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**Subcommittee on Energy and Power**
**Committee on Energy and Commerce**
**U.S. House of Representatives**

**Hearing On The American Energy Initiative**

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**Written Statement**

Chairman Whitfield, Ranking Member Rush, and Members of the Subcommittee, thank you for inviting me to testify today regarding the draft Jobs and Energy Permitting Act of 2011. I appreciate the opportunity to bring to your attention some of the factors we believe you should consider as you develop this legislation.

On March 30th the President released the Blueprint for a Secure Energy Future, which recognizes the importance of producing domestic oil safely and responsibly, while also taking steps to reduce our dependence on oil, wherever it comes from, by leveraging cleaner, alternative fuels and greater energy efficiency. We have already made progress towards these objectives. Last year, America produced more oil than we had since 2003, and we announced ground-breaking fuel efficiency standards for cars and trucks that, over the life of the vehicles, will conserve 1.8 billion barrels of oil and save thousands of dollars for the owners of those vehicles.[1]

**Background on EPA Permitting of OCS Sources**

The Clean Air Act (CAA) is one of the tools that helps ensure that oil production proceeds safely and responsibly. Section 328 of the Clean Air Act vests with EPA the responsibility for permitting air pollution sources located in the Outer Continental Shelf (OCS) other than those in the western Gulf of Mexico.[2] Exploration and drilling activities on the OCS can emit substantial amounts of pollution—during the 168-day Arctic OCS drilling season, one exploratory OCS source could emit approximately as much on a daily basis as a large state-of-the art refinery, for example—and that pollution can adversely affect the health of people living and working near and along the coastline. EPA is the primary permitting authority for OCS air permits, but can delegate it to a state or local government.[3] The process and requirements for

[1] White House Blueprint for a Secure Energy Future, March 30, 2011 http://www.whitehouse.gov/sites/default/files/blueprint_secure_energy_future.pdf

[2] Air quality impacts associated with the exploration, development, drilling and production of mineral activities in the Outer Continental Shelf (OCS) in the western Gulf of Mexico (i.e., off the coast lines of Alabama, Mississippi, Louisiana and Texas) are under the jurisdiction of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), the former MMS, in the Department of the Interior pursuant to the Outer Continental Shelf Lands Act (OCSLA). Air permitting activities in the eastern Gulf of Mexico and the rest of the OCS are under EPA's jurisdiction.

[3] EPA has issued regulations to establish requirements to address pollution from OCS sources. As required in the statute, EPA's implementing regulations at 40 CFR Part 55 make potential sources within 25 miles of the States'

these OCS permits are essentially the same as for PSD permits for on-shore sources. Air permits are not the only approvals required for off-shore activities, whether in the Arctic or the Gulf, and EPA works closely with the National Oceanic Atmospheric Administration (NOAA), as well as the Bureau of Ocean Energy Management (BOEMRE) and the Fish and Wildlife Service (FWS) within the Department of the Interior (DOI).

After an initial burst of OCS air permit applications in the early 1990's, there was a lull until the last few years. Nine OCS permit applications are currently pending at EPA. Part of this increased interest in OCS permitting arises from exploratory drilling activities, particularly in the Arctic. Permitting these activities can be complex due to the variety of drilling equipment and support vessels. Energy exploration activities in the Arctic, which need to address the challenges of operating in a climatic environment very different from the Gulf of Mexico, are raising a number of issues that EPA and other agencies have not had to address in the Gulf. To help address these issues responsibly and expeditiously, the President's *Blueprint* established a cross-agency team to facilitate a more efficient offshore permitting process in Alaska, while ensuring that safety, health, and environmental standards are fully met. EPA participates in this team, and has also established an intra-agency work group comprised of regional and headquarter permit experts to help expedite resolution of OCS air permitting issues.

**Comments on the Draft Jobs and Energy Permitting Act of 2011**

The draft bill would amend section 328 both procedurally and substantively. My comments on these changes are rooted in our support for a common sense approach to OCS development that balances the need to explore for and produce energy, with the need to protect the public health and the environment in surrounding areas.

The changes the bill would make to the process of issuing and reviewing a permit are quite significant. They would deprive nearby residents of an important avenue to voice concerns about matters affecting their communities, and increase litigation (and hence extend the length of time when there would be uncertainty about the validity of a permit). The bill is designed to preclude citizens from appealing permit decisions to the Environmental Appeals Board, and thus would force them into a more expensive, lengthier process in the U.S. Court of Appeals for the District of Columbia. In some respects, the change is one-sided, for the bill seems to preserve some ability for the permit applicant, but not other interested parties, to seek reconsideration by EPA of an adverse permit decision.

The EAB review process not only provides a meaningful opportunity for communities who may be affected by these operations to have their concerns addressed, it also expedites the process of obtaining a final, valid permit by facilitating a process that is faster and more certain

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seaward boundaries subject to the same requirements as would be applicable if the source were located in the corresponding onshore area. EPA regulations also address OCS sources beyond 25 miles of the States' seaward boundaries. EPA regulations provide that OCS sources are subject to federal Prevention of Significant Deterioration (PSD) permitting rules (40 CFR Part 52.21) and the federal Title V operating permit rules (40 CFR Part 71). Under the rules, a State may choose to seek delegation of EPA's authority to implement and enforce the program – either for areas within or beyond the 25 mile limit, or both.

for the applicant in the event of an appeal. That may sound strange or hard to believe, so let me explain.

Currently, if a group of subsistence fishermen were concerned that an EPA permit did not adequately address the effects on their health of air pollution from drilling rigs in or near their fishing grounds, they could appeal the decision to the Environmental Appeals Board. They would not be required to hire a lawyer; they could attend oral arguments via video conference; and they would know that their concerns were being heard by experts. This bill would instead force appeals into the court system – and not even the closest U.S. Court of Appeals. Alaska fishermen would either need to hire a D.C. attorney or fly a local attorney all the way to D.C.

Because the Board's decisions currently may be challenged in court, the Board may seem like it adds an extra step that prolongs the permit process. The actual experience is quite different. Rather than adding a step, the Board usually serves as a cheaper, faster, more expert substitute for judicial review. Since the Board was established in 1992 to review permit appeals, including PSD preconstruction air permit appeals,[4] there have been just over 100 PSD permits (both onshore and offshore) appealed to the Board. On average, the Board decides PSD appeals in just over five months from the filing of the appeal, much faster than judicial cases are resolved.

Although the Board has always expedited PSD appeals, it is working to conclude permit actions even faster. It has recently issued a new Standing Order governing PSD permit appeals (including OCS permit appeals) that will reduce the time allowed for briefing, put limits on the length of briefs, create a presumption against reply briefs and oral arguments, and allow summary disposition of simple appeals without the need for written opinions, including a summary affirmance procedure for cases that have been remanded and are subsequently appealed.[5] When an appeal is filed following an EAB remand, generally the EAB considers only issues arising out of the remand and will not consider any new issues that could have been raised in the initial appeal but were not. Of the PSD permits that have been remanded to the Agency, only five have been appealed back to the EAB after the Agency has responded to the remand.[6]

In almost all cases, the Board's decision resolves the disputes and concludes litigation, avoiding protracted federal court review. Since 1992, only four of the Board's PSD permit decisions have been reviewed by a federal court, and no Board PSD decision has ever been overturned.[7] The process changes in this bill would not only mute the voices of citizens on decisions that affect their communities, it would likely increase federal court litigation, which would lengthen the permit applicants' period of uncertainty about the validity of its permit.

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[4] 57 Fed. Reg. 5320 (Feb. 13, 1992).

[5] http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/a47db3a99cab46698525788000414196/$FILE/NSR%20Standing%20Order%204-19-2011.pdf

[6] An appeal after remand was filed for a sixth PSD permit, but the project was abandoned while the appeal was pending.

[7] Only 3 cases have been appealed and considered by a federal court of appeals. All were affirmed. A fourth case remains pending (Chabot-Las Positas Comm. College Dist. V. EPA (9th Cir. Docketed Mar. 9, 2011)).

In addition to changes described above, which are largely procedural, the legislation also raises serious questions about the scope of compliance requirements themselves. The bill makes three substantive changes to section 328. It would preclude the Agency from requiring OCS sources to demonstrate compliance with health-based air quality standards at any point offshore, regardless of the number of people exposed at offshore locations. It would establish when exploration platforms and drill ships are an OCS source. It also would preclude emission control requirements under subpart 1 of part C of title I of this Act from being set for support and service vessels associated with an OCS source. Although I would be happy to discuss these with you further in response to questions, I would like to raise a few issues now.

In evaluating this and other substantive provisions of the bill, it is important to consider whether the requirements in question are needed to meet the Clean Air Act's broad objectives of protecting public health and the environment, as it has done for more than 40 years. In 2020, Clean Air Act programs adopted since 1990 will provide $2 trillion in benefits – over thirty dollars in benefits for every dollar spent.[8] In just the last year, these programs are estimated to have reduced premature mortality risks equivalent to saving over 160,000 lives; spared Americans more than 100,000 hospital visits; prevented millions of cases of respiratory problems, including bronchitis and asthma; enhanced productivity by preventing 13 million lost workdays; and kept kids healthy and in school, avoiding 3.2 million lost school days due to respiratory illness and other diseases caused or exacerbated by air pollution.[9]

Common sense says that we should avoid requiring pollution controls that are unnecessary. For example, I understand why you would question the value of requiring compliance with health-based standards in locations where there is no obvious human exposure to the emissions. However, not requiring compliance with health-based air quality standards at any point off the shore line, as the draft bill does, could result in significant human exposure to air pollution from OCS sources, including nitrogen dioxide, particles, sulfur dioxide, and pollution that causes ozone. Usually there is substantial human activity between the shore line and states' seaward boundaries (generally three to nine miles offshore). Substantial human activity may also occur on the inner OCS (within 25 miles of the states' seaward boundaries) and, to a lesser extent, on the outer OCS. Off of the coast of Alaska, subsistence hunting and fishing is practiced by native populations. In addition, there are commercial fishing activities along the East and West Coasts; as well as recreational activities such as cruise ships and pleasure craft; commuter ferries; and other sources of human exposure in most of the U.S. Territorial Waters. Islands located within the inner OCS can be permanently populated or have significant recreational activity. Choosing the wrong point of measurement for compliance with the health-based standards could harm the health of the people we should be protecting.

Another factor to consider is how the requirements you set for OCS sources will affect on-shore sources. For example, if OCS sources are not required to use cost-effective pollution controls, any resulting degradation of air quality could result in the need for more stringent

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[8] USEPA (2011). *The Benefits and Costs of the Clean Air Act from 1990 to 2020*. Final Report. Prepared by the USEPA Office of Air and Radiation. February 2011. Table 7-5.
[9] Id. Table 5-5.

controls for on-shore sources. It was this very concern about OCS sources contributing to air quality problems in California that led to the enactment of section 328.

In closing, EPA supports the use of an efficient permitting process to develop domestic energy supplies safely and responsibly. Our responsibility is to protect the health of Americans, but we must do so with common-sense measures that also allow us to strengthen our domestic energy supply. As part of the Administration's interagency task force on Arctic energy permitting, we are committed to finding ways to improve our processes and better integrate our work with that of other Federal agencies involved in permitting Arctic OCS energy activities.

Again, I appreciate the opportunity to provide the Agency's views as you develop this legislation. I look forward to your questions.