June 24, 2010

PETITION FOR REINITIATION OF CONSULTATION WITH THE BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT UNDER THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

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 255,000 members and online activists throughout the United States. The Center and its members are concerned with the conservation of fish and marine habitat and the effective implementation of environmental laws, including the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”).

Action Requested

The Center for Biological Diversity (“Center”) hereby petitions the Secretary of Commerce, through the National Marine Fisheries Service (“NMFS”), and the Secretary of the Interior, through the Bureau of Ocean Energy (“BOE”), to carry out the non-discretionary duties imposed by section 305(b)(2) of the MSA, 16 U.S.C. § 1855(b)(2), for a federal agency to consult with NMFS regarding “any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under” the MSA. The federal agency “must reinitiate consultation with NMFS if . . . new information becomes available that affects the basis for NMFS EFH Conservation Recommendations.” 50 C.F.R. § 600.920(l). The Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1331 et seq., requires the BOE to manage the outer continental shelf (“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.”

Contrary to these requirements, the Secretaries have failed to adequately consult or reinitiate consultation in light of new available information regarding measures for avoiding, mitigating, or offsetting the impact of oil and gas activities in the Gulf of Mexico on essential fish habitat (“EFH”). In addition, the Secretaries have failed to initiate consultation at each step of the oil and gas development process that might have adverse affects on EFH. Lastly, the Secretaries have failed to implement conservation measures for EFH as required by the MSA and OCSLA. Therefore, the Center requests that the Secretaries reinitiate consultation under the MSA section 305(b)(2) requirement and associated regulations in order to rectify each of these failures to meet statutory requirements.

To the extent any of the violations of law described herein require affirmative action by agencies and officials within the Department of Commerce or the Department of the Interior, please consider this letter a formal petition for such action pursuant to section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e).

Catherine Ware Kilduff
Center for Biological Diversity

Date: this 24th day of June, 2010
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I. INTRODUCTION

The Gulf of Mexico is one of the most productive—and fragile—marine ecosystems in the nation. This ecosystem provides valuable habitat for many species of fish, which could not survive without the complex species assemblages and spawning grounds found in the Gulf of Mexico. In addition to the ecological importance of fish habitat, the Gulf supports a robust commercial and recreational fishing industry. The Gulf of Mexico is also home to an industrial network of about 4,000 oil platforms. As demonstrated by the BP oil spill disaster, a catastrophic oil spill is a real concern and a severe threat to the marine environment, fish, and the communities that depend on coastal resources. Even the routine operations of offshore oil and gas activities and the threat of small oil spills may adversely affect fish and their habitat.

The Center for Biological Diversity ("Center") formally requests that the Secretary of Commerce, through the National Marine Fisheries Service ("NMFS"), and the Secretary of the Interior, through the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOE"),\(^1\) fulfill their statutory duties to:

- Reinitiate consultation because of the new information available since the oil spill beginning April 20, 2010 that affects the basis for NMFS essential fish habitat ("EFH") conservation recommendations for oil and gas activities in the Gulf of Mexico under the federal Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1801 et seq.
- Initiate consultation under the MSA before each step in the process for oil and gas development on the outer continental shelf that may adversely effect EFH, including at the adoption of the five-year leasing program, lease sales, seismic permitting, approval of the exploration plan, approval of the development operations coordination document, and approval of the application to drill.
- Implement recommended conservation measures to protect EFH as required by the MSA and to conserve ocean resources as required by the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq.

The federal agencies petitioned here have failed to adequately consider the effects of oil and gas activities on fishery resources in the Gulf of Mexico. These resources urgently need the protections afforded by the MSA and OCSLA.

In light of new information regarding the risk of oil spills as demonstrated by the oil spill from BP exploratory drilling in the Gulf of Mexico, the BOE has a duty to reinitiate consultation so as to ensure that authorization of lease sales, exploration plans, seismic exploration, development plans, and drilling in the Gulf of Mexico does not adversely affect any EFH or includes measures to minimize any unavoidable adverse effects. The MSA contains a non-discretionary duty for the BOE to consult with NMFS regarding "any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified." 16 U.S.C. § 1855(b)(2). The BOE “must

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\(^1\) Secretarial Order 3302, issued June 18, 2010 renamed the Minerals Management Service to the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOE).
reinitiate consultation with NMFS if . . . new information becomes available that affects the basis for NMFS EFH Conservation Recommendations.” 50 C.F.R. § 600.920(l). Additionally, OCSLA requires the BOE to manage offshore oil and gas activities “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).

A serious consequence of offshore oil and gas development is the persistent threat of oil spills. On April 20, 2010, the Deepwater Horizon rig conducting exploratory drilling for BP in the Gulf exploded and began to spill millions of gallons of oil. Thus far efforts to contain the spill for more than 60 days have failed, and the spill has far surpassed the disastrous Exxon Valdez spill. Fish populations and their essential habitats are being devastated and many effects will continue for many years to come.

In its approvals of offshore oil and gas activities, the Minerals Management Service (“MMS”), now named the Bureau of Ocean Energy (“BOE”), has failed to consult or has relied upon inadequate consultation with NMFS concerning the impacts of its actions on EFH as required by law. For example, despite the ever present risk of massive oil spills as demonstrated by the BP spill, the MMS’s approvals of each stage of offshore oil activities were made without ever analyzing the impacts of a catastrophic oil spill on the Gulf’s EFH. While the Secretary had an obligation to consult with NMFS on the impacts to EFH, the consultations that did occur were flawed because pervasive throughout those analyses is the assumption that a truly large oil spill was unlikely to occur and, that if it did, any effects on fish populations and habitat would be minimal. The MMS’s actions authorizing oil and gas activities in the Gulf of Mexico without adequate consultation with NMFS at each stage violates the MSA and OCSLA requirements. In addition, NMFS and the BOE have violated the MSA by not reinitiating consultation in light of new information presented by the Gulf oil spill.2

II. LEGAL AND FACTUAL BACKGROUND

A. The Magnuson-Stevens Fishery Conservation and Management Act

When amending the MSA in 1996, Congress noted that one of the greatest long-term threats “to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States.” 16 U.S.C. §

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2 The information regarding the risk of oil spills and environmental impacts of offshore oil and gas activities carried out or authorized by the Services also triggers the obligation to prepare a Supplemental Environmental Impact Statement (“SEIS”) under the National Environmental Policy Act (“NEPA”). See 40 C.F.R. § 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 Deepwater Horizon oil spill violates NEPA.
Thus, one of the purposes of the MSA is to “promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.” 16 U.S.C. § 1801(b)(7).

The Act defines the term “essential fish habitat” as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.” 16 U.S.C. § 1802(10). For each fishery requiring conservation and management, NMFS or a regional fishery management council prepares a fishery management plan. In this plan, NMFS or the council must “describe and identify essential fish habitat . . . , minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat.” 16 U.S.C. § 1853(a)(7). NMFS or the council determines the extent of the EFH based on “the quantity and quality of habitat that are necessary to maintain a sustainable fishery and the managed species’ contribution to a healthy ecosystem.” 50 C.F.R. § 600.815(a)(1)(iv)(E). Fishery management plans must identify activities other than fishing that may adversely affect EFH and describe known and potential adverse effects. 50 C.F.R. § 600.815(a)(4).

In order to fulfill the substantive purposes of the MSA’s protections for EFH, federal agencies are required to engage in consultation with NMFS “with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat.” 16 U.S.C. § 1855(b)(2). Likewise, NMFS has a mandatory duty to recommend “measures that can be taken by [an] agency to conserve” EFH whenever NMFS receives information that an action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any State or Federal agency would adversely affect any EFH. 16 U.S.C. § 1855(b)(4)(A). The term “adverse effect” means any impact that reduces quality and/or quantity of EFH. Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH. Adverse effects to EFH may result from actions occurring within EFH or outside of EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions.

50 C.F.R. §600.910(a).

The federal agency acting or proposing to act in a way that would adversely affect EFH must respond in writing to the conservation recommendations that NMFS provides within 30 days of receipt. 16 U.S.C. § 1855(b)(4)(B), 50 C.F.R. § 600.905(b). The response must include “a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat. In the case of a response that is inconsistent with the recommendations of the Secretary, the Federal agency shall explain its reasons for not following the recommendations.” Id. Conservation recommendations may include “measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH resulting from actions or proposed actions authorized, funded, or undertaken” by the agency. 50 C.F.R. § 600.905(b).
The EFH regulations (50 C.F.R. §§ 600.905–600.930) outline the process for federal agencies, NMFS, and the fishery management councils to satisfy the EFH consultation requirement under section 305(b) of the MSA. As part of the EFH consultation process, when an agency action may adversely impact EFH, the regulations require federal action agencies to prepare a written EFH assessment describing the effects of that action on EFH. 50 C.F.R. § 600.920(e)(1). All EFH assessments must include the contents stated in 50 C.F.R. § 600.920(e)(3), however they may be incorporated into documents prepared for other purposes (such as National Environmental Policy Act (“NEPA”) documents). Id. § 600.920(f).

This has allowed the MMS to perform EFH consultations as part of its NEPA process, but has resulted primarily in a paper exercise with no meaningful analysis or adoption of conservation recommendations.

B. The Outer Continental Shelf Lands Act (“OCSLA”)

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 BOE to manage the outer continental shelf (“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).

Throughout OCSLA, Congress mandated accommodation of other uses of the OCS, including fisheries and environmental values. At the lease program stage, OCSLA requires the consideration of marine and costal 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 of the Interior 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. § 1344(f)(4).

The BOE must ensure that geological and geophysical explorations of the OCS “are not unduly harmful to aquatic life.” 43 U.S.C. § 1340(a)(1). Further, the BOE 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. § 1351(h)(1)(D).

C. Fish Species With Identified EFH in the Gulf of Mexico

The central and western Gulf of Mexico, where oil and gas platforms are located, provides EFH to several fish species. In 1998, the Gulf of Mexico Fishery Management Council (“GMFMC”) identified EFH within the Gulf of Mexico for the following species or groups of species within its jurisdiction: shrimp, coral, red drum, stone crab, reef fish, spiny lobster, and coastal migratory pelagics (GMFMC 1998). In 2005, the GMFMC reduced the extent of the EFH relative to the 1998 Generic Amendment by removing EFH identification from waters between 100 fathoms and the seaward limit of the Exclusive Economic Zone (“EEZ”) (GMFMC 2005).

Table 1. EFH Designations for Species Managed by the Gulf of Mexico Fishery Management Council (NMFS 2008, Appendix 6).

<table>
<thead>
<tr>
<th>Species FMP</th>
<th>EFH Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Red Drum FMP</td>
<td>EFH for red drum consists of all Gulf of Mexico estuaries; waters and substrates extending from Vermilion Bay, Louisiana to the eastern edge of Mobile Bay, Alabama out to depths of 25 fathoms; waters and substrates extending from Crystal River, Florida to Naples, Florida between depths of 5 and 10 fathoms; waters and substrates extending from Cape Sable, Florida to the boundary between the areas covered by the Gulf of Mexico Fishery Management Council and the South Atlantic Fishery Management Council between depths of 5 and 10 fathoms.</td>
</tr>
<tr>
<td>Reef Fish FMP</td>
<td>EFH for reef fish consists of Gulf of Mexico waters and substrates extending from the US/Mexico border to the boundary between the areas covered by the Gulf of Mexico Fishery Management Council and the South Atlantic Fishery Management Council from estuarine waters out to depths of 100 fathoms.</td>
</tr>
<tr>
<td>Coastal Migratory Pelagics FMP</td>
<td>EFH for coastal migratory pelagics consists of Gulf of Mexico waters and substrates extending from the US/Mexico border to the boundary between the areas covered by the Gulf of Mexico Fishery Management Council and the South Atlantic Fishery Management Council from estuarine waters out to depths of 100 fathoms.</td>
</tr>
<tr>
<td>Shrimp FMP</td>
<td>EFH for shrimp consists of Gulf of Mexico waters and substrates extending from the US/Mexico border to Fort Walton Beach, Florida from estuarine waters out to depths of 100 fathoms; waters and substrates extending from Grand Isle, Louisiana to Pensacola Bay, Florida between depths of 100 and 325 fathoms; waters and substrates extending from Pensacola Bay, Florida to the boundary between the areas covered by the Gulf of Mexico Fishery Management Council and the South Atlantic Fishery Management Council out to depths of 35 fathoms, with the exception of waters...</td>
</tr>
</tbody>
</table>
extending from Crystal River, Florida to Naples, Florida between depths of 10 and 25 fathoms and in Florida Bay between depths of 5 and 10 fathoms.

**Stone Crab FMP** – EFH for stone crab consists of Gulf of Mexico waters and substrates extending from the US/Mexico border to Sanibel, Florida from estuarine waters out to depths of 10 fathoms; waters and substrates extending from Sanibel, Florida to the boundary between the areas covered by the Gulf of Mexico Fishery Management Council and the South Atlantic Fishery Management Council from estuarine waters out to depths of 15 fathoms.

**Spiny Lobster FMP** – EFH for spiny lobster consists of Gulf of Mexico waters and substrates extending from Tarpon Springs, Florida to Naples, Florida between depths of 5 and 10 fathoms; waters and substrates extending from Cape Sable, Florida to the boundary between the areas covered by the Gulf of Mexico Fishery Management Council and the South Atlantic Fishery Management Council out to depths of 15 fathoms.

**Coral FMP** – EFH for coral consists of the total distribution of coral species and life stages throughout the Gulf of Mexico including the East and West Flower Garden Banks, Florida Middle Grounds, southwest tip of the Florida reef tract, and predominant patchy hard bottom offshore of Florida from approximately Crystal River south to the Keys, and scattered along the pinnacles and banks from Texas to Mississippi, at the shelf edge.

In 1999, NMFS identified EFH within the Gulf of Mexico for several Atlantic highly migratory species under NMFS’s jurisdiction (see Table 2).
Table 2. Summary of EFH Designated in 1999 for Highly Migratory Species (NMFS 2008, Appendix 7).

<table>
<thead>
<tr>
<th>Gulf of Mexico Species</th>
<th>Life Stage</th>
<th>EFH</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Offshore</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Atlantic bluefin tuna</td>
<td>spawning/eggs/larvae</td>
<td>Gulf-wide, 15 mi offshore to EEZ</td>
</tr>
<tr>
<td></td>
<td>adults</td>
<td>200 m to EEZ, Terrebonne LA to Galveston TX</td>
</tr>
<tr>
<td>Atlantic skipjack tuna</td>
<td>spawning/eggs/larvae</td>
<td>Gulf-wide, 200 m isobath to EEZ</td>
</tr>
<tr>
<td></td>
<td>adults</td>
<td>200 to 2000 m, Terrebonne LA to Galveston TX</td>
</tr>
<tr>
<td>Atlantic yellowfin tuna</td>
<td>all life stages</td>
<td>from 200 m isobath to EEZ</td>
</tr>
<tr>
<td>Swordfish</td>
<td>spawning/eggs/larvae</td>
<td>Gulf-wide, 200 m isobath to EEZ</td>
</tr>
<tr>
<td></td>
<td>juvenile</td>
<td>as above, except to 2000 m from 88E to 86.5E W</td>
</tr>
<tr>
<td></td>
<td>adults</td>
<td>200 to 2000 m from Tampa to Mobile Bays; MS</td>
</tr>
<tr>
<td>Blue marlin</td>
<td>all stages</td>
<td>variable, but generally Gulf-wide 200 - 2000 m except adults not shown E. of Choctawhatchee Bay, FL</td>
</tr>
<tr>
<td>White marlin</td>
<td>juvenile</td>
<td>Gulf-wide 200 - 2000 m isobath, except S of Galveston &amp; Cape San Blas</td>
</tr>
<tr>
<td></td>
<td>adult</td>
<td>100 m to EEZ, W of 86.5E W</td>
</tr>
<tr>
<td>Sailfish</td>
<td>all stages</td>
<td>Gulf-wide 200 to 2000 m isobath or EEZ, whichever is closer &amp; within 5 mi of Padre Island &amp; to 50 m in DeSoto Canyon</td>
</tr>
<tr>
<td>Silky shark</td>
<td>early juvenile</td>
<td>DeSoto Canyon MS/AL, 200 - 2000 m isobath</td>
</tr>
<tr>
<td></td>
<td>late juvenile</td>
<td>FL Keys -10,000 Islands, 50 - 2000 m isobath</td>
</tr>
<tr>
<td>Longfin mako shark</td>
<td>all life stages</td>
<td>FL Keys to 92.5E W, 200m isobath to EEZ</td>
</tr>
<tr>
<td><strong>Nearshore/Inshore</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Great hammerhead shark</td>
<td>late juvenile</td>
<td>FL Bay and adjacent waters</td>
</tr>
<tr>
<td></td>
<td>adult</td>
<td>off FL, to 85.5E W (&lt;100 m isobath)</td>
</tr>
<tr>
<td>Scalloped hammerhead shark</td>
<td>late juvenile/subadult</td>
<td>off MS/AL, shoreline to 50 m &amp; FL Keys</td>
</tr>
<tr>
<td>Nurse shark</td>
<td>early juvenile</td>
<td>FL Keys &lt;25 m</td>
</tr>
<tr>
<td></td>
<td>late juvenile/adult</td>
<td>as above &amp; Charlotte Harbor to Tampa Bay, FL</td>
</tr>
<tr>
<td>Blacktip shark</td>
<td>early juvenile</td>
<td>&lt;25 m Ten Thousand Isl to Cedar Key, FL</td>
</tr>
<tr>
<td></td>
<td>late juvenile</td>
<td>&lt;25 m FL Keys to Cedar Key, Cape San Blas to MS delta, and Galveston to Mexico</td>
</tr>
<tr>
<td></td>
<td>adult</td>
<td>&lt;50 m FL Bay to Cape San Blas, FL</td>
</tr>
<tr>
<td>Bull shark</td>
<td>juvenile</td>
<td>inlets, estuaries, coastal waters&lt;25 m, Ten Thousand Isl. to Cedar Key, Appalachiola to Mobile, and Galveston to Mexico</td>
</tr>
<tr>
<td></td>
<td>adults</td>
<td>inlets, estuaries, coastal waters&lt;25 m, Charlotte Harbor to Anclote Key, FL</td>
</tr>
<tr>
<td>Lemon shark</td>
<td>early juvenile</td>
<td>inlets, estuaries, coastal waters&lt;25 m, FL Bay, Tampa Bay, and TX from 95.5E N to Mexico</td>
</tr>
<tr>
<td></td>
<td>late juvenile/adult</td>
<td>inlets, estuaries, coastal waters&lt;25 m, FL Keys to Anclote Key, FL</td>
</tr>
</tbody>
</table>
In 2009, NMFS identified EFH within the Gulf of Mexico for bigeye tuna (*Thunnus obesus*; juvenile and adult life stages) and longbill spearfish (*Tetrapturus pfluegeri*; juvenile and adult life stages). NMFS also identified EFH for additional life stages of the following species: great hammerhead shark (*Sphyrna mokarran*; all life stages) and scalloped hammerhead shark (*Sphyrna lewini*; all life stages). NMFS increased the area identified as EFH for the Atlantic bluefin tuna, the blue marlin, the white marlin, and the blacktip shark (NMFS 2009a). Finally, NMFS also identified habitat areas of particular concern (“HAPCs”) within EFH areas for some species (e.g., Atlantic bluefin tuna, see Fig. 1).³

³ HAPCs are subsets of EFH that merit special considerations to conserve the habitat. These habitat considerations are listed in the EFH Guidelines (50 C.F.R. § 600.815(a)(8)) and summarized as: 1) the importance of the ecological function provided by the habitat; 2) the extent to which the habitat is sensitive to human-induced environmental degradation; 3) whether, and to what extent, development activities are, or will be, stressing the habitat type; and 4) the rarity of the habitat type.

<table>
<thead>
<tr>
<th>Gulf of Mexico Species</th>
<th>Life Stage</th>
<th>EFH</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nearshore/Inshore</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sandbar shark</td>
<td>all life stages</td>
<td>Key Largo to Cape San Blas, &lt;50 m (except adults, &lt;100 m)</td>
</tr>
<tr>
<td>Spinner shark</td>
<td>neonate/early juvenile</td>
<td>&lt;25 m, FL Keys to 29.25E N</td>
</tr>
<tr>
<td>Tiger shark</td>
<td>juvenile</td>
<td>MS Sound to FL Kyes, &lt; 100 m</td>
</tr>
<tr>
<td></td>
<td>adults</td>
<td>Cape San Blas, FL to MS Sound, 25 to 200 m isobaths</td>
</tr>
<tr>
<td>Bonnethead shark</td>
<td>juvenile</td>
<td>inlets, estuaries, coastal waters &lt;25 m, FL Keys to Cedar Key; LA and TX</td>
</tr>
<tr>
<td>Atlantic sharpnose shark</td>
<td>juvenile</td>
<td>&lt;25 m Galveston to Mexico; &lt;40 m MS &amp; Atchafalaya deltas</td>
</tr>
<tr>
<td></td>
<td>adults</td>
<td>&lt;50 m MS Sound &amp; Galveston to Laguna Madre</td>
</tr>
<tr>
<td>Blacknose shark</td>
<td>juvenile</td>
<td>FL Keys to Tampa &lt;25 m isobath</td>
</tr>
<tr>
<td></td>
<td>adults</td>
<td>FL Keys to Cedar Key &lt;25 m; Mobile Bay to Terrebonne Parish, LA 25 to 100 m isobath</td>
</tr>
</tbody>
</table>
D. Effects of Oil and Gas Development on EFH

Fishing is one of the largest industries in the Gulf of Mexico. In 2008, more than three million recreational fishermen took a total of 24 million fishing trips in the Gulf. That same year commercial fishermen harvested 1.27 million pounds of finfish and shellfish, earning $659 million in revenue. Red snapper and shrimp are the largest fisheries, with most catches made in the summer and fall. The Gulf of Mexico provides spawning grounds for many highly migratory species (“HMS”) and is also home to many resident coastal fish species. Without better protection under the MSA, EFH will continue to be drastically affected by offshore oil and gas activities. In 1999, NMFS designated a large portion of the Gulf of Mexico as EFH for HMS (NMFS 2009a). NMFS identified that oil and gas development on the outer continental shelf is one of the major activities with the potential to impact HMS’s EFH. There are approximately 4,000 oil and gas platforms in the Gulf of Mexico (NMFS 2009a), and many of the shallower sites and most of the deepwater sites fall within HMS EFH (NMFS 2009a).
Many routine offshore oil and gas activities can adversely affect EFH. Activities such as construction of pipelines, vessel traffic, and drilling can directly affect the fish habitat. Additionally, discharges of drilling muds, produced waters, and oil spills can impact fish and their habitats. Direct and indirect impacts to the environment from oil and gas activities include (excerpted from NMFS 2009a):

- 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 on EFH require consultation as well as conservation measures to avoid and reduce harmful impacts on fish and EFH.

1. Oil Spills and Dispersants

Oil exposure negatively affects shellfish and fish. It 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 experience malformations, genetic damage, mortality, 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).

The Exxon Valdez spill in 1989 provides insight into the impacts of an oil spill on fish and their habitat. That spill caused salmon and herring populations to crash. Even now, herring populations that were exposed to oil during their spawning season have never rebounded from the impacts of the oil spill. In Alaska, the persistence of toxic subsurface oil and chronic exposures, even at sublethal levels, has continued to affect wildlife (Peterson et al. 2003). A recent scientific study has shown that harlequin ducks are still encountering oil from the Exxon Valdez oil tanker spill that occurred twenty years ago (Esler et al. 2010).

Each spring Atlantic bluefin tuna, a critically imperiled species whose numbers have already been decimated by overfishing, spawn in the Gulf of Mexico. More and more offshore oil and gas activities are expanding into the bluefin tuna’s critical breeding areas. Their EFH in the Gulf of Mexico comprises the only known spawning grounds for the western population of Atlantic bluefin tuna. The ongoing 2010 BP oil spill may push the bluefin tuna even closer to extinction. The oil may prove deadly to eggs, which float near the surface, and to young fish hiding in floating sargassum seaweed, which may collect oil and increase the fish’s exposure.
Another threat to fish and EFH is the use of dispersants to respond to oil spills. Dispersants and dispersed oil have been shown to have significant negative impacts on many forms of marine life, including fish. Dispersants release toxic break-down products from oil that, alone or in combination with oil droplets and dispersant chemicals, can make dispersed oil more harmful to marine life than untreated oil. Both the short-term and long-term impacts of dispersants on marine life have not been adequately tested. As acknowledged by the EPA, the “long term effects [of dispersants] on aquatic life are unknown.”4 Fish may be exposed to dispersants, dispersed oil, and the break-down products of dispersed oil—which studies have shown are toxic—as they swim and feed in the water column.

Dispersed oil has been shown to be toxic to fish at all life stages, from eggs to larval fish to adults, according to numerous laboratory studies that have tested a variety of species (Khan and Payne 2005; Anderson et al. 2009). Moreover, the extensive use of dispersants on the BP oil spill appears to have resulted in the formation of massive deepwater oil plumes extending as far as twenty miles from the leak.5 Species that frequent and feed in deep water, like some fish in the Gulf, could suffer serious adverse impacts from this deep water contamination. Fish are likely being exposed to significant levels of toxins by swimming through these dispersed oil plumes and through feeding on tainted prey. Furthermore, the effects of these plumes are unlikely to remain isolated to deep water habitats. Indeed, the enormous volumes of dispersants and dispersed oil now circulating in the Gulf of Mexico have the potential to adversely affect EFH from the bottom up. Reports on monitoring data have indicated that the use of Corexit dispersants killed up to 25% of all organisms living 500 feet below the surface in areas where the dispersant was used.6

2. Noise in the Ocean

Another disturbance created by the act of seismic exploration and drilling is ensonification of the water column. Effects on marine species include physiological or anatomical effects on auditory systems, potential behavioral alterations, and auditory masking. The highest energy levels produced by seismic airguns fall within the frequency range from 10 to 200 Hz (up to 1,000 Hz), which is within the audible range for Gulf of Mexico highly migratory fishes (MMS 2004). Several studies indicate that seismic shooting can temporarily alter the behaviors and movements of a number of fish species when received sound pressures are sufficiently high (MMS 2004). In a literature review of the impact of underwater sound levels on fish, Slabbekoorn et al. (2010) noted a study that found that tuna schools in pens were less coherent in the presence of boat noise. In addition, fish have also been reported to flee from seismic shooting areas as inferred from decreased catch rates for both long lines and trawler fisheries (Slabbekoorn et al. 2010). This could be an especially big problem in the Gulf of Mexico, which is a spawning ground for so many species. Slabbekoorn et al. (2010) concluded that “if fish sounds serve a communicative function in a reproductive context, problems of

5 Eilperin, J., D. Fahrenthold, and A. MacGillis, “Oil spreading much farther than thought; Obama returns to Gulf Coast,” Washington Post (May 29, 2010).
detection and recognition due to the presence of anthropogenic noise could have fitness consequences.” Based on these studies, the cumulative effect of ensonification from oil and gas development activities in the Gulf of Mexico has a high likelihood of adversely affecting EFH.

3. Mercury Bioaccumulation

As long-lived predators, many highly migratory species for which NMFS has identified EFH in the Gulf of Mexico are susceptible to bioaccumulation of contaminants, especially mercury. The number of trophic levels between predators and prey has a critical effect on the accumulation of mercury (Morel et al. 1998). One third of the mercury in surface seawater is from natural sources, and two thirds is of anthropogenic origin (sources include metal production, chlor-alkali and pulp industries, waste handling and treatment, and coal, peat, and wood burning) (Morel et al. 1998). Low pH enhances accumulation of mercury in the food chain (Morel et al. 1998, Glover et al. 2010), so bioaccumulation is likely to accelerate during climate change induced ocean acidification.

The Final Environmental Impact Statement (“2004 FEIS”) for EFH for the Gulf of Mexico Fishery Management Plan noted concern over severe methylmercury contamination associated with sediments beneath oil and gas platforms (MMS 2004, at 3-281). The levels of mercury accumulating in Atlantic bluefin tuna are frightening in a public health context, and have the potential to reduce commercial demand for highly migratory species generally. Lowenstein et al. (2010) recently published species-specific mercury levels of tuna samples collected from restaurants and supermarkets. They found that mean mercury levels “for bluefin akami exceed those permitted by the US Food and Drug Administration (2000), Health Canada (2007) and the European Commission (2008)” (Lowenstein et al. 2010). The US Food and Drug Administration (“FDA”) action levels for poisonous or deleterious substances, to which this sentence refers, represent limits at or above which FDA will take legal action to remove products from the market (FDA 2000). Based on this study, much of the tuna sold in supermarkets and restaurants should be removed by the FDA. Although the 2004 FEIS cited MMS studies and scientists concluding that the contribution of methylmercury from drilling sites appears to be small, NMFS should conduct its own evaluation of this threat, especially in light of the uncertain scientific knowledge surrounding mercury methylation and bioaccumulation in the ocean (Glover et al. 2010).

4. Climate Change and Ocean Acidification

Climate change and ocean acidification impacts on fish and EFH also flow from both the operation of oil and gas activities as well as the use of the oil produced by the industry. The Gulf of Mexico provides about 40 percent of the domestic oil used in the United States and therefore the oil and gas activities authorized by the BOE contribute significantly to greenhouse gas production.

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7 Atlantic Bluefin Tuna (Thunnus thynnus), Pacific Bluefin Tuna (T. orientalis), and Southern Bluefin Tuna (T. maccocyti) are pooled into the sample category “bluefin,” but over half the bluefin samples were from T. thynnus (Lowenstein et al. 2010, data supplement). Toro is the Japanese name denoting ‘fatty tuna,’ and akami the Japanese name for ‘red tuna.’
Climate change is already impacting the North Atlantic Ocean, resulting in warming temperatures, rising sea levels, increasing acidification, and altered circulation and nutrient supplies (Bindoff et al. 2007, Beaugrand 2009). The IPCC has projected 1.1 to 6.4°C (2° to 11.5°F) of additional surface warming (relative to 1980–1999) by the end of this century, with higher warming under the more intensive greenhouse gas emissions scenarios (Solomon et al. 2007). Ocean warming has an adverse effect on EFH because it can reduce prey availability, species distributions, productivity, spawning timing and success, and other factors. NMFS stated that because most HMS EFH is comprised of open ocean environments occurring over broad geographic ranges, “large-scale impacts such as global climate change that affect ocean temperatures, currents, and potentially food chain dynamics, are most likely to have an impact and pose the greatest threat to HMS EFH” (NMFS 2009a, p. 295).

Acidification due to the ocean’s absorption of carbon dioxide from the atmosphere also disrupts metabolism and other biological functions in marine life. Changes in the ocean’s carbon dioxide concentration result in accumulation of carbon dioxide in the tissues and fluids of fish and other marine animals, called hypercapnia, and increased acidity in the body fluids, called acidosis. These impacts can cause a variety of problems for marine animals including difficulty with acid-base regulation, calcification, growth, respiration, energy turnover, and mode of metabolism (Pörtner et al. 2004). In fish, high concentrations of carbon dioxide in seawater can lead to cardiac failure and mortality (Ishimatsu et al. 2004). At lower concentrations, sublethal effects can be expected that can seriously compromise the fitness of fish (Id.) Juvenile and larval stages of fish were found to be even more vulnerable (Id.). Some studies show that juvenile marine organisms are particularly susceptible to ocean acidification (Ishimatsu et al. 2004; Kurihara & Shirayama 2004). In conditions simulating future seawater with elevated carbon dioxide, larval clownfish lost their detection and homing abilities to find suitable habitat (Munday et al. 2009). Moreover, ocean acidification may also enhance the mobility of mercury in the environment (USGS 2000) and decrease the sound absorption of seawater causing sounds to travel further with potential impacts on marine life that may be sensitive to noise from vessel traffic, seismic surveys, and other sources of noise pollution (Hester et al. 2008).

III. THE BOE AND NMFS MUST INITIATE CONSULTATION ON EFH

A. New Information from the 2010 Oil Spill in the Gulf of Mexico Triggers the Duty for the BOE and NMFS to Reinitiate Consultation on EFH

If new information becomes available that affects the basis for NMFS EFH conservation recommendations regarding oil and gas development activities, then the MMS must reinitiate consultation with NMFS. 50 C.F.R. § 600.925. The Deepwater Horizon oil spill, described below, qualifies as new information regarding the risks and severity of oil spills, which affects the basis for NMFS EFH conservation recommendations. Thus, the BOE must reinitiate consultation in order to implement proper conservation recommendations to protect EFH from future potential oil and gas development disasters.

On April 20, 2010, an offshore oil rig exploded and caught fire in the Gulf of Mexico, leaving 11 workers dead and spilling millions of gallons of oil into the water. The BP operated oil rig sank two days later about 50 miles off the Louisiana coast. Five thousand feet below the surface, the deep water well continues to spew oil. Experts estimate that the ruptured oil well is
spilling upwards of 60,000 barrels of oil, or 2.5 million gallons, each day. The technology used on the now-sunken oil rig in the Gulf was supposed to be the most advanced in the world, including various mechanisms to prevent or cap a blowout. None of these mechanisms worked, and the state-of-the-art technology completely failed to stop the spill.

At the time of this petition, the most recent satellite images show that the various surface oil slicks and sheens believed to be associated with the BP spill may cover as much as 28,950 square miles (about the size of South Carolina). Meanwhile, a research cruise discovered massive plumes of oil in the deep waters beneath the sea surface. Some of the oil is already entrained in the Gulf’s loop current, and experts predict that sea currents could 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. 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. Meanwhile, marine life in the massive spill area has been exposed to the oil, which can impair behavior, respiratory functions, reproduction, and food availability and poison wildlife. Moreover, toxic persistent compounds in the oil remain in the environment and accumulate in the food chain. Additionally, significant air pollution resulted from the explosion and controlled burning efforts. Impacts on wildlife 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 a million gallons of dispersant have been deployed to break up the oil spill. In addition to the threats of crude oil, dispersants come with their own set of problems that potentially harm the environment and wildlife. As discussed above in the section on the effects of oil and gas development on EFH, dispersed oil has been shown to be toxic to fish at all life stages, from eggs to larval fish to adults, according to numerous laboratory studies that have tested a variety of species (Khan et al. 2005, Anderson et al. 2009).

NMFS has instituted fishing closures in the Gulf of Mexico’s federal waters to protect consumers from oil contaminated seafood. As of June 23, the closed area covers 78,600 square miles, almost one third of federal waters in the Gulf of Mexico (see Fig. 2). In addition, Louisiana and Alabama have implemented closures of portions of state waters (see Figs. 3, 4). State waters in Mississippi and Florida remain open at the time of this petition. Louisiana is the largest seafood producer in the lower 48 states, with annual retail sales of about $1.8 billion, according to state data. Recreational fishing generates about $1 billion in retail sales a year, according to the state. The oil spill’s long-term impacts on marshes, which serve as nurseries for juvenile fish seeking food and protection, may decrease commercial and recreational catches for years to come.

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9 Various statistics related to the spill are assembled at [http://www.deepwaterhorizonresponse.com/go/site/2931/](http://www.deepwaterhorizonresponse.com/go/site/2931/)
Figure 2. *Deepwater Horizon*/BP oil spill related federal fishery closure boundary as of June 23, 2010 (http://sero.nmfs.noaa.gov/deepwater_horizon_oil_spill.htm).

Figure 3. Louisiana recreational and commercial fishing closures as of June 8, 2010 (http://www.wlf.louisiana.gov/oilspill/).
B. BOE and NMFS EFH Consultation in the Gulf of Mexico Fails to Meet the Procedural or Substantive Requirements of the Law

Regulations outline the process for federal agencies, NMFS and the fishery management councils to satisfy the EFH consultation requirement under section 305(b) of the MSA. (50 C.F.R. §§ 600.905–600.930). These regulations prescribe acceptable approaches for conducting consultation (use of existing environmental review procedures, general concurrence, abbreviated consultation, expanded consultation, and programmatic consultation). 50 C.F.R. § 600.920(a)(2). The regulations also require federal action agencies to prepare a written EFH assessment describing the effects of that action on EFH when an agency action may adversely impact EFH. 50 C.F.R. § 600.920(e)(1). All EFH assessments must include the contents stated in 50 C.F.R. § 600.920(e)(3). Finally, the regulations require NMFS to provide EFH conservation recommendations to federal agencies for actions that would adversely affect EFH. 50 C.F.R. § 600.925(a).
1. Programmatic Consultation Is Inappropriate in the Context of Oil and Gas Activities in the Gulf of Mexico

The Secretary excludes most of its approvals for offshore oil and gas activities from any EFH consultation by virtue of programmatic consultations with NMFS and the activities’ categorical exclusion from NEPA. There is a five-step process for oil and gas development on the outer continental shelf. First, the Secretary of the Department of the Interior adopts a five-year leasing program that sets forth a proposed schedule of lease sales. 43 U.S.C. § 1344. Second, the Secretary may then sell any lease to the “highest responsible qualified bidder.” Id. § 1337. Third, lease holders conduct oil and gas exploration pursuant to an approved exploration plan (EP). Id. § 1340. This is followed by development and production of the oil and gas found, pursuant to a development plan (for the Gulf of Mexico this is known as a Development Operations Coordination Document or DOCD). Id. § 1351. The fifth and final step of the OCSLA process is sale of the recovered oil and gas. Id. § 1353. Only for the first of these steps did the MMS and NMFS state that they were engaging in an EFH consultation.

Consultations may be conducted through use of existing environmental review procedures, abbreviated consultation, expanded (project-specific) consultation, general concurrence, and programmatic consultation. 50 C.F.R. § 600.920(a)(2). Programmatic and general concurrence consultations minimize the need for individual project consultation in most cases because NMFS has determined that the actions will likely result in no more than minimal adverse effects, and conservation measures will be implemented (NMFS 2008). As an example, NMFS might agree to a general concurrence for the construction of docks or piers which, with incorporation of design or siting constraints, would minimally affect federally managed fishery resources and their habitats (NMFS 2008). The MMS and NMFS engaged in programmatic consultation for the FEIS for the Gulf of Mexico OCS Oil and Gas Lease Sales: 2007–2012 (“Multisale EIS”), which purportedly satisfied consultation requirements (MMS 2007a; MMS 2007b, at 47). A programmatic consultation for as many activities as the Multisale EIS encompasses (eleven lease sales over five years throughout the central and western Gulf of Mexico), however, is inadequate.

With the Multisale EIS, the MMS and NMFS engaged in programmatic consultation to analyze potential adverse effects on EFH. The Multisale EIS refers to previous programmatic level consultation agreements, but also cites a request for a new programmatic consultation initiated with the completion of the Draft EIS:

The MMS and NOAA Fisheries Service have previously entered into a programmatic-level consultation agreement for EFH related to OCS activities in all of the lease areas described in this EIS. The EFH conservation measures recommended by NOAA Fisheries Service serve the purpose of protecting EFH and include avoidance distances from topographic-feature’s No Activity Zones and live-bottom pinnacle features. Additional conservation provisions and circumstances that require project specific consultation have also been agreed to through this Programmatic Consultation. These agreements, including avoidance distances from topographic-feature’s No Activity Zones and live-bottom pinnacle features appear in Notice to Lessees and Operators (NTL) 2004-G05. A new
request for Programmatic Consultation was initiated with the completion of the Draft EIS.

(MMS 2007a, at 1-8). On the same page, the Multisale EIS states that the “EIS includes the required components of an EFH assessment that represents a submission to NOAA Fisheries Service in request of an EFH consultation.” As a result of these statements, it is not clear whether the MMS relied on a previous programmatic consultation, requested a new programmatic consultation, or consulted as part of the NEPA process itself (per the statement that the EIS is the EFH assessment) to fulfill the requirements of the MSA for consultation. Nevertheless, the consultation at the Multisale EIS stage was inadequate to meet the EFH consultation requirements for all oil and gas development activities in the five-year lease sale program, including BP’s development activities that preceded the spill.

The Multisale EIS covers five annual area wide lease sales for the Western Planning Area and six annual area wide lease sales scheduled for the Central planning area. The MMS prepared a single EIS for these 11 sales because “each lease sale proposal and projected activities are very similar each year for each sale area” (MMS 2007a, at iii). The MMS prepares an environmental analysis for each subsequent proposed lease sale, but further oil and gas development activities (such as seismic exploration, exploration and development plans, and permits to drill) are usually categorically excluded from the NEPA process.10

Programmatic consultations should not apply to something as large-scale and long-term as oil and gas development activities pursuant to a five-year lease sale program, or if the BOE uses programmatic consultation at this stage to consider cumulative impacts, BOE must conduct site-specific consultations at later oil and gas development stages. Regulations specify that programmatic consultation provides a means for NMFS and the BOE to consult regarding a potentially large number of individual actions that may adversely affect EFH (50 C.F.R. § 600.920(j)(1)), but this is not the sole criteria for determining when a programmatic consultation is appropriate. Sufficient information must be available to address “all reasonably foreseeable adverse effects on EFH of an entire program, parts of a program, or a number of similar individual actions occurring within a given geographic area.” Id. The Multisale EIS covered activities with potential impacts to an area spanning hundreds of square miles and many species’ EFH. Sufficient information is not available to address all the reasonably foreseeable adverse effects from a five-year lease sale program. Therefore, programmatic consultation is not appropriate over the broad time and spatial scale that the Multisale EIS encompasses. NMFS should have identified potential adverse effects that could not be addressed programmatically and required project-specific consultation, pursuant to 50 C.F.R. § 600.920(j)(3), or determined that programmatic consultation is not appropriate at all for these activities.

In the case of the BP oil spill, NMFS and the MMS had at least three opportunities for consultation regarding the potential adverse effects on EFH: at the adoption of the five-year leasing program setting forth the proposed schedule of lease sales (the Multisale EIS), during the subsequent decision to proceed with Lease Sale 206, and during the approval of BP’s exploration

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drilling plan. At each of these opportunities, NMFS and the MMS failed to fulfill their mandatory duties for consultation and conservation management under the MSA and OCSLA. In the MMS’s environmental assessment for Lease Sale 206, NMFS agreed “that impacts to EFH and associated fishery resources resulting from activities conducted under the 2007–2012 lease sales would be minimal. Therefore, unless future changes to the proposed 2007–2012 lease sales are proposed or new information becomes available, no further EFH consultation is required for the 2007–2012 lease sales” (MMS 2007b). By consulting in a cursory manner on all activities anticipated by a five-year lease sale program, NMFS and the MMS inappropriately dispensed with the requirements to consult under the MSA on any other MMS actions adversely affecting EFH.

2. MMS’s Programmatic Consultation Failed to Meet Either the Substantive Purposes or Legal Requirements of the MSA

Even when the MMS consulted with NMFS regarding offshore oil and gas development in the Gulf of Mexico, this consultation was substantively inadequate to fulfill the goals of and the duties imposed by the MSA and OCSLA. First, the Multisale EIS did not include a level of detail commensurate with the complexity and magnitude of the potential adverse effects of the action, per the requirements of 50 C.F.R. 600.920(e)(2). Second, the Multisale EIS failed to include the required contents of an EFH assessment. 50 C.F.R. § 600.920(e)(3). Specifically, the Multisale EIS lacked analysis of the potential adverse effects of the action on EFH and the managed species, failed to offer conclusions as to the temporal or spatial extent and the severity of the impacts, and failed to propose mitigation measures as part of the action to avoid, minimize, or otherwise mitigate for the anticipated adverse effects to EFH.

The Multisale EIS provided only minimal detail despite the complexity and magnitude of potential adverse effects of oil and gas development activities on EFH in the Gulf of Mexico. Regulations require a commensurate level of detail “with the complexity and magnitude of the potential adverse effects of the action. For example, for relatively simple actions involving minor adverse effects on EFH, the assessment may be very brief. Actions that may pose a more serious threat to EFH warrant a correspondingly more detailed EFH Assessment.” 50 C.F.R. 600.920(e)(2).

Furthermore, while the Multisale EIS states that it “includes the required components of an EFH assessment that represents a submission to NOAA Fisheries Service in request of an EFH consultation,” it does not meet the content requirements in 50 C.F.R. § 600.920(e)(3). For example, the Multisale EIS never identifies what species’ EFH will be affected by the action. Nor does the Multisale EIS identify the adverse effects that could occur (e.g., loss of 0.5 acres of seagrass, turbidity) or how the activities would impact managed species (see NMFS 2004, at 4). In addition, the analysis and conclusions of the Multisale EIS are vague, as noted by the Fish and Wildlife Service in comments submitted on January 5, 2007:
Unlike the Fish and Wildlife Service, NMFS did not submit comments to be included in the Multisale EIS (MMS 2007a, at 5-13).

The Multisale EIS does not adequately analyze the potential adverse effects of the MMS’s activities on EFH and the managed species. The EIS states that a “subsurface blowout would have a negligible effect on Gulf of Mexico fish resources or commercial fishing” (MMS 2007a, at 2-17). The passage concludes that:

If spills due to a proposed action were to occur in open waters of the OCS proximate to mobile adult finfish or shellfish, the effects would likely be nonfatal and the extent of damage would be reduced due to the capability of adult fish and shellfish to avoid a spill, to metabolize hydrocarbons, and to excrete both metabolites and parent compounds. The effect of proposed-action-related oil spills on fish resources and commercial fishing is expected to cause less than a 1 percent decrease in standing stocks of any population, commercial fishing efforts, landings, or value of those landings. Historically, there have been no oil spills of any size that have had a long-term impact on fishery populations. Any affected commercial fishing activity would recover within 6 months. . . . At the expected level of impact, the resultant influence on fish populations and commercial fishing activities from a proposed action would be negligible and indistinguishable from variations due to natural causes.

(MMS 2007a, at 2-17). These statements are obviously false and unsupportable in light of current events and the failure of herring populations to recover even twenty years after the Exxon Valdez spill. NMFS’s and the MMS’s efforts to streamline the oil drilling approval process have resulted in an important and legally required analysis falling through the cracks, with fish, fisheries, fishermen, and fishing communities now paying the price.

The MMS published an environmental assessment for Lease Sale 206. At this stage, the MMS concluded that “new analysis of the potential impacts of proposed Lease Sale 206 on fish resources and EFH is not required” (MMS 2007b, at 47). Therefore, the previous conclusions in the Multisale EIS were carried forward. The MMS “expected that coastal and marine
environmental degradation from proposed Lease Sale 206 would have little effect on fish resources or EFH” (MMS 2007b, at 46). Further, the impact of any degradation of the coastal and marine environment would “cause an undetectable decrease in fish resources or in EFH” (MMS 2007b, at 46). After the oil spill of April 20, 2010, it is evident that these expectations are oversimplified and unsupported conclusions, which fail to meet the consultation requirements of the MSA and conserve ocean resources as required by OCSLA.

The problem of inadequate consultation regarding adverse effects on EFH has not ended with the BP oil spill. Since President Obama took office on January 20, 2009, the MMS has conducted three lease sales in the Gulf of Mexico. One of those lease sales, Central Gulf Lease Sale 213, occurred on March 17, 2010, and the Secretary is continuing to take actions on it. Western Gulf Lease Sale 215 is scheduled to be held on August 18, 2010, and more lease sales are in the pipeline. During this time, the Secretary has also approved more than 500 exploration and development plans for the Gulf of Mexico. Even since the disastrous April 20, 2010, explosion of BP’s rig that was conducting exploration drilling, the Secretary has approved about a dozen new drilling plans.

Each lease sale, exploration plan, and development plan was approved without an adequate analysis of the impacts of oil spills on EFH. It is important to conduct this analysis at the site-specific level of an exploration or development plan because of the requirement to mitigate adverse affects on species-specific, and often life-stage-specific, EFH designations. There is no way to anticipate adverse effects on EFH without first identifying the EFH designated at that site. Thus, analysis at the site-specific level will be more rigorous than an analysis of adverse affects from the sale of leases in the central and western planning areas as a whole.

The Multisale EIS failed to include the required contents of an EFH assessment because it did not identify which species’ EFH could be affected, it gave inadequately supported conclusions regarding the effects on EFH, and it failed to propose measures to avoid, minimize or otherwise mitigate anticipated adverse effects. In sum, the consultation process failed to protect EFH—those waters and substrate necessary to fish.11

3. NMFS Failed to Propose Adequate Conservation Measures To Protect EFH

The goal of the MSA is to maintain sustainable fisheries, which requires long-term maintenance of suitable marine fishery habitat. Thus, under section 305(b)(4)(A), NMFS is required to provide EFH conservation recommendations to the MMS for actions that would adversely affect EFH. 16 U.S.C. § 1855(b)(4)(A); 50 C.F.R. § 600.925(a). These recommendations are advisory, not proscriptive. However, federal agencies that do not adopt

11 As discussed, EFH is defined in the MSA as “...those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.” NMFS defines these terms as: waters - aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; substrate - sediment, hard bottom, structures underlying the waters, and associated biological communities; necessary - the habitat required to support a sustainable fishery and the managed species’ contribution to a healthy ecosystem; and spawning, breeding, feeding, or growth to maturity - stages representing a species’ full life cycle (NMFS 2008).
EFH conservation recommendations must provide a written explanation setting forth the basis for that decision. 16 U.S.C. § 1855(b)(4)(B). NMFS’s failure to adopt adequate conservation measures to protect EFH is arbitrary and capricious and violates mandates under the MSA and OCSLA.

In response to the EFH assessment in the Multisale EIS, NMFS stated that, provided that the MMS’s (1) proposed mitigations, (2) previous EFH conservation recommendations, and (3) standard lease stipulations and regulations are followed, it agreed “that impacts to EFH and associated fishery resources resulting from activities conducted under the 2007–2012 lease sales would be minimal” (MMS 2007b, at 67). Incredibly, NMFS provided no new conservation measures to protect EFH from oil and gas development activities anticipated by the five-year lease sale program.

First, the proposed mitigation measures contained in the Multisale EIS are neither clearly articulated nor adequate to protect EFH. For example, section 2.2.2.2. briefly mentions existing mitigating measures including some “incorporated into OCS operations through cooperative agreements” and over 120 site-specific mitigating measures applied during plan reviews, but it is not clear that any of these relate to EFH. Almost laughably, the MMS relies on later NEPA review to allow opportunities for additional mitigation measures: “each exploration and development plan, as well as any pipeline applications that may result from a lease sale, will undergo a NEPA review, and additional project-specific mitigations may be applied as conditions of plan approval” (MMS 2007a). Because the BOE categorically excludes the vast majority of these plans from the NEPA review, there would be no way to apply additional mitigations. It is not clear which proposed mitigations, if any, caused NMFS to conclude that impacts to EFH would be minimal.

Second, the previous EFH conservation measures to which NMFS refers may include recommendations in the 1999 HMS fishery management plan. These recommendations, however, are only “examples of NMFS’ recommendations that potentially could be made regarding particular projects” (NMFS 1999, at 5-6). NMFS stated that “[d]uring EFH consultations NMFS will evaluate each project based on its merits and potential threat to EFH, and the appropriate conservation measures will be assessed at that time” (NMFS 1999, at 5-6). Therefore, relying on these previous conservation measures is not adequate to meet the requirements of the MSA, even according to NMFS itself.

Finally, the only lease stipulation regarding fish is to protect one bottom feature in the central planning area (the pinnacle trend, consisting of topographic irregularities providing structural habitat for fish). The stipulation does not apply as a whole to the EFH in the central planning area, does not mention EFH areas, and was formulated nearly 30 years ago (MMS 2007a, at 3-80), prior to congressional mandates regarding EFH.

The MMS provides a notice to lessees and operators of federal oil and gas leases which gives guidance for the avoidance and protection of biologically sensitive features and areas (NTL 2009-G39). Although the MMS references this notice to lessees (“NTL”) as providing additional EFH conservation measures, the NTL identifies protected areas including only topographic features, pinnacles, live bottoms and other sensitive “features,” and not fish habitat as a whole.
For example, the NTL states that “based on an Essential Fish Habitat (EFH) programmatic consultation with the National Oceanic and Atmospheric Administration Fisheries,” (1) no bottom disturbing activities may occur within 500 feet of a topographic feature and (2) if more than two wells not from development operations are to be drilled from the same surface location which is within the 3-mile zone of a topographic feature, all drill cuttings and drilling fluids are to be shunted to the sea bottom (NTL 2009-G39). These do not adequately address all oil and gas activities that may adversely affect EFH, and they actually address only a small subset of the total area identified as EFH.

MMS’s lease stipulation and NTL addresses bottom disturbing activities, but these are not the primary threat to HMS EFH from oil and gas activities in the Gulf of Mexico. As NMFS stated:

> Exploration and recovery operations may cause substantial localized bottom disturbance. However, more pertinent to HMS is the threat of contaminating operational wastes associated with offshore exploration and development, the major operational wastes being drilling muds and cuttings and formation waters. In addition, there are hydrocarbon products, well completion and work-over fluids, spill clean-up chemicals, deck drainage, sanitary and domestic wastes, ballast water, and the large volume of unrefined and refined products that must be moved within offshore and coastal waters.

(NMFS 1999, at 6-272 to 6-273). There is no indication that MMS received, implemented, or responded to conservation recommendations that would mitigate the impacts on EFH that were likely to result from the specific oil and gas development activities anticipated in the Multisale EIS.

**Fishery Management Plans Containing Conservation Recommendations**

The MSA requires that fishery management plans (FMPs) identify activities other than fishing that may adversely affect EFH and describe known and potential adverse effects of these activities. 50 C.F.R. § 600.815(a)(4). Both NMFS and the Gulf of Mexico Fishery Management Council (“GMFMC”) have identified EFH in the Gulf of Mexico, as discussed above. In the case of the latter, the conservation recommendations have been woefully inadequate to address potential adverse effects from non-fishing activities. NMFS’s Atlantic HMS EFH conservation recommendations established in June 2009 are better, but have yet to be implemented by NMFS.

**Gulf of Mexico Fishery Management Council**

The GMFMC established conservation recommendations for EFH in the 1998 Generic Amendment and the 2005 Generic Amendment 3. A number of the measures recommended in 1998 concern hard banks and banks containing reef-building coral, not EFH generally, or adverse effects—such as oil spills, ocean acidification, mercury contamination, or ensonification—which are not tied to the substrate. In addition, the recommendations are measures that oil and gas development activities would already be taking under other regulatory frameworks.
For example, the MMS noted that the two changes the GMFMC made in 2005 to the 1998 recommendations regarding oil and gas exploration and production activities on the continental shelf “now reflect the actual policy MMS has historically followed” (MMS 2007a, at 3-80). The GMFMC therefore did not provide any additional measures which would actually protect EFH from adverse affects because those practices were already in place. As another example, in a section entitled “Recommendations to minimize damages to EFH from non-fishing activities,” the GMFMC recommends that:

- “A plan should be in place to avoid the release of hydrocarbons, hydrocarbon-containing substances, drilling muds, or any other potentially toxic substance into the aquatic environment and the surrounding area.”
- “An oil spill response plan should be developed and coordinated with federal and state resource agencies.”

(GMFMC 2005). These recommendations duplicate existing requirements under laws other than the MSA. The GMFMC’s FMP, therefore, provides no additional protection of EFH as required under the MSA.

There is also no discussion of the potential adverse effects of an oil spill on EFH and no prediction as to the extent of the potential damage a spill might cause. This is despite the GMFMC acknowledging the year before, in the Final Environmental Impact Statement (“FEIS”) for the generic essential fish habitat amendment, that “[b]lowouts can occur during any phase of development: exploratory drilling, development drilling, production, or workover operations” (GMFMC 2004). Even this document, while it acknowledges the potential for blowouts, leaves assessment of the adverse effects from an oil spill on fish or fish habitat to the industry or the MMS (“The Mineral [sic] Management Service has a responsibility to assess biological effects of Federally authorized mineral extraction (especially oil and gas) in the Gulf of Mexico.”) (GMFMC 2004, at 3-20). Discussion of effects of potential oil spills is limited to citing MMS documents and stating that oil spills “can have an acute toxic effect on living habitats (e.g. seagrasses, wetlands) and also contaminate the pelagic zone making it uninhabitable by aquatic organisms in the short term (MMS 2002a)” (GMFMC 2004). In light of the oil spill disaster occurring now in the Gulf of Mexico, these documents show the egregious oversight of the GMFMC in fulfilling its obligations to describe known and potential adverse effects on EFH from non-fishing activities.

**NMFS Atlantic Highly Migratory Species Fishery Management Plan**

In comparison, NMFS’s Amendment 1 to the Consolidated Atlantic Highly Migratory Species Fishery Management Plan Essential Fish Habitat provides an analysis and discussion of the potential effects of petroleum exploration and development on EFH, as required by the MSA (NMFS 2009a). The NMFS document describes the industry, the number of oil and gas platforms, and the water depths at which the platforms are located. It also notes that many of the sites fall within HMS EFH, particularly for bluefin tuna (see Figs. 1 and 5). Conservation measures include, *inter alia*, the following:
• “The impacts of all exploratory and development activities on the fisheries resources should be determined prior to MMS approval of any applications for permits to drill, including effects of seismic survey signals on fish behavior, eggs and larvae.”
• “All vessels transporting fuels and other hazardous materials should be required to carry equipment to contain and retrieve the spill. Dispersants shall not be used to clean up fuels and hazardous materials unless approved by the EPA/Coast Guard and fishery agencies.”
• “NPDES permit conditions such as those relating to dissolved oxygen, temperature, impingement and entrainment, under the Clean Water Act should be monitored and strictly enforced in areas that could affect HMS EFH.”

(NMFS 2009a, at 291–292). These conservation recommendations clearly anticipate that spills are possible, and that oil and gas activities may have adverse affects on EFH. The first of these recommendations, to determine impacts of all exploratory and development activities prior to approval of applications for drill permits, was the only recommendation added in 2009 that was not included in the 1999 Atlantic HMS fishery management plan (see NMFS 1999, at 6-273 to 6-275). It is not clear whether NMFS has consulted with the MMS regarding these recommendations, or whether MMS has implemented them or responded in writing, as required. These recommendations are a step in the right direction as examples of NMFS’ recommendations that could be made regarding particular projects, but alone do not suffice to meet the consultation requirements of the MSA.
Figure 5. Atlantic bluefin tuna essential fish habitat overlaid with BP Deepwater Horizon oil spill extent as of June 11, 2010.

Source: Center for Biological Diversity, June 11, 2010.

NMFS clearly has the technical expertise and ability to consult meaningfully with the BOE on oil and gas development activities. As an example, NMFS submitted comments on the Draft Proposed Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2010–2015. These comments included points like:

The MMS data on hurricane incidents includes the following:
- More than 8 million gallons of oil were spilled from coastal oil storage facilities;
- Over 600,000 gallons (including an estimated 84,000 gallons from one platform incident) were spilled from federal offshore oil platforms and associated pipelines; and
- Approximately 3.3 million gallons were spilled from a tank barge, when it struck a submerged oil platform that had been damaged during the storms. These incidents call into question the DPP statement that: “It has been many years since any substantial environmental impacts have been observed as a result of an oil spill caused by the OCS production and transportation activities.”
(NMFS 2009b, at 11). Similar points are made that the “analysis of the risk and impacts of accidental spills and chronic impacts are understated and generally not supported or referenced, using vague terms and phrases such as ‘no substantive degradation is expected’ and ‘some marine mammals could be harmed.’ This is particularly problematic for expanding oil and gas production.” (NMFS 2009b, at 11–12). Although these comments were not made during the course of EFH consultation with the MMS, they provide an example of what more rigorous consultation should look like.

C. OCSLA Requires the BOE to Consider Environmental Information such as EFH and to Implement Conservation Measures

Under its authorities in OCSLA, the BOE has a duty to manage offshore oil and gas in a manner that conserves the marine and coastal environment. 43 U.S.C. § 1344(a)(1). At each stage of oil and gas development, OCSLA requires the consideration of environmental information prior to decision-making and requires the MMS to disapprove, modify, or impose conditions on approvals accordingly. 43 U.S.C. §§ 1340(a)(1), 1346(d), 1351(h). Thus the BOE must include the consideration of impacts of its proposed actions on EFH and fish. In light of the Gulf of Mexico oil spill from the Deepwater Horizon rig, the BOE must reinitiate consultation on EFH and establish conservation measures prior to approving any offshore oil and gas activities in order to prevent serious harm or damage to fish and other marine life.

D. The BOE and NMFS Must Reinitiate Consultation on EFH

NMFS and the BOE must reinitiate expanded consultations for oil and gas development activities in the Gulf of Mexico in light of (1) the MSA’s non-discretionary duties for consultation regarding actions authorized or proposed to be authorized that may adversely affect any essential fish habitat and (2) OCSLA’s requirement that the BOE manage the OCS in a manner which considers the economic, social, and environmental values of fisheries resources, and the potential impact of oil and gas exploration on the marine, coastal, and human environments.

The federal agencies petitioned here have failed to adequately consider the effects of oil and gas activities on fishery resources in the Gulf of Mexico. These resources urgently need the protections afforded by the MSA and OCSLA. Adverse effects to EFH may result from cumulative or synergistic consequences of federal actions. 50 C.F.R. § 600.910(a). Therefore, the BOE must initiate EFH consultation for each agency action approving oil and gas development activities in order to broadly assess cumulative impacts. In addition, the consultation must be tailored narrowly to understand the timing and location of specific drilling and seismic surveys. As an example, BP should not have been doing risky exploratory drilling in habitat protected for Atlantic bluefin tuna spawning during the spawning season. Yet the BOE continues to rely on the inadequate consultation in the Multisale EIS in order to approve oil and gas development activities occurring now and in the future.

The Center requests that NMFS and the BOE fulfill their statutory duties to: (1) reinitiate consultation because of the new information available since the oil spill beginning April 20,
that affects the basis for NMFS EFH conservation recommendations for oil and gas activities in the Gulf of Mexico; (2) initiate consultation under the MSA before each step in the process for oil and gas development on the OCS that may adversely effect EFH, including at the BOE’s adoption of the five-year leasing program, lease sales, seismic permitting, approval of exploration plans and development operations coordination documents, and approval of applications to drill; (3) implement recommended conservation measures to protect EFH as required by the MSA and to conserve ocean resources as required by OCSLA.

IV. CONCLUSION

Nationwide, the BOE, formerly MMS, and NMFS have treated the requirements of the MSA with respect to EFH as a paper exercise rather than using the consultation process to actually protect fish habitat. The Gulf of Mexico is a tragic example of the results of that failure of policy. The Center petitions the BOE and NMFS to reinitiate consultation under the MSA in order that substantive conservation measures will be established regarding offshore oil and gas activities in the Gulf of Mexico.

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