



STATOIL GULF OF MEXICO LLC

181 IBLA 252

Decided July 25, 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
STATOIL USA E&P INC.
STATOIL GULF PROPERTIES INC.

IBLA 2011-101

Decided July 25, 2011

Appeal from a decision by the Bureau of Ocean Energy Management, Regulation, and Enforcement denying a request to confirm that the Secretary of the Interior had effected a suspension of operations that extended the primary terms of certain oil and gas leases in the Gulf of Mexico. OMMG-2011-001.

Affirmed.

1. Administrative Practice--Administrative Procedure:
Administrative Review--Appeals: Generally--Board of
Land Appeals

A claim by BOEMRE that the decision under review was issued in an exercise of its discretion and that the Board is bound to review that decision based on an abuse of discretion standard is rejected because its decision was not issued in an exercise of its discretion, and even if it were, the scope of the Board's review is de novo. Although the Board may affirm an agency decision under a particular standard of review, it is not obligated to apply such standards of review in deciding administrative appeals for the Secretary.

2. Oil and Gas Leases: Suspensions--Outer Continental Shelf Lands
Act: Oil and Gas Leases

The Bureau of Ocean Energy Management, Regulation, and Enforcement properly denied a request to confirm that all deepwater leases were suspended by the Secretary where the plain language of the Secretary's decision directed it to suspend only the drilling of deepwater wells using subsea blowout preventer systems (BOPs) or surface

BOPs on a floating facility and not to approve pending and future applications for permits to drill using such BOPs.

APPEARANCES: Peter J. Schaumberg, Esq., and James M. Auslander, Esq., Washington, D.C., for appellants; Sarah Greenberger, Esq., Scott Currie, Esq., Milo Mason, Esq., Peter Meffert, Esq., and Matthew Ballenger, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Ocean Energy Management, Regulation, and Enforcement; Jonathan A. Hunter, Esq., and Lesley F. Pietras, Esq., New Orleans, Louisiana, for amicus curiae, the American Petroleum Institute.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Statoil Gulf of Mexico LLC, Statoil USA E&P Inc., and Statoil Gulf Properties Inc. (Statoil), appeal from a December 20, 2010, decision by the Acting Director for Offshore Energy and Minerals Management, Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE or BOEM). That decision denied Statoil's request to confirm that the Secretary had effected a suspension of operations that extended the primary terms of certain oil and gas leases in the Gulf of Mexico. For the reasons discussed below, we affirm BOEMRE's decision.¹

Legal Context

The Outer Continental Shelf (OCS) encompasses submerged lands seaward of State-owned submerged lands, which extend approximately three miles from the coastline. 43 U.S.C. §§ 1301(a)(2), 1331(a) (2006). The Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. §§ 1331-1356 (2006), authorizes the Secretary of the Interior, through BOEMRE,² to sell leases on the OCS, which allow

¹ Statoil filed a statement of reasons (SOR), with additional materials attached as exhibits that are hereafter referred to (*e.g.*, "Ex. 2"). The Government filed an Answer; Statoil then filed a Reply. The Government submitted the Administrative Record (AR) on a CD, which has an index and series of folders organized by date, each of which contains a separate document. For ease of reference, we refer to each folder in the order identified on the AR index (*e.g.*, the first identified document is cited as "AR 1"). In addition, the American Petroleum Institute (API) filed a motion requesting leave to file an Amicus brief. For good cause shown, we grant API's motion and accept its filing, which was considered in deciding this appeal.

² The management of OCS activities that had been carried out by the Minerals Management Service (MMS) was transferred to BOEMRE by Secretarial Order

(continued...)

lessees to “explore, develop, and produce” oil and gas within the lease area. 43 U.S.C. § 1337(b)(4) (2006).³ Before commencing exploration activities on an OCS lease, the lessee must submit an exploration plan (EP) and have it approved by the Department. 43 U.S.C. § 1340(c)(1) (2006). After receiving approval for its plan,⁴ the lessee can apply for permission to engage in exploratory drilling under and as identified in its approved EP. *See* 43 U.S.C. § 1340(d) (2006); 30 C.F.R. § 250.410. In applying for that permission, the lessee must submit an Application for Permit to Drill (APD) that satisfies the requirements of 30 C.F.R. §§ 250.411 through 250.418. If those requirements are met, the APD is approved and the lessee is then authorized to “begin drilling” on its lease. 30 C.F.R. § 250.410. Similar requirements apply for drilling development and production wells under approved Development and Production Plans or Development Operations Coordination Documents. *See* 30 C.F.R. §§ 250.201 through 250.206, 250.241 through 250.285.

Section 5(a)(1) of the OCSLA requires the Secretary to issue rules for

the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease . . . or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to

² (...continued)

Nos. 3299 and 3302, respectively dated May 19 and June 18, 2010.

³ OCS leases run for an initial term of 5 years or for a term of up to 10 years if the Secretary finds such longer period is “necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions” and continue “as long after such initial period as oil or gas is produced from the [lease] in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon.” 43 U.S.C. § 1337(b)(2) (2006); *see* 30 C.F.R. §§ 250.180(a)(2), 256.37.

⁴ Pursuant to regulations implementing these requirements, the lessee must submit detailed information, including geological and geophysical information, air emissions data, and environmental monitoring information. 30 C.F.R. §§ 250.211 through 250.228. Applicable rules also specify time frames for action on an EP (*e.g.*, BOEMRE will determine within 15 working days whether the EP and its supporting information are “sufficiently accurate”). 30 C.F.R. § 250.231. Upon a determination that applicable requirements are satisfied, the plan is deemed submitted and must either be approved, disapproved, or a modification required within 30 days thereafter. 30 C.F.R. § 250.233; *see also* 43 U.S.C. § 1340(c)(1) (2006).

the marine, coastal, or human environment⁵], and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit.

43 U.S.C. § 1334(a)(1) (2006). Initial rules implementing these OCSLA requirements have been revised and are now found at 30 C.F.R. §§ 250.168 through 250.177. *See, e.g.*, 44 Fed. Reg. 61886, 61896-98 (Oct. 26, 1979). The rule at 30 C.F.R. § 250.172 states:

The Regional Superior may grant or direct an SOO [Suspension of Operations] or SOP [Suspension of Production] under any of the following circumstances:

. . . .

(b) When activities pose a threat of serious, irreparable, or immediate harm or damage. This would include a threat to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment. . . .

(c) When necessary for the installation of safety or environmental protection equipment;

(d) When necessary to carry out the requirements of NEPA [National Environmental Policy Act] or to conduct an environmental analysis; or

(e) When necessary to allow for inordinate delays encountered in obtaining required permits or consents

Subject to certain exceptions, such a suspension extends the primary lease term by a period “equal to the length of time the suspension is in effect,” but only a directed suspension may suspend the obligation to make lease rental payments. 43 C.F.R. §§ 250.169(a), 218.154(b).

⁵ In addition, the OCSLA states: “Any permit for geological exploration authorized by this section shall be issued only if the Secretary determines, in accordance with regulations issued by the Secretary, that . . . such exploration will not be unduly harmful to aquatic life in the area, result in pollution, [or] create hazardous or unsafe conditions.” 43 U.S.C. § 1340(g)(3) (2006); *see generally* 30 C.F.R. Part 251 (Geological and Geophysical (G&G) Explorations of the Outer Continental Shelf); *but see* 30 C.F.R. § 251.3(a) (“This part does not apply to G&G exploration conducted by or on behalf of the lessee on a lease in the OCS.”).

Factual Background

Statoil was the operator on OCS leases in the Gulf of Mexico when a catastrophic incident occurred during the drilling of an exploratory well for BP America, Inc., from the Deepwater Horizon drilling rig. See SOR at 1; Answer at 12. On April 20, 2010, the Deepwater Horizon was drilling in deepwater when it exploded, resulting in a loss of life and well control and massive quantities of oil entering the marine environment due to a failure of its blowout preventer system (BOP) to halt the flow of oil from that well. While efforts were being made to address and contain the incident, the Department initiated a “30-day review” of its possible causes. These efforts were continuing when the President directed the Secretary to conduct a thorough review of the incident and to present him with a report by the end of May on additional precautions and technologies that could improve the safety of oil and gas operations on the OCS. To allow for the completion of the Department’s review of these OCS issues, the Regional Supervisor, Gulf of Mexico OCS Region (Regional Supervisor), MMS, directed suspensions of operations to prohibit offshore drilling in the region for 30 days, as had been directed by the Secretary on May 6, 2010. SOR at 4; see AR 3.

The Secretary presented his report to the President on May 27, 2010, “Increased Safety Measures for Energy Development on the Outer Continental Shelf.” AR 1 (Safety Report). After summarizing key recommendations on BOPs, safety equipment, well control systems, and a systems-based approach to safety, it stated:

[T]he Secretary recommends a six-month moratorium on permits for new wells being drilled using floating rigs. The moratorium would allow for implementation of the measures proposed in this report and for consideration of the findings from ongoing investigations, including the bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling.

The Secretary further recommends an immediate halt to drilling operations on the 33 permitted wells, not including the relief wells currently being drilled by BP, that are currently being drilled using floating rigs in the Gulf of Mexico. Drilling operations should cease as soon as safely practicable for a 6-month period.

Id., Executive Summary at unpaginated ii-iii. The next day, May 28, the Secretary issued the following 1-page memorandum to the MMS Director:

The recent blow-out and oil spill in the Gulf of Mexico is new evidence of the serious risks associated with deepwater drilling, and presents

new challenges for the Department to assure the American public that OCS deepwater drilling can be accomplished in a safe and environmentally sound manner.

Yesterday, I presented recommendations to the President based on a 30-day review of the BP Explosion and Oil Spill that began on April 20, 2010. Based on that review, the recommendations contained in the report to the President, and further evaluation of the issue, I find at this time and under current conditions that offshore drilling of new deepwater wells poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment as that is specified in 30 C.F.R. 250.172(b). I also have determined that the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment. 30 C.F.R. 250.172(c).

Therefore, I am directing a six month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions. This suspension does not apply to drilling operations that are necessary to conduct emergency activities, such as the drilling operations related to the ongoing BP oil spill. For those operators who are currently drilling new deepwater wells, they shall halt drilling activity at the first safe and controlled stopping point and take all necessary steps to close the well. In addition, MMS shall not process any new applications for permits to drill consistent with this directive. All applicable regulations shall apply to the implementation of this directive.

Please ensure that appropriate Letters of Suspension and any other appropriate documentation, including any additional instructions and details regarding this directive, are sent to all affected lessees, owners, and operators immediately.

AR 2 (May 28 Memorandum). As required by the Secretary, the Regional Supervisor issued directed SOOs on each deepwater lease with an approved APD, including four

Statoil leases with APDs,⁶ which extended their earlier received SOOs through November 29, 2010. SOR at 4; *see* AR 3.

Service contractors that support oil drilling, exploration, and production on the OCS in the Gulf of Mexico challenged the Secretary's May 28 Memorandum, claiming the drilling moratorium it established was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 702 (2006). *Hornbeck Offshore Services, L.L.C. v. Salazar*, 696 F. Supp.2d 627 (E.D. La. 2010). The District Court recognized the Deepwater Horizon incident is "an unprecedented, sad, ugly and inhuman disaster," but it granted the plaintiffs' motion for a preliminary injunction on June 22, 2010, finding they had shown a likelihood of success on the merits because, "[o]n the record now before the Court, the defendants have failed to cogently reflect the decision to issue a blanket, generic, indeed punitive, moratorium with the facts developed during the thirty-day review." 696 F. Supp.2d at 630, 638. The Department appealed, sought a stay, but on July 8, 2010, the court of appeals denied its motion to stay the effect of the district court's injunction. *See* 2010 WL 3219469, at *1 (5th Cir. Aug. 16, 2010).

The Secretary responded by issuing a decision memorandum on July 12, 2010, to replace and supersede his May 28 Memorandum, which was the object of the district court injunction.⁷ AR 7 (Decision Memorandum). This 22-page memorandum details the Secretary's rationale for taking action (*i.e.*, a drilling and permitting moratorium), supports his decision with an attached summary of the decision record,⁸ and replaced his earlier moratorium (repeated verbatim above) by restating it as follows:

I am directing BOEM to direct the suspension of any authorized drilling of wells using subsea BOPs or surface BOPs on a floating facility. I

⁶ Statoil received and then appealed from the directed suspensions on each of these four leases (*i.e.*, OCS-G 20341, 26265, 26419, 31199), which were separately docketed as IBLA 2010-189 through IBLA 2010-192. By orders dated Nov. 16, 2010, the Board dismissed those appeals because each suspension had been directed by the Secretary and was therefore beyond our authority to review under 43 C.F.R. § 4.410(a)(3). *See* SOR, Exs. 2-3.

⁷ Based on the Decision Memorandum, the circuit court dismissed the Government's appeal from that injunction. *See* 2010 WL 3825395 (5th Cir. Sept. 29, 2010).

⁸ This 7-page summary identifies scores of internal and external reports, memoranda, and meetings, as well as the hearing transcripts of 26 Congressional hearings held on the Deepwater Horizon incident and its aftermath between May 11 and June 24, 2010. *See* Decision Memorandum at 23-29 (Attachment).

further direct BOEM to cease the approval of pending and future applications for permits to drill wells using subsea BOPs or surface BOPs on a floating facility. These suspensions shall apply in the Gulf of Mexico and the Pacific regions through November 30, 2010, subject to modification if I determine that the significant threats to life, property, and the environment set forth in this memorandum have been sufficiently addressed.

Decision Memorandum at 19. The Secretary added “suspending these particular operations until November 30 will allow BOEM and the Department to develop the interim rules required to address the safety issues that have recently come to light,” but recognized that “additional time will be required after these rulemaking actions are completed for operators to implement the new requirements established.” *Id.* at 20; *see* 30 C.F.R. § 250.172(c) (a suspension may be directed or granted when “necessary for the installation of safety or environmental protection equipment”). His memorandum concludes with a section entitled “Implementation,” expressly requiring BOEMRE to “withdraw” its May suspension letters, “issue new suspensions,” and “cease the approval of pending and future applications for permits to drill consistent with this decision.” *Id.* at 22. The Regional Supervisor issued directed SOOs to each affected operator with an approved APD shortly thereafter, which replaced and superseded his earlier SOOs.⁹ *See* Answer at 6-7; SOR at 5.

On October 1, 2010, BOEMRE recommended that the Secretary “lift the suspension of deepwater drilling” in its report on the status of drilling, workplace safety, blowout containment, and spill response. AR 11 at 12. The Secretary reviewed that report, accepted BOEMRE’s recommendations, and directed it “to lift the current deepwater drilling suspension as to all deepwater drilling activity” by memorandum dated October 12, 2010. AR 12 at 1. In addition, the Secretary stated that APDs then pending under his Decision Memorandum must, prior to approval, have “written and enforceable commitments . . . that ensure that containment resources are available promptly in the event of a deepwater blowout” and the operator’s Chief Executive Officer must certify to BOEMRE that it “has complied with all applicable regulations, including the new drilling safety rules.” *Id.* at 1-2. To implement these new requirements, BOEMRE issued a Notice to Lessees on November 8, 2010. *See* AR 15, NTL 2010-N10 (“Statement of Compliance with

⁹ Statoil received directed SOOs for each of its four OCS leases with approved APDs on or about July 12, 2010. *See* SOR at 5; AR 8; *supra* note 6. However, the Regional Supervisor rescinded his suspension on OCS-G 20341 two days later. Statoil appealed and petitioned for a stay of the decision on rescission, which was docketed as IBLA 2010-241. AR 8, 9. We granted Statoil’s petition for stay by order dated Nov. 12, 2010, and its appeal remains pending before the Board.

Applicable Regulations and Evaluation of Information Demonstrating Adequate Spill Response and Well Containment Resources”).¹⁰

Statoil’s Request and the Decision on Appeal

By letter dated September 28, 2010, shortly before BOEMRE recommended that the deepwater drilling suspension be lifted, Statoil requested BOEMRE to extend the primary lease terms on certain OCS leases by confirming that they had been extended by the Secretary’s Decision Memorandum.¹¹ SOR, Ex. 4 at 1; *see id.* at 2 (“Statoil requests that BOEM immediately confirm the suspension of the affected leases, effective as of the commencement of the May 6 initial moratorium”).¹² Statoil contended the Decision Memorandum “constitutes a de facto and de jure suspension of operations” on each Affected Lease because it “categorically suspends both permitting and drilling activities” on all of them, adding that it also “illegally abrogates” lease rights by divesting Statoil of part of the primary lease term it had “purchased.” *Id.* at 3, 5. Statoil emphasized the cost and planning impacts the

¹⁰ On July 20, 2011, BOEMRE filed a Motion to Supplement Record on Appeal and for Clarification of Remaining Scope. Attached to that document are two exhibits: (1) Exhibit A, which is a copy of a June 16, 2011, Secretarial Memorandum directing BOEMRE “to issue a Notice to Lessees and Operators (NTL) setting forth a one-time, expedited process through which leaseholders can request and obtain an up to one-year extension of deepwater leases in the Gulf of Mexico affected by last year’s Suspension Directive,” if certain criteria are met, *id.* at unpaginated 2; and (2) Exhibit B, which is a June 29, 2011, NTL implementing that directive, NTL 2011-N05 (“Procedure for Requesting Suspensions of Operations for Certain OCS Oil and Gas Leases in the Gulf of Mexico”). While BOEMRE’s submission is made part of the record in this appeal, we have not relied on it to resolve this appeal. The motion to clarify is denied as moot.

¹¹ Attached to Statoil’s request was a list of 178 leases it identified as “the Affected Leases.” SOR, Ex. 4 at 1. It explained that “[n]one of the Affected Leases currently is being held by production or a BOEM-issued suspension of operations or production.” *Id.* On appeal, Statoil continues to refer to them as the Affected Leases. We will do the same.

¹² According to Statoil, “the Secretary issued an initial 30-day moratorium on May 6, . . . imposed a 6-month moratorium on May 28,” and after that moratorium was enjoined by the District Court, “the Secretary enacted the July 12 Moratorium” by decision memorandum. SOR, Ex. 4 at 2; *see id.* at 1 (“BOEM should suspend the terms of [the Affected Leases] from the date of the Secretary’s initially imposed moratorium (May 6, 2010) until the date the Moratorium terminates”); *see also* SOR at 4-5; Reply at 10; Answer at 4-5.

moratorium was having on its “carefully arranged queue of maturing and drilling prospects,” particularly on leases with primary terms expiring in late 2010 and mid-2012. *Id.* at 6. It met with BOEMRE in early November and submitted additional information and argument by letters dated November 12 and 16, 2010. *See* SOR, Exs. 5, 6.

BOEMRE denied Statoil’s request on December 20, 2010. SOR, Ex. 1. BOEMRE represented that it had complied with the Decision Memorandum “by directing Suspensions of Operations (SOOs) by letter to each of the oil and gas operators who were drilling or proposing to drill wells via an approved Application for Permit to Drill (APD) covered by the Decision.” *Id.* at 1. BOEMRE explained it issued directed SOOs on each Statoil lease with an approved APD, adding that it rescinded the directed SOO on OCS-G 20341 because that lease did not meet the Secretary’s criteria (*i.e.*, “Statoil had completed drilling activities” and “could not begin new sidetrack, bypass, or other drilling at that location without an additional BOEM approval”). *Id.* at 2; *see supra* note 11. BOEMRE concluded by stating:

The Decision Memorandum directed BOEMRE to direct suspensions at locations with authorized drilling of wells (*i.e.*, wells with approved APDs) using subsea BOPs or surface BOPs on a floating facility, and not at other locations such as those referenced in Attachment A. Therefore, the [Affected Leases] were not, and are not, under a suspension unless BOEMRE specifically directed or granted, in writing, such a suspension for that lease or unit (or a portion thereof). You may request a suspension under 30 CFR 250.168-172, if the specific circumstances and diligent activities regarding a particular lease or unit meet the regulatory criteria. If you wish to request suspensions for any or all of the [Affected Leases], please submit justification for each individual lease/unit and all information required under 30 CFR 250.171, including the cost recovery fees.

Id. This appeal followed.

Discussion

The central facts giving rise to this appeal are uncontroverted. Statoil was the operator on certain OCS leases when the Secretary directed a suspension of deepwater drilling and permitting following the catastrophic Deepwater Horizon incident. The Regional Supervisor complied by issuing directed SOOs on each lease with an approved APD, including four of Statoil’s OCS leases with approved APDs. *See supra* notes 6, 10. Although Statoil concedes it did not submit or then have any APDs awaiting approval, it claims such is irrelevant, “given that it was patently futile

to prepare and submit detailed permit applications while the Secretary categorically foreclosed BOEMRE from approving them.” SOR at 15; Reply at 8. As framed by Statoil, the issue here presented is whether the Affected Leases were suspended by the Secretary as a matter of law because they were all affected to some degree by his deepwater drilling suspensions and directions not to approve APDs from early May to October 12, 2010, plus 4 additional months for it to comply with newly issued rules and other offshore requirements (e.g., NTL 2010-N10).¹³ See SOR at 4-5, 21-22.

[1] The BOEMRE decision on appeal is its denial of Statoil’s request to confirm that the primary terms of the Affected Leases had been extended by the Secretary. Statoil asserts that in considering this appeal, “the scope of IBLA’s review is de novo.” SOR at 8 (citing 43 C.F.R. § 4.1; *Wyoming Outdoor Council*, 160 IBLA 387, 397-98 (2004)); see Reply at 2-3. We agree and find support in the Director’s recent decision in *Statoil Gulf of Mexico LLC*, 42 OHA 261, 286-90 (2011), which involved an SOP and contains a section entitled “*Scope of IBLA’s Review Authority*.” The Director rejected an assertion by MMS (now BOEMRE) that the IBLA is obligated to review its discretionary decision under an abuse of discretion standard and held the Board is not obligated to apply that standard or defer to any determination or interpretation made by BOEMRE in exercising our de novo review authority and deciding administrative appeals for the Secretary. 42 OHA at 289. The same assertion there rejected is here advanced by BOEMRE when it asserts the Decision Memorandum “left it to the agency’s discretion to determine which operations met the criteria of that memorandum” and that its decision denying Statoil’s request involved an exercise of discretion. Answer at 8-9. BOEMRE is also mistaken in suggesting that the actions it took to comply with the Decision Memorandum, as well as its decision interpreting and applying that memorandum, constituted an exercise of discretion. In any event, it is Statoil’s burden to show error (e.g., that BOEMRE’s decision is contrary to the Secretary’s Decision Memorandum establishing a new drilling and permitting moratorium), and while we agree “the Board need only look to the moratorium and its effects *as a matter of law*,” SOR at 9 (emphasis added), we conclude it has not met its burden in this case.

¹³ Statoil does not claim BOEMRE failed to exercise its discretion to issue directed SOOs, claiming instead that BOEMRE had no discretion to exercise. See SOR at 2 (“the Secretary conferred no discretion on BOEMRE to deny suspensions or corresponding lease terms”); see also Reply at 7. Statoil discounts the suggestion that it request lease-specific SOOs, objects to being required to satisfy “detailed regulatory criteria” in requesting those SOOs, but reserves the right to do so in the future. See SOR at 17, 18 n.18. If Statoil makes such a request and is dissatisfied with BOEMRE’s decision, it may pursue an appeal. It is in that appeal in which the Board will decide claims and issues necessary for its proper resolution. We do not do so here.

The OCSLA requires the Department to have rules for suspending or temporarily prohibiting an operation or activity if requested by a lessee and in the national interest or if such operation or activity threatens “serious, irreparable, or immediate harm or damage” to life, property, or the environment. 43 U.S.C. § 1334(a)(1) (2006). Such rules must also specify that the term of an affected lease is extended “by a period equivalent to the period of such suspension or prohibition.” *Id.* These requirements are reflected in implementing rules at 30 C.F.R. § 250.172(b), which state the “Regional Supervisor may grant or direct an SOO or SOP” under the circumstances identified in the OCSLA. Any such suspension may extend the lease term by a period “equal to the length of time the suspension is in effect.” 30 C.F.R. § 250.169(a); *see also* 30 C.F.R. §§ 250.168 through 250.177.¹⁴

The Secretary established a 6-month suspension of all “deepwater” drilling on May 28, 2010, and directed MMS to send Letters of Suspension “to all affected lessees, owners, and operators”; he superseded and replaced that directive on July 12 by his requiring BOEMRE “to direct the suspension of any authorized drilling of wells using subsea BOPs or surface BOPs on a floating facility.” May 28 Memorandum (citing 30 C.F.R. § 250.172(b), (c)); Decision Memorandum at 19 (citing 30 C.F.R. § 250.172(b), (c)). The Regional Supervisor promptly directed SOOs on each such lease with an approved APD. Also on May 28, the Secretary directed the Department not to “process” any deepwater APDs, which he revised and replaced on July 12, 2010, when he stated “I further direct BOEM to cease the approval of pending and future [APDs] using subsea BOPs or surface BOPs on a floating facility.” May 28 Memorandum; Decision Memorandum at 19.

While Statoil contends the above-described Secretarial actions “functioned as a de facto and de jure suspension” of the Affected Leases, SOR at 9, we do not find that the Secretary directed or required BOEMRE to issue SOOs on its Affected Leases.¹⁵

¹⁴ These rules specify how to request a suspension and what must be submitted. 30 C.F.R. § 250.171. They also authorize the Regional Supervisor to: grant an SOO if necessary due to reasons beyond the operator’s control (*e.g.*, “unavoidable accidents”), 30 C.F.R. § 250.175(a); direct an SOP “when the suspension is in the national interest,” 30 C.F.R. § 250.174; and either grant or direct an SOO/SOP under certain other circumstances (*e.g.*, to install safety equipment or allow for “inordinate delays” in permitting), 30 C.F.R. § 250.172(c), (e).

¹⁵ Statoil also claims the Secretary’s actions “unilaterally interrupted” the lease terms it “purchased” when it acquired these OCS leases and that BOEMRE’s failure to confirm that their primary terms had been extended “illegally abrogate[s] Statoil’s lease rights.” SOR at 9, 13; *see id.* at 10 (“Statoil cannot be held accountable . . . for
(continued...)”)

The Secretary initially directed a suspension of “all pending, current, or approved offshore drilling,” which was replaced on July 12, 2010, by his “directing BOEM to direct the suspension of any authorized drilling of wells using subsea BOPs or surface BOPs on a floating facility.” May 28 Memorandum; Decision Memorandum at 19. Operators with APDs were clearly and directly affected because they were authorized to drill under those APDs, and each such operator received a directed SOO. The Secretary also and separately directed the Department not to process new deepwater APDs and replaced that directive when he “further direct[ed] BOEMRE to cease the approval of pending or future [APDs] using subsurface BOPs or surface BOPs on a floating facility.” *Id.* By suspending the processing and approval of those APDs, OCS leases with deepwater APDs awaiting approval under an approved EP (or other required plan) were affected by the permitting moratorium, but none of the Affected Leases were so situated or similarly affected by that moratorium.

[2] Based on our review of the Decision Memorandum, as well as the May 28 Memorandum it replaced and superceded, we conclude that the Secretary required BOEMRE to issue directed SOOs on leases with APDs for drilling in deepwater and using subsurface BOPs or surface BOPs on a floating facility. However, we do not find and are unable to conclude that the Secretary also required BOEMRE to direct SOOs on any other OCS leases; nor can we glean from his memoranda an intent that it do so. BOEMRE therefore properly rejected Statoil’s request to confirm that the Affected Leases had been suspended by the Secretary as a matter of law.

In the onshore oil and gas leasing context, Departmental action that precludes or delays drilling and development has been construed as constituting a de facto suspension of operations and production under section 39 of the Mineral Leasing Act, 30 U.S.C. § 209 (2006). *See Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595, 604-05 (D.C. Cir. 1981)¹⁵; *see also Hoyl v. Babbitt*, 129 F.3d 1377, 1384 (10th Cir. 1997). However, Statoil can point to no comparable case in which a Departmental action has been construed as an SOO or SOP under the OCSLA. It nevertheless argues there is analogous agency precedent establishing that MMS (now

¹⁵ (...continued)

a time period [during] which the agency simultaneously barred its performance”). Statoil has provided no legal support or identified any precedent for these claims; we need not consider them or the novel legal theories upon which they are based.

¹⁶ In that case, the Department imposed a “winter season only” restriction even though the lease did not include such a restriction. Copper Valley sought an extension of the lease term, which the Secretary denied. The court found that restriction constituted a suspension of operations and production within the meaning of 30 U.S.C. § 209 (1982), and that the operator was entitled to an automatic lease extension equal to the period of suspension.

BOEMRE) has “readily issued suspensions and resultant lease extensions to accommodate long-term studies and area-based drilling bans” without the requirement that the lessees fulfill any additional conditions, although it admits that such precedent is not “comparable to the moratorium’s nature and scope.” SOR at 18-19. BOEMRE responds that the cases cited by Statoil involved different facts and legally distinguishable circumstances: directed suspensions of leases pending completion of the California Offshore Oil and Energy Resources study, which was initiated in 1992 and completed in 1999, *Amber Resources Co. v. United States*, 538 F.3d 1358, 1365 (Fed. Cir. 2008); a suspension granted based on necessary environmental studies that lasted 6 years, *Mobil Oil Exploration & Producing SE, Inc. v. United States*, 530 U.S. 604, 613 (2000); suspensions required by lease stipulation; or suspensions issued as a result of a court decision, *Native Village of Point Hope v. Salazar*, 730 F. Supp. 2d 1009 (D. Alaska 2010). None of the cases cited by Statoil are apposite or mandate the result it seeks. The question here is not whether BOEMRE should direct or grant SOOs on the Affected Leases, but whether the Secretary has already done so. Clearly, he has not.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the December 20, 2010, decision by BOEMRE is affirmed.

_____/s/_____
James K. Jackson
Administrative Judge

DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS CONCURRING:

I write separately to emphasize that the only documents at issue in this appeal are the Secretary's July 12, 2010, Decision Memorandum (Decision Memorandum) and BOEMRE's December 20, 2010, decision interpreting that decision.

This case arises from attempts by Statoil to persuade BOEMRE to "confirm" that the Secretary's Decision Memorandum was a suspension of certain Outer Continental Shelf (OCS) deepwater leases by immediately issuing suspensions of operations (SOOs) for each of those deepwater leases or by otherwise confirming that their lease terms had been extended.

Statoil initiated its request in a September 28, 2010, letter to BOEMRE, which accompanies Statoil's statement of reasons (SOR) and is identified therein as Ex. 4. In its letter, Statoil states that the leases in question are identified in Attachment A to the letter, which is a six-page document titled "Statoil Gulf of Mexico LLC Operated Leases Not Held by Lease or Unit Production, SOP [Suspension of Production], or SOO As Of 9-28-2010," identifying 178 leases.¹ Statoil designates those leases as its "Affected Leases." Letter at 1.

In the opening paragraph of that letter, Statoil states:

On July 12, 2010, the Secretary of the Interior issued a Decision Memorandum to the Bureau of Ocean Energy Management, Regulation, and [Enforcement] ("BOEM") imposing a new moratorium on most current, pending, and future deepwater permitting and drilling operations on the Outer Continental Shelf ("OCS") until November 30, 2010 ("Moratorium"), and possibly longer.

¹ The case record submitted by BOEMRE, which, as noted in the lead opinion at n.1, is contained on a compact disk, does not contain a copy of the Sept. 28, 2010, Statoil letter or two subsequent Statoil letters (SOR, Exs. 5 and 6) submitted to BOMRE in support of its request. BOEMRE provides no explanation for the failure to include those documents, and the failure to do so makes it impossible for the Board to determine if BOEMRE received a complete copy of Attachment A. In its Dec. 20, 2010, decision and thereafter, BOEMRE makes reference to the 173 leases listed in Attachment A; however, the six-page Attachment A provided to the Board on appeal by Statoil lists 173 leases on the first 5 pages, and 5 more on page 6. Statoil does nothing to clarify the matter on appeal, instead making reference to its "173 deepwater leases." *E.g.*, SOR at 3.

Thus, Statoil defined the Decision Memorandum as the “Moratorium,” later stating that “[t]he Moratorium, per its terms, supersedes the Secretary’s May 28 Order and BOEM’s SOOs directed thereunder” (Letter at 2) and “the Moratorium constitutes a de facto and de jure suspension of operations on each of the Affected Leases” (Letter at 3), and “the Secretary’s Moratorium functions as a final departmental suspension” (Letter at 4).²

In response to that request, and two subsequent letters (SOR, Exs. 5 and 6) in support of the request, BOEMRE issued its December 20, 2010, decision that is the subject of this appeal.

Therein, BOEMRE held that

[t]he Decision Memorandum directed BOEMRE to direct suspensions at locations with authorized drilling of wells (i.e., wells with approved APDs) using subsea BOPs [blowout preventers] or surface BOPs on a floating facility, and not at other locations such as those referenced in Attachment A. Therefore, the leases listed in your Attachment A were not, and are not, under a suspension unless BOEMRE specifically directed or granted, in writing[,] such a suspension for that lease or unit (or a portion thereof).

Decision at 2.

Thus, BOEMRE refused to accept Statoil’s position that the Decision Memorandum functioned as a suspension of the Affected Leases.

The Secretary’s Decision Memorandum states at page 1:

Pursuant to 30 C.F.R. § 250.172(b)-(c) and with certain exceptions explained below, I have determined that BOEM shall direct the suspension of the drilling of wells using subsea blowout preventers (BOPs) or surface BOPs on a floating facility. I have also determined that BOEM shall cease the approval of pending and future applications for permits to drill wells using subsea BOPs or surface BOPs on a floating facility.

² It is clear, nevertheless, that Statoil sought a recognition of lease extensions for its Affected Leases, “effective as of the May 6 initial moratorium.” Letter at 2.

While Statoil claims that this language amounted to a de facto and de jure suspension of its Affected Leases, that is not the case.

Regarding the first sentence above, the Secretary made a decision that, in light of the Deepwater Horizon disaster, certain OCS activities should be suspended, *i.e.*, drilling of wells with subsurface BOPs or surface BOPs on a floating facility, and that BOEMRE should direct the suspension of those activities. BOEMRE complied with that order vis-a-vis Statoil on July 12, 2010, by carrying out the ministerial act of directing SOOs for wells on four lease operated by Statoil. The Decision Memorandum itself did not suspend any OCS permit or lease; it merely identified the activities that should be suspended by BOEMRE. As the Secretary stated: “In this case, BOEM will be suspending certain activity involving certain operations and will issue individual suspension letters to that effect.” AR 7 at 19. The Secretary’s direction to BOEMRE to suspend the drilling of deepwater wells did not, itself, suspend Statoil’s leases and extend the terms of those leases.

Regarding the Secretary’s direction to BOEMRE to cease the approval of pending and future APDs using subsea BOPs or surface BOPs on a floating facility, Statoil argues that such language constrained BOEMRE’s deepwater permitting authority and must be construed as having directed a suspension of the Affected Leases and extended their lease terms. It identifies “the key issue presented in this appeal” as “whether the *Secretary’s* direction to categorically withhold deepwater permits for several months was a directed suspension that, by law, correspondingly extends Statoil’s Affected Lease terms for that period.” Reply at 1. Statoil states that it “does not assert ‘entitlement to a suspension,’” because the Secretary has already issued one; Statoil appeals only BOEMRE’s Decision refusing to confirm the resulting extensions.” Reply at 7.

In support of its position, Statoil offers various situations in which the Minerals Management Service or BOEMRE affirmatively issued suspensions in the wake of Congressional or court action or as a result of lease stipulations, all of which are distinguishable from the present case. Here, Statoil seeks confirmation that the Secretary suspended its Affected Leases by directing BOEMRE to cease the approval of pending and future APDs for a period of time. While Statoil offered assertions in its letters to BOEMRE (*see* SOR, Exs. 4 and 5) about how its activities in the Gulf of Mexico were affected by the Secretary’s directive to BOEMRE, the fact that its activities were affected does not support a conclusion that the Secretary’s words constituted a suspension of its Affected Leases, either as a matter of law or as a matter of fact.

I find no basis for concluding that either of the two sentences of the Decision Memorandum, quoted above, suspended the Affected Leases. For that reason, I concur in affirming BOEMRE's December 20, 2010, decision.

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge