

February 27, 2015

Mr. Mark Fesmire
Alaska Region Director
Bureau of Safety and Environmental Enforcement
3801 Centerpoint Drive, Suite 500
Anchorage, AK 99503

Dear Mr. Fesmire:

On June 10, 2014, Shell Offshore, Inc. and Shell Gulf of Mexico, Inc. (collectively, “Shell”) submitted to the Bureau of Safety and Environmental Enforcement (BSEE) a “request for an initial five-year Suspension of Operations for their Outer Continental Shelf oil and gas leases in the Beaufort Sea and Chukchi Sea.”¹ Shell’s request does not comport with the regulatory requirements for a Suspension of Operations (SOO), fails to recognize the company’s substantial role in its own failures, and should be denied in its entirety. When Shell—one of the most sophisticated companies in the world—invested billions of dollars to purchase leases in the Beaufort and Chukchi seas, it was aware, or certainly should have been, of the ten-year term of the leases, potential problems with government analyses and permitting, challenges inherent in operating in the Arctic Ocean, and substantial opposition to its proposed activities. BSEE owes the company no special treatment and should not bend the rules to grant the requested suspension.

Statoil and ConocoPhillips have submitted parallel requests—though premised in part on different arguments—for suspensions of their leases in the Chukchi Sea. Your agency already has correctly denied ConocoPhillips’ request, and proceedings related to that request currently are stayed before the Interior Bureau of Land Appeals.²

The Outer Continental Shelf Lands Act (OCSLA) directs the Secretary of the Interior to promulgate regulations “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 to allow for the construction or negotiation for use of

¹ Letter from Peter Slaiby, Shell to Mark Fesmire, BSEE re: Shell Offshore Inc. and Shell Gulf of Mexico Inc. request for an initial five-year Suspension of Operations (July 10, 2014) (SOO Request). Oceana obtained this document pursuant to a Freedom of Information Act (FOIA) request submitted to BSEE on July 7, 2014. As an initial matter, Oceana encourages BSEE to make documents like the SOO Request available to the public when submitted. Public participation in government processes depends on timely access to important information, and BSEE should not wait for FOIA requests that require disclosure to make correspondence like this available. Moreover, BSEE has redacted portions of the SOO Request pursuant to FOIA Exemption 4, which protects confidential business information. *See* 5 U.S.C. § 552(b)(4). On February 26, 2015, Oceana submitted an appeal to BSEE on the grounds that the agency has not justified withholding the portions of the letter that have been redacted.

² *See* Letter from Michael Faust, ConocoPhillips to Mark Fesmire, BSEE, re: Request for Suspension of Operations, ConocoPhillips Chukchi Sea Leases (November 11, 2013); Letter from Mark Fesmire, BSEE, to Michael Faust, ConocoPhillips, re: Request for Suspension of Operations, ConocoPhillips Chukchi Sea Leases (Sale 193) (March 24, 2014) (denying ConocoPhillips’ request for an SOO) (hereinafter, “ConocoPhillips SOO Denial”); Letter from Erik Andreas, BSEE, to Interior Board of Land Appeals, re: ConocoPhillips Company, Chukchi Sea Leases (Sale 193), Notice of Appeal; Letter from Bill Shoellhorn, Statoil, to Brian Salerno, BSEE (July 3, 2014).

transportation facilities”³ The regulations must allow for “the extension of any permit or lease affected by suspension . . . by a period equivalent to the period of such suspension or prohibition.”⁴

The regulations implementing that directive allow BSEE to grant an SOO in any of five circumstances:

- a) When necessary to comply with judicial decrees prohibiting any activities or the permitting of those activities. The effective date of the suspension will be the effective date required by the action of the court;
- 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. BSEE may require you to do a site-specific study (see § 250.177(a));
- c) When necessary for the installation of safety or environmental protection equipment;
- d) When necessary to carry out the requirements of NEPA or to conduct an environmental analysis; or
- e) When necessary to allow for inordinate delays encountered in obtaining required permits or consents, including administrative or judicial challenges or appeals.⁵

Though its letter is not clear, Shell only appears to premise its request on some combination of subsection e) and a subsequent regulation allowing for an SOO to be granted “when necessary to allow you time to begin drilling or other operations when you are prevented by reasons beyond your control, such as unexpected weather, unavoidable accidents, or drilling rig delays.”⁶ These provisions do not allow BSEE to grant an SOO for Shell’s Arctic Ocean leases.⁷

According to Shell, suspension is warranted based on:

- multiple time-consuming federal court and administrative challenges, appeals, and remands, based upon findings that the Government had failed adequately to carry out its legal obligations, resulting in repeated prohibitions against Shell’s engagement in exploratory operations, often on the eve of such operations, and often after Shell had expended hundreds of millions of dollars in preparatory work, most of which it has not been able to recoup or redeploy

³ 43 U.S.C. § 1334(a)(1)(A). The statute also requires regulations allowing for suspension “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 the marine, coastal, or human environment. . . .” *Id.* § 1334(a)(1)(B).

⁴ *Id.* § 1334(a)(1). The provision continues, “[N]o 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.” *Id.* To the extent, therefore, that Shell’s activities resulted in an SOO, it may be that the SOO should not extend the term of the company’s leases.

⁵ 30 C.F.R. § 250.172.

⁶ *Id.* § 250.172(a). Shell does not specify which subsections might give BSEE the authority to grant its SOO request, instead simply citing the entire regulatory section. *See e.g.*, SOO Request at 1 & 8 (citing 30 C.F.R. §§ 250.168-.177 and referring to § 250.172(e) as an “illustrative example”).

⁷ If, in fact, Shell relies on other regulatory authority, its arguments would be similarly unpersuasive. For example, in addition to rejecting the company’s other arguments, BSEE determined that neither section 30 C.F.R. § 250.172(b) nor § (c) justified ConocoPhillips’ request for an SOO. *See ConocoPhillips SOO Denial at 2.* The reasons provided in that denial are equally applicable here.

- BSEE's unexpected and unprecedented determination to introduce a fixed operational time constraint on drilling into a prospective reservoir zone, specifically the September 24 cut-off in the approved Chukchi Exploration Plan
- accommodation of Alaska Native whaling season in the Beaufort Sea
- limited Arctic-viable and regulatory-compliant drilling rigs
- BSEE's announced intention to develop new, comprehensive operating regulations specific to all future drilling operations on the Alaska OCS⁸

It describes these factors as creating “[c]ircumstances Shell could not have anticipated at the time it acquired its leases [that] significantly impede Shell's utilization of its lease rights to proceed with exploration and development of its Alaska leases before they are due to expire.”⁹

Primarily, Shell appears to argue that an SOO is warranted to account for delays in its exploration program that resulted from successful court challenges to government plans, lease sales, and approvals. Specifically, the company contends that it “lost” six exploration seasons due to successful litigation challenging: 1) approval of its 2007-09 Beaufort Sea Exploration Plan; 2) the 2007-2012 Five-Year Leasing Program; and 3) Chukchi Sea Lease Sale 193.¹⁰ It also points to the Secretary of the Interior’s decision not to grant approvals necessary for exploration in the wake of the *Deepwater Horizon* accident and to appeals to the Environmental Appeals Board of EPA’s grant of Clean Air Act permits as reasons that exploration was precluded.¹¹

These court cases, even if they could support an SOO, were not “circumstances Shell could not have anticipated at the time it acquired its leases.” Strong opposition among Alaska Native entities, local governments, and conservation organizations to leasing and exploration in the Chukchi and Beaufort seas has not been a secret. Shell certainly was aware, or should have been, of that opposition and the likelihood that litigation would result. Further, five-year leasing programs and Arctic Ocean lease sales have been challenged regularly in court.¹² More specifically, the lawsuit challenging Chukchi Sea Lease Sale 193 was filed before the sale was held, and shortly after filing the suit, the plaintiffs sent a letter to the Department of Justice identifying several of the deficiencies in the analysis and requesting that the sale be delayed.¹³

Moreover, Shell should have been aware of the deficiencies in the analyses that led courts and the Environmental Appeals Board to invalidate government decisions. The plaintiffs (or appellants) in each of those suits participated in the public process related to those decisions. That participation included submitting comments to the relevant agency in which the substantive deficiencies were identified. The arguments presented in the relevant court cases and appeals are based on the problems detailed in those letters. Shell is one of the most sophisticated companies in the world. If the deficiencies in the government’s analysis were apparent to Alaska Native entities and conservation organizations, they

⁸ Shell SOO at 2.

⁹ *Id.*

¹⁰ See Shell SOO Request at 3-4 (referencing *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), *Ctr. for Biol. Div. v. Dep’t of Interior*, 563 F.3d 466 (D.C. Cir. 2009); *Native Village of Pt. Hope v. Salazar*, 730 F. Supp. 2d 1009 (D. Alaska 2010); and *Native Village of Pt. Hope v. Jewell*, 740 F.3d 489 (9th Cir. Jan. 22, 2014).

¹¹ *Id.* at 4.

¹² See Michael LeVine et al., *Oil and Gas in America’s Arctic Ocean: Past Problems Counsel Precaution*, 37 Seattle L. Rev. 1271, 1313-21 (2014).

¹³ See Letter from to (2008).

certainly should have been apparent to Shell. Accordingly, the successful cases should not have been entirely “unanticipated.”

Further, Shell fails entirely to take responsibility for its own failures. Notably, the company simply does not mention 2012 or 2013 as “lost” years. It does not mention the myriad of problems it encountered in 2012, culminating in the grounding of the *Kulluk*. Shell also fails to acknowledge that the new prevention and response regulations applicable to all Arctic Ocean drilling operations are, in large part, the result of the company’s own mistakes in 2012 that demonstrated the need for those regulations.¹⁴

Nor does it accept responsibility for pushing forward based on insufficient preparation and deficient government analyses. Shell was not forced to purchase leases or push for approval of its exploration proposals. Another course—in which the company encouraged the government to fully and fairly evaluate all potential impacts and risks before selling leases or approving exploration—was available to Shell.

Further, Shell does not explain how these delays justify a five-year suspension in either the Beaufort or Chukchi seas. Suspensions were granted in the past to account for Shell’s inability to pursue exploration as a result of the court cases referenced above. In fact, leases in the Chukchi Sea are currently suspended. Rather than providing any specific justification for the length of the extension sought, Shell simply claims that “lost time has not been adequately compensated by the limited, short-term suspensions Shell has received to date” and that “[t]he short-term suspensions Shell has received to date for the Alaska OCS do not begin to reflect the extent of the actual delays Shell suffered resulting from court decisions and agency delays.”¹⁵ Even if those statements are true, they do not create new authority under which BSEE may grant an SOO or alleviate Shell of its obligation to justify the length of the suspension it seeks.

The other factors cited by Shell to justify a five-year suspension are no more persuasive. Neither the “operational time constraint” nor new safety and prevention regulations referenced by Shell contributed to the company’s inability to complete exploration since purchasing leases. In fact, BSEE rejected precisely this argument in denying ConocoPhillips’ SOO request, concluding that “the planned development of generally-applicable, Arctic-specific standards[] does not prevent you from submitting an exploration plan . . . and beginning drilling or other operations.”¹⁶

Shell also contends that an SOO is warranted because “the available drilling season has been abbreviated further due to Shell’s accommodation for Native community traditional whaling activities. This accommodation significantly reduces the already limited drilling season.”¹⁷ Any “accommodations” Shell may have made in the past have not been the cause of its failed exploration efforts, and Shell certainly should have anticipated needing to meet its statutory obligation to protect subsistence uses in the area. None of these efforts justify an SOO.

¹⁴ U.S. Dep’t of the Interior, Review of Shell’s 2012 Alaska Offshore Oil and Gas Exploration Program 6-7 (2013), available at <http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf>.

¹⁵ Shell SOO at 5&9.

¹⁶ ConocoPhillips SOO Denial at 2. The “operational time constraint” referenced by Shell appears to refer to the requirement that drilling operations cease with sufficient time to allow for completion of a relief well, if one were necessary, before the end of the season. This requirement is included in the draft “Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf” released by BOEM and BSEE on February 20, 2015. See Department of the Interior, Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf, available at <http://www.bsee.gov/uploadedFiles/Proposed%20Arctic%20Drilling%20Rule.pdf>.

¹⁷ Shell SOO at 6.

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Shell's reliance on the difficulties of operating in the Arctic Ocean, the paucity of available rigs, and other logistical challenges are no more persuasive.¹⁸ It is undeniably true—as Shell, unfortunately, learned in 2012—that the Arctic Ocean is a difficult and remote place to operate and that there is a limited supply of equipment capable of withstanding the elements. Shell, however, was well aware of these challenges when it purchased leases and decided to pursue exploration. The company has repeatedly assured the government and public that it is capable of operating safely in the Arctic Ocean; in part, these assurances have been based on the fact that the company drilled exploration wells in the U.S. Arctic Ocean in the past. It should not be able now to rely on challenges in meeting those commitments to justify an SOO.

Moreover, Shell's request, particularly as it relates to its Chukchi Sea leases, is untimely. Here, Shell's Chukchi leases will not expire until at least 2019 and are currently suspended. As BSEE noted in concluding that ConocoPhillips' SOO request was "not ripe," Shell seeks "what effectively would be a 50 percent extension of the primary term of its leases less than halfway through that term."¹⁹

Operating in the Arctic Ocean is dangerous, controversial, and logistically challenging. Those facts, however, do not allow BSEE to bend its rules to grant Shell an unjustified extension of its leases. Shell knew the rules and realities when it purchased the leases it now owns, and BSEE should not give special treatment to the company. We encourage BSEE to follow the example it set by denying ConocoPhillips' SOO Request and deny Shell's as well.

Thank you again, and we look forward to working with you on this and other issues.

Sincerely,



Susan Murray
Deputy Vice President, Pacific
Oceana

cc: Tommy Beaudreau, Chief of Staff, Secretary of the Interior
Brian Salerno, Director, Bureau of Safety and Environmental Enforcement

¹⁸ Shell SOO Request at 6-7.

¹⁹ ConocoPhillips SOO Denial at 2.