



Via Facsimile and Certified Mail/Return Receipt Requested

June 29, 2010

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RE: Notice of Intent to Sue: Violations of the Endangered Species Act Related to the Controlled Burn Activities in the Gulf of Mexico

This letter serves as official notice by the Center for Biological Diversity and Turtle Island Restoration Network of our intent to sue BP America, Inc. (“BP America”), Admiral Thad Allen, Admiral Robert Papp, and the Unified Command for the Deepwater Horizon Oil Spill (“Unified Command”) and its members and individuals,¹ for violations of the Endangered

¹ Members of the Unified Command include: BP; Transocean; U.S. Coast Guard; Minerals Management Service (a.k.a. Bureau of Ocean Energy Management, Regulation and Enforcement); National Oceanic and Atmospheric Administration; U.S. Environmental Protection Agency; U.S. Department of Homeland Security; U.S. Department of the Interior; U.S. Department of Defense; U.S. Fish and Wildlife Service; U.S. National Park Service; U.S. Department of State; U.S. Geological Survey; Centers for Disease Control and Prevention; and Occupational Safety and Health Administration.

Species Act (“ESA”) (16 U.S.C. § 1531, *et seq.*) resulting from actions and inactions related to the burning of oil and gas on ocean surface waters in the Gulf of Mexico. BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals have recently begun to use “controlled burns” of oil and gas on the surface of U.S. territorial seas in the Gulf of Mexico – which is trapping protected species, including Kemp’s ridley sea turtles, and burning them alive – without authorization for the “take” of listed species as required by the ESA. 16 U.S.C. § 1638(a)(1)(A) (prohibiting any person from committing the “take” of listed species “within the United States or the territorial sea of the United States”); 16 U.S.C. § 1532(19) (“The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”).

In addition, federal agencies within the Unified Command – which include the U.S. Coast Guard; Minerals Management Service (a.k.a. Bureau of Ocean Energy Management, Regulation and Enforcement); National Oceanic and Atmospheric Administration; U.S. Environmental Protection Agency; U.S. Department of Homeland Security; U.S. Department of the Interior; U.S. Department of Defense; U.S. Fish and Wildlife Service; U.S. National Park Service; U.S. Department of State; U.S. Geological Survey; Centers for Disease Control and Prevention; and Occupational Safety and Health Administration – have allowed these actions to proceed without consulting with and seeking the assistance of the Secretary of the Interior, as required by Section 7(a)(1) of the ESA. 16 U.S.C. § 1536(a)(1).

“Controlled burns” of oil and gas on the ocean surface, which are being carried out in an attempt to control the oil that is still spewing from the Deepwater Horizon ruptured wellhead, are being done with little to no regard for the fate of oiled sea turtles and other listed species that are trapped within the perimeter and burned alive. Researchers are being prevented from searching trapped material and rescuing wildlife before vegetation and the marine life it supports are burned.

Thus, by this letter the Center puts BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals on official notice that the Center and TIRN believe that these activities are resulting in the unlawful take of threatened and endangered species, including but not limited to the Kemp’s ridley sea turtle, in violation of the ESA. 16 U.S.C. § 1538. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

I. Legal and Factual Background

A. The Endangered Species Act

The ESA, was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved ... [and] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

Section 9 of the ESA specifically prohibits the “take” of an endangered species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to include harassing, harming, pursuing, wounding or killing such species. 16 U.S.C. § 1532(19). The term “harm” means “an intentional or negligent omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. The ESA’s legislative history supports “the broadest possible” reading of “take.” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; *see also Nat’l Wildlife Fed’n v. Burlington No. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994). Consistent with these provisions and precedent, controlled burns that are being carried out by BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals can be the legal cause of a prohibited taking under Section 9 of the ESA. Persons who are knowingly carrying these activities are liable for take and subject to civil and criminal penalties, including imprisonment. *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (“any person” who knowingly “takes” an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.” (citing 16 U.S.C. §§ 1540(a), (b) (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for one year); *Babbitt v. Sweet Home Chapter, Communities for Great Oregon*, 515 U.S. 687 (1995) (upholding interpretation of the term “take” to include significant habitat degradation).²

In addition, courts have repeatedly held that government actions authorizing third parties to engage in harmful activities can constitute an illegal taking under Section 9 of the ESA. *See Strahan v. Cox*, 127 F.3d 155, 158, 163-64 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998) (state agency caused takings of the endangered right whale because it “licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]”); *Defenders of Wildlife v. Admin’r, Env’tl. Prot. Agency*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency caused takes of endangered black-footed ferret through its “decision to register pesticides” even though other persons actually distributed or used the pesticides); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008) (state agency liable for take under the ESA for its licensing and regulation of trapping that resulted in the incidental take of Canada lynx); *Loggerhead Turtle v. City Council of Volusia County*, 148 F.3d 1231, 1253 (11th Cir. 1998) (county’s inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA). Consistent with this precedent, the Unified Command federal agencies’ authorization, approval, and allowance of controlled burns can be the legal cause of a prohibited taking under Section 9 of the ESA.

² “Person” is defined in the ESA to include “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. § 1533(13).

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3). Section 7(a)(1) of the ESA directs that the Secretary review “other programs administered by him and utilize such programs in furtherance of the purposes of the Act.” 16 U.S.C. § 1536(a)(1).

The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Interior and Commerce. The Secretaries of Interior and Commerce have delegated this responsibility to the FWS and the NMFS, respectively. 50 C.F.R. §402.01(b). NMFS has primary responsibility for administering the ESA with regards to most marine species, while FWS has responsibility for terrestrial species.

B. Gulf of Mexico Threatened and Endangered Species

The Gulf of Mexico is one of the most productive and fragile marine ecosystems in the nation. It supports a staggering array of marine life and represents an important contribution to the Gulf coast economy. The Gulf 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 tens of thousands of shore and coastal birds, thousands of species of invertebrates, at least 600 species of fish, and 29 species of cetaceans in the Gulf. More than 300 species of coral, combined with other hard-bottom communities, wetlands, seagrass beds, mangroves, and soft-bottom communities, provide the necessary habitat to support this rich assemblage of marine life. These diverse and highly complex habitats provide food, shelter, and spawning grounds for all of the Gulf’s species at different points during their life history.

The rich biodiversity found in the Gulf of Mexico includes several threatened and endangered species marine mammals, seabirds, and fish. Endangered whales in the Gulf include sperm whale (*Physeter macrocephalus*), blue whale (*Balaenoptera musculus*), fin whale (*B. physalus*), sei whale (*B. borealis*), humpback whale (*Megaptera novaeangliae*), and North Atlantic right whale (*Eubalaena glacialis*). Protected fish species include the gulf sturgeon (*Acipenser oxyrinchus desotoi*) and smalltooth sawfish (*Pristis pectinata*). Protected elkhorn (*Acropora palmata*) and staghorn corals (*A. cervicornis*) occur in the Florida Keys. Coastal species under the jurisdiction of FWS include West Indian manatee (*Trichechus manatus*), piping plover (*Charadrius melodus*), whooping crane (*Grus americana*), wood stork (*Mycteria americana*), Alabama red-belly turtle (*Pseudemys alabamensis*), Alabama (*Peromyscus polionotus ammobates*), Choctawhatchee (*P. polionotus allophrys*), St. Andrew (*P. polionotus peninsularis*), and Perdido Key (*P. polionotus trissyllepsis*) beach mice.

In addition, five of the world’s seven species of sea turtles reside in or migrate to the Gulf of Mexico, including leatherback (*Dermochelys coriacea*), green (*Chelonia mydas*), Kemp’s

ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*), and hawksbill (*Eretmochelys imbricata*) sea turtles. All of these species are listed as threatened or endangered under the ESA. FWS and NMFS share jurisdiction pursuant to the ESA over sea turtles.

The Kemp's ridley sea turtle, believed to be the smallest marine turtle in the world, is found throughout the Gulf of Mexico as well as the U.S. Atlantic Seaboard. Kemp's ridleys are found in many different areas within the Gulf, with males migrating annually between feeding and breeding grounds and females migrating to and from nesting beaches in Mexico. Kemp's ridley sea turtles are renowned for the "arribada" ("arrival" in Spanish), a synchronized nesting habit whereby large groups of Kemp's ridleys gather off a nesting beach and then come ashore in waves. It is not known what triggers an arribada. Females next from May to July, laying two to three clutches of about 100 eggs that hatch after incubating for 50-60 days. After emerging from the nest, hatchlings must enter the water and swim quickly to avoid predators, and then develop in the ocean for years before returning to "neritic" zones – muddy or sandy bottoms where prey are found, including swimming crabs, fish, jellyfish, and mollusks – to feed and develop into adulthood. Hatchlings ride the Gulf current and can be swept out of the Gulf, around Florida and into the Atlantic, by the Gulf Stream. Like other sea turtles, Kemp's ridleys utilize floating sargassum seaweed mats for refuge, rest, and food, particularly during this developmental stage of life.

Even before the BP disaster, Kemp's ridley sea turtles were extremely endangered as a result of egg poaching and fisheries bycatch, especially in trawls and gill nets. The species' arribada near Rancho Nuevo, Mexico, believed to have numbered 42,000 turtles in the late 1940s, collapsed to just 5,000 individuals within 20 years, and between 1978 and 1991, only 200 Kemp's ridleys nested there annually. Before the BP disaster, nesting Kemp's ridleys were increasing steadily, with 2,000 nesting females at Rancho Nuevo in 2000, an arribada of 1,000 turtles in 2001, and 3,600 turtles producing more than 8,000 nests in 2003. In 2006, 12,143 nests were documented in Mexico, including 7,866 at Rancho Nuevo. A record-breaking 127 Kemp's ridley nests were recorded on the Texas coast in 2007, including 73 nests at Padre Island National Seashore. Although egg poaching has been reduced, it still occurs, and bycatch in shrimp trawls remains a significant problem despite turtle excluder device requirements. Still, Kemp's ridley sea turtles were showing promising signs of recovery and were poised to become a success story before the BP disaster hit.

Now, of the five listed species of sea turtles in the Gulf of Mexico, Kemp's ridley sea turtles are likely being affected the most by the BP disaster because they rely most extensively on the Gulf's many environments. Kemp's ridley and other threatened and endangered sea turtles are being found in growing numbers in thick pools of oil near shore and miles out into the Gulf of Mexico. See NPR, *Sea Turtles Among Oil Spill Victims* (June 10, 2010). Oil causes toxic poisoning and interferes with breathing and feeding. Only a fraction of Kemp's ridleys are nesting at Padre Island National Seashore this year, where tar balls and tar mats have recently been seen. See National Parks Traveler, *Sea Turtle Hatchlings Set Free at Padre National Seashore Despite Tar Balls* (June 18, 2010). Hatchlings heading for the ocean are likely barraged by tar balls and oil in the water that can cause them to choke. Kemp's ridleys have

recently been documented heading directly for the oily water in the Gulf. The same sargassum mats that provide a refuge and feeding area for many species of developing turtles are found in the same ocean zones where the oil is collecting.

C. Take of Listed Species from the Burning of Oil and Gas on the Ocean Surface in the Gulf

BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals have recently begun to use controlled burns to contain the oil spill. Fire-resistant booms are used to corral an area of oil that often also includes sargassum seaweed mats where juvenile turtles aggregate. Juvenile turtles may not be able to distinguish between sargassum mats and globs of oil. When the oil is encircled with booms and burned, animals trapped within are burned alive. Kemp's ridleys – and probably loggerhead, green, hawksbill, and leatherback sea turtles as well as other species – are being killed in this way. As of the date of this letter, there have been almost 300 controlled burns in the Gulf, about 30 every week. *See* Mother Jones, *Backlash on Possible Sea Turtle Burning* (June 2010). Meanwhile, rescue boats and crews seeking to rescue trapped marine life from these areas before burning are being turned away by BP America and others who are subject to this notice, which may be letting the animals die in order to avoid liability under the ESA. *See* Longboat Key News, *Oil Watch: Oil Spill Stirs Strategic Responses* (June 25, 2010).

II. Violations of the Endangered Species Act

A. BP America, Admiral Allen, Admiral Papp, and the Unified Command and its Members and Individuals, Are Liable for Take Under Section 9 of the ESA.

BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals are in violation of Section 9 of the ESA for the unauthorized take of threatened and endangered species resulting from controlled burns in the Gulf of Mexico. These burns are killing Kemp's ridley sea turtles, as well as other sea turtles and protected marine life, by burning them alive. BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals are carrying out these controlled burns without take authorization under the ESA, as no take of ESA-listed sea turtles or other species has been authorized for BP disaster-related controlled burns in the Gulf. As such, BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals are violating the take prohibition found in Section 9 of the ESA.

Additionally, the federal agencies of the Unified Command are authorizing, approving and allowing such activities which are indisputably resulting in take of ESA-listed species like Kemp's ridley sea turtles. No take authorization has been granted for these activities. The of the Unified Command federal agencies' authorization, approval, and allowance of controlled burns has been documented to take Kemp's ridley sea turtles and therefore is the legal cause of such

take. Such take is ongoing and likely to continue to occur. As such these federal agencies are violating Section 9 of the ESA by authorizing, approving, and allowing controlled burns.

B. The Unified Command's Federal Agencies Have Failed to Comply with ESA Section 7 In Connection With the Burning of Oil and Gas.

The Unified Command federal agencies' actions authorizing, approving, and allowing controlled burn activities in the Gulf of Mexico are agency programs that must, in consultation with and with the assistance of NMFS and FWS, be utilized in furtherance of the purposes of the ESA – *i.e.*, in furtherance of the conservation of threatened and endangered species and their habitat. 16 U.S.C. §§ 1536(a)(1), 1532(b). By authorizing, approving, and allowing controlled burn activities to occur without consulting with or seeking the assistance of NMFS and FWS, these agencies are violating their duty, under Section 7(a)(1) of the ESA, to utilize their authorities in furtherance of the purposes of the ESA and to carry out their BP oil spill disaster-related activities for the conservation of threatened and endangered species. 16 U.S.C. § 1536(a)(1).

III. Conclusion

As stated above, BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals are violating the ESA as a result of their actions and inactions related to the burning of oil and gas on ocean surface waters in the Gulf of Mexico. BP's, Admiral Allen's, Admiral Papp's, and the Unified Command's controlled burn activities, and the federal agencies of the Unified Command's authorization, approval, and allowance of controlled burn activities, constitute violations of Section 9 of the ESA. In addition, the Unified Command federal agencies' failure to consult with and seek the assistance of NMFS and FWS to ensure the conservation of threatened and endangered species in connection with controlled burns constitutes violations of Section 7(a)(1) of the ESA.

If BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals do not act to correct the violations described in this letter, the Center and TIRN will pursue litigation against BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals in U.S. District Court in 60 days from your receipt of this notice. The Center and TIRN will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would prevent litigation would be for BP America, Admiral Allen, Admiral Papp, and the Unified Command and its members and individuals to immediately cease controlled burn activities until they can do so without taking listed species and in consultation with and with the assistance of NMFS and FWS. Specifically, all oil spill response vessels, including those conducting controlled burns, should have measures to rescue listed species and observers to document incidental take of threatened and endangered species. Each response vessel – in particular, each skimmer boat – must carry a qualified observer to identify and remove wildlife from response areas before any such areas are burned or dispersant is applied. BP must allow access to areas that allow for efforts to conserve listed species. Additionally, federal agencies must require that BP allow access to these areas,

and refrain from conducting any surface burn activities until these survey and rescue operations are complete.

If you have any questions, wish to discuss this matter, or feel this notice is in error; please contact me at 503-283-5474.

Sincerely,



Amy R. Atwood
Center for Biological Diversity

cc: *Via Certified Mail/Return Receipt Requested and Facsimile or Email (where indicated)*

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