



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office for Coastal Management
Silver Spring Metro Center, Building 4
1305 East-West Highway
Silver Spring, Maryland 20910

Ms. Kimberly Cole, Administrator
Delaware Coastal Management Program
DNREC, Division of Climate, Coastal & Energy
100 W. Water St., Suite, 7B
Dover, DE 19904

NOV - 8 2018

Re: Unlisted Activity Review Request – BOEM Permit E18-002

Dear Ms. Cole:

This letter responds to your August 24, 2018, request for approval to review an application by TDI Brooks International, Inc. (TDI Brooks) for a geological and geophysical (G&G) permit from the Bureau of Ocean Energy Management (BOEM) to conduct a survey in federal waters in the South and Mid-Atlantic.

For the reasons stated below, the National Oceanic and Atmospheric Administration's (NOAA's) Office for Coastal Management denies the request. The Office for Coastal Management finds that the state has not met its burden of showing that the proposed survey would have reasonably foreseeable effects on coastal uses or resources of the Delaware coastal zone.

CZMA UNLISTED ACTIVITY REVIEW REQUESTS

The Coastal Zone Management Act (CZMA) authorizes states to review federal actions that may have reasonably foreseeable effects on the uses or resources of the coastal zone of the state for consistency with the enforceable policies of the state coastal management program.¹

Federal license or permit activities (activities) that are listed in a state's federally-approved coastal management program and that would occur within a state's coastal zone are subject to federal consistency review.² Listed activities are presumed to have coastal effects and provide notice to applicants and federal agencies that those activities are subject to state review pursuant to the CZMA federal consistency requirements.

If a federal license or permit activity is unlisted, a state is required under 15 CFR § 930.54 to request approval from the Office for Coastal Management if the state wants to review the activity.³ If a state wants to have automatic review of federal license or permit activities outside its coastal zone, it can submit to the Office for Coastal Management a request to add to its coastal management program a "geographic location description" within which specified listed activities would be subject to federal consistency review.⁴ If a federal license or permit activity is

¹ 16 U.S.C. § 1456(c), 15 CFR § 930.53(a).

² 15 CFR § 930.53(a).

³ *Id.* § 930.54.

⁴ *Id.* § 930.53(a).

listed, but would occur outside the state's coastal zone and the state does not have a NOAA-approved geographic location description for the activity, a state can request that the Office for Coastal Management approve the state's review as an unlisted activity under 15 CFR § 930.54.⁵

For an unlisted activity request under 15 CFR § 930.54, a state must meet two criteria. First, the state must make the request within 30 days of receiving notification of the application to the approving federal agency (in this case BOEM).⁶ Second, the state must show that the proposed activity may have reasonably foreseeable effects on the uses or resources of the coastal zone of the state.⁷

In requesting approval to review an activity, states have the burden of showing that a proposed activity would have reasonably foreseeable effects on coastal uses or resources of the state.⁸ Effects include direct and indirect effects.⁹ The Office for Coastal Management's decisions on state requests to review unlisted activities are fact-specific, case-by-case evaluations based on the totality of specific circumstances and information provided.¹⁰

THE PROPOSED ACTIVITY

The activity that is the subject of this request is the application by TDI Brooks for authorization from BOEM for proposed piston coring and heat flow measurements for stratigraphic, geographic studies and basin modeling in the federal waters of the South and Mid-Atlantic (E18-002).

TDI Brooks proposes to conduct piston coring with barrel lengths of 6 meters (19.6 feet) and 18 meters (59 feet),¹¹ leaving a hole diameter of 8.25 inches.¹² The potential footprint of the coring apparatus is 24 inches.¹³ TDI Brooks proposes taking 103 coring samples over a roughly 225,262 square mile area of federal waters extending offshore from Delaware to northern Florida. The closest two samples would be taken 17 miles apart with an average distance of 35 miles between samples. TDI Brooks would conduct all corings on federal submerged lands. The collection of samples would be over a four-month period.¹⁴

Since the proposed survey is entirely in federal waters and the activities are not listed in the state's coastal management program federal consistency list, the state must request that the

⁵ *Id.* §§ 930.53(a), 930.54.

⁶ 15 CFR § 930.54(a)(1).

⁷ *Id.* § 930.54(b), (c).

⁸ *Id.* § 930.54(b).

⁹ *Id.* § 930.11(g).

¹⁰ 65 Fed. Reg. 77,124, 77,130 (Dec. 8, 2000).

¹¹ TDI Brooks, International, Inc., Application for Permit to Conduct Geological or Geophysical Exploration for Mineral Resources or Scientific Research on the Outer Continental Shelf, May 29, 2018, at p. 6. (hereinafter referred to a TDI Brooks Application)

¹² Email from Kullman, Michael, TDI Brooks, to Kerry Kehoe, NOAA (Nov. 5, 2018).

¹³ *Id.*

¹⁴ TDI Brooks Application at p. 6.

Office for Coastal Management approve the state's review of the proposed action pursuant to the requirements of 15 CFR § 930.54.

THE STATE COASTAL EFFECTS ASSERTIONS

The Delaware Coastal Management Program asserts that there is a legal presumption, or at least an inference, of coastal effects from geophysical and geological surveys. The state points to the authorization within Section 307 of the CZMA for state review of Outer Continental Shelf (OCS) exploration plans.¹⁵ The state notes that the BOEM Outer Continental Shelf Lands Act (OCSLA) regulations define "exploration" to include geophysical and geological surveys using coring.¹⁶ The state further notes that the NOAA CZMA federal consistency regulations provide that "[i]n the event the person does not consolidate such OCS-related permit activities with the State agency's review of the OCS plan, such activities will remain subject to individual State agency review under the requirements of subpart D of this part."¹⁷ According to the state, the only distinction is in the review process, rather than effects, for exploration activities under an OCSLA exploration plan, and exploration activities outside of an exploration plan.

The state further asserts that BOEM acknowledges reasonably foreseeable coastal effects by citing the suite of required mitigation measures described in "Alternative B" of the BOEM Atlantic G&G Programmatic Environmental Impact Statement (PEIS).¹⁸

The state makes more specific assertions regarding direct, secondary and cumulative adverse effects to marine invertebrates, benthic organisms, air quality and commercial and recreational fisheries.

The state cites substantial sales, expenditures and employment associated with recreation and commercial fishing that extend beyond state waters to offshore areas east and south of Delaware's Atlantic coastline, encompassing designated artificial reef sites, and the Lindenkohl, Spencer, Wilmington and Baltimore Canyons that occur on the edge of the outer continental shelf.¹⁹ The state supports its effects assertion by citing the BOEM PEIS, which states that "direct impacts to commercial fisheries include entanglement issues with bottom fisheries," and that "indirect impacts associated with G&G studies that disturb the seafloor may include destruction and/or alteration of habitat, and disturbance of benthic communities."²⁰ The state also expresses concerns about exclusion zones and the displacement of target fish species.²¹

¹⁵ Letter from Cole, Kimberly, DNREC, to Dr. Jeffrey Payne, NOAA Office for Coastal Management by email from Holmes, Jennifer, DNREC (Aug. 24, 2018) (hereinafter cited as the DNREC Letter), at pp. 1, 2.

¹⁶ DNREC Letter at pp. 1, 2, citing 30 CFR § 250.105.

¹⁷ *Id.* at p. 2, citing 15 CFR § 930.81.

¹⁸ *Id.* citing BOEM, Final Programmatic Environmental Impact Statement (PEIS) for Atlantic OCS Proposed Geological and Geophysical Activities, Mid-Atlantic and South Atlantic Planning Areas (OCS EIS/EA BOEM 2014-001) (hereinafter cited as the BOEM PEIS).

¹⁹ *Id.* at p. 3.

²⁰ *Id.*

²¹ *Id.* at p. 4.

A species of particular concern to the state is the horseshoe crab. Delaware Bay hosts the world's largest concentration of spawning horseshoe crabs. The annual spring event coincides with shorebird migration from the southern hemisphere to the arctic with the horseshoe crab eggs being an important food source for the migrating birds, which include state-listed endangered and federally-listed threatened species. In addition to attracting birds, the arthropod orgy attracts birdwatchers and voyeuristic tourists to the Delaware beaches.²²

Horseshoe crabs are food-chain consumers preying on thin-shelled clams, and consumed within the food web as bait for whelk and conch fisheries. The state asserts that the impacts to shellfish beds from coring could extend to the horseshoe crabs that prey upon the shellfish. The state notes that the shellfish themselves are important ecologically and economically.²³

Last, the state asserts that offshore oil and gas exploration including G&G studies could result in air emissions from vessels during the survey, particularly when idling.²⁴

OFFICE FOR COASTAL MANAGEMENT FINDINGS

1. Timeliness of the Request

On July 25, 2018, BOEM notified state coastal management programs extending from New Jersey to Florida of the TDI Brooks application for the proposed G&G permit.²⁵ The Office for Coastal Management notified the states that August 24, 2018, was the deadline for submitting state requests for approval to conduct CZMA reviews of the proposed survey.²⁶

The State of Delaware submitted its request on August 24, 2018.²⁷ The Office for Coastal Management finds that the state's request was timely.

2. Coastal Effects

The Office for Coastal Management does not agree that there is a legal presumption or inference of coastal effects by the operation of the CZMA, OCSLA, or their implementing regulations.

The CZMA § 307(c)(3)(B) does not establish a requirement that OCS exploration plans are automatically subject to review under the CZMA absent any determination of coastal effects. Section 307(c)(3)(B) states in relevant part:

any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been

²² *Id.*

²³ *Id.* at pp. 4-5.

²⁴ *Id.* at p. 5.

²⁵ Email from Cameron, Brian, BOEM, "Re: Notification of Application Submittal for Mid- and South-Atlantic Geological and Geophysical Survey Activities." Message to Shana Kinsey, FL DEP, *et al.* (July 25, 2018).

²⁶ Email from Kehoe, Kerry, NOAA, "Fwd: Notification of Application Submittal for Mid- and South-Atlantic Geological and Geophysical Survey Activities." Message to Kimberly Cole, DNREC, *et al.* (July 25, 2018).

²⁷ DNREC Letter.

leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land or water use or natural resource of the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with the enforceable policies of such state's approved management program and will be carried out in a manner consistent with such program.²⁸

As NOAA stated in the preamble to its 2006 revisions to the CZMA federal consistency regulations, not all OCS plans are subject to state review; state authority “stops at the point where coastal effects are not reasonably foreseeable.”²⁹

Regardless of what authority a state may have to review OCS exploration plans under CZMA § 307(c)(3)(B), that section is not applicable to this matter. The controlling regulations are those under subpart D of the CZMA federal consistency regulations that govern federal licenses and permits. The specific section that applies is 15 C.F.R. § 930.54, which requires state unlisted activity requests to contain an analysis that supports the state agency's assertion that coastal effects are reasonably foreseeable.³⁰ The burden for arguing coastal effects under 15 C.F.R. § 930.54 always rests with the requesting state. There is no presumption of effects.

The Office for Coastal Management also disagrees with the claim that effects from the proposed coring are acknowledged in the BOEM PEIS descriptions of required mitigation measures in Alternative B – the Preferred Alternative.³¹ The discussion of required mitigation measures in Alternative B is for seismic surveys, which are not being proposed by TDI Brooks. In regards to seafloor disturbances that could result from seafloor sampling activities such as coring, the discussion under Alternative B found such impacts to be negligible.³²

Although the Office for Coastal Management finds that the state has established that coastal uses and resources of the state are found in the area of interest for the proposed survey, the impacts, if any, to those uses and resources do not amount to a reasonably foreseeable effect to coastal uses or resources of the state.

In considering the more specific effects arguments of the state, we note that at the time the state submitted its request, information regarding the number or spacing of coring sites was not available. TDI Brooks subsequently submitted this information to the Office for Coastal Management.³³

At their closest proximity to each other, the corings would be 17 miles apart with an average

²⁸ 16 U.S.C. § 1456(c)(3)(B) (underline added for emphasis).

²⁹ 71 Fed. Reg. 788, 791 (Jan. 5, 2006).

³⁰ 15 CFR § 930.54(b).

³¹ See BOEM PEIS 2.2, at pp. 2-35 to 2-38.

³² *Id.* at p. 2-45.

³³ Email from Kullman, Michael, TDI Brooks, to Kerry Kehoe, NOAA Office for Coastal Management (Sept. 14, 2018).

separation distance of 35 miles.³⁴ The diameter of the corings would be 8.25 inches with the footprint of the apparatus being 24 inches.³⁵

Despite the assertion of impacts, there are no allegations by the state that the impacts would affect population or exploitation levels of any stock of species or even be perceptible at a population or exploitation level. The BOEM PEIS concluded that potential impacts to soft bottom benthic communities from seafloor sampling would not be detectable and therefore would be negligible.³⁶ Under the significance criteria used in the BOEM PEIS, negligible impacts to benthic communities include impacts to soft bottom benthic organisms that might produce extremely small changes in abundance of individual species but no overall changes in species composition, community structure, and/or ecological functioning of soft bottom communities.³⁷ The BOEM PEIS further states that BOEM would require site-specific information regarding potential sensitive benthic communities (including hard/live bottom areas, deepwater coral communities, and chemosynthetic communities) prior to approving any G&G activities involving seafloor disturbance.³⁸ BOEM would use this information to establish setbacks from sensitive benthic communities to ensure that physical impacts to benthic communities are avoided.³⁹

The Office for Coastal Management finds that the assertions by the state of reasonably foreseeable effects to commercial and recreational fishing misinterpret the findings and conclusion of the BOEM PEIS. While the BOEM PEIS acknowledges the potential for disruptions to commercial and recreational fishing albeit on a very small scale, that discussion is in the context of considering all of the various types of surveys that could occur when surveying areas for potential oil and gas deposits, siting structures for renewable energy production, and identifying marine mineral borrow sites.⁴⁰ An important qualifier on those findings is the phrase “[d]epending on the amount and frequency.”⁴¹ Given the nature of the operations, scale and dispersion of the proposed coring, the Office for Coastal Management finds the argument of potential disruption and user conflicts with commercial and recreational fishing is unpersuasive.

In regards to the assertion of effects to air quality from the survey vessels, there is nothing offered in the analysis by the state to support this assertion other than a general concern.

CONCLUSION

For the reasons stated above, the Office for Coastal Management finds that the state has not met its burden of demonstrating that there may be reasonably foreseeable effects from the proposed survey on state coastal resources or uses. Therefore, the Office for Coastal Management denies the request by the state for approval to conduct a CZMA review of the proposed survey.

³⁴ *Id.*

³⁵ Email from Kullman, Michael, TDI Brooks, to Kerry Kehoe, NOAA (Nov. 5, 2018).

³⁶ BOEM PEIS, at p. 4-21.

³⁷ *Id.* at p. 4-16.

³⁸ *Id.* at p. 4-20.

³⁹ *Id.* at p. 4-25.

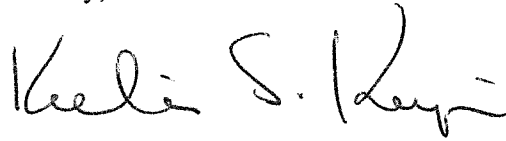
⁴⁰ *Id.* at pp. 4-161 to 4-162.

⁴¹ *Id.* at p. 4-162.

These findings and this denial do not preclude the state and applicant from discussing and attempting to resolve concerns that the state may have. Both are encouraged to do so.

Please contact David Kaiser, Senior Policy Analyst, Office for Coastal Management, at 603-862-2719, or Kerry Kehoe, Federal Consistency Specialist, Office for Coastal Management, at 240-533-0782, if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey L. Payne". The signature is fluid and cursive, with the first name "Jeffrey" being more prominent and the last name "Payne" following in a similar style.

Jeffrey L. Payne, Ph.D.
Director

cc:

Michael Kullman, TDI Brooks
Dr. James M. Brooks, TDI Brooks
Brian Cameron, BOEM
Jennifer Holmes, DNREC