



United States Department of the Interior  
BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT  
Alaska OCS Region  
3801 Centerpoint Drive, Suite 500  
Anchorage, Alaska 99503-5823

Ms. Susan Childs  
Venture Support Integrator, Alaska  
Shell Gulf of Mexico, Inc. and Shell Offshore, Inc.  
3601 C Street, Suite 1000  
Anchorage, Alaska 99503

OCT 16 2015

Dear Ms. Childs:

The Bureau of Safety and Environmental Enforcement - Alaska Region (BSEE) is in receipt of the Suspension of Operations (SOO) request submitted by Shell Gulf of Mexico Inc. and Shell Offshore Inc. (hereinafter collectively Shell) on July 10, 2014. In that request, you asked BSEE to act pursuant to its authority under 30 C.F.R. § 250.168 et seq., to grant a 5-year SOO for all leases held by Shell in both the Chukchi Sea and Beaufort Sea. After a thorough review of the subject request and the cited justifications and applicable laws and regulations, BSEE finds that Shell has not demonstrated that granting the SOO is justified under the applicable regulatory standards. The request is hereby denied.

After conducting exploratory drilling operations in the Chukchi Sea this year, Shell has publicly stated that it will not undertake further exploratory drilling activities in the Chukchi or Beaufort Seas “for the foreseeable future.” In addition, Shell has not provided a schedule or plan for commencing or resuming leaseholding operations on any of its leases in the Chukchi or Beaufort Seas and has stated that it is not in a position to do so. As such, BSEE finds that Shell has failed to satisfy the requirements of 30 C.F.R. § 250.171(b). Specifically, Shell has failed to submit “a reasonable schedule of work leading to the commencement or restoration of the suspended activity.” BSEE further finds that Shell’s application fails to make a sufficient showing under 30 C.F.R. § 250.172 or § 250.175(a) to justify the discretionary approval of a suspension by BSEE. See attached Decision Memorandum from Mark Fesmire, BSEE Regional Director-Alaska to Brian Salerno, BSEE Director.

Nothing in this letter precludes Shell from submitting future SOO requests prior to the expiration of its leases in the Chukchi Sea or Beaufort Sea, if facts and circumstances relevant to the regulatory grounds for suspensions change.

If you have any questions, please contact me at (907) 334-5300, or via e-mail at [kevin.pendergast@bsee.gov](mailto:kevin.pendergast@bsee.gov).


Sincerely,

Kevin J. Pendergast, PE CPG  
Regional Supervisor, Field Operations

Enclosures:

1. Decision Memorandum

## DECISION MEMORANDUM

From: Mark Fesmire, Regional Director for Alaska, Bureau of Safety and Environmental Enforcement (BSEE) 

To: Brian Salerno, BSEE Director

Date: October 16, 2015

Subject: Denial of Shell's Request for a Suspension of Operations on Chukchi and Beaufort Sea Leases

### I. Introduction

This memorandum provides the reasoning and analysis that has led the BSEE Alaska Region to conclude that Shell's request for a Suspension of Operations (SOO) should be denied for leases it currently holds in the Chukchi and Beaufort Seas.

### II. Background

#### *A. Shell's Request*

On July 10, 2014, Shell requested an SOO for each of the leases that the company currently holds in the Chukchi and Beaufort Seas. Shell claimed that, under the Outer Continental Shelf Lands Act (OCSLA) and BSEE regulations, BSEE has broad authority to grant the SOOs and argued that BSEE should use that authority to grant an SOO on each lease for a five-year period. If granted, that would effectively lengthen the term of each lease by the length of the SOO.

Shell states that its request should be granted for a variety of reasons, including: (1) circumstances beyond Shell's control have prevented exploratory drilling operations on the leases; (2) regulatory restrictions limiting operations (as compared to other OCS operations, e.g., in the Gulf of Mexico); (3) delays resulting from federal court and administrative challenges; (4) the limited availability of "Arctic viable" and "regulatory-compliant" rigs; and (5) uncertainties associated with proposed Arctic regulations.

Shell argues that these circumstances could not have been anticipated at the time that it acquired the leases and that these circumstances have resulted in inordinate delays beyond Shell's control that ultimately caused the company to lose out on six drilling seasons. Following the submission

of Shell's request, between April and September, BSEE met with Shell in person or by telephone to further discuss Shell's request. These included the following:

- 4/9/2015 meeting in which Shell reiterated the nature of its pending SOO requests. The discussion during this meeting focused around the reasonable schedule of work requirement. Shell expressed the need for flexibility in any schedule and expressed concerns about timing and protecting confidential information regarding its Arctic operations.
- 4/29/2015 follow up call during which Shell reiterated its perceived need for SOOs for leases on which it may conduct operations based on an activity schedule.
- 5/14/2015 meeting during which Shell described a "hypothetical" or "notional" approach to Arctic exploratory drilling operations on certain of its Chukchi Sea leases and prospects.
- 9/8/2015 and 9/10/2015 calls during which the approaches discussed in May were explored further.
- 9/29/2015 meeting during which Shell restated its request for SOOs, but confirmed, as public statements suggested, that it could not offer a schedule for commencing or resuming further leaseholding operations in the "foreseeable future."

After considering Shell's request, I have determined based on the reasons below that it should be denied.

#### *B. Legal Authority to Grant SOOs*

There are two kinds of suspensions allowed under BSEE's regulations: a suspension of operations and a suspension of production.<sup>1</sup> (These are commonly referred to as SOOs and SOPs.) An SOO is reserved for activities leading up to leaseholding operations, such as drilling, while an SOP is reserved for situations when exploration has occurred and there has been a firm commitment to produce oil and/or gas from the lease. Briefly discussed here are the legal bases for granting an SOO.

OCSLA provides that the Secretary shall prescribe regulations that allow for suspensions under certain limited circumstances. 43 U.S.C. § 1334(a). Those regulations are found at 30 C.F.R. §§ 250.168-177. Suspensions may only be granted for up to five years at a time, but BSEE may grant consecutive suspensions. 30 C.F.R. § 250.170(a). The decision by BSEE whether to grant a suspension is discretionary.

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<sup>1</sup> Under the regulations, a suspension is defined as "a granted or directed deferral of the requirement to produce (Suspension of Production (SOP)) or to conduct leaseholding operations (Suspension of Operations (SOO))." 30 C.F.R. § 250.105.

A request for an SOO must include a reasonable schedule of work leading to the commencement or restoration of the suspended activity. 30 C.F.R. § 250.171(b). Further, the request must show that an SOO is necessary for at least one of the following reasons:

- To comply with judicial decrees prohibiting any activities or the permitting of those activities. 30 C.F.R. § 250.172(a).
- When activities pose a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment. 30 C.F.R. § 250.172(b).
- For the installation of safety or environmental protection equipment. 30 C.F.R. § 250.172(c).
- To carry out the requirements of the National Environmental Policy Act (NEPA) or to conduct an environmental analysis. 30 C.F.R. § 250.172(d).
- To allow for inordinate delays encountered in obtaining required permits or consents, including administrative or judicial challenges or appeals. 30 C.F.R. § 250.172(e).
- To allow time to begin drilling or other operations when the lessee is prevented by reasons beyond its control, such as unexpected weather, unavoidable accidents, or drilling rig delays. 30 C.F.R. § 250.175(a).<sup>2</sup>

### **III. Analysis**

Shell's suspension request, as explained below, does not meet the regulatory requirements for granting a suspension. In sum, Shell failed to provide BSEE with a reasonable schedule of work and did not provide a factual basis sufficient to support an SOO under the applicable regulations.

#### *A. No Reasonable Schedule of Work*

Shell's SOO request includes an exhibit entitled "Notional Exploration Program with 5 YR SOO." That "program," which Shell refers to as a "reasonable schedule of work," references planned exploratory drilling operations (on a very high level) that Shell would undertake on its leases during the time period that would be covered by 5-year SOOs, and includes operations in both the Chukchi and Beaufort Seas. On its face, Shell's program provides only the most cursory overview of anticipated "campaigns" with no specific activities listed that could be used as measurable milestones leading to eventual commencement or restoration of leaseholding operations. As such, it does not qualify as a reasonable schedule of work as required by 30 C.F.R. § 250.171(b).

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<sup>2</sup> 30 C.F.R. §§ 250.175(b) and (c) identify two additional situations in which BSEE may grant an SOO, however the relevant factual predicates are inapplicable to Shell's Arctic leases. See 30 C.F.R. § 250.175(b) (5- or 8-year leases with subsalt hydrocarbon prospects); 30 C.F.R. § 250.175(c) (5- or 8-year leases with ultra-deep prospects).

The meetings that have occurred between BSEE and Shell following Shell's request have not resulted in the submission of an appropriately defined schedule for either the Beaufort or the Chukchi Seas. Most recently, on September 28, 2015, after concluding exploratory drilling operations at its Burger prospect in the Chukchi Sea, Shell stated publicly that it "will now cease further exploration activity in offshore Alaska for the foreseeable future [and] will continue to safely de-mobilize people and equipment from the Chukchi Sea."<sup>3</sup> This statement, reported by numerous media outlets and repeated by Shell officials to DOI personnel, as well as the Ninth Circuit Court of Appeals,<sup>4</sup> made it clear that Shell no longer had any current plan for exploring its existing leases, let alone a reasonable schedule of work for commencing or restoring leaseholding operations thereon. Moreover, during the September 29 meeting with Shell, the company was unable or unwilling to identify any reasonable future schedule that would lead to the commencement or restoration of exploratory drilling.

Without a reasonable schedule of work, BSEE does not have a regulatory basis upon which to grant an SOO to Shell on any of its Chukchi or Beaufort leases.

#### *B. Shell's Alleged Delays Do Not Provide the Basis for an SOO*

In addition to failing to provide a reasonable schedule of work, Shell has not provided sufficient justification for a suspension pursuant to the additional requirements of the applicable regulations. The center of Shell's request hinges on allegations that it encountered delays beyond its control that resulted in the loss of six drilling seasons. As legal authority in support of its request, Shell generally cites to OCSLA, 43 U.S.C. § 1334(a)(1), and BSEE's regulations at 30 C.F.R. §§ 250.168-177. More specifically, Shell alleges that there is a "common theme" in BSEE's regulations "that lease terms should be suspended for periods when a lessee cannot enjoy its lease rights for reasons beyond its control." As an example, it cites to 30 C.F.R. § 250.172(e), which states that an SOO may be granted "[w]hen necessary to allow for inordinate delays encountered in obtaining required permits or consents, including administrative or judicial challenges or appeals." Section 250.172(e), however, does not explicitly allow for suspensions due generally to delays beyond a lessee's control. Instead, this section is limited to a specific situation where inordinate delays are encountered in obtaining permits and consents. The facts that Shell provides do not support its claim for a suspension because they are either delays arising from judicial injunctions for which a suspension was already directed by BSEE, or they are allegations of delay that are not cognizable under 30 C.F.R. § 250.172(e).<sup>5</sup> I address these further below.

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<sup>3</sup> Shell's entire statement is available at <http://www.shell.com/global/aboutshell/media/news-and-media-releases/2015/shell-updates-on-alaska-exploration.html>.

<sup>4</sup> Intervenor-Defendants-Appellees' Response to Petition for Panel Rehearing and Rehearing En Banc, Case No. 13-35866, at 2 n.1 (9th Cir.) (filed Sept. 30, 2015).

<sup>5</sup> Shell does not cite to 30 C.F.R. § 250.175(a), which allows for suspensions "[w]hen necessary to allow time to begin drilling or other operations when the lessee is prevented by reasons beyond its control, such as unexpected weather, unavoidable accidents, or drilling rig delays." *Id.* (emphasis added). Nevertheless, we have analyzed the

- Allegations related to the 2007-2009, 2011, and 2014 Drilling Seasons: While it is correct that Shell was prevented in these years from conducting operations on its leases as the result of court injunctions, it is not the case that such orders applied to both Shell's Beaufort and Chukchi leases. For example, the court action in 2007 and 2008 applied to the Beaufort, while the court action in 2009, 2011, and 2014 applied to the Chukchi. Moreover, any court-related delays were cured by directed suspensions issued pursuant to 30 C.F.R. § 250.172(a). Court-related suspensions were directed for a number of Shell's Beaufort Sea Leases in 2007. In addition, as the result of a 2011 suspension request by Shell pertaining to its Arctic OCS leases and the resulting settlement of Shell's appeal of BSEE's partial denial of that request, Shell was granted SOOs on a number of its other Beaufort Sea leases. The directed suspensions for the Chukchi Sea leases were issued from July 21, 2010 to October 26, 2011 and from January 22, 2014 to March 31, 2015, totaling nearly two and a half years. Shell fails to provide a reasonable explanation as to how these court-related delays entitle Shell to yet another suspension under 30 C.F.R. § 250.172(e), in addition to those already directed pursuant to 30 C.F.R. § 250.172(a).
- Allegations related to the 2010 Drilling Season: Shell incorrectly states that the 2010 season was lost because DOI halted consideration of Shell's Beaufort and Chukchi permits in the wake of the Deepwater Horizon oil spill. In fact, Shell's exploration plan was approved on December 7, 2009 and Shell did not have permits before the agency for consideration. Furthermore, the drilling suspensions imposed in 2010 applied only to the deepwater Gulf of Mexico. Claims of an Alaska moratorium were dismissed in *Alaska v. Salazar*, No. 3:10-cv-205 (D. Alaska) (order regarding pending motions and dismissing case without prejudice). There is, therefore, no factual basis here upon which to grant a suspension.
- Allegations related to EPA Clean Air Act Permits: Shell alleges that trouble in obtaining EPA Clean Air Act permits also contributed to delays between 2007 and 2011. Shell, however, does not describe the extent of such delays and had already obtained directed SOOs for most of this time period as the result of court-related delays.

Shell also argues that the delays it encountered were "exacerbated" by conditions that are unique to the Alaska OCS. As discussed further below, these conditions do not support Shell's request for a five-year SOO and do not provide a basis for suspensions under the regulations.

- Shell alleges that "due to sea ice conditions most of the year, any exploration drilling activity is limited to three or four months." Shell, however, voluntarily chose to enter into 10-year leases (the maximum lease length permitted by statute) knowing of this limitation. If this fact were a basis for suspensions, all Arctic lessees would be arguably entitled to suspensions, despite lessees knowing that ice would limit their operations.

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request under those criteria and have concluded, for the reasons set out below, that a suspension is not warranted under that provision either.

The regulations do not require suspensions for this type of expected condition and, not surprisingly, Shell does not cite to any particular regulation in support. Section 250.175(a), while allowing for suspensions due to “unexpected weather,” has not been invoked by Shell and, even if it were, would not justify a suspension for the entirely expected formation of seasonal sea ice.

- Shell also complains about the element of the company’s recently approved and “previously approved” Chukchi Sea exploration plans that required Shell to cease drilling into a prospective reservoir zone weeks before the end of the drilling season.<sup>6</sup> Shell has not alleged that these restrictions delayed the start of its drilling operations. As such, 30 C.F.R. § 250.175(a) is inapplicable here because no delay was encountered that prevented Shell from “begin[ing] drilling or other operations.” Likewise, no other regulatory bases provide support for a suspension on these facts.
- Similarly, Shell claims that its Beaufort Sea leases were “abbreviated” due to Shell’s own accommodation of the traditional whaling season. Again, Shell’s adoption of such accommodation did not delay the start of any leaseholding operations and does not provide the basis for a suspension under the regulations.
- Shell also cites several business related and planning factors that “warrant tailored considerations for the grant of an SOO for Shell’s Alaska leases.” These include the time to create the necessary infrastructure, very long supply lines, the burden of acquiring and mobilizing “Arctic-suitable rigs as well as more than 25 associated Arctic capable support vessels,” and the long lead times associated with these undertakings. While conducting operations in the Arctic is undoubtedly difficult, time consuming, and expensive, such considerations were well known to Shell when it acquired its 10-year leases, are not outside Shell’s control, and they do not provide support for a suspension under 30 C.F.R. § 250.175(a), § 250.172(e), or the other SOO regulatory provisions.
- Lastly, Shell alleges that, as a result of BSEE’s pending Arctic regulations, it cannot reasonably be expected to proceed with long term contracting, or design and construction of new rigs and other vessels, when specifications may change as a result of rulemaking. Shell’s leases expressly incorporate not only all then-existing applicable regulations, but also all future regulations promulgated pursuant to OCSLA. Shell acknowledges the complex nature of Arctic operations and conditions, and by the same token should reasonably have anticipated the rigorous regulatory environment necessitated by such circumstances. It also bears noting that the newly proposed requirements for Arctic exploratory drilling largely track the conditions under which Shell proceeded with operations in both 2012 and 2015. If this fact were a basis for suspensions, all Arctic lessees would be arguably entitled to suspensions, whenever any new regulatory proposal was taken by any agency despite lessees knowing full well that the oil and gas

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<sup>6</sup> The Bureau concluded that such restrictions were necessary for safety reasons in the case of a blowout, pursuant to regulations existing at the time Shell entered into its leases and which were incorporated by reference into those leases.

industry is subject to regulation to ensure safe and responsible oil and gas development in ever changing technological environments. Regardless, section 250.175(a) is narrowly tailored to address specific events (e.g., unexpected weather, unavoidable accidents, drilling rig delays) “to allow [a lessee] time to begin drilling or other operations” when “prevented by reasons beyond their control” – i.e., when the lessee is otherwise ready and able to drill but prevented by external events from doing so; not when the lessee is unable or unwilling to comply with applicable regulatory requirements.

In addition to the regulations, Shell cites three examples that it believes demonstrate the “breadth and flexibility” of BSEE’s authority to grant an SOO. As the following illustrates, the examples Shell provides do not support granting it a five-year suspension as requested.

- Shell notes that BSEE (which was actually BOEMRE at the time) granted requested SOOs in the wake of the Deepwater Horizon incident “without strict adherence to its normal SOO process and criteria.” We assume that Shell refers here to the up-to one-year SOOs that were granted pursuant to NTL No. 2011-N05. Those suspensions were granted under extraordinary circumstances following the worst oil spill in the Nation’s history. Moreover, such suspensions were limited to one year, applied only in water deeper than 500 feet, and were intended to address the panoply of new constraints on deep water operations that were imposed immediately following the spill. Shell does not face a similar situation in the Arctic. Further, the Bureau made specific findings with respect to the bases for those suspensions under the criteria set forth in governing regulations, which are not sustainable here.
- In further support of a suspension for “sea ice limitations and accommodation of hunting and wildlife issues,” Shell cites to *Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595 (D.C. Cir. 1981) as providing “analogous” authority for seasonal suspensions. *Copper Valley*, however, is not analogous. In that case, the Secretary required a suspension of drilling operations on an onshore lease during summer months to protect the Alaska tundra and had initially refused to grant a corresponding extension of the lease term. Such is not the case here. BSEE has not directed a suspension prohibiting Shell from performing operations on its leases during the winter months to protect the environment. The fact that such work is impossible due to sea ice does not require formal recognition of a ‘de facto suspension’ because in this case the “seasonal” limitation was not imposed by the government, but rather was a natural characteristic of the operating environment, of which Shell was fully aware at the time it acquired its leases with ten-year terms.
- In this same vein, Shell also states that BSEE regularly suspends lease terms in the Eastern Gulf of Mexico during military exercises. The “Drilling Window Program” described in Joint NTL No. 2014-G01 also does not provide a good analogy here. Those suspensions are granted due to National Security concerns that are not at issue on the Alaska OCS. Further, like the *Copper Valley* situation, those suspensions arise from



government conduct that precludes operations. The seasonal limitations on operations due to sea ice formation in the Arctic are not the product of government-created restrictions on operations.

#### **IV. Decision**

In summary, based upon the information contained both in this memorandum and in the administrative record, Shell's request for an SOO on its Chukchi and Beaufort Sea Leases is denied.