

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OCEANA; DEFENDERS OF WILDLIFE;)
NATURAL RESOURCES DEFENSE)
COUNCIL; and CENTER FOR)
BIOLOGICAL DIVERSITY)

Plaintiffs,)

v.)

COMPLAINT

BUREAU OF OCEAN ENERGY)
MANAGEMENT; TOMMY P.)
BEAUDREAU, Director, Bureau of)
Ocean Energy Management; UNITED)
STATES DEPARTMENT OF THE)
INTERIOR; and KEN SALAZAR,)
Secretary of the Interior,)

Defendants,)

Case: 1:11-cv-02208
Assigned To : Bates, John D.
Assign. Date : 12/13/2011
Description: Admn. Agency Review

Plaintiffs Oceana, Defenders of Wildlife, Natural Resources Defense Council, and Center for Biological Diversity (collectively, "Plaintiffs"), by and through their undersigned counsel of record, file this Complaint.

INTRODUCTION

1. This Complaint challenges the Defendants' unlawful approval of Lease Sale 218, the first Gulf of Mexico lease sale since the 2010 BP *Deepwater Horizon* oil spill catastrophe, without taking into account what this disaster taught us about the likelihood of oil spills, the difficulty of cleaning them up, and their environmental impact on the resources and species of the Gulf.

2. In approving this lease sale, the Bureau of Ocean Energy Management (“BOEM”)¹ violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, by relying on a Supplemental Environmental Impact Statement (“SEIS”) that fails to adequately consider the impacts of the *Deepwater Horizon* spill; does not incorporate new understandings of the risks posed by offshore drilling, particularly in deepwater; ignores new information regarding the oil spill containment and response capabilities of industry; and fails to assess impacts using a post-*Deepwater Horizon* baseline for species and habitats in the Gulf. In addition, the SEIS fails to adequately consider alternatives to the proposed action.

3. Plaintiffs seek a declaration that Defendants BOEM, Tommy P. Beaudreau, Director of BOEM, the Department of the Interior, and Ken Salazar, Secretary of the Interior (collectively hereinafter “BOEM”) have violated NEPA. Plaintiffs additionally seek vacatur and remand of the Final SEIS, until such time as BOEM complies with NEPA.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (federal officer action), 28 U.S.C. §§ 2201 and 2202 (declaratory judgment), 5 U.S.C. §§ 551 *et seq.* (APA), 42 U.S.C. §§ 4321 *et seq.* (NEPA), and 43 U.S.C. § 1349(b) (OCSLA).

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 43 U.S.C. § 1349(b). Defendants all reside in this district.

¹ BOEM, formerly known as the Minerals Management Service, was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement in 2010. *See* 75 Fed. Reg. 61,051 (Oct. 4, 2010). In late 2011, the agency was again reorganized. The new Bureau of Ocean Energy Management (“BOEM”) is responsible for managing development of offshore resources; a new Bureau of Safety and Environmental Enforcement was created to enforce safety and environmental regulations. For simplicity, this Complaint refers to the relevant agency by its current name when discussing activities both prior and following the *Deepwater Horizon* spill.

PARTIES

A. Plaintiffs

6. Plaintiff Oceana, Inc. is a nonprofit international advocacy organization dedicated to protecting and restoring the world's oceans through policy, advocacy, science, law, and education. Oceana has over 86,000 members around the world, including 7,470 members in the Gulf states. Oceana is organized under the laws of the District of Columbia, and maintains its headquarters in Washington, D.C. It has offices or staff in ten states (Alaska, California, Delaware, Florida, Maine, Massachusetts, New York, North Carolina, Oregon, and Virginia) and six foreign countries (Belgium, Belize, Chile, Denmark, Spain, and the United Kingdom). Through its policy, scientific, litigation, communications, and grass-roots activities, Oceana promotes the protection of marine species and clean, responsible offshore energy development and opposes environmentally harmful offshore oil drilling. Oceana's members use and enjoy the oceans, including the Gulf of Mexico, for a variety of activities, including fishing, scuba diving, snorkeling, boating, swimming, beach walking, and study. Oceana's members value a healthy marine environment. They are concerned about and directly affected by the environmental injuries caused by drilling operations and oil spills.

7. Defenders of Wildlife ("Defenders") is a national nonprofit organization dedicated to the protection and restoration of all native wild animals and plants in their natural communities. Headquartered in Washington, D.C., and with offices spanning from Florida to Alaska, Defenders has nearly 400,000 members across the nation, including over 44,000 members from states bordering the Gulf of Mexico. Defenders is a leader in the conservation community's efforts to protect and recover threatened and endangered species, including sea turtles, whales, birds, and manatees impacted by the *Deepwater Horizon* spill and other Gulf activities on the

Outer Continental Shelf (“OCS”). Defenders’ members regularly use, enjoy, and benefit from healthy coastal and marine ecosystems and the presence of diverse coastal and marine life, including the threatened and endangered birds, sea turtles, marine mammals, and other species that are likely to be killed, injured, or disturbed by drilling operations, and the risks inherent in such operations, in the Gulf of Mexico. Defenders’ members derive recreational, aesthetic, economic and scientific benefits from coastal and marine life in the Gulf of Mexico. BOEM’s failure to comply with federal law and the resulting harm to the coastal and marine environments, including the disturbance, injury, and death of coastal and marine life that is likely to result from that failure, harms the interests of Defenders’ members.

8. Plaintiff Natural Resources Defense Council (“NRDC”) is a national not-for-profit membership organization committed to the preservation, protection, and defense of the environment, public health, and natural resources. For forty years, NRDC has engaged in scientific analysis, public education, advocacy, and litigation on a wide range of environmental and health issues. NRDC has long been active in efforts to protect marine and coastal environments from pollution. In particular, NRDC has worked for over 35 years to protect sensitive coastal and marine areas from the harmful effects of offshore drilling, including the impacts of oil spills. NRDC maintains offices in New York City; Washington, D.C.; Chicago; San Francisco and Santa Monica, California; and Beijing, China. NRDC has approximately 1.3 million members and e-activists nationwide. NRDC has 42,489 members in the states of Louisiana, Texas, Mississippi, Alabama, and Florida.

9. Plaintiff Center for Biological Diversity (“the Center”) is a nonprofit corporation that works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is dedicated to the preservation, protection, and

restoration of biodiversity and ecosystems throughout the world. The Center's members, staff, and board members include people with aesthetic, professional, recreational, spiritual, educational, scientific, moral, and conservation interests in the species and habitats of the Gulf of Mexico that will be harmed if the relief sought by the Plaintiffs is not granted. The Center has approximately 42,000 members, including those who have viewed, photographed, and otherwise appreciated the species, habitats, and ecosystems of the Gulf of Mexico, and who intend to visit and enjoy these species, habitats and ecosystems in the future. The Center's members and staff use the Gulf of Mexico for wildlife observation, research, nature photography, aesthetic enjoyment, recreational, educational, and other activities. The Center, its members, staff, and board have worked and plan to continue to work to protect and preserve the Gulf of Mexico ecosystem, and others at risk from offshore oil development, to ensure the survival and recovery of imperiled species such as sea turtles, whales, and seabirds and their habitats. For many years the Center has also worked to improve the regulatory oversight and environmental compliance of offshore oil and gas activities. Therefore, not only do the Center's members, staff, and/or board have strong aesthetic, recreational, moral and spiritual interests in the species and ecosystem of the Gulf, they also have strong professional, conservation, education, and scientific interests in them as well.

B. Defendants

10. Defendant Bureau of Ocean Energy Management is the agency within the Department of the Interior that is charged with managing the exploration and development of the nation's offshore resources, including the permitting and issuing of oil and gas leases on the Outer Continental Shelf ("OCS").

11. Defendant Tommy P. Beaudreau is the Director of the Bureau of Ocean Energy Management, and is sued in his official capacity as the head of the federal agency that took the actions challenged pursuant to the Administrative Procedure Act (“APA”) and NEPA.

12. Defendant Department of the Interior (“Interior”) is an executive branch agency of the United States Government and is responsible for managing the resources under its jurisdiction in accordance with all applicable laws and regulations.

13. Defendant Ken Salazar is the Secretary of the Department of the Interior (“the Secretary”), and is sued in his official capacity as the head of the federal agency that took the actions challenged pursuant to the APA and NEPA.

LEGAL BACKGROUND

A. Outer Continental Shelf Lands Act (“OCSLA”)

14. Leases to develop oil and gas deposits in the OCS are sold and issued by the Secretary of the Interior pursuant to OCSLA, 43 U.S.C. § 1331 *et seq.*

15. OCSLA requires that oil exploration and production be “balanced with protection of the human, marine, and coastal environments.” *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 292 (D.C. Cir. 1988) (citation omitted).

16. Oil and gas exploration and production in the OCS is governed through a five-step process: (1) the Secretary’s promulgation of a five-year national leasing program, 43 U.S.C. § 1344; (2) lease sales, 43 U.S.C. § 1337; (3) exploration, 43 U.S.C. § 1340; (4) development and production, 43 U.S.C. § 1351; and (5) sale of recovered oil and gas, 43 U.S.C. § 1353.

17. Lease holders acquire their leases through lease sales organized pursuant to regulations issued by BOEM. *See* 30 C.F.R. Part 556. Potential lessees submit bids for tracts offered in the sale, and BOEM has 90 days, with a possible 15-day extension if warranted, to

either approve or reject the highest bid for each tract. *See id.* § 556.47(e)(2). “The United States reserves the right to reject any and all bids received for any tract, regardless of the amount offered.” *Id.* § 556.47(b).

18. A leaseholder can conduct preliminary and ancillary activities on its lease prior to filing an exploration plan, such as seismic surveys and geological exploratory activities, *see* 30 C.F.R. §§ 550.207, 550.105. The leaseholder may also commence exploratory drilling at a site after BOEM approves an exploration plan. *See* 43 U.S.C. § 1340(c)(1).

19. OCSLA mandates that the Secretary at all times makes sure that any authorized offshore development is conducted pursuant to “environmental safeguards.” 43 U.S.C. § 1332(3). NEPA review applies to all stages of the OCSLA five-step process. *See Vill. of False Pass v. Clark*, 733 F.2d 605, 614 (9th Cir. 1984); *N. Slope Borough v. Andrus*, 642 F.2d 589, 594-95 (D.C. Cir. 1980).

B. National Environmental Policy Act

20. Congress enacted NEPA to “promote efforts which will prevent or eliminate damage to the environment” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to fully consider and disclose the environmental consequences of an agency action before proceeding with that action. *See id.* § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5. Agencies’ evaluation of environmental consequences must be based on scientific information that is both “[a]ccurate” and of “high quality.” 40 C.F.R. § 1500.1(b). In addition, federal agencies must notify the public of proposed projects and allow an opportunity for comment on the environmental impacts of such actions. *See id.* § 1506.6.

21. The cornerstone of NEPA is the environmental impact statement (“EIS”). An EIS is required for all “major Federal actions significantly affecting the quality of the human

environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The EIS must provide a “full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

22. When an agency finds there is incomplete or unavailable information to conduct this analysis, NEPA and its implementing regulations require the agency to include that information in the EIS if it is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant. *See id.* § 1502.22(a). If the costs of obtaining the information are exorbitant, the agency must make clear that such information is lacking, state its relevance, summarize existing credible evidence relevant to evaluating impacts, and evaluate such impacts based upon methods or approaches generally accepted by the scientific community. *See id.* § 1502.22(b).

23. Analysis of alternative actions is “the heart of the environmental impact statement.” *Id.* § 1502.14. NEPA requires agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). In an EIS, an agency must “[r]igorously explore and objectively evaluate all reasonable alternatives,” including “the alternative of no action.” 40 C.F.R. § 1502.14. If the agency decides to eliminate certain alternatives from detailed analysis, it must explain that decision. *Id.*

24. An agency must prepare a Supplemental Environmental Impact Statement (“SEIS”) when “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* § 1502.9(c)(1)(ii). An SEIS is necessary if there are changes in the project since the original EIS that “will have a ‘significant’

impact on the environment that has not previously been covered by the [original] EIS.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1216 (11th Cir. 2002) (quotation marks and citation omitted).

25. BOEM employs a tiered review process to analyze environmental impacts of offshore drilling under NEPA, addressing general matters in broad EISs. For example, in the Gulf of Mexico, BOEM analyzes five years of lease sales in a single EIS. BOEM then incorporates by reference these conclusions from broad EISs into later environmental analyses (such as exploration plans). *See* 40 C.F.R. § 1508.28. Where an action is “included within the entire program or policy” already analyzed, NEPA regulations allow a subsequent, tiered EIS to “concentrate on the issues specific to the subsequent action.” *See id.* § 1502.20.

C. Endangered Species Act

26. Congress enacted the ESA, in part, to provide both a “means whereby the ecosystems upon which endangered and threatened species depend may be conserved” and “a program for the conservation of such endangered species” 16 U.S.C. § 1531(b).

27. The ESA requires federal agencies to “insure” that the actions that they fund, authorize, or undertake “[are] not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of those species’ designated critical habitat. *Id.* § 1536(a)(2); 50 C.F.R. § 402.02. Agency actions subject to this requirement include licenses, contracts, and leases. *See* 50 C.F.R. § 402.02.

28. In order to fulfill this substantive mandate, Section 7(a)(2) of the ESA and its implementing regulations require that a federal agency planning to undertake an action (the “action agency”) must engage in “consultation” with one of two delegated “expert agencies” (either NMFS or FWS), depending on what species might be affected by the action. 16 U.S.C.

§ 1536(a)(2). FWS and NMFS share responsibilities for administering the Act. Pursuant to federal regulations, FWS is responsible for implementing the ESA primarily for terrestrial species and NMFS is responsible for implementing the ESA primarily for marine species. *See id.* § 1532(15); 50 C.F.R. § 402.01.

29. Formal consultation is required if the action “may affect” a listed species. *Id.*; 50 C.F.R. § 402.14(a). “Any possible effect [to listed species or critical habitat], whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). If, on the other hand, the action agency concludes that the action is not likely to have an adverse effect and NMFS or FWS concurs in writing with that determination, then consultation may proceed informally. *See* 50 C.F.R. § 402.12(k)(1).

30. An action agency’s duty to insure against jeopardy or adverse modification continues after the completion of Section 7 consultation. *See, e.g., Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989). The action agency must immediately reinstate consultation with NMFS and FWS if “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered” or if “the amount or extent of taking specified in the incidental take statement is exceeded.” 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

D. Administrative Procedure Act (“APA”)

31. The APA, 5 U.S.C. §§ 551 *et seq.*, confers a right of judicial review on any person who is adversely affected by agency action. *See* 5 U.S.C. § 702. The APA provides that the reviewing court “shall . . . hold unlawful and set aside agency action, findings, and conclusions

found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A).

32. BOEM’s decisions to approve lease sales and accept lease bids are final agency actions subject to judicial review under the APA. *See . Slope Borough*, 642 F.2d at 609; *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation, & Enforcement*, 2011 U.S. Dist. LEXIS 58004, *65-66 (S.D. Ala. 2011).

STATEMENT OF FACTS

A. The Gulf of Mexico

33. The Gulf of Mexico is a “rich, productive marine environment” with “abundant and diverse marine life.” Nat’l Comm’n on the BP *Deepwater Horizon* Oil Spill & Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling*, Report to the President (“Commission Report”) at 174, *available at* http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf.

34. The Gulf is home to many federally-listed threatened and endangered species, including marine mammals such as sperm whales and the West Indian manatee, sea turtles (leatherback, green, hawksbill, Kemp’s ridley, and loggerhead), several species of beach mice (Alabama, Perdido Key, St. Andrew, and Choctawhatchee), listed bird species such as the piping plover and whooping crane, and the Gulf sturgeon. Critical habitat has been designated in the Gulf for the Gulf sturgeon, smalltooth sawfish, and elkhorn and staghorn corals. *See* NOAA, *Endangered and Threatened Species and Critical Habitats under the Jurisdiction of the NOAA Fisheries Service: Gulf of Mexico*,

<http://sero.nmfs.noaa.gov/pr/Endangered%20species/specieslist/PDF2010/Gulf%20of%20Mexico.pdf>.

35. The Gulf coast further includes “one of the most extensive estuary systems in the world,” stretching from the Rio Grande River to Florida Bay. *See* Gulf of Mexico OCS Oil and Gas Lease Sales: 2007-2012 Final Environmental Impact Statement Vol. 1 (“Multisale EIS”) at 3-4, *available at* www.boem.gov/BOEM-Newsroom/Library/Publications/2007/2007-018-Vol1.aspx. Its wetland habitats and seagrass beds provide habitat for numerous plants, invertebrates, fishes, reptiles, birds, and mammals and are a critical nursery grounds for fish and shellfish. *Id.* at 3-12.

36. The Gulf region produces more than one-third of the nation’s domestic seafood supply. All told, coastal tourism and commercial fisheries generate more than \$40 billion of economic activity annually in the five Gulf states. Commission Report at 186-87.

B. Multisale EIS for Gulf of Mexico Lease Sales

37. In April 2007, BOEM published the Multisale EIS, which covered eleven lease sales planned for 2007-2012 in the Gulf of Mexico (“Gulf Multisale”). *See* 72 Fed. Reg. 18,667 (Apr. 13, 2007). These eleven sales included Lease Sale 206 in the Central Planning Area of the Gulf of Mexico – where the *Deepwater Horizon* site is located – and Lease Sale 218 in the Western Planning Area of the Gulf of Mexico.

38. In the Multisale EIS, BOEM estimated that over the 40-year life span of the eleven proposed lease sales, the total amount of oil spilled in the offshore waters of the Central Planning Area, which includes the *Deepwater Horizon* site, would be 5,500 to 26,500 barrels of oil. *See* Multisale EIS at 4-241. The maximum amount estimated – 26,500 barrels – is slightly over 1 million gallons, a mere 0.5%, or 1/200, of the amount of oil spilled at the *Deepwater Horizon*

site. For the Western Planning Area, the area of the Gulf offshore the state of Texas, where the tracts for Lease Sale 218 are located, BOEM estimated that 400 to 21,000 barrels of oil would be spilled during that 40-year period. *Id.*

39. BOEM also concluded in the Multisale EIS that an oil spill would only be “likely to result in sublethal impacts (e.g., decreased health, reproductive fitness, and longevity; and increased vulnerability to disease)” to marine mammals, *id.* at 2-37-38, sea turtles, *see id.* at 2-38, and coastal and marine birds, *see id.* at 2-39.

40. BOEM similarly discounted the potential harm to other listed species from oil spills, including six species of threatened and endangered beach mice, *see id.* at 2-39 (explaining that impacts of oil spills on beach mice are “highly unlikely,”) and Gulf sturgeon, *see id.* at 2-40 (noting that the likelihood of impacts to Gulf sturgeon is “extremely low.”).

41. BOEM also concluded that the effects of an oil spill on fish populations and the commercial fishing industry would be “negligible and indistinguishable from variations due to natural causes.” *Id.* BOEM further explained that

[a] subsurface blowout would have a negligible effect on GOM fish resources or commercial fishing. If spills due to a proposed action were to occur in open waters of the OCS proximate to mobile adult finfish or shellfish, the effects would likely be nonfatal and the extent of damage would be reduced due to the capability of adult fish and shellfish to avoid a spill, to metabolize hydrocarbons, and to excrete both metabolites and parent compounds. The effect of proposed-action-related oil spills on fish resources and commercial fishing is expected to cause less than a 1 percent decrease in standing stocks of any population, commercial fishing efforts, landings, or value of those landings. Historically, there have been no oil spills of any size that have had a long-term impact on fishery populations. Any affected commercial fishing activity would recover within 6 months. There is no evidence at this time that commercial fisheries in the GOM have been adversely affected on a regional population level by spills or chronic contamination.

Id.

42. The Multisale EIS assessed the likely capability of industry and the government to respond to a large oil spill in the Gulf. It concluded that 10-30% of spilled oil could be mechanically removed prior to the spill making landfall with the use of booms and skimmers. *Id.* at 4-254. BOEM also stated that dispersants would be effective on 20-50% of treated oil. *Id.* The Multisale EIS also recommended the use of in-situ burning to control an oil spill. *Id.* Lastly, BOEM concluded that shoreline boom is the “single most frequently recommended spill-response strategy” for protecting coastal areas such as marshes from spilled oil. *Id.* at 4-256.

43. BOEM estimated that for spills larger than 1,000 barrels of oil, the maximum length of shoreline affected would be 19-31 miles. *Id.* at 4-234.

44. The Multisale EIS considered four alternatives for lease sales in the Western Planning Area. The four alternatives were BOEM’s preferred alternative (offering virtually all unleased blocks), two alternatives in which fewer blocks would be leased, and a “no action” alternative in which one or more of the lease sales would be cancelled. *Id.* at viii-ix.

45. BOEM formally consulted with NMFS and informally consulted with FWS with respect to the 2007-2012 Gulf Multisale, but not with respect to any individual Gulf of Mexico lease sales.

46. In September 2008, after Congress repealed a moratorium on drilling in a particular area of the Gulf, BOEM issued an SEIS (“Multisale Supplement”) for seven lease sales that had been covered in the Multisale EIS. The Multisale Supplement analyzed the potential effects of the lease sales on that area as well as the general impact of new information obtained since the Multisale EIS was issued. *See* BOEM, Gulf of Mexico OCS Oil and Gas Lease Sales: 2009-2012 Final Supplemental Environmental Impact Statement at vi, *available at* www.boem.gov/BOEM-Newsroom/Library/Publications/2008/2008-041.aspx. BOEM consulted

informally with NMFS and FWS in connection with the Multisale Supplement, receiving written concurrences from both “that the additional potential impacts analyzed for [the lease sales] do not alter the findings of the previous consultations and therefore do not trigger a reinitiation of consultation under the ESA.” *Id.* at 5-11.

47. There are two lease sales remaining in the Gulf under the Multisale EIS: Lease Sale 218 in 2011, and Lease Sale 222 (which was combined with Lease Sale 216 following the *Deepwater Horizon* spill) in 2012.

C. The *Deepwater Horizon* Blowout and Oil Spill

48. On April 20, 2010, the *Deepwater Horizon* oil rig exploded and caught fire. It sank shortly thereafter, and the well it was drilling spewed at least 4.9 million barrels (or 206 million gallons) of oil into the Gulf of Mexico for several months. *See* Commission Report at 346 n.76.

49. The *Deepwater Horizon* disaster was the largest oil spill in the history of the United States. It dwarfs the approximately 250,000 barrels, or about 11 million gallons, spilled in the 1989 *Exxon Valdez* accident, the previous largest oil spill in the United States. *Id.* at 231.

50. The spill resulted in roughly 641 miles of oiled shoreline. *See* Site-Specific Environmental Assessment of Exploration Plan No. S-7444 for Shell Gulf of Mexico Inc. (May 10, 2011) at 10, *available at* <http://www.data.bsee.gov/PI/PDFImages/PLANS/31/31794.pdf>. Scientists have also reported large plumes of oil below the sea’s surface which have been confirmed to have originated from the *Deepwater Horizon* well. Researchers from the National Institute for Undersea Science and Technology discovered oil plumes as big as ten miles long, three miles wide, and 300 feet thick. *See* Justin Gillis, *Giant Plumes of Oil Forming Under the Gulf*, N.Y. Times, May 16, 2010, at A1. Scientists from Woods Hole Oceanographic Institution documented an undersea oil plume originating from the *Deepwater Horizon* well that was 22

miles long and 700 feet thick. See Woods Hole Oceanographic Inst., WHOI Scientists Map and Confirm Origin of Large, Underwater Hydrocarbon Plume in Gulf, Aug. 19, 2010, <http://www.whoi.edu/dwhresponse/page.do?pid=43720&tid=282&cid=79926>.

51. Contrary to the government's predictions in the Multisale EIS, oil spill response methods were not effective at containing the majority of the spilled oil. The government estimated that only 3 percent of the oil from *Deepwater Horizon* was skimmed; 16 percent was chemically dispersed; and 5 percent was burned. See Federal Interagency Solutions Group, Oil Budget Calculator Science and Engineering Team, *Oil Budget Calculator: Deepwater Horizon* (Nov. 2010) at 50, available at http://www.restorethegulf.gov/sites/default/files/documents/pdf/OilBudgetCalc_Full_HQ-Print_111110.pdf.

52. The response effort also resulted in unforeseen and harmful impacts to the Gulf. Before the *Deepwater Horizon* spill, chemical dispersants had never been used in such quantities, nor in the manner in which they were employed in the *Deepwater Horizon* response. See Gulf of Mexico OCS Oil and Gas Lease Sale: 2011 Western Planning Area Lease Sale 218 Final Supplemental Environmental Impact Statement at 4-25, available at <http://www.boem.gov/BOEM-Newsroom/Library/Publications/2011/2011-034-v1.aspx> ("Final SEIS") (noting that approximately 1.84 million gallons of dispersant were used); Commission Report at 143 (noting that "novel methods and unprecedented volumes" of dispersants were used in the spill response that could be "toxic in both the short and long term"). In addition, the government's practice of in situ burning to contain oil resulted in the deaths of untold numbers of sea turtles that were caught in the boom. See Suzanne Goldenberg, *BP Accused of Killing*

Endangered Sea Turtles in Cleanup Operation, The Guardian, June 25, 2010, available at <http://www.guardian.co.uk/environment/2010/jun/25/bp-accused-of-killing-turtles>.

53. The spill caused significant impacts to the ecology of the Gulf. Contrary to BOEM's prediction of purely "sublethal" impacts, large numbers of Gulf creatures were found dead in the wake of the spill, in numbers far exceeding estimated takes. Over 6100 dead coastal and marine birds, 600 dead sea turtles, and 500 dead marine mammals were collected and identified in the wake of the *Deepwater Horizon* spill. See U.S. Fish and Wildlife Service, *Deepwater Horizon Response Consolidated Fish and Wildlife Collection Report* (Apr. 20, 2011), available at <http://www.fws.gov/home/dhoilspill/pdfs/ConsolidatedWildlifeTable042011.pdf>. Recent studies suggest that the observed numbers of deceased whales and dolphins are vastly lower than the actual number of those animals that perished as a result of the spill. See Williams et al., *Underestimating the Damage: Interpreting Cetacean Carcass Recoveries in the Context of the Deepwater Horizon/BP Incident*, 4 *Conservation Letters* 228 (2011); Jennifer Viegas, *Whale, Dolphin Deaths in Gulf Spill Underestimated*, *Discovery News*, Mar. 30, 2011, <http://news.discovery.com/animals/gulf-deaths-underestimated-110330.html>.

54. The spill also resulted in severe economic harm to the Gulf region. See Commission Report at 185. Government officials responded to the spill "by closing huge portions of the Gulf" – 88,522 square miles, or one-third of the Gulf – "to commercial and recreational fishing." *Id.* at 187. Gulf tourism was similarly affected. See *id.* at 185. The post-spill fisheries closures triggered by the *Deepwater Horizon* spill are estimated to have caused a 20% loss in average annual U.S. commercial catch in the Gulf of Mexico, with a potential minimum loss in annual landed value of \$248 million. See A. McCrea-Strub et al., *Potential Impact of the Deepwater Horizon Oil Spill on Commercial Fisheries in the Gulf of Mexico*, 36 *Fisheries* 332 (2011),

available at

<http://www.searoundus.org/researcher/dpauly/PDF/2011/JournalArticles/PotentialImpactoftheDeepwaterHorizonOilSpill1.pdf>.

55. The *Deepwater Horizon* spill coincided with the spawning months and habitat of commercially important fish species such as Western Atlantic bluefin tuna, which have declined over 80% over the last 30 years due to overfishing. Studies show that over 60% of the spawning habitat of bluefin tuna in the Gulf was covered with oil, presenting serious threats to the survival of eggs and larvae due to the acute toxicity of crude oil. See European Space Agency, "Spawning habitat of Atlantic bluefin in the Gulf of Mexico with and without oil spill" (2010), available at http://www.esa.int/images/BluefinSpawning-GOM_OilSpill_H.gif.

D. ESA Consultation Following The Spill

56. On July 30, 2010, in response to the *Deepwater Horizon* disaster, BOEM requested that NMFS and FWS reinstate consultation under Section 7(a)(2) of the ESA on the effects of the Gulf Multisale. BOEM explained that reinstatement was warranted because the spill (1) called into question the assumptions that formed the basis for the government's oil spill modeling used in earlier consultations and (2) may have affected the status of listed species and critical habitats. BOEM, Reinstatement Request Letter (July 30, 2010), at 1.

57. NMFS and FWS agreed that reinstatement was warranted. NMFS noted that "it is clear that we have underestimated the size, frequency, and impacts associated with a catastrophic spill." NMFS, Response to BOEM Reinstatement Letter (Sept. 24, 2010), at 2. FWS stated that the "incident and resulting oil spill represent new information regarding potential adverse effects to endangered and threatened species," and acknowledged that "the status of some listed species

or designated critical habitats may have been altered.” FWS, Response to BOEM Reinitiation Letter (Sept. 27, 2010), at 1.

E. Lease Sale 218

58. On November 10, 2010 BOEM issued a notice of intent to prepare an SEIS for Lease Sale 218. 75 Fed. Reg. 69,122 (Nov. 10, 2010). The SEIS was intended to “consider new circumstances and information arising, among other things, from the *Deepwater Horizon* blowout and spill.” The SEIS was to focus on “updating the baseline conditions and potential environmental effects of oil and natural gas leasing, exploration, development, and production” in the Gulf in the wake of the spill. *Id.*

59. Lease Sale 218 will be the first lease sale held in the Gulf of Mexico since the *Deepwater Horizon* spill. It will make available for oil and gas leasing nearly all of the remaining unleased blocks within the Western Planning Area. The unleased area encompasses approximately 18.3 million acres, 64% of the Western Planning Area’s total acreage. Final SEIS at ix.

60. On April 20, 2011, BOEM issued a Draft SEIS for Lease Sale 218. *See* 76 Fed. Reg. 22139 (Apr. 20, 2011). Plaintiff Oceana submitted comments on the Draft SEIS on June 3, 2011, and Plaintiffs Defenders of Wildlife and Center for Biological Diversity submitted joint comments on the Draft SEIS on June 6, 2011.

61. In August 2011, BOEM issued the Final SEIS for Lease Sale 218. This Final SEIS relied on and tiered to the pre-spill Multisale EIS and the Multisale Supplement.

62. In its Final SEIS, BOEM concluded that “[n]one of the additional information analyzed in this [SEIS] was found to alter the environmental concerns and impact conclusions as presented in the Multisale EIS and the 2009-2012 Supplemental EIS.” *Id.* at x.

63. In the Final SEIS, BOEM conceded throughout its discussion of environmental impacts that “relevant information on reasonably foreseeable significant adverse impacts is incomplete or unavailable,” but stated that this information has been deemed nonessential. *Id.* at v; *see also id.* at 2-16 (incomplete information on impacts to marine mammals); at 2-16 to 2-17 (same for sea turtles); at 4-4 to 4-5 (incomplete information on the impacts of the *Deepwater Horizon* spill); at 4-7 (same for benthic habitats).

64. In assessing the risk of an oil spill larger than 1000 barrels, the Final SEIS relied on the discussion of spill risks in the Multisale EIS, which predicted that at most one such spill would occur over the 40-year period at issue. *Id.* at 3-34. Appendix B to the Final SEIS constituted a region-wide “general overview of potential effects of a catastrophic spill in the Gulf of Mexico.” *Id.* at B-1. Both of those analyses were based on pre-*Deepwater Horizon* oil spill risk modeling. BOEM conceded in the Final SEIS that it is “in the process of updating these spill rates, which will include the recent [*Deepwater Horizon*] event.” *Id.* at 3-33. However, BOEM noted without explanation that significant changes to these spill rates “are not anticipated.” *Id.*

65. Despite this deficiency, BOEM relied on Appendix B of the SEIS, which estimated that a deepwater catastrophic blowout would result in an uncontrolled flow rate of 30,000-60,000 barrels per day, for a total volume of 2.7-7.2 million barrels over the estimated 3-4 months it would take to stop the spill. *Id.* at B-12. BOEM concluded that such an offshore spill could affect multiple threatened and endangered species, *see id.* at B-17, but conceded that it does not have sufficient information to understand the effects of spilled oil and response activities on marine mammals, *see id.* at B-19.

66. The SEIS discussed oil spill response and containment methods developed in the wake of the *Deepwater Horizon* spill, which included rapid response systems that are being developed by the oil and gas industry. *See id.* at 3-40. However, the SEIS relied on the same faulty assumptions as were contained in the Multisale EIS regarding the risk of a catastrophic spill and its potential impacts, which greatly overestimated the efficacy of spill response and cleanup technologies. *Id.* at 3-43. Additionally, there was no discussion in the Final SEIS of whether these containment systems will have the capacity to respond to spills in ultra-deepwater, despite BOEM's concession that "[i]ndustry challenges remain as operators move into ultra-deepwater areas and seek deeper geologic prospects with little knowledge of the subsurface environment." *Id.* at 3-47.

67. In considering impacts to threatened and endangered species in the Final SEIS, BOEM continued to rely on the "no jeopardy" conclusion of the pre-spill Multisale Biological Opinion, which BOEM claimed remains in effect until reinitiated consultation is completed. *Id.* at 4-140.

68. In undertaking the analysis of alternatives required by NEPA, the Draft SEIS and Final SEIS considered the environmental impacts of three potential alternatives: the preferred alternative, Alternative A, which would offer for lease virtually all unleased blocks within the Western Planning Area; Alternative B, which would exclude blocks located near certain biologically sensitive topographic features; and Alternative C, termed the "no action" alternative, in which Lease Sale 218 would be cancelled. *See id.* at 2-3.

69. The alternatives considered by BOEM in the Final SEIS were the same as those considered in the Multisale EIS. BOEM did not consider, or discuss the possibility of considering, any new alternatives in light of the *Deepwater Horizon* spill or any other new

information gained in the intervening years since the Multisale EIS was prepared. *See id.* 2-3 to 2-4.

70. In its comments on the Draft SEIS, Oceana stated that, because information about the effects of the *Deepwater Horizon* spill was still largely incomplete and unavailable, BOEM should consider an alternative in which Lease Sale 218 would be delayed until adequate impact assessments could be completed. *See id.* at 5-139 to 5-140.

71. BOEM declined to consider an alternative that would delay the lease sale. BOEM stated that “[i]nformation on many impacts of the [*Deepwater Horizon*] event and oil spill . . . may not be available for years, and certainly not within the contemplated timeframe of this NEPA process.” At the same time, BOEM reiterated that it had concluded that the area covered by Lease Sale 218 “did not experience any significant adverse effects” from the spill. *See id.* at 5-162 to 5-163.

72. In considering the “no action” alternative, BOEM concluded that “[i]f the lease sale would be canceled, the resulting development of oil and gas would most likely be postponed to a future sale.” *Id.* at 2-27. As a result, overall offshore activities “would only be reduced by a small percentage, if any” and “the cancellation of the proposed lease sale would not significantly change the environmental impacts of overall OCS activity.” *Id.*

73. BOEM stated that additional information about the *Deepwater Horizon* spill would be relevant to analyzing the impacts of a catastrophic spill. However, BOEM concluded that “very large oil spills could result in significant adverse impacts regardless of the alternative” selected. As a result, “any incomplete or unavailable information regarding the nature of a very large spill would not be essential to a reasoned choice among the alternatives since the impacts of

accidental or catastrophic events would be similar under any of the alternatives.” *Id.* at 4-7 to 4-8.

74. BOEM prepared a Record of Decision for Lease Sale 218 on Nov. 14, 2011, selecting the agency’s preferred alternative, Alternative A, which offers for sale virtually all unleased blocks within the Western Planning Area for oil and gas operations. *See* 76 Fed. Reg. 70,478 (Nov. 14, 2011).

75. The Final Notice of Sale for Lease Sale 218 was issued that same day, alerting the public that BOEM intends to open and publicly announce bids for the blocks offered under the lease sale on Dec. 14, 2011. *See* 76 Fed. Reg. 70,473 (Nov. 14, 2011).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Violation of NEPA and APA – BOEM Acted Arbitrarily and Capriciously and Not in Accordance with Law in Failing To Take a Hard Look at the Environmental Impacts of Lease Sale 218)

76. The allegations of paragraphs 1-76 are incorporated herein by reference.

77. Pursuant to NEPA, an EIS must take a “hard look” at the direct, indirect, and cumulative impacts of the proposed action and consider alternative actions and their impacts. 42 U.S.C. § 4332; 40 C.F.R. §§ 1502.14, 1502.16, 1508.7. “[T]he comprehensive ‘hard look’ mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

78. Given the *Deepwater Horizon* blowout and spill, the conclusions of the Multisale EIS are no longer valid. For example, in the Multisale EIS, BOEM predicted that over the 40-year life span of the eleven proposed lease sales, the total amount of oil spilled in the offshore waters

of the Central Planning Area, which includes the *Deepwater Horizon* site, would be a maximum of 26,500 barrels, slightly over 1 million gallons and a mere 0.5% of the estimated amount of oil spilled at the *Deepwater Horizon* site. See Multisale EIS at 4-241. Similarly, BOEM estimated that the impacts of oil spills on fish, marine mammals, turtles, and other marine life would be “sublethal” and “negligible.” See *id.* at 2-37-40.

79. The blowout of BP’s *Deepwater Horizon* and subsequent spill of millions of gallons of oil into the Gulf and resulting devastation of the Gulf waters, shorelines, wildlife, and livelihoods of those dependent on the Gulf are significant new circumstances and information relevant to environmental concerns.

80. Despite these significant new circumstances, BOEM omits much of this critical new information from the Final SEIS, declaring that the information was deemed not to be essential to a reasoned choice among alternatives, in violation of 40 C.F.R. § 1502.22. See, e.g., Final SEIS at 2-16 and 2-17 (missing information concerning the potential impact of spills on marine mammals and sea turtles); see also *id.* at 4-8 (missing information concerning the impacts of a catastrophic spill), 4-108 (missing information concerning the cumulative impact of the *Deepwater Horizon* spill on the Western Planning Area), 4-143 (missing information concerning the damage to marine mammals from the *Deepwater Horizon* spill).

81. As discussed above, the Final SEIS does not adequately consider the *Deepwater Horizon* spill’s impacts on Gulf resources, including threatened and endangered species.

82. Nor does the Final SEIS adequately discuss and analyze the true risks of a catastrophic oil spill in the Gulf, instead relying on the outdated pre-spill analyses and faulty assumptions contained in the Multisale EIS.

83. The Final SEIS also fails to consider new information gained from the spill about the efficacy of the spill response and containment capabilities of the oil and gas industry.

84. The Final SEIS does not contain a legally adequate analysis of alternatives to the proposed lease sale. BOEM failed to consider a reasonable alternative of delaying the lease sale, concluded irrationally that no significant difference in environmental harm would result from proceeding with the lease sale as opposed to cancelling it, and did not properly assess the environmental impacts of the “no action” alternative. *See California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (holding that an inadequate range of alternatives was considered where the end result of all eight alternatives was development of a substantial portion of wilderness); *Tex. Comm. on Natural Res. v. Van Winkle*, 197 F. Supp. 2d 586, 609 (N.D. Tex. 2002) (stating that under NEPA, an agency “must briefly discuss the reasons for the exclusion of the alternatives eliminated from detailed study.”) (citing 40 C.F.R. § 1502.14(a) & (b)).

85. These inadequacies cannot meet BOEM’s duty to take a hard look at the environmental impacts of its proposed action.

86. BOEM’s SEIS is thus arbitrary, capricious, and an abuse of discretion in violation of NEPA and the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

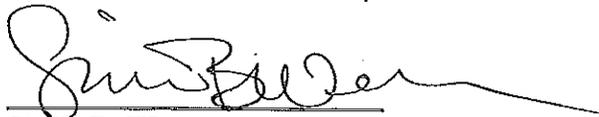
WHEREFORE, Plaintiffs respectfully requests that the Court:

- A. Declare that the Defendants are each in violation of NEPA and the APA as described above;
- B. Vacate the Lease Sale 218 SEIS until such time as BOEM has complied with NEPA;

C. Grant, in its discretion, Plaintiffs their costs of suit, including reasonable attorneys' fees and expert witness fees; and

D. Grant Plaintiffs such further and additional relief as this court deems to be necessary and appropriate.

Respectfully submitted this 13th day of December, 2011.



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