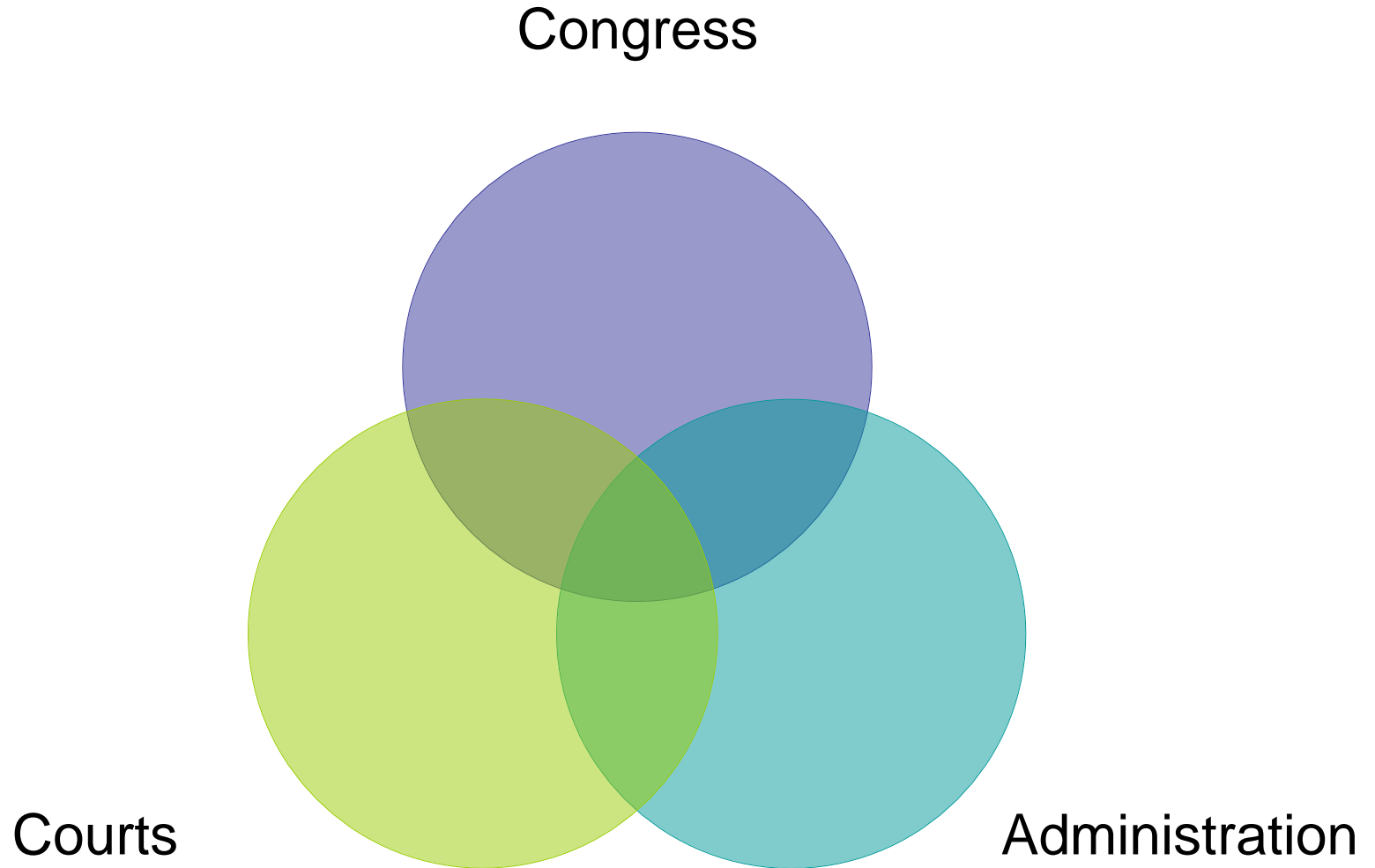


The Application of the National Environmental Policy Act and the Endangered Species Act in a Post-Macondo World, and the Effect on the Offshore Energy Industry

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The OCS Landscape



The National Environmental Policy Act

- The National Environmental Policy Act (NEPA) was enacted in 1970 and among other things, the statute has two aims:
 - Federal agencies are obligated “to consider every significant aspect of the environmental impact of a proposed action;” and
 - To ensure “that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.”
- These goals are “realized through a set of ‘action-forcing’ procedures that require that agencies ‘take a ‘hard look’ at environmental consequences,’ and that provide for broad dissemination of relevant environmental information.”

Source: ***Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.***, 462 U.S. 87, 97 (1983) and ***Robertson v. Methow Valley Citizens Council***, 490 U.S. 332, 350 (1989).

Federal Agencies Use Various Procedures To Comply with NEPA

- If a proposed action will have a significant environmental impact, they generally, must prepare an Environmental Impact Statement (EIS).
- If it is unclear whether the action would have a significant effect, agencies prepare an Environmental Assessment (EA).
 - If the analysis in an EA shows the action would not have a significant effect, a “Finding of No Significant Impact” (FONSI) documents that there is no need for an EIS.
- If the proposed action belongs to a category of actions that have no potential for significant environmental impacts, you may categorically exclude the action from analysis in an EA or EIS before deciding to implement it.
- Interior’s NEPA procedures also provide for the use of existing NEPA analysis documents. If a proposed action is adequately covered by an existing EIS or EA, then they may document a “Determination of NEPA Adequacy” (DNA).

Highlights of Administration Actions Regarding NEPA

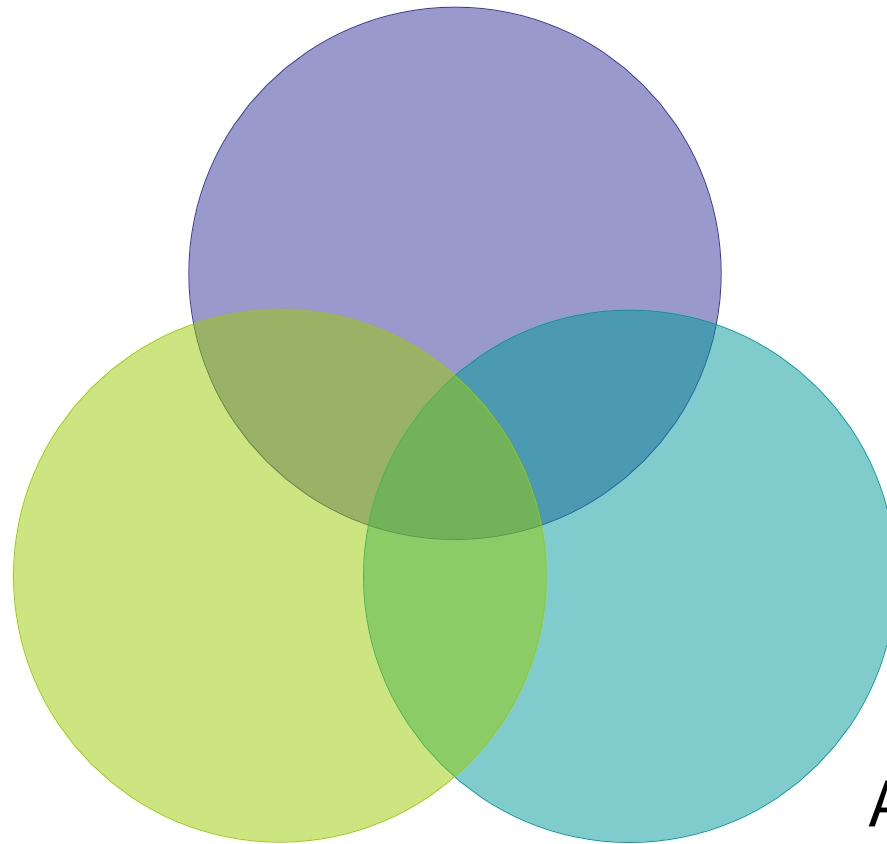
- May, Administration announced a review of the NEPA “policies practices, and procedures applied” by MMS.
- August, the CEQ issued a report regarding this review with several recommendations, and Director Bromwich explained his intention to “announce a formal process for the comprehensive review and evaluation of categorical exclusions in the relation to offshore oil and gas exploration and drilling activities.”
- October, BOEMRE initiated the public comment stage of its review of its use of categorical exclusions for decisions regarding energy development on the OCS.
- October, BOEMRE issues EA/FONSI for the modification to the moratorium.
- November, 2010 BOMRE initiated a Supplemental Environmental Impact Statement for the current 5 year program.
- February 2011, BOMRE seeks public comment on the first EA for a deepwater exploration plan since Macando.
- March 2011, BOMRE makes multiple EA’s available to public

Endangered Species Act

- When Congress passed the Endangered Species Act (ESA) in 1973, it recognized that our rich natural heritage is of “aesthetic, ecological, educational, recreational, and scientific value to our nation and its people.” It further expressed concern that many of our nation’s native plants and animals were in danger of becoming extinct.
- The ESA has substantive and procedural provisions. For entities seeking authorization from a federal agency, the most pertinent provision, is section 7(a)(2) of the ESA that requires federal agencies to ensure, in consultation with either the Secretary of the Interior or the Secretary of Commerce and based on “the best scientific and commercial data available,” that their proposed actions will not be “likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of the critical habitat of such species.”
- Consultation is required only when a federal agency determines that its proposed action “may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a).
- It is generally understood that a proposed action passes the “may affect” test when an agency determines there is some likelihood the proposed action will have an effect on listed species or designated critical habitat.

Chapter Two

Congress



Courts

Administration

Comparison of NEPA Lawsuits

NEPA lawsuits 2001-2008									
Lead Defendant	2001	2002	2003	2004	2005	2006	2007	2008	Total
Forest Service	40	40	66	76	50	30	40	46	388
BLM	20	18	15	19	12	21	7	14	126
Army Corps	7	13	12	13	8	25	1	15	94
NOAA	8	10	6	15	3	4	2	8	56
FWS	17	12	2	5	3	6	3	6	54
Park Service	7	4	1	4	4	0	2	6	28
Reclamation	1	2	11	1	3	0	3	1	22
DOE	2	4	1	4	3	0	1	6	21
EPA	4	1	0	6	2	2	2	1	18
FERC	0	0	0	2	4	2	2	3	13
BIA	3	3	2	0	2	1	2	0	13
NRC	0	0	1	2	0	3	0	3	9
OSM	0	0	1	0	1	0	1	1	4
BOEMRE	0	0	0	0	1	0	2	0	3
Other agencies									185

Source: White House Council on Environmental Quality

Agency's Own Description of Macando in its own EA

- “Baseline environmental conditions in the Gulf of Mexico have been substantially affected from the impacts of the *Deepwater Horizon* oil spill.”
- “Consensus information on the magnitudes of these impacts, the length of time needed for baseline conditions to be restored to conditions existing prior to the *Deepwater Horizon* spill, and the magnitude of impacts that would be expected if another catastrophic spill occurred while baseline conditions are still recovering from the *Deepwater Horizon*, is largely unavailable at this time, although progress is underway toward answering these questions.”

Source: Department of Interior, BOEMRE Modifications to Suspension of Deepwater Drilling Operations Environmental Assessment and Finding of No Significant Impact (10/12/2010), available at <http://www.boemre.gov/eppd/PDF/EAModificationsSuspension10122010.pdf>.

The Center for Biological Diversity

- “By approving a new exploration plan in deep water, Secretary of the Interior Salazar has essentially determined that deepwater drilling in the Gulf has no significant environmental effects — a position that seems untenable in the wake of the Deepwater Horizon oil spill,” said Miyoko Sakashita, Oceans Director at the Center for Biological Diversity.
- “Pressure to drill is clouding Secretary Salazar’s meaningful review of offshore drilling,” said Sakashita. “While Interior has admitted that environmental review was inadequate before the BP oil spill, it nonetheless just approved new deepwater drilling before completing the full environmental impact statement that it has promised to prepare.”

Source: Center for Biological Diversity, Press Release, First Deepwater Drilling Plan Approved for Gulf of Mexico; Feds Claim No Significant Environmental Impacts (3/21/2011), available at http://www.biologicaldiversity.org/news/press_releases/2011/gulf-oil-drilling-03-21-2011.html.

A New Listing Petition

- “The Center for Biological Diversity today filed a petition seeking Endangered Species Act protection for the dwarf seahorse, a one-inch long seahorse that lives in seagrass beds in the Gulf of Mexico, Florida and the Caribbean. The seahorse is threatened with extinction due to pollution from the BP *Deepwater Horizon* oil spill, decline of seagrass throughout its range and commercial collection.”

Source: Center for Biological Diversity, Press Release, Endangered Species Act Protection Sought for Nation’s Smallest Seahorse Oil Disaster in Gulf of Mexico Pushes Already Imperiled Species Closer to Extinction (4/6/2011).

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