INTRODUCTION AND SUMMARY

On October 8, 2010, the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE" or "the agency") requested comments on issues that the agency should address during the review of its current Categorical Exclusions and their application to decision making for Outer Continental Shelf ("OCS") activities. The American Petroleum Institute ("API"), the National Ocean Industries Association ("NOIA"), and the Independent Petroleum Association of America ("IPAA") hereby submit these joint comments on this matter to BOEMRE.

API is a national trade association that represents all aspects of America's oil and natural gas industry. API has over 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API's members are engaged in oil and gas exploration and development in the OCS and elsewhere and undertake activities requiring environmental review, approval and permitting by BOEMRE. API and its members have a keen interest in the agency's current review of implementation of the National Environmental Policy Act ("NEPA") through Categorical Exclusions ("CEs").

NOIA represents hundreds of companies engaged in the exploration for, and production of, traditional and alternative energy on the nation's OCS. Its members are drawn from all facets of the oil and natural gas industry, from drilling to producing, engineering to marine and air transport, offshore construction to equipment installation, manufacture and supply, and geophysical surveying to diving and remotely operated vehicles. Increasingly, NOIA's membership includes companies that are developing systems for tapping unconventional energy resources in the ocean, including wind, wave and tidal power. Either directly or indirectly, NOIA's member companies are all working to explore and produce OCS energy resources in an environmentally sensitive manner.

The IPAA is a national trade association that serves as an informed voice for the exploration and production segment of the industry. IPAA has over 5,000 members in 34

states. IPAA members hold 90 percent of the leases that are active in all areas of the Gulf of Mexico, from shallow to ultra-deep water. In their offshore operations, IPAA member companies are subject to rules and regulations set forth by the BOEMRE and are greatly concerned about the manner in which the agency administers NEPA through CEs.

In general, we wish to express strong support for maintaining the current slate of CEs related to OCS activities. This support is based on the long history of drilling activities in the Gulf of Mexico that individually or collectively do not raise environmental issues or concerns which require additional analysis beyond that which the agency has customarily accomplished in NEPA reviews prepared for the current 5-Year Program or applicable OCS lease sale. The current list of CEs, the product of previous public comment and review, gives the agency discretion to decline application of any individual CE in light of "extraordinary circumstances," and has been found by the Council on Environmental Quality ("CEQ") to be an appropriate way to comply with NEPA. In fact, the CEQ recently reinforced its support for the use of CEs, even in the aftermath of the Deepwater Horizon incident and negative publicity surrounding the alleged misuse of CEs.

From a procedural perspective, this support is based on the BOEMRE's well-established practice of preparing multiple layers of environmental studies for all OCS actions, beginning with Environmental Impact Statements ("EIS") and Environmental Assessments ("EA") prepared at the 5-Year Program, lease sale or exploration plan stage. These "tiered" environmental reviews help ensure that activities associated with exploration of OCS leases are carefully considered over a lengthy period without being duplicative of agency resources, that they are subject to public review, and that the agency and industry coordinate to implement appropriate planning and mitigation. Following the Deepwater Horizon incident, BOEMRE decided to temporarily suspend application of CEs to deepwater drilling approvals, thereby requiring at least an EA or more.[1] Any decision to maintain that temporary policy would dramatically and unnecessarily extend the agency's already comprehensive NEPA review process for thoroughly analyzed offshore activities. Again, the CEQ has noted that with appropriate safeguards, this tiered NEPA review process works and should be maintained.

DISCUSSION

As a preliminary matter, we note that the most recent *Federal Register* notice provides the public merely the opportunity to comment in a broad manner on the issues that BOEMRE should address during its review of current CEs. This is a useful process and we appreciate the agency's decision to provide this initial comment period. However, if at any time during its review, BOEMRE considers revising its NEPA rules, the agency should take such action through the formal opportunity for comment under standard rules of administrative law. The inclusion or exclusion of a certain category of

---

[1] Specifically, BOEMRE's temporary policy applies to plans submitted for approval that involve a subsea Blowout Preventer ("BOP") or surface BOP on a floating facility and propose an activity that requires an Application for Permit to Drill ("APD").

actions from the list of CEs clearly could mark a substantive change to agency procedure that should be subject to notice and comment.

I. THE CURRENT GROUP OF CE's APPLICABLE TO OCS ACTIVITIES WAS ADOPTED PROPERLY AND HAS SERVED THE AGENCY, THE PUBLIC AND INDUSTRY WELL

The BOEMRE, when it was formerly known as the Minerals Management Service ("MMS"), created the current CE process in an appropriate procedural fashion. The categories of CE's related to offshore activities were undertaken with public comment and oversight. As CEQ Chair Nancy Sutley has recognized, these CEs were adopted following a public process, consistent with CEQ and Department of the Interior requirements. *See*, http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/May_18_2010). In the context of its recent proposals to adopt further guidance on the application of CEs, the CEQ has stated that they serve an "integral part" of any agency's NEPA tool box to be used where appropriate in the course of sound and practical exercise of NEPA responsibilities.

Not only were the CEs originally adopted using accepted procedural protections, but the agency regulations themselves provide adequate procedural safeguards in the event "extraordinary circumstances" are present that would counsel that any specific CE not be applied. All CEs for offshore activities should be read in the context of the existing NEPA regulations and the agency's obligation to conduct a CE Review for all actions to determine if any extraordinary circumstances are present that demand additional environmental analysis. *See* 43 C.F.R. § 46.215. Therefore, under the current regulatory framework, the use of CEs for individual drilling authorizations is appropriate unless there are unique considerations, in which case BOEMRE has the authority to conduct additional analysis.

Making changes to the carefully vetted series of CEs, and certainly any consideration to exclude the application of this accepted procedural device to an entire class of activity (*e.g.*, deepwater drilling) without regard to experience would undermine the historical role of CEs to balance risk against unnecessary repetitive analysis. Unless a specific exploration or development plan or drilling application poses the risk of environmental consequences that have not already been thoroughly assessed, the use of CEs for these activities is appropriate.

The benefits of the existing categories of CEs to BOEMRE's administration of the offshore program are crucial. This approach allows the BOEMRE to focus its detailed analyses of OCS oil and gas exploration and development at a stage in the process in which environmental risks presented by similar activities can be considered in a programmatic manner (*e.g.*, consideration of risks presented by deepwater drilling operations at the lease sale stage when deepwater tracts are to be offered for sale). Where necessary, BOEMRE can and does engage in more detailed analyses of individual plans or site-specific permit decisions which may pose unique issues. Even the regulatory language regarding the specific CE for drilling approvals demonstrates the care with

which the agency has considered the question of when further review must be undertaken. The CE applies to an APD for "an offshore oil and gas exploration or development well, *when said well and appropriate mitigation measures are described in an approved exploration plan, development plan, production plan, or Development Operations Coordination Document.*" 75 Fed. Reg. 62418, 62419 (October 8, 2010) (emphasis added). Only activities that have been subject to prior NEPA analysis, approval and with appropriate mitigation are eligible for this CE.

Some have mischaracterized the record and suggested that MMS had previously granted CEs indiscriminately to essentially all actions. In fact, between 2004 and 2008 a significant number of our members' projects did not receive a CE. This record of careful NEPA compliance regarding the assessment of individual OCS actions reflects the continued viability of the categories of CEs established by the agency under its existing framework. No significant modifications to this framework are necessary.

II. BOEMRE SHOULD NOT ALTER ITS REGULATORY BASIS FOR CEs BASED ON RISK THRESHOLDS

As a reflection of the generally accepted "rule of reason" governing an agency's compliance with NEPA, the assessment of a proposed action's potential environmental impacts does not require agencies to consider and plan for every remote possibility. BOEMRE's NEPA review should not change this standard without addressing the alternative problem of bringing agency decision-making to gridlock.

When considering the approval of energy exploration on federally-managed lands, NEPA requires agency officials to evaluate whether the action is expected to have a significant impact. The generally accepted standard does not impose a threshold based on a guarantee that an action "will not" or "cannot" result in a significant impact. Rather, the level of review is based on the long-standing principle that an agency only needs to evaluate and consider an impact determined to be "reasonably foreseeable." *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197 (1st Cir. 1999). An effect or impact is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Gulf Restoration Network v. Dep't. of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006) (citations omitted).

BOEMRE's procedures need not change, even in the face of the Macondo oil spill. We believe the CE procedures and standards established by the agency accurately reflect past experience with the safe drilling of over 2,000 deepwater exploration and/or production wells (wells drilled in 1,000 feet of water depth or greater). Even more fundamentally, just like other potential impacts from oil exploration or production, little value will be added by requiring this risk to be analyzed in redundant studies of individual drilling or development proposals that present facts and circumstances common to virtually every Gulf of Mexico exploration or development proposal. Equally important, BOEMRE recently established additional safety reviews, inspections and procedures applicable to drilling activities. *See, e.g.,* 75 Fed. Reg. 63346 (Oct. 14, 2010); 75 Fed. Reg. 63610 (Oct. 15, 2010). The industry too has implemented additional safety

measures. These additional safeguards were rigorous enough to convince the agency to lift the OCS moratorium in advance of the six-month period originally announced. BOEMRE's summary of additional mitigation measures implemented since the Macondo spill is wide-ranging and comprehensive. *See* October 1, 2010 Decision Memorandum for the Secretary at pgs. 9-26.

Both the CEQ and the U.S. Supreme Court have concluded that NEPA does not require a "worst case" analysis of low probability events like the Deepwater Horizon accident. In 1986, CEQ formally withdrew its "worst case analysis" regulation, 50 Fed. Reg. 15618 (1986), concluding that it was inconsistent with the rule of reason and forced agencies to engage in highly remote and speculative analysis of little value to the public and decision-makers. The Supreme Court, in *Roberston v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), upheld CEQ's rescission of its rule and held that NEPA does not require agencies to perform worst case analyses. (NEPA "does not mandate that uncertainty in predicting environmental harms be addressed" through conjectural worst case analysis). 490 U.S. 355-56.

It was entirely reasonable for the MMS to have adopted procedures recognizing that the risk of a substantial spill was extremely remote and has been and will be considered at the leasing program and sale stages. In light of additional safety requirements now in place, maintaining CE procedures applicable to drilling activities is even more appropriate and reasonable. The agency, and the public, can be more confident than ever that the broad category of APD approvals, when considered individually or collectively, in the context of tiered environmental review as described below, will not have significant impacts on the environment.

III. THE TIERING PROCESS

In its review of the BOEMRE process for the assessment of environmental impacts of OCS energy development, the CEQ summarized the scope and care with which the agency has conducted its NEPA review. CEQ stated that BOEMRE "has devoted substantial resources" to the preparation of NEPA documents. Specifically,

> Final decisions regarding drilling activities typically are preceded by a series of environmental analyses that often include the preparation of at least two Environmental Impact Statements. The agency typically "tiered" off these programmatic NEPA analyses and documents when making site-specific approvals. This approach is in line, as a general matter, with NEPA policy and practice.

August 16, 2010 CEQ Report on MMS NEPA Policies, Practices and Procedures at 11; *see* 40 C.F.R. § 1508.28 (CEQ "tiering" regulations).

Under the tiering practice, BOEMRE first prepares an EIS for its nationwide 5-year oil and gas development program which addresses a broad array of environmental consequences and risks (including the potential risks and impacts of oil spills) associated

with leasing, exploration and development of OCS oil and gas resources. For the 2007-2012 leasing program, for instance, MMS prepared a comprehensive EIS and also prepared a similarly comprehensive EIS for proposed leasing areas for each of the different OCS regions, including the Gulf of Mexico OCS Oil and Gas Lease Sales in the Western and Central Planning Areas.

Following completion of these EISs, BOEMRE typically prepares EAs for individual lease sales, such as that for the Central Gulf of Mexico Lease Sale 206. EAs are appropriate for these individual lease sales because the environmental consequences associated with these leases have already been exhaustively analyzed in the nationwide and regional EISs. And finally, BOEMRE addresses the need for even more local environmental review with its initiative to develop "grid EAs" for each of 17 biologically-distinct geographic areas within the Western and Central Gulf of Mexico planning areas.

This series of comprehensive environmental reviews provides the BOEMRE multiple opportunities to conduct the sorts of analyses required to further bolster the continued use of CEs for exploration and production drilling activities. The sorts of "cumulative impact analysis" and consideration of any "unique characteristics of the applicable geographic area" recommended by the CEQ in its assessment of BOEMRE's current NEPA practices, *see* Report at 30, are all conducted during the programmatic environmental reviews for OCS actions. Reform of the agency's NEPA practices should not eliminate or restrict the use of CEs in light of these "tiered" documents, but should rather ensure that those assessments are complete and are carried through to the agency's CE Review process for individual permit actions.

The proper time to consider the impact of accidents, oil spills and planned response actions from OCS exploration and production activities is during the many layers of analyses that precede the application of a CE to an individual drilling plan. As discussed earlier, this is because the nature of the risks presented and the actions taken to mitigate or reduce the likelihood of these risks are in most cases common to particular classes of OCS exploration and production activities, such as deepwater exploration drilling operations, and are most effectively considered at a programmatic level. Without the availability of the CE, applicants and the BOEMRE will be forced to engage in repetitive analyses of little value to the general public. Imposing another layer of analysis would be wasteful and unnecessary. "NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action." 40 C.F.R. § 1500.1(c); *Sierra Club v. Marita*, 46 F.3d 606, 622 (7th Cir. 1995).

In sum, the existing tiered process for OCS activities, that includes CEs for individual plans or drilling permit applications, enables BOEMRE, states and other stakeholders to make efficient use of their limited resources. This is particularly important now as BOEMRE and its other government partners work to meet its new responsibilities. Instead of having to comment on each individual plan, interested parties can focus their efforts on the comprehensive reviews supporting program development, the mitigation measures included in those reviews and, in particular, oil spill response planning.

CONCLUSION

Using the existing constructs for agency review and permitting decisions under NEPA is adequate. This process allows for the agency and industry applicants to coordinate with the development and consideration of reasonably practical and feasible alternatives. Substantially modifying the process to prohibit uniformly the application of CEs is not consistent with past federal actions. The decision to temporarily discontinue the use of CEs may have been an understandable measure taken when the Macondo spill was uncontained, but lacks solid legal backing when viewed in the context of the historical application of NEPA.

API, NOIA and IPAA appreciate this opportunity to comment on BOEMRE's review and are available to assist and discuss these issues in greater detail with the agency to ensure the continued efficient and appropriate implementation of NEPA for all OCS activities.

Respectfully submitted,

Erik Milito, API

Michael Kearns, NOIA

Barry Russell, IPAA