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September 24, 2004

BY MESSENGER

Director, Minerals Management Service
Attention: Policy and Management Improvement
1849 C Street, N.W.
Room 4223
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Re: The Open and Non-Discriminatory Movement of Oil and Gas as Required by the
Outer Continental Shelf Lands Act - Advance Notice of Proposed Rulemaking

Dear Sir/Madam:

Enclosed for filing is an original and one (1) copy of the **Reply Comments of Indicated Producers** in the referenced matter. Also enclosed are two (2) additional copies to be time-stamped and returned to my messenger.

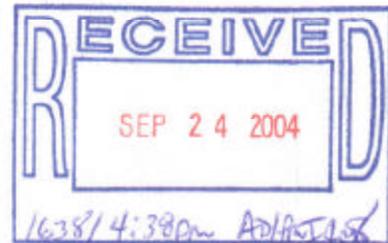
Thank you for your attention to this matter.

Very truly yours



Thomas J. Eastment

Enclosures



UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

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

The Indicated Producers¹ hereby submit these Reply Comments in response to the Comments that The Williams Companies (“Williams”) filed in response to the April 12, 2004 Advance Notice of Proposed Rulemaking (“Notice”) issued by the Minerals Management Service (“MMS”) of the United States Department of the Interior in the above-referenced proceeding. *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). Indicated Producers do not respond in these Reply Comments to all of the positions of Williams. Instead, Indicated Producers here respond only to Williams’ argument that MMS lacks statutory authority to establish procedures to adjudicate complaints that pipelines have violated the open and non-discriminatory access requirements under Sections 5(e) and (f) of the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §§ 1334(e) and (f). Specifically, Indicated Producers submit these Reply Comments to demonstrate that OCSLA expressly provides MMS with the authority to establish complaint procedures to adjudicate complaints against persons violating any provision of OCSLA, including the open and non-discriminatory access requirements under Section 5(e) and (f), or any regulation, order, lease, license, or permit issued thereunder.

¹ Indicated Producers are an *ad hoc* group of companies having interests in natural gas transported on interstate pipelines and handled in production-related facilities in the Gulf of Mexico. The members of the group for purposes of these Reply Comments are BP America Production Company, Chevron U.S.A. Inc., Exxon Mobil Corporation, and Shell Offshore Inc.

I. INTRODUCTION

In the Notice, MMS requested comments about, among other things, the appropriate complaint resolution process that MMS should institute pursuant to its authority under OCSLA “to regulate open and non-discriminatory access to pipelines operating under rights-of-way on the OCS.” Notice at 19,139. Specifically, MMS requested comments on “the possible structure of either an informal or formal complaint resolution process.” *Id.*

On June 14, 2004, the Indicated Producers submitted Comments supporting a complaint-based approach to address open and non-discriminatory access to pipelines providing transportation service pursuant to rights-of-way on the OCS.² Indicated Producers suggested that MMS should adopt a hotline mechanism, modeled on the Federal Energy Regulatory Commission’s (“FERC”) Enforcement Hotline, which would allow market participants to informally bring their complaints to MMS’ attention without the need for formal proceedings. To address situations where this informal process is unsuccessful, Indicated Producers suggested that MMS should put in place more formal procedures, also modeled on procedures at FERC, for the prosecution of a complaint. Under these formal complaint procedures, Indicated Producers explained that it was essential for MMS to provide for full discovery rights (including the right to take depositions) and hearings before Administrative Law Judges in which interested parties could present witnesses and cross-examine opposing witnesses. Indicated Producers further explained that with a more formal complaint process in place, MMS and industry participants would have both the convenience and efficiency of informal resolution and the availability of a formal process for more contentious or complex cases.

² Indicated Producers also pointed out that under the plain terms of Sections 5(e) and (f) of OCSLA, the non-discrimination and open access requirements apply only to transportation provided in pipelines subject to rights-of-way granted by the Department of the Interior, and do not apply to production-related services provided by producers under rights granted under oil and gas leases.

In Comments submitted on June 12, 2004, Williams argued that there is no need, or authority under OCSLA, for MMS to establish complaint procedures. In Williams' view, Congress intended the federal district courts to serve as the *exclusive* forum to hear complaints under Sections 5(e) and (f) of OCSLA. Williams Comments at 6. Nonetheless, Williams suggests that MMS could propose an "informal, voluntary complaint resolution process" that would not infringe on the authority given to the courts. *Id.* at 8.

II. EXECUTIVE SUMMARY

OCSLA provides MMS with broad authority to administer OCSLA, including the open and non-discriminatory access provisions in Section 5(e) and (f). As part of its authority, the Department of the Interior is empowered to "prescribe such rules and regulations as may be necessary to carry out" the provisions of OCSLA. OCSLA Section 5(a), 43 U.S.C. § 1334(a). Further, Section 24(b) of OCSLA, 43 U.S.C. § 1350(b), empowers the Department of the Interior to hold hearings to determine civil penalties for *any* violation of OCSLA or of regulations, orders, leases, licenses, or permits issued thereunder. Inherent in this broad rulemaking and adjudicatory authority is the authority to interpret the provisions of OCSLA and determine when a violation has occurred. Accordingly, OCSLA empowers the Department of the Interior to adjudicate whether a pipeline has violated OCSLA or any regulation, order, lease, license, or permit issued under OCSLA, and to assess civil penalties for such violations based on the record developed in the statutorily-mandated hearings.

The authority given to the district courts under OCSLA complements, rather than contradicts, MMS' authority to adjudicate complaints regarding violations of the open and non-discriminatory access requirements of OCSLA. Under Section 24(a) of the OCSLA, 43 U.S.C. § 1350(a), the Department of the Interior may institute, through the Attorney General or a United States Attorney, a civil action in a federal district court "for a temporary restraining order,

injunction, or other appropriate remedy” to enforce *any* provision of OCSLA or *any* regulation, order, lease, license, or permit issued thereunder. The hearing mechanism authorized under OCSLA Section 24(b) provides the Department with a forum to adjudicate the occurrence of a violation and to determine the appropriate remedy. In the event a pipeline refuses to cease its violation upon MMS’ issuance of an order finding a violation, MMS may then issue an order imposing civil penalties and seek judicial enforcement of its orders under Section 24(a). In the event MMS concludes that no violation has occurred, or decides not to institute a district court action to remedy a violation, the affected shipper or other interested person may institute its own action for judicial review in federal district court.

Accordingly, contrary to Williams’ argument, the district courts are not the exclusive forum to hear complaints alleging that a pipeline has violated the open and non-discriminatory access requirements of OCSLA. OCSLA plainly gives the Department of the Interior the broad authority to hold hearings to resolve complaints alleging that violations of the statute have occurred and to determine the appropriate remedy for any such violations. The district courts provide the forum to the Department of the Interior to seek enforcement of its orders in the event a pipeline refuses to comply and provide the forum to shippers and other interested persons to seek to compel compliance if the Department fails to do so.

III. DISCUSSION

A. **The Notice Correctly Reflects The View That OCSLA Provides MMS With Authority To Enforce The Open And Non-Discriminatory Access Requirements.**

MMS issued its Notice in response to the decision in *Williams Co. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003). There the D.C. Circuit vacated certain regulations issued by FERC pursuant to its purported authority to enforce the open and non-discriminatory access requirements of OCSLA. The Court concluded that the statute gave no general enforcement

authority to FERC, but rather gave such authority to the Department of the Interior. As the Court stated:

The crux of § 1334(e) is to require the Secretary (of the Interior) to impose open access conditions in his or her issuance of rights-of-way through submerged lands of the Outer Continental Shelf. . . . Without some explicit provision to the contrary . . . Congress presumably intended that enforcement would be at the hands of the obligee of the conditions, the Secretary of the Interior (or possibly other persons that the conditions might specify).

Id. at 913-14.

MMS' Notice sets forth the agency's proposed implementation of its enforcement authority recognized in *Williams*. The Notice reflects the view that OCSLA provides MMS authority to exercise this enforcement authority through adjudicatory procedures to resolve complaints relating to alleged violations of the open and non-discriminatory access requirements of OCSLA. Specifically, the Notice asserts that "MMS has authority to regulate open and non-discriminatory access to pipelines operating under rights-of-way on the OCS," and seeks comments on the nature of procedures that should be established to resolve complaints regarding violations of the open and non-discriminatory access requirements. Notice at 19,139. As explained below, MMS' reading of its statutory authority to enforce the open and non-discriminatory access requirements under OCS is well-founded.

B. MMS Has Express Statutory Authority To Implement Its Enforcement Power By Establishing Adjudicatory Procedures To Ascertain When Violations Of The Open And Non-Discriminatory Requirements Have Occurred And To Determine Appropriate Remedies.

In this rulemaking, MMS seeks to implement the enforcement authority that the D.C. Circuit recognized in *Williams* lies in the hands of the Department of the Interior. Specifically, MMS here seeks to determine, within the confines of its statutory authority, what procedures and substantive regulations will best implement its authority to enforce the open and non-discriminatory access requirements under OCSLA.

In Williams' view, MMS' authority is limited to the power to request that the Attorney General or a United States Attorney bring an action in district court to enforce the open and non-discriminatory access requirements. But this view, which would relegate MMS to an essentially ministerial role, fails to reflect the broad authority given to the Secretary of the Interior under OCSLA.

Section 5(a) of OCSLA, 43 U.S.C. § 1334(a), grants the Secretary of the Interior broad authority to administer the Act. This grant of authority includes the power to "prescribe such rules and regulations as may be necessary to carry out" the provisions of the Act. Inherent in the Secretary of the Interior's authority to administer the Act, and to promulgate regulations to implement its responsibilities, is the primary responsibility to interpret the terms of the Act. See *United States v. Mead*, 533 U.S. 218, 227-30 (2001). Where the Secretary's interpretation is in accordance with the plain language of the Act, or reflects a reasonable interpretation of ambiguous terms, the courts must give deference to the Secretary's interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

Accordingly, it is the Secretary's responsibility to determine in the first instance the meaning of the open and non-discriminatory access standard and, concomitantly, to determine the circumstances under which a pipeline violates the standard. There is no basis in the statute to support the view, put forward by Williams, that MMS may not establish reasonable procedures under which MMS may gather relevant facts in order to determine whether a pipeline has violated the open and non-discriminatory access standard as interpreted by the Secretary of the Interior. To the contrary, OCSLA provides the Department of the Interior with the right to hold hearings to adjudicate violations and to fashion appropriate remedies.

Under Section 24(b) of OCSLA, 43 U.S.C. § 1350(b), the Department of the Interior is explicitly empowered to hold hearings to determine civil penalties for *any* violation of

OCSLA or of the regulations, orders, licenses, leases or permits issued thereunder. The Section states:

[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) (emphasis added). Inherent in this provision is the obligation of the Department of the Interior to make a determination that a violation has occurred. A person charged with a violation may not be assessed a penalty until the person has been afforded a hearing. Clearly, the hearing must encompass the underlying question whether a violation has occurred because the primary defense against an assessment of a penalty is the argument that no violation has in fact occurred.

Accordingly, Section 24(b) of OCSLA 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. In the event MMS determines, after the requisite hearing, that a violation has occurred, MMS can assess a penalty of up to \$20,000 for each day of non-compliance.

If a pipeline refuses to cease its non-compliance and/or refuses to pay the assessed penalty, MMS can request the Attorney General or a United States Attorney to bring an action in federal district court to enforce the provisions of OCSLA and MMS' order finding a violation and imposing civil penalties. In such civil action, the Department can seek not only enforcement of civil penalties but also "a temporary restraining order, injunction, or other appropriate remedy" for the violation. As Section 24(a), 43 U.S.C. § 1350(a), states:

At the request of the Secretary [of the Interior], the Secretary of the Army, or the Secretary of the Department in which the Coast Guard is operating, the Attorney General or a United States attorney shall institute a civil action in the district court of the United States for the district in which the affected operation is located for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this subchapter, any regulation or order issued under this subchapter, or any term of a lease, license, or permit issued pursuant to this subchapter.

In the event that MMS concludes that there is no violation, or refuses to bring an enforcement action in a district court to remedy a violation, the complainant can bring its own action for judicial review in district court.

These provisions plainly demonstrate that MMS has full statutory authority to adjudicate complaints relating to pipelines' violations of the open and non-discriminatory access requirements of Sections 5(e) and (f) of OCSLA. Williams' citation to *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953) does not undermine this conclusion. The case relates to the lawfulness of certain conditions that the Secretary of the Interior imposed on rights-of-way granted under the Mineral Leasing Act ("MLA"). The OCSLA was not at issue. Further, the case did not address the Secretary's authority to adjudicate complaints regarding violations of the MLA. Instead, the case holds only that the Secretary had exceeded applicable statutory authority by imposing retroactively more expansive and onerous conditions on a previously granted right-of-way than permitted by statute. *Chapman* bears no relevance to the proper interpretation of the authority of the Department of Interior to adjudicate complaints pertaining to the violation of the open and non-discriminatory access condition under OCSLA.

C. MMS Also Has Broad Rulemaking Authority Under Which It May Establish Substantive Standards And Necessary Procedures To Govern The Adjudication Of Complaints.

In Section 5(a) of OCSLA, 43 U.S.C. § 1334(a), the Department of the Interior is empowered to administer leasing activities in the OCS, including the grants of rights-of-way for

pipelines in the OCS that are subject to the open and non-discriminatory access condition pursuant to Sections 5(e) and (f) of OCSLA, 43 U.S.C. § 1334(e) and (f). The authority is broad, providing the Department with the power to “prescribe such rules and regulations as may be necessary to carry out” its authority under OCSLA.

Under this broad grant of authority, MMS possesses authority to promulgate regulations that make clear that the imposition of unreasonable or discriminatory rates, terms and conditions constitute a violation of the open and non-discriminatory access standard. As Indicated Producers explained in their Initial Comments, MMS should develop its views as to the meaning of the non-discrimination and open access standards on a case-by-case basis through its adjudication of complaints. Indicated Producers’ Comments, dated June 14, 2004, at 27-30. Nonetheless, MMS should make clear in its regulations that the open access standard is not narrowly designed to prohibit only an overt denial of physical access. Specifically, MMS should make clear in its regulations that pipelines are prohibited from conditioning access on shippers’ agreement to unreasonable or discriminatory rates, terms, and conditions of service. It would remain for MMS to determine on a case-by-case basis what rates, terms, and conditions, when demanded by a pipeline as a condition to access, constitute an unreasonable or discriminatory denial of access.

Similarly, this broad rulemaking authority empowers the Department of the Interior to establish effective procedures to govern its complaint process. As contemplated by the statute, MMS can establish such complaint procedures as it deems appropriate to implement its authority to enforce the open and non-discriminatory access requirements. As explained above, this authority includes the right to hold hearings to adjudicate alleged violations of OCSLA, or violations of any regulation, order, license, lease or permit issued thereunder, and to fashion appropriate remedies in order to compel compliance.

IV. CONCLUSION

WHEREFORE, Indicated Producers urge the MMS to adopt the complaint procedures as described herein and in their Comments dated June 14, 2004.

Respectfully submitted,



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Dated: September 24, 2004