UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Oceana et al.,

Plaintiffs,

v.

Bureau of Ocean Energy Management et al.,

Defendants,

and

American Petroleum Institute et al.,

Intervenors.

Case No. 1:12-cv-00981-RC

Federal Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and this Court's Revised Scheduling Order (ECF No. 62), Federal Defendants hereby respectfully cross-move the Court for summary judgment on all claims contained in Plaintiffs' Complaint because Federal Defendants are entitled to judgment in their favor as a matter of law. In support of this Cross-Motion, Federal Defendants rely upon the accompanying Memorandum of Law and the supporting declaration of David M. Bernhart that is filed herewith, and the pleadings and administrative record on file in this action.

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I. Introduction

In holding Lease Sale 216/222, the Bureau of Ocean Energy Management (BOEM) complied with the National Environmental Policy Act (NEPA). BOEM engaged in multiple environmental reviews, analyzed extensive scientific information from a multitude of sources, and cogently summarized relevant information, as well as information gaps, for the decision maker and public in advance of the decision to hold the sale.

In the aftermath of the Deepwater Horizon incident, BOEM undertook exhaustive research to prepare updated environmental analyses before proceeding with any planned lease sales in the Gulf of Mexico. BOEM delayed moving forward with Lease Sale 216 and prepared a supplemental environmental impact statement (the 2012 SEIS) before determining whether to hold Lease Sale 216/222. The 2012 SEIS analyzed "potential changes to baseline conditions" of Gulf of Mexico resources. The 2012 SEIS also responded to the Council on Environmental Quality's ("CEQ") 2010 report that recommended preparation of NEPA documents to consider "reasonably foreseeable impacts associated with low probability catastrophic spills for oil and gas activities." DOI 5475, 6561. BOEM identified and incorporated new information into the 2012 SEIS and, in accordance with CEQ's regulations, disclosed where relevant information was unavailable. Plaintiffs challenge BOEM's decision to proceed with the lease sales, on grounds that the 2012 SEIS allegedly failed to take a "hard-look" at the potential impacts of the lease sales. These claims, however, are belied by the in-depth analysis in the 2012 SEIS, which is fully supported by BOEM's administrative record. Plaintiffs have offered no record evidence to substantiate their claims and cannot show that BOEM's approval of this lease sale was arbitrary or capricious. Accordingly, Plaintiffs NEPA claims must fail.

When it conducted these lease sales, BOEM also complied with the Endangered Species Act ("ESA"). BOEM consulted with the National Marine Fisheries Service ("NMFS") in 2007 on the effects of the leasing program that included these lease sales on

threatened and endangered species, and it reinitiated that consultation after the *Deepwater Horizon* ("DWH") incident. The ESA expressly describes what a Federal agency may do while consultation is ongoing, and BOEM's sale of these leases complies with those provisions of the Act because they are not an "irreversible or irretrievable commitment of resources." BOEM also rationally concluded that these lease sales are not likely to "jeopardize" the continued existence of any threatened or endangered species because the leases do not authorize the kind of exploration and production drilling that Plaintiffs claim may harm species.

Finally, NMFS has not "unreasonably delayed" its completion of its new biological opinion on BOEM's actions in the Gulf of Mexico. To the contrary, NMFS is making expeditious progress and now expects to complete that biological opinion by October 31, 2014, less than two years after its receipt of BOEM's final biological assessment. That schedule is consistent with the ESA, which expressly authorizes NMFS and BOEM to take the time that they need to analyze these complex issues. And that schedule is reasonable when judged by the standards of Section 706(1) of the Administrative Procedure Act ("APA") given the extremely broad scope of this consultation, which will cover at least ten species and every action that BOEM takes in the Gulf of Mexico at every stage of oil and gas development.

II. Statutory Background

A. The Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1301-1356 ("OCSLA"), was enacted in 1953 to establish a regime for offshore oil and gas leasing. It was later amended in 1978 to establish a national policy of making the Outer Continental Shelf ("OCS") "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. §1332(3).

The OCSLA prescribes a multi-stage process for development of offshore leases, with environmental review at each stage. This multi-stage process provides a "continuing opportunity for making informed adjustments" that ensures that OCS oil and gas activities are conducted in an environmentally sound manner. *Tribal Vill. of Akutan v. Hodel*, 869 F. 2d 1185, 1188 (9th Cir. 1988) (citations omitted). The first stage is the "five-year program," involving the development and publication of schedules of proposed OCS lease sales over a five-year period to best meet the nation's energy needs. *See* 43 U.S.C. § 1344. The second stage, at issue in this case, is the lease sale itself. *See generally id.* §§ 1334, 1337. The decisions made at this stage include whether to hold a sale and which lease blocks to offer in any sale. The sale itself is accomplished through a competitive sealed-bid auction. *Id.* § 1337(a)(1). The highest qualified bidders obtain leases which entitle them to conduct limited preliminary activities such as geophysical surveys. *See* 30 C.F.R. § 550.207.

The third stage includes the lessee's filing and BOEM's review of an exploration plan ("EP") pursuant to 43 U.S.C. § 1340(c) to explore for oil and gas deposits. The fourth and final stage, which is contingent upon discovery of commercially feasible deposits of oil or gas, is the lessee's filing and BOEM's review of a development and production plan for the purposes of actually producing oil and gas from the leaseholds. 43 U.S.C. § 1351.

B. National Environmental Policy Act

The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f ("NEPA"), serves the dual purpose of, first, informing agency decision-makers of the environmental effects of proposed major federal actions and, second, ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires an agency to prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. While this mandate identifies the procedures agencies must follow to consider the

environmental impacts of their actions, it does not dictate substantive results. *See Robertson*, 490 U.S. at 351. The CEQ regulations implementing NEPA provide guidance as to the nature and content of an EIS. *See* 40 C.F.R. Part 1502.

In carrying out its NEPA and OCSLA duties, BOEM performs a programmatic NEPA analysis for the five-year program and additional NEPA analysis at each OSCLA stage requiring federal action, including prior to each lease sale. *See Vill. of False Pass v. Clark ("Vill. of False Pass II")*, 733 F.2d 605, 608, 614 (9th Cir. 1984). Typically in the Gulf of Mexico, BOEM prepares an EIS for all lease sales proposed in the five-year program (referred to as a multisale EIS). At the completion of that EIS, decisions are made on the first sale in each planning area covered in the document, and then additional NEPA analyses are prepared for each later lease sale, including but not limited to supplemental EISs as appropriate. *See* DOI 1341.

C. Endangered Species Act

Under Section 7(a)(2) of the Endangered Species Act ("ESA"), each federal agency must ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of the designated "critical habitat" of such a species. 16 U.S.C. § 1536(a)(2). The ESA requires the agency taking the action to fulfill this duty "in consultation with" the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"). *Id.*

III. Standard of Review

Judicial review of agency action taken under the ESA and NEPA is governed by the APA, 5 U.S.C. § 706. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 872 (1990), *cert. granted, vacated sub nom. Mountain States Legal Found. v. Nat'l Wildlife Fed'n*, 497 U.S. 1020 (1990)); *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (citation omitted); *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989). The reviewing court may set aside

agency action only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). The Court must uphold an agency's decision if it finds "adequate support in the record." *J.A. Jones Mgmt. Servs. v. FAA*, 225 F.3d 761, 765 (D.C. Cir. 2000); *see also El Conejo Americano of Tex., Inc. v. DOT*, 278 F.3d 17, 20 (D.C. Cir. 2002).

In applying this standard of review to NEPA cases, the "role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97–98 (1983). Thus, in reviewing the sufficiency of an EIS, a court is charged only with ensuring that the agency has presented a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (quoting *Trout Unltd., Inc. v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). Further, "a reviewing court may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." *N. Plains Res. Council v. Lujan*, 874 F.2d 661, 665 (9th Cir. 1989) (citation omitted); *Sierra Club v. Adams*, 578 F.2d 389, 393 (D.C. Cir. 1978). Once satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, a court's review is at an end. *Block*, 690 F.2d at 761 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

IV. Factual Background

Lease Sale 216/222 NEPA Background. The planning stages for Lease Sale 216/222 date back to the 2007-2012 OCS Five Year Program. Prior to this sale, BOEM published three Environmental Impact Statements (EISs) for the leasing program in the Gulf of Mexico, in compliance with NEPA. These supporting NEPA documents consist of (1) the Final Environmental Impact Statement for the 2007-2012 Western Planning Area ("WPA")

Sales 204, 207, 210, 215, and 218 and the 2007-2012 Central Planning Area ("CPA") Sales 205, 206, 208, 213, 216, and 222 (hereinafter the Multisale EIS), DOI 1337-2432; (2) the Final Supplemental Environmental Impact Statement for the 2009-2012 Western Planning Area Sales 210, 215, and 218 and the 2009-2012 Central Planning Area Sales 208, 213, 216, and 222 (hereinafter the 2009 SEIS), DOI 2433-2917; and (3) the Final Supplemental Environmental Impact Statement for the 2012 Central Planning Area Lease Sale 216/222 (hereinafter the 2012 SEIS). DOI 5438-6077.

In the Multisale EIS, BOEM analyzed the impacts of, and alternatives to, each of eleven potential oil and gas lease sales over the 2007-2012 Five Year Program. DOI 1368. BOEM then supplemented that analysis in its 2009 SEIS, which addressed all lease sales that had yet to be held under the 2007-2012 Five Year Program. As of the time of the Deepwater Horizon ("Deepwater Horizon" or "DWH") explosion and related spill from the Macondo well in April, 2010, Lease Sale 216 had been planned to take place in 2011 and Lease Sale 222 had been planned for 2012. Following the DWH incident, BOEM decided to postpone the proposed Lease Sale 216 and combine it with the proposed Lease Sale 222. To determine whether to proceed with the sales, BOEM prepared yet another supplemental environmental impact statement. The draft SEIS for the sale was published in June 2011, DOI 4155-5074, and the final 2012 SEIS was published in January 2012. DOI 5433-6077. The sale was held in June, 2012. DOI 6779-99.

The 2012 SEIS. As is mandated by NEPA, the 2012 SEIS identified and analyzed significant new information and changes in circumstance since the Multisale EIS and 2009 SEIS. While the majority of this information related to the Deepwater Horizon explosion and related spill, other resource information and scientific data that had become available was likewise included if it was relevant to reasonably foreseeable impacts from the proposed action or related to the environmental baseline. DOI 5475. BOEM subject matter experts culled information from, among others, scientific journals and literature, government data, studies performed by outside sources, and BOEM funded studies, as evidenced by the

numerous new references cited in the 2012 SEIS bibliography. DOI 6315-422. Given the recent nature of the Deepwater Horizon explosion and spill, BOEM subject matter experts researched data collected by responding federal and state agencies, as well as websites and news reports related to the spill. *Id*. Finally, BOEM sought out scientists and academics that were known to be studying the explosion, spill and its impacts to determine what initial information could be obtained, even where final reports and studies were unavailable and there was no timeframe for their completion. *Id*. (entries noted as "official communication"). While BOEM included all relevant information that was available at the time the 2012 SEIS was prepared, s*ee e.g.*, DOI 5509, 5546, due to the ongoing nature of data collection and scientific inquiry generally and with regard to the Macondo spill specifically, BOEM acknowledged that some information relevant to reasonably foreseeable impacts was unavailable. DOI 5623-25. BOEM determined that some of this unavailable information may be essential to a reasoned choice among the alternatives considered in the 2012 SEIS, but it also determined that much of this information could not be obtained within the timeframe of the proposed action. Specifically, BOEM concluded that some of the unavailable information may never become available, and that other information could not be obtained because the overall costs of obtaining it would be exorbitant in terms of both money and associated delay. DOI 5623-25; *see also, generally* DOI 5619-6076 (2012 SEIS Chapter 4). BOEM subject matter experts then examined the scientifically credible information that was available using accepted methodologies in each resource category to analyze the potential environmental impacts to each resource. *Id*.

The SEIS' Analysis of Catastrophic Events. In addition to the significant new information disclosed and analyzed throughout the 2012 SEIS, BOEM also included an in-depth analysis of potentially catastrophic events (e.g. catastrophic oil spills) and their potential impacts. DOI 6561. Although considered low probability events that are not reasonably expected as a result of the proposed action, BOEM nonetheless included a qualitative analysis of impacts that could result from a catastrophic event (Appendix B) as

well as a spill trajectory model (Appendix C: Oil Spill Risk Analysis ("OSRA")) that tracked a hypothetical spill to determine potential resource contacts. DOI 6555-632 (Appendix B); DOI 6633-50 (Appendix C). These analyses were a direct response to recommendations made by CEQ to "ensure that NEPA documents provide decisionmakers with a robust analysis of reasonably foreseeable impacts, including an analysis of reasonably foreseeable impacts associated with low probability catastrophic spills for oil and gas activities on the Outer Continental Shelf." DOI 6561, DOI REF 8989-92. BOEM discussed in Appendix B that larger deepwater spills and comparatively smaller shallow water spills may rise to the level of a catastrophic event, depending on the nature and duration of the spill, the time needed for response activities, and the degree to which released oil may weather prior to shore contacts. DOI 6561-62; 6572. BOEM further noted that the ranges of shallow water and deepwater spill sizes (i.e. 900,000 to 3.2 million barrels and 2.7 to 7.2 million barrels, respectively) that could constitute a low probability catastrophic event are several orders of magnitude larger than the more reasonably foreseeable spills that may result from the proposed action. *Compare* DOI 6572 *with* DOI 5574-79, 6471. The much smaller, more reasonably foreseeable spills are discussed in the Chapters 3 and 4 of the 2012 SEIS. DOI 5543-618; DOI 5619-6076.

ESA Consultation. In the Gulf of Mexico, BOEM typically initiates ESA consultation on a programmatic basis for all proposed lease sales in a five-year program, and related post-lease activities for the duration of those leases. *See* DOI 6885-7184 (2002 and 2007 Biological Opinions). BOEM's consultation for the Gulf of Mexico sales proposed in the 2007-2012 Five Year Program, including Sales 218 and 216/222, resulted in the 2007 Biological Opinion from NMFS, which concluded that these actions were not likely to "jeopardize" the continued existence of any listed species. DOI 7138. After the Macondo spill in 2010, BOEM reinitiated consultation with NMFS on matters related to the 2007

Biological Opinion.[1] DOI 7351-52.

BOEM and NMFS have developed an interim consultation process for use until the new biological opinion is completed. That process gives NMFS the opportunity to review and comment on certain-post lease activities (such as exploration plans). *See, generally,* DOI 7496–507, 7525, 7557–61, 7571–72. BOEM's reinitiated consultation with NMFS remains ongoing, with the involvement of the Bureau of Safety and Environmental Enforcement ("BSEE") and the U.S. Environmental Protection Agency ("EPA"), who also authorize activities related to OCS oil and gas development. The agencies have expanded the scope of the consultation to include all currently-active leases and expected lease sales to be held through 2022, and the post-lease activities related to those leases, for the entire Gulf of Mexico. DOI 7909. This comprehensive approach will allow the agencies to consider the effects of OCS oil and gas activities on threatened and endangered species (and their habitats) more fully. The complexities of this comprehensive consultation, however, mean that it will take longer, and the agencies have agreed to an October 31, 2014 deadline for the completion of NMFS's new biological opinion. Declaration of David M. Bernhart ("Bernhart Decl.") ¶ 3 (attached hereto as Exhibit 1).

V. Argument

A. BOEM Complied with NEPA

1. BOEM Fully Complied With 40 C.F.R. § 1502.22

Plaintiffs contend that BOEM violated 40 C.F.R. § 1502.22 by "failing to gather information essential to a reasoned choice among alternatives" and, as a result, BOEM lacked "information necessary to prepare its SEIS." Pls.' Mot. for Summ. J. ("Pls.' Mot.") at 13, 14 (ECF No. 60). Plaintiffs misinterpret § 1502.22's requirements. The SEIS duly acknowledged where essential information was lacking, discussed the relevance of that

[1] BOEM had also previously consulted with the United States Fish and Wildlife Service, and BOEM reinitiated that consultation after the *Deepwater Horizon* incident. BOEM's consultations with the FWS, however, are not at issue in this case.

information, summarized the existing scientific evidence, and evaluated the potential impacts of the proposed action using generally accepted methodologies. Section 1502.22 requires nothing more.

40 C.F.R. § 1502.22 provides that when an "agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an [EIS] and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." *Id.; see also Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 60 (D.D.C. 2009). Further, where, as here, essential information "cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known" the agency may proceed with the proposed action so long as the agency discloses the relevant data gaps, summarizes existing scientific evidence, and reasonably evaluates impacts using the generally accepted theories or scientific methods that are available to it. 40 C.F.R. § 1502.22(b).

BOEM's 2012 SEIS complied with § 1502.22 because it identified where information was incomplete or unavailable and plainly disclosed which of that information may be "essential" and which was not[2]. *See* DOI 5623-25. Specifically, in its description of potential impacts, the 2012 SEIS stated:

> Credible scientific data regarding the potential short-term and long-term impacts on CPA resources is slowly becoming available but remains incomplete at this time, and it could be many years before this information becomes available via the Natural Resource Damage Assessment (NRDA) process, BOEM's Environmental Studies Program, and numerous studies by academia.

Id. at 5623-24[3]. The 2012 SEIS listed eleven resources for which BOEM's subject-matter

[2] Plaintiffs have not challenged BOEM's determinations as to whether the unavailable information was "essential." *See* Pls.' Mot. at 13-17.

[3] In the immediate aftermath of a large-scale spill or hazardous release, response agencies may be able recover all or portions of the substance and eliminate or reduce risks to human health and the environment through spill minimization and cleanup efforts. To identify the extent of resource injuries, the preferred methods for restoring those resources, and the type

experts determined that there was incomplete or unavailable information that may be essential to a reasoned choice among alternatives. *Id.* at 5624-25. BOEM subject matter experts individually analyzed each of those eleven resources in Chapter 4 of the 2012 SEIS. *See* DOI 5623-25; *see also e.g.,* DOI 5707-08 (Seagrass Communities); DOI 5721 and 5750-51 (Live Bottoms (Pinnacle Trend and Low Relief)); DOI 5780-81(Topographic Features), DOI 5839-42 (Marine Mammals); DOI 5853-54 (Sea Turtles); DOI 5879 (Coastal and Marine Birds); DOI 5907(Gulf Sturgeon); DOI 5922 (Fish Resources and Essential Fish Habitat); DOI 5937-38 (Commercial Fisheries); DOI 6010 (Environmental Justice); and DOI 6059-60 (Diamondback Terrapins). In strict adherence to § 1502.22(b), the 2012 SEIS examined "whether the information could be obtained under any circumstance or whether it could only be obtained with exorbitant costs." DOI 5625. The SEIS then "applied scientifically credible information using accepted scientific methodologies" to analyze the potential impacts. *Id.* This is precisely what § 1502.22(b) requires.

a. BOEM's Efforts To Obtain Unavailable Information Were Fully Consistent With § 1502.22(b)

Plaintiffs boldly assert that BOEM "made no effort to obtain the essential information." Pls.' Mot. at 15. That assertion is belied by the administrative record. The bibliography of the 2012 SEIS contains over one hundred pages of references that were consulted for its preparation. *See* DOI 6315-422. Scores of those references are delineated as an "official communication" wherein BOEM subject matter experts contacted, among others, scientists, state environmental officials, NOAA and NMFS personnel, and the

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and amount of restoration required, the Oil Pollution Act of 1990 created a process called the Natural Resource Damage Assessment (NRDA). *See* 33 U.S.C. § 2706; *see also* 40 C.F.R. part 300. Certain federal agencies, states, and Indian tribes—designated by the President, Governor or tribal governments—evaluate the impacts of oil spills, ship groundings, and hazardous substance releases on natural resources. 33 U.S.C. § 2706(b). The NRDA for the Deepwater Horizon explosion is currently underway. BOEM was not designated as a trustee for the Deepwater Horizon NRDA process. *See e.g.*, http://www.gulfspillrestoration.noaa.gov/about-us/co-trustees/ (last visited Aug. 22, 2013).

Army Corps of Engineers for updates and information on items such as fish mortality, impacts to coral, seabirds, critical habitat, damage assessments, and species population estimates[4]. Further, BOEM collected available, post-Deepwater Horizon data, reports, and studies for consideration. These included, among others, FWS and NMFS animal collection and impact reports (see e.g., DOI REF 36929, 46860-65, 46866-69, 49563-68), field reports from the National Park Service (DOI REF 6828-41), data regarding shoreline oiling compiled by NOAA's Environmental Response Management Application ("ERMA") - Shoreline Cleanup and Assessment Teams ("SCAT") (DOI REF 47864), papers presented by independent scientists (DOI REF 164-94), and the Joint Analysis Group[5] (DOI REF 23141-213) and Operational Science Advisory Team ("OSAT") (DOI REF 35354-520). As additional information became available, BOEM incorporated it into the SEIS. *See* DOI 6104 ("[B]etween the Draft and Final [SEIS, BOEM] continued to update information and data relied on in [the SEIS]."). Given the above, Plaintiffs cannot credibly allege that BOEM's effort to obtain essential information was lacking.

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[4] Contrary to Plaintiffs' assumption, the foregoing makes clear that BOEM consulted with scientists and experts in the field to collect information regarding the DWH incident. *See* Pls.' Mot. at 16. Further, the record contains media reports that were considered by BOEM which also defeats Plaintiffs' claims that BOEM failed to verify news reports. *See* e.g. DOI REF 6524-26, 6527-32, 19335-38, 36459-61. Finally, there is also no basis for Plaintiffs to assert that BOEM should (or could) have forced itself onto the Board of NRDA Trustees in order to gather more information. *Id.* But, even if BOEM could somehow become a NRDA trustee, there is no indication that information would be available to and usable by BOEM as part of the 2012 SEIS.

[5] The Joint Analysis Group ("JAG") for Surface and Sub-Surface Oceanography, Oil and Dispersant Data is a working group with membership from key agencies, including NOAA, the U.S. Environmental Protection Agency ("EPA"), the U.S. Geological Survey ("USGS"), and the White House Office of Science and Technology Policy ("OSTP"). The JAG was formed to analyze sub-surface oceanographic data being compiled and analyzed from on-going coordinated sampling efforts by private, federal and academic scientists. The goal is to provide comprehensive characterization of the Gulf of Mexico sub-surface conditions, as well as the fate and transport of dispersed petroleum as a result of the Deepwater Horizon oil spill. *See* http://www.ncddc.noaa.gov/activities/healthy-oceans/jag/ (last visited Aug. 22, 2013).

b. BOEM Appropriately Demonstrated Where The Costs of Obtaining the Unavailable Information Was Exorbitant and Where The Information Was Unavailable Regardless of Costs

Plaintiffs next contend that BOEM did not "demonstrate that the cost to obtain [the incomplete or unavailable information] was 'exorbitant.'" Pls.' Mot. at 15. But, as the 2012 SEIS unambiguously states, "the subject-matter experts . . . determined that additional information was not available absent exorbitant expenditures or could not be obtained regardless of cost in a timely matter." DOI 5624; *see also* DOI 5623, 5625, 5970 (noting in the context of archaeological resources that "a Gulfwide study would be exorbitant, and it could take years" before data could be compiled and analyzed). For most considered resources, the BOEM subject matter experts determined that the unavailable information could not be obtained and utilized in a timely matter. *See* DOI 5623 (indicating that it could be many years for missing information to become available from the NRDA process, BOEM's environmental studies, and studies by academia). For example, with respect to marine mammals, in the 2012 SEIS stated:

> [T]he best available information on impacts to marine mammals does not yet provide a complete understanding of the effects of the oil spilled and of the active response/cleanup activities from the DWH even on marine mammals as a whole in the GOM and whether these impacts reach a population level.
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> * * *
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> The costs for obtaining data on the effects from the UME [Unusual Mortality Event] and/or the DWH event are considerable, duplicative efforts are already being undertaken by other agencies (such as NMFS) that may be years away from conclusion, and it would likewise take BOEM years to acquire and analyze through the existing NRDA and UME processes. Further, impacts from the DWH event may be difficult or impossible to discern from other factors. For example, even 20 years after the *Exxon Valdez* spill, long-term impacts to marine populations are still being investigated. Therefore, it is not possible for BOEM to obtain this information within the timeline contemplated in this [SEIS], regardless of the cost or resources needed.

DOI 5839. Similarly, with respect to Sea Turtles, the SEIS noted that "final determinations

on damages to sea turtle resources from the DWH will ultimately be made through the NRDA process," which is not under BOEM's jurisdiction and as explained in the 2012 SEIS, may take years to complete. DOI 5854. BOEM reached similar conclusions—that the unavailable information could not soon be obtained and instead was expected to take years, if it could be obtained at all—for all eleven resources for which the unavailable information was deemed essential. *See* DOI 5707-08 (Seagrass Communities); DOI 5721 and 5750-51 (Live Bottoms (Pinnacle Trend and Low Relief)); DOI 5780-81(Topographic Features); DOI 5839-42 (Marine Mammals); DOI 5853-54 (Sea Turtles); DOI 5879 (Coastal and Marine Birds); DOI 5907 (Gulf Sturgeon); DOI 5922 (Fish Resources and Essential Fish Habitat); DOI 5937-38 (Commercial Fisheries); DOI 6010 (Environmental Justice); & DOI 6059-60 (Diamondback Terrapins). Plaintiffs have presented nothing to refute these determinations or to show with record evidence how they are arbitrary or capricious. Accordingly, their claims must be rejected.

c. BOEM Properly Proceeded With The Decision Under § 1502.22(b)

Plaintiffs have not identified any record evidence to dispute BOEM's conclusion that the unavailable data could not be obtained and analyzed in a timely manner. *See* Pls.' Mot. at 13-17. Instead, Plaintiffs assert that BOEM improperly "forged ahead in the face of missing, essential information" in violation of § 1502.22. *Id*. at 16. Plaintiffs are essentially arguing that § 1502.22 compelled BOEM to delay or stop the proposed action altogether because of the unavailable information. Plaintiffs fail to understand, however, that § 1502.22 only require disclosures regarding unavailable information but does not mandate a particular result such as halting a proposed action. Indeed, by its plain terms, § 1502.22 directs an agency to "make clear that [the incomplete or unavailable] information is lacking." *See* § 1502.22. As explained herein, BOEM fully complied with that mandate. Further, CEQ has stated that an agency can properly consider delay and programmatic needs in deciding to proceed with an action despite the unavailable information. *See* NEPA

Regulations, Incomplete or Unavailable Information, Final Rule, 51 Fed. Reg. 15618, 15622 (April 25, 1986) ("the term 'overall costs' [as used in § 1502.22] encompasses financial costs and other costs such as costs in terms of time (delay) and personnel" and CEQ "intends that the agency interpret 'overall costs' in light of overall program needs"). These considerations of cost have been incorporated into the agency's NEPA implementing regulations. 43 C.F.R. § 46.125 ("[W]here the provisions of 40 C.F.R. § 1502.22 apply, bureaus must consider all costs to obtain information. These costs include monetary costs as well as other non-monetized costs when appropriate, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandates.") With respect to delay, the BOEM properly considered that obtaining and analyzing the unavailable information may not ever be possible in some instances and could take years or even decades in others. *See e.g.,* DOI 5689, 5855 (noting that in addition to the years it could take for NRDA data to become available, it may be impossible to distinguish Deepwater Horizon impacts from other factors); DOI 5487 (noting that two decades after Exxon Valdez, information on impacts to marine mammals is still being identified). With respect to programmatic needs, BOEM properly considered OCSLA's statutory mandate for the expeditious and orderly development of OCS resources to, "help reduce the Nation's need for oil imports and lessen a growing dependence on foreign oil." DOI 5475. Plaintiffs have offered nothing in response to these determinations.

CEQ has also made clear that "one of the costs that must be weighed by decisionmakers is the cost of uncertainty—i.e., the costs of proceeding without better information." 51 Fed. Reg. at 15,624 (quoting *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978), *vacated in part by W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978)). Here, as explained above, BOEM identified the uncertainty surrounding the unavailable information, strictly adhered to the disclosure requirements of § 1502.22(b) with respect to that information, and decided to proceed. Nothing more is required. *See* 51 Fed. Reg. at 15,624 ("'where the responsible decision-maker has decided that [any uncertainty] is outweighed by the benefits

of proceeding with the project without further delay…' he may proceed to do so") (citation omitted). Simply put, there is nothing in § 1502.22 that mandates stopping agency decision making—and in this case frustrating OCSLA's goal of fostering expeditious and orderly development of the OCS—due to unavailable information. Accordingly, Plaintiffs cannot show that BOEM's decision to proceed with the lease sale was arbitrary or capricious. *See Wilderness Soc'y*, 603 F. Supp. 2d at 61 ("The 'rule of reason' requires that consideration be given to practical limitations on the agency's analysis, such as the information available at the time."); 51 Fed. Reg. at 15,621 (Section 1502.22 must be grounded in the "rule of reason" which ensures that "common sense and reason are not lost in the rubric of regulation").

d. BOEM Properly Disclosed How It Relied On Existing Methodologies To Evaluate Potential Impacts

Plaintiffs lastly contend that BOEM violated § 1502.22 by failing to evaluate potential impacts based on generally accepted scientific methodologies. *See* Pls.' Mot. at 17. That notion can be easily dispensed. BOEM explained that the 2012 SEIS was developed and prepared by BOEM's subject-matter experts "using accepted scientific methodologies where information remained incomplete or unavailable." DOI 5625; *see also* DOI 5623-24, 5841-42, 5846, 5854, and 5907. Plaintiffs complain that BOEM did not disclose the details of each methodology employed. But, BOEM did disclose the subject matter experts' methods for evaluating potential impacts. The 2012 SEIS references information and methodologies which were applied to existing knowledge about Gulf resources, including such standards as "optimum sustainable level" for particular species, DOI 5840, the application of modeling to birds collected after the DWH event—including modeling similar to that utilized after the Exxon Valdez incident—to prepare population estimates, DOI 5874, and reliance upon studies for related or similar species. DOI 5909. Moreover, CEQ made clear during the 1986 amendments to the NEPA regulations that the phrase "theoretical approaches or research methods generally accepted in the scientific

community" in § 1502.22(b) "include[s] commonly accepted professional practices such as literature searches and peer review." 51 Fed. Reg. at 15,622. CEQ also explained that that the "requirement that the analysis of impacts be based on credible scientific evidence is viewed as a specific component of the 'rule of reason'" which "ensure that common sense and reason are not lost in the rubric of regulation." *Id.* at 15,624; 15,621. As discussed above (and as evident from the 100 page bibliography), BOEM's subject matter experts relied heavily on outside sources, including scientists and literature to complete the SEIS. *See* A., 1., a., *supra*. Plaintiffs have not and cannot dispute this fact. Given the level of detail in the 2012 SEIS, and the sources and available data upon which the analyses are based, there can be no credible dispute that BOEM complied with the § 1502.22 mandate to rely on the available science to evaluate potential impacts. *See Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172-73 (10th Cir. 1999) (discouraging a hyper-technical reading of 40 C.F.R. § 1502.22).

2. BOEM Appropriately Considered New Information Regarding Spill Risks

Plaintiffs next raise various arguments asserting that BOEM "failed to adequately consider new analyses about the risks of catastrophic oil spills." Pls.' Mot. at 17-24 (Section B(1)-(3)). Each of these arguments, however, is premised on a fundamental misunderstanding of the 2012 SEIS and administrative record.

a. BOEM Incorporated New Information Into The SEIS

Plaintiffs allege that BOEM relied on outdated data in preparing the 2102 SEIS' oil spill risk analysis and therefore violated NEPA's "hard look" mandate. Pls.' Mot. at 20. Plaintiffs' argument relies exclusively on BOEM's report entitled "Update of Oil Spill Occurrence Rates for Offshore Oil Spills" (hereinafter the "Spill Occurrence Report"). *See id.* at 19-20, also provided at DOI REF 48326-78. That report, which estimated the occurrence rates for offshore spills, was originally prepared in 2000 and was updated, in draft form, when BOEM finalized the 2012 SEIS. *See* DOI 5556. Plaintiffs claim that this

Spill Occurrence Report "is not provided in the SEIS." Pls.' Mot. at 19. The 2012 SEIS, however, includes numerous references to the Spill Occurrence Report, demonstrating that BOEM did consider that document. *See* DOI 5556 (noting that the 2000 Spill Occurrence Report is referenced throughout the Multisale EIS and the 2009 and 2012 SEISs, and that it has been updated in draft); *see also* DOI 5556, 5575-76, 6141, 6281, & 6471. And, contrary to Plaintiffs' contentions, the updated draft Spill Occurrence Report was provided in the administrative record filed by DOI, at DOI REF 48326-78. As these citations unequivocally demonstrate that BOEM relied upon the Spill Occurrence Report in preparing the SEIS, Plaintiffs' claims that BOEM failed to consider it and thereby violated NEPA's hard look mandate must fail. *See Wilderness Soc'y*, 603 F. Supp. 2d at 59 (The Court's role is to ensure the agency takes a hard look, but "'not to interject its own judgment as to the course of action to be taken.'") (quoting *Hammond v. Norton*, 370 F. Supp. 2d 226, 240 (D.D.C. 2005)).

Contradicting their above argument, Plaintiffs next assert that the Spill Occurrence Report's "inclusion" in the SEIS is "limited" and "misleading" because BOEM "*removed* the 'catastrophic' spill size category" from consideration. Pls.' Mot. at 19 (emphasis in original). While less than clear, Plaintiffs appear to be arguing that the SEIS should have included more analysis regarding potential oil spills of 10,000 barrels or greater, which Plaintiffs classify as "catastrophic." *See id.* at 19-20. As an initial matter, Plaintiffs misunderstand when a spill is deemed "catastrophic." As explained in the 2012 SEIS, "a catastrophic event is a high volume, long-duration oil spill" that cannot be defined by spill volume alone. DOI 6561. Rather, defining a spill as "catastrophic" requires consideration of, among other things, location, time of year, winds, currents, sensitive resources, flow rates, hydrocarbon characteristics (i.e. the nature of the material spilled) and the speed and effectiveness of the response to any particular spill. *Id*. Accordingly, Plaintiffs' focus on spills of 10,000 barrels as "catastrophic" is misplaced. In any event, as detailed below, BOEM properly considered the risks of spills in the 2012 SEIS, including spills of 10,000 barrels or greater.

Chapter 3.2.1 of the 2012 SEIS discussed potential, reasonably foreseeable, spills associated with the proposed action. DOI 5574. That analysis, like the SEIS in general, was prepared, in part, because of potential new information that became available after publication of the Multisale EIS or the 2009 SEIS, including information that was collected as a result of the DWH event. *See* DOI 5546. Chapter 3.2.1.1 discusses the risk analysis for spills greater than or equal to 1,000 barrels and the methods used for calculating those spills, while Chapter 3.2.1.2 discusses the risk analysis for spills of less than 1,000 barrels. *See* DOI 5576-78. SEIS Table 3-5 summarized the "Mean Number and Sizes of Spills Estimated to Occur" over a forty (40) year time period, dividing spills over six categories according to size (i.e. from less than 1 barrel spilled to greater than or equal to 1,000 barrels spilled), estimating the number of spills, describing the estimated rate of spills (the rate of spills per billion barrels of oil produced), and calculating the median spill size, where possible. DOI 6471. Table 3-5 included updated information through 2011, including the information from the Spill Occurrence Report. *Id.*

Plaintiffs complain that previous versions of Table 3-5 (including the version in the draft SEIS) had a category for spills equal to or greater than 10,000 barrels that was removed in the SEIS. Pls.' Mot. at 19-20. However, BOEM explained that "[a] spill size group for ≥ 10,000 bbl was not included in this table, because the catastrophic Deepwater Horizon spill (4.9 million bbl) was the only spill in this size range during 1996-2010, and thus meaningful statistics (such as median spill size) could not be calculated." DOI 6471. Plaintiffs mischaracterize the Spill Occurrence Report by suggesting that the report "stated that it was appropriate to count the *Deepwater Horizon* spill in spill rates for 1,000 and 10,000 bbl or greater spills," and then criticize the 2012 SEIS for allegedly being inconsistent with the Report. Pls.' Mot. at 19-20. This is a striking example of "cherry-picking" the record and ignoring the Report's overall findings. In actuality, the Spill Occurrence Report stated that the DWH related spill size "overwhelms the rest of the [historical] record in any calculation using spill volume" and that "[i]n the interest of

characterizing the size of a 'typical' or 'representative' OCS spill it would be best to exclude the Macondo spill volume in the calculation of mean (average) or median spill size." Pls.' Mot., Ex. 7 at 14; DOI REF 48339. Plaintiffs have failed to acknowledge these findings and have offered nothing to contradict them. Accordingly, their claims must fail. Moreover, because BOEM indisputably considered the 10,000 barrel spill category in the DEIS and fully explained why it was excluded from the SEIS, Plaintiffs cannot show that BOEM failed to take a hard look as a matter of law. *See Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1031 (D.C. Cir. 2008).

b. BOEM Took A "Hard-Look" At Spill Risks

Plaintiffs next contend that the SEIS failed to consider "a range of factors that make spills more likely and more large," particularly as a result of increased deepwater exploration. Pls.' Mot. at 21. Plaintiffs, however, provide no discussion or record evidence to support the notion that spills are "more likely and more large." Nor do they identify the "factors" BOEM should have considered or describe any scientific basis to support any such factors. *Id.* Plaintiffs merely rely upon broad public scoping comments to advance their theory. This is insufficient to meet their burden of proof. Nevertheless, the Spill Occurrence Report demonstrates that there has been no historical upward trend for spills in deepwater either in terms of size or number. See *id.*, Ex. 7 at 21, Table 1; also at DOI REF 48363. To date, the only platform spill greater than or equal to 1,000 barrels in deepwater is the Macondo spill. *Id*. The Spill Occurrence Report noted a slight increase in the overall spill rate (i.e. the total number of spills in both shallow and deepwater combined based on volume of crude handled) over the last 15 year period, but this increase was primarily attributable to the combined effects of a spill after Hurricane Rita (in shallow water) and the Macondo spill (the only large spill to date in deepwater). *Id*. at 1, 15, and Table 1; also at DOI REF 48326, 48340, 48363.

Even if Plaintiffs could substantiate their assertion that spills are "more likely and

more large," however, their claim would still fail because the 2012 SEIS appropriately acknowledged that responding to and containing a spill in deep water poses difficulties that would not be encountered in shallow water spills due to factors such as reservoir size, pressurization, and increased distances for response mobilization. *See e.g.*, DOI 5588-94, 6132, 6572. Further, in Appendix B of the 2012 SEIS, BOEM estimated that a reasonable range for a catastrophic deepwater spill could be 2.7 to 7.2 million barrels, over three (3) times that of the range calculated for a potential shallow water catastrophic spill. DOI 6572. Although Plaintiffs have failed to acknowledge this analysis, there can be no legitimate dispute that BOEM considered spill risks, including risks specifics to deepwater spills, in the 2012 SEIS.

Continuing their string of unsupported assertions, Plaintiffs next opine that BOEM "manipulated the presentation of evidence in the new risk analysis to obscure environmental impacts." Pls.' Mot. at 21. This "manipulation" stems from the Spill Occurrence Report's determination that the Macondo spill was a "worst case" scenario whereby the volume of that spill renders "mean" and "median" size of all past spills impossible to meaningfully calculate. *Id*. Here again, Plaintiffs ignore the substance of the report in favor of "cherry-picking" out-of-context quotations. The Spill Occurrence Report explains that the Macondo incident was a "worst case" spill because of a "complete loss of well control due to multiple failures on a well with a very large reservoir under very high pressures" and that "[f]ew wells would be capable of this size release even under the worst of circumstances." *Id.*, Ex. 7 at 14; also at DOI REF 48339. The report also notes (as discussed above) that calculating the historical mean and median spill volumes utilizing the Macondo spill volume would provide no usable statistical measure because the Macondo spill was "about 8.5 times the roughly 570,000 bbl of petroleum previously spilled (spills ≥ 1 bbl) between 1964 and 2009" from all OCS spills combined. *Id., see also* DOI 5588 (noting that the Macondo spill was "statistically a rare event"). Based on these findings, BOEM determined—and publicly disclosed in the 2012 SEIS—that "meaningful statistics" could

not be calculated with respect to the Macondo spill. DOI 6471. Plaintiffs have offered no scientific, mathematical or other record evidence to dispute these findings and have not otherwise shown that the BOEM "manipulated" evidence from the Spill Occurrence Report[6]. Accordingly, their claims must fail.

c. Plaintiffs Misinterpret BOEM's Oil Spill Risk Analysis Report

Plaintiffs next assert that BOEM's Oil Spill Risk Analysis ("OSRA") model failed to "assess the likelihood of a catastrophic spill." Pls.' Mot. at 23. Plaintiffs misunderstand the purpose of BOEM's OSRA report for the 2012 SEIS. The 2012 SEIS plainly stated that the OSRA model "simulates oil-spill transport using model-simulated winds and ocean currents in the Gulf of Mexico" and that an OSRA "run was conducted in order to estimate the impacts of a possible future catastrophic or high-volume, long-duration oil spill[7]." DOI 6635 (emphasis added); *see also* DOI 5577-78, 6636-38. Thus, contrary to Plaintiffs' assumptions, BOEM's OSRA runs were never intended to "estimate the risk of future spills occurring."[8] Pls.' Mot. at 22. In explaining that the OSRA run is intended to consider spill trajectory to assess resource impacts, the SEIS unequivocally stated that "[t]he probability of a catastrophic spill occurring was not calculated" for the purposes of this model. DOI 6635. As they have done repeatedly throughout their brief, Plaintiffs take the foregoing quote out of context and ignore BOEM's detailed description in the 2012

[6] The Spill Occurrence Report's findings also belie Plaintiffs argument that the Macondo spill was inappropriately characterized as an outlier. Pls.' Mot. at 20. Neither the 2012 SEIS nor the report make that characterization. Rather, the 2012 SEIS and the Spill Occurrence Report have demonstrated that utilizing Macondo spill data was not representative or statistically meaningful to other spills.

[7] Using model-simulated winds and ocean currents in the Gulf of Mexico, the OSRA runs calculated probabilities of oil spill contact, from which BOEM subject matter experts could then estimate potential impacts in qualitative analyses in the SEIS. DOI 6635

[8] As discussed above, estimated spill occurrence rates were considered in the Spill Occurrence Report and set forth in Table 3-5 of the 2012 SEIS.

SEIS of the limited purpose for the OSRA (i.e. to consider impacts, not occurrence rates). *See* Pls.' Mot. at 23. Because it is clear that BOEM's OSRA run was not intended to assess the likelihood of occurrence for a catastrophic spill, Plaintiffs have no basis to claim that the OSRA report failed to make such a calculation.

Plaintiffs next repeat their prior arguments that BOEM failed to analyze the likelihood of ≥ 10,000 barrel spill occurring. Those arguments have already been addressed. *See* sec. A. 2., a, *supra*. Further, Plaintiffs complain that the spill rate and size for spills ≥ 1,000 barrels in Table 3-5 is lower than a similar table in the 2007 Multisale EIS and that this was somehow hidden from the public. Pls.' Mot. at 23. Plaintiffs, however, ignore (and cannot refute) that the Multisale EIS table included information from both the Western and Central Planning Areas of the Gulf, while the 2012 SEIS only included information from the Central Planning Area. *Compare* DOI 2404 and 6471. In addition, as noted above, Table 3-5 of the 2012 SEIS was updated with information from the draft Spill Occurrence Report. *See* DOI 6471; DOI REF 48326-78. Plaintiffs' comparison of these two tables, therefore, is misleading. Regardless, there is no dispute that the Multisale EIS is referenced in the 2012 SEIS and is part of the administrative record. Accordingly, there can be no argument that the Multisale EIS information was somehow hidden from public disclosure.

Ultimately, Plaintiffs' arguments throughout Part B of their brief amount to little more than conjecture that is not grounded in any record evidence. Further, Plaintiffs misunderstand and inappropriately "fly-speck" the record in an attempt to buttress their threadbare arguments. Plaintiffs are unable to offer any record evidence demonstrating that BOEM failed to take a hard-look at the proposed action. Therefore, Plaintiffs' claims must fail as a matter of law. *Block*, 690 F.2d at 761.

3. The SEIS Included An Appropriate No-Action Alternative

Federal Defendants agree that federal agencies must include a "no-action" alternative in their EIS' analyses of potential impacts. *See* 40 C.F.R. § 1502.14(d). Contrary

to Plaintiffs' contentions, BOEM did consider an appropriate no-action alternative in the 2012 SEIS. *See* DOI 5541 ("Alternative D—No Action"). Alternative D provided:

> Alternative D is the cancellation of the proposed CPA lease sale. The opportunity for development of the estimated 0.801-1.624 BBO and 3.332-6.560 Tcf of gas that could have resulted from the proposed lease sale would be precluded or postponed. Any potential environmental impacts resulting from the proposed sale would not occur or would be postponed.

Id. Plaintiffs are critical of this alternative because, in their estimation, "it assumed that leasing and development in the Central Gulf would continue." Pls.' Mot. at 25. Not so. The 2012 SEIS plainly stated that "Alternative D is the cancellation of the proposed CPA lease sale." DOI 5541. Further, under "Summary of Impacts," the SEIS stated that "[c]anceling the lease sale would eliminate the effects described [in the proposed alternative]. *Id.*; *see also* DOI 6068 ("Alternative D is equivalent to cancellation of a lease sale scheduled for a specific period in the *Final Proposed Outer Continental Shelf Oil and Gas Leasing Program: 2007-2012."*).

By use of the word "postponed," Plaintiffs contend that the SEIS "assumed that the sale [i.e. Lease Sale 216/222] would go forward at some point in the future." Pls.' Mot. at 25. That too is incorrect. Lease Sale 216/222 was the final lease sale under the 2007-2012 Five Year Program. Regardless of whether BOEM decided to proceed with or cancel the sale, no more lease sale decisions could be proposed under that program. DOI 6068. Any future development of the CPA would therefore be left to a future five year plan as statutorily required by the OCSLA. *See* 43 U.S.C. § 1334. Any future five year plan (as well as any lease sales thereunder) would be subject to an appropriate NEPA analysis that is independent of the 2012 SEIS. Thus, by use of the word "postponed," BOEM was merely disclosing that decisions on future lease sales in the CPA will occur under OCSLA's mandate as part of the next five year program. Plaintiffs cannot dispute that the 2012 SEIS disclosed to the public that "all impacts, positive and negative, associated with the CPA proposed action discussed in Chapter 4 would be eliminated" if the decision was made to

cancel Lease Sale 216/222 under Alternative D, the no action alternative. DOI 6070; *see also* DOI 5541, 6068-71. NEPA requires nothing more. *See* 40 C.F.R. § 1502.14(d).

B. BOEM complied with the ESA.

Plaintiffs argue that BOEM "cannot be permitted to move forward with new offshore leasing without first evaluating the impacts of its action on endangered species in the wake of the *Deepwater Horizon* disaster." Pls.' Mot. at 27; *see, generally*, *id*. at 27-38. Their argument fails because (1) the ESA expressly provides that BOEM can take actions after it has initiated consultation as long as those actions do not "make any irreversible or irretrievable commitment of resources"; (2) under the OCSLA's strict staged process, issuing these leases was not an "irreversible or irretrievable commitment of resources"; (3) BOEM reviewed these issues and rationally concluded that its issuance of these leases complied with the ESA; and (4) every court that has ever reviewed this issue has reached that same conclusion.

In fact, Plaintiffs have already brought—and lost—substantially similar claims in two previous cases. In *Defenders of Wildlife v. BOEM*, plaintiff Defenders of Wildlife challenged a previous lease sale (Lease Sale 213) on the same grounds as the present challenge. 871 F. Supp. 2d 1312, 1325 (S.D. Ala. 2012). That court concluded that the Federal Defendants had "successfully rebut[ted] plaintiff's ESA challenge." *Id.* at 1326. In another case before the Eleventh Circuit, Plaintiffs Center for Biological Diversity, Natural Resources Defense Council, and Defenders of Wildlife challenged an exploration plan ("EP"), again alleging that it was unlawful for BOEM to approve that EP until it completed its ESA consultation. *Defenders of Wildlife v. BOEM*, 684 F.3d 1242 (11th Cir. 2012).[9] The Eleventh Circuit rejected the plaintiffs' arguments and held that "the ESA does not require BOEM to delay approval of the Shell EP until results of reinitiated consultation are received." *Id.* at 1253.

[9] Under OCSLA, the Courts of Appeals have original jurisdiction over claims challenging EPs. 43 U.S.C. § 1349(c)(2).

1. BOEM did not have to wait until the reinitiated consultation is complete to conduct these lease sales.

a. Section 7(d) of the ESA allows BOEM to act during the reinitiated consultation.

Plaintiffs argue that BOEM "cannot be permitted to move forward with new offshore leasing" until it has completed its reinitiated consultation, Pls.' Mot. at 27, but they have ignored Section 7(d) of the ESA, which describes exactly what kinds of actions an agency may take after it has initiated consultation, but before that consultation is complete. 16 U.S.C. § 1536(d). Section 7(d) states that, "[a]fter initiation of consultation…, the Federal agency…shall not make any irreversible or irretrievable commitment of resources with respect to the agency action…." *Id.* The ESA then clarifies that an "irreversible or irretrievable commitment of resources" is one that "has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures…." *Id.* Thus, under Section 7(d) of the ESA, once BOEM reinitiated consultation, it could continue to take actions as long as those actions did not "foreclos[e] the formulation or implementation" of any "reasonable and prudent alternative" needed to avoid "jeopardy."[10] *See, e.g., Defenders of Wildlife*, 871 F. Supp. 2d at 1326 (holding that "an agency is not forbidden from taking **all** action while consultation is underway") (emphasis in original).

b. The lease sales were not an "irreversible or irretrievable commitment of resources."

Under the strict staged process created by OCSLA, these lease sales were not an "irreversible or irretrievable commitment of resources" for two reasons. First, the lease sales do not foreclose any "reasonable and prudent alternatives" because they do not authorize

[10] The ESA requires Federal agencies to insure that their actions are not likely to "jeopardize" any threatened or endangered species (or adversely modify their habitats). 16 U.S.C. § 1536(a)(2). If the FWS or NMFS determines that an agency's actions are likely to result in "jeopardy," then the ESA requires them to identify a "reasonable and prudent alternative" that will avoid that jeopardy. 50 C.F.R. § 402.02 (definition of "reasonable and prudent alternatives").

the kind of drilling that Plaintiffs claim may harm threatened and endangered species.[11] *See, e.g., Defenders of Wildlife*, 791 F. Supp. 2d at 1161 n.2. OCSLA carefully separates the issuance of leases from the subsequent issuance of Federal permits and plan approvals to explore for, develop, and produce oil and gas on the outer continental shelf. *See, e.g.,* 43 U.S.C. §§ 1340, 1351. As a result, these leases do not give the lessees any right to conduct exploratory or production drilling, and any plans by the lessees for exploration, development, or production are subject to further review and approval by BOEM (and BSEE) in subsequent stages of the OCSLA process. *See, e.g.,* 43 U.S.C. § 1340(c)(1). These leases merely give the lessees the exclusive right to submit such plans to BOEM for further review and approval. *Id.*; *Defenders of Wildlife*, 871 F. Supp. 2d at 1327 n.14 (finding that Lease Sale 213 had not "irretrievably committed that agency to approve exploration plans and issue drilling permits for all blocks, or irreversibly authorized lessees to spend lavish sums on drilling at those locations"—"[t]he law is otherwise.").[12]

Second, these lease sales are not an "irreversible or irretrievable commitment of resources" because the Department of the Interior (the "Department") retains "strict control" of all operations conducted under these leases. *N. Slope Borough v. Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980). OCSLA expressly authorizes the Department to suspend "any operation or activity" conducted under these leases if "there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life)" or "to the marine, coastal, or human environment." 43 U.S.C. §§ 1334(a)(1) & (2). It also authorizes the Department to cancel these leases outright if it determines that "continued

[11] These leases do authorize lessees to conduct certain geological and geophysical surveys, including limited shallow-core drilling done to test sediment composition. 30 C.F.R. § 250.201.

[12] *Cf.* Memorandum Opinion at 32, *Center for Biological Diversity v. Salazar*, Case No. 10-cv-816 (D.D.C. Sept. 15, 2011) (attached hereto as Exhibit 2) (explaining that, under OCSLA's staged process, "lease sales demand a biological opinion that addresses **certain** ramifications of the sales, but not **all** ramifications of such sales.") (emphasis in original).

activity pursuant to such lease…would probably cause serious harm or damage to life (including fish and other aquatic life)…or to the marine, coastal, or human environment." *Id.*

Thus, these leases do not authorize exploratory or development drilling, and, even after their issuance, BOEM and the Department still retain broad authority to mitigate environmental harm by conditioning the approval of any subsequent exploration or development or even by suspending or cancelling the leases. "Nothing in BOEM's mere approval" of these leases "could reasonably be viewed as constituting an 'irreversible or irretrievable commitment of resources' under § 7(d)." *Defenders of Wildlife*, 871 F. Supp. 2d at 1326. As such, Section 7(d) of the ESA allowed BOEM to hold these lease sales before the new consultation is complete. *Id.* at 1327 (holding that Section 7(d) did not "foreclose[] BOEM from taking action with respect to Lease Sale 213 pending the conclusion of the reinitiated consultation with the expert agencies.").

BOEM carefully reviewed this issue and concluded in its "Section 7(d) Determination" that issuing these leases pending the completion of the reinitiated consultation did not violate the ESA. DOI 7502–06. BOEM determined that these leases do not "foreclose the formulation or implementation of any measures necessary to avoid jeopardy" because, "[i]f at any point and time during the reinitiated consultation, [BOEM]—in consultation with FWS and NMFS—concluded that it was necessary to avoid likely jeopardy, [the Secretary of the Interior] could (1) deny or rescind any drilling plan or permit approval or (2) suspend all (or select) activities (even those ongoing)…." DOI 7503. As BOEM noted, the "most stringent RPA that could be identified . . . would be **the cessation of all oil and gas related activities in the [Gulf of Mexico]**," and BOEM concluded that the Department has the authority to implement even that "most stringent" alternative "if necessary to avoid jeopardy…." *Id.* (emphasis added).

BOEM also determined that the potential effects of these leases (together with its other actions in the Gulf of Mexico) "remain[] low because it is very unlikely that another

high impact oil spill will occur" and because, as discussed below, BOEM "is taking steps to reduce the likelihood of such a spill and to protect listed species and their habitat…." DOI 7506. BOEM then rationally concluded that its issuance of these leases "is consistent with ESA Section 7(d)." DOI 7503. The agency's conclusions—both its interpretation of its own authority and its factual findings on issues of oil and gas production within its expertise—have been reviewed by both the Eleventh Circuit and the Southern District of Alabama and found to be "convincing" and "not arbitrary or capricious." *Defenders of Wildlife*, 684 F.3d at 1252; *Defenders of Wildlife*, 871 F. Supp. 2d at 1327 n.14.

Plaintiffs argue that BOEM's Section 7(d) determination "deserves no deference." Pls.' Mot. at 36. The caselaw shows otherwise,[13] but even if BOEM's determination were not entitled to deference, it is still "convincing," *Defenders of Wildlife*, 684 F.3d at 1252; *Defenders of Wildlife*, 871 F. Supp. 2d at 1327 n.14. Moreover, the Plaintiffs' claims would still fail even without deference because they have not presented **any evidence** showing that these lease sales violate Section 7(d). *Defenders of Wildlife*, 871 F. Supp. 2d at 1327 n.14.

c. Every court to review the issue has held that issuing OCSLA leases complies with § 7(d), and the cases cited by Plaintiffs do not show otherwise.

Finally, every court that has reviewed this issue has concluded that BOEM's sale of leases under OCSLA does not violate Section 7(d) of the ESA. In addition to the Eleventh Circuit and the Southern District of Alabama, the D.C. Circuit, the First Circuit, and the Ninth Circuit have all held that, "[p]lainly, the preliminary activities permitted by this lease sale entail no 'irreversible or irretrievable commitment of resources'…." *N. Slope*, 642 F.2d at 611; *Vill. of False Pass II*, 733 F.2d at 610 (same); *Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712, 714-16 (1st Cir. 1979) (same).

Plaintiffs ignore this precedent—even the case that Plaintiff Defenders of Wildlife

[13] *See, e.g., Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 684–86 (D.C. Cir. 1982) (explaining that ESA claims against action agencies are reviewed under the APA's deferential "arbitrary and capricious" standard, not *de novo*).

itself litigated and lost—and instead cite a series of cases that are not relevant here. Most significantly, the Plaintiffs claim that the Supreme Court itself has held that "the '[r]equirements of the…[ESA] must be met first' before 'the issuance of offshore leases.'" Pls.' Mot. at 29 (citing *Sec'y of Interior v. California*, 464 U.S. 312, 338 (1984)). But the claims in *California* were not brought under the ESA at all; they were actually brought under the Coastal Zone Management Act ("CZMA"). *California*, 464 U.S. at 315. The question before the Supreme Court in that case was not whether BOEM may hold lease sales before it completes consultation, but rather "[w]hether the sale of leases…is an activity 'directly affecting' the coastal zone" as those terms are defined by the CZMA. *Id.* at 320. The Court did state, in passing, and without explanation or citation, that the "[r]equirements of the [NEPA] and the [ESA] must be met first" during the lease sale stage of the OCSLA process. *Id.* at 338. But that dicta has no application here because the ESA issues that are before this Court were not before the Supreme Court in *California*.

Plaintiffs also cite the D.C. Circuit's decision in *Center for Biological Diversity v. United States Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009). Pls.' Mot. at 29. The plaintiffs in that case challenged an OCSLA "leasing program," which is the first step of the staged OCSLA process. *Ctr. for Biological Diversity*, 563 F.3d at 473. The D.C. Circuit held that the plaintiffs' ESA claims were not ripe because the five-year leasing program "does not cause any harm to anything because it does not require any action or infringe on the welfare of animals." *Id.* at 483. The Court did make the general observation that "later stages of the [five-year leasing] program" would require "ESA consultation and additional environmental review," *id.*, but it never held that BOEM could only conduct lease sales after it had completed a reinitiated consultation with NMFS—that issue was not before the Court.

The remaining cases cited by Plaintiffs are all from the Ninth Circuit. The first two—*Environmental Protection Information Center v. Simpson Timber Co.* and *Mount Graham Red Squirrel v. Madigan*—are not relevant here because neither of those cases arose under OCSLA. *Envtl. Prot. Info. Ctr. ("EPIC") v. Simpson Timber Co.*, 255 F.3d 1073, 1075 (9th Cir.

2001) (challenge to incidental take permit issued to timber company for logging activities); *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1447 (9th Cir. 1992) (challenge to construction of Mount Graham observatory). The Ninth Circuit did state in dicta in *Mount Graham* that "[r]einitiation of consultation requires the Fish and Wildlife Service to issue a new Biological Opinion before a project may go forward." 954 F.2d at 1451. But the Ninth Circuit cited no law to support this proposition and it did not attempt to reconcile that statement with Section 7(d) of the ESA. The Ninth Circuit then repeated this dicta again in *EPIC*, citing only *Mount Graham* as authority. *EPIC*, 255 F.3d at 1076. This dicta is not good law—the Ninth Circuit has expressly held that agencies may take "non-jeopardizing" actions during consultation. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005). And the Ninth Circuit itself has also held that OCSLA lease sales are not "an irreversible or irretrievable commitment of resources" and that an OCSLA "lease sale decision itself could not directly place [listed species] in jeopardy…." *Vill. of False Pass II*, 733 F.2d at 610, 611.

Plaintiffs also cite *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000), another case decided in the Ninth Circuit that did not involve OCSLA. Pls.' Mot. at 29. In that case, the court enjoined a fishery pending the completion of consultation because it found that the fishery was reasonably certain to cause irreparable harm to listed species, *Greenpeace*, 106 F. Supp 2d at 1077, but it also affirmed that agencies may move forward with "non-jeopardizing" actions while consultation is pending, *id.* at 1074 n.5, 1075 n.6.

Finally, Plaintiffs cite an excerpt of the district court's lengthy analysis of the complex interaction between OCSLA and the ESA in *Village of False Pass v. Watt ("Vill. of False Pass I")*, Pls.' Mot. at 29, but that court did not hold that the ESA prohibited BOEM from conducting lease sales before it had completed consultation. 565 F. Supp. 1123 (D. Alaska 1983), *aff'd sub nom. Vill. of False Pass II*, 733 F.2d 605 (9th Cir. 1984). To the contrary, that court agreed with "[t]he uniform conclusion of the reported cases" that OCSLA "lease sales do not constitute an 'irreversible or irretrievable commitment of

resources' within the meaning of section 7(d)." *Id.* at 1163 (citations omitted).

In a last-ditch effort to distinguish the relevant OCSLA precedent, Plaintiffs suggest that "it is questionable whether 7(d) should even apply in this case." Pls.' Mot. at 35-38. But by its plain terms, Section 7(d) applies to all Federal agencies and all agency action, without limitation. 16 U.S.C. § 1536(d). Plaintiffs try to support their argument by citing the Ninth Circuit's decision in *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), but that case involved onshore oil and gas leases under the Mineral Leasing Act ("MLA"), not OCSLA leases, *id.* at 1452, and the Ninth Circuit expressly noted that its conclusion would have been different under OCSLA because of OCSLA's strict staged process, *id.* at 1455 n.34, 1455–57. Nothing in *Conner* suggests that Section 7(d) does not apply to the lease sales at issue in this case.

2. BOEM's issuance of these leases is not likely to cause "jeopardy."

Section 7(a)(2) imposes an independent obligation on BOEM to "insure" that its actions are "not likely to jeopardize the continued existence" of any listed species (or to destroy or adversely modify their designated critical habitat). 16 U.S.C. § 1536(a)(2). Plaintiffs argue that BOEM "cannot insure that the Lease Sales are not likely to" cause jeopardy "because [BOEM] authorized them before it completed consultation…." Pls.' Mot. at 2. That argument fails because (1) under OCSLA, these leases do not authorize the exploratory and production drilling that Plaintiffs claim may "jeopardize" listed species; (2) the courts agree that BOEM's mere sale of leases under OCSLA will not cause "jeopardy;" (3) these leases include terms to protect listed species, and BOEM and BSEE have put significant new safety measures in place since the *Deepwater Horizon* incident; (4) BOEM consulted with NMFS in 2007 on the proposed Gulf of Mexico lease sales in its five-year leasing program, including Lease Sales 218 and 216/222, and NMFS concluded at that time that the program was not likely to result in "jeopardy"; (5) BOEM evaluated its process for OCS leasing after the *Deepwater Horizon* incident and again concluded that these leases would not foreclose any "reasonable and prudent measures" and would not result in

"jeopardy"; and, (6) Plaintiffs have not presented any evidence that the sale of these leases is likely to cause "jeopardy."

a. These leases do not authorize the drilling that Plaintiffs claim may cause "jeopardy."

Plaintiffs never explain how these leases could cause "jeopardy." They argue that the *Deepwater Horizon* incident proves that "offshore drilling" is more likely to cause a catastrophic oil spill than the agencies had previously thought. Pls.' Mot. at 9, 32-34. But whether that is true or not, BOEM's issusance of these leases does not create any risk of a catastrophic oil spill because it does not authorize "offshore drilling" (except for limited shallow-core drilling done to test sediment composition, 30 C.F.R. § 250.201). That kind of offshore drilling is only authorized in the next two stages of the OCSLA process. While these leases have important legal consequences, the Plaintiffs have not shown that they are somehow likely to cause "jeopardy."[14]

b. The courts have repeatedly held that OCSLA lease sales do not put listed species in "jeopardy."

The D.C. Circuit has held that lease sales are "non-jeopardizing activities." *N. Slope*, 642 F.2d at 610-11. The Ninth Circuit has held that a "lease sale decision itself could not directly place [listed species] in jeopardy." *Vill. of False Pass II*, 733 F.2d at 609, 611. In contrast, no court has held that an OCSLA lease sale, in and of itself, would put listed species in jeopardy.

The Southern District of Alabama discussed this issue at length when it ruled against Plaintiff Defenders of Wildlife's nearly identical challenge to Lease Sale 213. *Defenders of Wildlife*, 871 F. Supp. 2d 1312. The Court observed that the "critical insight—and the one

[14] Even though they do not approve the kind of "offshore drilling" that Plaintiffs are concerned about, these leases still have some potential effects on listed species because they do authorize certain geological and geophysical surveys (and conducting such surveys may also result in vessel strikes and the temporary exposure of certain species to noise). But Plaintiffs have not argued, much less shown, that such effects are likely to amount to "jeopardy."

that ultimately is fatal to [Defenders of Wildlife's] ESA claim—concerns the strict, staged structure of the OCSLA and its interplay with [ESA] § 7(a)." *Id.* at 1327. While the ESA "[u]ndoubtedly" applies to "each stage of the OCSLA process, including the lease sale stage," the Court found that OCSLA requires the Courts to analyze "jeopardy" "separately with respect to each stage of the OCSLA framework" because Congress has "taken pains" to separate the stages. *Id.* at 1328. Thus, given the "compartmentalization of the OCSLA stages for environmental review," the question is "whether [Defenders of Wildlife] has shown that BOEM's approval" of a lease sale—**"taken in isolation, without regard to any ensuing exploration, development or drilling activities"**—"might jeopardize listed species or habitat to an extent not previously considered, so as to violate § 7(a)(2)." *Id.* at 1329 (emphasis added); *see also id.* at 1329 n.16 (noting that the case, like this one, was "confined to the lease sale stage.").

The "inescapable fact of the matter," the Court concluded, is that BOEM's sale of a lease under OCSLA is a "narrowly circumscribed event, in terms of its repercussions for listed species and their habitat." *Id.* at 1329. Lease sales simply do not "authorize full scale exploration, development, or production." *Id.* For all of these reasons, the Southern District of Alabama—like the D.C. Circuit and the Ninth Circuit before it—concluded that OCSLA lease sales "generally do not cause jeopardy to listed species or critical habitat." *Id.* (citations omitted).

c. These leases include terms to protect listed species, and the Department has adopted new safety measures since *Deepwater Horizon*.

Plaintiffs claim that BOEM "made no effort to consider lessons from the [*Deepwater Horizon*] disaster in approving the Lease Sales." Pls.' Mot. at 1. This is flatly untrue. First, BOEM has insured that these leases include terms specifically designed to protect threatened and endangered species. DOI 437–43; DOI 1100–11 (lease stipulations for protected species); DOI 1096. The D.C. Circuit found such lease terms significant in its review of

BOEM's environmental compliance in *North Slope*, 642 F.2d at 595-96.

Second, the Department of the Interior has adopted stringent new drilling safety measures to prevent incidents like the *Deepwater Horizon*. DOI 7504; 77 Fed. Reg. 50,856 (Aug. 22, 2012). Among other things, these measures "strengthen[] requirements for safety equipment, well control systems, and blowout prevention practices on offshore oil and gas operations…." DOI 7505. These safety measures were designed to "directly address[] issues that likely led to the [*Deepwater Horizon*] event." *Id.*

Finally, to further ensure compliance with the ESA, BOEM and NMFS have worked together to design and implement an interim ESA consultation process. *See, generally,* DOI 7496–507, 7525, 7557–61, 7571–72; *see also* NMFS AR 00007–00021. This process "ensure[s] that NMFS has the opportunity to review certain actions to assess their potential to affect listed species or critical habitat before the actions occur or are authorized." DOI 7496. By engaging in "close project-specific coordination," NMFS and BOEM can "addresses any new environmental information relevant to proposed projects at the earliest possible time" and can determine "whether additional mitigation is appropriate…." DOI 7498. BOEM has not ignored the lessons of the *Deepwater Horizon* incident—to the contrary, it has taken significant steps to further ensure that these leases will not cause "jeopardy."

d. BOEM rationally concluded that these lease sales are not likely to cause "jeopardy."

BOEM reviewed these lease sales, both before and after the *Deepwater Horizon* incident, and rationally concluded that they are not likely to cause "jeopardy." BOEM first consulted with NMFS on the effects of these lease sales as part of its consultation on its five-year leasing program. *See Defenders of Wildlife*, 871 F. Supp. 2d at 1322. NMFS reviewed the five-year leasing program that included Lease Sales 216/222 and 218, as well as the exploration, development, and production that would follow, and concluded in its 2007 biological opinion that these actions were not likely to result in "jeopardy." *See* DOI 7138; *see also, generally*, DOI 7039–184.

After *Deepwater Horizon*, BOEM again reviewed the 2007 biological opinion and these lease sales. DOI 7496–507, 7525, 7557–61, 7571–72; *see also* NMFS AR 00014–17. While it found that the *Deepwater Horizon* incident had "revealed that there are relatively higher risks of a spill connected with certain drilling operations at [water] depths greater than 500 feet," it also found that those risks had been mitigated by the new safety measures discussed above. DOI 7504. Based on that analysis, and relying on NMFS's analysis in the 2007 biological opinion, BOEM rationally concluded that its leasing activities were not likely to cause "jeopardy." *Id.* That conclusion is entitled to deference. *See, e.g., Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996); *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 375 (5th Cir. 1976).

Plaintiffs, of course, argue that the 2007 biological opinion has been "proven conclusively wrong" and that it was "arbitrary and capricious" for BOEM to rely on it. Pls.' Mot. at 33–34. Obviously, BOEM and NMFS are now "reevaluating the spill volumes and scenarios used during the previous consultation in light of the [*Deepwater Horizon*] event…." NMFS AR 00015. But NMFS has not withdrawn its 2007 biological opinion, and BOEM rationally continued to rely on that opinion, together with the additional safety measures and other factors described above, to ensure that these lease sales are not likely to cause "jeopardy." *See* NMFS AR 00008; *see also Defenders of Wildlife*, 684 F.3d at 1253.

Importantly, Plaintiffs have not actually brought any claims challenging the 2007 biological opinion. Instead, Plaintiffs seem to be asking the Court to assume that they have won a challenge that they never even brought. The law does not allow the Court to make that assumption—to the contrary, the law requires the Court to presume that NMFS acted rationally and lawfully when it wrote its biological opinion in 2007. *See, e.g., United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (holding that an agency's official actions are entitled to a presumption of regularity).

In any event, Plaintiffs' arguments have already been heard and rejected by the Eleventh Circuit (in a related case brought by these Plaintiffs, with the exception of Plaintiff

Oceana). *Defenders of Wildlife*, 684 F.3d 1242. In that case, the plaintiffs challenged an exploration plan (a challenge that must be heard in the Courts of Appeals) and, like the present case, they offered "no proof" that listed species were in "jeopardy," but instead argued that BOEM had somehow conceded liability when it reinitiated consultation. *Id.* at 1252.

The Eleventh Circuit repudiated the plaintiffs' arguments and held that BOEM had rationally relied on the 2007 biological opinion and rationally concluded in its analysis following the *Deepwater Horizon* incident that its actions in the Gulf are not likely to cause "jeopardy." *Id.* at 1253. The Eleventh Circuit found "no precedent" that "BOEM's choice to reinitiate consultation with NMFS…automatically renders the former biological opinions invalid." *Id.* at 1252. The Eleventh Circuit then held that BOEM—relying on its "broad consideration of the *Deepwater Horizon* disaster and new safety measures" and the 2007 biological opinion—had rationally concluded that its actions were not likely to cause "jeopardy." *Id.* at 1253. The Eleventh Circuit's conclusion applies with equal force here.

e. Plaintiffs have not shown that these lease sales are likely to cause "jeopardy."

All of the evidence supports BOEM's conclusion that these lease sales are not likely to cause "jeopardy," including NMFS's 2007 biological opinion, BOEM's new drilling safety measures, the terms included in these leases for the benefit of protected species, the interim consultation process developed by NMFS and BOEM, and the limited nature of these lease sales under OCSLA's strict staged process. Against this evidence, Plaintiffs have offered nothing. They have never explained how a lease sale could harm a species, much less cause "jeopardy," and they cite no evidence to support their claims.

To be sure, Plaintiffs recite a litany of the environmental harms allegedly caused by the *Deepwater Horizon*, and they suggest that "offshore drilling" in the Gulf of Mexico could lead to another catastrophic oil spill. Pls.' Mot. at 9, 32-34. But as discussed above, BOEM's issuance of these leases did not create any risk of a catastrophic oil spill because it did not

authorize "offshore drilling" (except for limited shallow-core drilling done to test sediment composition, 30 C.F.R. § 250.201).

This failure to identify any evidence supporting their claims was the key reason why the Southern District of Alabama rejected plaintiff Defenders of Wildlife's previous challenge to Lease Sale 213. That court found that the plaintiff's "assertion that BOEM violated [ESA] § 7(a)(2) by the mere act of approving bids, without more, is **highly suspect and demands proof, which plaintiff does not have and does not offer**." *Defenders of Wildlife*, 871 F. Supp. 2d at 1330 (emphasis added); *see also Defenders of Wildlife*, 684 F.3d at 1252 (finding that the plaintiffs had offered "no proof" to support their claims). Plaintiffs here bore the same burden, and, once again, they have not met that burden. *See id.* For this reason, and all of the reasons set out above, this Court should enter summary judgment on Plaintiffs' ESA claims in favor of Federal Defendants.

C. NMFS has not delayed this biological opinion.

BOEM reinitiated its ESA consultation with NMFS after the *Deepwater Horizon* incident, and right now the agencies are working to assess the effects of BOEM's entire program of oil and gas exploration, development, and production (including these lease sales and the activities resulting from them) on threatened and endangered species in the Gulf of Mexico. DOI 7602, 7909–8139. NMFS currently expects to complete its biological opinion on this program by October 31, 2014, less than two years after its receipt of BOEM's final biological assessment. Bernhart Decl. ¶ 3. That schedule is consistent with the ESA because, while the ESA generally requires consultations to be completed (and biological opinions written) within 135 days, it also gives the agencies the discretion to extend their consultation to such "other period of time as is mutually agreeable" to them. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e). Here, NMFS and BOEM have agreed that they need more time to complete this consultation because of its broad scope and enormous complexity, and that October 31, 2014 is an appropriate deadline for the biological opinion.

Bernhart Decl. ¶ 6.

Despite the plain language of the statute and its regulations, Plaintiffs now argue that NMFS has "unreasonably delayed" its completion of the new biological opinion in violation of Section 706(1) of the APA. Pls.' Mot. at 2; *see, generally*, *id*. at 38-44. This claim fails because the facts show that there has been no "unreasonable delay," much less the kind of egregious delay that would justify this Court's intervention.[15]

It is easy to see why the consultation will take this long. First, the consultation will take until October 2014 because its scope is very broad and it presents scientific and regulatory questions that are staggeringly complex. NMFS and BOEM are not just consulting on the lease sales at issue in this case. Unlike their previous consultations, which addressed only individual five-year leasing programs, BOEM and NMFS are now consulting on the effects of all on-going and future oil and gas activities in the Gulf of Mexico related to currently-active leases and leases expected to be awarded through 2021. *See* Bernhart Decl. ¶ 7. Each lease has a potential life span of 40 years, so the biological opinion will look at effects approximately 50 years into the future. *Id.*

And BOEM and NMFS are not just consulting on every lease in the Gulf of Mexico—they are also consulting on every stage of oil and gas production that follows from those leases, including "all actions" taken by all of the agencies involved (not just BOEM, but also BSEE and EPA, who take related actions on OCS oil and gas activities) "to approve or review the activities associated with leasing, exploration, development, and

[15] The Courts have repeatedly held that a finding of "unreasonable delay" is only appropriate when the delay is "egregious" and, even then, that the Courts should only intervene in "exceptionally rare cases." *Biodiversity Legal Found. v. Norton*, 285 F. Supp. 2d 1, 12 (D.D.C. 2003) (citations omitted); *see also, e.g., Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (noting that the courts are "reluctant to upset existing agency priorities, unless the delay is 'egregious,'" "[f]or good reason" and that "a finding that delay is unreasonable does not, alone, justify judicial intervention."); *Telecomms. Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 79 (D.C. Cir. 1984) (noting that "the threshold a litigant must pass to obtain judicial review of ongoing agency proceedings [is] a high one.").

decommissioning of oil and gas leases under the OCSLA." *Id.* The agencies have structured the consultation this way because they believe that it "more realistically fits the nature of leasing and development activities in the Gulf of Mexico, and their potential impacts on listed species and their habitats." *Id.* But a consultation this broad and challenging will necessarily take longer.

In addition, NMFS must weigh the effects of all of these actions on ten different threatened and endangered species spread over the entire northern Gulf of Mexico and Florida Atlantic coast and also on the designated critical habitats for four of those species, which cover an area of more than 12,000 square kilometers. *Id.* NMFS will also have to consider the effects of these actions on seven coral species that are currently proposed for listing under the ESA and on critical habitat that has been proposed for the loggerhead sea turtle. *Id.*

Second, the consultation will take this long because it requires a higher degree of coordination among agencies than is normally required. *Id.* As noted above, NMFS must consult not only with BOEM, but also with BSEE and EPA. *Id.* Personnel at all of these agencies must be involved in the consultation and must contribute to the analysis required for the biological opinion. *Id.* The schedule that BOEM and NMFS have developed for this consultation also allows six months for BOEM to review the draft biological opinion to ensure that the analysis is thorough and accurate. *Id.*

Third, and finally, the consultation will take this long because NMFS has only limited resources to complete this daunting task. This consultation is being conducted by staff in NMFS's Southeast Region, which covers eight states and the Caribbean. *Id.* The Southeast Regional Office has only 16 staff to work on the hundreds of ESA consultation requests that it receives every year. *Id.* Of those staff, only two are available to work on this consultation. *Id.* Those two staff members must review BOEM's biological assessment, which is over 500 pages long, compile and analyze the pertinent scientific literature, complete the necessary coordination with other NMFS offices, and then synthesize the

available data and information to draft the biological opinion. *Id*. Forcing them to complete this biological opinion on a shorter schedule would threaten their ability to conduct a "thorough and reasoned analysis of the effects of this agency action on threatened and endangered species." *Id.* ¶ 9.

In short, it will take NMFS until October 31, 2014 to complete this consultation because it presents questions of significant "scientific and regulatory complexity." *Id.* ¶ 7. NMFS must analyze how every interrelated component of BOEM's oil and gas programs cumulatively affects an array of listed species and their designated critical habitats throughout a huge area of the Gulf of Mexico over the next approximately 50 years. *Id.* And NMFS must also evaluate the best available scientific information on the effects of the *Deepwater Horizon* incident. *Id.* Given these facts, NMFS's schedule is fully justified.

The D.C. Circuit identified six factors for use in assessing APA "unreasonable delay" claims in its seminal decision, *Telecommunications Research and Action Center v. FCC* (*"TRAC"*), 750 F.2d 70, 80 (D.C. Cir. 1984). Applying those *TRAC* factors here, it is clear that NMFS has not unreasonably delayed this biological opinion. As the D.C. Circuit explained, "the time agencies take to make decisions must be governed by a 'rule of reason.'" *Id.* (citation omitted). Here, a "rule of reason" dictates that NMFS's schedule is not unreasonable in light of the extremely broad and complex nature of this consultation. That "rule of reason" may be informed by the statutory scheme "where Congress has provided a timetable," *id.*, and NMFS's schedule is not unreasonable because it is consistent with the express terms of the ESA. The Court "should consider the effect of expediting delayed action on agency activities," *id.*, and NMFS has testified that an order requiring a shorter schedule would "threaten NMFS's ability to conduct a thorough and reasoned analysis," Bernhart Decl. ¶ 9. Finally, the Court "should also take into account the nature and extent of the interests prejudiced by delay," *TRAC*, 750 F.2d at 80, and, as we discuss below, Plaintiffs have not shown that this schedule will prejudice their interests in threatened and endangered species. Thus, the relevant *TRAC* factors show that NMFS has not

unreasonably delayed this biological opinion.

No court has ever applied the APA's "unreasonable delay" standard to the schedule for an ESA consultation.[16] But the courts that have applied that standard to other kinds of agency action have **not** found that less than two years constitutes "unreasonable delay."[17] To the contrary, this Court and the D.C. Circuit have confirmed that delays of three or even five years may not be unreasonable in the face of limited agency resources and complex scientific questions.[18]

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[16] Most of the reported cases applying the APA's "unreasonable delay" standard do not involve the ESA. The few cases that have involved the ESA have not involved a schedule for consultation. *See, e.g., Biodiversity Legal Found.*, 285 F. Supp. 2d at 6 (challenging alleged agency delay to respond to a petition to revise critical habitat under Section 4 of the ESA).

The only case that merits further discussion is *In re American Rivers and Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004). In that case, the plaintiffs petitioned FERC to consult on its operations under Section 7 of the ESA, but their petition was submitted to the agency under the agency's own authority, not the ESA. *Id.* at 414, 417 n.9. The case turned on FERC law, not the provisions of the ESA at issue here. Notably, the Court in that case—after finding "unreasonable delay"—did not order FERC to consult, and did not set a schedule for ESA consultation, but merely ordered FERC to respond to the plaintiffs' petition. *Id.* at 420.

[17] *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 833, 837 (D.C. Cir. 2012) (holding that nearly two-year delay after remand was unreasonable); *In re American Rivers*, 372 F.3d at 414 (holding that six-year delay was unreasonable); *Cobell*, 240 F.3d at 1095-96 (holding that six-year delay was unreasonable); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (holding that nine-year delay was unreasonable); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1148 (D.C. Cir. 1992) (holding that delay of over six years is unreasonable); *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (finding four-year delay unreasonable); *Cutler v. Hayes*, 818 F.2d 879, 885, 901 (D.C. Cir. 1987) (remanding ten-year delay to district court for review of reasonableness); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1154 (D.C. Cir. 1983) (holding that three-year delay was unreasonable); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1033 (D.C. Cir. 1983) (holding that eight-year delay was unreasonable); *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 31 (D.D.C. 2000) (finding four-year delay unreasonable).

[18] *Sierra Club v. Thomas*, 828 F.2d 783, 798-99 (D.C. Cir. 1987) (holding that less than three-year delay in EPA rulemaking was not unreasonable "[g]iven the complexity of the issues facing EPA…."); *Biodiversity Legal Found.*, 285 F. Supp. 2d at 14 (holding that the Court "cannot say" that a four-year delay is unreasonable in light of limited agency resources); *see also TRAC*, 750 F.2d at 73 (declining to decide whether five-year delay was unreasonable in light of agency's expeditious progress).

Moreover, the real question in these cases was not how long the agency took, but whether it had committed itself to a concrete deadline and whether it was making progress toward that deadline. The Courts have consistently found "unreasonable delay" where an agency refused to provide a deadline, proposing only an "ambiguous, indefinite time frame" for action, or where the agency relegated issues to "proceedings that go on without conclusion…."[19] *Muwekma Tribe*, 133 F. Supp. 2d at 37; *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 344 (D.C. Cir. 1980) (citing *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975)). Those courts intervened because otherwise agencies could "prevent judicial review of their policy determinations by simply refusing to take final action." *Cobell*, 240 F.3d at 1095.

In contrast, no Court has ever found "unreasonable delay" where an agency provided a deadline and was making expeditious progress toward that deadline.[20] NMFS has done just that—it has committed itself to complete this biological opinion by October 31, 2014, and it is making expeditious progress toward that deadline. *See* Bernhart Decl. ¶¶ 7–8. The caselaw shows that this cannot be "unreasonable delay."

For their part, Plaintiffs suggest that this biological opinion should have been completed within mere months, citing the D.C. Circuit's statement that "a reasonable time

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[19] *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837 (holding that agency had "failed to heed our remand."); *In re American Rivers*, 372 F.3d at 418-19 (noting that FERC did not attempt to "demonstrate the reasonableness" of its delay and did not present any schedule for completion to the Court); *In re Bluewater Network*, 234 F.3d at 1316 (finding delay unreasonable in light of agency's "admission that it will do no more…."); *Midwest Gas Users Ass'n*, 833 F.2d at 359 (finding unreasonable delay where resolution of issues was "still nowhere in sight."); *Pub. Citizen Health Research Grp.*, 702 F.2d at 1152, 1157 (finding agency's "unaccounted-for delay" unreasonable in light of its failure to act); *Potomac Elec. Power Co.*, 702 F.2d at 1035 ("Again and again the Commission has promised to expedite this matter, but without delivering."); *Biodiversity Legal Found.*, 285 F. Supp. 2d at 17 (ordering the FWS to "declare a date certain on which" its work would be done where the agency "has proposed no timetable for its future action…."); *Muwekma Tribe*, 133 F. Supp. 2d at 37 (finding that the agency's "refusal to provide the plaintiff with a definite time frame for review of its petition does not enable the court to evaluate any prospect of completion….").

[20] *See, e.g., TRAC*, 750 F.2d at 80 (declining to apply the *TRAC* factors because "the FCC has assured us that it is moving expeditiously on both overcharge claims…").

for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" Pls.' Mot. at 39 (citing *Midwest Gas Users Ass'n*, 833 F.2d at 359). But the D.C. Circuit was talking about how long "ratemaking procedure[s]" should take under the 1934 Communications Act, it was not—as it expressly acknowledged—creating some "*per se* rule" that applies to all agency action. *MCI Telecomms. Corp.*, 627 F.2d at 340. It is unreasonable for Plaintiffs to suggest that a biological opinion of this scope and complexity, with this many Federal agencies involved, could be completed in months.

Plaintiffs also argue that NMFS's schedule is unreasonable when "judged in light of the ESA's specific timelines governing consultations." Pls.' Mot. at 40. In fact, the ESA's "timelines governing consultation" further demonstrate that this schedule is reasonable. The ESA generally requires agencies to complete their consultations within 90 days. 16 U.S.C. § 1536(b)(1)(A). But it also expressly authorizes agencies to extend their consultation to any "period of time" that is "mutually agreeable" to them.[21] *Id.* The ESA's regulations and the Consultation Handbook also both include these terms. 50 C.F.R. § 402.14(e); United States Fish and Wildlife Service & National Marine Fisheries Service, Endangered Species Act Consultation Handbook[22] (Mar. 1998) ("Consultation Handbook") at 4–7. Thus, by its plain language, the ESA gave NMFS and BOEM the latitude to structure this ESA consultation efficiently and to take the time that they need to analyze these complex issues.[23] Congress's decision to give the agencies that latitude informs the "rule of reason" applied under *TRAC*

[21] The ESA limits this discretion in cases "involving a permit or license applicant," 16 U.S.C. § 1536(b)(1)(B)(ii), but those limitations are not relevant here because the Plaintiffs are not applicants.

[22] The Consultation Handbook is available online at http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

[23] There are other provisions of the ESA that protect threatened and endangered species while the agencies are consulting—notably, Section 9's prohibition against "take," Section 7(a)(2)'s prohibition against "jeopardy," and Section 7(d)'s prohibition against making an "irreversible or irretrievable commitment of resources." 16 U.S.C. §§ 1538(a), 1536(a)(2), (d).

and further demonstrates that NMFS has not "unreasonably delayed" this biological opinion.

Finally, Plaintiffs argue that NMFS's alleged "delay" is causing "dire consequences" and "undermin[ing] the ESA's statutory scheme to protect and recover listed species," Pls.' Mot. at 42, but they present no evidence to substantiate that claim and the facts show otherwise. NMFS's 2007 biological opinion, with its conservation measures, remains in place. BOEM has adopted a wide array of new measures to protect threatened and endangered species, and BOEM and NMFS have implemented an interim consultation process so that NMFS can review certain plans and permits until the new biological opinion is done. The leases that Plaintiffs have challenged here all include terms to protect listed species. And, of course, all of these species continue to enjoy the many protections created by the ESA.

Plaintiffs' real concern seems to be that "exploration[ ] and production activities…may jeopardize species already harmed by the *Deepwater Horizon* disaster." Pls.' Mot. at 43. But this case is not about "exploration and production activities"—this case is about lease sales and, as we have shown above, Plaintiffs have not presented any evidence showing that these lease sales are likely to result in "jeopardy." To the contrary, BOEM rationally concluded that they would not. If Plaintiffs believe that BOEM has approved exploration or development plans in violation of the ESA, then they may challenge those plans in the Courts of Appeals. A court order rushing this complex biological opinion to completion will not help these species—it will only threaten NMFS's ability to conduct a thorough and searching analysis.

VI. Conclusion

For all of the reasons set out above, the Federal Defendants respectfully submit that summary judgment on all claims should be entered on behalf of the Federal Defendants.

Respectfully submitted August 23, 2013,

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