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## Too Much Oil for the Rubber-Stamp: The Government's Role in the BP Oil Spill

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# TOO MUCH OIL FOR THE RUBBER-STAMP: THE GOVERNMENT’S ROLE IN THE BP OIL SPILL

*Jaclyn Lopez*

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### I. INTRODUCTION

In the wake of British Petroleum’s (“BP”) *Deepwater Horizon* oil spill, Michael Ellis, a veteran charter boat captain, volunteered to assist BP with oil spill cleanup efforts. He signed a vessels of opportunity contract with BP, which authorized him to charter a boat in the Gulf of Mexico for sea turtle rescuers so that they could attempt to save sea turtles impacted by the oil spill. Typical sea turtle rescues involved identifying oil lines, which are places in the ocean where oil accumulates at the convergence of two currents, and scooping out sea turtles immobilized by the thick oil.

On several occasions, Mr. Ellis witnessed BP’s use of “controlled” or “in-situ” burns, a widely accepted method of containing and disposing of oil. Responders conduct a controlled burn by dragging fire-resistant booms behind boats to corral oil, where it has already accumulated, and then lighting the enclosure on fire. In all, BP burned approximately 10 million gallons of oil over 500 square miles in the Gulf of Mexico during the summer of 2010.<sup>1</sup> However, because the

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1. Department of the Interior, Update: The Ongoing Administration-Wide Response to the Deepwater BP Oil Spill <http://www.doi.gov/news/doinews/Update-6-28-2010-The-Ongoing-Administration-Wide-Response-to-the-Deepwater-BP-Oil-Spill.cfm> (last visited Mar. 21, 2011); Patrik Jonsson, *BP Gulf Oil Spill: Turtles to be Protected from ‘Burn Boxes’*,

same oil lines that BP targeted for burning also trapped the sea turtles, the practice had the propensity to harm rare and endangered sea turtles such as: the Kemp's ridley, leatherback, green, loggerhead, and hawksbill sea turtle by overwhelming, suffocating, and burning the trapped sea turtles. Mr. Ellis became concerned that this was happening when BP refused to allow him and other boat captains close enough to examine the oil lines to determine whether sea turtles were in fact getting stranded and burned alive in the burn boxes.

While controlled burns are an approved oil spill response method, activities that result in the unauthorized "take" of an endangered species are not. Therefore, believing BP was engaged in the unauthorized "take" of sea turtles and upon information obtained from Mr. Ellis and others, environmental groups sought a temporary restraining order against BP seeking to stop it from engaging in activities that kill, harm, and harass endangered and threatened sea turtles in violation of the Endangered Species Act.<sup>2</sup> The lawsuit resulted in a settlement agreement where the U.S. Coast Guard and BP temporarily agreed to cease oil burning, meet and confer with wildlife agencies to minimize adverse impacts, and revise protocols for sea turtle observation and rescue.<sup>3</sup>

The immediate halt and reform of the burn boxes was a small but significant victory in the litany of litigation that followed the oil spill. This article focuses on the impacts of the oil spill and response efforts on wildlife and provides a brief overview of the role of two federal environmental laws in protecting endangered and threatened species from the impacts of oil and gas drilling and production activities. This article is based on a presentation given by the author at the Florida A&M University College of Law's Environmental Law and Justice Symposium, November 11-12, 2010. Part I reviews the government's noncompliance with the National Environmental Policy Act throughout its oil and gas leasing program and explains how that may have contributed to the overall devastation of the oil spill. Part II summarizes the failure of the government to comply with the Endangered Species Act and how that led to the injury of endangered and

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The Christian Science Monitor, July 3, 2010, <http://www.csmonitor.com/Environment/2010/0703/BP-Gulf-oil-spill-Turtles-to-be-protected-from-burn-boxes>.

2. Center for Biological Diversity, *Agreement Reached in Gulf to Prevent Sea Turtle Burning Deaths Settlement Forces BP to rescue Sea Turtles Before Oil Slicks Set on Fire*, July 2, 2010, [http://www.biologicaldiversity.org/news/press\\_releases/2010/gulf-sea-turtles-07-02-2010.html](http://www.biologicaldiversity.org/news/press_releases/2010/gulf-sea-turtles-07-02-2010.html).

3. Patrik Jonsson, *BP Gulf Oil Spill: Turtles to be Protected from 'Burn Boxes'*, THE CHRISTIAN SCIENCE MONITOR, July 3, 2010, <http://www.csmonitor.com/Environment/2010/0703/BP-Gulf-oil-spill-Turtles-to-be-protected-from-burn-boxes>.

threatened species. Part III looks at the use of dispersants in the response efforts and the long-term impacts that dispersants may have. This article concludes that the government's failure to adhere to environmental laws contributed to the overall environmental impact of the oil spill and response efforts.

## II. THE BP OIL SPILL AND THE NATIONAL ENVIRONMENTAL POLICY ACT

It is estimated that BP's failed Macondo well released 4.9 million barrels of crude oil into the Gulf of Mexico.<sup>4</sup> The spill impacted over 500 miles of coastline, and the National Oceanic Atmosphere Administration was forced to close large portions of the Gulf of Mexico to fishing.<sup>5</sup> The oil spill and response efforts impacted more than 15,000 different species that call the Gulf home,<sup>6</sup> including dozens of endangered or threatened species.<sup>7</sup>

Wildlife officials frantically transported and released more than 70,000 loggerhead hatchlings into waters far from the oil spill in an attempt to keep them safe.<sup>8</sup> To date, wildlife officials have collected the carcasses of over 6,000 birds, 100 marine mammals, and over 600 sea turtles.<sup>9</sup> There are no records of the numbers of fish, crustaceans, and other small fauna that were impacted by the oil spill and response efforts; however, scientists have discovered a brown substance killing

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4. Campbell Robertson and Clifford Krauss, *Gulf Spill is the Largest of its Kind*, *Scientists Say*, N.Y. TIMES, Aug. 2, 2010, <http://www.nytimes.com/2010/08/03/us/03spill.html>.

5. [http://sero.nmfs.noaa.gov/deepwater\\_horizon\\_oil\\_spill.htm](http://sero.nmfs.noaa.gov/deepwater_horizon_oil_spill.htm) (last visited Jul. 18, 2011).

6. D.L. Felder, D.K. Camp, and J.W. Tunnell, *An Introduction to Gulf of Mexico Biodiversity Assessment, in Gulf of Mexico Origin, Waters, and Biota Vol. I, Biodiversity*, 8 (Texas A&M University Press 2009).

7. <http://www.fws.gov/endangered/Marine> mammals include: blue whale, fin whale, humpback whale, North Atlantic right whale, sei whale, sperm whale, and West Indian manatee; Sea turtles include: green, hawksbill, Kemp's ridley, leatherback, and loggerhead; Fish include: Gulf sturgeon and smalltooth sawfish; coral include: elkhorn and staghorn; Birds include: piping plover, whooping crane, and wood stork; Freshwater turtles include: Alabama red-belly turtle; Land mammals include: Alabama, Choctawhatchee, Perdido, and St. Andrew beach mouse.

8. *Gulf Oil Spill: 70,000 Turtle Eggs to be Moved from Oily Beaches in Massive Relocation Effort*, THE HUFFINGTON POST, Jun. 30, 2010, [http://www.huffingtonpost.com/2010/06/30/gulf-oil-spill-70000-turt\\_n\\_630562.html](http://www.huffingtonpost.com/2010/06/30/gulf-oil-spill-70000-turt_n_630562.html).

9. FWS, <http://www.fws.gov/home/dhoilspill/collectionreports.html> (select "Consolidated Wildlife Table") (last visited Mar. 21, 2011).

coral in colonies located in 4,600 feet deep water about seven miles southwest of the spill.<sup>10</sup>

The direct impacts of crude oil on marine wildlife are well-documented.<sup>11</sup> Impacts range from acute to chronic and lethal to sub-lethal. Crude oil contains hundreds of compounds, mostly toxic hydrocarbons, with polycyclic aromatic hydrocarbons (“PAHs”) causing some of the most significant damage. Oil affects different TAXA in different ways. Impacts to fish and sharks can include larval deformation and death in partially weathered crude oil at less than one part per billion, which is the equivalent to one drop of oil in a swimming pool full of water.<sup>12</sup> Sea turtle eggs suffer mortality due to smothering and oil’s toxicity,<sup>13</sup> and sea turtles in the open ocean can ingest and inhale tar balls.<sup>14</sup> Oil has an immediate impact on birds by destroying the waterproofing and insulating properties of their feathers, which compromises their buoyancy and ability to thermo-regulate and exposes them to additional stressors.<sup>15</sup> Birds also suffer chronic effects from PAH toxicity.<sup>16</sup> Marine mammals inhale volatile compounds at the surface and they can eat and swallow oil, which affects their ability to locate food, and can have long-term population-wide effects.<sup>17</sup> Oil is also toxic to bottom-dwellers. Corals and other invertebrates suffer mortality from smothering and impairment of reproduction, growth,

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10. Mark Schleifstein, *Scientists Find Dead and Dying Coral Covered With a Brown Substance 7 Miles from BP Oil Spill Site*, NOLA.com, Nov. 4, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/11/scientists\\_find\\_dead\\_and\\_dying.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/11/scientists_find_dead_and_dying.html).

11. See D.A. Holdway, *The acute and chronic effects of wastes associated with offshore oil and gas production on temperate and tropical marine ecological processes*, *Marine Pollution Bulletin* 44:185-203, 2002; C.H. Peterson, S.D. Rice, J.W. Short, D. Esler, J.L. Bodkin, B.E. Ballachey, and D.B. Irons, *Long-term ecosystem response to the Exxon Valdez oil spill*, *Science* 302:2082-86, 2003.

12. M.G. Carls, S.D. Rice, and J.E. Hose, *Sensitivity of Fish Embryos to Weathered Crude Oil: Part I. Low-Level Exposure During Incubation Causes Malformations, Genetic Damage, and Mortality in Larval Pacific Herring (Clupea pallasii)*, *Environmental Toxicology and Chemistry* 18:481-93, 1999.

13. NOAA, OIL AND SEA TURTLES: BIOLOGY, PLANNING, AND RESPONSE 38 (2010), [http://response.restoration.noaa.gov/book\\_shelf/35\\_turtle\\_complete.pdf](http://response.restoration.noaa.gov/book_shelf/35_turtle_complete.pdf).

14. *Id.* at 39-40.

15. B.M. Jensen, *Review Article: Effects of Oil Pollution, Chemically Treated Oil, and Cleaning on the Thermal Balance of Birds*, *Environmental Pollution* 86:207-15, 1994.

16. C. Alonso-Alvarez, I. Munilla, M. Lopez-Alonso, and A. Velando, *Sublethal Toxicity of the Prestige Oil Spill on Yellow-Legged Gulls*, *Environment International* 33:773-81, 2007.

17. NOAA, NOAA’S OIL SPILL RESPONSE: EFFECTS OF OIL ON MARINE MAMMALS AND SEA TURTLES, [http://response.restoration.noaa.gov/book\\_shelf/1887\\_Marine-Mammals-Sea-Turtles-fact-sheet.pdf](http://response.restoration.noaa.gov/book_shelf/1887_Marine-Mammals-Sea-Turtles-fact-sheet.pdf).

respiration, excretion, chemoreception, feeding movements, stimulus response, disease resistance, and chronic impacts.<sup>18</sup>

Through environmental statutes such as the National Environmental Policy Act (“NEPA”), Congress imposes environmental obligations on the federal government for activities it carries out, funds, or authorizes, including those that lead to oil and gas drilling and production. The goal of NEPA is that the action agency takes a hard look at the activities it proposes and involves the public at an early stage. To facilitate this goal, there are three levels of environmental review under NEPA. NEPA mandates that for “major federal actions significantly affecting the quality of the human environment” the action agency prepare an environmental impact statement (“EIS”).<sup>19</sup> An EIS is the most comprehensive of the three types of assessment and is required for all actions that will significantly affect the environment. An EIS should contain an analysis of alternatives and the public should have an opportunity to comment on the draft EIS. An agency may prepare an environmental assessment (“EA”) where an action may not have significant impacts or where the agency is unsure of the significance of the impacts. An EA must include alternatives and a review of the effects of the action. A categorical exclusion (“CE”) review is for actions the agency has pre-determined have no significant impact.<sup>20</sup> An agency may compile and publish a list of projects that qualify for a CE, however, CEs may not be invoked when extraordinary circumstances exist or where there would in fact be a significant impact.

The Minerals Management Service (“MMS”), an agency of the Department of the Interior (“DOI”), is charged with overseeing oil and gas exploration on the outer continental shelf.<sup>21</sup> MMS manages oil and gas activities through a four-stage program under the Outer Continental Shelf Lands Act (“OCSLA”). Pursuant to OCSLA, MMS oversees a 5-year lease program, conducts lease sales, and approves exploration

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18. T.H. Suchanek, *Oil impacts on marine invertebrate populations and communities*, *American Zoologist* 33:501-23, 1993.

19. See 42 U.S.C. § 4332.

20. See 40 C.F.R. § 1508.4.

21. On June 18, 2010 the Department of the Interior changed the name of Minerals Management Services to Bureau of Ocean Energy Management, Regulation, and Enforcement (“BOEMRE”), see *Change of the Name of the Minerals Management Service to the Bureau of Ocean Energy Management, Regulation, and Enforcement*, Order of the Secretary No. 3302, U.S. Dept. of the Interior (June 18, 2010) available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=35872>. On June 18, 2010 the Department of the Interior changed the name of Minerals Management Services to Bureau of Ocean Energy Management, Regulation and Enforcement, see Secretarial Order 3302.

plans and for the Gulf of Mexico only, development and production plans (for all other regions, these are called development operations coordination documents).<sup>22</sup> Typically MMS conducts NEPA review at each stage: an EIS for the 5-year program; an EIS for lease sales; an EA for exploration plans; and an EIS for development and production plans.<sup>23</sup> However, in the western and central planning areas of the Gulf of Mexico, exploration plans and development and production plans are categorically excluded from environmental review.<sup>24</sup>

It has become evident that there were a multitude of flaws in MMS's implementation of NEPA and in its analysis of environmental impacts with regard to BP's Macondo well. The well was on a tract leased by BP on Mississippi Canyon Block 252, from Lease Sale 206, approximately 50 miles off the coast of Louisiana. For the activities leading up to the drilling of BP's Macondo well, MMS first issued an EIS in April 2007 for the Outer Continental Shelf ("OCS") 5-Year Leasing Program for oil drilling throughout the U.S.<sup>25</sup> That same month, MMS issued another EIS for the western and central lease sales.<sup>26</sup> Also in 2007, MMS issued an EA for Lease Sale 206, tiering to the two previous EISs and finding no new significant impact.<sup>27</sup> Finally, in April 2009, MMS issued a CE for BP's exploration plan which is what authorized the drilling of Macondo well.<sup>28</sup>

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22. See 43 U.S.C. § 1344 (2005); 43 U.S.C. § 1337(a) (2005); 43 U.S.C. § 1340, and 43 U.S.C. § 1351.

23. BOEMRE, *Oil and Gas Leasing on the Outer Continental Shelf*, available at [http://www.boemre.gov/PDFs/5BOEMRE\\_Leasing101.pdf](http://www.boemre.gov/PDFs/5BOEMRE_Leasing101.pdf).

24. See U.S. DEPT. OF THE INTERIOR, DEPARTMENT MANUAL, 516 DM 15.4(C)(10), available at [http://elips.doi.gov/app\\_dm/act\\_getfiles.cfm?relnum=3625](http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3625).

25. The D.C. Court of Appeals determined the environmental analysis under OCSLA was insufficient and remanded it to the MMS for revision. *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009). A preliminary revised 5-year plan was subsequently released on April 2010. See Preliminary Revised 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2007-2012, 75 Fed. Reg. 16833-01 (Apr. 2, 2010).

26. MMS, Gulf of Mexico OCS Oil and Gas Lease Sales: 2007-2012 Western Planning Area Sales 204, 207, 210, 215, and 218, Central Planning Area Sales 205, 206, 208, 213, 216, and 222, Draft Environmental Impact Statement (2006), available at [www.gomr.mms.gov/PDFs/2006/2006-062-Vol1.pdf](http://www.gomr.mms.gov/PDFs/2006/2006-062-Vol1.pdf) and <http://www.gomr.mms.gov/PDFs/2006/2006-062-Vol2.pdf>.

27. MMS, Proposed GOM OCS Oil and Gas Lease Sale 206 Central Planning Area, Environmental Assessment (2007), available at <http://www.gomr.mms.gov/PDFs/2007/2007-059.pdf>.

28. Council on Environmental Quality, *Report Regarding the Minerals Management Service's National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development*, Aug. 16, 2010 at 12, <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf>.

Inadequacies and flaws in MMS's analyses can be traced throughout the NEPA process. For example, the EIS for the OCS 5-Year Leasing Program, to which all other NEPA documents are tied, entirely underestimated the potential for a large oil spill. MMS estimated that a large oil spill from a platform would be 1,500 barrels,<sup>29</sup> and assumed that four such spills could occur within the 40-year lease term. The EIS for the lease sales also concluded that a large oil spill was a low-probability event, and found that the likely size of an oil spill greater than 1,000 barrels would be 4,600 barrels.<sup>30</sup> It concluded from its modeling that natural weathering would dissipate a 4,600 barrel oil spill 32-74%, 30-32% of the oil would be lost to atmospheric evaporation, and that 2-42% of the oil would be lost via natural dispersion.<sup>31</sup> It also found a 99% chance of a 10,000 barrel oil spill occurring during the 40-year lease period, but did not conduct an analysis of the effects of such an oil spill.<sup>32</sup> In each of its environmental analyses, MMS concluded that the proposed activities would have no significant environmental impact.

These estimates were clearly inadequate, not only in light of the massive BP oil spill and when taking into account the fact that BP's own estimates were much higher, but also in considering the fact that a previous exploratory well drilled in only 160 feet of water – Ixtoc I – had spilled 3.5 million barrels of oil in the Gulf of Mexico decades earlier. Additionally, the National Marine Fisheries Service (“NMFS”) in its analysis of OCS activities in the Gulf analyzed those impacts based on the potential for an oil spill of 1.75 million barrels.<sup>33</sup> The Lease Sale 206 EA, which built upon the subsequent EISs and intended to provide more site-specific environmental information, did not analyze the potential for even a 4,600 barrel oil spill. The EA incorrectly

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29. MMS, 2007-2012 Final Environmental Impact Statement, Ch. IV-Environmental Consequences, at IV-29, available at <http://www.boemre.gov/5-year/2007-2012FEIS.htm>.

30. MMS, Gulf of Mexico OCS Oil and Gas Lease Sales: 2007-2012 Western Planning Area Sales 204, 207, 210, 215, and 218, Central Planning Area Sales 205, 206, 208, 213, 216, and 222, Draft Environmental Impact Statement (“Multisale EIS”), p. 4-232, available at <http://www.gomr.mms.gov/PDFs/2006/2006-062-Vol1.pdf>.

31. *Id.* at 4-226.

32. *Id.* at 4-234.

33. NMFS, *Biological Opinion for Endangered Species Act Consultation on Gulf of Mexico Oil and Gas Activities: Five-Year Leasing Plan for Western and Central Planning Areas 2007-2012*, at 78. Available at [http://sero.nmfs.noaa.gov/sf/deepwater\\_horizon/02611\\_MMS\\_Leases\\_2007-2012.pdf](http://sero.nmfs.noaa.gov/sf/deepwater_horizon/02611_MMS_Leases_2007-2012.pdf). Ironically, NMFS settled on 1.75 million barrels (and not a larger amount) because “[w]ith new technologically [sic] advances and oil spill prevention and response plans, a major oil spill in the GOM would not likely be as large as Ixtoc I” (citing MMS, Gulf of Mexico Oil and Gas Activities: 2007-2012 Western and Central Planning Areas, MMS Gulf of Mexico Region Biological Assessment, 2006, at 149).

characterized the subsequent EISs as overstating the environmental impacts.<sup>34</sup> Finally, in spite of finding that 119 loggerhead, 10 leatherback, 1 hawksbill, 13 Kemp's ridley, and 38 green sea turtles would be killed over the 40-year lease period, it concluded there would be no significant environmental effect.<sup>35</sup>

While MMS did not prepare an EA for BP's exploration plan, instead granting it a CE, BP discussed a worst case scenario response in its exploration plan, finding that at the exploratory stage, a spill of 3,857 barrels a day was possible.<sup>36</sup> However, BP was not required to discuss a blowout scenario in its exploration plan citing a 2008 Notice to Lessees which exempted BP from providing a blowout scenario.<sup>37</sup> Because MMS did not prepare an environmental review, did not require BP to discuss a blowout scenario, and MMS's environmental review at the programmatic and lease sale levels were so inadequate, both BP and the government were woefully unprepared to deal with the eventual catastrophic oil spill.

#### A. *Categorical Exclusion Policy*

In all other regions, exploration plans undergo some form of NEPA review. However, in the western and central planning areas of the Gulf of Mexico, the exploration plans are categorically excluded from environmental review. CEs are traditionally reserved for only the most insignificant activities, activities that can have no possibility of significant environmental impacts. Yet, hundreds of plans are approved every year pursuant to the CE policy, and in fact continued to be approved even after the BP oil spill. This policy of categorically excluding plans and permits from environmental review is currently being challenged in litigation.<sup>38</sup> Additionally, the DOI is currently in-

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34. MMS, *Proposed Gulf of Mexico OCS Oil and Gas Lease Sale 206 Central Planning Area, Environmental Assessment* ("Lease 206 EA"), at 14, available at <http://www.gomr.mms.gov/PDFs/2007/2007-059.pdf>.

35. *Id.* at 41.

36. See BP, Initial Exploration Plan ("BP's EP"), Mar. 10, 2009, at 7-1.

37. MMS, *Notice to Lessees and Operators of Federal Oil, Gas and Sulfur Leases in the Outer Continental Shelf, Gulf of Mexico: NTL No. 2008-G04* (May 1, 2008), available at <http://www.gomr.mms.gov/homepg/regulate/regs/ntls/2008NTLs/08-g04.pdf>; a subsequent NTL revoked portions of the 2008 NTL, see MMS, *Notice to Lessees and Operators of Federal Oil and Gas Leases, Other Continental Shelf: NTL No. 2010-N06* (Jun. 1, 2010) (citing 30 C.F.R. § 250.213(g) (2006) requiring that operators disclose the volume of oil that could be discharged in a blowout and its ability to control a blowout).

38. *Center for Biological Diversity v. Salazar*, Case No. 1:10-cv-00816 HHK (D.D.C.); *Center for Biological Diversity v. Salazar*, Case No. 10-60417 (5th Cir.).

dependently reviewing this policy,<sup>39</sup> and has promised not to approve plans pursuant to it until the review is complete.<sup>40</sup>

Instead of having an opportunity to review and comment on the environmental impacts of a proposed drilling activity, the public and the federal government must rely upon the companies' explanations of threats and promises to deal with them. For example, while BP was not required to submit a site-specific oil spill response plan, it had calculated in its exploration plan that the worst case scenario for an uncontrolled well could be up to 162,000 barrels a day and certified that it had "the capability to respond, to the maximum extent practicable, to a worst-case discharge."<sup>41</sup> In its exploration plan, BP predicted that "[a]n accidental oil spill from proposed activities could cause impacts to beaches. However, due to the distance to shore (48 miles) and the response capabilities that would be implemented, no significant adverse impacts are expected."<sup>42</sup> BP's conclusions are essentially the same with regard to wetlands, shore and nesting birds, marine and pelagic birds, beaches, essential fish habitat, coastal wildlife refuges and wilderness areas.<sup>43</sup> In light of the BP oil spill, it is evident that the government can no longer rely on the industry's predictions and promises in the risky ventures of oil and gas drilling and production.

On its face, the CE policy appears at odds with the primary purpose of NEPA, which is to ensure that federal agencies conduct an environmental review for proposed activities that may have a significant impact on the environment. Regardless of whether MMS's policy of categorically excluding exploration plans from environmental review is illegal on its own, it appears the policy should never have been applied in the case of the BP's exploration plan to begin with. For example, pursuant to the CE policy, certain types of activities do not qualify for a categorical exclusion review because they are likely to have a significant impact on the environment. MMS prohibits the use of categorical exclusions in relatively untested deep water or remote areas.<sup>44</sup> MMS does not further define deep water or remote areas in its regulations, but it is hard to imagine that a well drilled in 4,990 feet of

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39. See Notice of Intent to Conduct a Review of Categorical Exclusions for Outer Continental Shelf Decisions, 75 Fed. Reg. 62418-01 (Oct. 8, 2010).

40. Memorandum from Michael Bromwich Dir. of BOEMRE on Use of Categorical Exclusions in Gulf of Mexico Region to Walter Cruickshank, Deputy Dir. of BOEMRE, & Robert LaBelle Acting Assoc. Dir. of OMM, Aug. 16, 2010.

41. BP's EP, *supra* note 36, at 7-1.

42. *Id.* at 14-5 (alteration in the original).

43. *Id.* at 14-2, 14-6.

44. U.S. DOI, Dept. Manual Environmental Quality Programs, 15.4(C)(10) (May 27, 2004).

water is not deep, and a rig located 50 miles from shore, is not remote. Moreover, DOI regulations prohibit the use of categorical exclusions in the event of extraordinary circumstances, which include those that have significant impacts on public health or safety, have significant impacts on natural resources, have highly controversial environmental effects, have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks, or have significant impacts on listed species or their critical habitat.<sup>45</sup>

The NEPA documents prepared by MMS subsequent to the oil spill included each of the above extraordinary circumstances. Furthermore, as the BP oil spill has demonstrated, and like hundreds of other oil spills before it, oil and gas drilling and production activities are risky and have significant impacts. MMS should have never approved BP's exploration plan pursuant to a categorical exclusion for drilling activities planned in nearly 5,000 feet of water, 50 miles from shore, and with no cogent plan for containing a blowout or responding to an oil spill. Similarly, with the present knowledge that such an oil spill and environmental impacts are possible, the MMS has no reasonable basis to continue applying the CE policy to drilling activities as it is now well-established that such activities can and do have significant impacts on the environment.

### III. INADEQUATE CONSULTATION UNDER THE ENDANGERED SPECIES ACT

The Endangered Species Act ("ESA") provides for the protection and conservation of endangered and threatened species. The purpose of the ESA is to "halt and reverse the trend toward species extinction."<sup>46</sup> In furtherance of that goal, Section 9 of the ESA prohibits the "take" of endangered species and mandates federal agencies to "insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered species. . . or result in the destruction or adverse modification of habitat of such species."<sup>47</sup> The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>48</sup> The U.S. Fish and Wildlife Service (for land species) or the NMFS (for marine species) (collectively "Services") further define "harm" as "an act which actually kills or injures fish or wildlife.

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45. 43 C.F.R. § 46.205(c)(1) (2010), § 46.215(a) – (d), (h).

46. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

47. 16 U.S.C. § 1538(a)(1)(B) (2010), § 1536(a)(2).

48. 16 U.S.C. § 1532(19) (2010).

Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.”<sup>49</sup>

Federal agencies engaged in major activities must, therefore, consult with the Services pursuant to Section 7 of the ESA. If after the consultation the Services conclude that the proposed action will result in take of the species, but is unlikely to jeopardize any listed species or adversely modify critical habitat, the Services must provide the action agency with an incidental take statement that sets forth the amount or extent of the anticipated taking of listed species by specifying the impact of the taking on the species, “reasonable and prudent measures” to minimize such incidental take, and “terms and conditions” to implement those measures.<sup>50</sup>

Like the flawed NEPA process, there were several instances throughout MMS’s lease sale program where MMS failed to fully comply with the ESA. This failure has resulted in the take of scores of endangered and threatened species in the Gulf of Mexico. For example, Section 7 consultation only occurred during the 5-Year Lease Program for 2007-2012 in the Gulf of Mexico, and even this consultation was inadequate. Additionally, MMS did not consult for impacts from the noise impacts of geological and geophysical exploration – or seismic exploration.<sup>51</sup> Noise pollution from seismic activities can severely impact wildlife. Seismic surveys are conducted by the oil and gas industry to explore for subsurface oil and gas. This typically involves towing air-guns behind ships sounding 250 decibels or more, every 10-12 seconds, days on end. This is many times more intense than noise thresholds known to compromise foraging and other vital behavior, a leading contributor to background noise, which carries for thousands of miles. The consultation also did not include an incidental

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49. 50 C.F.R. § 222.102 (2010), 50 C.F.R. § 17.3; *See generally*, [http://www.defenders.org/newsroom/press\\_releases\\_folder/2010/10\\_20\\_2010\\_bp\\_responsible\\_for\\_harm\\_to\\_ecosystem\\_and\\_species\\_in\\_the\\_gulf.php](http://www.defenders.org/newsroom/press_releases_folder/2010/10_20_2010_bp_responsible_for_harm_to_ecosystem_and_species_in_the_gulf.php) (On October 20, 2010 environmental groups, Defenders of Wildlife, Southern Environmental Law Center, Gulf Restoration Network, and Save the Manatee Club, filed suit against BP for the take of at least 27 endangered and threatened species).

50. 16 U.S.C. § 1536(b)(4), (o); 50 C.F.R. § 402.14(i) (2011); *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1034. (9th Cir. 2006).

51. On June 30, 2010, environmental groups, Natural Resources Defense Council, Center for Biological Diversity, Gulf Restoration Network, and Sierra Club challenged MMS’s NEPA analysis with regard to geological and geophysical activities in the Gulf of Mexico in *Natural Resources Defense Council v. Salazar*, 2:10-cv-01882 (E.D. Cal.). On February 9, 2011, the same groups notified MMS of their intent to sue for violations of the ESA and Marine Mammal Protection Act in the approval of seismic activities.

take statement for the sperm whale, sea turtles (other than for vessel strikes), gulf sturgeon, or the small-tooth sawfish.

MMS also did not seek consultation at the lease sale level which would have provided additional local information, or at the exploration plan or development and production plan level. Furthermore, the Coast Guard and EPA did not consult with the Services for the continued authorization of the use of chemical dispersants known to or likely to adversely affect multiple endangered and threatened species.<sup>52</sup> These failures to consult with the Services have led to the needless loss of endangered and threatened species, and are in violation of federal environmental laws.

#### IV. UNPRECEDENTED USE OF DISPERSANTS

Dispersants use toxic chemicals to break down oil into smaller droplets which are intended to help the oil disperse. Dispersants are known to have a wide array of impacts on marine wildlife. Unfortunately, not only are the dispersants themselves toxic, they can increase the toxicity of the oil to wildlife, and are thought to result in the formation of massive deepwater oil plumes.<sup>53</sup>

Banned in the United Kingdom for adverse effects to marine wildlife, and never tested at the volume or depth it was applied, tests confirm Corexit, a brand of dispersant, killed up to 25% of all living organisms 500 ft. below the surface of the ocean where it was applied.<sup>54</sup> Dispersants contain components that can interfere with lung function, respiration, digestion, excretion, and a host of other life systems, similar to the effects of oil alone. About 1.4 million gallons were applied on the surface of the ocean, and another 771,000 gallons were injected into and around the wellhead, nearly one mile below the surface of the ocean.<sup>55</sup> With respect to the dispersants used most heavily in response to the BP oil spill, Corexit 9500A and 9527A, part of the criticism rests in the fact that these dispersants had never been used or tested in the quantities or depths approved by the EPA.<sup>56</sup>

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52. On June 2, 2010, the Center for Biological Diversity notified the EPA and Coast Guard of its intent to sue for violations of Section 7 of the ESA.

53. NOAA, *Analysis of Hydrocarbons in Samples Provided from the Cruise of the R/V WEATHERBIRD II, May 23-26, 2010*, NOAA, Silver Spring, Maryland, 20910.

54. Matt Gutman, L. Ferran, and B. Blackburn, *EPA May Not Force BP to Change Dispersants*, ABC News, May 21, 2010, <http://abcnews.go.com/WN/epa-bp-dispersants/story?id=10711367>.

55. [www.whitehouse.gov/blog/issues/Deepwater-BP-oil-spill](http://www.whitehouse.gov/blog/issues/Deepwater-BP-oil-spill).

56. The recommended application volume is 2-10 gallons/acre. See EPA, *Guide to Using the NCP Product Schedule Notebook*, (Mar. 2011).

Another significant criticism is that of the EPA-approved dispersants, seven are less toxic than the Corexit dispersants, some ten times less toxic, and six of the seven dispersants were found to be more effective on Southern Louisiana crude oil than the Corexit products.<sup>57</sup> Two of those were 100% effective compared to 55% (Corexit 9500A) and 63% (Corexit 9527A). On May 10, 2010, the EPA authorized BP's subsurface application of dispersants, requiring BP to first determine whether the application was chemically breaking up the oil, and then sample and delineate the dispersed plume.<sup>58</sup> A week and a half later EPA issued an addendum giving BP 24 hours to identify and use dispersants on the NCP Product Schedule that were more effective and less toxic.<sup>59</sup> Ultimately, BP did not use a more effective, less toxic dispersant; instead, the EPA directed it to cease its surface application and reduce its subsurface application.<sup>60</sup> While the full impact of the use of the dispersants remains to be seen, scientists recently discovered a large portion of the dispersants within a deep water oil plume, meaning that the dispersants have not fully degraded.<sup>61</sup>

## V. CONCLUSION

Congress imposes environmental obligations on the federal government precisely to avoid the type of catastrophe caused by the BP oil spill. Federal environmental statutes like the National Environmental Policy Act and Endangered Species Act are a vital safety net for our nation's most imperiled species. These environmental laws are designed to protect the environment by requiring the government to analyze the effects of its activities and by involving the public in the decision-making process. The BP oil spill has demonstrated that when the federal government fails to comply with these environmental mandates, tragedy ensues.

Although MMS conducted multiple environmental reviews associated with Gulf of Mexico oil and gas drilling and production, it

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57. National Contingency Plan Product Schedule Toxicity and Effectiveness Summaries, [http://www.epa.gov/emergencies/content/ncp/tox\\_tables.htm](http://www.epa.gov/emergencies/content/ncp/tox_tables.htm).

58. EPA, *Dispersant Monitoring and Assessment Directive for Subsurface Dispersant Application* (2010), available at <http://www.epa.gov/bpspill/dispersants/subsurface-dispersant-directive-final.pdf>.

59. EPA, *Dispersant Monitoring and Assessment Directive (Addendum 2)*, (2010), available at <http://www.epa.gov/bpspill/dispersants/directive-addendum2.pdf>.

60. EPA, *Dispersant Monitoring and Assessment Directive* (May 26, 2010).

61. Elizabeth B. Kujawinski, M.C. Kido Soule, D.L. Valentine, A.K. Boysen, K. Longnecker, and M.C. Redmond, *Fate of Dispersants Associated with the Deepwater Horizon Oil Spill*, *Environmental Science & Technology*, Jan. 11, 2011.

categorically excluded from environmental review BP's exploration plan; the plan that authorized the drilling of the failed Macondo well. The exploration plan is the first step in the regulatory process where specific drilling plans are mentioned; therefore, it is the first opportunity for the responsible management agency to conduct a detailed, site specific environmental analysis. Yet BP's exploration plan did not undergo a careful review. Had the Macondo well been located anywhere else in the OCS, MMS most likely would have conducted a more thorough review. Such an environmental review may have minimized the extent of the damage from the oil spill, or at a minimum better prepared BP and the government to respond to such a disaster.