



NATURAL RESOURCES DEFENSE COUNCIL

**By Facsimile and Certified Mail**

February 9, 2011

Ken Salazar, Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240  
Fax: 202-208-6956

Gary Locke, Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., N.W., Room 5516  
Washington, DC 20230  
Fax: 202-208-6965

Michael Bromwich, Director  
Bureau of Ocean Energy Management,  
Regulation, and Enforcement  
1849 C Street, N.W.  
Washington, DC 20240  
Fax: 202-208-7242

Eric Schwaab, Assistant Administrator  
NOAA Fisheries/NMFS  
1315 East-West Highway  
Silver Springs, MD 20910  
Fax: 301-713-1940

Rowan Gould, Acting Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW, 3256 MIB  
Washington, DC 20240  
Fax: 202-208-6965

**Re: Notice of Intent to Pursue Legal Action for Violations of the  
Endangered Species Act and the Marine Mammal Protection Act in  
Connection with Unauthorized Take of Marine Mammals Related to  
Offshore Oil and Gas Activities in the Gulf of Mexico**

Dear Sirs:

On behalf of the Natural Resources Defense Council, the Center for Biological Diversity, Sierra Club, and the Gulf Restoration Network, I am writing to inform you that we intend to pursue legal action against the U.S. Department of the Interior, the U.S. Department of Commerce, the Bureau of Ocean Energy Management, Regulation, and Enforcement (“BOEMRE”),<sup>1</sup> the National Marine Fisheries Service (“NMFS”), the U.S. Fish and Wildlife Service (“FWS”), and agency officials acting in their official capacities for

<sup>1</sup> On June 18, 2010, pursuant to Secretarial Order 3302, Interior Secretary Salazar changed the name of the Minerals Management Service to “Bureau of Ocean Energy Management, Regulation, and Enforcement.” The name “BOEMRE” is used throughout this letter to refer inclusively to both the Minerals Management Service and its successor agency.

violations of the Endangered Species Act (“ESA”) (16 U.S.C. § 1531 *et seq.*) and the Marine Mammal Protection Act (“MMPA”) (16 U.S.C. § 1361 *et seq.*) related to the management and authorization of oil and gas activities in the Gulf of Mexico that have resulted, continue to result, and/or will result in the unauthorized take of legally protected marine mammals, sea turtles, and other protected species. This letter is provided pursuant to the sixty-day notice requirements of the citizen suit provision of ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

## **Background**

### *Endangered, Threatened, and Protected Species*

The Gulf of Mexico is an extraordinary aesthetic, economic, and environmental resource to the States along the Gulf coast and the nation. It supports a staggering array of marine life and represents some of the most productive tropical and temperate ecosystems in the United States. The Gulf of Mexico is home to thousands of marine species, ranging from simple invertebrates such as gastropods and sponges to complex and highly evolved fish and marine mammals. It is estimated that there are thousands of species of invertebrates, at least 600 species of fish, and 29 species of cetaceans in the Gulf. In addition, five of the world’s eight species of sea turtles as well as tens of thousands of shore and coastal birds reside in or migrate to the Gulf of Mexico. Over 300 species of coral, together with other hard bottom communities, wetlands, seagrass beds, mangroves, and soft bottom communities, provide the habitat necessary to support this rich assemblage of marine life. These diverse and highly complex habitats provide food, shelter, and spawning grounds for all of these species at different points during their life history.

Many of the aquatic animals living in the Gulf are endangered or threatened. Of the seven baleen whale species known to occur in the Gulf of Mexico, five are listed as endangered (the blue whale, finback whale, sei whale, humpback whale and Northern right whale). Other endangered marine mammals present in the Gulf are the sperm whale and the West Indian manatee. The remaining species of marine mammals that occur in the Gulf of Mexico, all of which are protected under the Marine Mammal Protection Act, include dwarf and pygmy sperm whales, Bryde’s whales, several species of beaked whales, Northern Gulf of Mexico stocks of bottlenose dolphins, Atlantic and pantropical spotted dolphins, striped dolphins, spinner dolphins, Clymene dolphins, Fraser’s dolphins, killer whales, pygmy killer whales, Risso’s dolphins, melon-headed whales, and short-finned pilot whales.

All five sea turtles occurring in the Gulf are endangered or threatened, including the Kemp’s ridley sea turtle (the most endangered sea turtle species in the world), leatherback sea turtle, hawksbill sea turtle, green sea turtle, and loggerhead sea turtle. Of the fish stocks, both the Gulf sturgeon and the smalltooth sawfish have been listed as endangered or threatened, and additional fish species are candidate species or species of concern. Two invertebrates are listed as threatened, the elkhorn coral and staghorn coral.

The Gulf’s coastal regions similarly support a variety of species, many of which are listed as endangered or threatened. Numerous endangered and threatened coastal and migratory

birds are found along the Gulf coast, including whooping crane, piping plover, wood stork, roseate tern, Mississippi sandhill crane, and least tern. Other endangered and threatened species depend on the health of the Gulf, such as the Gulf Coast jaguarondi. Finally, the Gulf coast is home to numerous endangered and threatened plant species.

#### *Overview of Oil and Gas Activities in the Gulf of Mexico*

BOEMRE approves or otherwise authorizes various lease-based and non-lease-based offshore oil and gas activities in the Gulf of Mexico. Lease-based activities include the development of five-year leasing programs, lease sales, and the approval of exploration plans (“EP”), development and production plans (“DPP”), and development operations coordination documents (“DOCD”). Non-lease-based activities include geological and geophysical (“G&G”) exploration activities, such as seismic exploration and the drilling of test holes. BOEMRE also engages in authorizing or approving amendments, modifications, and/or supplements to previously approved or authorized activities. Since October 1, 2010, BOEMRE has approved/authorized ten G&G permits for the Gulf of Mexico Outer Continental Shelf (“OCS”).

BOEMRE’s authorization and approval of these 10 activities, which are listed below, have resulted in, or are likely to result in, harm, harassment, and other forms of take of marine mammals, sea turtles, and other species listed as threatened or endangered under ESA and occurring within the Gulf of Mexico and its coastal regions. Further, BOEMRE failed to consult with NMFS and FWS prior to approving or authorizing these activities as required by ESA. Thus, each time that BOEMRE approved or authorized one of these activities it violated the consultation requirements of ESA.

Additionally, the Endangered Species Act Section 7 consultation that occurred between BOEMRE and NMFS and between BOEMRE and FWS on the effects of the five-year outer continental shelf oil and gas leasing program (2007-2012) in the Central and Western Planning Areas of the Gulf of Mexico failed to meet the requirements of ESA and the MMPA because it did not adequately address the likely impacts from an oil spill, including the oil and gas industry’s inability to contain and clean up a major oil spill, and the impacts from noise associated with offshore exploration and development and production activities.

BOEMRE has knowingly disregarded its obligations under ESA and the MMPA when approving oil and gas activities in the Gulf of Mexico. Together, these statutes prohibit the take of protected marine mammals, sea turtles, and other species unless authorized. Nonetheless, BOEMRE has never obtained the required authorizations for oil and gas activities in the Gulf of Mexico, despite its acknowledgement that such activities harm, harass, and otherwise take marine mammals and other protected species.

### **Legal Claims**

#### *Final Agency Actions Taken in Violation of ESA and the MMPA*

With this letter, the Natural Resources Defense Council, Center for Biological Diversity,

Sierra Club, and the Gulf Restoration Network identify the following agency actions that violated ESA and the MMPA as described below.

Approval of the following G&G Exploration Permits:

<b>Applicant Name</b>	<b>Permit Number</b>	<b>Protraction Areas</b>	<b>Final Action Date</b>
Seabird Exploration	L10-026	AC, KC, SE, WR, GC, AM, GB	10/15/2010
Fairfield Industries	L10-033	MC	10/15/2010
WesternGeco	L10-035	KC, SE	12/16/2010
Dynamic Data Services	L10-043	MU, PN, PS, PI, CC, GB, KC, GC, WR, SE, AM, EW, MC, AT, LU, LS	12/2/2010
Fugro Multiclient Service	L10-044	GC, SS, EW	12/3/2010
WesternGeco	L10-046	GC, AT, WR, LU	12/8/2010
TDI-Brooks International	M10-007	EW, MC, DC, LL, EL	12/22/2010
Dynamic Data Services	M10-008	DD, DC, LL, HE, FP, AP, FM, EL, VN, HH, RK, GV, TP, PB, CH, PR, DT	2/2/2011
WesternGeco	T10-002	CC, PI, EB, AC, KC	12/16/2010
CGG Veritas	T10-003	MU E.Add, EB, AC, CC, MU, PN E. Add, PS E. Add	12/9/2010

*Endangered Species Act*

Congress passed ESA in 1973 in response to growing concern over the extinction of fish, wildlife, and plants stemming from human activities “untempered by adequate concern and conservation.” 16 U.S.C. § 1531(a)(1). Recognizing the aesthetic, ecological, educational, historical, recreational, and scientific value of these species, Congress enacted ESA with the express purpose of “provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] ... provid[ing] a program for the conservation of such endangered species and threatened species.” *Id.* § 1531(b). The FWS and NMFS share responsibility for administering ESA. 50 C.F.R. § 402.01(b).

At its core, ESA prohibits any person from taking species listed as endangered, and empowers FWS and NMFS to promulgate regulations prohibiting the taking of any species listed as threatened. 16 U.S.C. §§ 1533(a)(1)(A)-(B), (G). “Take” is defined by ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” (16 U.S.C. § 1532(19)) and has been interpreted broadly by the courts. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Section 7 of ESA requires each federal agency, in consultation with NMFS or FWS, to “insure that any action authorized, funded, or carried out by [a federal] agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [of the Interior or of Commerce]...to be critical.” 16 U.S.C. § 1536(a)(2).

BOEMRE’s approval of offshore exploration plans, development and production plans, development operations coordination documents, and exploration permits constitutes “agency action” under ESA. Because these agency actions are likely to affect the threatened and endangered species that occur in the Gulf of Mexico (discussed above), BOEMRE is required to undergo Section 7 consultation with NMFS under 16 U.S.C. § 1536 before it approves any such activity so as to ensure that the authorized activity will not jeopardize the continued existence of any listed species or adversely modify designated critical habitat. This consultation has not yet occurred with respect to the G&G permits listed above. The absence of Biological Opinions (“BiOp”) for each of the listed activities suggests that BOEMRE is relying on consultations that occurred in support of its five-year outer continental shelf leasing program, specific multi-lease sales, or individual lease sales, rather than engaging in an analysis that is tailored to the particular location and conditions of the activity, as required. Yet BOEMRE may not rely on any consultation and resulting BiOp that may have occurred for the leasing program because this consultation did not address the site-specific activities at issue here; and its doing so violates ESA.

Separately, the consultation, and resulting BiOps, that occurred between BOEMRE and NMFS and between BOEMRE and FWS on the effects of the five-year outer continental shelf oil and gas leasing program (2007-2012) in the Central and Western Planning Areas of the Gulf of Mexico was inadequate under ESA and the APA because it did not

properly address the likely impacts from an oil spill, including the oil and gas industry's inability to contain and clean up a major oil spill, and impacts from noise associated with offshore exploration and drilling/production activities. In failing to properly consider oil spill and other risk in their Biological Assessment and BiOp, respectively, BOE and NMFS violated ESA and engaged in action that is arbitrary and capricious and contrary to law pursuant to the Administrative Procedure Act.

Finally, BOEMRE must obtain an Incidental Take Statement prior to initiating any action that results in take of ESA-listed species. *See* 16 U.S.C. § 1536(b)(4) & 1538.

BOEMRE's approval of offshore exploration and development activities harm, injure, and harass animals listed as threatened or endangered under the ESA, resulting in take, through pollution – including oil spills as well as routine discharges and marine debris. Further, marine animals are also victims of vessel strikes that can result in serious injury or mortality. In addition, the noise resulting from such activities harms, injures, and harasses threatened and endangered marine animals. The BiOp for BOEMRE's five-year leasing program in the Central and Western Planning Areas failed to include an incidental take statement for sperm whales and other marine mammals, sea turtles (other than take from vessel strikes), Gulf sturgeon and the smalltooth sawfish, and other endangered and threatened species that will be harmed from the authorized activity, nor was an incidental take statement provided for takes of these species for any of the specific actions listed above. According to that BiOp, an incidental take statement was not included for sperm whales because a take authorization had not yet been issued under Section 101(a)(5) of the MMPA. 2007 BiOp at 70. In failing to provide an incidental take statement in the 5-year BiOp or any subsequent BiOp, and in approving and permitting the taking of these animals without such a statement, NMFS and BOEMRE respectively violated ESA.

#### *Marine Mammal Protection Act*

The Marine Mammal Protection Act was adopted more than thirty years ago to ameliorate the consequences of human impacts on marine mammals. Its goal is to protect and promote the growth of marine mammal populations “to the greatest extent feasible commensurate with sound policies of resource management” and to “maintain the health and stability of the marine ecosystem.” 16 U.S.C. § 1361(6). A careful approach to management was necessary given the vulnerable status of many of these populations (a substantial percentage of which remain endangered or depleted) as well as the difficulty of measuring the impacts of human activities on marine mammals in the wild. 16 U.S.C. § 1361(1), (3). “[I]t seems elementary common sense,” the House Committee on Merchant Marine and Fisheries observed in sending the bill to the floor, “that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known. As far as could be done, we have endeavored to build such a conservative bias into the [Marine Mammal Protection Act].” Report of the House Committee on Merchant Marines and Fisheries, reprinted in 1972 U.S. Code Cong. & Admin. News 4148.

The heart of the MMPA is its so-called “take” provision, a moratorium on the harassing,

hunting, and killing of marine mammals by any private or public party. 16 U.S.C. § 1362(13). Under the law, NMFS (or the U.S. Fish and Wildlife Service (FWS)) may grant exceptions to the take prohibition, on application from a government agency or third party, for small numbers of marine mammals, provided it determines that such take would have only a negligible impact on marine mammal species and stocks. There are two types of general exemptions available through the MMPA for activities that incidentally take marine mammals: five-year permits and one-year incidental harassment authorizations. Regardless of which process is used, NMFS must prescribe “methods” and “means of effecting the least practicable impact” on protected species as well as “requirements pertaining to the monitoring and reporting of such taking.” 16 U.S.C. §§ 1371(a)(5)(A)(ii), (D)(vi).

BOEMRE has violated the MMPA by failing to obtain the necessary authorization from NMFS for the taking of marine mammals. For most marine mammal species, the MMPA prohibits the “take” of a marine mammal without a permit from the Secretary of Commerce. 16 U.S.C. § 1371(a); 50 C.F.R. § 216.107. The term “take” is defined broadly to include both mortality and acts of harassment, which are in turn defined to include acts of “torment” or “annoyance” that have the potential to injure a marine mammal or marine mammal stock in the wild or have the potential to “disturb” them “by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, breeding, feeding, or sheltering.” 16 U.S.C. § 1362(18).

For example, there is no doubt that seismic surveys, drilling, and other noise-generating activities in the Gulf of Mexico OCS harass marine mammals. As BOEMRE admitted in its Programmatic Environmental Assessment for Geological and Geophysical Exploration for Mineral Resources on the Gulf of Mexico Outer Continental Shelf, a “[l]iteral interpretation of the MMPA and the definitions of harassment suggest that there may be a technical violation of the law if sperm whales (a listed species) realize injurious auditory effects...or changes in behavior (*e.g.*, avoidance behavior, moving away from a seismic noise source) from exposure to G&G surveys.”<sup>2</sup> Final Programmatic EA (July 2004) at B-16. Furthermore, NMFS has quantified substantial numbers of marine mammal take in authorizing and proposing to authorize both seismic exploration and drilling activities in the Arctic.

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<sup>2</sup> We note that BOEMRE’s Final Programmatic EA analyzed G&G exploration in the Gulf of Mexico, which constitutes major federal action significantly affecting the quality of the environment. As such, BOEMRE violated the National Environmental Policy Act (“NEPA”) in issuing a finding of no significant impact and failing to prepare an Environmental Impact Statement (“EIS”). Further, BOEMRE’s EA violates NEPA as it fails to adequately consider the impacts, direct and cumulative, of such exploration on the environment; to consider and analyze all reasonable alternatives; and to identify and implement all feasible mitigation measures. Furthermore, BOEMRE failed to identify relevant gaps in the data it used to support its conclusions. For these reasons, BOEMRE acted in a manner that is arbitrary and capricious and contrary to law in violation of the APA. See 42 U.S.C. § 4332; 5 U.S.C. § 706. On June 30, 2010, we filed an action in the Eastern District of Louisiana challenging the violations of NEPA identified above. In addition, the EAs subsequently produced for the activities cited above fail to adequately identify and consider direct and cumulative impacts and all reasonable alternatives and mitigation measures; contain an improper finding of no significant impact; and were improperly issued to activities covered by a pending EIS (40 C.F.R. § 1506.1(c)).

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While BOEMRE applied to NMFS for authorization to take marine mammals incidental to conducting seismic surveys in 2002, that authorization has never been granted. In addition, BOEMRE has not applied to NMFS for authorization to take marine mammals incidental to other exploration activities and development and production activities in the Gulf of Mexico. Thus, BOEMRE violated the MMPA when it approved the G&G permits listed above without first obtaining authorization from NMFS for the incidental take that will result. In addition, BOEMRE has not obtained authorization under the MMPA for any potential take of marine mammals that may result from an oil spill.

### **Conclusion**

The failures of BOEMRE, NMFS, and FWS with regard to the approval of the G&G permits listed above violate ESA and the MMPA. If you do not act within 60 days to correct the ESA violations described in this letter, our organizations will pursue these particular claims in federal court.

We welcome the opportunity to discuss this important matter with you and your staff at any time, however, and are able to meet immediately in an effort to avoid litigation. Please contact me as soon as possible if you wish to pursue discussions.

Thank you for your attention to this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jasny", with a stylized flourish at the end.

Michael Jasny  
Senior Policy Analyst