

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA**

**NATURAL RESOURCES DEFENSE COUNCIL )  
INC., et al., )**

**Plaintiffs, )**

**v. )**

**S.M.R. JEWELL, Secretary of the Department of )  
the Interior, et al., )**

**Defendants, )**

**and )**

**AMERICAN PETROLEUM INSTITUTE, et al., )**

**Intervenor-Defendants. )**

**CIVIL ACTION NO. 2:10-cv-01882**

**SECTION "A"**

**JUDGE JAY C. ZAINEY**

**MAGISTRATE JOSEPH C.  
WILKINSON**

**MEMORANDUM IN SUPPORT OF JOINT MOTION FOR  
APPROVAL OF SETTLEMENT AND STAY OF PROCEEDINGS**

Pursuant to LR 7.1 and LR 7.9, Plaintiffs (Natural Resources Defense Council, Center for Biological Diversity, Gulf Restoration Network, and Sierra Club), Federal Defendants (named parties Sally Jewell, Secretary of the Department of the Interior, the Bureau of Ocean Energy Management ("BOEM"), and Tommy Beaudreau, Director, Bureau of Ocean Energy Management), and Intervenor-Defendants (American Petroleum Institute, International Association of Geophysical Contractors, Independent Petroleum Association of America, U.S. Oil and Gas Association, Chevron U.S.A., Inc.), respectfully submit this Memorandum in support of their Joint Motion for Approval of Settlement Agreement and Stay of Proceedings ("Joint Motion"). The Settlement Agreement has been executed by all parties, and a copy of the Agreement is attached. The Settlement Agreement takes effect only upon entry of an Order of the Court, substantively identical to the attached proposed order, approving the Agreement and

staying all proceedings in accordance with the terms of the Agreement. As demonstrated below, the Settlement Agreement is fair, adequate, and reasonable, and the proposed stay, though of significant length, would be an appropriate exercise of the Court's discretion, and will likely lead to the voluntary dismissal of this action, with prejudice, without further involvement of the Court. Accordingly, the parties' Joint Motion should be granted.

## **I. BACKGROUND**

### **A. Background Regarding Plaintiffs' Claims<sup>1</sup>**

Plaintiffs' claims relate to BOEM's permitting of geological and geophysical seismic exploration and development surveys in the Gulf of Mexico ("Gulf") pursuant to the regulations set forth at 30 C.F.R. Part 551 promulgated under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C.A. §§ 1331 *et seq.* Most relevant are "deep penetration" seismic surveys permitted by BOEM. These surveys generally involve the use of air gun arrays towed behind ships that release impulses of compressed air into the water. Plaintiffs allege that the acoustic pulses from these air guns and similar energy sources can harm marine mammals and other forms of marine life. *See* Compl. ¶¶ 2-5.

The Complaint alleges that BOEM is permitting seismic surveys in the Gulf in violation of the National Environmental Policy Act ("NEPA"). NEPA generally directs each federal agency to prepare an environmental impact statement ("EIS") prior to taking any major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.18. An agency may first prepare an environmental assessment, which is a "concise public document," 40 C.F.R. § 1508.9, that provides sufficient evidence and analysis to

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<sup>1</sup> The section includes a general summary of Plaintiffs' allegations and the relevant statutory provisions, and is not intended to be binding on any party in any subsequent litigation or continuation of the present action.

determine whether the agency must prepare an EIS or, in the alternative, issue a finding of no significant impact. *See Spiller v. White*, 352 F.3d 235, 237-38 (5th Cir. 2003); 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9. Plaintiffs allege that seismic activities in the Gulf cause significant environmental harm and that BOEM's 2004 Programmatic Environmental Assessment and Finding of No Significant Impact for such activities is arbitrary, capricious, and contrary to NEPA. *See Compl.* ¶¶ 1, 6-10.

Defendant-Intervenors have filed Answers denying Plaintiffs' allegations. Federal Defendants have not yet filed an Answer to the Complaint.

In correspondence with BOEM, Plaintiffs have also alleged that seismic activities in the Gulf permitted by BOEM result in the unauthorized "take" of marine mammals, including threatened and endangered species, in violation of the Marine Mammal Protection Act ("MMPA") and the Endangered Species Act ("ESA"). The MMPA generally prohibits the "take" of marine mammals absent prior authorization from (as is relevant here) the National Marine Fisheries Service ("NMFS"). *See* 16 U.S.C. § 1371(a). The ESA prohibits the take of marine mammals that have been listed as threatened or endangered unless NMFS has authorized the take under both the MMPA and the ESA. *See id.* §§ 1538(1)(B), 1539(a)(1)(B), 1536(b)(4). Plaintiffs' correspondence also alleges that BOEM has violated its duty under ESA Section 7(a)(2) to insure, in consultation with NMFS, that Gulf seismic permits issued by BOEM are not likely to jeopardize the continued existence of any threatened or endangered species. *Id.* § 1536(a)(2); *see generally Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012) (providing more detailed statutory background and reviewing NEPA, MMPA, and ESA challenge to BOEM's authorization of oil and gas exploration activities in the Chukchi Sea and the adjacent coast of Alaska).

While the Defendant-Intervenors and the Federal Defendants disagree that the Plaintiffs' further allegations state a violation of either the MMPA or ESA, Plaintiffs have indicated that, absent settlement, they will amend their Complaint to (*inter alia*) allege the MMPA and ESA violations generally described above.

#### **B. BOEM's Pending MMPA Application**

BOEM has applied to NMFS for authorization under the MMPA to take marine mammals incidental to geological and geophysical surveys conducted in the waters of the Outer Continental Shelf in the Gulf. *See* 76 Fed. Reg. 34656 (June 14, 2011). NMFS announced receipt of BOEM's application in June 2011, solicited public comments, and is currently processing the application. *Id.* On May 10, 2013, BOEM announced its intent to prepare a related EIS to evaluate the potential environmental effects of geological and geophysical activities in Outer Continental Shelf waters of the Gulf. *See* 78 Fed. Reg. 27427 (May 10, 2013). BOEM's announcement states that the EIS will "be prepared cooperatively with NMFS to serve as the requisite environmental analysis under NEPA for the [NMFS MMPA] rulemaking" and to "provide information for future decisions regarding [OCSLA] permit and MMPA authorization actions, in addition to informing consultations under the [ESA] ...." *Id.*

#### **II. TERMS OF THE SETTLEMENT AGREEMENT**

After the filing of the Complaint, and prior to the filing of any answer or other response by the Federal Defendants, the Court stayed all proceedings so that the parties could pursue settlement (ECF No. 51). The Court has since extended the stay at the request of Plaintiffs and Federal Defendants on numerous occasions to allow for the continuation of settlement negotiations. From the onset, the negotiations have been conducted by all parties, including the

Intervenor-Defendants. The parties have now concluded their negotiations and executed the attached Settlement Agreement, the key provisions of which are summarized below.<sup>2</sup>

### **1. Stay of Proceedings**

The Agreement provides for a stay of all proceedings in this action (subject to the Court's approval) for up 30 months from the effective date or until NMFS takes final action on BOEM's pending MMPA application described above, whichever occurs first. Agreement ¶¶ II.A, II.I. The Agreement takes effect only upon entry of an Order of the Court, substantively identical to the attached proposed order, approving the Agreement and staying the litigation in accordance with the terms of the Agreement. Agreement ¶ I.E. "Final action" on BOEM's MMPA application means either: (1) a final decision by NMFS denying the application; (2) BOEM's withdrawal of the application without resubmission; or (3) NMFS's issuance of an MMPA take authorization in response to the application, preceded or accompanied by a related NEPA analysis and a biological opinion or other final decision from NMFS concluding consultation pursuant to ESA Section 7(a)(2). Agreement ¶ I.C. Federal Defendants have agreed to make their best effort to facilitate final action on BOEM's MMPA Application within 30 months of the effective date of the Agreement. *Id.* ¶ II.A. The Agreement also provides for the parties to meet periodically during the stay to discuss the status of the BOEM's MMPA application and the related NEPA and ESA processes. *Id.* ¶ XII.A.

### **2. Additional Permit Application Requirements and Consideration of Interim Mitigation Measures**

In exchange for Plaintiffs' agreement not to pursue their claims during the stay, BOEM has agreed to undertake certain steps during the stay that Plaintiffs believe will inform the

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<sup>2</sup> The following summary of the primary components of the Settlement Agreement is not intended to alter or affect the meaning of any of its terms. In the event of a discrepancy between the summary and the terms of the Agreement itself, the Agreement is controlling.

ongoing MMPA, NEPA, and ESA processes and mitigate the alleged adverse impacts of seismic activities on marine mammals. *See* Agreement ¶¶ IV, V, VII, VIII, IX. For example, BOEM will implement new permit application information requirements intended to assist in determining (a) whether the proposed seismic survey is unnecessarily duplicative of prior surveys, and (b) that the airguns or other energy sources employed during the proposed survey will operate at the lowest practicable levels. *See* Agreement ¶¶ IV.A-B. BOEM has also agreed to consider, in permit-specific NEPA analyses for proposed deep penetration seismic permits in the Gulf, the appropriateness of prescribing additional marine mammal mitigation measures, including: a seasonal restriction on certain seismic activities in coastal waters; an expansion of existing mitigation measures to cover manatees and to apply in all federal waters in the Gulf; observance of certain minimum separation distances between concurrently-operating seismic sources under specified conditions; restrictions on seismic activity in the portions of Plaintiffs' areas of concern falling within the Gulf Eastern Planning Area; and an increase in the use of passive acoustic monitoring to detect marine mammals. *See* Agreement ¶¶ IV.A-E.

BOEM's commitment to evaluate the interim measures described above in permit-specific NEPA analyses does not obligate the agency to include the measures in any specific seismic permit. Agreement ¶¶ V, XII.D-E. However, so long as the stay is in effect, Intervenor-Defendants have agreed to abide by the mitigation measures described in the Agreement when conducting deep penetration seismic surveys pursuant to a permit issued by BOEM during the stay, even if the mitigation measures are not included as conditions of the permit itself. *See* Agreement ¶ VI. If BOEM were to issue a permit for deep penetration seismic surveys during the stay that does not require each of the mitigation measures described above, and the permittee were to fail to implement the mitigation measures pursuant to the commitment of the Intervenor-

Defendants, then Plaintiffs would be entitled to partially terminate the stay to challenge the permit or fully terminate the stay and recommence the instant litigation. *See* Agreement ¶ II.D.

### **3. Dismissal of the Lawsuit upon Issuance of MMPA Take Authorization**

If, as the parties believe is likely, the stay automatically terminates as a result of NMFS's taking final action in response to BOEM's MMPA application (preceded or accompanied by the completion of associated NEPA and ESA processes), Plaintiffs will file a notice of dismissal, with prejudice, pursuant to Federal Rule of Civil Procedure 41. *See* Agreement ¶ III.A. If the stay terminates for any reason other than NMFS's issuance of an MMPA take authorization, the litigation would resume.

### **DISCUSSION**

“It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement.” *Armstrong v. Board of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 312 (7th Cir. 1980) (citations omitted); *Ho v. Martin Marietta Corp.*, 845 F.2d 545, 547 n.2 (5th Cir. 1988) (“public policy strongly encourages the settlement of cases”). “The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge.” *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982) (citations omitted). When approving a consent decree or other form of settlement, “[t]he court must ascertain only that the settlement is fair, adequate and reasonable.” *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (quotation omitted). Similarly, “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). When determining whether to enter a stay, the court “must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S. at 255.

As demonstrated below, the parties' Settlement Agreement is fair, adequate, and reasonable, and entry of the proposed stay, though of significant duration, would be an appropriate exercise of the Court's discretion, and will likely lead to the voluntary dismissal of this action, without further involvement of the Court.

First, there is no question that the Settlement Agreement is the result of a fair and reasonable process. All parties have been involved in the negotiations from the onset and have approved and executed the Agreement. Where, as here, an agreement "is the product of good faith, arms-length negotiations, it is presumptively valid." *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 834 F. Supp. 2d 1004, 1017 (D. Haw. 2011) (citations and internal quotations omitted), *aff'd*, 672 F.3d 1160 (9th Cir. 2012); *United States v. Wallace*, 893 F. Supp. 627, 632 (N.D. Tex. 1995) ("Coupled with the arms length settlement negotiations conducted in good faith by experienced legal counsel representing each defendant, the Court's finding of procedural fairness is clearly supported").

The Settlement Agreement is also substantively fair and reasonable. The stay component will allow BOEM and NMFS to continue work on BOEM's MMPA application and the related NEPA and ESA processes without having to devote scarce agency resources to the litigation. In contrast to a dismissal without prejudice, the stay mechanism also preserves Plaintiffs' right to recommence the litigation, without concerns regarding a potential new statute of limitations defense, in the event final action on BOEM's pending MMPA application is not taken within a 30-month period or the application is denied or withdrawn. However, if as is likely, final action on BOEM's pending MMPA application is taken within a 30-month period, the result will be the voluntary dismissal of this action, with prejudice, without further involvement of the Court.

The Settlement Agreement also advances Plaintiffs' interests in providing additional protection for marine mammals by, for example, requiring consideration of additional interim mitigation, without impermissibly constraining BOEM's discretion regarding the permit-specific NEPA process. *See Turtle Island*, 834 F. Supp. 2d at 1020 (noting that "when a government agency is the target of a consent decree, the Court must ensure that the proposed consent decree does not unduly constrain the agency's discretion") (citing *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983)).

In addition, the Settlement Agreement protects the interests of BOEM and the Intervenor-Defendants in insuring that geophysical and geological seismic exploration activities in the Gulf are not prohibited or unduly restricted pending completion of the ongoing MMPA process.

Finally, the approval of the Settlement Agreement by the federal agencies "charged with the implementation and review of the various environmental protection statutes carries with it a strong presumption of the [Agreement's] validity." *Wallace*, 893 F. Supp. at 631 (citation omitted); *see United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995) ("[W]hen a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement," a reviewing court may appropriately accord substantial weight to the agency's expertise and public interest responsibility) (citation omitted); *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1435 (6th Cir. 1991).

The parties recognize that the stay component of the Settlement Agreement is atypical. The parties also recognize and appreciate that the Court has already stayed the litigation for a significant amount of time to allow them to pursue settlement, and the parties are now asking to the Court to enter a new stay of significant length as a condition of their Agreement. The additional stay, however, will provide the parties necessary time to fulfill their negotiated

obligations under the Settlement Agreement, and will likely lead to the final dismissal of this lawsuit, with prejudice. The parties respectfully submit that approval of the Settlement Agreement and entry of the proposed stay would be an appropriate exercise of the Court's discretion because the Agreement reasonably accounts for the competing interests of all parties, and replaces the likely alternative of protracted litigation. *See Landis*, 299 U.S. at 255 (determining whether to enter stay requires "weigh[ing] competing interests and maintain[ing] an even balance"); *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1053 (N.D. Ind. 2001) (finding consent decree reasonable where "[t]he only likely alternative to the decree appears to be complex and lengthy litigation which would expend limited Government resources not to mention valuable judicial resources").

### CONCLUSION

For the foregoing reasons, the parties' Joint Motion should be granted, and the Court should enter an order similar to the attached proposed order approving the Settlement Agreement and staying all proceedings in this action in accordance with the terms of the Agreement.

Respectfully submitted this 20th day of June, 2013.

/s/ Rebecca J. Riley by permission

Rebecca J. Riley  
Natural Resources Defense Council  
2 N. Riverside Plaza, Suite 2250  
Chicago, IL 60606  
(312) 651-7913  
FAX: (312) 234-9633  
rriley@nrdc.org

JOEL WALTZER (LA #19268)  
3715 Westbank Expressway, Ste. 13  
Harvey, LA 70058  
Office: (504) 340-6300; Fax: (504) 340-6330  
Email: joel@waltzerlaw.com

*Counsel for Plaintiffs*

/s/ Stephen E. Roady

Stephen E. Roady  
Earthjustice  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 667-4500  
Fax: (202) 667-2356  
sroady@earthjustice.org

*Counsel for Plaintiff Gulf Restoration Network*

ROBERT G. DREHER  
Acting Assistant Attorney General

/s/ Kevin W. McArdle

KEVIN W. MCARDLE  
Trial Attorney, DC Bar # 454569  
United States Department of Justice  
Environment and Natural Resources Division  
Wildlife and Marine Resources Section  
Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369  
(202) 305-0219 (tel.); (202) 305-0275 (fax)  
Kevin.McArdle@usdoj.gov

JIM LETTEN

United States Attorney  
PETER M. MANSFIELD (28671)  
Assistant United States Attorney  
Hale Boggs Federal Building  
500 Poydras St., Ste. 210B  
New Orleans, LA 70130  
Tele: (504) 680-3047; Fax: (504) 680-3184  
[Peter.Mansfield@usdoj.gov](mailto:Peter.Mansfield@usdoj.gov)

*Attorneys for Federal Defendants*

/s/ Judy Y. Barrasso by permission

Judy Y. Barrasso, 2814  
John W. Joyce, 27525  
Andrea Mahady Price, 30160  
Barrasso Usdin Kupperman Freeman  
& Sarver, L.L.C.  
909 Poydras St. 24th Floor  
New Orleans, La. 70112  
Telephone: (504) 589-9720

Facsimile: (504) 589-9701  
JBarrasso@barrassousdin.com

/s/ Steven J. Rosenbaum by permission

Steven J. Rosenbaum  
Bradley K. Ervin  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue N.W.  
Washington, D.C. 20004  
Telephone: (202) 662-5568  
Facsimile: (202) 778-5568  
srosenbaum@cov.com

*Counsel for Intervenor-Defendants American Petroleum Institute,  
International Association of Geophysical Contractors, Independent  
Petroleum Association of America, and US Oil & Gas Association*

/s/ John C. Martin by permission

John C. Martin  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Telephone: (202) 624 2505  
Facsimile: (202) 628-5116  
jmartin@crowell.com

/s/ Charles J. Engel III by permission

Charles J. Engel III  
King & Spalding  
1700 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, DC 20006  
Telephone: (202) 661-7800  
Facsimile: (202) 626-3737  
tengel@kslaw.com

*Counsel for Chevron U.S.A., Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 20, 2013, the above motion was filed with the United States District Court for the Eastern District of Louisiana's electronic filing system for service on all parties:

/s/ Kevin W. McArdle