



June 15, 2010

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**Re: Review of MMS NEPA Policies, Practices, and Procedures for OCS Oil and Gas Exploration and Development**

The Center for Biological Diversity (“the Center”) submits the enclosed formal petition in response to the Notice of Review and Request for Public Comment dated May 28, 2010, for CEQ’s 30-day review of the Minerals Management Service’s (“MMS”) compliance with National Environmental Policy Act (“NEPA”) policies, practices, and procedures for Outer Continental Shelf (“OCS”) oil and gas exploration and development in the Gulf of Mexico (“Gulf”) (75 Fed. Reg. 29996). This Petition is a formal request that MMS and CEQ initiate rulemaking requiring NEPA compliance at to every stage of offshore oil and gas activities and eliminate the categorical exclusion of exploration and development drilling plans from detailed review under NEPA.

The disastrous oil spill in the Gulf of Mexico from the blowout of BP’s exploration drilling demonstrates that large oil spills with significant environmental impacts can and do result from offshore oil drilling in the Gulf of Mexico. Nonetheless, MMS has continued its longstanding practice of approving exploration and development plans with categorical exclusions from NEPA, each time concluding that there is no possibility of significant environmental impacts from the proposed drilling. The conclusion that no significant effects could occur from exploration and development drilling was arbitrary and capricious before the oil spill, and now in light of the ongoing oil spill such a position is now clearly untenable.

Sincerely,

Miyoko Sakashita

**June 15, 2010**

**PETITION FOR RULEMAKING UNDER THE  
NATIONAL ENVIRONMENTAL POLICY ACT FOR ENVIRONMENTAL REVIEW  
OF OFFSHORE OIL AND GAS ACTIVITIES**

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**BEFORE THE MINERALS MANAGEMENT SERVICE  
AND THE COUNCIL ON ENVIRONMENTAL QUALITY**



## NOTICE OF PETITION

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### PETITIONER

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The Center is a non-profit, public interest environmental organization dedicated to the protection of imperiled species and their habitats through science, policy, and environmental law. The Center has 260,000 members and online activists throughout the United States. The Center and its members are concerned with the environmental effects of offshore oil and gas activities in the Gulf of Mexico and other regions.

### Action Requested

The Center for Biological Diversity (“Center”) hereby petitions the Secretary of Interior, the Minerals Management Service, and the Council on Environmental Quality to carry out the non-discretionary duties imposed by the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* Contrary to NEPA’s requirements, the Secretary has failed to comply with his obligations with respect to offshore oil and gas activities by approving drilling plans for

exploration and development without the proper environmental review as required by NEPA. Therefore, the Center requests that the Minerals Management Service and CEQ initiate rulemaking to eliminate categorical exclusions for risky drilling and require environmental review of all stages of offshore oil and gas activities as required by NEPA. Please consider this request a formal petition for such action pursuant to section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e).

A handwritten signature in black ink, appearing to read 'Miyoko Sakashita', written over a horizontal line.

Miyoko Sakashita  
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## **I. INTRODUCTION**

Offshore drilling plans in the Gulf of Mexico largely escape meaningful environmental review. For example, on April 6, 2009, the Secretary of the Interior (“Secretary”) approved British Petroleum’s (“BP”) exploration plan allowing drilling in the Gulf of Mexico without any environmental review. This exemption was granted under a Minerals Management Service (“MMS”) department policy (516 DM 15.4 (C)(10)) that excludes nearly all drilling plans in the Gulf from environmental review that is normally mandated under the National Environmental Policy Act (“NEPA”). On April 20, 2010, BP’s oil rig conducting exploratory drilling exploded and caught fire leaving 11 workers dead and began spilling more than one million of gallons of oil each day into the Gulf of Mexico. To date, the ruptured well continues to gush oil and has become the largest environmental disaster in United States history, exceeding the *Exxon Valdez* oil spill by about five times. So far, the oil slick covers approximately 10,000 square miles including key habitat for sperm whales, bluefin tuna, and other marine animals. Oil and tar balls are also washing ashore on the Gulf coast’s sensitive wetlands and beaches. As of June 11, 2010, officials have collected hundreds of dead animals, including 658 birds, 279 sea turtles, and 36 mammals, including dolphins—meanwhile most of the environmental devastation is unobserved out at sea. As a result of the spill, hundreds of animals in the Gulf of Mexico have been harmed by the toxic oil, including several threatened and endangered species of sea turtles, whales and seabirds. By no stretch of the imagination can any of these effects be deemed insignificant.

Although impacts on the environment will continue for years to come as a result of the Gulf oil spill, the Secretary has continued to approve drilling plans under MMS’s categorical exclusion policy. This strategy of implementing categorical exclusions for drilling in the Gulf undermines the goals and mandates of NEPA. In light of the devastating environmental consequences of BP’s oil spill, it has become necessary insist upon meaningful environmental review of all offshore oil and gas activities in the Gulf.

Accordingly, the Center for Biological Diversity formally petitions for rulemaking by MMS and CEQ to require NEPA compliance at every stage of offshore oil and gas activities, including environmental review for exploration and development and production plans, and Development Operation Coordination Documents (“DOCs”) in the Gulf of Mexico, under NEPA, thus eliminating the categorical exclusion that has allowed fast track drilling approvals to evade needed environmental review. Specifically, Petitioner requests that MMS:

- (1) Revise its Department Manual for NEPA to eliminate the categorical exclusions under 516 DM 15.4 (C)(10) for “Approval of an offshore lease or unit exploration, development/production plan or a Development Operation Coordination Document in the central or western Gulf of Mexico.”**

Additionally, Petitioner requests that MMS and CEQ initiate rulemaking or publish guidance under their NEPA authorities to require environmental review for all stages of offshore oil and gas activities permitted by MMS. Specifically, MMS and CEQ should:

**(2) Adopt a rule pursuant to the policy and goals of NEPA (42 U.S.C. §§ 4321 – 4370) stating:**

- **The Secretary’s approvals of (1) five-year leasing plans; (2) lease sales; (3) exploration plans; (4) development and production plans, or DOCDs in the central or western Gulf of Mexico, (5) geological and geophysical permits and (6) applications to drill are major Federal actions requiring full compliance with NEPA, 42 U.S.C. § 4332(2)(C). This analysis requires the agency to prepare, at minimum, a detailed environmental assessment (“EA”) of the proposed action (42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9) or a more detailed environmental impact statement (“EIS”) for actions with significant environmental effects, including opportunity for public participation.**
- **An EIS should be prepared for exploration plans and development and production plans, or DOCDs, with facilities: (1) In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas, or (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or (3) in areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology.**

Even since the oil spill, MMS has continued its longstanding practice of approving drilling plans without environmental review, each time concluding that there is no possibility of significant environmental impacts from the proposed drilling. The conclusion that no significant effects could occur from exploration and development drilling was arbitrary and capricious before the oil spill, and now in light of the ongoing oil spill such a position is clearly untenable. MMS has no basis to assume that there are no significant environmental effects of offshore oil drilling. Indeed, it has no basis to assume that even regular, accident-free operations will not have significant impacts under the hundreds of plans it has approved without any environmental review. For example, offshore oil and gas exploration and development activities harm marine life through, among other things, noise, pollution, vessel strikes, and marine debris. Only by conducting the required NEPA reviews in a thorough, independent manner can the Secretary ensure that the Gulf of Mexico is not exposed to significant environmental impacts.

## **II. STATUTORY AND REGULATORY FRAMEWORK**

### **a. The Outer Continental Shelf Lands Act of 1953**

In 1953, Congress enacted the Outer Continental Shelf Lands Act (“OCSLA”) to authorize federal leasing of the outer continental shelf (“OCS”) for oil and gas development in federal waters (43 U.S.C. § 1331 *et seq.*). OCSLA includes a congressional declaration of policy, which recognizes that “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards.” 43 U.S.C. § 1332. OCSLA requires the MMS to manage the OCS “in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.” 43 U.S.C. § 1344(a)(1).

In its current state, OCSLA provides for four distinct stages for oil and gas development activities on the OCS: (1) the development of a five-year leasing plan; (2) issuance of oil and gas leases; (3) approval of lessee’s exploration plans; and (4) approval of lessee’s development and production plans (43 U.S.C. § 1331 *et seq.*). This “pyramidal” four-tiered structure is meant to proceed from “broad-based planning to an increasingly narrower focus as actual development grows more imminent” (*Id.*). The purpose of this tiered scheme is to ensure “the expeditious but orderly development of OCS resources” (*California v. Watt (Watt I)*, 668 F.2d 1290, 1295-1300 (D.C. Cir 2009)).

Throughout OCSLA, Congress mandated accommodation of other uses of the outer continental shelf, including environmental values. At the lease program stage, OCSLA requires the consideration of marine and coastal environments, “the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf,” and balancing “between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.” 43 U.S.C. § 1344 (a)(1)-(3). OCSLA requires that the Secretary establish procedures for “periodic consultation with State and local governments, oil and gas lessees and permittees, and representatives of other individuals or organizations engaged in activity in or on the outer Continental Shelf, including those involved in fish and shellfish recovery, and recreational activities.” *Id.* at § 1344(f)(4).

MMS must ensure that geological and geophysical explorations in the Outer Continental Shelf “are not unduly harmful to aquatic life.” 43 U.S.C. § 1340(a)(1). Further, MMS has a duty to consider environmental information for all approvals:



The Secretary shall consider available relevant environmental information in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders.

43 U.S.C. § 1346 (d). Lastly, OCSLA requires that the Secretary require modification of any development and production plan to ensure the “protection of the human, marine, or coastal environment.” 42 U.S.C. § 1351(h)(1). Further, the Secretary must disapprove an oil and gas development and production plan if “the plan would probably cause serious harm or damage to life (including fish and other aquatic life)... or to the marine, coastal or human environments” *Id.* at § 1351(h)(1)(D).

#### **b. The National Environmental Policy Act of 1969**

NEPA “makes environmental protection a part of the mandate of every federal agency and department” (*Calvert Cliffs’ Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971)). Moreover, NEPA “insure[s] that environmental information is available to public officials and citizens before decisions are made and before action is taken” (42 U.S.C. § 4321). In order to carry out this mandate, Congress has required that all federal agencies act to preserve, protect, and enhance the environment (*See* 42 U.S.C. 4331(b)).

Section 102(2)(C) of NEPA provides the basic framework by which agencies consider the environmental effects in their decision-making processes and inform the public of those effects. Generally, NEPA requires all federal agencies to identify and consider environmental impacts, alternatives, and mitigating measures prior to approving a project (40 C.F.R. § 1508.25). Among other delineated duties, NEPA requires federal agencies: to “[i]nclude in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement” which addresses, inter alia, the environmental impact of the proposed action (42 U.S.C. § 4332(C)); 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(E)); and to “recognize the worldwide and long-range character of environmental problems” (42 U.S.C. § 4332(F)).

The purpose of the NEPA review process is two-fold: “First, it places upon [the action] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process” (*Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1066 (9th Cir. 2002); *see also Columbia Basin Protection*

*Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) (“[T]he preparation of an EIS ensures that other officials, Congress, and the public can evaluate the environmental consequences independently.”)). These dual objectives require that environmental information be disseminated “early enough so that it can serve practically as an important contribution to the decisionmaking and will not be used to rationalize or justify decisions already made” (40 C.F.R. § 1502.5; *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) (“the broad dissemination mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time”); *Metcalf v. Daley*, 214 F.3d 1135, 1143-44 (9th Cir. 2000)). Ultimately, an EIS does not satisfy NEPA unless “its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences, and (2) make available to the public, information of the proposed project’s environmental impacts and encourage participation in the development of that information” (*Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)).

NEPA’s mandate is essentially procedural in nature and ensures that decisions made by Federal government agencies are “fully informed and well-considered ...” (*Vermont Yankee Nuclear Power Corp v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978)). It was the intent of Congress that NEPA serve as a vehicle for Federal agencies to “carefully consider [] detailed information concerning environmental impacts” before reaching a decision regarding a particular course of action (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-51 (1989)). NEPA and the regulations promulgated there under by the Council on Environmental Quality (“CEQ”) require that federal agencies, including MMS, prepare an environmental impact statement (“EIS”) for all “major federal actions significantly affecting the quality of the human environment” (42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4). Although performance of this duty is qualified under NEPA by the phrase “to the fullest extent possible,” it is important to note that such language sets a high standard for agencies and does not provide an “escape hatch for footdragging agencies” or otherwise render NEPA’s procedural requirements discretionary (*Calvert Cliffs*’ at 1114). This language further implies that such duties “are not inherently flexible” and agencies may not use “excessively narrow construction[s] of existing statutory authorizations to avoid compliance” (*Id.* at 1115). Throughout the NEPA process, the Federal agency is required to “insure the professional integrity, including scientific integrity,” of its discussions and analyses (*Id.* § 1502.24).

The CEQ has the duty of overseeing the implementation of NEPA (42 U.S.C. §§ 4321, 4344)). President Carter directed that CEQ promulgate regulations for the implementation of NEPA (Exec. Order No. 11991, 42 Fed. Reg. 26967 (May 24, 1977), amending Exec. Order 11514, 35 Fed. Reg. 4247 (March 5, 1970), reprinted in 42 U.S.C.A § 4321)). The regulations

subsequently promulgated by CEQ, 40 C.F.R. §§ 1500-08, implement the directives and purpose of NEPA, and “[t]he provisions of [NEPA] and [CEQ] regulations must be read together as a whole in order to comply with the spirit and letter of the law” (40 C.F.R. § 1500.3). CEQ’s regulations are applicable to and binding on all federal agencies (*Id.*; *see, e.g., Hodges v. Abraham*, 300 F.3d 432, 438 (4<sup>th</sup> Cir. 2002)). The regulations also provide formal guidance to the courts on the requirements of NEPA and are entitled to substantial deference (*Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989); *Methow Valley Council* at 355-56; *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)). Among other requirements, CEQ’s regulations mandate that federal agencies address all “reasonably foreseeable” environmental impacts of their proposed programs, projects, and regulations (*See* 40 C.F.R. §§ 1502.4, 1508.18, & 1508.25). CEQ should therefore take a leadership role in ensuring that offshore oil and gas activities undergo a thorough environmental review and that MMS complies with its duties under NEPA.

### **III. APPROVALS OF OFFSHORE OIL AND GAS ACTIVITIES IN THE GULF VIOLATE NEPA**

Home to about 4,000 oil and gas platforms, the Gulf of Mexico is currently one of the most highly exploited continental shelf regions in the world (Montagna et al. 2002). The Gulf region also boasts a diverse population of marine species, many of which are currently considered endangered or threatened. The ongoing threat of oil pollution and routine offshore oil and gas activities remains significant to these marine species and the habitats they have come to depend upon. Nonetheless, the Secretary’s approvals of offshore oil and gas activities in the Gulf of Mexico have gone forward without adequate review of the environmental effects of these actions.

NEPA, which serves as the “basic national charter for protection of the environment,” is among the most comprehensive means by which the Federal government is able to safeguard natural resources (40 C.F.R. § 1500.1). NEPA sets forth a national policy meant to “encourage productive and enjoyable harmony between man and his environment...” and “prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man...” (42 U.S.C. § 4321). NEPA mandates that Federal agencies first subject their actions to a “hard look” at the potential environmental consequences and ensure that relevant environmental information is made available to both “public officials and citizens before decisions are made and before actions are taken” (40 C.F.R. § 1500.1). It is only in the most limited of circumstances that an agency may determine that a proposed action does not “individually or cumulatively have a significant effect on the human environment” such that it may evade stringent environmental review (40 C.F.R. § 1508.4). The Secretary and MMS have neglected these basic duties under NEPA.

The Secretary has relied upon, and continues to rely upon, environmental documents that are wholly inadequate. In 2007, the Secretary prepared a programmatic EIS for the Gulf of Mexico's outer continental shelf oil and gas leasing activities for 2007-2012, and supplemented that EIS in 2009. In its programmatic EIS, MMS analyzed the possibility of only one so-called large spill of approximately 4,600 barrels of oil and other smaller spills (EIS 4-232). In total, MMS assumed that 11,167-31,777 barrels of oil might be spilled into Gulf's marine and estuarine environments for the entire Gulf of Mexico program over 40 years (EIS 4-278). This same flawed analysis was also used in MMS's 2009 Supplemental EIS (SEIS 3-26). Now, it is obvious that a much larger oil spill is a foreseeable possibility that must be analyzed under NEPA. MMS's NEPA documents vastly underestimated the risk and size of an oil spill by analyzing the environmental impacts of even less than the oil spilled in just one day of the current BP oil spill. MMS' conclusions were vastly inadequate with regard to the effects of oil spills on the coastal environment, marine environment, endangered species, marine mammals, fisheries and fish habitat, among other considerations. Accordingly, the environmental impacts of an oil spill failed to provide the requisite "hard look" that NEPA requires. MMS's assumption that there was a low possibility of a large oil spill and failure to analyze the environmental impacts of an oil spill over 4,600 barrels is arbitrary and capricious and violates NEPA.

The Secretary also relies on the programmatic EIS for approvals of individual lease sales in the Gulf of Mexico, preparing only EAs for lease sales despite the significant environmental effects of these actions. In 2007, the Secretary prepared an EA for Lease Sale 206, the lease sale that led to the BP spill, and concluded that the lease sale would have no significant environmental impacts (MMS EA for Lease Sale 206 2007). Subsequently, MMS has routinely found that its lease sales in the Gulf of Mexico have no significant environmental impacts (MMS EA for Lease Sale 213 2009; MMS EA for Lease Sale 215 2010). For the purposes of NEPA, MMS presumes that only one large oil spill (>1,000 barrels) would occur during the 40 year implementation of its 5-year plan. Nonetheless, EAs prepared in 2009 and 2010 acknowledged that a 2009 oil spill greater than 1,000 barrels had already occurred, yet MMS did nothing to change its analysis of oil spill risk or environmental effects (*Id.*). Each of these NEPA documents for lease sales discusses the possibility of oil spills in only the most general terms. In each case the Secretary concluded that spill risks were low and that if a spill were to happen the environmental consequences would be minimal. No spill of the magnitude of BP spill is contemplated or analyzed. Even before the spill the findings that these lease sales pose no significant environmental impacts was arbitrary and capricious, now post-spill it is painfully obvious that the Secretary's environmental analysis and findings violate NEPA.

MMS has done a poor job analyzing oil spills and their environmental effects in its EAs and EISs for the leasing program and lease sales in the Gulf of Mexico. In light of the Gulf oil

spill, the Secretary's continued reliance on these environmental documents is unacceptable. The information regarding the risk of oil spills and environmental impacts of offshore oil and gas activities carried out or authorized by the Services triggers the obligation to prepare a Supplemental Environmental Impact Statement ("SEIS") under NEPA (See 40 CFR § 1502.9(c) (requiring agency to supplement NEPA document when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) ("if there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared") (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989))). The failure of the Secretary to prepare a SEIS to address new information brought to light by the BP oil spill is a violation of NEPA.

#### **a. Categorical Exclusions for Drilling Plans Are Unlawful**

Despite the fact that NEPA and OCSLA require environmental review at every stage of oil and gas development, the Secretary routinely approves exploration plans and development plans, also known as DOCDs in the Gulf, without first preparing an EA or EIS. Indeed, drilling and exploration plan documents have been approved without any mention of alternative proposals or mitigation measures (*see* Initial Exploration Plan: Mississippi Canyon Block 252, BP Exploration & Production, Inc. (Feb. 2009)). In choosing to forgo an EIS or EA for drilling plans, the Secretary relies upon a manual adopted on May 27, 2004. According to this MMS Department Manual for NEPA, the approvals of (1) offshore lease exploration, development/production plans and (2) DOCDs in the central or western Gulf of Mexico are categorically excluded from the need to prepare an EIS or an EA (516 DM 15.4 (C)(10)). The categorical exclusion of drilling plans from NEPA review is unlawful and must be discontinued.

A proposed federal action may be categorically excluded from a detailed NEPA environmental analysis if a federal agency has previously determined that the action meets certain criteria that indicate the action will have no significant environmental impact. The CEQ regulations define a categorical exclusion as a "category of actions which do not individually or cumulatively have a significant effect on the human environment, and which have been found to have no such effect in procedures adopted by a Federal agency." 40 C.F.R. § 1508.4. MMS's approved drilling plans are neither "too minor" to warrant basic environmental analysis, nor are the activities without "significant effect on the human environment." The exploration and development activities in the Gulf of Mexico do not fall within the NEPA framework for categorical exclusions, yet MMS has continued to use its categorical exclusions for these activities.

Since the explosion and oil spill resulting from BP's exploratory drilling on April 20, 2010, the Secretary has approved at least a dozen additional exploration plans and DOCs under the categorical exclusion policy. In each case the Secretary had to make a finding that no significant environmental impacts could occur. In light of the BP oil spill, it is clear that exploratory and development drilling can and does result in significant environmental impacts. The Secretary's policy, as articulated in the Department Manual, that drilling should be categorically excluded from further NEPA review was arbitrary when it was adopted. Moreover, even if the categorical exclusion policy could somehow be deemed to have been rational and lawful at the time it was promulgated, the Gulf oil spill completely undermines the foundation of the policy—namely that the risk of a large oil spill from drilling is so low that it can be completely discounted. Consequently, the Secretary's long-standing policy of applying categorical exclusions in such instances must now be set aside.

Although the Manual does provide for exceptions to the use of a categorical exclusion for drilling plans, this is inadequate to save the Manual's misguided and unlawful policy. Under 516 DM 15.4(C)(10), a categorical exclusion cannot be used if a facility is proposed: (1) In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas; (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; (3) in areas of hazardous natural bottom conditions; or, (4) utilizing new or unusual technology. In such cases, the Secretary is required to prepare at least an EA. Instead, under these enumerated circumstances, where the potential environmental effects are most likely to be significant, MMS should always prepare a full EIS.

Hundreds of exploration plans and DOCs are approved each year under the categorical exclusion policy. Accordingly, most of the drilling conducted in the Gulf goes forward without a thorough analysis of the project specific and site-specific environmental impacts of the drilling. Importantly, drilling plans that are categorically excluded from NEPA review do not undergo any analysis regarding the likelihood and consequences of a large oil spill.

The Secretary has promulgated regulations regarding NEPA compliance, including regulations that describe when a categorical exclusion is or is not available (*See* 43 C.F.R. § 46). Only in the most limited of circumstances may an agency determine that an action it proposes to take falls within a "categorical exclusion" from the EIS process. A categorical exclusion must make allowances for "extraordinary circumstances" under which an action normally excluded may in fact have a significant environmental effect (*Id.*). In addition to the listed MMS exceptions specific to Gulf of Mexico exploration plans and DOCs, the Department of Interior provided "extraordinary circumstances" in which actions that are normally excluded from full-fledged NEPA review "may have a significant environmental effect and require additional

analysis and action.” 40 C.F.R. § 205(c). If the action meets an extraordinary circumstance, “further analysis and environmental documents must be prepared for the action.” *Id.* The extraordinary circumstances include, but are not limited to, individual actions that:

- (a) Have significant impacts on public health or safety.
- (b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; . . . wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas.
- (c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].
- (d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- . . .
- (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.
- (i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.

40 C.F.R. § 215. MMS’s approvals of many, if not most, Gulf of Mexico exploration plans and DOCDs fall within one or more of these extraordinary circumstances. Certainly, the current oil spill disaster makes clear that the BP exploration plan had “highly uncertain and potentially significant environmental effects or involve[d] unique or unknown environmental risks,” as well as “significant impacts on public health and safety.” Moreover, the drilling plans also have predictably significant impacts on wetlands, migratory birds, and “other ecologically significant or critical areas,” as well as threatened and endangered species and their critical habitat. While the scale of the disaster may or may not have been obvious from the outset, the potential for significant environmental effects is plain for exploration plans and DOCDs. From the outset the use of categorical exclusions for drilling plans was inconsistent with NEPA and its implementing regulations, and now more than ever the continued approval of exploration plans and DOCDs in the Gulf under the categorical exclusion policy is untenable. Additionally, because NEPA provides for public participation, including a public comment period and public hearings, the failure of the Secretary to carry out a NEPA process for drilling plans frustrates the public participation process that Congress intended.

#### **IV. OFFSHORE OIL AND GAS ACTIVITIES TRIGGER NEPA REVIEW**

##### **a. Offshore Oil and Gas Activities Are Major Federal Actions with Significant Environmental Effects**

A “major Federal action” trigger to produce an EIS under NEPA includes actions with effects that may be major in scope and potentially subject to Federal control and responsibility (40 C.F.R. § 1508.18). MMS’s approval of offshore oil and gas activities at every stage is a major federal action. Before preparing an EIS a Federal agency may first be responsible for producing a detailed Environmental Assessment (“EA”) to determine whether the project significantly affects the environment and thus requires a full EIS (42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9). The term “significantly,” as used in NEPA, requires a consideration of both the context and intensity of the proposed action (40 C.F.R. § 1508.27). When evaluating the intensity of an action, an agency should take into consideration, inter alia, the unique characteristics of the geographic area, the degree to which effects on the quality of the human environment are likely to be highly controversial and whether an action is related to other actions with individually insignificant, but cumulatively significant, impacts (*Id.*). If an EIS is not required, the federal agency must provide a “convincing statement of reasons” why the project’s impacts are insignificant and issue a Finding of No Significant Impact or “FONSI” (40 C.F.R. §§ 1501.4, 1508.9, 1508.13). Offshore oil and gas activities in the Gulf of Mexico present significant environmental effects that require analysis in an EIS, or at minimum the preparation of an EA. In light of the ongoing oil spill in the Gulf of Mexico from BP’s exploratory drilling, it is completely unreasonable for the Secretary to conclude that any offshore drilling activities are without any significant environmental impacts.

Satellite images currently show that the oil slick resulting from the BP *Deepwater Horizon* spill is spanning more than 10,000 square miles and has reached the shores of the Gulf Coast. Meanwhile, researchers have discovered massive plumes of oil in the deep waters beneath the sea surface. There is mounting concern that sea currents will carry the spill south past the Florida Keys and up the Atlantic Coast. Hundreds of species in the Gulf of Mexico will be harmed by the toxic oil, including several threatened and endangered species of sea turtles, whales, and seabirds. Oiled seabirds have been among the first victims of the oil spill, and oil is beginning to wash up into wetlands where thousands of seabirds nest and rest from their migrations. Marine animals, such as sperm whales, in the massive spill area have been exposed to the oil, which can impair behavior, respiratory functions, reproduction, food availability, and poison prey. Moreover, toxic persistent compounds in the oil remain in the environment and accumulate in the food chain. The effects of the oil spill are likely to be both far-reaching and long lasting. Significant impacts on the environment will continue for years to come. Despite



extensive efforts to respond to the oil spill, the prospects of stopping the leak are still distant. Meanwhile, cleanup and containment efforts have proven inadequate to prevent disastrous impacts on ocean ecosystems and wildlife. More than 1 million gallons of dispersant have been deployed to break up the oil spill, which comes with its own set of environmental effects. Additionally, oil fumes and controlled burns pollute the air. The *Deepwater Horizon* oil spill is the worst environmental disaster in U.S. history, thus demonstrating the significant environmental impacts that can and do result from exploration drilling.

Many of the routine activities from offshore oil and gas activities can also adversely affect the environment. Activities such as construction of pipelines, vessel traffic, and drilling can directly affect the marine habitat. Additionally, the discharges of drilling muds, produced waters, and oil spills can impact wildlife and its habitat. Direct and indirect impacts to the environment from oil and gas activities include (excerpted from NMFS 2009):

- disturbance created by the activity of drilling,
- associated pollution from drilling activities,
- discharge of wastes associated with offshore exploration and development,
- operational wastes from drilling muds and cuttings,
- potential for oil spills, and potential for catastrophic spills caused by accidents or hurricanes, and
- alteration of food webs created by the submerged portions of the oil platform, which attract various invertebrate and fish communities.

These effects require analysis under NEPA consultation and must inform decisionmaking so that the Secretary can avoid and reduce harmful impacts on the environment. A few of the significant environmental effects that trigger the need to prepare an EA or EIS for offshore oil and gas activities are described below.

#### **i. Exposure to Toxic Compounds**

The continued presence of toxic aromatic hydrocarbons in the Gulf presents a very real threat to the health and well-being of marine species. Chronic oil exposure has been known to have a wide array of biological effects including: behavioral responses, suppressed growth, induced or inhibited enzyme systems and other molecular effects, physiological responses, reduced immunity to disease and parasites, histopathological lesions and other cellular effects, tainted flesh, and chronic mortality (*See* Holdway 2003). Studies of past ecosystem responses to oil spills in the Gulf have shown that, over time, toxicity has led to noticeable depressions in the population sizes of various species of nematodes, amphipods and copepods in the areas nearest to oil platforms (Peterson et al. 1996). Additionally, bioaccumulation of resultant toxic compounds from oil spills has been shown to exist years after a spill event. For example, over 20 years after the *Exxon Valdez* spill in Prince William Sound, Alaska, polychlorinated biphenyls

(“PCBs”), difurans, and other aromatic hydrocarbons found in crude oil were detected higher concentrations in harlequin ducks captured in areas oiled during the spill than in nearby un-oiled areas (Esler et al. 2009).

Oil is toxic to both bottom dwelling and intertidal shellfish such as lobsters, crabs, oysters, and clams (FWS 2010). These shellfish can also accumulate toxins from oil and pass it onto predators. Exposure to crude oil from small or large spills can be devastating for fish eggs. When exposed to weathered crude oil fish embryos experienced malformations, genetic damage, mortality, and decreased size and inhibited swimming (Carls et al. 1999). Adult fish are also at risk of adverse effects from exposure to oil including reduced growth, enlarged liver, changes in heart and respiration rates, fin erosion, and reproductive problems (FWS 2010).

## **ii. Threatened and Endangered Species**

The presence of threatened and endangered species in the Gulf that are at risk from oil and gas development makes categorical exclusion inapplicable to drilling approvals. The Gulf of Mexico is home to several threatened and endangered species of marine mammals, sea turtles, seabirds, and fish. Endangered whales in the Gulf include sperm whale (*Physeter macrocephalus*), blue whale (*Balaenoptera musculus*), fin whale (*B. physalus*), sei whale (*B. borealis*), humpback whale (*Megaptera novaeangliae*), and North Atlantic right whale (*Eubalaena glacialis*). Five listed sea turtles occur in the Gulf of Mexico, which are leatherback (*Dermochelys coriacea*), green (*Chelonia mydas*), Kemp’s ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*), and hawksbill (*Eretmochelys imbricata*) sea turtles. Protected fish species include the gulf sturgeon (*Acipenser oxyrinchus desotoi*) and smalltooth sawfish (*Pristis pectinata*). Protected elkhorn (*Acropora palmata*) and staghorn corals (*A. cervicornis*) occur in the Florida Keys. Coastal species include, West Indian manatee (*Trichechus manatus*), piping plover (*Charadrius melodus*), whooping crane (*Grus americana*), wood stork (*Mycteria americana*), Alabama red-belly turtle (*Pseudemys alabamensis*), Alabama (*Peromyscus polionotus ammobates*), Choctawhatchee (*P. polionotus allophrys*), St. Andrew (*P. polionotus peninsularis*), and Perdido Key (*P. polionotus trissyllepsis*) beach mice.

Impacts on threatened and endangered species can occur from all phases of offshore activities. The threat of oil spills presents the greatest concern for threatened and endangered species and their critical habitat. Additionally, routine activities can impact listed species, including vessel strikes, marine debris, oil pollution, water quality impacts, ensonification and destruction of habitat all have effects on threatened and endangered species. For example, sperm whales in the Gulf may be susceptible to collisions with vessels. For leases between 2007 and 2012, MMS estimated that there will be 119,000-241,000 trips by service vessels in the Central Planning Area and an additional 94,000-155,000 trips in the Western Planning Area (SEIS at 4-

87-88; EIS at 4-112). This significant increase in vessel traffic will contribute to collisions with protected whales. NMFS estimated that 7-8 sperm whales may be harassed annually by vessels. BiOp at 17. Vessel strikes can cause serious injuries and death of whales. In its EIS for Gulf of Mexico lease sales, MMS concedes:

Increased traffic from support vessels involved in survey, service, or shuttle functions will increase the probability of collisions between vessels and marine mammals occurring in the area. These collisions can cause major wounds on cetaceans and/or be fatal (e.g., northern right whale, Kraus, 1990, and Knowlton et al., 1997; bottlenose dolphin, Fertl, 1994; sperm whale, Waring et al., 1997).

(EIS at 4-107). Additionally, marine debris from discarded plastic used during offshore drilling and production can harm listed whales and sea turtles by entangling them, causing injury or impaired mobility that can interfere with feeding and reproduction.

### **iii. Seismic and Noise Impact**

In addition to glossing over the potential biological impacts of oil spills and drilling, environmental analysis of drilling-related activities in the Gulf do not properly analyze the significant environmental risks associated with seismic exploration – a harmful and disruptive activity with potentially major significant impacts on the marine environment. For offshore exploration, the oil and gas industry typically rely on arrays of airguns, which are towed behind ships and release intense impulses of compressed air into the water about once every 10-12 seconds. A large seismic airgun array can produce effective peak pressures of sound higher than those of virtually any other man-made source save explosives (National Research Council, *Ocean Noise and Marine Mammals* (2003)). Although airguns are vertically oriented within the water column, horizontal propagation is so significant as to make them, even under present use, one of the leading contributors to low-frequency ambient noise thousands of miles from any given survey (Nieukirk et al. 2004). It is well established that the high-intensity pulses produced by airguns can cause a range of impacts on marine mammals, fish, and other marine life, including broad habitat displacement, disruption of vital behaviors essential to foraging and breeding, loss of biological diversity, and, in some circumstances, injuries and mortalities (*See e.g. Weilgart* (2007)).

### **iv. Climate Change Impacts**

NEPA documents performed in anticipation of Gulf drilling have also failed to adequately review the impacts of drilling, and subsequent combustion of oil and gas resources for energy, on climate change and ocean acidification. The MMS cannot properly consider the environmental damage and the adverse impact on the coastal zone of exploration and development programs without considering its greenhouse gas emissions and global warming implications. Leading scientists have pronounced, with a high degree of certainty, that additional

warming of more than 1° C (1.8° F) above year 2000 levels will constitute “dangerous climate change,” with particular reference to sea level rise and species extinction (Hansen 2006; Hansen et al. 2006a,b). Furthermore, scientists are able to tell us the atmospheric greenhouse gas level “ceiling” that must not be exceeded in order to prevent additional warming of more than 1° C (1.8° F) above year 2000 levels (*Id.*). In turn, scientists can tell us the limitations that must be placed on greenhouse gas emissions in order to not exceed this “ceiling” of approximately 450 ppm of carbon dioxide.

Dr. James E. Hansen, Director of the NASA Goddard Institute for Space Studies, and NASA’s top climate scientist, has stated: “In my opinion there is no significant doubt (probability > 99%) that . . . additional global warming of 2° C would push the earth beyond the tipping point and cause dramatic climate impacts including eventual sea level rise of at least several meters, extermination of a substantial fraction of the animal and plant species on the planet, and major regional climate disruptions” (Hansen 2006:30). In order to avoid truly unacceptable consequences of global warming, we must stop the growth of greenhouse gas emissions, and, in relatively short order, begin reducing them. Achieving the reductions necessary to keep additional global warming beyond the year 2000 within 1° C will be extremely challenging.

The future impacts of global warming are not too speculative to consider. The continuation of current emissions trajectories for even just 10 more years will essentially commit us to climate disaster (Hansen 2006, Hansen et al. 2006a, 2006b). Sea level rise will inundate not only the habitat of the beach mouse and sea turtle nesting beaches but also urban areas home to millions of people. Many thousands of species will become extinct (Thomas et al. 2005; Parmesan 2006). Public health will be severely impacted from increased incidence of disease and more frequent heat waves (Epstein and Mills 2005). Coral reefs, including those in the Florida Keys National Marine Sanctuary and Flower Garden Banks National Marine Sanctuary, will likely disappear entirely due to increasing ocean temperatures and ocean acidification from increased levels of dissolved carbon dioxide.

The world’s oceans are also becoming more acidic from absorbing carbon dioxide emissions from the atmosphere to the tune of 22 million tons each day. Surface waters have become 30% more acidic since the industrial age, and scientists predict that if carbon dioxide emissions continue unabated seawater acidity will increase 100-150% by the end of the century (Orr et al. 2005). Thus, ocean acidification is becoming one of the greatest threats to seawater quality. Ocean acidification impairs the ability of marine animals — including corals, plankton, and shellfish — to build the protective shells they need to survive. Scientific evidence shows that ocean acidification may harm many marine organisms, and some of these impacts are already underway.

- Studies of certain corals, shellfish, and plankton show that they will have difficulty building and maintaining their structures under future conditions of acidification (Talmage et al. 2009, Fabry et al. 2009, Cohen et al. 2009).
- Slower growth rates have already been observed in some corals, and many corals could be lost within a few decades due to global warming and acidification (Hoegh Guldberg et al. 2007, Veron et al. 2009).
- Pacific Coast oyster hatcheries are experiencing difficulties that may be related to acidification, and two of the largest hatcheries report production rates down by as much as 80% (Miller et al. 2009).
- Some plankton are growing thinner and weaker shells in polar regions, which are more vulnerable to ocean acidification (Moy et al. 2008).
- Studies show that exposure of fish, squid, and other animals to future levels of ocean acidification may disrupt metabolism and other biological functions (*J. of Oceanogr.* 60:705-718; *PNAS* 105:20776-20780; *J. of Oceanogr.* 60:731-741).

The Gulf of Mexico provides a significant amount of domestic oil for consumption and therefore MMS must analyze the full impacts of its actions approving offshore oil and gas activities.

In short, global warming represents the most significant and pervasive threat to the future of biodiversity worldwide, affecting both terrestrial and marine species from the tropics to the poles. Peer-reviewed studies have concluded that 35 percent of species could be committed to extinction by the year 2050 if current emissions trajectories continue and that these extinctions could be significantly reduced if greenhouse gas emissions fall (Thomas 2004). The MMS cannot comply with its legal obligation to fully analyze and disclose the impact of oil and gas development activities on the environment without accurately analyzing global warming and ocean acidification.

#### **b. NEPA Requires Thorough Environmental Analysis**

Where an EIS is required, it should provide a detailed statement of the following: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long- term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented (42 U.S.C. § 4332(C)). In this way, an EIS serves to “inform decision-makers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment” (40 C.F.R. § 1502.1).

CEQ recognizes that the “heart of the environmental impact statement” is the analysis of alternatives to the proposed action (40 C.F.R. § 1502.14). A proper alternatives analysis “rigorously explore[s] and objectively evaluate[s] all reasonable alternatives, and alternatives which were eliminated from detailed study [along with a discussion of] the reasons for their having been eliminated” (*Id.* § 1502.14(a)). Each alternative is to be discussed in detail “so that reviewers may evaluate their comparative merits” (*Id.* § 1502.14(b)) and a “no action” alternative must be included as part of the final analysis (*Id.* § 1502.14(d)).

NEPA review further requires Federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action (40 C.F.R. §§ 1508.7, 1508.8). Cumulative impacts include the “impact[s] on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future significant actions” (*Id.* § 1508.7). Because the cumulative impacts of a proposed action may be significant, it is impermissible to segment a project into consecutively smaller pieces in order to avoid completing an EIS (*State of South Carolina ex rel. Campbell v. O’Leary*, 64 F.3d 892, 898 (4<sup>th</sup> Cir. 1995)). Segmentation of one phase of a larger project prior to completion of environmental review of the whole project constitutes impermissible segmentation when the smaller component of the action has a “direct and substantial probability of influencing [the agency’s] decision regarding completion of the larger decision” (*Id.* quoting *State of North Carolina v. City of Virginia Beach*, 951 F.2d 596, 603 (4<sup>th</sup> Cir. 1991)). Direct effects are caused by the action and occur at the same time and place (40 C.F.R. § 1508.8(a)). Indirect effect are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable (*See id.* § 1508.8(b)). Both include “effects on natural resources and on the components, structures, and functioning of affected ecosystems,” as well as “aesthetic, historic, cultural, economic, social, or health [effects]” (*Id.*).

In addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental impacts of the proposed action (40 C.F.R. § 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental consequences and mitigation measures; *see also Methow Valley Citizens* at 732-34 (stating that “omission of a reasonably complete discussion of possible mitigation measures [in an EIS] would undermine the ‘action forcing’ function of NEPA...”)). NEPA implementing regulations define mitigation to encompass “avoidance, reduction, or repair of adverse impacts or providing substitute resources (40 C.F.R. § 1508.20).

NEPA requires Federal agencies to ensure the public that they have considered environmental concerns in their decision-making processes (*Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97, 100-101 (1983)). To that end, environmental analysis conducted under NEPA for the five-year leasing plans, lease sales, exploration plans,

and development and production plans, or DOCDs in the central or western Gulf of Mexico, seismic surveys and applications to drill must provide a full environmental analysis. Some of the specific topics that MMS should discuss are enumerated below.

## **V. RESPONSES TO CEQ QUESTIONS**

### **1. What are substantive issues and at what level should they be analyzed in each of the tiered NEPA submissions, from National 5-year Oil and Gas Program to an individual well permit?**

As previously mentioned, OCSLA establishes four distinct stages for oil and gas development activities on the OCS: (1) the development of a five-year leasing plan; (2) issuance of oil and gas leases; (3) approval of lessee's exploration plans; and (4) approval of lessee's development and production plans (43 U.S.C. § 1331 *et seq.*). Thus far, NEPA review for OCS oil and gas leasing activities in the Gulf has only occurred during the lease sale stage. NEPA documents for oil and gas development activities in the Gulf largely omit any substantive discussion regarding the possibility of an oil spill, and couch the potential risks in only the most general of terms. In fact, spill risk is often deemed to be low and environmental consequences are assumed to be minimal. More startling, however, is that in light of the consequences of the *Deepwater Horizon* spill, the Secretary has continued to approve exploration and development plans without prior environmental review by invoking categorical exclusions pursuant to the MMS Department Manual for NEPA.

It is no longer the case that MMS can simply shirk its duty to perform sound environmental review in the Gulf simply because it deems the risks to be negligible. If anything, the fallout from the *Deepwater Horizon* explosion has made it clear that environmental review for oil and gas development activities in the Gulf has been utterly inadequate in confronting and analyzing potential environmental threats. To that end, it is necessary for the agency to revise its policy of categorical exclusions under categorical exclusions under 516 DM 15.4 (C)(10) of the Department Manual for NEPA and instead prepare an EIS at every stage of oil and gas activity in the Gulf. Additionally, an EIS should be performed for all exploration plans and development and production plans, or DOCDs, with facilities: (1) In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas, or (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or (3) in areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology.

Moving forward, it is imperative that all environmental analyses conducted under NEPA for the five-year leasing plans, lease sales, exploration plans, and development and production

plans, or DOCDs in the central or western Gulf of Mexico, address the following issues, in addition to other requirements under NEPA:

- Environmental impacts of worst-case scenario oil spills and cumulative oil spills, including response activities and the use of dispersants.
- The direct, indirect, and cumulative climate change impacts of the action, including the greenhouse gas emissions from the produced oil and gas, and the influence of those climate change impacts on the affected environment.
- The impacts of the action on special status species such as those protected under the Endangered Species Act and Marine Mammal Protection Act and sensitive habitat areas, including but not limited to critical habitat, essential fish habitat, marine protected areas.
- A reasonable range of alternatives that would avoid or minimize environmental impacts
- Broader cumulative impacts analysis which take into consideration the incremental impacts of the action when considered in conjunction with past, present and reasonably foreseeable future actions in the Gulf.
- At lease sale and exploration stages, each EIS should contain site-specific analyses, smaller in scale than a typical multi-sale EIS, though not so narrowly focused as to result in impermissible segmentation of the project.
- At exploration and drilling stages, specific focus on time and place of activity, keeping in mind seasonal shifts in migratory patterns and habitat composition.

There can no longer be any doubt that the environmental consequences and cumulative effects of oil and gas development in the Gulf significantly impact the marine environment. The *Deepwater Horizon* spill has had considerable effects on hundreds of species of marine mammals, migratory and ground-nesting birds, fish, and reptiles. As a result of the spill, these species face prolonged exposure to oil and toxic fumes, loss of habitat, loss of vegetation and food sources as oil floods nearby wetlands, loss of buoyancy, skin and eye lesions, ulcers, pneumonia, liver damage, loss of eggs and young, decreased disease resistance, loss of breeding grounds, and fatalities (National Wildlife Federation, *How does the BP Oil Spill Impact Wildlife and Habitat?*, <http://www.nwf.org/Wildlife/Wildlife-Conservation/Threats-to-Wildlife/Oil-Spill/Effects-on-Wildlife.aspx> (last visited June 8, 2010)). With far-reaching environmental



impacts like this, it is simply impractical to suggest that low-probability, high-impact spills should not be analyzed in the context of an EIS.

**2. Does this sequence of permitting stages (and associate NEPA submissions) allow for comprehensive evaluation of all relevant issues?**

The sequence of permitting stages (and associate NEPA submissions) can only provide for comprehensive evaluation of all relevant issues if a thorough NEPA analysis is performed at each of the four stages of oil and gas development. The Secretary's approval of permits and other regulatory functions at each of these stages constitutes a major Federal action and should be subject to NEPA review (42 U.S.C. §§ 4321 - 4370). Compliance with NEPA in the Gulf should require, at a minimum, preparation of a detailed environmental assessment ("EA") of proposed actions (42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9), with the possibility of more detailed environmental impact statements ("EIS") in all instances in which actions are deemed to have significant effects on the environment.

**3. Has the use of the CER process been an effective tool for reducing unnecessary paperwork without compromising the robustness of the NEPA analysis for OCS oil and gas activities?**

The use of the CER process has clearly not been an effective tool for reducing unnecessary paperwork. In fact, this scheme has only worked to weaken the effectiveness of NEPA analysis in the Gulf and has created environmental problems many magnitudes larger in scope than the small-scale administrative hurdles it was designed to address.

It is critical that CEQ and MMS initiate rulemaking and CEQ provide guidance to eliminate the categorical exclusion of offshore leases, exploration plans, development and production plans, and DOCDs in the Gulf of Mexico from detailed review under NEPA (40 C.F.R. § 1508.18). Approval of drilling and exploration plans without compelling any form of analysis of alternative proposals or mitigation measures is an unreasonably risky practice. In light of the serious environmental impacts of the *Deepwater Horizon* spill, it is imprudent to rely on a policy of categorical exclusions to minimize unnecessary paperwork.

Pursuant to NEPA, a categorical exclusion may only be used on a category of actions "which do not individually or cumulatively have a significant effect on the human environment and ... therefore, neither an environmental assessment nor an environmental impact statement is requirement" (40 C.F.R. § 1508.4). Notwithstanding, NEPA requires agencies to take environmental factors into consideration at every important stage of its decision-making process (*Calvert Cliffs*' at 1118). Duties under NEPA are not inherently flexible and must be complied

with to the fullest extent. Considerations of administrative difficulty, delay, or economic cost do not, and should not, strip the statute of its fundamental importance (*Id.* at 1115).

**4. To what degree has public engagement been a part of MMS NEPA practice, particularly as it deals with categorical exclusions?**

The catastrophic impacts of the *Deepwater Horizon* spill, the effects of which we will likely face for decades to come, stem from a lack of agency oversight and public participation. Without first subjecting proposed actions to stringent NEPA review, it is impossible for the public to assess, propose amendments to, or comment on potential mitigation measures and alternative action proposals. Indeed, in such instances, public participation, in the form of notice and comment, is non-existent.

**VI. CONCLUSION**

Thank you for your consideration of this Petition. MMS and CEQ have the duty and authority to ensure that offshore oil and gas activities comply with the goals and mandates of NEPA. Only by eliminating the categorical exclusion of drilling plans can MMS meet its duties under NEPA. If any provision of this petition is found to be invalid or unenforceable, the invalidity or lack of legal obligation shall not affect other provisions of the petition. Thus, the provisions of this petition are severable.

**VII. SOURCES**

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*Hodges v. Abraham*, 300 F.3d 432, 438 (4<sup>th</sup> Cir. 2002).

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