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Via Certified Mail, Return Receipt Requested

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Dear Sirs and Madam:

Pursuant to 16 U.S.C. § 1540(g), this letter serves as notice on behalf of the Southern Environmental Law Center (“SELC”) and Defenders of Wildlife (“Defenders”) of our intent to sue the Mineral Management Service (“MMS”) for violations of Section 7 and 9 of the Endangered Species Act (“ESA”) (16 U.S.C. § 1531 *et seq.*) regarding authorization of oil and gas exploration and development activities in the Gulf of Mexico (“the Gulf”). First, MMS has failed to ensure in consultation with the National Marine Fisheries Service (“NMFS”) and U.S. Fish and Wildlife Service (“FWS”) (collectively, “the Services”) that such actions are not likely to jeopardize the continued existence of any threatened or endangered species or adversely modify critical. Second, MMS has failed to consult or reinstate consultation with the Services in light of new information concerning the Deepwater Horizon explosion and subsequent release of oil into the Gulf. Finally, MMS has authorized the illegal take of endangered and threatened species with respect to the Deepwater Horizon exploratory drilling permit. If the agencies do not rectify these violations within sixty days, Defenders and SELC intend to file a civil action to compel compliance with the ESA.

I. Legal and Factual Background

A. Endangered Species Act

Congress enacted the ESA, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b). Principal responsibilities for implementing the requirements of the ESA have been delegated to the FWS, an agency within the Department of the Interior, and to NMFS, an agency within the Department of Commerce. FWS is responsible for implementing the ESA for terrestrial species and a limited number of marine mammals, and NMFS is responsible for implementing the ESA for most other marine species. *See* 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), provides that “[e]ach Federal agency shall, in consultation with and with the assistance of [the Services], insure that any action authorized, funded, or carried out by such agency . . . is 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.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400. Agency actions subject to this requirement include licenses, contracts, and leases. *See* 50 C.F.R. § 402.02.

Action agencies must engage in formal consultation with the Services whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Formal consultation is required if an agency action may result in “[a]ny possible effect [to listed species or critical habitat], whether beneficial, benign, adverse, or of an undetermined character” 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 the Services concur in writing with that determination, then consultation may proceed informally. *See* 50 C.F.R. § 402.12(k)(1).

Formal consultation concludes with the issuance of a Service biological opinion (“BiOp”), which includes an assessment of the effects of the action on listed species and critical habitat and a conclusion as to whether the agency action is likely to jeopardize a listed species or destroy or adversely modify a critical habitat for that species. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If jeopardy or adverse modification is not likely to occur, the BiOp must include an “incidental take statement” (“ITS”) covering any potential take of listed species likely to occur as a consequence of the action. *See* 16 U.S.C. § 1536(b)(4), (o); 50 C.F.R. § 402.14(i). Take of any endangered or threatened species in the absence of an ITS is prohibited under ESA § 9 and its implementing regulations. *See* 16 U.S.C. § 1538(a)(1)(C), (g).

An agency’s duty to insure against jeopardy or adverse modification continues after the completion of section 7 consultation. The action agency must provide periodic progress reports

to the Services covering impacts on and take of listed species as specified in the ITS. *See* 50 C.F.R. § 402.14(i)(3). Moreover, the action agency must immediately reinstate consultation with the Services if “the amount or extent of taking specified in the incidental take statement is exceeded” or 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.” *Id.* §§ 402.14(i)(4), 402.16(a).

A. Factual Background

The Gulf of Mexico is home to several endangered and threatened species, including at least five species of whale (blue, fin, sei, humpback, and sperm), five types of sea turtles (green, hawksbill, leatherback, Kemp’s ridley, and loggerhead), four kinds of beach mice (Alabama, Choctawhatchee, St. Andrew, and Perdido Key); four species of marine birds (piping plover, whooping crane, bald eagle, and brown pelican), two species of fish (gulf sturgeons and smalltooth sawfish), two species of coral (elkhorn and staghorn), and West Indian manatees. Critical habitat has been designated for four of these species – the Gulf sturgeon, the smalltooth sawfish, and elkhorn and staghorn coral. *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>.

On May 2, 2007, MMS issued a final environmental impact statement (“FEIS”) for its 2007-2012 Outer Continental Shelf Oil and Gas Leasing Program (“Program”). *See* 72 Fed. Reg. 24,326 (May 2, 2007). MMS specifically declined to engage in a Section 7 consultation with the Services at this stage of the Program, concluding that because the act of “[p]reparing the proposed 5-year program does not fit the definition of a Federal action,” any formal or informal Section 7 consultation “at the 5-year program level [would be] premature.” FEIS on Program at I-8.

i. Consultation on Five-Year Plan for the Gulf

On April 13, 2007, MMS issued a separate FEIS addressing the eleven oil and gas lease sales in the Outer Continental Shelf of the Gulf that were set to occur during the course of the Five-Year Program (hereinafter termed “Gulf FEIS”). *See* 72 Fed. Reg. 18,667 (Apr. 13, 2007). Five of these sales were to take place in the Western Planning Area (“WPA”) of the Gulf, and six in the Central Planning Area (“CPA”). In the Gulf FEIS, MMS estimated that “about 400-21,000 bbl of oil would be spilled in offshore waters over the 40-year life of a proposed action in the WPA and about 5,500-26,500 bbl of oil would be spilled in offshore waters over the 40-year life of a proposed action in the CPA.” Gulf FEIS at 4-238. MMS also identified at least twenty-one endangered or threatened species present in those two regions, and noted that many of the species would suffer deleterious impacts from oil spills. *See id.*

MMS engaged in formal consultation with NMFS and informal consultation with FWS with respect to the eleven Gulf lease sales. NMFS subsequently issued a BiOp on June 29, 2007 (“Gulf BiOp”) that examined the effect of the proposed action, which it described as “the exploration, development and production, and associated activities as a result of MMS lease sales of available OCS blocks in the WPA and CPA,” on seven listed species – sperm whales, gulf sturgeon, and five kinds of sea turtles (leatherback, loggerhead, green, hawksbill, and Kemp’s ridley). *See* Gulf BiOp at 3, 14.

In the Gulf BiOp, NMFS discounted the threat posed by oil spills, noting that, “[b]ased on oil spill modeling conducted by MMS, the coastal waters inhabited by the Gulf sturgeon are not expected to be at any significant risk from oil spills.” *Id.* at 33. In reliance on this data, NMFS concluded that “the probability of an oil or chemical spill reaching designated Gulf sturgeon critical habitat is so low, it is considered discountable” *Id.*

Despite NMFS’s downplaying of the risk of oil spills, it still determined that many of these protected species would be subjected to and potentially harmed by oil spills during the 40-year lifetime of the proposed actions. *See id.* at 72-82. It estimated that 8 leatherback turtles, 49 green turtles, 25 Kemp’s ridley turtles, 153 loggerhead turtles, and 1 hawksbill turtle would be taken as a result of oil spills over that period, with 66 of those takes being lethal. *See id.* at 78-80. Oil spills were also expected to lead to two lethal and two non-lethal takes of gulf sturgeon, as well as 11 non-lethal takes of sperm whales. *See id.* at 81. Although NMFS acknowledged that there likely could be oil-spill-related take of these species, it did not issue MMS an ITS for such take in part because any release or spillage of oil would be unlawful. *See id.* at 98-102.

In addition to the risk of oil spills, NMFS examined other potential threats, most notably vessel strikes and seismic surveys, to the seven listed species. *See id.* at 68-72. Based on these analyses, it expected that, due to vessel strikes, there would be take of over 500 sea turtles, approximately one-third of which would be lethal and the majority of which involved loggerhead turtles. *See id.* at 100. NMFS issued an ITS for these takes. *See id.* Based on these findings, NMFS concluded that the lease sales and related actions, including drilling, would “not appreciably reduce the likelihood of survival and recovery of” any of the listed species and “that implementation of the proposed action described in this biological opinion is not likely to jeopardize the continued existence of these species.” *Id.* at 99.

Consultation with the FWS proceeded informally and concluded with the FWS’s September 14, 2007 written concurrence with MMS’s determination that its actions would not likely adversely affect any listed species or critical habitat.

ii. Consultation on Lease Sale 206

On March 19, 2008, MMS held Lease Sale 206, which encompasses Mississippi Canyon 252 (“MC252”), the site of the Deepwater Horizon oil spill. Prior to commencing this sale, on October 22, 2007, MMS published an Environmental Assessment (“EA”) examining the sale’s

potential environmental effects. The EA summarized and incorporated by reference many of the findings of the Gulf FEIS and included new information discovered since during subsequent to publication of that FEIS. Based on the information contained in the EA, MMS made a Finding of No Significant Impact (“FONSI”), which meant that a supplemental EIS did not need to be filed.

It is unclear whether MMS engaged in any formal or informal consultation with the Services regarding this lease sale, as the EA discusses only the previously completed consultations with the Services that accompanied the Gulf FEIS. *See* EA at 67-68. Based on the text of the EA, it appears that MMS may have consulted informally with FWS on Lease Sale 206, although this did not result in the imposition of any new terms and conditions or mitigations. *See id.* at 38, 42. There is nothing in the EA suggesting consultation on the sale occurred between MMS and NMFS.

The EA examined the impact of activities related to and stemming from Lease Sale 206 on various species in the Gulf, including marine mammals, sea turtles, beach mice, gulf sturgeon, and coastal and marine birds. Regarding these species, MMS reexamined its analysis in the Gulf FEIS in light of the new research conducted since completion of the FEIS. With respect to each endangered or threatened species, MMS concluded that it had uncovered no new significant information and, accordingly, that a new analysis of the potential impacts of Lease Sale 206 on listed species or critical habitat was unwarranted. *See* EA at 36-46. Since the Gulf FEIS reached a no-jeopardy conclusion with respect to all the lease sales discussed therein, which included Lease Sale 206, MMS thus implicitly concluded that Lease Sale 206 would not jeopardize the likelihood of survival for any of the listed species.

In so concluding, MMS relied on its Gulf FEIS analysis regarding the likelihood of a major oil spill, which presumed that such an event did not pose a discernable threat. *See* EA at 23. For example, MMS noted that “[g]iven the low probability of a large spill ($\geq 1,000$ bbl) occurring, direct impacts of oil spills on beach mice from proposed Lease Sale 206 are highly unlikely.” *Id.* at 42. Similarly, MMS admitted that “Gulf sturgeon and its critical habitat can be cumulatively impacted by activities such as oil spills, alteration and destruction of habitat, and commercial fishing.” *Id.* at 45. However, it deemed Lease Sale 206 not to pose a risk to the sturgeon because “the effect of contact between sale-specific oil spills and Gulf sturgeon is expected to be sublethal and last less than one month.” *Id.*

Notwithstanding these findings,, MMS concluded that many of these listed species would suffer oil-spill-related takes from Lease Sale 206. The EA predicted, for example, that, over the 40-year lifetime of Lease Sale 206, the following would occur: 11 non-lethal takes of sperm whales; 42 lethal and 111 nonlethal takes of loggerhead turtles; 2 lethal and 7 nonlethal takes of a leatherback sea turtles; 9 lethal and 16 nonlethal takes of Kemp’s ridley sea turtles; and 13 lethal and 36 nonlethal take of green sea turtles. *See id.* at 38, 41. As with the BiOp, MMS received no take authorization for these predicted takes. *See id.*

iii. Consultation on BP's Exploration Plan

On March 10, 2009, BP submitted to MMS an Exploration Plan ("EP") and Environmental Impact Analysis ("EIA") for MC252, in which it asserted that it did "not anticipate that any protected species might be incidentally taken during operations proposed in this plan." EP at 8-1. BP also predicted that the worst case scenario for an oil spill from an uncontrolled blowout was 162,000 gallons of crude oil per day. *See id.* at 7-1. BP also noted that accidental oil spills could have adverse impacts on protected species and critical habitat in the area. *See, e.g., id.* at 14-3 ("Oil spills and oil spill response activities are potential threats that could have lethal effects on turtles."). Nevertheless, it anticipated that there would be no such impacts because "it is unlikely that an accidental surface or subsurface oil spill would occur from the proposed activities." *Id.* at 14-3 to 14-6.

MMS approved the EP less than a month later, on April 6, 2009, once again without apparently consulting the Services. In approving the plan, MMS did not impose any restrictions or mitigation measures, offering only the suggestion that BP should "[e]xercise caution while drilling due to indications of shallow gas and possible water flow." MMS, Approval Letter for MC252 Exploration Plan (Apr. 6, 2009).

iv. Deepwater Horizon Oil Spill and Subsequent Events

On April 20, 2010, an offshore oil rig at MC252 exploded and caught fire, causing the deaths of 11 workers and spilling millions of gallons of oil into the water. The oil rig at the site, the Deepwater Horizon, sank shortly thereafter, and the well it was digging continues to spew oil as of the date of this letter. According to current estimates, at least 5000 barrels (about 210,000 gallons) of oil per day are being spilled; however, there is good reason to believe this figure is a gross underestimation, with the actual figure possibly as high as 26,000 barrels (about 1.1 million gallons) per day – meaning that over 5 millions gallons have been spilled to date. *See Joel Achenbach, 5,000 or 26,000 Barrels a Day: Size of Gulf Oil Spill Is a Guesstimate*, Wash. Post (May 14, 2010), at A6. At the time of this letter, the oil slick created by this spill is estimated to cover at least 2500 square miles of surface and has approached, and in some cases reached, the shores of the Gulf Coast. There is even a reasonable possibility that sea currents will carry the spill around the Florida panhandle and up the Atlantic seaboard.

At present, efforts to contain the spread of the spill have been unsuccessful, as have attempts to stop the leak. Digging a relief well may turn out to be the only viable solution, an option that would take at least three months to complete. Based on current estimates of spill volume this would mean that between 450,000 and 2.3 million barrels (about 19 to 90 million gallons) of oil could be leaked into the gulf, an amount that would dwarf the approximately 12 million gallons spilled in the 1989 Exxon Valdez accident.

Several hundred species in the Gulf are expected to be at risk of being harmed by the oil from this spill, including several endangered and threatened sea turtles, whales, and seabirds. Already there is reason to believe that species such as seabirds, turtles, and dolphins may have been affected and even killed by the spill. *See* Steve Gorman, *Dolphin, Turtle Deaths Eyed for Links to Oil Spill*, Reuters (May 13, 2010). Oil has begun to appear in the coastal wetlands used by seabirds and other species, and much of the marine life in and around the Gulf Coast has been exposed to oil and thus likely will experience its toxic effects on their bodies and ecosystem..

Additionally, since the oil spill at MC252, MMS has approved over twenty exploration plans for drilling in the Gulf, apparently without initiating consultation regarding possible effects on endangered species. *See* Marian Wang, *After Spill, More Gulf Drilling Plans Get Environmental Exemptions*, ProPublica (May 11, 2010). In fact, MMS has exempted all of these exploration plans from having to conduct a more stringent environmental review. *See id.*

II. ESA Violations

As discussed above, section 7 of the ESA requires each federal agency to insure that any action they authorize, fund or carry out “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification” of critical habitat of that species.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). In order to achieve this goal, all agencies must consult with NMFS and/or FWS whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). This duty to insure against jeopardy is ongoing, and agencies must reinitiate consultation if expected take is exceeded or if new information indicates that the effects of the action will be greater than anticipated. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

Here, MMS’s decision to proceed with the lease sales in the Gulf, including Lease Sale 206, its approval of BP’s exploration plan, and its post-Deepwater Horizon spill approval of other exploration plans all are agency actions under the ESA. *See* 50 C.F.R. § 402.02. In light of the current and expected effects of the MC252 spill, there is little doubt that these actions “may affect” endangered or threatened species and critical habitat, including, but not limited to, gulf sturgeon, sea turtles, and sperm whales. The oil spill thus constitutes “new information” that triggers the need to reinitiate consultation. Based on prior consultations, it is plain that that MMS and the Services failed to even ponder, much less analyze in any meaningful way, a spill of this magnitude and its likely impacts on listed species and critical habitat. Given that MMS entirely dismissed the threat posed by such a spill, an assumption now sadly shown to be grossly optimistic, its failure to formally consult with the Services to address this new information and to meaningfully analyze the potential risks to marine and coastal species constitutes a violation of section 7. Moreover, MMS is in violation of section 9 of the ESA and implementing regulations for authorizing actions, including the Deepwater Horizon EP, that are likely to cause prohibited take of endangered and threatened species.

Sincerely,



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