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VIA ELECTRONIC MAIL

Department of the Interior
Minerals Management Service
Attention: Rules Processing Team
318 Elden Street, MS-4024
Herndon, VA 20170-4817
Email: rules.comments@mms.gov

Re: Proposed Information Requirements for Outer Continental Shelf Oil, Gas and Sulphur Operations; Regulation Identification No. 1010-AD10

To Whom It May Concern:

ConocoPhillips Alaska, Inc. ("CPAI") respectfully submits herein comments concerning the Minerals Management Service's ("MMS") proposed rulemaking regarding information requirements for Outer Continental Shelf ("OCS") operations. See 70 Fed. Reg. 52953 (September 6, 2005).

CPAI is the #1 oil and gas producer in Alaska and is also a leader in exploration for oil and gas in this state and adjacent state and federal waters of the Outer Continental Shelf (OCS). CPAI and its predecessor companies have operated in Alaska since the 1950s and expect to continue oil and gas operations well into the future.

The proposed rule would establish information collection requirements for lessees and operators undertaking OCS operations that effect species listed under the Endangered Species Act ("ESA") or Marine Mammal Protection Act ("MMPA"). Specifically, MMS proposes to require lessees and operators to describe how they will (1) identify potential "take" of listed species resulting from their actions; (2) mitigate such potential "take;" (3) monitor for potential take; and (4) report any take, should it occur.

For the reasons outlined below, CPAI recommends that MMS withdraw the proposed rule as unnecessary, or in the alternative, revise and reissue the proposed rule in accordance with the comments outlined below, and after passage of ESA reauthorization legislation.

The ESA Does Not Expand Agency Authority

The proposed rule would require lessees and operators to develop monitoring, mitigation, and reporting programs for listed species prior to completion of ESA section 7 consultation. However, the proposed rule does not explain how lessees should arrive at such monitoring plans or mitigation, nor does the rule explain the manner in which lessees should determine if take under the ESA or MMPA is reasonably certain to occur in the first instance. See Babbitt v.

Sweet Home Chap. of Comm. for Greater Oregon, 515 U.S. 687 (1995) (explaining causation requirements for a determination of “take” under the definition of “harm”); see also Arizona Cattlegrowers Assoc. v. FWS, 1999 WL 33722331 (D. Ariz. 1998)(explaining the Services must show a reasonable likelihood of take prior to imposing requirements through issuance of an Incidental Take Statement in an ESA Section 7 biological opinion). In essence, the proposed rule would shift the burden from the U.S. Fish and Wildlife Service (“FWS”), the National Marine Fisheries Service (“NMFS”) (FWS and NMFS collectively, “the Services”) and MMS to lessees and operators to determine whether specific projects have the potential to result in take – a threshold finding the Services may ultimately disagree with after completion of consultation or permitting processes. The proposed rule is premised upon a belief that the ESA requires such programs for all agency and applicant activities, regardless whether such activities are deemed necessary by the Services. See 70 Fed. Reg. 52953, 52954. In effect, the proposed rule implies that the ESA has broadened MMS’ legal authority and discretion to require incidental take monitoring, mitigation, and reporting programs beyond MMS’ enabling legislation.

CPAI disagrees with the position reflected in the proposed rule that the ESA or the MMPA expand MMS’ existing statutory authority.¹ As numerous courts have found, the ESA does not expand an agency’s existing authority or discretion. See American Forest and Paper Assoc. v. U.S. EPA, 137 F.3d 291 (5th Cir. 1998)(stating that ESA confers no substantive powers); Rio Grande Silvery Minnow v. Keyes, 333 F.3d 1109 (10th Cir. 2003)(stating that no court has held that the ESA expands an agency’s existing authority or discretion). Simply stated, MMS may not impose ESA- or MMPA-related requirements upon lessees or operators unless such requirements are necessary, and authorized under MMS’ enabling legislation.

The proposed rule states that ESA section 7(a)(1) requires MMS to (1) develop programs in furtherance of the purposes of the ESA, and (2) mandate that lessees and operators conduct their activities consistent with the ESA and MMPA. See 70 Fed. Reg. 52953. First, this statement is incorrect in that ESA Section 7(a)(1) has no bearing on MMPA requirements, and does not provide authority to require lessees to undertake programs in furtherance of MMPA objectives. Second, the requirements of ESA Section 7(a)(1) do not mandate that MMS take specific actions; rather, ESA Section 7(a)(1) simply requires federal agencies to use their existing statutory authorities to carry out programs for the “conservation” of endangered species. See Pyramid Lake Paiute Tribe of Indians v. U.S. Navy, 898 F.2d 1410 (9th Cir. 1990); Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27 (D.C. Ct. App 1992).

As described below, the proposed rule likely oversteps MMS’ legal authority and discretion by attempting to require development and adoption of ESA requirements that may in fact prove unnecessary after consultation with the Services.

The Proposed Regulations are Unnecessary in View of Existing Regulatory Requirements

An important issue raised by the proposed rule is the apparent misconception that MMS, and by extension, lessees or operators, are somehow obligated to monitor and report take under the

¹ Although our comments focus specifically on the ESA, and the relevant substantive and procedural requirements relating to this law, CPAI believes that most, if not all, of the legal defects identified in this letter apply equally to both the ESA and the MMPA.

ESA in the absence of an affirmative finding that a proposed action is either likely to adversely affect a listed species, or adversely modify designated critical habitat. Such is not the case.

The Services' ESA section 7 implementing regulations located at 50 C.F.R. Part 402 outline a process by which federal action agencies and applicants engage in consultation with the Services upon a threshold finding by an action agency that a proposed action "may affect" a listed species or designated critical habitat. See 50 C.F.R. § 402.13. Barring a finding that a proposed action is likely to "adversely affect" a listed species or critical habitat, the Services need not issue an Incidental Take Statement, and they need not impose requirements for monitoring or minimization of take. See 50 C.F.R. § 402.14.

Simply stated, the proposed rule would circumvent the Services' ESA Section 7 consultation process by requiring lessees, in advance of a consultation with the Services, to determine whether monitoring or mitigation programs are required or appropriate. Furthermore, the proposed regulation could result in lessees making determinations regarding the potential for take under the ESA that conflict with MMS conclusions regarding the proposed action, and whether informal or formal consultation is required. Both of these outcomes are highly undesirable and unnecessary.

The Services' ESA implementing regulations provide a detailed process by which MMS and applicants comply with the ESA. By following this process, the parties will determine necessary and appropriate mitigation and monitoring programs after consultation with the expert resource agencies. Given the existence of these well-defined consultation procedures, the proposed regulations are unnecessary, and may result in monitoring or mitigation plans that are unneeded or in conflict with conclusions contained in biological opinions issued by the Services.

Implications of ESA Reauthorization on Proposed Rule

An important issue not addressed in the proposed rule is the potential impact of proposed ESA reauthorization legislation on MMS or applicant proposals. On September 29, 2005, the U.S. House of Representatives passed the Threatened and Endangered Species Recovery Act, H.R. 3824, known as the "Pombo bill," to amend and reauthorize the Endangered Species Act ("ESA"). Among other things, the Pombo bill would repeal all critical habitat requirements, including the requirement that the Services designate critical habitat, and all subsequent ESA Section 7 consultation obligations associated with the designation. The bill would also clarify that, for purposes of consultation, the "baseline" to which a proposed action is compared includes all effects that have occurred or are occurring; provide that terms and conditions in a biological opinion's Incidental Take Statement be "roughly proportional" to the impact of the incidental take; and further limit terms and conditions to those that are capable of successful implementation and are, to the greatest extent possible, consistent with the action agency or applicant's objectives.

Proposed ESA legislation could have sweeping impacts on ESA Section 7 requirements and procedures. Such changes would fundamentally change how action agencies and applicants assess and determine appropriate mitigation and monitoring requirements in advance of consultations with the Services. At a minimum, it is appropriate for MMS to delay action on the proposed rule until Congress takes action on H.R. 3824 to avoid potential conflicts with new reauthorization legislation.

The Proposed Rule Fails to Differentiate the Term “Take” under the ESA and MMPA

The proposed rule uses the term “take” interchangeably under both the ESA and MMPA without specifically defining the term, or explaining the importance of statutory differences. Review of the statutes and regulations demonstrates that the term “take” has a different meaning under the ESA² than under the MMPA.³ These differences create significant questions regarding lessee and operator obligations under the proposed regulations.

Potential Impacts under the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

MMS states in its findings pertaining to Executive Order (“E.O.”) 12866, the Regulatory Flexibility Act (“RFA”), and the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) that the proposed rule will result in “no additional costs” because it merely clarifies requirements that already exist.⁴ It is unclear how MMS reached this conclusion. Development of monitoring plans and mitigation programs for ESA- and MMPA-listed species will most certainly have economic impacts on lessees and operators. From experience, we know that the costs to develop such programs, which may include monitoring and mitigation programs that are ultimately deemed to be unnecessary after ESA Section 7 consultation with the Services, is not insubstantial. Thus, requirements contained in the proposed rule will have some economic impact on lessees and operators, and MMS is required under a variety of laws and Executive Orders to assess in detail such impacts before taking final action.

² The term “take” is defined in the ESA to mean to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. See 16 U.S.C. §1532(19). The Services have further defined the term “harm” in the definition of “take” to mean an act which actually kills or injures fish or wildlife, including significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns. See 50 C.F.R. §222.102 (NMFS definition); see also 50 C.F.R. § 17.3 (FWS definition).

³ The term “take” is defined in the MMPA to mean to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” See 16 U.S.C. § 1362(13). FWS’ implementing regulations further define “take” in this context to mean to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal, including, without limitation, any of the following: collection of dead animals or parts thereof; restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in the disturbing or molesting of a marine mammal. See 50 C.F.R. § 18.3.

⁴ MMS’ conclusion that the rule will result in “no additional cost” are premised on the faulty belief that the ESA requires action agencies and applicants to monitor and mitigate for take in the absence of findings under ESA section 7 that such take is reasonably certain to occur, and not discountable or insignificant. As stated above, we disagree with this assumption, and believe it inappropriate for MMS to assume such requirements have no cost simply because the Services may find at some point in the future they may be necessary in some form as part of an Incidental Take Statement.

Summary and Recommendations

As outlined above, CPAI concludes that the proposed rule contains significant substantive and procedural defects warranting its withdrawal. The proposed rule would result in requiring lessees and operators to speculate on potential monitoring and mitigation programs that may prove unnecessary, and in conflict with agency analyses. Existing ESA section 7 regulations contain a process whereby MMS and applicants may assess the effects of proposed actions, and through consultation with the Services, identify appropriate monitoring and mitigation programs. Requiring lessees and operators to determine potential take in advance of such consultation is inefficient, ineffective, and inconsistent with the MMS' obligations under the ESA.

In the event that MMS chooses to disregard CPAI's recommendations to withdraw the proposed rule, CPAI recommends that MMS revise and reissue the proposed rule to (1) take into account ESA reauthorization legislation and amendments resulting from such legislation; (2) clarify how lessee and operator development of monitoring and mitigation requirements will be coordinated with ESA consultation and MMPA permitting; (3) identify the incremental costs associated with lessee or operator development of programs pursuant to this rule, and analyze such costs consistent with the requirements of the E.O. 12866, the RFA, the SBREFA. In doing so, CPAI recommends that MMS conduct public hearings on any revised proposed rule to ensure the public is provided an adequate opportunity to comment upon MMS proposals.

Again, thank you for the opportunity to provide comments on this MMS proposal. If you have any questions concerning these comments, please contact Ms. Caryn Rea of my staff at (907) 265-6515 or by e-mail at your convenience.

Sincerely,



Ken L. Donajkowski

cc: Small Business Administration
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