



United States Department of the Interior  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

January 11, 2021

M-37061

Memorandum

To: Director, Bureau of Safety and Environmental Enforcement  
Acting Director, Bureau of Ocean Energy Management

From: Solicitor

Subject: Bureau of Safety and Environmental Enforcement's Obligations to Consider  
Applications for Permits to Drill/Modify in a Timely Manner

**I. Introduction**

The Bureau of Safety and Environmental Enforcement (BSEE) and the Bureau of Ocean Energy Management (BOEM) have asked me to advise them on whether BSEE must issue a determination on a complete application for permit to drill (APD) and application for permit to modify (APM)<sup>1</sup> and, if so, whether such a determination must be made within a specific timeframe. I conclude, based on the Administrative Procedure Act (APA) and relevant case law, that lessees likely have a reasonable expectation that their complete applications will receive a timely determination and that the government has a duty to issue a timely determination. I further conclude, based on case law and BSEE's current practices, that 75 days is an appropriate and legally defensible benchmark for issuing timely determinations on APDs and APMs, absent a compelling justification for a longer period.

**II. Background**

**A. Outer Continental Shelf Development Process**

The outer continental shelf development process consists of four stages: (1) planning for a five-year national oil and gas program (National Program); (2) preleasing activity and lease sale; (3) post-lease exploration; and (4) development and production. Before engaging in any exploratory drilling, an operator must first submit an exploration plan and receive approval from BOEM. Likewise, before engaging in any development drilling, an operator must submit a development and production plan, or, in areas of the Gulf of Mexico not adjacent to Florida, a development operations coordination document, and receive approval from BOEM. Once approved, or oftentimes contemporaneously, an operator must submit and receive approval from BSEE of an APD, which focuses on the specifics of particular wells and associated equipment. BOEM or

---

<sup>1</sup> Generally, references in this memorandum to APDs should be read to also include APMs.

BSEE must ensure that the agency actions at each stage comply with the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and any other applicable laws.

To comply with NEPA, BOEM conducts tiered environmental analyses to support each relevant stage with an appropriate degree of analysis.<sup>2</sup> See 40 C.F.R. §§ 1500 *et seq.* At the lease sale stage, BOEM prepares an environmental impact statement (EIS) analyzing the potential impacts of anticipated activities on the leases, including exploration, development, and decommissioning. At the exploration stage, BOEM typically prepares site-specific environmental assessments (EAs) analyzing the impacts of specific exploration plans. Similarly, at the development and production stage, BOEM typically prepares site-specific EAs for development and production plans. Finally, for APDs submitted at either the third or fourth stage (e.g., for exploratory drilling or for well completion and production), BSEE tailors its NEPA review based on the nature of the activity for which approval is requested and may tier to analyses from prior stages as appropriate. If the requested activity is already described in an underlying plan and in a prior NEPA analysis, then BSEE may prepare a Determination of NEPA Adequacy, or if there is an available categorical exclusion, then BSEE may perform a Categorical Exclusion Review. If the requested activity is not described in the underlying plan and a revised or supplemental plan is required, then BOEM may prepare further NEPA analysis for the revised or supplemental plan, if existing analysis is not adequate.

To comply with the CZMA, BOEM and the relevant coastal state agencies undertake a consistency determination review process for proposed federal agency activities, such as holding a lease sale. 16 U.S.C. § 1456(c)(1)(C). Consistency reviews also occur at the plan approval stages (e.g., the third stage for exploration plans, and the fourth stage for development and production plans). 16 U.S.C. § 1456(c)(3)(B). At this plan stage, the operator submits a consistency certification to the relevant coastal state for its concurrence. Once an operator has received a state concurrence or such concurrence is presumed due to the passage of time, the CZMA does not require any further actions at the permitting stage for activities described in the plan. However, if an APD triggers the requirement to submit a supplemental plan, the CZMA's implementing regulations require consistency review with the affected states for that supplemental plan. 15 C.F.R. § 930.76; 30 C.F.R. §§ 550.285(c), 550.267.

While the Outer Continental Shelf Lands Act (OCSLA) and its implementing regulations provide timeframes within which BOEM must review and make a decision on an exploration plan or a development and production plan, no such timeframes are provided for BSEE's review and decision on APDs. See 43 U.S.C. § 1340(c)(1) (providing that the Secretary must approve (if warranted) an exploration plan within 30 days of submission); 30 C.F.R. § 550.233 (providing that BOEM will take action on an exploration plan within 30 days of submission); 30 C.F.R. § 550.270 (providing timeframes for decisions on development and production plans and development operations coordination documents). At least one court has found that, “[a]lthough OCSLA grants the Secretary discretion to decide whether to review permit applications, . . . once

---

<sup>2</sup> The D.C. Circuit has twice ruled that NEPA is not ripe for review at the National Program stage, as there is no irreversible and irretrievable commitment at this stage. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 599 (D.C. Cir. 2015); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 480–82 (D.C. Cir. 2009). The lack of such commitment has been relied on in other D.C. Circuit cases to conclude no NEPA analysis is required. See *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999).