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July 1, 1997

Ms. Kumkum Ray
Engineering and Standards Branch Geologist
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, VA 22070

Re: Proposed Amendments to 30 C.F.R. Part 251

Dear Kumkum:

As we agreed at our May 15, 1997 meeting, a number of involved companies and organizations have prepared a document discussing the issues of greatest concern in the referenced rulemaking. As stated, this document is not intended to encompass each and every argument that could be raised in regard to the proposal, but rather highlights those issues of most concern to us.

Please feel free to distribute the Discussion Document as necessary within MMS in order to facilitate the communication at our upcoming meeting on July 10, in New Orleans. We look forward to a full exploration of these issues which, as you know, are absolutely critical to the survival of the geophysical exploration industry and the explorers and producers that depend upon it.

Of course, if you have any questions or wish to discuss any aspect of the meeting or the paper prior to July 10, please do not hesitate to contact me.

Sincerely,



Mark N. Savit
Counsel for the
International Association of Geophysical
Contractors

MNS:df1

DISCUSSION PAPER PROPOSED CHANGES TO 30 C.F.R. PART 251

Since the amendment of the OCS Lands Act Amendments in 1978, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), government and industry have cooperated in perhaps the most successful offshore mineral development program in the world. During that time period, approximately six billion barrels of oil and 84.6 trillion cubic feet of natural gas have been produced, yielding over \$82.7 billion in bonus and royalty revenues to the treasuries of the United States and a number of coastal states. Indeed, the OCS leasing program stands out as a fine example of government and industry cooperation in achieving a mutually beneficial result.

Recently, however, a regulatory proposal has been made that threatens to disrupt the balance between public resources and private industry which has worked so well over the last 19 years. In order to understand the centrality of the issues raised by this proposed change, some background is necessary.

The decision to lease a given tract of land is made, at least in part, on the basis of geophysical data collected prior to that decision. Those data are generally collected by specialized geophysical exploration contractors, at their own expense, under permits issued on behalf of the United States by the Minerals Management Service ("MMS"). In exchange for permission to conduct exploratory activities, the permittees must, among other things, agree to abide by various conditions intended to protect the environment and, most importantly, to make the data that is collected available to MMS under a variety of circumstances, subject to stringent confidentiality protections. With some exceptions, the data are required to be made available from the permittee to MMS without reimbursement (other than the cost of reproduction). The permits issued by MMS have also traditionally reflected regulatory requirements that the permittee report to MMS any "processing, reprocessing and interpretation" of the data and also, any "transfer" of the data to a "third party." In the case of any "transfer", the "third party" has historically been required to agree to all of the permit conditions imposed upon the permittee.

While much of this seems relatively straightforward, problems arise in the application of permit conditions to parties other than the permittee. Geophysical contractor permittees ordinarily do not sell the data they collect, but rather, issue non-exclusive licenses granting limited use rights in the data to the licensee. Typically, these non-exclusive licenses allow the licensees to process and otherwise utilize the data, but they generally also contain stringent limits on the transfer, sale or disclosure of the data, in any format, to any other party.

The use of non-exclusive licensing has been a major impetus in the exponential growth of pre-lease data collection. Using such arrangements, several competing geophysical contractors may conduct surveys of overlapping areas using a variety of techniques. Through the non-exclusive licensing system, multiple competing oil and gas exploration companies can access the data collected in each survey, thereby increasing geometrically both the quantity and variety of data that can be analyzed prior to making a leasing determination. It is this system that has created the revenue engine that the OCS leasing program has become.

During a May 15 meeting, representatives of the MMS, the geophysical contractors, and major and independent oil and gas companies engaged in a wide ranging discussion regarding MMS' proposed changes to Part 251. We learned that, aside from an effort to update and modernize the regulations, and a general desire to write regulations in "plain English," the proposed changes were motivated by a desire to address perceived difficulties arising from the operation of the "trial procedures" adopted with respect to Gulf of Mexico operations a little over two years ago.¹

The proposed changes to Part 251 go well beyond what is needed to address possible problems with the "trial procedures." In fact, the proposed changes threaten to disrupt the OCS leasing program in a number of important ways. First, through the imposition of consultation, coordination and written advance notice requirements, they threaten to make geophysical survey industry the *de jure* "junior user" of the OCS. Second, through a myriad of required notices as well as changes to the definition of "third party" and "transfer," they threaten the confidentiality of the data collected by the contractor, as well as the proprietary technologies used to process it. Finally, they threaten to subject non-exclusive licensees to the conditions identical to those imposed on the contractor. This not only jeopardizes the competitive position of the licensees in the leasing process, it exposes proprietary technology -- technology that forms the key to multi-million dollar leasing decisions -- to the public at large. If adopted, the proposed changes would alter the balance between industry and government in the OCS leasing process and ultimately threaten its viability.

THE PROPOSED CHANGES

The comments below are not intended as an exhaustive discussion of each point on which there are disagreements with the proposed regulations. Rather, they are intended to facilitate discussions aimed at resolving issues inherent in the proposed regulations that potentially disrupt the balance of the OCS leasing program or impose unnecessary, unwarranted or unauthorized regulatory changes.

¹ In the absence of further discussions, it is impossible for industry to discern the full scope of what is intended to be addressed by the proposed changes. However, it appears that the vast majority of the issues raised by MMS are limited to conditions unique to current exploration trends in the Gulf of Mexico Region. Because of the unique nature of those trends, it may not be necessary to change regulations of universal application, but rather, as was done with the "trial procedures," only to adopt a set of voluntary measures intended to address MMS' data needs, if possible, without upsetting the balance of the program or imposing unnecessary regulatory burdens.

1. Section 251.1 (Purpose)

The OCSLA was intended to authorize, rather than to prohibit, responsible exploration for, and development of oil, gas and sulfur resources from the OCS. Yet the proposed rule appears to reverse the clear direction of the statute and to prohibit exploration where there is any "harm" to both living or economic resources and the undefined, and entirely subjective "quality of life" of those "indirectly affected" by exploration activity. MMS is well aware of the myriad challenges both to leases and pre-lease activities, that have taken place in the past. The proposed language would seemingly create a much expanded grounds to challenge OCS exploration from a group of people affected only in the most tangential way. For instance, under the proposed language, a challenge might be brought by someone who was unaffected by geophysical surveys themselves, but could contend that increased production and use of fossil fuels would affect his "quality of life." Clearly such a result could not have been intended. Staying closer to the statutory language, with a more specific iteration of the varieties of interests sought to be protected would appear to be more consonant with both the mandates and strictures of the OCSLA.

2. Section 251.2 (Definitions)

"Notice"

The definition of the term "notice" has been changed in such a way that it appears that no oral notice will be permitted. However, it appears not to be applicable to operations conducted under permit. Unfortunately, the use of the word "notice" to denote the sort of communication that must be made to MMS before research is commenced and also to denote the communications to be made to MMS regarding the modification of operations conducted under a permit is extremely confusing. If MMS did not mean that all communications regarding changes in operations conducted under a permit are required to be in writing, it must say so clearly.

"Third Party"

The new definition of "third party" expands it to, among other things, specifically include holders of non-exclusive license rights in data collected by a permittee. In conjunction with Sections 251.11 and 251.12, it will subject those licensees to myriad regulatory requirements to which they have not previously been subject.² An expansion of this magnitude does not appear to be warranted in order to address MMS' difficulties with the operation of the "trial procedures." What is more, it does not appear to be justified in light of the limited geographic and circumstantial scope of the data to which MMS indicated that it would like to have access.

² The particular issues arising as a result of the imposition of those additional requirements is discussed separately in conjunction with Section 251.11 and 251.12.

3. Section 251.6(a)(2)

The reference, once again, to the human environment appears to grant to MMS the power to deny permits based on subjective judgments regarding the "quality of life" of people who are otherwise unaffected by the activity itself.

4. Section 251.6(a)(7)

The elimination of the term "unreasonably" appears to prohibit seismic exploration activity based on an assertion by any other ocean user that geophysical survey activity would "interfere" with its activities. It will make the geophysical exploration industry the junior user of the OCS. Under the proposed rule, a fisherman could decide to fish in an area of seismic acquisition, giving the seismic contractor the alternative of shutting down operations so as not to interfere with another use of the area, or pay the fisherman to depart from the area. Of course, payment to the fisherman would virtually guarantee that the fisherman would continue to come back to the same area during the duration of the survey, presumably preferring the certainty of payment by the contractor over the uncertainty of fishing. When read in the context of Section 251.6(c), the enormity of such a restriction, making a permittee dependent on the whim of every other (unregulated) ocean user, becomes graphically apparent.

5. Section 251.6(c)

This new language requires those conducting activities under permit to "consult" with all other ocean users and "coordinate" survey activities with them. Unfortunately, none of the parties with whom such consultation and coordination is required is subject to a similar regulatory requirement. Thus, in most cases (i.e. fishing and marine transportation) there is no entity or contact with which to coordinate. Even if such consultation and coordination could be carried out, this new language could be read to require geophysical exploration to cease unless all other ocean users allow it to go forward. That is clearly not the mandate of the OCSLA. If, as MMS appeared to state at the May 15 meeting, this language was intended to make sure that contemporaneous geophysical surveys did not interfere with each other, then it should be narrowed to reflect that intent. MMS must be careful to avoid putting competing contractors or oil companies into a position where they are required to reveal proprietary information regarding the timing and location of planned surveys. Such a requirement could place companies in violation of anti-trust laws and, even if it did not, would create a significant disincentive to anyone seeking to start a new program in or near an area where activity is already ongoing.

6. Section 251.6(d)

This provision is proposed to be expanded to require the use of "best available and safest technology" to seismic exploration activities. While apparently intended to apply only to stratigraphic test wells, the amendment would allow MMS to dictate to permittees the type of data acquisition and processing technology that they would be allowed to use. Obviously, if the MMS technologies differed from the technologies chosen by the contractor or the oil industry, no commercial exploration would go forward. MMS has indicated that it did not intend such a

result and that the requirement was intended to be applicable only to the drilling of test wells. If that correction is made, the problem will be cured.

7. Section 251.4(b)(2)

The new regulations regarding scientific research are well intentioned but overbroad. Read literally, they empower MMS to regulate research on acquisition technology even where no data are collected. Thus, a test of new airguns or streamer cables would be subject to advance, written notice. Such notices are not protected under the OCSLA and thus, would enable anyone to observe and, if desired, to record the tests as they are being conducted. In a technology-based business, disclosure of that information could be devastating. Further, since no exploration of the OCS would have been undertaken, the activity is arguably beyond the authority of MMS to regulate. We suggest replacing the language "related to oil, gas and sulfur" with "during which data regarding the presence or absence of oil, gas and sulfur are collected." This change should also address a number of issues arising from Section 251.5.

8. Section 251.5

Were Section 251.4 to remain unchanged, it would clearly apply to situations in which proprietary research on commercial acquisition or processing technology or techniques were being conducted. In short, this section would require that all of the results of that proprietary research be released to the public. Even if such a requirement were within the authority granted by OCSLA, it would deprive the permittee of the results of its private research without compensation, and is therefore, unconstitutional. As stated above, were Section 251.4 reworded to account for such situations, the very real problems created by the proposed changes to Section 251.5 could be avoided.

9. Section 251.8

The changes to the reimbursement language of this section appear to empower MMS to disallow actual costs incurred in feeding, housing and transporting its inspectors. If that was MMS' intent, on what basis does MMS propose to offer reimbursement? Additionally, the new language to Section 251.8(b) appears to eliminate the ability of a permittee to make modifications of its program orally, regardless of how minor the modification might be. Such a restriction will make it harder to accommodate seismic activities to the activities of other ocean users. This appears to be inconsistent with the intent of the amendment to Section 251.6(c). Greater flexibility in the ability to modify programs based on other activities in the area could, in fact, eliminate the need for pre-survey consultation and coordination.

10. Section 251.11(b)(1)

Although the amended standard is facially applicable only to geological data and information, it is, nevertheless a cause of great concern. Increasingly, the distinction between geological and geophysical data is blurred. The products of modern exploration efforts are

blends of various types of data, integrated so as to best highlight the subsurface characteristics of greatest interest in a given play or prospect.

The amendments to this section shift its focus from geological "information," (a defined term meaning processed, analyzed and interpreted data) to descriptions of the technologies and techniques used to arrive at processed, analyzed or interpreted information. First, the use of the term "information" in a generic sense in the amended standard is misleading. It does not refer to "information" as that term is defined at Section 251.2, but really refers to descriptions of proprietary technology. OCSLA does not grant to MMS the authority to demand such descriptions, nor does it appear that the stringent statutory protections of Section 1350 of the OCSLA extend to them.

With the exception of a statement by MMS that it believed that it had statutory authority for the amendment, and a general statement that, as a matter of policy, such information would generally not be requested, no rationale for the changes wrought by the proposed amendment was offered by MMS at the May 15 meeting. Further, the requested descriptions apparently do not address any of the data needs identified by MMS at that meeting. Thus, because of the devastating effects this language could have on competition for leases, as well as on technology-based competition among contractors, we request that it be withdrawn.

11. Section 251.12(a)

The proposed elimination of the 30-day period in which to file notices under this section is simply unrealistic. It is complicated by the fact that no definition of "immediately" is offered. We are at a loss to understand the need for such urgency. Unless MMS can demonstrate cause for earlier notification, we see no need to replace the existing standard.

12. Section 251.12 (d)

This section spells out for the first time, MMS' belief that the issuance of non-exclusive, limited use licenses in data held by a permittee constitutes a "transfer" of that data within the meaning of the OCSLA.³ MMS' belief is not new. Nor is industry's view that MMS' belief is not supported by the OCSLA, and that, even if it were, it would be contrary to constitutional protections of private property. In fact, during the May 15 meeting, the participants generally agreed that this dispute could probably not be resolved through negotiation. Nevertheless, MMS representatives appeared receptive to industry's suggestion that the matter be addressed without formal regulatory changes that would affect the definition of the term "transfer."

³ The comments offered here are, for the reasons outlined immediately above, equally applicable to the proposed changes to Section 251.11.

The additional reporting burdens that are imposed by the proposed regulations have been addressed in the comments already submitted. However, it bears repeating that a great deal of the additional information that is requested by the proposed regulations does not appear to be protected by the provisions of Section 1350 of the OCSLA. Information such as the identity of licensees, as well as a description of the data that has been licensed will clearly be put at risk of disclosure if it is required to be made available in the absence of statutory protection. Since release of this information would reduce the value of the data both to the permittee and the licensee, it is quite likely that the requirement to release it could violate the constitutional prohibition against the taking of private property without compensation.

The ability to issue non-exclusive licenses lies at the heart of current Gulf of Mexico exploration practices. A requirement that licensees be subject to data disclosure requirements will have significant consequence on the willingness of permittee contractors to collect data "on spec" and issue such licenses in the future. What is more, the requirement that a licensee assume all obligations of a permittee on each license it accepts will subject the licensee to significant additional expense in addition to reporting and making data available to the MMS.

In proposing this amendment, MMS appears to have lost track of the fact that the obligations placed on a permittee through the permit go far beyond those related to data sharing. Many of the conditions that are commonly placed on permittees have to do with environmental protection or other matters related solely to data collection operations. Some of those conditions require the permittee to engage in certain required activities that must be completed prior to engaging in data collection. Absent a thorough audit of the permittee's compliance, the licensee will have no way to determine whether the permittee, whose obligations he must accept, has complied with those conditions. What is more, many permit conditions subject the permittee to potential liability following completion of its collection activities. The assumption of these conditions will subject any licensee to potential liabilities which could exceed the value of the limited rights he has acquired⁴. It is quite likely that the requirement that these potential liabilities be assumed will simply raise the price of receiving a license beyond what is reasonably capable of smaller, independent operators.

Finally, it bears repeating that, despite MMS' assertion to the contrary, there has never been any understanding on the part of industry that holders of non-exclusive licenses are subject to all of the permit conditions imposed on a permittee. The new requirement that each license must contain such an explicit acknowledgment on the part of the licensee could require the renegotiation of hundreds of existing license agreements. It would also delay any new licensing transactions until the parties agreed upon the language. Each new license may take months to negotiate. And, MMS must bear in mind that it has proposed that no data be licensed

⁴ This situation is further complicated by the fact that there are generally multiple licensees to data acquired under a single permit. There is, however, no explanation of how such liability would be apportioned among multiple licensees. Any such discussion must take into account the fact that: 1) the nature of the data set licensed may differ among licensees, and 2) licensees are not generally issued simultaneously for data collected under a single permit.

until such negotiations are completed. The economic consequences of both the renegotiation effort and the delay that it would create would be devastating.

These added burdens will reduce the value of a license to a point where it may no longer be economic for the permittee contractor. The specter of compromised confidentiality, degraded economics, and increased regulatory burdens would be chilling to anyone interested in collecting or licensing data. The impact of such action on exploration in the Gulf of Mexico cannot accurately be predicted, but it would undoubtedly be significant.

The issues raised by this proposed amendment are the most significant issues facing the industry since the passage of the OCSLA amendments 19 years ago. The new regulatory regime would force restructuring the entire offshore exploration industry. Before it proceeds, MMS must consider whether its needs for additional data are worth the destruction of a system that, to date, has been an unqualified success in the exploration for and development of the petroleum resources of the outer continental shelf.

13. Section 251.12(c)(3)

The newly-added requirement that a permittee provide data in a "quality" format is not readily understandable. Taken as a whole, it appears to allow MMS to require that data of unacceptable "quality" be reprocessed to meet some undefined specification. Yet there appears to be no provision for reimbursement of the permittee for this effort. Absent compensation, MMS clearly cannot order the reprocessing of data to suit its particular needs or "quality" requirements and the language of this section should be modified to make that clear.

14. Section 251.14(c)

The change in the officer responsible for decisions to disclose or to protect data is apparently intended to put the decision maker closer to the circumstances surrounding the data sought to be disclosed. However, in many cases the permittee has no asset other than the data on which to base his business. Moreover, even if the data is not the central asset of the business itself, wrongful disclosure of the data could have disastrous consequences from a competitive standpoint. This fact is explicitly recognized in the Section 1350 of the OCSLA which prescribes unprecedented criminal penalties, applicable to government officials who wrongfully disclose protected data. Thus, it would be more logical to place the ultimate decision to disclose or withhold data in the hands of the top official of MMS and to ensure, through the language of the regulation, that that official is bound by all applicable laws and regulations regarding the dissemination of that data.

Read in conjunction with Sections 251.11 and 251.12, the use of the word "you" to denote the person to be notified in the event of disclosure is extremely unclear. It could mean the data owner, or it could mean any of the entities that licensed the data from the permittee. Such a system would result in massive confusion as to the entity to be notified and the obligations of the notified entity vis-a-vis all other entities who have assumed the obligations of the permittee.