

IWC Consideration of the Field Guide, “Whales, River Dolphins, and Dolphins in the Campos Basin, Brazil” as recommended by CRE Brasil

Comments

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I INTRODUCTION

CRE Brasil’s endorsement in its White Paper of Professor Sicialono’s conclusions in the Field Guide entitled, “Whales, River Dolphins, and Dolphins in the Campos Basin”(“Whale Report”), and request for inclusion in the International Whaling Commission’s agenda (IWC) is alarming. The conclusion reached in the Whale Report is that oil and gas exploration and production in the Campos Basin area do not constitute a threat to marine mammals. CRE Brasil’s endorsement is alarming because of the potential consequences of the Whale Report’s conclusion, which is based upon the premise that “everything is done with the greatest care” regarding oil and gas exploration and production.

It is particularly troubling because the Whale Report is the document that is intended to provide guidance to Petrobras, Brazil’s state owned oil company, in obtaining an environmental license for its offshore structures. However, the Whale Report does not constitute guidance: It is simply a rubber stamp for oil and gas exploration and extraction and fails to identify or even acknowledge the risks of these activities to marine ecosystems and marine life. It also discredits a 2000 Brazilian study that arrives at the opposite conclusion: It identified oil and gas activities as constituting a major threat to marine mammals¹.

According to CRE Brasil, the Whale Report identifies the “real threats” as constituting pollution, ship traffic and fishing. CRE Brasil agrees with the Whale Report’s conclusion that “[o]il and gas exploration and production are minor risks, and regulatory authorities [such as the International Whaling Commission(IWC) and the U.S. National Oceanic and Atmospheric

¹ ARE SEISMIC SURVEYS RESPONSIBLE FOR CETACEAN STRANDINGS? AN UNUSUAL MORTALITY OF ADULT HUMPBACK WHALES IN ABROLHOS BANK, NORTHEASTERN COAST OF BRAZIL (*Engel et al., 2000*). (“*Engel Study*”).

Administration (NOAA)]” should not waste their scarce resources concentrating on them and rather, should be concentrating on “real threats”.²

The Campos Basin

The Campos Basin is Brazil’s most prolific basin, and is located in the western South Atlantic on the southeastern coast of Brazil and covers a total prospectable area of 100,000 km. It currently has about forty producing fields including deep-water giant field and is responsible for more than 80% of Brazilian oil production.³

II. REQUIREMENTS AND RECOMMENDATIONS

First and foremost, a regionalized approach is required to protect Brazil’s marine species and ecosystems that is based on a comprehensive database of marine mammals, natural ecosystems and resources in the various regions, including the South East, where the Campos Basin is located. Brazil’s coastal and marine environments are home to a great number of species of mammals, birds and ecosystems that include mangroves and coral reefs.⁴

According to CRE Brasil, the Whale Report identifies more than 30 species of whales and dolphin in Brazil, with at least 31 of those found in the Campos Basin. The Whale Report also emphasizes the importance of protecting the Humpback Whale and the Southern Right Whale, which are both endangered.

A 2007 study published by The Nature Conservancy, a U.S. N.G.O., examines threats to coastal and marine biodiversity in South America and identifies priority areas for conservation in the region, including Brazil. The report is the result of a five-year collaboration between The Nature Conservancy and the national governments of Brazil, Chile, Colombia, Ecuador, Peru, and Venezuela.

According to The Nature Conservancy study, there are 43 registered cetacean species in the Brazilian Exclusive Economic Zone (EEZ). The study also identifies two additional cetacean species of concern, in addition to the Southern Right Whale and the Humpback Whale, viz., the La Plata river dolphin and the gray boto dolphin.⁵

² CRE Brasil Regulatory Implications of the Field Guide: Whales, River Dolphins, and Dolphin in the Campos Basin, Brazil.

³ PETROLEUM SYSTEM OF CAMPOS BASIN, *Brazil* Sasaki Satoshi (Sekiyukaihatsujohose) Iwasaki Tetsuharu (Sekiyukaihatsujohose) Iguchi Yoshiro (Sekiyukaihatsujohose) Ono Naoki (Sekiyukaihatsujohose). *Journal Of The Japanese Association For Petroleum Technology* Vol.72; No.1; Page 40-50 (2007)

⁴ Prates, Ana Paula., Lima, Luis Henrique. and Chatwin, Anthony. "COASTAL AND MARINE CONSERVATION PRIORITIES IN BRAZIL" *Paper presented at the annual meeting of the International Congress for Conservation Biology, Convention Center, Chattanooga, TN, July 13, 2008.*

<http://www.allacademic.com/meta/p237048_index.html>

⁵ The Nature Conservancy: PRIORITIES FOR COASTAL AND MARINE PROTECTION IN SOUTH AMERICA. 2007, Ed. Anthony Chatwin. The Nature Conservancy, 2007 at page 21. Available at <http://conserveonline.org/docs/2007/08/South%20America%20Coastal%20Marine%20Priorities.pdf>

The authors of The Nature Conservancy Study identify the top threats to coastal and marine life in South America, and, contrary to CRE Brasil's central tenet, rank resource extraction and the hydrocarbon industry as two of the top risks:⁶

Table 1: Top Ten Threats to Coastal and Marine Biodiversity in South America

Threat Rank Mapped

Fisheries 1 Yes
Pollution 2 No
Urban Development 3 Yes
Resource Extraction 4 No
Hydrocarbon Industry 5 Yes
Aquaculture 6 Yes
Maritime Transport 7 Yes
Tourism 8 No
Invasive species 9 No
Climate Change 10 No

The Study further identifies the main threats to coastal biodiversity in South eastern Brazilian waters, in particular, with oil, gas, resource extraction, pollution and noise shown as key threats in that area:⁷ While the activities identified by CRE Brasil of maritime transportation and fishing are also identified as key risks in the Nature Conservancy study, it is completely inaccurate for CRE Brasil to claim that oil and gas exploration and production pose no threat:

Figure 5: Key Threats to Coastal Biodiversity in Southeastern Brazilian Waters

Oil and Gas 6.0%
Resource Extraction 7.9%
Maritime Transportation 5.6%
Tourism 13.2%
Fishery Activity 15.3%
Pollution 17.4%
Coastal Development 23.0%
Climate Change 1.2%
Noise 0.8%
Others 11.7%

The Burden of Proof and the Need to address all Threats

ALL threats need to be addressed to afford sufficient protection to protect vulnerable species and ecosystems, not just some. Without comprehensive measures that address all risks, protective measures will be hollow and will ultimately fail. CRE Brasil's conclusion in its Executive Summary that seismic, oil and gas operations pose minor risks to species and ecosystems is invalid and contradicts other studies, including the Nature Conservancy study done in conjunction with the Brazilian government.

Moreover, by making such an assertion, CRE Brasil ignores Brazil's international obligations as well as the current regulatory regime in the United States, by taking the position that

⁶ Id.

⁷ Id.

such agencies as IBAMA, the IWC and NOAA should not expend resources on such risks “[u]ntil such time it is demonstrated that seismic and other oil and gas operations present a clear endangerment to marine mammals based upon peer reviewed and reproducible data...”⁸

In the United States, NEPA (National Environmental Policy Act), MMPA (Marine Mammal Protection Act), ESA (Endangered Species Act), and CZMA (Coastal Zone Management Act), require that the impacts of activities affecting marine mammals be reduced to the least practicable adverse impact and set the burden of proof for determining what those impacts are.

International Obligations

Brazil is a Party to a number of international treaties that promote the conservation of ecosystems and species. As a Party, Brazil has rights in addition to obligations. Any development or activity that undermines or runs counter to those treaties would be in violation thereof.

1) National Plan of Protected Areas

Brazil has made great strides in focusing on the conservation and integrated management of the rich diversity of ecosystems and species. As a signatory to the Convention of Biological Diversity, the Brazilian government developed a National Plan of Protected Areas (PNAP) that includes special consideration of the Brazilian coastal and marine environments. Legal recognition of the PNAP, along with its defining principles, directives, objectives and strategies for the establishment of a representative and effectively managed system of terrestrial areas by 2010 and marine areas by 2012, was established by Decree 5, 758/2006. A key directive of the PNAP mandates that marine protected areas be created and managed for the conservation of biodiversity and the recovery of fishery resources.⁹

2) Rio Declaration

The Rio Declaration emerged from the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, which took place in Rio de Janeiro, Brazil from June 2-14, 1992.¹⁰ The results of the UNCED included the Rio Declaration comprising 27 principles of environment and development, which were all adopted by consensus (without vote) by the conference. These principles, while non-binding on signatory nations, including Brazil, are understood to comprise a set of norms intended to guide nation states in the future. The principles are intended to commit governments to ensure environmental protection and responsible development and are intended to be an Environmental Bill of Rights, defining the rights of people to development, and their responsibilities to safeguard the common environment.

⁸ CRE Brasil, REGULATORY IMPLICATIONS OF THE FIELD GUIDE: WHALES, RIVER DOLPHINS, AND DOLPHINS IN THE CAMPOS BASIN, BRAZIL, at page 5.

⁹ The Nature Conservancy: PRIORITIES FOR COASTAL AND MARINE PROTECTION IN SOUTH AMERICA. 2007, Ed. Anthony Chatwin. The Nature Conservancy, 2007 at page 15. Available at <http://conserveonline.org/docs/2007/08/South%20America%20Coastal%20Marine%20Priorities.pdf>

¹⁰ [http://www.eoearth.org/article/United_Nations_Conference_on_Environment_and_Development_\(UNCED\),_Rio_de_Janeiro,_Brazil](http://www.eoearth.org/article/United_Nations_Conference_on_Environment_and_Development_(UNCED),_Rio_de_Janeiro,_Brazil)

Importantly, it established the "Precautionary principle" which requires environmental assessments to identify adverse impacts and eliminate any potential harms from a project prior to its commencement.¹¹ Underlying these principles is the goal of ensuring that development does not undermine the resource and species base of future generation.

3) United Nations Convention on the Law of the Sea

Brazil is a Party to the United Nations Convention on the Law of the Sea (UNCLOS).¹² Under Article 192, UNCLOS, states have the obligation to protect and preserve the marine environment. Article 193, UNCLOS provides that States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment. Under Article, 156, UNCLOS, the burden of proof may shift to a Party accused of not having adequate environmental measures in place.

Moreover, UNCLOS defines "pollution" to include harmful "energy" and, thus, consistent with the general rule of treaty interpretation set forth in the Vienna Convention on the Law of¹¹ Treaties, would be interpreted to encompass underwater sound within its mandates. This definition is significant because UNCLOS provides the international legal framework for nearly all ocean uses and its definition of marine pollution has been incorporated into instruments governing a number of other global and regional institutions.¹³ Pollution would encompass seismic testing, which accompanies oil and gas exploration and production.

A number of international bodies are addressing ocean noise as a threat to marine ecosystems and have begun to recognize that noise is a form of pollution requiring international regulation. This includes the International Whaling Commission (IWC). Established in 1946 under the International Convention for the Regulation of Whaling (ICRW), the IWC is an intergovernmental organization. In 2004, the IWC Scientific Committee held a symposium on the impact of anthropogenic noise on cetacean populations. It concluded that there was "compelling evidence implicating anthropogenic sound as a potential threat to marine mammals. This threat is manifested at both regional and ocean-scale levels that could impact populations of animals"¹⁴ The Scientific Committee made a number of recommendations based on this review, which included international research projects to study and describe acoustic impacts and including anthropogenic noise assessments and noise exposure standards within the framework of both national and international ocean conservation plans.¹⁵

¹¹ Principle 15 of the Rio Declaration provides:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

¹² [United Nations Convention on the Law of the Sea](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm), published at www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

¹³ Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31, 1155 U.N.T.S. 311; see H.M. Dottinga and A.G. Oude Elferink, ACOUSTIC POLLUTION IN THE OCEANS: THE SEARCH FOR LEGAL STANDARDS, 31 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 151, 158 (2000).

¹⁴ IWC, 2004

¹⁵ Id.

CRE Brasil's position, therefore, that seismic operations constitute "minor risks" runs counter to the above described recognition that ocean noise is a form of pollution. It also runs counter to Brazil's treaty obligations, including UNCLOS.

4) The IUCN-World Conservation Union

The IUCN-World Conservation Union (IUCN) is a non-governmental organization made up of about 1000 members from some 140 countries, including 77 States, 114 government agencies, and more than 800 NGOs. Brazil is a member. In 2004, the IUCN adopted by consensus a resolution recognizing that anthropogenic ocean noise is a form of pollution that may have adverse effects on the marine ecosystem.¹⁶ It has called on governments to apply the precautionary principle in assessing the impacts of noise generated by commercial, military, and industrial activities and to avoid the use of powerful noise sources in habitat supporting vulnerable species and in areas where marine mammals or endangered species may be concentrated.

CONCLUSION

Included in the serious risks posed by oil and gas exploration and production is seismic testing. Ocean noise, including seismic testing, has been recognized as a serious threat, not the "minor" threat that CRE Brasil would have us believe it to be. It can deafen, disturb, injure, and kill marine life.¹⁷ The extent of the threat is not known at this time but in order to adequately protect marine mammals, the precautionary principle must be employed. The current U.S. regulatory framework, including NEPA, MMPA, and ESA, incorporates precaution. Immediate and effective mitigation measures such as geographic exclusion zones must be implemented to distance vulnerable marine mammals from noise sources. The California Coastal Commission and other agencies recognize that requiring scientific certainty before acting could be catastrophic: "Because many of these species reproduce very slowly, requiring scientific certainty before taking protective measures could very well result in their extinction."¹⁸ The IWC, therefore, should disregard the Whale Report and should distance itself from it. In addition to running counter to the U.S. position, the Whale Report runs counter to Brazil's international obligations and the efforts that the Brazilian government has recently taken to implement these obligations and protect its marine environment.

¹⁶ RESWCC3.068 (2004), Undersea noise pollution, www.iucn.org

¹⁷ California Coastal Commission, <http://www.coastal.ca.gov/energy/comments-mmcc-12-2005.pdf>

¹⁸ Id.

