

ATTORNEYS AT LAW

WRIGHT & TALISMAN, P.C.

1200 G Street, N.W.
Suite 600
Washington, D.C. 20005-3802
202-393-1200
FAX 202-393-1240
www.wrightlaw.com

James T. McManus
mcmanus@wrightlaw.com

November 19, 2004

ORIGINAL

Department of the Interior
Director, Minerals Management Service (MS 4230)
1849 C Street, N.W.
Washington, D.C. 20240-0001

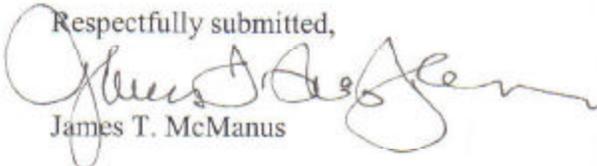
Delivered Via Messenger
To Room 4223

Re: Responsive Comments of The Williams Companies on MMS Advance Notice
Of Proposed Rulemaking
The Open And Non-Discriminatory Movement Of Oil And Gas
As Required By The Outer Continental Shelf Lands Act
69 Fed. Reg. 19,137 (April 12, 2004)

Ladies and Gentlemen:

Enclosed for filing are an original and one copy of the Responsive Comments Of The Williams Companies. Should there be any question or need for further information, please do not hesitate to call the undersigned at (202) 393-1200. Thank you for your attention to this matter.

Respectfully submitted,


James T. McManus

Attorney for
The Williams Companies

wmsfield/1088-004-207.doc

**UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
MINERAL MANAGEMENT SERVICE**

The Open and Non-Discriminatory)
Movement of Oil and Gas as) Advance Notice of
Required by the Outer Continental) Proposed Rulemaking
Shelf Lands Act)

ORIGINAL

**RESPONSIVE COMMENTS OF
THE WILLIAMS COMPANIES**

The Williams Companies (Williams) hereby requests that the Minerals Management Service (MMS) accept these comments in response to the "Reply Comments of Indicated Producers" (Reply Comments) filed on September 24, 2004, over three months after the close of the comment period in this matter. As shown below, those Reply Comments fail to address the judicial process which is explicitly prescribed in the Outer Continental Shelf Lands Act (OCSLA) for adjudicating complaints. Indicated Producers¹ would have the MMS ignore this explicit complaint adjudication process, contrary to the express will of Congress.

I. BACKGROUND

In the subject advance notice of proposed rulemaking, 69 Fed. Reg. 19,137 (Apr. 12, 2004) (Advance Notice), MMS provided "the public and interested parties an opportunity to provide input to the MMS regarding what actions or processes [they]

¹ BP America Production Co., Chevron U.S.A. Inc., ExxonMobil Corp., and Shell Offshore Inc.

believe the Secretary should initiate to ensure that pipelines provide open and non-discriminatory access.” *Id.* As to complaint resolution, MMS requested comments “regarding the possible structure of either an informal or formal complaint resolution process.” *Id.* at 19,139. In particular, MMS indicated that it was considering the establishment of a “hotline” for the reporting of complaints regarding perceived violations and requested comments on the “advantages and disadvantages of resolving the complaints through an informal negotiation or a more rigorous dispute resolution process” and “what the [more formal] resolution process could look like.” *Id.*

On the June 14, 2004 deadline for the submission of comments, Williams timely filed its comments (June 14 Comments) addressing each of the areas of inquiry set out in the Advance Notice. As to the subject of complaint process, Williams stated that OCSLA section 23² is quite explicit in prescribing the exclusive judicial process by which adversely affected parties can file complaints commencing civil actions (*i.e.*, “citizens suits”) in the appropriate U.S. District Court to challenge actions alleged to be in violation of the OCSLA. June 14 Comments at 5. Williams further commented that, without infringing upon the courts’ exclusive authority to adjudicate such complaints, MMS possibly could employ an informal, voluntary complaint resolution process, such as the “hotline” suggested in its notice. *Id.* at 8.

² 43 U.S.C. § 1349.

II. RESPONSE TO INDICATED PRODUCERS

A. The Notice Does Not Reflect The View That The OCSLA Provides MMS With Authority To Enforce The Open And Non-Discriminatory Access Requirements Via Administrative Adjudication Of Private-Party Complaints

Indicated Producers first distort MMS's reading of the *Williams*³ decision which precipitated the Advance Notice. In the Advance Notice, MMS quoted and paraphrased the court in *Williams* to say: "Without some explicit provision to the contrary (as exists for quantification of the ratable take duty), Congress presumably intended that enforcement would be at the hands of the obligee of the conditions [i.e., a person transporting oil or gas through the pipeline], the Secretary of the Interior (or possibly other persons that the conditions might specify)." *Id.* at 913-914." Advance Notice at 19,139 (emphasis added) (paraphrase added by MMS). In quoting this same language, Indicated Producers omit the above-bracketed language added by MMS, which elaborates that enforcement also is at the hands of the "obligee" shipper of gas. *See* Reply Comments at 5.

Thus, contrary to Indicated Producers' attempt to obscure this reference to private enforcement, MMS in the Advance Notice clearly recognizes the rights of complainants (*e.g.*, private-party shippers) to seek enforcement of the OCSLA. Indeed, this is precisely what Congress in OCSLA subsection 23(a) authorized by way of "citizens suits" in U.S. District Courts.

Indicated Producers' response to these explicit section 23 complaint resolution provisions discussed in *Williams*' June 14 Comments is utter silence; nowhere in the Reply Comments is there even a mention of OCSLA section 23.

³ *Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003).

B. The OCSLA Expressly Confers Upon The Courts Authority To Adjudicate Private Complaints Alleging Violations Of The Open And Non-Discriminatory Access Requirements

Indicated Producers further contend that “OCSLA provides the Department of Interior with the right to hold hearings to adjudicate violations and to fashion appropriate remedies.” Reply Comments at 6. Thus, according to Indicated Producers, OCSLA subsection 24(b)⁴ purportedly “provides MMS with the authority to establish hearing procedures to consider the complaints of shippers and other interested persons that a pipeline has violated the open and non-discriminatory access requirements of OCSLA.” *Id.* at 7.

Moreover, beyond such purported MMS authority to adjudicate private complaints, Indicated Producers claim that subsection 24(b) imposes an obligation upon the Department of Interior/MMS: “Inherent in this provision is the obligation of the Department of Interior to make a determination that a violation has occurred.” *Id.* Indicated Producers further contend: “In the event that MMS concludes that there is no violation, or refuses to bring an enforcement action [under subsection 24(a)] in a district court to remedy a violation, the complainant can bring its own action for judicial review in district court.” *Id.* at 8.

Once again, Indicated Producers ignore, and would have MMS ignore, the explicit enforcement process prescribed by Congress in OCSLA section 23 authorizing private-party complainants to file “citizens suits.” Instead, Indicated Producers would have MMS focus solely upon OCSLA section 24 dealing with government-instituted enforcement.

⁴ 43 U.S.C. § 1350(b).

Plainly though, OCSLA subsection 23(a) authorizes any adversely affected party to commence a civil action in U.S. District Court to compel compliance in the event of any alleged violation. Moreover, subsection 23(a)(6) makes clear the exclusivity of such citizen suits, *i.e.*, that “all” private-complainant suits challenging violations or seeking enforcement under the OCSLA “shall be undertaken in accordance with the procedures described in this subsection.” 43 U.S.C. § 1349(a)(6).⁵ The Conference Report in the legislative history to the 1978 amendments describes the exclusivity of such citizen suits:

Exclusivity of suits

The House amendment and Senate bill have similar provisions as to the exclusivity of the citizen suit and other judicial procedures. The House amendment provides that all suits challenging violations of the OCS Act or implementing regulations are to be in accordance with this new section. Rights under any other act or the common law to seek appropriate relief are not barred. The Senate bill provides that no rights under any statute or common law to seek enforcement of the act or any regulations or to seek any other relief are barred by this section. The conference report adopts the House language.

H.R. Rep. No. 95-1474, at 113-14 (1978).

Moreover, while subsection 23(a)(1)(B) precludes the commencement of a citizen suit if the Attorney General has commenced and is diligently pursuing a comparable action, such preclusion likewise is based on a civil action in court (as opposed to an administrative proceeding). One such comparable action is prescribed in subsection 24(a), where, upon request of certain Federal authorities, including the Secretary of Interior, the Attorney General shall institute a civil action in the appropriate U.S. District

⁵ But without barring any rights “under any other Act or common law to seek appropriate relief.” *Id.*

Court for a temporary restraining order, injunction or other appropriate enforcement remedy.

In stark contrast to these explicit Congressional directives requiring all OCSLA complainants to file suit in U.S. District Court (subject to the Attorney General's ability to preempt such citizen suits by commencing a comparable civil action), Indicated Producers instead seek to impose upon MMS the obligation to adjudicate such complaints in administrative hearings under subsection 24(b), which provides in pertinent part:

(b) Civil penalties; hearing

[I]f any person fails to comply with any provision of this subchapter, or any term of a lease, license, or permit issued pursuant to this subchapter, or any regulation or order issued under this subchapter, after notice of such failure and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than \$20,000 for each day of the continuance of such failure. The Secretary may assess, collect, and compromise any such penalty. No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing.

43 U.S.C. § 1350(b). Contrast the absence of any reference in subsection 24(b) to affected party-complainants with subsection 23(a)(1) of the "citizens suits" provisions, set out below, which explicitly authorizes such adversely affected persons to commence civil actions against alleged OCSLA violators:

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

43 U.S.C. § 1349(a)(1).

Indicated Producers defy reason in arguing that Congress would create in section 24, implicitly under the guise of the government's civil penalty powers, the right of a private complainant and the obligation of the Secretary of Interior to administratively adjudicate a private complaint alleging violation of the OCSLA, when Congress explicitly prescribed in section 23 the right of a private complainant to adjudicate such a complaint in court, subject to the right of the Secretary of Interior, through the Attorney General, to commence a comparable civil action in court.

It likewise defies reason that Congress intended the sole remedy under subsection 24(b), *i.e.*, payment of civil penalties to the U.S. Treasury, to be a remedy for private complaints. Civil penalties are obviously designed to vindicate the rule of law, *i.e.*, the public's interest in faithful execution of the OCSLA. Conversely, civil penalties paid to the Treasury do not redress any harm that a private complainant may suffer. And civil penalties that do not remedy private injury cannot bootstrap a private complainant into an administrative civil-penalty hearing process.

Indeed, when Congress wants to confer upon complainants any private rights of enforcement regarding civil penalties, it says so explicitly. Thus, highly instructive in this regard are other statutes that, like the OCSLA, have citizen suit and civil penalty provisions, but which also have significant distinctions that demonstrate clear differences in congressional intent. For example, in the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, we find that, when Congress intends such private enforcement of civil penalties, it explicitly says so in the citizen suit provision. *See* 33 U.S.C. § 1365(a) (in citizen suits “[t]he district courts shall have jurisdiction . . . to apply any appropriate civil penalties under section 1319(d) of this title.”) Likewise, Congress explicitly provided for civil

penalties in citizen suits under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et seq. See 42 U.S.C. § 6972(a) (“The district court shall have jurisdiction . . . to apply any appropriate civil penalties under section 6928(a) and (g) of this title.”) In the Clean Air Act, 42 U.S.C. §§ 7401, et seq., the originally enacted citizen suit provision did not permit private enforcement for civil penalties, but in the 1990 amendments to that act, Congress explicitly added such rights. See Pub. L. No. 101-549, section 707(a), amending 42 U.S.C. § 7604 by inserting: “, and to apply any appropriate civil penalties (except for actions under paragraph (2))”. In stark contrast, citizen suits under the OCSLA have absolutely no civil penalty enforcement rights.

Moreover, and of particular relevance here, when Congress, in authorizing agency-imposed civil penalties, has wanted to confer rights upon interested private parties (other than the alleged violator) to petition for, and participate in, administrative-civil penalty hearings, it explicitly says so in the civil penalties provision. An example is the Clean Water Act, in which Congress provided for citizen (private party) participation in such administrative penalty proceedings in clear and unmistakable terms. See 33 U.S.C. § 1319(g)(4).

In sum, Congress in the OCSLA could not have been more clear in delineating, on the one hand, the exclusive judicial powers to adjudicate private complaints via “citizens suits” in U.S. District Court and, on the other hand, the entirely administrative agency process to assess civil penalties, in which private complainants have no right to a hearing.

C. MMS's Rulemaking Authority Cannot Be Used To Create Authority To Administratively Adjudicate Private Complaints Where Congress Expressly Conferred This Adjudication Authority Upon The Courts

Lastly, Indicated Producers (Reply Comments at 9) argue that, under OCSLA subsection 5(a),⁶ the Secretary of Interior is given the power to “prescribe such rules and regulations as may be necessary to carry out” the provisions of the OCSLA relating to the leasing of the Outer Continental Shelf. According to Indicated Producers, “this broad rulemaking authority empowers the Department of Interior to establish effective procedures to govern its complaint process,” including “the right to hold hearings [under subsection 24(b)] to adjudicate alleged violations.” Reply Comments at 9.

Such a routine grant of authority to an agency to prescribe such rules and regulations as necessary to its administration of an act is not, however, a license to create authority beyond that conferred on the agency by Congress. *See, e.g., New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972) (Such provisions “are of an implementary rather than substantive character;” they “merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act.”)

As discussed above, Congress in OCSLA subsection 23(a) expressly conferred authority to adjudicate private complaints by creating in the courts exclusive private rights of action of complainants against OCSLA violators. Conversely, with absolutely no mention in subsection 24(b) of any private complainant, that provision cannot be interpreted as conferring such complaint adjudication authority in conjunction with an alleged OCSLA violator's right to an administrative hearing prior to assessment of a

⁶ 43 U.S.C. § 1334(a).

civil-administrative penalty. Stated differently, the Secretary of Interior's section 5 rulemaking powers augmenting its authority to administer various provisions of the OCSLA cannot be used to create authority to administer a private complaint resolution process which Congress expressly left to the courts to administer.

III. CONCLUSION

As stated in its June 14 Comments (at 8), Williams applauds MMS's efforts through the Advance Notice to consider carefully its statutory authority for any regulations before proposing them. Williams recommends that MMS carefully assess and articulate the pertinent division of authority which Congress delineated in the OCSLA. Indeed, the *Williams* case, which was the impetus for this Advance Notice proceeding, illustrates the need to avoid overstepping the lines of authority specified by Congress. Similarly, far from being the "poster child" for pipeline abuse in the OCS, the oft-referenced case in the North Padre Island area (discussed in the June 14 Comments at 4) ultimately was found by the court to have been based on a wholly misguided complaint filed by a shipper. That case is illustrative of the needless, wasteful litigation that can result from an agency's misapplication of statutory enforcement authority in the OCS. See *Shell Offshore Inc. v. Transcon. Gas Pipeline Corp.*, 100 FERC ¶ 61,254 (2002), *order on reh'g*, 103 FERC ¶ 61,177 (2003), *vacated and remanded sub nom., Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004).

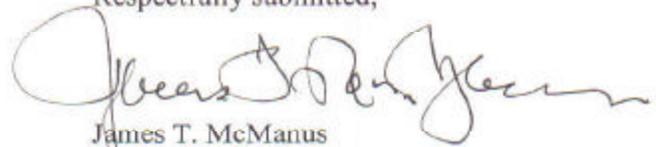
What these cases point up is that Congress purposefully chose not to subject OCS pipelines to common-carrier or other utility-type forms of pervasive regulation, such as those under the Interstate Commerce Act or the Natural Gas Act. See June 14 Comments at 2-3. Instead, in the OCSLA, Congress required that pipeline operations be governed

by competitive principles. *Id.* at 3. Correspondingly, Congress chose not to commit this form of competition-based regulation to administrative adjudication (such as that which typically accompanies common-carrier or other utility-type regulation), but rather to create private rights of action in court, together with the ability of the Federal government to commence comparable civil actions in court (akin to other statutory schemes addressing competition).

Conspicuously absent from Indicated Producers' Reply Comments is any mention whatsoever of OCSLA section 23. The reason is obvious. Indicated Producers would prefer that OCS pipelines be subjected to pervasive, command-and-control modes of regulation rather than be governed by the competitive principles mandated by Congress in the OCSLA.

Mari M. Ramsey, Senior Attorney
The Williams Companies
One Williams Center, 41st Floor
Tulsa, OK 74172-0152
(918) 573-2611

Respectfully submitted,



James T. McManus
Joseph S. Koury
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, DC 20005
(202) 393-1200

**Attorneys for
The Williams Companies**

wmsfield/1088-003-207