Cross-posted at CPRBlog.

The Minerals Management Service within the Department of Interior was responsible for overseeing offshore oil development in federal waters from its creation in 1982 until its demise earlier this year. MMS was always a troubled agency, to put it mildly, dogged by scandals and a revolving door with the industry it regulates. After the Deepwater Horizon incident made its failings obvious, Interior Secretary Ken Salazar reorganized MMS out of existence, promising that the new management structure would "improve the management, oversight, and accountability of activities on the Outer Continental Shelf."

Salazar replaced MMS with the new Bureau of Ocean Energy Management, Regulation, and Enforcement (an awkward name that produces the even more awkward acronym BOEM or BOEMRE, which I'm told people in the Gulf have already taken to pronouncing as "bummer"). In order to try to reduce perceived conflicts of interest, BOEMRE is divided into three parts: a revenue branch housed in the Department's office of Policy, Management, and Budget; a safety and environmental enforcement office dedicated to making sure that offshore operators follow applicable regulations; and an ocean energy management office responsible for planning and leasing decisions.

At the time, Eric Biber and I argued in an LA Times op-ed that although splitting MMS was a good idea it wouldn't be enough to solve the agency's many problems, notably including routinely shoddy environmental reviews. Looks like we got that one absolutely right, unfortunately.

BOEMRE has just issued a new draft EIS for proposed Lease Sale 193 in the Chukchi Sea off the Alaska coast. This do-over was necessary because the first attempt, completed in 2007, was tossed this summer by a federal district court because MMS had failed to consider the impacts of natural gas development or to evaluate the importance and availability of missing information, as required by the Council on Environmental Quality regulation dealing with uncertainty in environmental analyses. That regulation, which replaced the worst-case analysis requirement that was done away with during the Reagan administration, requires that agencies conducting environmental analyses obtain information needed to make "a reasoned choice among alternatives" if the costs of getting that information are not "exorbitant." If needed information can't be obtained, agencies must explain that and make their best evaluation of the reasonably foreseeable impacts based on scientifically accepted methods.

In its first pass at the lease sale EIS, MMS had stated repeatedly that it didn't know much about the potential impacts of development of the lease sale on various species of wildlife,

without bothering to consider whether the information was essential to informed choices or what it would take to obtain it.

Taking a second crack at the environmental analysis, the reinvented BOEMRE looks a lot like the late unlamented MMS. With respect to missing information, its basic answer is that none of it matters because: (1) we know enough, even though we don't know everything; (2) if it's presumed that significant impacts will follow certain events, like a blowout, the exact mechanisms of harm don't matter; (3) the impacts, whatever they may be, will be the same from all the alternatives; (4) other environmental laws and regulations will prevent adverse impacts; and (5) the information will be filled in at later stages of the development process.

That all sounds very rational until you start picking it apart. Let's take the excuses one by one.

(1) We know enough to make a reasoned decision. Reading this document, I wouldn't think so. There are a lot of statements to the effect that the environmental impacts of a big spill would be significant, and some other environmental impacts could be significant. But there's no estimate of the probability of those harms, nor even any attempt to quantify them should they occur. How much would wildlife populations be affected? For how long? As far as I can tell, BOEMRE doesn't know and doesn't care. The administration, the public, and the courts should all demand more.

(2) Mechanisms of harm don't matter. Again, it seems to me that a reasonable decisionmaker would disagree. Mechanisms could well be important to choices about spill response, as well as to a better understanding of population impacts and ways to minimize those impacts.

(3) All the alternatives (except no action) will have the same impacts. If this is true, the range of alternatives examined is too narrow.

(4) Other environmental laws will protect us. Wishful thinking. The Deepwater Horizon gusher violated (at least) the Endangered Species Act and Clean Water Act. Those laws did not, however, keep it from happening. Neither did MMS's operational safety regulations, which were both too lax and too little enforced. The point of NEPA analysis is to understand what might happen. And violations of the law, whether we want to admit or not, are reasonably foreseeable in any business.

(5) We'll know more at later stages, and we'll deal with it then. This is perhaps the most insidious argument, because it sounds so reasonable. Two problems, though. First, at the

later stages of environmental review, MMS had a bad habit of simply repeating what it had said initially, without a deeper look. Second, even if environmental impacts are recognized after the lease sale, there may not be anything the feds can do about them. Although Interior likes to say in its environmental analyses that the issuance of an offshore lease doesn't commit the U.S. to anything, that's not actually true. At that point, the OCSLA says that the feds can't prohibit drilling unless they can show that serious environmental harm is probable, and even then they may have to pay compensation. If it affirms the decision to take some $2.6 billion in bonus bids on this lease sale, the chances that the U.S. will later say the potential environmental effects preclude drilling are slim to none.

Perhaps even more troubling than its cavalier treatment of uncertainty is the agency's cavalier treatment of the Deepwater Horizon blowout. Here, it had already been ordered to redo the environmental analysis and reconsider its decision to offer the lease sale. Seems like a perfect opportunity to consider whether anything had been learned from the Gulf disaster that might be relevant to drilling in Alaska — like, say, that drilling safety regulations aren't necessarily sufficient or well enforced, or that responding to a large spill is more difficult than we thought. There's no harm to such an analysis; NEPA doesn't require that the agency choose the least environmentally harmful path, so even if it found a greater potential for environmental harm than it had previously acknowledged, BOEMRE could still decide to offer the lease. But everyone around, significantly including the lessees, the Coast Guard, and the state would better understand the risks.

Despite having promised in August to follow CEQ's advice for improving environmental analysis of offshore leasing, BOEMRE didn't see this as an opportunity to make good on that promise. Instead, it put its energy into finding excuses for not updating the analysis. BOEMRE claims that it didn't have to consider the blowout, because it wasn't one of the issues on which the remand was based. That *might* be legally tenable, but it's a weak argument. As long as federal discretion remains, the agency is obligated to update its analysis whenever significant new information comes to light. Here, the agency tried to give up its discretion, but the court's direction to reconsider means it could still pull back the lease sale. Under the circumstances, the better legal interpretation is that BOEMRE is obligated to fully evaluate anything the Deepwater Horizon experience may teach us about the potential environmental impacts. But even if the agency's interpretation were legally right, it's a bad idea to blow off the Gulf tragedy as irrelevant to drilling off Alaska. It may well be that the situation is significantly different; if so, this is an early opportunity to explain that in a way the public can understand and appreciate. Instead, BOEMRE takes the position that it won't do any more than it absolutely has to.

BOEMRE offers an additional rationale for its decision that isn't very reassuring:

> any change in likelihood of an oil spill from a blowout during exploration drilling would not alter the potential effects of the oil spill already analyzed.

Say what? Seems to me that risk is the product of probability times magnitude. Even if the effects of a blowout had already been considered, most rational people would think that a change in the likelihood of a blowout alters the decisionmaking calculus.

Oh, and by the way, BOEMRE also refuses to consider the environmental impacts of burning the hydrocarbons to be produced on leased lands (can you say global warming), on the grounds that it lacks the authority to control consumption once production occurs. Again, this is a mystifying claim. NEPA requires that agencies consider the direct and indirect environmental impacts of their actions, not just the effects over which they have direct control.

Bottom line — new name, same old agency. Time to think about real reform, not just redrawing the org chart. Meanwhile, this is just a draft. Let’s hope someone higher up the food chain at Interior or the White House notices what a shoddy draft it is and demands improvements before it’s used to justify a rubber-stamp affirmance of the lease sale.