



STATOIL GULF OF MEXICO LLC
EXXONMOBIL CORPORATION

178 IBLA 244

Decided December 22, 2009

Editors note:

Petition for the Director, Office of Hearings and Appeals, to assume jurisdiction of and review a decision of the Interior Board of Land Appeals in *Statoil Gulf of Mexico LLC*...

Petition granted; decision of the Board of Land Appeals reversed; decision of the Minerals Management Service affirmed. [42 OHA 261](#), May 31, 2011.



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

STATOIL GULF OF MEXICO LLC
EXXONMOBIL CORPORATION

IBLA 2009-188 and 2009-190

Decided December 22, 2009

Appeal from a decision of the Regional Director, Gulf of Mexico Region, Minerals Management Service, denying a request for a suspension of production for the Walker Ridge Block 627 Unit, offshore Louisiana Outer Continental Shelf. OMMG-2009-001 and OMMG-2009-002.

Reversed and remanded.

1. Administrative Procedure: Administrative Review--
Administrative Appeals

The deference that courts, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), extend to an agency's interpretation of a statute it administers does not apply to review by the Interior Board of Land Appeals of the legal interpretations on which a Minerals Management Service Regional Director's decision is based.

2. Administrative Procedure: Administrative Review--
Administrative Appeals

This Board will review a denial of a requested suspension of production for an oil and gas unit on the Outer Continental Shelf on the basis of whether that action was an abuse of discretion. To be a proper exercise of discretion, the decision denying the suspension must have a rational basis and be supported by the record.

3. Outer Continental Shelf Lands Act: Oil and Gas Leases

The authority in 30 C.F.R. § 250.174(a) to grant a suspension of production to allow a lessee to properly develop its lease, including time to construct and install production facilities,

applies to facilities that the lessee proposes to use that are or will be owned, or majority owned, and operated by another party.

4. Outer Continental Shelf Lands Act: Oil and Gas Leases

The authority in 43 U.S.C. § 1334(a) (2006) to promulgate rules for suspensions “to allow for the construction or negotiation for use of transportation facilities,” and the authority in 30 C.F.R. § 250.174(b) to grant a suspension of production to allow time to obtain adequate transportation facilities, are not limited to situations in which the lessee constructs such facilities itself or negotiates for use of existing facilities owned by another party. This authority includes situations in which the lessee negotiates for use of facilities to be constructed by another party.

5. Outer Continental Shelf Lands Act: Oil and Gas Leases

Where (1) the combination of factors the Minerals Management Service relied on to find a lack of commitment to production are no longer valid in light of the state of the record on appeal, and (2) appellants have an executed contract to participate in the design of a deep water production facility (and an agreement in principle for use of, and ownership interest in, that facility), and where the agency admits that an executed contract for use of such a facility constitutes sufficient evidence of a commitment to production, the finding of a lack of commitment to production lacks a rational basis.

APPEARANCES: Jonathan A. Hunter, Esq., and Katie C. Cambre, Esq., New Orleans, Louisiana, for appellant ExxonMobil Corporation; Peter J. Schaumberg, Esq., Fred R. Wagner, Esq., and James M. Auslander, Esq., Washington, D.C., for appellant Statoil Gulf of Mexico LLC; Milo C. Mason, Esq., and Benjamin A. F. Nussdorf, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HEATH

ExxonMobil Corporation (ExxonMobil) and Statoil Gulf of Mexico LLC (Statoil), separately appeal from the April 9, 2009, decision (Decision) of the Regional Director, Gulf of Mexico Region (GOMR) of the Minerals Management Service (MMS). The Decision upheld the February 10, 2009, decision of the Regional Supervisor for Production and Development of the GOMR denying the October 21, 2008, request for a suspension of production (SOP) submitted by ExxonMobil for the

Walker Ridge Block 627 Unit for the period December 2008 to March 2016.¹ The Walker Ridge Block 627 Unit includes Leases OCS-G 20351, 20361, 20362, 25251, and 25258, located on Blocks 584, 627, 628, 540, and 583, respectively, in the Walker Ridge Area of the Gulf of Mexico (GOM) Outer Continental Shelf (OCS) offshore Louisiana. Collectively, these leases comprise what is usually informally called the “Julia Project” or the “Julia Unit.” ExxonMobil and Statoil each own a 50 percent interest in each of these five leases, and ExxonMobil is the designated unit operator. The appeals present identical issues and have been consolidated.² For the reasons explained below, we conclude that the Decision was based on incorrect interpretations of relevant regulations and factual premises that are inconsistent with the record as it has developed on appeal. Accordingly, we reverse the denial of the suspension and remand this matter to MMS to determine the appropriate suspension period.

FACTUAL AND LEGAL BACKGROUND

A. Issuance of the Walker Ridge Block 627 Leases, Exploration, and Subsequent Unitization

MMS issues leases for exploration, development, and production of oil and gas resources underlying the OCS under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356a (2006). Section 8(b)(2) of the OCSLA, 43 U.S.C. § 1337(b)(2) (2006), provides that leases may be issued for an initial period (a

¹ See Administrative Record (AR) Tab 48 at 444-45 (Apr. 9, 2009, Decision); Tab 36 at 291-92 (Feb. 10, 2009 decision); and Tab 14 at 203-06 (SOP request). The documents in the AR are separately tabbed, but they are sequentially page-numbered. We therefore cite to them by both tab and page numbers.

² ExxonMobil and Statoil both initially appealed the Feb. 10, 2009, decision of the Regional Supervisor for Production and Development. Those appeals were docketed as IBLA 2009-167 and 2009-166, respectively. At the same time, ExxonMobil sought informal resolution before the Regional Director of the GOMR under 30 C.F.R. § 290.6. That request resulted in the Apr. 9, 2009, Decision appealed here. In an order dated June 17, 2009, this Board noted that IBLA 2009-166 and 2009-167 “are essentially appeals of a decision that has been superseded by ‘final decision’ of the Regional Director, who, in declining to change the underlying February 10, 2009, decision, implicitly adopted its rationale.” June 17, 2009, Order at 2. The Board then dismissed the initial appeals and instructed that the pleadings filed in IBLA 2009-166 become part of the case record in IBLA 2009-188, and that the pleadings filed in IBLA 2009-167 be transferred to IBLA 2009-190. *Id.*, n.3. The Board then granted a stay of the Apr. 9, 2009, Decision and consolidated IBLA 2009-188 and IBLA 2009-190. *Id.* at 3.

primary term) not to exceed 10 years where the Secretary finds that such a period is necessary “to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions.” It further provides that leases will continue in effect “as long after such initial period as oil and gas is produced in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon.” See 30 C.F.R. § 256.37.

MMS issued Leases OCS-G 20361, 20362, and 20351 (located on Walker Ridge Blocks 627, 628, and 584, respectively) with 10-year primary terms and an effective date of June 1, 1998, to Mobil Exploration & Producing Southeast, Inc., predecessor to ExxonMobil. AR Tab 1 at 1-24. Statoil subsequently acquired a 50 percent interest in each of those leases. MMS issued Lease OCS-G 25258 (Walker Ridge Block 583) to Chevron U.S.A. Inc. (Chevron) and Devon Energy Production Co., L.P. (Devon), each with a 50 percent interest, and Lease OCS-G 25251 (Walker Ridge Block 540) to BP Exploration & Production, Inc. (BP), in both cases with 10-year primary terms and an effective date of June 1, 2003. AR Tab 1 at 25-46.

According to ExxonMobil, it originally anticipated drilling in the Miocene formation. However, dry holes drilled in that formation on nearby leases in 2000-2001 did not yield encouraging results. Subsequently, wells drilled on other nearby fields resulted in discoveries in the deeper Paleogene (Lower Tertiary) formation in 2003-2006. (Before those discoveries, seismic data for the Paleogene formation was poor because of distortion from salt layers above that formation, notwithstanding considerable expense incurred by ExxonMobil for additional seismic data in 2001.) See ExxonMobil Statement of Reasons (EM SOR) at 15. ExxonMobil and Statoil entered into a Paleogene exploration venture for the Walker Ridge Area, including the Julia prospect, in February 2005. AR Tab 40 at 316.

The Julia No. 1 well was drilled on Lease OCS-G 20361 (Block 627) beginning in mid-December 2006, in approximately 7,100 feet of water, reaching a total measured depth of more than 31,000 feet in mid-April 2007. On August 23, 2007, MMS determined the well to be capable of producing in paying quantities under 30 C.F.R. § 250.116. AR Tab 3 at 51-54; EM SOR at 16-17.

On November 7, 2007, ExxonMobil requested unitization of Leases OCS-G 20361, 20362, and 20351 (Blocks 627, 628, and 584). AR Tabs 4 at 62-91, 5 at 92-93; EM SOR at 17. On May 16, 2008, after meetings with MMS, ExxonMobil submitted a revised unitization proposal that included Leases OCS-G 25251 and 25258 (Blocks 540 and 583), adjacent to the originally proposed unit on the north and west. AR Tab 8. MMS approved the Walker Ridge Block 627 Unit on May 29, 2008, effective February 1, 2008, with ExxonMobil as designated unit operator. AR Tab 11. ExxonMobil and Statoil subsequently acquired BP’s and Devon’s interests in Leases OCS-G 25251 and 25258, at a cost of tens of millions of dollars. EM SOR

at 17-18. ExxonMobil and Statoil therefore each now own a 50-percent interest in each of the five leases in the unit.

On February 17, 2008, while the original unitization request was pending, the Julia No. 2 well was spudded on Lease OCS-G 20351 (Block 584). AR Tab 8 at 153; EM SOR at 18. It reached a total measured depth in excess of 30,900 feet on May 23, 2008, and the drilling rig was on location until June 26, 2008. AR Tab 3 at 57. MMS determined the Julia No. 2 well to be capable of producing in paying quantities on October 16, 2008. *Id.* at 55-59.

B. Lease Suspensions

MMS regulations at 30 C.F.R. § 250.180 provide, in paragraph (a)(2), that a lease expires at the end of its primary term “unless you are conducting operations on your lease,” and that for purposes of that section, “the term *operations* means, drilling, well-reworking, or production in paying quantities.” Paragraphs (b) and (d) then provide that if a lessee or operator stops conducting operations during the last 180 days of the primary lease term, or on a lease that has continued beyond its primary term, the lease will expire unless the lessee or operator either resumes operations or receives an SOP or a suspension of operations (SOO) from the Regional Supervisor before the end of the 180th day after operations stop.

ExxonMobil apparently was conducting operations on the Julia Unit on June 1, 2008, the date that otherwise would have been the expiration date of Leases OCS-G 20351, 20361, and 20362 (or, at least, had stopped conducting operations a few days before that date). On October 21, 2008, ExxonMobil requested an SOP for the unit for the period from December 2008 to March 2016 “to allow for proper development of the Walker Ridge Block 627 Unit.”³ AR Tab 14 at 203.

Section 5(a) of the OCSLA, as amended, 43 U.S.C. § 1334(a) (2006), grants the Secretary authority to prescribe rules and regulations necessary to carry out the statute. It specifically provides that those regulations shall include provisions “(1) for

³ According to ExxonMobil, at a meeting held on Aug. 25, 2008, MMS affirmatively encouraged ExxonMobil to apply for an SOP, instead of spudding a third well with an available drilling rig not capable of drilling to a 30,000-foot objective depth that would have to be finished when another drilling rig became available. EM SOR at 19-20 and Affidavit of J. Byron Morris, EM SOR Ex. 2 at 2. MMS’ Notice to Lessees and Operators of Federal Oil and Gas Leases in the Outer Continental Shelf Gulf of Mexico OCS Region (NTL) 2000-G17, dated Sept. 1, 2000, stated with regard to the timing of a suspension request: “We should receive an SOP request approximately 3 weeks before the lease expiration date.” AR Tab 2 at 47. ExxonMobil filed its SOP request considerably before that point.

the suspension or temporary prohibition of any operation or activity, including production,” pursuant to any lease “(A) at the request of a lessee, in the national interest, *to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities[.]*” (Emphasis added.)

Under this authority, MMS has promulgated regulations governing SOPs and SOOs at 30 C.F.R. §§ 250.168-250.177. Section 250.171 provides that a lessee must submit, and MMS must receive, a request for a suspension before the end of the lease term (*i.e.*, the end of primary term, the end of the 180-day period following the last leaseholding operation, or the end of a current suspension). Paragraph (a) requires a justification for the suspension, including the length of suspension requested. Paragraph (b) requires a “reasonable schedule of work leading to the commencement or restoration of the suspended activity.” SOP requests also must include a statement that a well drilled on the lease has been determined to be producible (paragraph (c)) and a “commitment to production” (paragraph (d)).

Section 250.174 provides that the Regional Supervisor may grant or direct an SOP when the suspension is in the national interest, and it is necessary because the suspension will meet one of four criteria. The first two, relevant here, are “(a) It will allow you to *properly develop a lease*, including *time to construct and install production facilities*” or “(b) It will allow you *time to obtain adequate transportation facilities.*” (Emphasis added.) An SOP granted in response to a lessee’s request operates to extend the lease term by the length of time the suspension is in effect. 30 C.F.R. §§ 250.169(a), 256.73.

In its SOP request, noting the results from recent exploration of the nearby Jack and St. Malo fields, ExxonMobil stated: “Chevron’s proposed development of the Jack and St. Malo fields may establish a host facility that could support Julia development. Other development concepts are under study, including a stand-alone Julia facility.” AR Tab 14 at 204. A proposed activity schedule accompanied the request. *Id.* at 206.

C. *The Jack and St. Malo Fields*

The Jack Field is located approximately 7 miles generally south of the Julia Unit, primarily on Walker Ridge Blocks 758, 759, and 714. The discovery well was completed in July 2004. Chevron owns 50 percent of the interest in the Jack Unit, and is the designated operator. Statoil owns 25 percent of that unit, and Devon owns the remaining 25 percent.

The St. Malo Field is located approximately 17 miles east-southeast of the Julia Unit on Walker Ridge Blocks 677, 678, 633, and 634. The discovery well for this field was completed in October 2003. Chevron owns a 41.25 percent interest in

the St. Malo Unit; Statoil owns 6.25 percent, and ExxonMobil owns 1.25 percent. Three other parties own the remaining 51.25 percent. Union Oil Co. of California, a wholly-owned Chevron subsidiary, is the designated operator. See AR Tab 15 at 212; ExxonMobil Petition for Stay (EM Stay Pet.) at 9-10, Ex. 55.

Chevron plans to develop the Jack and St. Malo Fields using a deep draft semi-submersible production facility (known as the “JSM host facility”) to be located on Walker Ridge Block 718—roughly equidistant from the Jack and St. Malo Fields—and connected to those fields through subsea tie-backs. The location of the JSM host facility is also approximately the same distance from the Julia Unit (slightly over 8 miles, or about 13 km). EM Stay Pet. Ex. 55; EM SOR at 21.

D. Development Plans, Negotiations for Connecting the Julia Project to the JSM Host Facility, and Communications with MMS

After analyzing different development concepts, ExxonMobil concluded that it preferred to develop the Julia Unit by producing initially from 3-6 wells connected to the JSM host facility through subsea tie-backs, rather than fabricating a stand-alone production facility for the Julia Unit only. ExxonMobil would use the results of that first production phase to evaluate options for further expanded production and make decisions and plans accordingly. EM SOR at 20-21. ExxonMobil explained this to MMS at a meeting regarding the SOP application held on November 6, 2008. This meeting included discussions of reservoir geologic characteristics, technical and engineering challenges, planned production techniques, comparison of a tie-back arrangement to a stand-alone facility, a discussion of alternative development scenarios, the reasons for preferring the tie-back approach, and an anticipated timeline and proposed activity schedule. AR Tab 15 at 208-09, 216-26, 245-46; EM SOR at 25.

After the November 6, 2008, meeting, MMS began to question ExxonMobil’s (and Statoil’s) commitment to production. An e-mail communication from Ronald R. Konecni, Chief of the Development and Unitization Section of the MMS GOMR, to J. Byron Morris at ExxonMobil dated November 14, 2008 (Friday), stated Konecni’s view that ExxonMobil had not demonstrated a “firm commitment” to production. Konecni opined that ExxonMobil had not obtained sufficient technical information during the term of the lease to determine that the Julia prospect was economic. AR Tab 16 at 247. Morris responded the following Monday, November 17, expressing surprise at Konecni’s message. Morris stated: “To be clear, ExxonMobil is committed to placing the Walker Ridge Block 627 Unit (aka Julia Unit) on production.” AR Tab 17 at 248. Morris further stated that ExxonMobil’s commitment did not depend on the success or failure of production from two other units in the Walker Ridge area with discoveries in the Lower Tertiary formation whose development scenarios apparently had been discussed at some point during the

November 6 meeting. However, Morris said, positive results from those units “could possibly induce ExxonMobil and Statoil to pursue a stand-alone development scenario.”⁴ *Id.*

On November 20, 2008, Paul W. Watson, a Land Manager with ExxonMobil, sent another e-mail message to Konecni explaining that while ExxonMobil’s plan was to reach an agreement with the Jack/St. Malo facility owners to handle Julia Unit production, “please be aware that ExxonMobil is committed to placing the Julia Unit on production regardless of whether an agreement is reached with the owners of that facility. This commitment extends to a wide variety of options which include installing stand-alone facilities at Julia if necessary.” AR Tab 20 at 254.

MMS and ExxonMobil representatives met again on November 25, 2008. MMS’ meeting notes state: “If Jack/St. Malo falls through or can’t work out terms w/ Chevron, Exxon ready to move forward with stand alone. The decision to proceed w/ Julia made at the highest echelons of Exxon.” AR Tab 24 at 260. They further stated: “Can’t bring Julia on line same time as JSM because Chevron wants to produce for a year and become comfortable with initial flow.” *Id.* They conclude with the note that the MMS Regional Supervisor for Production and Development in the GOMR, Kevin J. Karl, “stated 1) he wanted tangible evidence of commitment to prod as req’ed in e-mail 2) 2011 to [sic] long to reach agreement with Chevron, shorten 3) bring Julia online same time as JSM.” *Id.*

Watson subsequently sent a letter to Karl dated December 2, 2008, reiterating ExxonMobil’s commitment to develop the Julia Unit to production and noting that ExxonMobil was reviewing the suggestions regarding the activity schedule made at the November 25 meeting. AR Tab 25 at 264. Watson transmitted a revised schedule of activities to Karl on December 11, 2008. AR Tab 28 at 269-71. The revised schedule accelerated the anticipated date of first production by 17 months and the start of development well drilling by 21 months compared to the original proposed schedule. After a subsequent telephone conversation, Watson sent another letter to Karl dated December 22, 2008, further accelerating the date of beginning development well drilling by 11 months (based on an overall development well timeline). He also explained the bases for ExxonMobil’s determination that the Julia prospect is economic and should be taken to production. AR Tab 32 at 281-86.

On January 22, 2009, Karl e-mailed Watson posing “two basic questions.” AR Tab 34 at 289. Karl said that, based on the information ExxonMobil had submitted, it appeared to him that a stand-alone development would result in a much

⁴ Given the context, we understand this to mean using a stand-alone facility in the first instance instead of beginning production using a tie-back to the JSM host facility.

greater additional oil recovery. Karl perceived some inconsistency in ExxonMobil's previous communications regarding a stand-alone facility and said: "Please respond to let us know if ExxonMobil has made a determination that a stand-alone is economic at this point? If so, what is your reason for pursuing a tie-back in lieu of a stand-alone that would maximize ultimate recovery?" *Id.*

Watson responded on January 26, again reiterating that ExxonMobil was committed to bringing the Julia Unit on production. AR Tab 35 at 290. He explained that an initial 3-6 well development tied back to the Jack/St. Malo facility "addresses the key producibility uncertainties associated with the Lower Tertiary" and some additional challenges specific to the Julia discovery. *Id.* Watson said that if the initial phase of production is successful, ExxonMobil envisioned a transition to a full field development that would yield the production levels referred to in Karl's e-mail. *Id.* With respect to whether ExxonMobil had made a determination that a stand-alone facility is economic, Watson said: "A full-field stand-alone facility could be economic if the uncertainty associated with the producibility of the Lower Tertiary was lower. Economics of a stand-alone facility are highly influenced by the significant uncertainties associated with productivity of these reservoirs." *Id.*

With respect to the reason for pursuing a tie-back in lieu of a stand-alone that would maximize ultimate recovery, Watson said that "there may be no difference in the ultimate recovery of a successful phased development versus a stand-alone development," but that the phased development "addresses key risks in a timely and economically efficient manner." *Id.* Watson stated that using a subsea tie-back would generate the earliest first oil, minimize risk, minimize infrastructure on the OCS, and retain the option to "develop the entire field once producibility of the Lower Tertiary has been validated." *Id.* Watson further asserted that the phased development strategy, beginning with the tie-back to the JSM host, is very similar to the other two projects advancing in the Lower Tertiary formation, including Jack and St. Malo. The "key difference with Julia is that we are exploiting the opportunity for an available 3rd party host." *Id.*

E. The February 10, 2009, Regional Supervisor's Decision, Informal Resolution Efforts, and Continuing Negotiations

On February 10, 2009, Karl issued his decision denying the SOP. Karl stated the grounds for denying the SOP as follows:

Exxon states that the most logical development scenario for the WR 627 Unit is a subsea tieback to a facility being proposed by another operator. This proposed facility is not currently under fabrication nor has any type of codevelopment agreement been reached between Exxon and the operator of the proposed facility. In addition, Exxon states,

based on the data currently available, that they are unable to commit to a stand-alone WR 627 facility.

....

In this case, Exxon states that there is a commitment to produce the WR 627 Unit; however, [MMS] concludes that your purported commitment is not based on activities within your control. This asserted commitment is contingent upon 1) the potential fabrication and installation of a facility by another operator for another field, 2) a proposed facility of which you are not a party and have no control, 3) the future success of obtaining a contract with the operator of the proposed facility in order to tie-back WR 627 Unit wells, and 4) a proposed facility that would not likely be designed to handle WR 627 Unit production upon startup. Based on these facts, MMS has concluded that these contingencies prevent us from determining that your request includes the reasonable schedule of work leading to the commencement of production or the commitment to production required by 30 CFR 250.171(b) and (d). Since these are regulatory prerequisites to our approval of a suspension of production, your request for a suspension of production is hereby denied.

AR Tab 36 at 291-92.

As noted above, ExxonMobil and Statoil sought informal resolution before the Regional Director of the GOMR. At a meeting with MMS held on March 16, 2009, ExxonMobil compared its proposed tie-back production scenario to a stand-alone alternative. It also submitted a timeline comparison indicating that under the tie-back scenario, the Julia Unit would produce its first oil 7.5 years after discovery, in contrast to both the Jack and St. Malo Units, where the time between discovery and first oil was anticipated to be 9 years and 11 years, respectively. ExxonMobil also submitted a timeline for a stand-alone development indicating that first oil production likely would be more than 10 years after the 2007 discovery. AR Tab 37 at 293-302; AR Tab 40 at 307-08 and 322-33.

ExxonMobil subsequently sent a letter to the MMS Regional Director, Lars Herbst, on March 20, 2009, responding to the four grounds for denying the SOP stated in Karl's decision. AR Tab 40 at 308-11. Among other things, ExxonMobil said that as Chevron prepared to enter front-end engineering design (FEED) for the JSM host facility, the facility design included capacity to accommodate Julia Unit production that was "over and above what is already required to serve the Jack and St. Malo fields." *Id* at 309.

Statoil separately met with MMS on March 23, 2009. That discussion included Statoil's own negotiations with Chevron regarding use of the JSM host facility. AR Tab 42 at 363-89. Statoil's materials indicated that Chevron had made a counterproposal on January 26, 2009, describing a facility with a design capacity that would handle production from the Julia Unit. *Id.* at 380. *See* AR Tab 46 at 412-33.

By letter to Regional Director Herbst dated March 24, 2009, Chevron confirmed that it was negotiating draft terms for ExxonMobil and Statoil to secure a stated volume of processing capacity on the JSM host facility specifically for Julia Unit production and to share in the costs of, and acquire an ownership interest in, the host facility. Chevron confirmed that the FEED basis for the JSM host included capacity for Julia Unit production. AR Tab 43 at 390-91. *See* AR Tab 44 at 392-410.

On April 9, 2009, Karl sent a memorandum to Herbst reviewing the four "contingencies" on which Karl's February 10, 2009, decision was based. AR Tab 47 at 434-43. He maintained that "these four contingencies remain despite the additional information provided" since the February 10 decision. *Id.* at 436.

F. The Regional Director's April 9, 2009, Decision and Subsequent Developments

On April 9, 2009, the same day as the date of Karl's memorandum, the Regional Director issued his Decision. He informed ExxonMobil and Statoil that

the additional information and discussions during this informal resolution opportunity under 30 CFR 290.6 has not changed the Minerals Management Service decision regarding your SOP request. I find that Exxon, as operator of the WR Block 627 Unit, has not demonstrated a commitment to production and a reasonable schedule as required by regulation to warrant the SOP.

AR Tab 48 at 444.

ExxonMobil and Statoil both filed their SORs in this appeal on August 14, 2009. In its SOR, ExxonMobil affirmatively represented that as of the date of the SOR, Chevron and ExxonMobil had "reached an agreement in principle on the key terms for cost sharing and participation agreements" for the JSM host facility, including the contribution of hundreds of millions of dollars by ExxonMobil and Statoil in FEED and JSM host facility construction costs. EM SOR at 35; Affidavit of Larry E. Vollmer, EM SOR Ex. 5, at 2. In his August 13, 2009, affidavit, Vollmer further stated that under these terms, "the design basis for the Jack/St. Malo Regional Host Facility includes plans to accommodate increasing incremental oil process capacity" for third-party subsea tie-backs, including tie-backs from the Walker

Ridge Block 627 Unit. Vollmer Affidavit at 2-3. Further, “[t]hese planned facilities are over and above what is already required to serve only the Jack and St. Malo fields.” *Id.* at 3.

On the same date, Øivind Reinertsen, President of Statoil, stated his understanding that negotiations between Chevron, ExxonMobil, and Statoil “have now developed to a point where execution of a Front End Engineering and Design Cost-Sharing Agreement (‘FEED Agreement’) among Statoil, XOM [ExxonMobil], and Chevron is imminent.” Affidavit of Øivind Reinertsen, Statoil SOR Ex. 1, at 2. The FEED Agreement further requires the parties to negotiate the terms of a Participation Agreement for capacity at the JSM Host within 90 days. Reinertsen further stated that execution of the FEED Agreement will obligate Statoil to pay several million dollars to secure firm capacity at the JSM host facility, and execution of the Participation Agreement will obligate it to pay its share of the costs of the JSM host. *Id.* at 2-3.

MMS filed its Answer on October 6, 2009. ExxonMobil and Statoil filed replies on October 29, 2009. ExxonMobil’s reply states: “On August 14, 2009, ExxonMobil and Chevron signed an agreement which is now awaiting execution by the remaining Jack/St. Malo owners.” ExxonMobil Reply (EM Reply) at 3 n.9. The attached affidavit of J. Patrick Reinert dated October 28, 2009, EM Reply Ex. 1, states: “On August 14, 2009, ExxonMobil and Chevron (on behalf of itself and Unocal) signed the [FEED Agreement] referred to in the Vollmer Affidavit. The FEED Agreement is currently under review by the remaining Jack and St. Malo interest owners for execution.” Reinert Affidavit at 2. Reinert further stated that ExxonMobil and Statoil together would become a 20 percent interest owner in the JSM host facility “upon the successful execution of the FEED Agreement and completion of the anticipated participation agreement.” *Id.*

Analysis

I. The Applicable Standard of Review and Scope of Review Before this Board

[1] The parties disagree regarding what standard this Board is to apply in reviewing the April 9 Decision. ExxonMobil and Statoil both argue that the Board applies a *de novo* standard of review. EM SOR at 32-33; Statoil SOR at 9-10; Statoil Reply at 2-3. MMS, while initially appearing to concede that applicable precedent supports the appellants’ view, nevertheless argues for a different approach: “While the Board is bound by precedent to apply a *de novo* standard of review, it should still provide deference to the decision of the Secretary’s OCSLA delegate under the precedent established by *Chevron [U.S.A., Inc.] v. Natural Resources Defense Council [Inc.]*, 467 U.S. 837 (1984).” Answer at 10. Because MMS’ decision was based on its authority under OCSLA and MMS had promulgated a regulation on the granting or

denial of suspensions, the agency was filling a statutory gap left by Congress. *Id.* “Consequently,” MMS maintains, “the Board should afford MMS and its expertise in OCS petroleum engineering and OCS oil and gas development matters some *Chevron*-like deference to the decision of the Regional Supervisor and the informal review decision rendered by the Regional Director.” *Id.* at 11.

Chevron addresses the weight the *courts* are to give to an administrative agency’s interpretation of a *statute* it administers on judicial review of final agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2006). In situations where Congress has not addressed the precise question at issue, the Supreme Court held that the court “does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.” 467 U.S. at 843. Rather, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* (Footnotes omitted.)

Chevron is inapposite here. This Board is not a court, and this appeal is part of the process by which the Department’s ultimate interpretation will be formulated. The Department’s interpretation will be the interpretation applied in the final decision of the agency, which in the case of an appeal of the MMS decision ordinarily is the decision of this Board.⁵ There is no principle or precedent that implies or indicates that the Board owes any deference to the Regional Director’s legal views.

[2] The applicable regulation, 30 C.F.R. § 250.174, provides that “the Regional Supervisor *may* grant or direct an SOP” when the suspension is in the national interest and meets one of the prescribed criteria. (Emphasis added.) Thus, whether to grant an SOP is within the MMS’ informed discretion.⁶ Accordingly, in *Union Pacific Resources Co.*, 149 IBLA 294, 306 (1999), we reviewed the denial of a request for a retroactive SOP for an offshore lease under an abuse-of-discretion standard. Likewise, in *ATP Oil & Gas Corp.*, 173 IBLA 250 (2008), *aff’d*, *ATP Oil & Gas Corp. v. Department of the Interior*, 2009 WL 2777868 (E.D. La. 2009), *appeal filed*, No. 09-30953 (5th Cir. Sept. 29, 2009), we reviewed MMS’ denial of an offshore lessee’s request for an SOO on the basis of whether MMS had abused its

⁵ As Statoil correctly observes, when an appeal is filed, “the Board is the agency, empowered to render a final decision in the first instance ‘as fully and finally as might the Secretary.’ 43 C.F.R. § 4.1.” Statoil Reply at 2-3 (emphasis in original).

⁶ ExxonMobil repeatedly asserts that MMS denied the SOP for the very reasons that Congress prescribed in the OCSLA for granting an SOP. EM SOR at 35-36; EM Reply at 3. While couched as an argument on the merits, this seems to imply that in ExxonMobil’s view, if it asserts reasons for a suspension that are derived from or related to the statutory criteria, MMS is legally obligated to grant a suspension. We reject this view.

discretion. 173 IBLA at 260.⁷ To be a proper exercise of discretion, MMS' Decision must have a rational basis and be supported by the record. *E.g.*, *David L. Antley, Jr.*, 178 IBLA 194, 197 (2009), and cases cited; *see West Virginia Highlands Conservancy*, 164 IBLA 260, 267 (2005).⁸

However, in determining whether MMS' denial of the SOP is rational and supported by the record, the scope of our review is not subject to the same strictures as a court on judicial review. In *Wyoming Outdoor Council*, 160 IBLA 389 (2004), we explained:

As we stated in *National Wildlife Federation*, 145 IBLA 348, 362 (1998), although the courts are limited in their review to the administrative record created before the agency under the arbitrary, capricious, or an abuse of discretion standard,

our review authority is de novo in scope because it is our delegated responsibility to decide for the Department “as fully and finally as might the Secretary” appeals regarding use and disposition of the public lands and their resources. 43 C.F.R. § 4.1; *see Ideal Basic Industries v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976); *Forest Oil Corp.*, 141 IBLA 295, 306 (1997); *Richard Bargaen*, 117 IBLA 239, 245 n.3 (1991); *United States Fish & Wildlife Service*, 72 IBLA 218, 220 (1983).

Thus, we are not limited by the record before BLM at the time it denied appellant's protest in this case in determining the correctness of that decision. While we have said many times that BLM must ensure that its decision is supported by a rational basis, which must be stated

^c ExxonMobil asserts that an SOO is a “device that is subject to critically different legal criteria.” EM Reply at 2. While the prescribed reasons for which the Regional Supervisor may grant an SOO under 30 C.F.R. §§ 250.172 and 250.175 are different from the reasons for granting an SOP prescribed in section 250.174, ExxonMobil does not explain why review of a denial of an SOP would proceed on a different standard than review of a denial of an SOO.

⁸ This approach also accords with cases addressing SOPs and SOOs for onshore leases under section 39 of the Mineral Leasing Act, 30 U.S.C. § 209 (2006), and 43 C.F.R. § 3103.4-4. *See, e.g., Getty Oil Co. v. Clark*, 614 F. Supp. 904, 915 (D. Wyo. 1985), *aff'd sub nom., Texaco Producing, Inc. v. Hodel*, 840 F.2d 776 (10th Cir. 1988), and cases cited; *Prima Oil and Gas Co.*, 148 IBLA 45, 49-50 (1999); *Lario Oil and Gas Co.*, 92 IBLA 46, 50 (1986), and cases cited.

in the decision as well as being demonstrated in the administrative record accompanying the decision, *e.g.*, *Larry Brown & Associates*, 133 IBLA 202, 205 (1995); *Eddleman Community Property Trust*, 106 IBLA 376, 377 (1989), we have also, as a matter of practice, allowed parties to supplement the record on appeal. *Silverado Nevada, Inc.*, 152 IBLA 313, 322 (2000). We have accepted data submitted by BLM on appeal in support of its decision, emphasizing that it is our duty to have before us as complete a record as possible. *In Re Lick Gulch Timber Sale*, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983); *see B. K. Killion*, 90 IBLA 378, 381 (1986).

160 IBLA at 397-98. *See also Jerry D. Grover*, 163 IBLA 310, 318-19 (2004), and cases cited; *W&T Offshore, Inc.*, 148 IBLA 323, 357-59 (1999). The same principles apply here.⁹ It follows that for purposes of our review, we are not limited to the record before MMS on the date the Decision was issued (April 9, 2009). In examining whether the Decision was a proper exercise of discretion, relevant developments and events subsequent to that date may be taken into account.

Further, “[a] fundamental norm of administrative procedure requires an agency to treat like cases alike.” *Westar Energy, Inc. v. Federal Energy Regulatory Commission*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); *see also, e.g., Colorado Interstate Gas Co. v. Federal Energy Regulatory Commission*, 850 F.2d 769, 774 (D.C. Cir. 1988) (“dissimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice”). Thus, in the exercise of its discretion, MMS may not treat like cases dissimilarly.

With these principles in mind, we now turn to the relevant criteria for an SOP and examine the grounds on which MMS defends the denial of the suspension to determine whether the Decision represents a proper exercise of discretion.

⁹ Indeed, even in matters in which a hearing has been held and factual findings made, the Board has plenary authority to undertake a *de novo* review of the entire record and make its own findings of fact regarding those matters within its jurisdiction as fully and finally as might the Secretary. *E.g., Riddle Ranches, Inc. v. Bureau of Land Management (On Judicial Remand)*, 152 IBLA 119, 121 (2000), and cases cited; *W&T Offshore, Inc.*, 148 IBLA at 357. Whether the Board decides to exercise authority to review any particular matter entirely *de novo* and make its own factual findings is within the Board’s discretion. *E.g., Riddle Ranches, Inc.*, 152 IBLA at 122.

II. SOPs to Allow Proper Development of the Leases, Including Time to Construct and Install Production Facilities

As quoted above, the OCSLA, at 43 U.S.C. § 1334(a) (2006), authorizes the Secretary to promulgate rules for suspensions “to facilitate proper development of a lease[.]” The regulation at 30 C.F.R. § 250.174(a) states that the Regional Supervisor may grant or direct an SOP when the suspension is in the national interest and is necessary because it will meet one of the criteria in the regulation. 30 C.F.R. § 250.174(a)-(d). The criterion in subsection (a) is that the suspension will “allow you to properly develop a lease, including time to construct and install production facilities.”

MMS argues that “EM [ExxonMobil] admits that it is still negotiating for the use of this as yet unconstructed facility” and that “EM is negotiating for the use of something which does not exist, an inherently insecure and quite tentative situation, considering that EM has no control over construction, design, schedules, contingencies, capacity or any facet of the development of the theoretical facility.” Answer at 12. However, MMS does not seem to dispute that the Jack and St. Malo fields are going to be developed and produced and that the JSM host facility in all likelihood will be constructed. Nor does MMS seem to dispute that the JSM host facility is actually in the design phase, or at least that design will begin very shortly.¹⁰

[3] The legal question posed is this: Does the criterion set forth in 30 C.F.R. § 250.174(a) apply only to SOP applicants who own the production facilities to be constructed and installed to properly develop a lease? Or does the rule encompass construction and installation of production facilities that the SOP applicant plans to use that will be owned, or majority owned, by other parties?

The essence of MMS’ argument is that a request for time to properly develop a lease includes time to construct and install production facilities, but only if the SOP applicant will own them. In our view, nothing in the rule states or implies that the applicant for the SOP has to be the owner or majority owner, or operator, of the production facility. We see nothing in the identity of the owner or operator of a production facility that is particularly informative of whether an SOP will allow an applicant to properly develop a lease. In this case, the tie-back option allows ExxonMobil and Statoil to achieve first production 2-3 years earlier than would be the case with a stand-alone facility. Nor does anything in section 206.174(a) implicitly prohibit designing and constructing a production facility to serve several units or leases, particularly where it would make the most engineering and economic sense to do so. ExxonMobil and Statoil have negotiated to obtain Chevron’s

¹⁰ Indeed, MMS has granted SOPs to allow development and production of the Jack and St. Malo Units and for the construction of the host facility.

agreement to design the JSM host facility to be able to handle Julia Unit production at startup, and to acquire an ownership interest in that facility.

Further, MMS' concession, discussed below, that a commitment to production could be demonstrated by a signed agreement between ExxonMobil and Chevron for ExxonMobil to use the JSM host facility would seem to be an implicit admission that "time to construct and install production facilities" in section 250.174(a) is not restricted to production facilities owned by the SOP applicant.

Assuming *arguendo* that the JSM host facility is a production facility, we conclude that its construction comes within the purpose of allowing time to develop ExxonMobil's and Statoil's leases under 30 C.F.R. § 250.174(a).

III. *SOPs Allowing Time to Obtain Adequate Transportation Facilities*

The OCSLA, at 43 U.S.C. § 1334(a) (2006), also authorizes rules for suspensions "to allow for the construction or negotiation for use of transportation facilities." The rule, at 30 C.F.R. § 250.174(b), provides for suspensions to "allow you time to obtain adequate transportation facilities."

[4] MMS asserts that the statute "provides for a suspension for construction of a transportation facility *by the lessee*, but in this case, the lessee will neither be constructing the facility, nor have any control over its construction." Answer at 11-12 (emphasis added). It interprets the statutory language "to allow for the construction of new facilities or the negotiation for use of existing facilities." *Id.* at 12 (underscored emphasis in original). MMS later again asserts that negotiation for use of transportation facilities "implies that such facilities must be in existence." Answer at 35. In MMS' view, in other words, the *statute* allows suspensions only for lessees who are going to build the transportation system themselves or who are negotiating to use an existing transportation system owned by someone else.

We are unable to discern these limitations from either the text or the purpose of the OCSLA. MMS' argument is a *non sequitur*. The restrictions MMS advocates are not what OCSLA or the rule provides. Neither OCSLA nor the regulation says anything about who constructs the transportation system or whether it must have been constructed at the time of negotiations. Many, if not most, negotiations for transportation facilities following a discovery in an offshore area not yet served by a pipeline would be with another party for transportation capacity on a system not yet built, and many transportation systems serve multiple leases, units, and operators.

Further, assuming *arguendo* that the JSM host facility would be a transportation facility, MMS' concession, discussed below, that a commitment to production could be demonstrated by a signed agreement for ExxonMobil to use that

facility implicitly contravenes MMS' legal theory that a suspension to obtain adequate transportation facilities is limited to construction of a pipeline by the lessee or negotiation for use of transportation facilities owned by others that already exist.¹¹

We conclude that the statutory provision for regulations for SOPs to “allow for the construction or negotiation for use of transportation facilities,” and the corresponding rule for SOPs to allow time to “obtain adequate transportation facilities,” encompass negotiations for not-yet-built transportation facilities that will be owned, or majority owned, by parties other than the SOP applicant.

IV. “Commitment to Production”

A. *The Regulatory Requirement*

As quoted above, a request for an SOP must include a “commitment to production.” 30 C.F.R. § 250.171(d). The Regional Supervisor, in his February 10, 2009, decision, concluded that ExxonMobil (and, derivatively, Statoil) had not demonstrated a commitment to production because the commitment was dependent on four “contingencies” not within ExxonMobil’s control. The April 9, 2009, Decision by the Regional Director upholding the denial of the SOP did not offer any additional reasons, and appears to incorporate the grounds stated in the Regional Supervisor’s decision.

All parties point out that the term “commitment to production” is undefined. EM SOR at 54 n.48; Statoil SOR at 11; Answer at 9. Nor is the regulatory history particularly informative.¹² MMS advocates the following approach:

¹¹ We have not addressed the question of whether the JSM host facility will be a production facility, a transportation facility, or in part both. See EM SOR at 34-35. MMS asserts that the JSM host facility will not be “akin to a pipeline” and will be “more like a production facility.” Answer at 29. See also *id.* at 12. Statoil argues that it will be a transportation facility, relying on an MMS Associate Director’s May 20, 1999, guidance memorandum, addressed to royalty audit and valuation supervisors, regarding transportation allowances for deep water leases. Statoil SOR at 21-22, Ex. 3. The Associate Director’s internal memorandum is not a rule and is not binding on this Board or on royalty payors under offshore leases. Nor is it necessarily an accurate statement of the law in all situations. For purposes of this decision, we need not decide the precise character of the JSM host facility as a production facility or transportation facility or both.

¹² The 1998 proposed rule, at proposed 30 C.F.R. § 250.19(l), continued the requirement of former section 250.10(d)(1) (1988-1998) that a producible well was
(continued...)

MMS has not set forth a bright line standard or set recipe for what constitutes a CTP [commitment to production]. It has discretion on a case-by-case basis to decide what constitutes CTP. This allows flexible analysis and places the burden of demonstrating CTP on the lessee or operator. CTP is not easily or readily defined, but CTP has to be more than the recital of words. The lessee must demonstrate by some deeds, action, or proof beyond just words that its CTP is firm. Each project differs and contains numerous possibilities, economics, challenges, and dynamics. MMS must weigh the totality of the circumstances to determine whether there is a CTP; no rigid recipe exists to readily identify CTP under all circumstances. Something between just words and a built platform constitutes a CTP: a signed construction contract, a signed co-development agreement, a promise entirely within an operator's control, all may go toward this demonstration of CTP. MMS must draw a line, using its best judgment to decide on a case-by-case basis whether the request for an SOP meets the standard of CTP. Each request for a SOP must pass muster and demonstrate CTP.

Answer at 9-10. This seems to echo the late Supreme Court Justice Potter Stewart's famous remark regarding hard-core pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it . . .*"¹³

MMS' approach would result in making almost any denial of a suspension effectively unreviewable, because it incorporates such a broad view of discretion and is so ambiguous as to amount to no standard at all. In practical effect, except for cases clearly on one end of the factual continuum or the other, it would leave the

¹² (...continued)

a prerequisite for an SOP. It also proposed to add the requirement that "you have exercised diligence in pursuing production." 63 Fed. Reg. 7335, 7346 (Feb. 13, 1998). There was no relevant discussion in the preamble. The December 1999 final rule added the requirement in the current 30 C.F.R. § 250.171(d) that a request for an SOP include a commitment to production, and eliminated the proposed "diligence in pursuing production" language. 64 Fed. Reg. 72756, 72785 (Dec. 28, 1999). The only relevant statement in the preamble was: "Since diligence is not easily defined, we place more emphasis on the lessee's commitment to production and a sound activity schedule when analyzing SOP requests." 64 Fed. Reg. at 72769. However, there was no attempt to define "commitment to production" either.

¹³ *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (emphasis added).

determination to the Regional Supervisor's whim or gut feeling. In such a setting, one man's commitment is another man's evasion.

The lengthy arguments of the parties give rise to a number of intriguing questions regarding what constitutes a "commitment to production" and what elements are relevant to that determination. In this case, however, it is not necessary to delve into or decide most of those issues. An examination of the grounds relied upon by MMS to defend the denial of the suspension, in light of the record as it now stands, and comparison to MMS' concession as to what constitutes adequate evidence of a commitment to production, resolves the question of whether ExxonMobil and Statoil have shown the necessary commitment here.

B. The "Unique Combination" of Factors on which MMS Relied

In its Answer, MMS emphasizes the allegedly "unique combination of the four factors identified in the February 10, 2009, denial letter" (AR Tab 36 at 292) to defend denying the requested SOP. Answer at 19. *See id.* at 18, 30. We examine each of those "factors" or "contingencies" in turn.

The first was "the potential fabrication and installation of a facility by another operator for another field." While the JSM host facility has not yet been built, the design phase has begun and it appears that fabrication and installation are very probable. Indeed, in May 2009, MMS granted SOPs for the Jack and St. Malo Units for the purpose of constructing that facility. *See* EM SOR at 48-49, Ex. 9. Moreover, the record discussed above clearly shows that the design will incorporate capacity for production from the Julia Project from the beginning, so the facility will not be exclusively for "another field."

The second "contingency" was "a proposed facility of which you are not a party and have no control." This appears to be contrary to the record. Along with an executed FEED agreement, there is an agreement in principle that ExxonMobil and Statoil will indeed have a significant ownership interest (20 percent) in the JSM host facility. That will also give them some degree of influence or control.

The third factor was "the future success of obtaining a contract with the operator of the proposed facility in order to tie-back WR 627 Unit wells." ExxonMobil now has an executed agreement with Chevron ensuring that the design of the JSM host facility will include capacity for the tie-backs to the Julia Unit, as well as an agreement in principle for participation in, and partial ownership of, that facility. MMS cannot rationally disregard these arrangements. ExxonMobil effectively has obtained the contract MMS claimed was necessary.

The fourth contingency was “a proposed facility that would not likely be designed to handle WR 627 Unit production upon startup.” This is directly contrary to the record. As explained above, the JSM host facility will be designed to handle Julia production from the beginning.

[5] We need not decide whether the factors or contingencies on which MMS relied were legally valid reasons, either singly or collectively, for denying a suspension under the existing rules. Assuming, *arguendo* only, that they were, it is difficult for MMS to rely on the asserted “unique combination” of factors in the Regional Supervisor’s decision where the record demonstrates that they are no longer factually accurate. A finding of a lack of commitment to production that was based on reasons that, at a minimum, have been overtaken or rendered inoperative by subsequent events (including events occurring during the time the decision has been stayed) no longer has a rational basis.

Indeed, MMS concedes that a commitment to production “could have been demonstrated by a signed agreement with Chevron to use its future unconstructed facility.” Answer at 13. In terms of the adequacy of ExxonMobil’s and Statoil’s commitment to production, we are unable to discern any significant difference between the agreement in principle involved here and a signed agreement, particularly in view of the fact that the FEED agreement—which itself carries multi-million-dollar financial commitments—has been signed.

MMS urges us to disregard the contract developments on the basis that the “newly announced contract negotiation development [*i.e.*, ExxonMobil’s agreement in principle with Chevron] is post-decisional and misleading.” Answer at 30.¹⁴ This argument is misplaced because, as explained above, this Board’s review is not limited to the record before the Regional Supervisor; nothing compels the Board to disregard ongoing events or developments that directly bear on the merits of the appeal.¹⁵

Nor do we find the reference to the agreement in principle “misleading.” We do not discern the basis for MMS’ inference that it “shows the possible motivation for EM’s reluctance to commit to production prior to unit expiration.” Answer at 30.

¹⁴ MMS’ Answer was filed before ExxonMobil confirmed the execution of the FEED agreement in its Reply.

¹⁵ Ironically, Statoil commits the same error regarding the scope of the record when it criticizes the Apr. 9, 2009, Karl memorandum as “post-hoc rationalization prepared for litigation,” Statoil SOR at 19, and criticizes “[a]dditional arguments . . . now made for the first time by MMS’ counsel . . . in a litigation brief.” Statoil Reply at 6. We doubt that Statoil would suggest that we ignore the agreements reached subsequent to the April 9 Decision.

MMS speculates that if ExxonMobil “could have convinced MMS to give them a multi-year SOP while studying seismic data and modeling fluids on a computer and just talking to its neighbors without entering into a co-development contract, EM could sit back and watch Chevron enter the engineering phase of the proposed JSM facility and EM could potentially avoid hundreds of millions of dollars in expenses.” *Id.* at 30-31. MMS attributes similar motives to Statoil. Answer at 33. This does not make logical sense in light of the record. There is no indication that ExxonMobil or Statoil entered into and pursued the negotiations with Chevron as a feint to hide their true intention to “sit back” and avoid expenses while Chevron did all the work and incurred all the costs. Indeed, the FEED agreement, which obligates ExxonMobil and Statoil to incur millions of dollars in costs, has been executed. The participation agreement has been reached in principle, and when executed will obligate ExxonMobil and Statoil to pay yet much greater additional amounts.¹⁶

At the same time that MMS urges an approach that would effectively give the Regional Supervisor unfettered discretion in granting or denying SOPs, it apparently fears that granting an SOP under the present circumstances would imply that it would have to grant all SOP requests. MMS argues:

Under appellants['] theory of SOPs, all primary lease terms would have to be extended by MMS because of an assertion by a lessee that it was in discussions with a neighboring lessee about possibly bringing

¹⁶ MMS attempts to characterize the agreements reached subsequent to the Decision as “an agreement in principle for a mere option” to help design or construct the JSM facility and as “an agreement in principle for just an option” to commit to use that facility. Answer at 12, 15 (underscored emphasis in original). *See also id.* at 31 n.15. MMS cites the Declaration of Øivind Reinertsen dated Aug. 13, 2009, Statoil SOR Ex. 1, for this proposition. Reinertsen’s Declaration states in relevant part: “Upon execution of the FEED Agreement, Statoil will be obligated to pay [a stated amount of several million dollars] as its share in order to secure an option for firm capacity at the JSM Host. Upon execution of the forthcoming Participation Agreement, Statoil would be contractually obligated to pay 10% of the overall cost of the JSM Host for its firm capacity [stating an approximate and much greater amount], should the Julia SOP ultimately be granted.” Reinertsen Declaration at 2-3, ¶ 9. This does not support the inference MMS draws. Exact future production levels, the precise date on which production ultimately will commence, when pipeline transportation systems will become available, actual production levels over time, etc., are at present unknown. Therefore, it is proper at this point to refer to “secur[ing] an option for firm capacity.” Once production is up and running at all three units whose production the JSM facility is intended to handle, Statoil (and ExxonMobil) may have to sell some firm capacity at some points and may have to acquire additional capacity at other points. This does not imply a lack of commitment to production.

production from its lease to a neighbor's unconstructed facility and undeveloped lease. This theory of SOPs would render initial lease terms and expeditious development mandates under the OCSLA meaningless.

Answer at 3. This may be the real core of MMS' concern. If MMS generally were compelled to grant SOPs in situations where there has been nothing beyond initial exploratory discussions between operators of different fields, this concern would be justified. We agree that MMS is not obligated to grant a suspension if a lessee has done nothing more than talk with another party about distant or speculative possibilities, with no serious prospect of moving ahead. But that does not accurately reflect the situation before us in this appeal.

C. *Treatment of Other Similar Cases*

Moreover, it is apparent from the record that MMS has regularly granted SOPs in other situations where there is considerably less evidence of the necessary commitment to production than in this case. The parties devote much space and an extraordinary volume of paper analyzing MMS' grant of SOPs in other cases. ExxonMobil's consultant, J. Michael Melancon (Karl's former supervisor and predecessor as Regional Supervisor for Production and Development), has submitted an affidavit and associated documentation totaling more than 600 pages analyzing every instance of the 55 SOPs previously granted for deep water subsea tie-back development. EM SOR Ex. 6. MMS has submitted the Affidavit of Richie D. Baud, the current Deputy Regional Supervisor for Production and Development (who replaced Karl in that position when Karl was promoted to Regional Supervisor to replace Melancon), along with attached tables comparing the Julia circumstances to prior SOPs. Answer Ex. 1. Baud, Melancon's former subordinate, disputes Melancon's comparisons and characterization of many of the situations addressed. Thus, the former Regional Supervisor swears that an examination of other cases leads to the conclusion that the SOP should have been granted, while his former subordinate swears that the same examination leads to the opposite conclusion.

Fortunately for all parties, it appears that we do not need to require submission of large quantities of additional documents from other lease and unit files that might be necessary to resolve all of the disputed characterizations. For present purposes, it will suffice to compare the situation in the instant appeal to others in which the relevant circumstances are established not by Melancon's documentation only, but also by MMS' own statements and admissions in its Answer.

With regard to the Telemark project, MMS states that "the operator committed to production but *the development system was not identified at the time of the initial SOP request*. However, MMS records *do not demonstrate whether or not MMS*

questioned which scenarios the operator was evaluating or the details about those scenarios.” Answer at 24 (emphasis added). *See also* Baud Affidavit Table 1b. It is “now known” that the operator plans to tie-back Telemark to a stand-alone facility that the operator has fabricated and currently is installing. Answer at 24. So when MMS granted the SOP, by its own admission it knew nothing about what development system the operator planned to propose. Nor does MMS explain how, beyond “just words” (whether written or oral), the operator demonstrated its commitment to production.

In the case of the Allegheny project, MMS argues that “it is *likely* that the operator committed to production via a tieback development, at a minimum, in their initial SOP request. MMS records *do not indicate whether or not MMS questioned which facility would be the host location if developed via a tieback scenario*. The operator eventually fabricated a stand-alone facility for the Allegheny project.” Answer at 24 (emphasis added). *See also* Baud Affidavit Table 1b. In other words, MMS actually has found no evidence of what it knew about the specific production or development system the lessee intended to propose at the time it granted the SOP. (MMS does not assert that it has lost documents that actually were submitted previously.)

The situation of the Marlin project is virtually identical to the Allegheny project. *See* Answer at 24 (“it is *likely* that the operator committed to production via a tieback development, at a minimum” in the initial SOP request, and MMS admits that its records “do not indicate whether or not MMS questioned further to identify specifics regarding the likely host location.”) The Gemini project also presents facts similar to the Allegheny project. MMS asserts that “it is *probable* that the operator committed to production via a tieback to an existing host. Proprietary correspondence letters, *received shortly after the initial SOP approval*, confirm that to be the case. However, MMS records do not demonstrate whether or not this was definitely known at the time the initial SOP was granted.” *Id.* at 23 (emphasis added).

Finally, in the case of the King Kong project, Conoco initially committed to use a stand-alone facility. The leases were then unitized, and Shell, the new operator, committed to tie back to one of its existing facilities. Shell then changed the plan to a different facility. Conoco then became the operator and was granted an SOP based on tie-back to a facility to be fabricated in the future by another operator. MMS states that its “records are inconclusive regarding whether or not MMS questioned Conoco regarding a fallback scenario if its proposal did not occur.” In other words, there is no record that MMS did ask any such questions. In later records, Conoco expressed a “fallback scenario” to tie back to an existing facility. Answer at 27.

In each of these situations, there was considerably less evidence of a commitment to production than the record shows in the instant case. Nor is there any evidence of how, beyond “words,” each of the operators showed a commitment to production. MMS nevertheless granted the requested SOPs in each of these cases, thus finding, at least implicitly, a sufficient commitment to production. No party has cited a situation in which MMS has denied an SOP in circumstances analogous to the present case. These examples are sufficient to demonstrate that in finding an insufficient commitment to production here, MMS has not treated like cases alike.¹⁷

For all of these reasons, we conclude that the record does not support MMS’ finding that ExxonMobil and Statoil lacked the requisite commitment to production.¹⁸

V. *“Reasonable Schedule of Work”*

As quoted above, 30 C.F.R. § 250.171(b) requires a “reasonable schedule of work leading to the commencement or restoration of the suspended activity.” As also quoted above, the Regional Supervisor’s February 10 decision (reaffirmed by the Regional Director’s April 9 Decision) stated that the four “contingencies” MMS relied on “prevent us from determining that your request includes the reasonable schedule of work leading to the commencement of production or the commitment to production required by 30 CFR 250.171(b) and (d).” AR Tab 36 at 292. Because the record does not support the four “contingencies” on which MMS relied, it follows that the finding that the proposed schedule was not a reasonable schedule is unsupported. Given that the proposed schedule was revised and accelerated at MMS’ request, MMS does not seem to have offered a serious argument that the schedule itself, independent of the question of the commitment to production, is not reasonable.

¹⁷ MMS’ argument, Answer at 11, that a policy change is permissible if there are good reasons for it and the agency believes the new policy to be better (relying on *Federal Communications Commission v. Fox Television Stations, Inc.*, __ U.S. __, 129 S. Ct. 1800 (2009)) appears misplaced, as does its reliance, Answer at 13, on the quotation from 49 Fed. Reg. 17449 (Apr. 24, 1984) that suspensions of operations are subject to changes in policy. (We assume no distinction between an SOO and an SOP for this purpose.) The agency has not announced a change in policy. Indeed, there appears to be no policy. What policy was in place before, what the new policy is, and what the supposed change in policy was, are not apparent. We have no argument with a policy decision by MMS, going forward, to define “commitment to production” more specifically, or to prescribe or apply different criteria for granting SOPs. However, if it wishes to do so, it appears that rulemaking would be in order.

¹⁸ Consequently, we need not address at this point whether ExxonMobil had demonstrated a sufficient commitment to production using a stand-alone facility if negotiations for use of the JSM host facility were to fail.

Moreover, the revised proposed schedule of activities for the Julia Unit transmitted to MMS with Watson's December 11, 2008, letter anticipates first production from the Julia Unit at the very same time that first production is anticipated from the Jack and St. Malo Units under the schedule of work accompanying the SOPs that MMS granted for those units in May 2009, after the Decision in this case. See AR Tab 28 at 271; EM SOR at 48-49, Ex. 9. It would seem utterly arbitrary for MMS to argue that one schedule is reasonable and the other is not. We therefore conclude that the record does not support MMS' finding that ExxonMobil failed to submit a reasonable schedule of work leading to the commencement of production.

VI. *"Phased Development"*

MMS cites NTL 2000-G17, AR Tab 2, for the proposition that "MMS does not approve suspensions for 'phased development' – where an operator wants to wait for capacity at an existing host facility – unless there is a conservation or physical waste issue." Answer at 6. Karl's April 9, 2009, memorandum contains an identical statement. AR Tab 47 at 435. The cited NTL states:

Phased development is waiting for production capacity at the host facility to become available. You plan to develop the hydrocarbons that have been discovered by wellbore penetration as a proposed satellite project to an existing or newly built production facility. The host capacity is primarily targeted for the major field discoveries, thus leaving no room for the additional production from the satellite project. Capacity will not be available to accommodate satellite production within the initial lease term and is dependent upon the production decline at the host facility. Generally, we do not approve suspensions for phased development. . . .

AR Tab 2 at 48-49. In response to the assertion in Karl's memorandum, Melancon states in his affidavit:

Historically within the MMS, a traditional "phased development" is characterized by a field waiting for production capacity at a host facility. The field may be completely developed or may delay development until production capacity at the host is available. There is no expansion of production capacity at the host in a traditional phased development situation. That clearly is not the case with the Walker Ridge Block 627 Unit which contemplates the addition of production equipment at the Jack/St. Malo Regional Host Facility to accommodate the unit production. The Walker Ridge Block 627 Unit development was not "waiting on capacity" at the host facility, but instead was

waiting on the fabrication of that facility and the conclusion of the related commercial negotiations. ExxonMobil's use of the term "phased development" in its submissions to the MMS referred to a sequential development of the Walker Ridge Block 627 Unit as information from the initial development phase of three to six production wells is utilized to make future development decisions.

Melancon Affidavit, EM SOR Ex. 6 at 7-8.

The sequential development of the Julia Unit in successive "phases" that ExxonMobil contemplates does not involve "waiting for production capacity at the host facility to become available," in the words of NTL 2000-G17. As discussed above, the JSM host facility will be designed to handle Julia Unit production from the beginning. This is not a situation in which there is "no room for the additional production from the satellite project" where capacity for that production "is dependent upon the production decline at the host facility." The instant case is not the type of situation contemplated in the NTL, and we agree with Melancon's explanation of the distinction.

CONCLUSION

For the reasons discussed above, MMS' Decision to deny the requested suspension is based upon incorrect legal interpretations and factual premises that are inconsistent with the record as it has developed on appeal, and therefore lacks a rational basis in light of that record. Therefore, we reverse the Regional Director's Decision of April 9, 2009, denying the requested SOP and remand for MMS to determine the appropriate suspension period. We note that MMS does not have to grant an SOP for the full period that an applicant requests. It may grant a suspension for a shorter period.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed and this matter is remanded to MMS for further action consistent with this decision.

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/
T. Britt Price
Administrative Judge