed that future exploration and development activity under  
4 the leases at issue here is reasonably foreseeable as a result of  
5 the proposed suspensions. And, as Plaintiffs note, the lease  
6 suspensions do not preserve the status quo because, without them,  
7 the leases would expire. Plaintiffs cite California v. Norton, in  
8 which the Ninth Circuit not only analogized the lease suspensions  
9 at issue here with lease sales, but also held that the suspensions  
10 "represent a significant decision to extend the life of oil  
11 exploration and production off of California's coast, with all of  
12 the far reaching effect and perils that go along with offshore oil  
13 production." 311 F.3d at 1173. Defendants' argument that EISs are  
14 not required because they would be required in the future for  
15 exploration and development plans is similarly unavailing. The  
16 Ninth Circuit has ruled that "NEPA is not designed to postpone  
17 analysis of an environmental consequence to the last possible  
18 moment. Rather, it is designed to require such analysis as soon as  
19 it can reasonably be done." Kern v. U.S. Bureau of Land Mgmt., 284  
20 F.3d 1062, 1072 (9th Cir. 2002).

21       Future exploration and development activity on the thirty-  
22 seven leases at issue here is not only reasonably foreseeable, it  
23 is, as Defendants acknowledge, itself the object of the lease  
24 suspensions. A lessee has already made explicit plans to drill  
25 under at least one lease the very day that the corresponding  
26 proposed suspension expires. MMS may not restrict its NEPA  
27 analysis to activity during the lease suspensions; the agency must

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1 consider the environmental impact of future exploration and  
2 development activity in preparing environmental analyses in  
3 conjunction with the thirty-seven suspensions in this case. Such  
4 analyses must be prepared even if MMS does not currently have  
5 detailed proposals for such activity on all leases: "The purpose of  
6 an EIS is to evaluate the possibilities in light of current and  
7 contemplated plans and to produce an informed estimate of the  
8 environmental consequences. . . . Drafting an EIS necessarily  
9 involves some degree of forecasting." Id. at 1072 (internal  
10 citations omitted) (emphasis in original).

## 11 II. Activities During Lease Suspensions

12 Plaintiffs argue that, even in its NEPA analysis of activity  
13 during the lease suspensions, MMS violated NEPA by issuing flawed  
14 and incomplete EAs.

15 Plaintiffs contend that MMS used an inaccurate underwater  
16 noise model in calculating the impact zone for the acoustic surveys  
17 on several of the leases and, as a result, drastically under-  
18 estimated the zone's size. Plaintiffs argue that the spherical  
19 spreading noise model implemented by MMS was inaccurate for the  
20 Santa Barbara Channel because the water in the channel is too  
21 shallow for that model. Plaintiffs cite internal MMS documents  
22 indicating that MMS administrators knew that the agency was using a  
23 faulty model and that the impact zone was actually much larger than  
24 it represented in the EAs. Pl.'s Mot., Ex. J. Plaintiffs cite The  
25 Lands Council v. Powell, 395 F.3d 1019, 1032 (9th Cir. 2005), in  
26 which the Ninth Circuit ruled that the United States Forest Service  
27 had violated NEPA by failing to disclose in an EIS the limitations  
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1 of the model it had used to determine the environmental impact of a  
2 timber sale.

3 Defendants argue that the methods implemented by MMS were  
4 adequate to support the agency's FONSI, and that its field data  
5 indicated that the spherical spreading model had accurately  
6 calculated the impact zone. Notably, however, Defendants do not  
7 dispute that MMS's own research indicated that the spherical  
8 spreading model has limitations when applied to shallow water, or  
9 that its mitigation measures would be inadequate if the impact zone  
10 was much larger than described in the EAs. Defendants argue that  
11 the EAs stated that field data supported the conclusions reached by  
12 MMS's use of the model. However, the sentence in the EAs upon  
13 which they rely for this argument is conclusory and insufficient.  
14 Thus, MMS violated NEPA by failing to disclose in the EAs the  
15 limitations of the spherical spreading model relied upon for the  
16 FONSI, see Lands Council, 395 F.3d at 1032, and failing to describe  
17 fully the field data supporting its conclusions irrespective of the  
18 accuracy of the model.

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CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment (Docket No. 9) is GRANTED and Defendants' cross-motion (Docket No. 20) is DENIED. Defendants' motion for leave to file a reply brief (Docket No. 28) is GRANTED. The EAs and FONSI's relating to the lease suspensions at issue in this case are remanded to MMS; the agency shall complete adequate NEPA analyses on these suspensions in conformance with this order. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

8/31/05

Dated: \_\_\_\_\_



\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge