United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

December 22, 2020

M-37060

Memorandum

To: Acting Director, Bureau of Ocean Energy Management

From: Solicitor

Subject: Authority of the Secretary of the Interior to Disapprove Geological and Geophysical Permit Applications Based on National Security or Defense Considerations

## I. Introduction

In connection with an inquiry from the Department of Defense (DoD), I have been asked whether the delegee of the Secretary of the Interior (Secretary), the Bureau of Ocean Energy Management (BOEM), has the authority to disapprove geological and geophysical (G&G) survey permit applications for national security or defense considerations.

For the reasons below, I advise BOEM that it has the authority under the Outer Continental Shelf Lands Act and its implementing regulations to disapprove a G&G permit application for national security or defense reasons or due to unreasonable interference with governmental activities that have national security significance. This memorandum also addresses the legal standard governing the information BOEM would need from DoD, or another executive department or agency with national security equities, to support a decision to disapprove a permit application on those bases.

## II. Issues

### a. *Statutory and Regulatory Authority for Disapproval of G&G Permit Applications Based on National Security or Defense Considerations*

Section 11(a) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1340(a), provides that "any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease . . . and which are not unduly harmful to aquatic life . . . ." 43 U.S.C. § 1340(a)(1).[1] This section therefore appears to grant the Secretary authority to withhold such authorizations at the Secretary's discretion; this is unlike the situation for plans where the Secretary must by statute approve the plans, absent certain conditions. Certainly, nothing in this

[1] The requirement to obtain authorization to conduct G&G explorations under section 11(a) of OCSLA does not apply to operators or lessees who are conducting such explorations pursuant to an approved plan in an area under lease. 43 U.S.C. § 1340(a)(2).

or any other provision of OCSLA conveys a right to such an authorization, nor mandates approval of applications that meet statutory standards, as is the case with exploration plans. *Cf.* 43 U.S.C. § 1340(c)(l) (Exploration plans pursuant to oil and gas leases "shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this subchapter . . . .").

Section 11(g) of OCSLA, 43 U.S.C. § 1340(g), requires that the Secretary make three findings prior to issuing a permit that, "in accordance with regulations issued by the Secretary," (1) the permit applicant is qualified; (2) the permitted exploration will not interfere with operations conducted under a lease; and (3) "such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, *unreasonably interfere with other uses of the area*, or disturb any site, structure, or object of historical or archeological significance." *Id.* (emphasis added). "Other uses of the area" may include uses by DoD or another executive department or agency with national security equities. Therefore, under this provision, the Secretary may not issue a G&G permit if he determines that the activities to be authorized might unreasonably interfere with other governmental uses of the area, including where such interference would raise national security concerns on the outer continental shelf. Therefore, the express language in OCSLA allows the Secretary to disapprove a G&G permit application under consideration at his or her discretion, but prohibits the Secretary from approving a G&G permit application that might unreasonably interfere with other governmental uses of the area, including where such interference would raise national security concerns.

While section 11(g) of OCSLA does not list national security or defense implications as obstacles to permit issuance, OCSLA expressly addresses national security and defense in the context of cancellation of permits and leases. Section 5(a)(2)(A)(i) of OCSLA authorizes the Secretary to cancel a permit if the Secretary determines that continued activity pursuant to the permit "*would probably cause serious harm or damage . . . to the national security or defense . . .*" 43 U.S.C. § 1334(a)(2)(A)(i) (emphasis added).[2] Since OCSLA authorizes the Secretary to cancel a permit to protect national security or defense, I conclude that he may also consider national security or defense in deciding whether to issue a permit in the first instance when those considerations are evident before permit issuance. This is particularly true given that permit issuance is not mandatory, but is discretionary.

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[2] This statutory phrase is not defined in OCSLA or in the regulations. As will be discussed further below, in implementing this statutory provision, the regulations provide that BOEM may temporarily stop exploration under a permit if the Regional Director determines that the "[a]ctivities pose a threat of serious, irreparable, or immediate harm." 30 C.F.R. § 551.9(a)(1). Under those regulations, this type of harm includes "damage to life (including fish and other aquatic life), property, any mineral deposit (in areas leased or not leased), to the marine, coastal, or human environment, or to an archaeological resource; . . . ." *Id.* This regulation further provides that the Regional Director may stop exploration if he or she determines that "[s]topping the activities is in the interest of National security or defense." *Id.* at § 551.9(a)(3). Based on both the statute and the regulations, national security is an equally valid reason to temporarily stop exploration activities as a serious harm to life and the environment. This regulation's inclusion of consideration of the interest of national security or defense as a basis for temporarily stopping exploration activities is undoubtedly an outgrowth of the Secretary's authority granted in section 5 of OCSLA to cancel a permit if the continued activity would probably cause serious harm or damage to the national security or defense. *See* 43 U.S.C. § 1334(a)(2)(A)(i). In practice, DoD will need to make a persuasive recommendation to BOEM, and BOEM would then review that recommendation and make a final determination or adopt the DoD recommendation, as appropriate. BOEM should include as much unclassified or non-protected information as possible supporting their decision in the administrative record or decision file.

The Department's implementing regulations at 30 C.F.R. Part 551 (Part 551 regulations) provide for disapproval of permit applications and state broadly that the BOEM Regional Director "will state the reasons for the denial and will advise [the applicant] of the changes needed to obtain approval." *See* 30 C.F.R. § 551.5(b). The Part 551 regulations do not specify any particular criteria for disapprovals. They require the permit applicant to submit a signed Form BOEM-0327, *id.* § 551.5(a), and that form states that the applicant must not "unreasonably interfere with or harm other uses of the area (including submarine cables)," Form BOEM-0327. As mentioned above with respect to the similar statutory language, this could include unreasonably interfering with military uses or harming other uses of the area. Read together, these regulatory provisions and the requirements on the form constrain the Regional Director from approving a permit application, if a permit would unreasonably interfere with current military uses of the area.

The Part 551 regulations also set out additional permittee obligations, requiring permittees not to:

> (1) Interfere with or endanger operations under any lease, right-of-way, easement, right-of-use, Notice, or permit issued or maintained under the Act;
> (2) Cause harm or damage to life (including fish and other aquatic life), property, or to the marine, coastal, or human environment;
> (3) Cause harm or damage to any mineral resource (in areas leased or not leased);
> (4) Cause pollution;
> (5) Disturb archaeological resources;
> (6) Create hazardous or unsafe conditions; or
> (7) Unreasonably interfere with or cause harm to other uses of the area.

30 C.F.R. § 551.6(a). Although these requirements pertain to permits that have already been issued, I conclude that the disapproval of a permit application that would cause unreasonable interference with governmental uses of the area would also be reasonable based on these requirements.

As discussed in footnote 2 above, the Part 551 regulations also provide authority for BOEM to temporarily stop exploration activities under a permit when the Regional Director determines that "[s]topping the activities is in the interest of National security or defense."[3] 30 C.F.R. § 551.9(a)(3). While 30 C.F.R. § 551.9 applies to temporarily stopping activities under permits that have already been issued, it would be reasonable for the Secretary to also disapprove a G&G permit application under 30 C.F.R. § 551.5(b) based on current national security or defense interests. Certainly, BOEM is not required to issue a G&G permit when the grounds for stopping activities are evident even before permit approval.

In combination, the statutory requirements in section 11(g) of OCSLA, the permit cancellation authority in section 5 of OCSLA, as well as the broadly written disapproval provision in the Part 551 regulations, provide a legally sufficient and rational basis for the Secretary to disapprove a G&G permit application on national security or defense grounds, if necessary.

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[3] Note that the standards for cancellation and temporary suspension are different. A permit may be canceled in the event the proposed activity "would *probably cause serious harm or damage* . . . to the national security or defense." 43 U.S.C. § 1334(a)(2)(A)(i) (emphasis added). A permit may be temporarily suspended, however, where the BOEM Regional Director determines "stopping the activities *is in the interest of* National security or defense." 30 C.F.R. § 551.9(a)(3) (emphasis added).

*b. Basis for Determination that Approval of G&G Permit Application Presents a Risk to National Security or Defense Interests*

BOEM's disapproval of a G&G permit application is within its broad discretion but remains subject to review under the Administrative Procedure Act (APA).[4] *See* 5 U.S.C. § 706. A court will not vacate an agency's decision under the APA's arbitrary and capricious standard unless the agency "relied on factors which Congress ha[d] not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, if another executive department or agency with national security equities asks BOEM to disapprove a G&G permit application based on national security or defense grounds, the request would need to be supported by information sufficient to demonstrate that the application, if approved, presents an actual risk to national security or defense.

What constitutes interference with "national security" or "national defense" is a fact-specific determination that must relate to the protection of a legitimate interest and the perceived risk to that interest must be grounded in fact and not speculation. Courts typically presume that the government's national security concerns are legitimate, and focus their analysis instead on weighing the asserted private interest against the government's interest in protecting national security.[5] Accordingly, they tend to focus on whether the government's chosen action (here a permit denial) is permissible in light of a balancing of interests. Sometimes, though, courts do look at whether a particular action constitutes "interference" with national security or defense interests. For example, in *United States v. Platte*, the Tenth Circuit analyzed whether the defendants' protest at a nuclear missile site was sufficient interference to support a conviction under 18 U.S.C. § 2155, which prohibits intentional interference with national security and/or national defense. 401 F.3d 1176, 1179 (10th Cir. 2005). There the court noted that "national

[4] As the appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior, the Interior Board of Land Appeals (IBLA) possesses *de novo* review authority. The appropriate standard of review at the IBLA for a decision disapproving a G&G permit application on national security grounds would be preponderance of the evidence. Thus, if an appellant were to challenge BOEM's disapproval of a G&G permit application, the burden would be on the appellant to show, by a preponderance of the evidence that the agency erred. *See, e.g.*, *Taylor Energy Co. LLC*, 193 IBLA 283 (2018). In the *Taylor* case, the Board was reviewing a decision by the Bureau of Safety and Environmental Enforcement (BSEE) and stated that "[a]n appellant challenging such a discretionary decision must show, by a preponderance of the evidence, that the decision is based on an error of law, a material error of fact, or that the decision-maker failed to give due consideration to all relevant factors and act on the basis of a rational connection between the facts found and the choice made. A mere difference of opinion regarding proper management of offshore lands and resources does not show error or otherwise justify reversing a BSEE decision." *Id*. at 283.

[5] *See, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national security affairs.") (citations omitted). However, it is worth noting that courts sometimes prioritize certain national security concerns over others. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29 (2010) (terrorism is a particularly important national security interest); *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 321-22 (1972) ("domestic" national security is separate from national security "with respect to activities of foreign powers or their agents").

defense" is a broad term, which includes "activities of national preparedness,"[6] and analyzed various military court decisions interpreting the statute, all of which agreed that even small "inconveniences" could be considered interference with national defense, even when the burden on defense is small (*i.e.*, a delay in military readiness of 15 minutes). *Id.* at 1183. Therefore, in deciding to deny a permit application based on national security/defense considerations, BOEM must articulate a reasonable factual basis to support its conclusion. If such a minor inconvenience can survive the scrutiny of a criminal court, it is likely that BOEM would be able to provide a sufficient factual basis for a finding of interference to survive a court challenge.[7]

As previously stated, "[i]f BOEM disapproves [an] application for a permit, the [BOEM] Regional Director will state the reasons for the denial and will advise [on] the changes needed to obtain approval." 30 C.F.R. § 551.5(b). Therefore, in order for BOEM to disapprove a G&G permit application in accordance with 30 C.F.R. § 551.5(b) on national security/defense grounds, DoD or any other executive department or agency with national security equities would also need to assist BOEM in identifying any changes that the permit applicant might be able to make to reduce the risk to national security or defense and obtain permit approval. If there are such changes that the permit applicant could make to reduce the risk to national security or defense, BOEM must so inform the applicant when disapproving the application. If there are no changes that the permit applicant could make to reduce the risk to national security or defense, BOEM must so inform the applicant when disapproving the application, supported by information sufficient to demonstrate that the application presents a risk to national security or defense, so long as that information is unclassified and otherwise releasable.

There could be instances where the information supporting the application denial cannot be shared with the applicant due to national security or defense concerns. In the event an applicant challenges a permit denial, the information that the requesting agency provides to BOEM must —at a minimum—be made available for *in camera* review by the IBLA (*see* 43 C.F.R. § 4.1034) or a federal district court. Failure to provide information that can be available for *in camera* review would frustrate review of the action by the IBLA or federal district court and could result in the decision being found to be arbitrary and capricious. *See Deaton, Inc. v. Interstate Com. Comm'n*, 693 F.2d 128, 131 (11th Cir. 1982) ("[T]o survive judicial review under the arbitrary and capricious standard, an agency must explain the rationale for its decision.") (citations omitted). An agency action will likely not be upheld where inadequacy of explanation, or lack thereof, frustrates review. *See Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 694 (2d Cir. 1975), *cert. denied sub nom*. *Nat'l Nutritional Foods Ass'n v. Mathews*, 423 U.S. 827.

If the information supporting application denial is classified (*i.e.*, Confidential, Secret, Top Secret, Top Secret-Sensitive Compartmented Information), then the Department of the Interior will need to ensure that: the agency controlling the information will authorize the use of that information in litigation or in an administrative proceeding; all necessary approvals and

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[6] *See id.* at 1181 (quoting *Gorin v. United States*, 312 U.S. 19, 28 (1941)). The court held that, even though the defendants never intended to actually disable a missile, the fact that their actions interfered with Air Force training exercises and might have prevented, even for a short time, the Air Force's willingness to fire a missile at the site, they constituted sufficient "interference" with national defense to warrant conviction. *Id.* at 1183.

[7] We stress, again, that defensibility is fact-specific, and we always recommend contacting the Solicitor's Office with any questions about the legal risks of particular actions.

notifications are made prior to reliance on the information; and all personnel who need to review or otherwise handle that information (*i.e.*, need-to-know), including but not limited to IBLA personnel, have the appropriate level of security clearance, as well as access to workspaces, classified storage containers, and information technology systems commensurate with the classification level security requirements.

## III. Conclusion

BOEM, acting with the Secretary's delegation of authority, has the authority under OCSLA and its implementing regulations to disapprove a G&G permit application for national security or defense reasons or for unreasonable interference with governmental uses of the area that raise national security considerations. If DoD or another executive department or agency with national security equities requests that BOEM disapprove a G&G application based on national security or defense concerns, the requesting agency would need to provide BOEM with sufficient information to support a reasoned decision. Such information must include reasons why a specific permit application, if approved, could unreasonably interfere with governmental activities that raise national security considerations, or otherwise cause harm or damage to national security or defense.[8]

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[8] BOEM and the Department of the Interior should seek to have personnel in place who have the appropriate security clearances to view classified information related to national security and national defense considerations of G&G survey permit applications.