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RE: Notice of Intent to Sue: Violations of the Marine Mammal Protection Act and Endangered Species Act: Unauthorized Take of Marine Mammals Related to the Offshore Oil and Gas Activities in the Gulf of Mexico

This letter serves as a official notice by the Center for Biological Diversity of its intent to sue Ken Salazar, Secretary of the Interior, and the Minerals Management Service (“MMS”) (collectively “the Secretary”) over violations of the Marine Mammal Protection Act (“MMPA”) (16 U.S.C. § 1361 *et seq.*) and the Endangered Species Act (“ESA”)(16 U.S.C. § 1531 *et seq.*) for actions and inactions related to the management and authorization of oil and gas exploration activities in the Gulf of Mexico that have resulted and continued to result in the unauthorized take of legally protected marine mammals. Specifically, the Secretary has taken and continues to take actions approving offshore oil and gas lease sales, exploration plans, drilling plans, and seismic exploration permits—which result in harm, harassments and other forms of take of marine mammals, including marine mammals listed as threatened or endangered under the ESA—without authorization pursuant to the MMPA and ESA.

While the Secretary’s compliance with other statutes such as the Outer Continental Shelf

Lands Act (“OCSLA”) and the National Environmental Policy Act (“NEPA”) in relation to offshore oil and gas development in the Gulf has been cursory at best, the Secretary has utterly, and knowingly, disregarded his obligations under the MMPA and ESA. The MMPA and ESA prohibit the take of protected marine mammals unless authorized. It is undisputed that oil and gas activities such as exploratory drilling and seismic surveys harm, harass and otherwise take marine mammals, yet MMS has never obtained the required authorizations for such actions in the Gulf of Mexico. Meanwhile, offshore oil and gas development approved by MMS has accelerated in recent years. Since President Obama took office on January 20, 2009, MMS has approved for the Gulf of Mexico:

- 3 lease sales
- 103 Geological or Geophysical Exploration Permits (“G&G permits”)
- 299 Exploration Plans
- 185 Development Operations Coordination Documents

During that same period, there has not been a single authorization provided by the National Marine Fisheries Service (“NMFS”) or the U.S. Fish and Wildlife Service (“FWS”) related to any of these agency actions to take marine mammals pursuant to the MMPA or ESA. The MMPA and its implementing regulations explicitly require publication of proposed take authorizations in the Federal Register, with the opportunity for public comment on such proposals. 16 U.S.C. § 1371(a)(5)(A)&(D)(iii). While numerous such proposals for the take of marine mammals have been published related to oil and gas activities off Alaska, no such proposals have been published related to oil and gas activities in the Gulf since the Obama administration took office.¹

Through this letter we put the Secretary on official notice that we believe his current management of offshore oil and gas activities in the Gulf results in take of marine mammals and violates the procedural and substantive mandates of the MMPA and the ESA. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).²

I. Legal and Factual Background

A. Marine Mammal Protection Act

The MMPA was enacted in 1972 pursuant to congressional findings that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities,” and, further, that “[t]here is inadequate knowledge of the ecology and population dynamics of such marine mammals.” 16 U.S.C. § 1361(l), (2). In order to

¹ Nor is there any record of take authorizations predating the current administration that the Secretary can point to that would cover take resulting from recently approved oil and gas activities.

² Claims brought under the MMPA, as well as certain claims under the ESA, are brought pursuant to the Administrative Procedure Act (“APA”) and therefore do not require 60 days notice before suit. To the extent any of the violations of law described in this letter require affirmative action by the Secretary, please consider this letter a formal petition for such action pursuant to 5 U.S.C. § 553(e).

protect against further depletion and extinction, the MMPA established a “moratorium on the taking . . . of marine mammals.” *Id.* § 1371.

Under the MMPA, the term “take” means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.* § 1362(13). “Harass” is further defined to include acts of “torment” or “annoyance” that have the potential to injure a marine mammal or marine mammal stock in the wild or have the potential to “disturb” them “by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” *Id.* § 1362(18); 50 C.F.R. § 216.3 (defining “Level A” and “Level B” harassment).

All takings of marine mammals (except for certain specified activities such as subsistence hunting and commercial fishing) are prohibited under the MMPA unless first authorized by the Secretary of Interior or Commerce through the issuance of either small take regulations or an “incidental harassment” authorization. 16 U.S.C. § 1371(a)(5); 50 C.F.R. § 18.27 (FWS), 216.106-07 (NMFS). The MMPA and its accompanying regulations set forth standards and procedures, including public comment requirements, which must be satisfied before either small take regulations or incidental harassment authorization may issue. *Id.*

Section 101 of the MMPA allows the Secretaries of Interior and Commerce, through their agencies, FWS and NMFS, to authorize take via regulations for not more than five years on the condition that: (i) it is limited to a “specified geographical region”; (ii) it allows the taking of only “small numbers” of marine mammals; (iii) the takings it authorizes have no more than a “negligible impact” on species and stocks; (iv) it provides for the monitoring and reporting of such takings; and (v) it prescribes methods and means of effecting the “least practicable adverse impact” on species and stocks and their habitat. 16 U.S.C. § 1371(a)(5)(A). Each of these requirements is mandatory and cannot be skirted by claims of insufficient information. If the issuance of a small take permit is found to be appropriate, FWS or NMFS will issue a “Letter of Authorization” (“LOA”) to the applicant, allowing it to take action consistent with the regulations. 50 C.F.R. § 18.27 (FWS) and § 216.106 (NMFS).

If the expected take is limited to harassment and does not have the potential to result in serious injury or mortality, FWS and/or NMFS may issue an Incidental Harassment Authorization (“IHA”) for not more than one year, provided that all of the other conditions that apply to small take regulations are met. 16 U.S.C. § 1371(a)(5)(D), 50 C.F.R. § 216.107.

The prohibitions of the MMPA apply to any “person,” 16 U.S.C. § 1372(a)(1), which is defined to include “any officer, employee, agent, department, or instrumentality of the Federal Government.” 16 U.S.C. § 1362(10)(B). Secretary of the Interior Ken Salazar and his subordinates at the MMS are “persons” subject to the MMPA. Violations of the MMPA are subject to criminal and civil penalties. 16 U.S.C. § 1375.

B. The Endangered Species Act

The Endangered Species Act, 16 U.S.C. §§ 1531-1544, was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

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

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

Section 7 of the ESA requires federal agencies to consult with FWS and/or NMFS for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined in the ESA’s implementing regulations to include “(b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02. At the completion of formal consultation FWS and/or NMFS issues a biological opinion that determines if the agency action is likely to jeopardize the continued existence of the species. In formulating the biological opinion, FWS and/or NMFS must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). If an action is not likely to affect listed species, the action agency may enter into informal consultation with FWS and/or NMFS, which results in a “concurrence letter” if FWS and/or NMFS agrees that listed species are not likely to be affected.

Section 9 of the ESA specifically prohibits the “take” of an endangered species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to include harassing, harming, pursuing, wounding or killing such species, 16 U.S.C. § 1532(19). The term “harm” is further defined to include “significant habitat modification or degradation where it . . . injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. §17.3 “Harass” includes any “act or omission which creates the likelihood of injury to wildlife by annoying it to such and extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of “take.” *Babbitt v. Sweet Home*

Chapter of Communities for a Great Oregon, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; *see also National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994).

Courts have repeatedly held that government actions authorizing third parties to engage in harmful activities can constitute an illegal taking under Section 9 of the ESA. *See Strahan v. Coxe*, 127 F.3d 155, 158, 163-64 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998) (state agency caused takings of the endangered right whale because it “licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]”); *Defenders of Wildlife v. Administrator, Env'tl. Protection Agency*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency caused takes of endangered black-footed ferret through its “decision to register pesticides” even though other persons actually distributed or used the pesticides); *Loggerhead Turtle v. City Council of Volusia County*, 148 F.3d 1231, 1253 (11th Cir. 1998) (county’s inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA). Consistent with this precedent, the Secretary’s issuance and approval of oil and gas leases, exploration plans, development plans, and seismic surveys that result in take of ESA-listed marine mammals can be the legal cause of a prohibited taking and thereby be subject to regulation under Section 9 of the ESA.

Under certain circumstances FWS or NMFS may authorize a federal agency to incidentally take ESA-listed species pursuant to an incidental take statement after completing Section 7 consultation. 16 U.S.C. § 1536(b)(4). Section 7(b)(4)(c) of the ESA specifies that, in order to provide an incidental take statement for an endangered or threatened species of marine mammal, the taking must also be authorized under section 101(a)(5) of the MMPA. *Id.*

C. Gulf of Mexico Marine Mammals

The Gulf of Mexico is one of the most productive—and fragile—marine ecosystems in the nation. It supports a staggering array of marine life and represents an important contribution to the Gulf coast economy. The Gulf of Mexico is home to thousands of marine species, ranging from simple invertebrates such as gastropods and sponges to complex and highly evolved fish and marine mammals. It is estimated that there are thousands of species of invertebrates, at least 600 species of fish, and 29 species of cetaceans in the Gulf. In addition, five of the world’s eight species of sea turtles as well as tens of thousands of shore and coastal birds reside in or migrate to the Gulf of Mexico. More than 300 species of coral, combined with other hard-bottom communities, wetlands, seagrass beds, mangroves, and soft-bottom communities, provide the necessary habitat to support this rich assemblage of marine life. These diverse and highly complex habitats provide food, shelter, and spawning grounds for all of the Gulf’s species at different points during their life history.

Many of the marine mammals living in the Gulf are listed as endangered under the ESA. Six endangered whale species are known to occur in the Gulf of Mexico—the sperm whale, blue whale, finback whale, sei whale, humpback whale and North Atlantic right whale—and the West Indian manatee inhabits the Gulf’s coastal waters. Other species of marine mammals that occur in the Gulf of Mexico, all of which are protected under the MMPA, include dwarf and pygmy sperm whales, Bryde’s whales, several species of beaked whales, Northern Gulf of Mexico

stocks of bottlenose dolphins, Atlantic and pantropical spotted dolphins, striped dolphins, spinner dolphins, Clymene dolphins, Fraser's dolphins, killer whales, pygmy killer whales, Risso's dolphins, melon-headed whales, and short-finned pilot whales. In total, twenty-nine species of marine mammals occur in the Gulf of Mexico. MMS, Gulf of Mexico OCS Oil and Gas Lease Sales: 2009-2012; Central Planning Area Sales 208, 213, 216, and 222; Western Planning Area Sales 210, 215, and 218; Final Supplemental Environmental Impact Statement at 4-84 (2009)(available at <http://www.gomr.mms.gov/PDFs/2008/2008-041.pdf>) (hereinafter "SEIS"); See also, Waring GT, Josephson E, Maze-Foley K, and Rosel PE, editors. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments -- 2009. NOAA Tech Memo NMFS NE 213 (2009).

D. Take of Marine Mammals from Oil and Gas Activities in the Gulf

Offshore oil and gas exploration and development activities harm, harass and otherwise take marine mammals through, among other things, noise, pollution, vessel strikes, marine debris, and oil spills. In its Environmental Impact Statement for lease sales during the period of 2007-2012, MMS concluded that the "[e]ffects of the incremental contribution of a proposed action combined with non-OCS activities may be deleterious to cetaceans occurring in the [Gulf of Mexico]." MMS, Gulf of Mexico OCS Oil and Gas Lease Sales: 2007-2012 Environmental Impact Statement at 4-332 (Apr. 2007) (hereinafter "EIS").

Noise

Noise from seismic surveys, exploration drilling, vessel traffic, air traffic, construction, and operations may harm marine mammals. The noise produced by seismic survey airguns is tremendously loud, has far-ranging impacts, and has the "potential to harm marine mammals." SEIS at 4-86, 89. A large seismic array can produce peak pressure levels higher than that of virtually any other man-made source, save explosives—over 250 decibels. If the seafloor is hard and rocky, the pulses generated by the array might be heard for thousands of miles; under the right conditions, they can reverberate in such a way as to sound nearly continuous, masking the calls of baleen whales and other animals that rely on the acoustic environment for breeding and survival. An integral part of offshore oil development, seismic exploration occurs throughout the Gulf of Mexico.

Potential effects on Gulf of Mexico marine mammals include disturbance (i.e., subtle changes in behavior, interruption of previous activities, or short- or long-term displacement), masking of natural sounds (e.g., surf and predators) and calls from nonspecifics, stress (physiological), and hearing impairment (permanent or temporary) by explosions and strong nonexplosive sounds.

SEIS at 4-86-87. In its Biological Opinion, NMFS concluded that, "sperm whales are expected to be harassed through disruption of important biological behaviors as a result of the use of airguns in seismic surveys associated with the proposed action and these behavioral responses are likely to result in a biological effect which may adversely affect sperm whales." NMFS, Endangered Species Act: Section 7 Consultation Biological Opinion Gulf of Mexico Oil and Gas Activities 2007-2012 at 72 (June 29, 2007) (hereinafter "BiOp").

Other than underwater explosions, airgun arrays used in seismic surveying during oil and gas exploration generate the loudest human-made noise in the oceans. During operations, these airguns fire and generate a sound pulse once every seven to fifteen seconds. The noise generated by seismic airguns can propagate long distances in water. The noise generated by seismic airguns used for oil and gas exploration can be detected by underwater hydrophones several thousand kilometers away from the airguns that generate the noise. Several types of seismic surveys are used in offshore oil and gas exploration, including marine streamer 3D seismic surveys, Ocean Bottom Cable 3D seismic surveys, marine streamer 2D seismic surveys, and high resolution shallow-hazard and site-clearance surveys. Each of these involves the use of airguns. Several also involve the use of sonars, the sound source levels of which approach those of airguns in intensity.

Underwater noise like that generated by seismic airguns can harm marine mammals in numerous ways. Noise can interfere with communication among marine mammals, impair social bonding, and mask natural sounds that marine mammals rely on to obtain information about their environment and to avoid predators. MMS research found that even low levels of exposure to airguns largely reduced the foraging rate of some sperm whales. MMS, Sperm whale seismic study in the Gulf of Mexico: Synthesis report at 264 (2008) ([available at www.gomr.mms.gov/PI/PDFImages/ESPIS/4/4445.pdf](http://www.gomr.mms.gov/PI/PDFImages/ESPIS/4/4445.pdf)) (hereinafter “Sperm whale seismic study”). Noise can cause marine mammals to avoid areas, including areas used for feeding, resting or migration. Repeated avoidance of feeding or resting areas can have long-term adverse effects to marine mammals, such as reducing the overall fitness or reproductive rate of a population. Underwater noise has been shown to cause physiological impacts, and to cause serious injury and death to marine mammals. Fatal marine mammal strandings have been documented in areas near active seismic surveys on at least two occasions. Seismic airgun pulses of sufficient volume also have the potential to cause temporary and permanent hearing loss in marine mammals.

Both NMFS and FWS recognize a 180-dB threshold for the onset of Level A harassment (likely to cause serious injury, including permanent hearing loss) for cetaceans under the MMPA. *See, e.g.*, FWS, Marine Mammals; Incidental Take during Specified Activities, 73 Fed. Reg. 33212, 33217 (June 11, 2008); NMFS, Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program in the Chukchi Sea, AK; Notice, 75 Fed. Reg. 25730, 25743 (May 7, 2010). For Level B harassment (potential to disrupt essential behaviors) that threshold is 160-dB. Marine Mammals; Incidental Take During Specified Activities, 73 Fed. Reg. 33212, 33224 (June 11, 2008). Seismic airguns often have source levels over 250-dB, meaning any marine mammal near the ship will be exposed to dangerous sound levels (Level A harassment), while animals many kilometers from the ship will be exposed to disruptive sounds that constitute Level B harassment. Between 2003 and 2006, data compiled from observers recorded 287 sperm whale sightings during active seismic surveys, which amounts to take.

While a 160-dB threshold is recognized by NMFS and FWS as the onset of harassment from pulsed sounds such as airguns, NMFS has also recognized a 120-dB threshold for the onset of harassment from continuous sounds such as from exploratory drilling. *See, e.g.*, 75 Fed. Reg. at 25732 (May 7, 2010) (“NMFS currently uses a threshold of 120 dB re 1 μ Pa (rms) for the

onset of Level B harassment from continuous sound sources.”) (proposed IHA for exploratory drilling in the Chukchi Sea off Alaska). A 120-dB zone can extend many kilometers from a drill ship. Noise from exploration or production drilling is relatively constant and can “mask cetaceans’ reception of sounds produced for echolocation and communication.” EIS at 4-108; SEIS at 4-87-88. Additionally, offshore oil and gas activities also significantly increase vessel and air traffic, thus creating noise that disturbs marine mammals by “eliciting a startle response or masking other sounds.” SEIS at 4-86. Therefore, almost every stage of oil and gas development in the Gulf of Mexico harms and harasses marine mammals.

Given the number of seismic surveys and drilling operations that occur each year in the Gulf, hundreds (likely thousands) of square kilometers of the Gulf are ensonified to levels exceeding MMPA harassment thresholds each year, exposing many (if not all) of the Gulf’s marine mammal populations to disruptive and potentially dangerous levels of sound. MMS has even acknowledged take could rise above 200 marine mammals per year, including endangered sperm whales, from seismic activities even with mitigation measures. MMS, Geological and Geophysical Exploration for Mineral Resources on the Gulf of Mexico Outer Continental Shelf, Final Programmatic Environmental Assessment at L-27-31 (July 2004).³

Vessel strikes

For leases between 2007 and 2012, MMS estimated that there will be 119,000-241,000 trips by service vessels in the Central Planning Area and an additional 94,000-155,000 trips in the Western Planning Area. SEIS at 4-87-88; EIS at 4-112. This significant increase in vessel traffic will contribute to collisions with whales and other marine mammals. NMFS estimated that 7-8 sperm whales may be harassed annually by vessels. BiOp at 17. Vessel strikes can cause serious injuries and death of marine mammals. In its EIS for Gulf of Mexico lease sales, MMS concedes:

Increased traffic from support vessels involved in survey, service, or shuttle functions will increase the probability of collisions between vessels and marine mammals occurring in the area. These collisions can cause major wounds on cetaceans and/or be fatal (e.g., northern right whale, Kraus, 1990, and Knowlton et al., 1997; bottlenose dolphin, Fertl, 1994; sperm whale, Waring et al., 1997).

EIS at 4-107. The development and exploration of deepwater areas for offshore oil and gas has “increased the risk of OCS vessel collisions with sperm whales and other deep-diving cetaceans (e.g., *Kogia* and beaked whales).” SEIS at 4-87-88. MMS ultimately concluded that “[s]mall numbers of marine mammals could be killed or injured by a chance collision with a service vessel” for lease sales in the Gulf of Mexico. EIS at 4-113.

³ This is likely a vast underestimate considering that for a single research vessel doing seismic surveys in the Gulf in 2007, NMFS estimated a total of 3770 marine mammal takes, including 22 sperm whales, for authorizing incidental take under the MMPA. NMFS, Incidental Takes of Marine Mammals During Specified Activities; Seismic Testing and Calibration in the Northern Gulf of Mexico, 72 Fed. Reg. 45744 (Aug. 15, 2007).

Pollution

Operations from offshore oil and gas exploration and development “routinely” discharge wastes, including those with heavy metal or other toxins, into the water. SEIS at 4-86. These effluents contaminate the water and tend to biomagnify and bioaccumulate in the food web. EIS at 4-106; SEIS at 4-86. In turn, marine mammals are highly susceptible to concentrating toxins from ingesting prey. *Id.*

Marine debris from discarded plastic used during offshore drilling and production can harm marine mammals by entangling them, causing injury or impaired mobility that can interfere with feeding and reproduction. SEIS at 4-88. “Accidental release of debris from OCS activities is known to occur offshore, and ingestion of, or entanglement in, discarded material could injure or kill cetaceans.” EIS at 4-111. MMS concluded that sperm whales may be particularly vulnerable to impacts from marine debris because of their presence and foraging behaviors. EIS at 4-113.

Although permits may not be issued for taking marine mammals as a result of an accidental oil spill because it is unlawful, these impacts must still be considered to determine whether the activity will jeopardize threatened or endangered species or result in excessive take of marine mammals. In light of the recent oil spill in the Gulf of Mexico, it is clear that the possibility of a large oil spill is reasonably foreseeable and must be evaluated. Oil spills and response activities may adversely affect marine mammals, “causing physical injury and irritation, fouling of baleen plates, respiratory stress from inhalation of toxic fumes, food reduction or contamination, direct ingestion of oil and/or tar, and temporary displacement from preferred habitats or migration routes.” SEIS at 4-90. MMS estimates that a couple of blowouts per lease sale could occur in the Gulf of Mexico. SEIS at 4-91. If a blowout were to occur, the pressure waves and noise generated by the eruption of gases and fluids might be significant enough to harass or injure marine mammals. SEIS at 4-91. According to MMS, “spills occurring in these waters could impact more species and more individuals than coastal spills potentially impacting coastal marine mammals.” SEIS at 4-91.

II. The Secretary’s Violations of Law

A. Marine Mammal Protection Act

As described above, take of marine mammals has occurred and is virtually certain to continue to occur as a result of oil and gas exploration and development activities authorized, approved, and allowed by the Secretary. Neither the Secretary nor any industry operator has to date received any authorization pursuant to the MMPA for such take. As the Secretary admits in his EIS for oil and gas activities in the Gulf of Mexico, oil and gas activities can harm and harass marine mammals in a variety of ways. Thus, the Secretary is in continuing violation of the MMPA by authorizing, approving and allowing oil and gas activities in the Gulf of Mexico that are certain to result in take without obtaining, or requiring operators to obtain, take authorization from NMFS. 16 U.S.C. §§ 1371(a)(5) & 1372.

The Secretary's violations of the MMPA in the Gulf of Mexico can only be considered knowing and deliberate. The Secretary attempted to gain MMPA authorization from NMFS in 2002, yet that process has never been finalized.⁴ In 2002, MMS petitioned NMFS for regulations under the MMPA for incidental take of sperm whales due to seismic surveys in the Gulf of Mexico. *See* NMFS, Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Conducting Oil and Gas Exploration Activities in the Gulf of Mexico, 68 Fed. Reg. 9991 (Mar. 3, 2003). In 2004, MMS revised its petition to include the incidental take of other species of marine mammals, such as the Bryde's whale and several species of dolphins and beaked whales. In response NMFS published a Notice of Intent to Prepare an EIS. *See* Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Conducting Oil and Gas Exploration Activities in the Gulf of Mexico, 69 Fed. Reg. 67536 (Nov. 18, 2004). Neither the MMPA regulations nor the EIS have been completed,⁵ and as of March 2010, MMS was again revising its petition for MMPA rulemaking. MMS, Proposed Gulf of Mexico OCS Oil and Gas Lease Sale 215 Environmental Assessment (Mar. 2010). Despite this acknowledgement that oil and gas activities harm and harass marine mammals in violation of the MMPA, the Secretary has continued to authorize, approve and allow such activities without MMPA authorization. Such behavior constitutes a knowing violation of the MMPA. *See* 16 U.S.C. §§ 1372 & 1375(b).⁶

⁴ In 2007, MMS finalized regulations changing the requirements in exploration plans and development plans to contain specific environmental information concerning threatened or endangered species listed under the ESA and marine mammals protected under the MMPA. MMS, Oil, Gas, and Sulphur Operations in the Outer Continental Shelf (OCS)--Plans and Information--Protection of Marine Mammals and Threatened and Endangered Species, 72 Fed. Reg. 18577 (Apr. 13, 2007). However, the information requirement under the final rule cannot "substitute for a Letter of Authorization or Incidental Harassment Authorization" because "MMS does not have authority through the reporting requirements to authorize the taking of any marine mammal under the MMPA." *Id.* at 18578.

⁵ It is unclear why NMFS never completed the MMPA authorization process. It is possible that NMFS was not able to authorize the take because it could not determine that the requirements of MMPA authorization were met—i.e., that only small numbers of marine mammals would be taken and that the take would have no more than a negligible impact on the species or stocks.

⁶ Furthermore, the Secretary's behavior in approving activities that result in unpermitted take of marine mammals in the Gulf is all the more remarkable as it is completely at odds with how he conducts its operations in Alaska. In Alaska, the Secretary conditions the approval of all oil and gas projects on the receipt by the operator of MMPA take authorization from FWS and NMFS. *See, e.g.,* MMS Approval of Shell Gulf of Mexico, Inc.'s 2010 Outer Continental Shelf Lease Exploration Plan for the Chukchi Sea (Dec. 7, 2009), *available at* http://www.mms.gov/alaska/ref/ProjectHistory/2009_Chukchi_Shell/2009_1207.pdf, and MMS Approval of Shell Gulf of Mexico, Inc.'s 2010 Outer Continental Shelf Lease Exploration Plan for the Beaufort Sea (Oct. 16, 2009), http://www.mms.gov/alaska/ref/ProjectHistory/Shell_BF/2009_1016_EPapproval.pdf (stating that "[n]o exploratory drilling activities can be conducted until Shell has received an approved Marine Mammal Protection Act (MMPA) authorization from the National Marine Fisheries Service and the U.S. Fish and Wildlife Service for the specific activity and the MMS has received a corresponding Endangered Species Act Incidental Take Statement (ITS) for threatened, endangered and protected species"). In 2009-2010 alone, FWS issued at least 24 LOAs to oil and gas operators in the Beaufort and Chukchi seas off Alaska. U.S. Fish and Wildlife Service, Incidental Take Regulations and Letters of Authorization available for Public Review, at <http://alaska.fws.gov/fisheries/mmm/itr.htm>. NMFS is currently in the process of considering MMPA harassment authorization applications from Shell, which plans to drill exploratory wells in the Chukchi and Beaufort seas this summer. Shell's application for MMPA authorization estimates that nearly 2,000 cetaceans could be taken in the Beaufort Sea alone as a result of exploration activities. Shell, Application for Incidental Harassment Authorization for the Non-Lethal Taking of Whales and Seals in Conjunction with Planned 2010 Exploration Drilling Program near Camden Bay in the Beaufort Sea, Alaska (March 2010) at 28, *available at* http://www.nmfs.noaa.gov/pr/pdfs/permits/shell_camden_iha_application.pdf. That the Secretary follows (albeit poorly) MMPA

B. Endangered Species Act

The Secretary is also in violation of the ESA for the unauthorized take of threatened and endangered marine mammals resulting from its approvals of offshore oil and gas exploration and development activities in the Gulf of Mexico.

The Secretary's actions approving lease sales, exploration plans, development plans, and seismic surveys for offshore oil and gas activities in the Gulf of Mexico constitute "agency actions" under the ESA. Thus, MMS was required to undergo Section 7 consultation with NMFS and FWS before it approved any such plans so as to ensure that the authorized activities would not jeopardize any listed species. As a separate requirement, MMS must obtain an Incidental Take Statement prior to taking any actions resulting in take of ESA-listed species. 16 U.S.C. § 1536(b)(4) & 1538. The Secretary has never obtained such authorization for taking ESA-listed marine mammals in the Gulf of Mexico for its offshore oil and gas activities.

The Secretary is well aware of his lack of take authorization under the ESA. In 2007, for its Gulf of Mexico 2007-2012 leasing program activities MMS engaged in informal consultation with FWS. SEIS 4-85. MMS also formally consulted with NMFS resulting in a Biological Opinion dated June 29, 2007. SEIS 4-85. The Biological Opinion concluded that the proposed lease sales and associated activities are not likely to jeopardize listed species. MMS, Proposed Gulf of Mexico OCS Oil and Gas Lease Sale 213 Environmental Assessment at 67 (Oct. 2009). Although NMFS issued an Incidental Take Statement on sea turtle species, which contained measures to help minimize take, NMFS never authorized take of ESA-listed marine mammals. BiOp at 99-100. Although acknowledging that takes of sperm whales are likely to occur, "NMFS [did] not including an incidental take statement for the incidental take of whale species because the take of marine mammals has not been authorized under section 1010(a)(5)(A) of the [MMPA]." *Id.* NMFS noted that upon MMPA authorization, it would estimate the number of potential takes and authorize any take necessary. BiOp at 71. In other words, NMFS could not authorize take of ESA-listed marine mammals absent authorization under the MMPA.

Although MMS has never received ESA take authorization for any listed marine mammals, it has continued to approve Gulf of Mexico offshore exploration and development activities. These activities harm, injure, and harass threatened and endangered marine mammals, thus resulting in take. As described above, seismic surveys disturb whales, mask important communications, and can result in temporary or permanent hearing loss. Noise from drilling, service vessels, and air traffic also contributes to noise disturbance. Additionally, offshore oil and gas activities harm and harass marine mammals through pollution—including routine discharges, marine debris, and oil spills—and marine mammals are often victims of vessel strikes that can result in serious injury or mortality.

In this case, no take of ESA-listed marine mammals has ever been authorized related to oil and gas activities in the Gulf. Meanwhile, the Secretary's actions authorizing, approving and allowing oil and gas activities that are certain to result in take of ESA-listed marine mammals

procedures in Alaska renders his complete failure to comply with the MMPA in the Gulf both inexplicable, and completely inexcusable.

such as sperm whales are continuing. Take can be authorized via an incidental take statement issued pursuant to the ESA only if such take is also authorized pursuant to section 101 of the MMPA. As described above, no such take authorization has ever been granted for MMS's activities. The Secretary's continued authorization of exploration, development, and seismic activities directly authorizes offshore oil and gas activities that have been documented to take marine mammals and therefore is the legal cause of such take. Such take is ongoing, and likely to continue to occur. As such the Secretary is violating section 9 of the ESA.⁷

III. Conclusion

As the above makes clear, the Secretary's authorizing, approving, and allowing offshore oil and gas lease sales, exploration and drilling plans, and seismic surveys that are certain to result in take of marine mammals, including ESA-listed marine mammals such as sperm whales, constitute violations of the MMPA and the ESA. If the Secretary does not act correct the violations described in this letter, the Center for Biological Diversity will pursue litigation against the Secretary and his agencies and officials in Federal Court. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would prevent litigation would be for the Secretary to initiate the process to authorize the take of marine mammals in the Gulf of Mexico pursuant to Section 101(a)(5) of the MMPA by a date certain. Meanwhile, the Secretary must stop approving lease sales, exploration and development plans, and seismic exploration permits in the Gulf of Mexico until and unless it obtains the required authorizations under the MMPA and ESA.

If you have any questions, wish to discuss this matter, or feel this notice is in error; please contact me at 415-436-9682 x 308.

Sincerely,



Miyoko Sakashita
Oceans Program Director

⁷ The Secretary's continued authorization of offshore oil and gas activities also violates sections 2(c) and 7(a)(1) of the ESA because the agency refuses to use its authorities to further the purpose of listed species conservation. Specifically, by not taking other measures such as lease or permit suspension to avoid unlawful take following the unpermitted take of ESA-listed marine mammals, the Secretary is violating these provisions.