

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



November 19, 1999

Walt Rosenbusch
Director
Minerals Management Service
1849 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Rosenbusch:

This letter is in response to Secretary Bruce Babbitt's letter to Sara Wan, Chair of the California Coastal Commission (Commission), dated November 12, 1999. That letter states that the Minerals Management Service (MMS) has granted 36 lease suspensions requested by Outer Continental Shelf (OCS) lessees. These lease suspensions function to extend or renew the primary (5 year) terms of the respective OCS leases and, therefore, are subject to the consistency review requirements of Section 307(c)(3)(A) of the federal Coastal Zone Management Act (CZMA) (16 USC § 1456(c)(3)(A)).

Section 307(c)(3)(A) of the CZMA requires that an applicant for any federal license or permit for any activity in or outside of the coastal zone that affects any coastal zone resource prepare and submit a consistency certification to the Commission. The regulations implementing the CZMA define a federal license and permit as follows:

"(a) The term "Federal license or permit" means any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant." [15 CFR § 930.51(a)]

A lease of federal lands, including the OCS, is a form of permission that the MMS, a federal agency, is empowered to issue to an applicant. The lease suspensions function to extend or renew the primary (5 year) term of the leases

to which they pertain.¹ Section 930.51(b) of the CZMA regulations includes within the definition of “federal license or permit” several types of license and permit renewals. This list of renewals includes “*Renewals ... of Federal license and permit activities not previously reviewed by the State agency*” (15 CFR 930.51(b)(1)). The decision of the U.S. Supreme Court in the case of *Secretary of the Interior v. California*, 464 U.S. 312 (1984), prohibited the Commission from reviewing these leases. Therefore, the subject lease suspensions are subject to federal consistency review as “renewals...of Federal license and permit activities not previously reviewed by the [Commission].”

Activities authorized by OCS leases affect the natural resources of California’s coastal zone. This determination was made in 1977 when the Commission developed and the federal government approved the Coastal Management Program for the state of California (CCMP). The CCMP includes a list of federal licenses and permits for activities that both the Commission and the federal government determined to be likely to affect coastal resources. This list includes “*licenses and permits required for drilling and mining on public lands (BLM)*” (CCMP, p. 92). Therefore, an OCS lease is a federal license or permit that is listed in the CCMP.

Although the CCMP designates the Bureau of Land Management (BLM) as the federal agency responsible for permitting oil and gas drilling activities on federal land, the Commission believes that this permit and license listing also includes OCS leases awarded by the MMS. The federal government approved the CCMP in 1977. At that time, BLM was the agency responsible for leasing OCS areas for

¹ Further support for the fact that these suspensions function to extend or renew the terms of the leases can be found in section 5(a)(1) of the Outer Continental Shelf Lands Act (OCSLA; 43 USC § 1334 (a)(1)), which provides for “the extension of any permit or lease affected by suspension...by a period equivalent to the period of such suspension...” and in section 250.113(b) of the MMS’s regulations (Title 30, CFR), which provides that:

“If [an OCS lessee] stop[s] conducting operations during...the primary lease term, [a] lease will remain in effect only if [the lessee]:

....

(2) Ask[s] MMS for a suspension of operations or production under 30 CFR 250.110...and thereafter receive[s] the [MMS’s] approval.”

Other than the above-cited authorities, neither the OCSLA nor the regulations promulgated by the MMS to implement the OCSLA contain any authority pursuant to which the term of an unexercised or undeveloped OCS lease can be extended or renewed. Cf. 30 CFR § 256.73 (primary or extended term of OCS lease extended by period equivalent to that of lease suspension granted pursuant to 30 CFR § 250.110).

drilling purposes. In 1982, by Secretarial Order, the Secretary of the Interior created the MMS and delegated to it responsibility for leasing OCS submerged lands (see Secretarial Order 3071 as amended). Therefore, the authority for OCS submerged lands for oil and gas exploration and development was transferred from BLM to MMS after the federal government certified the CCMP. Thus, pursuant to 15 CFR § 930.51(b)(1), the status as a listed federal permit extends to the approval by MMS of any request by an OCS lessee for suspension of a lease that has not previously been the subject of a consistency review by the Commission. Accordingly, section 307(c)(3)(A) of the CZMA prohibits the MMS from granting the suspensions until the Coastal Commission concurs with a consistency certification. Specifically, the CZMA regulations provide that:

“No Federal license or permit described on an approved list shall be issued by a Federal agency until the requirements of this subpart have been satisfied. Federal agencies shall inform applicants for listed licenses and permits of the requirements of this subpart.” (15 CFR § 930.53(e).)

Therefore, the determination that the activities authorized by any federal approval of drilling and mining on federal land affects coastal resources was made at the time the federal government approved the CCMP. Further, the regulations implementing the CZMA make this determination applicable to any extension or renewal of any listed federal approval. The Department of the Interior does not have the discretion to determine that the activities authorized by an approval listed in the CCMP, or by an extension or renewal of any such approval, do not affect the coastal zone and thus are not subject to the consistency review requirements of the CZMA.

In the alternative, should it be established that OCS leases are not a federal approval listed in the CCMP, the Commission notes that it has also met the requirements for reviewing renewals of OCS leases as an unlisted federal approval. Section 930.54(a) of the CZMA regulations authorizes the Commission to review activities authorized by federal approvals that are not listed in its management program provided, in part, that the Commission notify the federal permit applicants and federal permitting agency of its intent to review the activity within 30 days of receiving notice (15 CFR § 930.54(a)). The Commission received notice of the lessees' applications as early as May 13, 1999. On May 25, 1999, the Commission published a status report on California Offshore Oil and Gas Leasing and Development, including the then pending OCS lease suspension requests. In that report, the Commission identifies lease suspensions as federal approvals that could be subject to the consistency review

requirements of section 307(c)(3)(A) of the CZMA. The Commission distributed copies of that report to the MMS accompanied by public notice of a hearing to discuss the report. The report and hearing notice were also made available to the OCS lessees who had submitted the suspension requests. The Commission held the public hearing on June 8, 1999. At that hearing, the Commission identified potential effects from the activities authorized by the OCS leases for which various lessees had submitted suspension requests. After considering these effects, the Commission directed staff to pursue consistency review of the subject suspension requests. Therefore, within 30 days of receiving notice of the application, the Commission informed the affected parties of its intent to pursue consistency review of the lease suspensions.

If the federal approvals at issue here (i.e., suspensions of OCS leases) are determined to be unlisted, the Commission must also request from the federal Office of Ocean and Coastal Resource Management (OCRM) permission to review the approvals and the activities they authorize. The Commission did not initially make such a request because, as discussed above, it considers OCS leases and their extensions or renewals to be listed federal approvals. In addition, it appeared at that time that the Department of the Interior and MMS were working cooperatively with the Commission on this issue and that it might not be necessary to make such a request. However, Secretary Babbitt's November 12, 1999, letter now makes clear that the Department of the Interior is not willing to direct the OCS lessees to submit consistency certifications to the Commission. Therefore, in the event that OCS leases and their extensions and renewals are determined to be federal approvals that are not listed in the CCMP, the Commission, by copy of this letter and pursuant to 15 CFR § 930.54(b), hereby requests that OCRM authorize the Commission to conduct a consistency review of the subject lease suspensions.

In his letter dated August 13, 1999, Secretary Babbitt concludes that the granting of a suspension does not affect coastal zone resources. The Commission, however, believes that activities authorized by OCS leases clearly do affect coastal zone resources. Specifically, the development of these leases would result in impacts to air quality from drilling and tankering activities. Additionally, exploration and production of these leases will have water quality impacts from discharge of drilling muds and increasing the risk of oil spills. The leases will set into motion activities that would affect biological resources, including fish and marine mammals, and the commercial fishing industry. These effects result from seismic testing activities, pollutant discharges, placement of platforms in areas currently used for fishing, and debris releases into the marine environment. Through the leases, the MMS makes critical decisions as to the size and location

of the tracts and the stipulations to which the leases would be subject. These discretionary actions determine whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to risk of accident, the flow of vessel traffic, and the siting of on-shore support facilities. It is at the leasing stage that all of these tracts can be considered together, taking into account the cumulative effects of all of the leases. If the Commission waits until the exploration and development phases to review activities on these tracts, that review would be made on a tract-by-tract basis, thus reducing its ability to evaluate and address cumulative impacts. Therefore, the Commission concludes that the activities authorized by the OCS leases for which the MMS has recently granted suspension requests affect coastal zone resources and thus are subject to the consistency review requirements of section 307(c)(3)(A) of the CZMA.²

We note that no judgment is being rendered at this time as to whether such effects rise to a level of concern that would warrant an objection to the consistency certifications. That is a decision that must be based on a review of the evidence that would be brought to the Commission through the consistency review proceedings.

It is clear that the subject lease suspensions function to extend or renew a license or permit required for drilling or mining on public lands that is listed in the CCMP as an activity likely to affect the coastal zone. Therefore, the CZMA requires the concurrence by the Commission in a consistency certification for these lease suspensions before they can be issued. In the alternative, should it be determined that the subject suspensions extend or renew a federal approval that is not listed in the CCMP, the applications for the suspensions constitute requests for the extension or renewal of federal approvals for activities that will unequivocally affect the resources of California's coastal zone. By copy of this letter the Commission is, if necessary, requesting OCRM's approval to review these activities pursuant to the federal consistency provisions of applicable law.

In closing, we disagree with the statement in Secretary Babbitt's November 12 letter, wherein he states that the "actions ... [he is] announcing today have been

² This position finds strong support in the enactment by Congress of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). In taking that action Congress determined that activities authorized by OCS leases affect the coastal zones of affected states to an extent sufficient to justify treating the activities of the MMS in preparing OCS lease sales as subject to the consistency review requirement of section 307(c)(1) of the CZMA. If the activities authorized by OCS leases justify such a finding in the context of prelease activities by the MMS, the case for a similar finding in the context of requests by OCS lessees for lease suspensions is equally compelling.

requested at various points by the California Coastal Commission....” That is simply not true. The Commission has specifically requested that the Department of the Interior require federal consistency reviews by the Coastal Commission before granting requests for OCS lease suspensions. The essence of the dispute that has necessitated the filing of litigation is the question of the MMS’s responsibilities under the federal CZMA and NEPA with respect to its decision to suspend these leases.

The Commission remains open to discussing the issues with MMS.

Please contact me if you have any additional questions or comments. The Commission looks forward to continuing to work with you on these issues and respectfully requests a response by November 29, 1999 that satisfies the Commission’s concerns. Failing that, the Commission will have no choice but to vigorously pursue the litigation that has now been filed.

Sincerely,

PETER M. DOUGLAS
Executive Director

cc: Secretary Bruce Babbitt
Governor Gray Davis
Attorney General William Lockyer
Jeff Benoit, Director, OCRM
Coastal Commissioners
Secretary Mary Nichols
Affected OCS lessees