

BP's Well Evaded Environmental Review: Categorical Exclusion Policy Remains Unchanged

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INTRODUCTION

Sea snot, tar balls, and designated oiled carcass holding locations are just a few of the many appalling and lingering consequences of the failure of BP's Macondo well in the deep waters of the Gulf of Mexico. The catastrophe began on April 20, 2010 when the well's blowout preventer failed and caused a fiery explosion aboard the *Deepwater Horizon*, the oil rig owned by Transocean and leased and operated by BP. The accident killed eleven rig workers and led to the largest oil spill in American history. Plugging the well took three months plus an additional two months to kill the well. Called an unprecedented environmental disaster by some and the Crime of the Century by others, BP's oil spill resulted in an estimated total discharge of 4.9 million barrels (205.8 million gallons) of oil, largely unmitigated, into the Gulf of Mexico. While the precise cause of the well's failure is still unknown, what has become evident is that the drilling plans for BP's broken well never underwent full environmental review – a review that could have helped prepare the company and local and federal governments for such an eventual catastrophe.

Even before the BP oil spill, the federal agency responsible for regulating and monitoring oil and gas extraction, the Minerals Management Service, had come under attack for its regulation of oil and gas leasing and drilling in tax-payer owned public waters.¹ After a series of investigations, Congress found that the agency was plagued with moral misdeeds and conflicts of interest. Then newly appointed Secretary of the

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1. In the wake of the oil spill, the Obama administration has renamed the Minerals Management Service (MMS) to the Bureau of Ocean Management, Regulation, and Enforcement. For purposes of clarity in telling of past and present events, this Article refers to the agency by its previous name.

Department of the Interior, Ken Salazar, promised that as “the new sheriff in town” he would clean up the misguided agency and restore order. However, nothing really changed. There is much speculation that between the sex and drug parties and the much deeper relationship between the Louisiana oil industry and the regulatory agency, the MMS’ management of oil and gas exploration and production in the Gulf of Mexico ranged from complacent to negligent. Despite the on again-off again moratorium, lawsuits, and international attention MMS’ behavior has attracted, MMS has not yet revoked its policy of exempting drilling activities in the Gulf of Mexico from full environmental review. This Article examines the history of the policy of excluding drilling plans from environmental review in the Gulf of Mexico, explains how this contributed to the BP oil spill, and why the Obama administration must take immediate steps to revoke this policy.

ENVIRONMENTAL REVIEW *IS* REQUIRED FOR DRILLING. . .

Full environmental review requires a site-specific analysis of the potential environmental impacts of oil drilling and production activities and helps companies and the federal government prepare for such eventual disasters. The National Environmental Policy Act (NEPA) both ensures that federal agencies take a hard look at the environmental consequences of proposed actions by carefully considering environmental impacts, and that the public plays a role in the decision-making process and the implementation of the agency decision.²

Pursuant to NEPA, all major federal actions that will significantly affect the quality of the human environment require an environmental impact statement (EIS).³ The purpose of producing an EIS is to inform decision makers and the public of the environmental effects of a proposed project and reasonable alternatives that would avoid or minimize adverse impacts.⁴ However, certain proposed federal actions may be categorically excluded from environmental analysis where the agency has previously determined that the action will not have significant environmental impact. The Council on Environmental Quality (CEQ), which has the authority and responsibility to guide federal agencies in their implementation of NEPA,⁵ defines a categorical exclusion as a “category of actions which do not individually or cumulatively have a significant effect on the human environment, and which have been found to have no such effect in procedures adopted by a Federal agency.” The main purpose of a categorical exclusion is to reduce delay where the

2. See 40 C.F.R. § 1500.1 (2010).

3. See 42 U.S.C. § 4332(2)(C) (2006); 40 C.F.R. § 1501.4 (2010).

4. See 40 C.F.R. § 1502.1 (2010).

5. See 42 U.S.C. §§ 4321, 4344 (2006).

agency has identified categories of activities that are too minor to warrant environmental review.⁶

The Outer Continental Shelf Lands Act (OCSLA) gives the MMS the authority and responsibility to approve oil and gas leasing, drilling, and production on the outer continental shelf. Under OCSLA, oil and gas development proceeds under four stages: (1) preparation of a nationwide 5-year program; (2) planning and execution of lease sales; (3) approving a private company's exploration plan; and (4) approving a company's development and production plan. OCSLA requires that MMS only permit offshore oil and gas activities that comply with NEPA.⁷ In general, MMS conducts NEPA review at each stage.

Typically, the approval process for oil and gas leasing as well as the implementation of NEPA is a multi-step process.⁸ First, under OCSLA, the MMS prepares a nationwide five-year oil and gas leasing program where it outlines a schedule for proposed lease sales and produces an EIS. Then site-specific leases are contemplated, EISs are prepared, and the leases are sold. After the lease sale, private companies develop exploration plans which undergo NEPA review in the form of an environmental assessment (EA). If the company subsequently proceeds with production, it submits to MMS a development and production plan. This plan also undergoes NEPA review typically in the form of an EIS.

... *UNLESS YOU WANT TO DRILL IN THE GULF OF MEXICO.*

While NEPA is applied at every stage of the OCSLA process in other regions of the United States, certain stages are exempt from environmental review in the Gulf of Mexico. In the Gulf of Mexico, the NEPA process operates in a dangerously different way. In the Gulf of Mexico only, MMS categorically excludes from NEPA review the approval of offshore lease exploration, development and production plans, and development operation coordination documents (DOCD).⁹ BP's exploration plan that resulted in the devastating oil spill was approved using this categorical exclusion.¹⁰

6. See Regulations for Implementing the Procedural Provisions of NEPA, 43 Fed. Reg. 55,978, 55,979 (Nov. 29, 1978).

7. See *Sec'y of the Interior v. California*, 464 U.S. 312, 337 (1984); see also 43 U.S.C. § 1866(a) (2006).

8. See BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, OIL AND GAS LEASING ON THE OUTER CONTINENTAL SHELF 2, available at http://www.boemre.gov/PDFs/SBOEMRE_Leasing101.pdf (last visited Oct. 23, 2010).

9. See U.S. Dep't of the Interior, Departmental Manual, Environmental Quality Programs, pt. 516, ch. 15.4(C)(10) (May 27, 2004), available at http://206.131.241.18/app_DM/act_getfiles.cfm?relnum=3625.

10. See Juliet Eilperin, *U.S. exempts BP's Gulf of Mexico drilling from environmental impact study*, THE WASHINGTON POST, May 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html>.

For BP's Macondo well, NEPA analysis was not completed at every stage of oil and gas leasing and drilling. In 2007, the MMS prepared a Programmatic EIS for the Outer Continental Shelf (OCS) Oil & Gas Leasing Program 2007–2012 which covered the entire OCS.¹¹ Then it prepared a Final EIS for the Gulf of Mexico (GOM) OCS Oil and Gas Lease Sales: 2007–2012 Western Planning Area Sales 204, 207, 210, 215, and 218 and Central Planning Area Sales 205, 206, 208, 213, 216, and 222.¹² This covered the area where the Macondo well was drilled, the 206 lease sale area. The MMS next prepared an EA for the Proposed GOM OCS Oil and Gas Lease Sale 206 Central Planning Area.¹³ However, it used categorical exclusions to approve BP's initial and revised exploration plans and approvals for the application for a permit to drill the Macondo well. Which means that instead of completing a site-specific review of the environmental impacts as required by NEPA, MMS instead relied on the earlier NEPA documents that were wrought with inadequacies. For example, the Programmatic EIS and Multi-Sale EIS concluded that an oil spill would weather and degrade by the time it reached shore and would therefore have a minimal impact on the environment and wildlife, an assertion we now have unfortunate ample evidence to know is untrue.¹⁴

The political and economic explanations for the “streamlined” NEPA processes in the Gulf of Mexico becomes clear in looking at the productivity and potential of the Gulf of Mexico. The Gulf of Mexico is the most productive region in the federal outer continental shelf, providing 97 percent of all production.¹⁵ It has nearly 7,000 active leases in federal waters, and 64 percent of them are in deepwater.¹⁶ Since 1947, a

11. See *2007–2012 Final Environmental Impact Statement*, BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, <http://www.boemre.gov/5-year/2007-2012FEIS.htm> (last visited Oct. 30, 2010).

12. See 1 MINERALS MGMT. SERV., GULF OF MEXICO OCS OIL AND GAS LEASE SALES: 2007–2012 WESTERN PLANNING AREA SALES 204, 207, 210, 215, AND 218, CENTRAL PLANNING AREA SALES 205, 206, 208, 213, 216, AND 222, DRAFT ENVIRONMENTAL IMPACT STATEMENT (2006), available at www.gomr.mms.gov/PDFs/2006/2006-062-Vol1.pdf; see also 2 MINERALS MGMT. SERV., GULF OF MEXICO OCS OIL AND GAS LEASE SALES: 2007–2012 WESTERN PLANNING AREA SALES 204, 207, 210, 215, AND 218, CENTRAL PLANNING AREA SALES 205, 206, 208, 213, 216, AND 222, DRAFT ENVIRONMENTAL IMPACT STATEMENT (2006), available at <http://www.gomr.mms.gov/PDFs/2006/2006-062-Vol2.pdf>.

13. See MINERAL MGMT. SERV., PROPOSED GOM OCS OIL AND GAS LEASE SALE 206 CENTRAL PLANNING AREA, ENVIRONMENTAL ASSESSMENT (2007), available at <http://www.gomr.mms.gov/PDFs/2007/2007-059.pdf>.

14. See BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, *supra* note 11, at IV–40, 63, 87, 128; 1 MINERALS MGMT. SERV., GULF OF MEXICO OCS OIL AND GAS LEASE SALES: 2007–2012 WESTERN PLANNING AREA SALES 204, 207, 210, 215, AND 218, CENTRAL PLANNING AREA SALES 205, 206, 208, 213, 216, AND 222, DRAFT ENVIRONMENTAL IMPACT STATEMENT 236, 238, 259, 260, 271, 274, 292, 305, 324, 331, 336 (2006), available at <http://www.gomr.mms.gov/PDFs/2006/2006-062-Vol1.pdf>.

15. See U.S. DEP'T OF THE INTERIOR, INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF 3 (2010).

16. See *id.*

staggering 50,000 wells have been drilled in the Gulf of Mexico, and there are currently about 3,600 structures in the Gulf of Mexico.¹⁷ The Gulf, in particular Louisiana, has had a love affair with oil that has been delicate, if not bizarre. The region has had to balance the inherent risks of drilling activities with the need for maintaining a productive ecosystem that supports a thriving fishing and tourism industry.

Perhaps partly to blame for the inappropriate exemptions is that these categorical exclusions were developed before OCS activities were conducted so deep. In the late 1970s, the deepest well was 1,023 feet.¹⁸ By the mid-1980s when the policy was adopted, drilling was typically in water 1,000–2,000 feet deep,¹⁹ not the extreme depths at which wells are drilled today. However, MMS' primary explanation for why exploration plans in the Gulf of Mexico enjoy a categorical exclusion policy seems to be that:

Some of the MMS categorical exclusions were developed based on experience in reviewing actions for compliance with the National Environmental Policy Act (NEPA) in the past. For example, hundreds of Environmental Assessments (EAs) were prepared for approval of certain types of oil and gas exploration and development and production plans in the Central and Western Gulf of Mexico. However, none of those EAs identified the need to prepare an Environmental Impact Statement (EIS).²⁰

Therefore, MMS appears to have concluded that because the previous EAs found no possibility of significant impacts from drilling, no future drilling would ever pose significant impacts.

Others have suggested that the categorical exclusion policy is necessary in light of OCSLA Section 11 requirement that the MMS approve or deny an exploration plan within thirty days, which means it only has thirty days to complete an environmental review.²¹ This timeframe is arguably narrow; however, approvals undergo full NEPA review in other regions, including Alaska and the Atlantic in the same amount of time.²² Therefore, the argument that the MMS cannot perform

17. *See id.*

18. *See* G. ED RICHARDSON, ET AL., MINERALS MANAGEMENT SERVICE, DEEPWATER GULF OF MEXICO 2008: AMERICA'S OFFSHORE ENERGY FUTURE app. A (2008).

19. *See id.*

20. *See National Environmental Policy (NEPA)-Categorical Exclusion*, BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, <http://www.boemre.gov/eppd/compliance/nepa/policy/ce/index.htm> (last visited Oct. 30, 2010).

21. *See* 43 U.S.C. § 1340(c) (2006).

22. *See* COUNCIL ON ENVTL. QUALITY, REPORT REGARDING THE MINERALS MANAGEMENT SERVICE'S NATIONAL ENVIRONMENTAL POLICY ACT POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT 8 (2010). On May 12, 2010, the Obama administration requested an extension of that timeline from Congress. Also a provision in the pending Consolidated Land, Energy, and Aquatic Resources Act contemplates extending the timeframe to 90 days. *See* H.R. 3534, 110th Cong. (2010).

a NEPA analysis because of a thirty day timeline appears to be without merit.

HOW IS DEEPWATER DRILLING EXEMPT FROM ENVIRONMENTAL REVIEW?

In light of the obvious risks and uncertainties of deepwater drilling it would seem axiomatic that such perilous activities would not qualify for an exemption intended for activities that are too minor to warrant environmental review. In fact, the categorical exclusion policy contemplates circumstances where a more thorough review should be conducted, and the MMS categorical exclusion review (CER) helps the applicant determine whether the project at issue qualifies as an exception to the categorical exclusion policy.²³ Certain types of activities do not qualify for a categorical exclusion because they may have a significant impact on the environment, such as:

- (1) areas of high seismic risk or seismicity, relatively untested deep water, or remote areas, or (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or (3) in areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology.²⁴

MMS does not have a fixed definition of deepwater. It has been described as depths greater than 400 meters (approximately 1,312 feet),²⁵ and at other times depths greater than 500 feet.²⁶ Regardless of the numerical definition of deepwater, MMS regards the areas in the Gulf of Mexico that are subject to the categorical exclusion policy as “relatively untested or remote” compared to other areas. The MMS further concedes that the Department of Interior Departmental Manual requires that an EA be prepared for operations proposed in these “relatively untested deepwater or remote areas.”²⁷ Yet, the MMS has and continues to approve deepwater drilling pursuant to a categorical exclusion. Absurdly, it justifies the use of the categorical exclusion policy in an area

23. See 43 C.F.R. § 46.215 (2010).

24. U.S. Dep’t of the Interior, Departmental Manual, Environmental Quality Programs, pt. 516, ch. 15.4(C)(10) (May 27, 2004) (emphasis added), available at http://206.131.241.18/app_DM/act_getfiles.cfm?relnum=3625.

25. See MINERALS MGMT. SERV., STRATEGY FOR POSTLEASE NEPA COMPLIANCE IN DEEPWATER AREAS OF THE GULF OF MEXICO, available at http://www.gomr.boemre.gov/homepg/regulate/environ/ea_grid/NEPADWSTRATEGY.PDF (last visited Oct. 30, 2010).

26. See Press Release, U.S. Dep’t of the Interior, Interior Issues Directive to Guide Safe, Six-Month Moratorium on Deepwater Drilling (May 30, 2010), available at <http://www.doi.gov/news/pressreleases/Interior-Issues-Directive-to-Guide-Safe-Six-Month-Moratorium-on-Deepwater-Drilling.cfm>.

27. See MINERALS MGMT. SERV., STRATEGY FOR POSTLEASE NEPA COMPLIANCE IN DEEPWATER AREAS OF THE GULF OF MEXICO, available at http://www.gomr.boemre.gov/homepg/regulate/environ/ea_grid/NEPADWSTRATEGY.PDF (last visited Oct. 30, 2010).

of the Gulf of Mexico, that by its own admission is deep and relatively untested, by explaining that “[i]mplementation of this strategy will, over time, result in the grid areas no longer being considered untested or remote, thereby eliminating this as a trigger for preparing an EA.”²⁸

The exploration plan for the BP Macondo well was approved pursuant to the categorical exclusion policy despite the fact that the plan called for, and the company drilled, the Macondo well in water over 4,990 feet deep. Approving the plan pursuant to the categorical exclusion policy was in clear contravention of NEPA and the agency’s own policy as the plan called for drilling in deep, relatively untested water. Even after the BP spill, MMS continues to approve exploration plans and DOCDs contemplating drilling in deepwater pursuant to this categorical exclusion policy.

HOW DOES THE BP OIL SPILL AFFECT THE CONTINUED USE OF CATEGORICAL EXCLUSIONS?

The oil spill conclusively demonstrates that deepwater drilling does have significant impacts on the environment. While the abuse of environmental review policy was unlawful before the spill, post-spill this position is simply no longer defensible. The Department of Interior explains that extraordinary circumstances prevent the use of a categorical exclusion where the activity may have a significant environmental effect and require additional analysis and action.²⁹ Regulations dictate that an action that is normally categorically excluded be evaluated, and if a proposed action meets an extraordinary circumstance, “further analysis and environmental documents must be prepared for the action.”³⁰ The Department of Interior provides a list of such extraordinary circumstances, and includes those that:

- (a) Have significant impacts on public health or safety;
- (b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources . . . ;
- (c) Have highly controversial environmental effects . . . ;
- (d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks;
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- (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or

28. *Id.* “This strategy” includes completing a few grid EAs for MMS-designated areas in lieu of requiring cite-specific environmental assessment for individual exploration plans.

29. *See* 40 C.F.R. § 1508.4 (2010).

30. 43 C.F.R. § 46.205(c)(1) (2010).

have significant impacts on designated Critical Habitat for these species. . .³¹

The BP oil spill makes it clear that exploratory drilling activities have significant impacts that qualify as extraordinary circumstances. The effects have been felt on public health and safety in the form of impacts from exposure to oil, gases, and dispersants.³² Significant impacts on natural resources and Endangered Species Act listed species have also been documented. Imperiled species in the Gulf of Mexico include the sperm, sei, North Atlantic right, blue, fin, and humpback whales; leatherback, green, Kemp's Ridley, loggerhead, and hawksbill sea turtles; gulf sturgeon, Atlantic bluefin tuna, and smalltooth sawfish; elkhorn and staghorn corals; West Indian manatee; piping plover, whooping crane, woodstork and recently de-listed brown pelican; Alabama red-belly turtle; and Alabama, Choctawhatchee, St. Andrew, and Perdido Key beach mice. Additionally, federally designated critical habitat upon which these species depend is found throughout the Gulf of Mexico.

Finally, oil drilling is unmistakably highly controversial with unique or unknown environmental risks. The MMS acknowledges oil spills have the potential to directly kill significant numbers of coastal and marine birds, interfere with almost every life function (including breeding and feeding), and destroy habitat for coastal, marine, freshwater, and migratory birds.³³ While one obvious risk of drilling is the direct impact from spilt oil, there are numerous other environmental impacts. Most evident from the BP spill is the untold impact from dispersants. Also, impacts from routine activities such as servicing rigs and transporting oil and gas result in vessel strikes on whales. Seismic activities associated with oil and gas exploration and production can also harm marine species. Sometimes random accidents also result in spilled oil. In fact, the MMS acknowledges that blowouts, oil spills, and spill-response activities could impact "small to large numbers of sea turtles" and result in "either acute or gradual population declines."³⁴ It is apparent that deepwater, and other outer continental shelf oil drilling, can no longer be approved via this rubber-stamp approval process.

WHERE DO WE GO FROM HERE?

On October 12, 2010, Secretary Salazar lifted a moratorium on deepwater drilling saying that MMS continues to make "significant

31. 43 C.F.R. § 46.215 (2010).

32. Dispersants are chemicals used to dilute oil in water. They are toxic to most animals, including humans.

33. See MINERALS MGMT. SERV., PROPOSED GOM OCS OIL AND GAS LEASE SALE 213 CENTRAL PLANNING AREA: ENVIRONMENTAL ASSESSMENT 44-46, 48-50 (2009).

34. See *id.* at 40-41; MINERALS MGMT. SERV., PROPOSED GOM OCS OIL AND GAS LEASE SALE 215 WESTERN PLANNING AREA: ENVIRONMENTAL ASSESSMENT 43-44 (2010).

progress in reducing the risks associated with deepwater drilling.”³⁵ The MMS issued new operating and safety rules for deepwater drilling and determined that deepwater drilling could proceed as before – without environmental review – because oil companies allegedly now have more complete plans for responding to any future spill and because BP finally capped its well. However, on October 19, 2010, a judge in the Eastern District Court of Louisiana, struck down some of the safety measures,³⁶ and on October 22, 2010, the Center for Biological Diversity filed suit over the lifting of the moratorium and the finding by the Secretary that lifting the moratorium would not have significant impacts on the environment.

Secretary Salazar originally issued the moratorium on May 28, 2010, suspending all drilling operations in waters deeper than five hundred feet for six months due to safety concerns and threats to the environmental. The moratorium was based in part on memorandum from the Secretary stating 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.”³⁷ Oil industry groups quickly challenged the legality of the May 28 moratorium. The court issued a preliminary injunction staying the moratorium on the basis that it was likely arbitrary under the Administrative Procedure Act.³⁸

The procedural history that followed is complicated. The Department of Interior was unsuccessful in moving the Fifth Circuit Court of Appeals for a stay pending the appeal. Meanwhile, the Secretary of the Interior rescinded the May 28 moratorium and on July 12, 2010, and issued a second moratorium.³⁹ The second moratorium was based on the MMS’ need to evaluate evidence by operators that the operators could respond to a potential spill in the Gulf given the fact that resources to respond to a spill have been depleted by the BP oil spill response and clean up efforts. The MMS also based the moratorium on the need to conduct an assessment of resources and to determine what caused the BP oil spill.

Without rendering a final determination, the Fifth Circuit remanded the case to the district court to determine:

35. Juliet Eilperin, J. & Steven Mufson, *White House lifts ban on deepwater drilling*, THE WASHINGTON POST, Oct. 12, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/12/AR2010101202326_pf.html.

36. *See* *Ensco Offshore Co. v. Salazar*, No. 10-01941, 2010 WL 4116892 (E.D. La. Oct. 19, 2010).

37. Memorandum from Sec’y of the Interior on Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells to the Director of the MMS (May 28, 2010), *available at* <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=33715>.

38. *See* *Hornbeck Offshore Servs. v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010).

39. Opponents of the moratorium argue that the second moratorium is nearly identical to the first and have challenged the second moratorium as well.

- (1) whether the Secretary had the authority to revoke the first moratorium;
- (2) whether the second moratorium relied upon new evidence;
- (3) whether the two moratoria are identical in scope; and
- (4) whether the preliminary injunction was moot.⁴⁰

The district court found that the Secretary had the authority to revoke the first moratorium and the authority to impose the second moratorium, and that the preliminary injunction was not moot.⁴¹ On September 29, the Fifth Circuit issued its opinion that the initial preliminary injunction against the first moratorium was moot,⁴² leaving the second moratorium intact. The moratorium had been scheduled to remain in effect until November 30 or until the Secretary determined that deepwater drilling can proceed safely.

Meanwhile, on August 16, 2010, the CEQ released a report on MMS compliance with NEPA in the OCS in the Gulf of Mexico, which used the permitting process for the drilling of the Macondo well as a case study for analyzing how MMS implements NEPA.⁴³ One of its seven recommendations to MMS is to review the use of categorical exclusions for the OCS and determine whether to revise the policy.⁴⁴ Furthermore, the CEQ reported that

. . . in light of the Deepwater Horizon incident, [MMS] is reviewing the use of categorical exclusions for offshore activities under NEPA and its implementing regulations. In the near future, [MMS] will issue a Federal Register notice announcing a formal process for the comprehensive review and evaluation of its use of categorical exclusions in relation to offshore oil and gas exploration and drilling activities.⁴⁵

On the same day CEQ released its report, the Director of the MMS, Michael Bromwich, instructed MMS not to use categorical exclusions for NEPA review requirements for plans that propose conduct that requires an application to permit drilling and involves use of a subsea blowout

40. *Hornbeck Offshore Servs. v. Salazar*, No. 10-30585, 2010 WL 3219469, at *1–2 (5th Cir. Aug. 16, 2010).

41. *See Hornbeck Offshore Servs. v. Salazar*, No. 10-1663, 2010 WL 3523040 (E.D. La. Sept. 1, 2010).

42. *See Hornbeck Offshore Servs. v. Salazar*, No. 10-30585, 2010 WL 3825385 (5th Cir. Sept. 29, 2010).

43. *See* COMM. ON ENVTL. QUALITY, REPORT REGARDING THE MINERALS MANAGEMENT SERVICE'S NATIONAL ENVIRONMENTAL POLICY ACT POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT (2010).

44. *Id.* at 4–5.

45. Memorandum from Michael Bromwich Director of BOEMRE on Use of Categorical Exclusions in Gulf of Mexico Region to Walter Cruickshank, Deputy Director of BOEMRE, and Robert LaBelle, Acting Associate Director of OEMM (Aug. 16, 2010) (on file with author).

preventer or surface blowout preventer on a floating facility.⁴⁶ However, the notice did not invalidate the approval of the handful of deepwater plans that were approved after the oil spill, and it is unclear whether the instruction has any binding effect. Finally, on October 8, 2010, MMS announced it is reviewing its categorical exclusions for OCS decisions,⁴⁷ and is accepting public comments through November 8, 2010.

CONCLUSION

The continued use of the categorical exclusion policy in the Gulf of Mexico is nothing short of reckless and would likely be found illegal in any federal court. Yet President Obama appears content to allow the legal battles to play out in court,⁴⁸ perhaps so as to avoid having to take a position on the troublesome policy and take the necessary steps to provide the maximum environmental protections for this fragile ecosystem. The President is the Executive of all the agencies, including the Department of the Interior and MMS. He has the authority to instruct the MMS to rescind this categorical exclusion policy, but instead the President has only committed in non-binding terms to review it. If the categorical exclusion policy were eliminated, the MMS would have to conduct environmental review for exploration plans and DOCDs which would provide the decisionmaker, the MMS, and the public information on the potential environmental impacts. The public should take advantage of this comment period to tell to President Obama to stop sacrificing the Gulf and put an end to the categorical exclusion policy.

We may never learn what went wrong in the tragic BP oil spill. This sobering fact makes careful assessment of the potential significant environmental impacts of drilling much more necessary. While we can plead ignorance as to the process that led to the BP spill, we now know that approving drilling without adequate environmental oversight can have devastating effects. Hopefully litigation will resolve favorably and the courts will do what the Obama administration has not. However, litigation can take years. In the meantime, the public must not be fooled again. It must demand that the Obama administration immediately and permanently abandon this irresponsible policy.

46. *See id.*

47. *See* Notice of Intent to Conduct a Review of Categorical Exclusions for Outer Continental Shelf Decisions, 75 Fed. Reg. 62418 (Oct. 8, 2010).

48. Several lawsuits have been filed challenging the use of categorical exclusions. *Center for Biological Diversity v. Salazar*, No. 10-60417 (5th Cir. filed June 18, 2010), challenges drilling plans that were approved pursuant to the categorical exclusion policy after the BP oil spill. *Center for Biological Diversity v. Salazar*, No. 10-CV-00816-HHK (D.D.C. filed May 18, 2010), challenges the categorical exclusion policy itself.