

PETITION FOR RULEMAKING

**DISCONTINUING USE OF CATEGORICAL EXCLUSIONS FOR APPROVING
EXPLORATION PLANS AND DEVELOPMENT OPERATIONS COORDINATION
DOCUMENTS IN THE GULF OF MEXICO**

July 12, 2023

Submitted by:

**CENTER FOR BIOLOGICAL DIVERSITY, BAYOU CITY WATERKEEPER, SIERRA
CLUB, FRIENDS OF THE EARTH, HEALTHY GULF, AND EARTHJUSTICE**

CENTER FOR BIOLOGICAL DIVERSITY, BAYOU CITY WATERKEEPER, SIERRA CLUB, FRIENDS OF THE EARTH, HEALTHY GULF, EARTHJUSTICE

July 12, 2023

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Petition to Repeal the Categorical Exclusion for Approval of an Offshore Exploration Plan, Development & Production Plan, or Development Operation Coordination Document

Dear Secretary Haaland, Ms. Daniel-Davis, and Ms. Klein:

The undersigned groups, Center for Biological Diversity, Bayou City Waterkeeper, Sierra Club, Friends of the Earth, Healthy Gulf, and Earthjustice, hereby petition the Department of the Interior (Interior) and the Bureau of Ocean Energy Management (BOEM) to immediately discontinue all use of the categorical exclusion (CE) for approving exploration plans (EP), development and production plans (DPP), and development operations coordination documents (DOCD) in the Gulf of Mexico, as well as undertake rulemaking to permanently repeal the CE.

The climate emergency is already the cause of devastation across the planet: rising seas and coastal erosion; more destructive hurricanes and wildfires; increasing numbers of heatwaves, droughts, and floods; imperiled food and water security; and impending ecosystem collapse. The Gulf of Mexico region—long-treated as a sacrifice zone by both the oil industry and the federal government—is ground-zero for many of these impacts.

The overwhelming scientific consensus has conclusively determined that without significant, rapid emissions reductions, warming will exceed 1.5 °C and will result in catastrophic damage around the world. Every fraction of additional warming above 1.5 °C will worsen these harms, threatening people’s health, safety, and livelihoods, as well as imperiling the economy and undermining national security for this generation and generations to come. Every ton of greenhouse gas emissions added to the atmosphere deepens the crisis.

Approving new offshore drilling activity also causes more oil spills, more harm to the marine species that are struggling to survive, and more toxic pollution that sickens Gulf communities overburdened by the onshore infrastructure—including refineries, gas processors, and petrochemical plants—that supports offshore drilling.

Our nation must transform our extractive economy to a regenerative and inclusive one in a manner that advances environmental, racial, and economic justice. As part of this transformation, the federal government must stop permitting new offshore oil and gas extraction. Until it does, the federal government must amend its current practices that only exacerbate the numerous harms inherent in offshore oil and gas drilling.

The currently degraded state of the Gulf is in part a consequence of policies such as the CE that allow for expedited approvals of oil and gas activity. Whatever the initial motivation for its development, the government can no longer justify the CE under existing law, given what is known about the aggregated effects of exploration and drilling on the region, the long-term implications for the climate from committing to decades of additional fossil fuel production, and the ever-increasing risks of development in the ultra-deep waters of the Gulf. The CE allows the government to avoid taking a hard look at these impacts. Interior and BOEM should immediately undertake all necessary steps to end any further reliance on it.

I. INTRODUCTION

In 1981, Interior first adopted a CE for oil and gas activities in the Outer Continental Shelf (OCS) in much of the Gulf of Mexico, allowing exploration and development plans to avoid the site-specific analysis of potential consequences otherwise required by the National Environmental Policy Act (NEPA). Over more than four decades, the repeated invocation of the exclusion has contributed to lax governmental oversight and a failure to grapple with the effects of long-term resource extraction in the Gulf, facilitating the area's unofficial status as the country's offshore oil and gas sacrifice zone.

Ill-conceived from the beginning, this CE has only become more untenable over time. Its use has continued as the volume and character of drilling in the Gulf has intensified and as the harms to marine species have accumulated and become more manifest. Interior continues to invoke the CE even following the 2010 catastrophic Deepwater Horizon blowout—an exploration well authorized under the CE—which caused unprecedented environmental destruction across thousands of square miles of the Gulf. Recent approval data (from data.boem.gov) show how BOEM is applying the CE in practice. Looking at approvals from the past ~5 years (Jan. 1, 2018 through December 31, 2022), BOEM still uses the CE to issue the vast majority of its DOCD approvals and about a quarter of its EP approvals in the Gulf.¹ It is past time for reassessing this outdated and environmentally destructive exclusion.

¹ BOEM approved or conditionally approved approximately 600 new, revised, or supplemental DOCDs and approximately 400 new, revised, or supplemental EPs in the last five years. Out of those approvals, BOEM used the CE to approve nearly all the DOCDs (about 560 out of the 600 DOCD approvals it issued). It used the CE to support about a quarter of the EPs it approved (approximately 90 out of the 400 EP approvals it issued).

We request that Interior immediately undertake rulemaking to repeal or otherwise eliminate the CE for exploration and development in the Gulf of Mexico.² This request should be considered a petition under the Administrative Procedure Act (APA), which allows any interested party to ask an agency to issue, amend, or repeal a rule.³ We urge Interior to begin the process as soon as possible to avoid any potential disruption of this effort in the final two years of the Biden Administration’s first term.⁴

In the interim, we ask that BOEM exercise its discretion to immediately discontinue its use of the CE. Nothing in NEPA or the relevant regulations demands the application of existing CEs. As explained below, it is more appropriate, if not required, to complete a site-specific analysis for each EP and DOCD approval in the Gulf.⁵ Interior has recognized the harm that arises from this CE in the past, at one point ceasing its use and initiating a process that would have reconsidered its existence. That initiative stalled due to a change in administrations, but the logic motivating it remains equally compelling today.

II. STATUTORY FRAMEWORK

A. National Environmental Policy Act

NEPA has long been considered the Magna Carta of U.S. environmental law, an early groundbreaking enactment that has had far-reaching effects. As noted by the Supreme Court, “NEPA declares a broad national commitment to protecting and promoting environmental quality.”⁶ NEPA ensures that an agency “will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”⁷

Environmental review as mandated by NEPA is not a meaningless, paper-pushing exercise where an agency must jump through procedural hoops to reach a predetermined result.⁸ In other words, compliance with its procedures “is not an end unto itself.”⁹ Rather, it is through

² See Dep’t of the Interior, 516 Dep’t Manual, *Ch. 15: Managing the NEPA Process—Minerals Management Service* 15.4(c)(10) (2004) (Interior Dep’t Manual).

³ 5 U.S.C. § 553(e). Agencies must respond to petitions in a reasonable amount of time. *Id.* at 555(b).

⁴ Moreover, the existing Council on Environmental Quality regulations require that agencies review and revise their regulations implementing NEPA by September 14, 2023. 40 C.F.R. § 1507.3(b). This petition should be incorporated into that effort.

⁵ 40 C.F.R. § 1501.5(b) (noting that an “agency may prepare an environmental assessment on any action in order to assist agency planning and decision making”).

⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

⁷ *Id.* at 349.

⁸ See 40 C.F.R. § 1500.1(a) (noting that NEPA is intended “to provide for informed decision making and foster excellent action”).

⁹ *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000).

NEPA’s “action-forcing” procedures that the “sweeping policy goals” of the statute are realized by ensuring that agencies consider the full consequences of an action and have before them the information needed to avoid or minimize any harm.¹⁰

An agency must prepare NEPA documents before any “irreversible and irretrievable” commitment of resources is made.¹¹ Generally, an agency is required to prepare an Environmental Impact Statement (EIS) for all major federal actions that may significantly affect the environment. An agency can also prepare an Environmental Assessment (EA) for actions that will not have significant impacts. Additionally, under certain circumstances, an agency can adopt “categorical exclusions,” to delineate those types of actions that do not demand a more searching review.¹² An agency adopting a categorical exclusion must also “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”¹³

The Council on Environmental Quality’s (CEQ) long-standing NEPA regulations specified that categorical exclusions are those that “do not individually or cumulatively have a significant effect on the human environment[.]”¹⁴ The regulations also place on agencies an ongoing duty to review and revise their procedures—including any categorical exclusions—to “ensure compliance” with purposes and provisions of NEPA.¹⁵

B. Outer Continental Shelf Lands Act

In 1953, Congress enacted the Outer Continental Shelf Lands Act (OCSLA) to govern federal leasing of the OCS for oil and gas development in federal waters.¹⁶ As amended in 1978, OCSLA delineates four distinct stages for oil and gas development activities on the OCS: (1) the development of a five-year leasing plan; (2) sale and issuance of oil and gas leases; (3) approval of lessee’s exploration plans; and (4) approval of lessee’s development and production plans.¹⁷ This “pyramidal” four-layered structure is meant to proceed from “broad-based planning to an

¹⁰ *Methow Valley*, 490 U.S. at 350.

¹¹ *See, e.g., California v. Norton*, 311 F.3d 1162, 1168 (9th Cir. 2002).

¹² 40 C.F.R. § 1501.4.

¹³ *Id.* § 1507.3(e)(2)(ii); *see also* 43 C.F.R. § 46.205(c).

¹⁴ 40 C.F.R. § 1508.4 (2005). In 2020, the Trump Administration weakened many of the NEPA regulations, although the revised regulations continue to recognize that categorical exclusions “normally do not have a significant effect on the human environment[.]” 40 C.F.R. § 1501.4(a).

¹⁵ *Id.* § 1500.6. CEQ recommends that agencies review categorical exclusions on a seven-year cycle to ensure that none are “outdated and no longer appropriate.” Mem. from Nancy Sutley, Chair CEQ, *Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act* 16 (Nov. 23, 2010) (“Sutley Memo”).

¹⁶ 43 U.S.C. § 1331 *et seq.*

¹⁷ *See, e.g., Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 125 (D.D.C. 2022), *vacated* 2023 WL 3144203 (D.C. Cir. 2023).

increasingly narrower focus as actual development grows more imminent.”¹⁸ NEPA’s requirements apply to each phase of the OCSLA process.¹⁹

Throughout OCSLA, Congress mandated accommodation of other aspects of the OCS beyond a singular focus on the extraction of fossil fuels. Management of the OCS must consider “economic, social, and environmental values of the renewable and nonrenewable resources.”²⁰ Indeed, BOEM must assess “the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.”²¹

OCSLA requires that a lessee obtain approval of an EP before beginning exploratory drilling.²² The EP must include a project-specific environmental impact analysis assessing the potential effects of the proposed exploration activities.²³ Typically, BOEM conducts its environmental review pursuant to NEPA, before issuing a decision approving, disapproving, or requiring modifications to the EP.²⁴ Specific to the Western Gulf of Mexico,²⁵ a lessee must submit a DOCD—rather than the otherwise applicable DPP—for the development or production of oil or gas.²⁶ BOEM will approve, disapprove, or require modifications of a DOCD within 60 days of the close of an OCSLA-mandated comment period, the release of an EIS, or the last amendment to a DOCD, whichever comes later.²⁷

¹⁸ *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981).

¹⁹ *Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

²⁰ *See, e.g.*, 43 U.S.C. § 1344(a)(1).

²¹ *Id.*; *see also id.* § 1351(h)(1) (“The Secretary shall require modification of a [exploration or development] plan if he determines that the lessee has failed to make adequate provision . . . for protection of the human, marine, or coastal environment . . .”).

²² 30 C.F.R. § 550.201(a)(1).

²³ *Id.* § 550.227.

²⁴ *Id.* §§ 550.232(c), 550.233.

²⁵ In general, BOEM uses “Western Gulf of Mexico” to refer to all of the Gulf’s OCS with the exception of those areas it determines are “adjacent to the State of Florida.” 30 C.F.R. § 550.105. The agency separately refers to three separate “planning areas” in the Gulf: Western, Central, and Eastern. *See* BOEM, *Gulf of Mexico OCS Region Blocks and Active Leases by Planning Area* (Jan. 3, 2023), https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/regional-leasing/gulf-mexico-region/Gulf%20of%20Mexico%20Region%20Lease%20Map_1.pdf. The “Western Gulf of Mexico” includes both the Western and Central Planning Areas, neither of which is adjacent to the State of Florida. Regardless of the precise terminology, it is clear that the CE excludes the Eastern Gulf of Mexico Planning Area (and small portions of the Central Gulf Planning Area), currently withdrawn from leasing until 2032. *See Areas Under Restriction*, BOEM, <https://www.boem.gov/oil-gas-energy/leasing/areas-under-restriction>. For simplicity, this petition will use “Western Gulf” and “Gulf of Mexico” (or “Gulf”) to include the Western and Central planning areas, except when referring to the broader marine or onshore environments.

²⁶ *See* 30 C.F.R. § 550.201(a).

²⁷ *Id.* § 550.270(a)(1).

OCSLA requires BOEM to reject an EP if it determines that such exploration “would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment” and the “activity cannot be modified to avoid such condition.”²⁸

Similarly, OCSLA requires BOEM to reject a DOCD if, *inter alia*, BOEM determines:

that (i) implementation of the plan would probably cause serious harm or damage to life (including fish and other aquatic life), . . . or to the marine, coastal or human environments, (ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time, and (iii) the advantages of disapproving the plan outweigh the advantages of development and production.²⁹

Without conducting comprehensive, site-specific NEPA review, BOEM has no reasonable basis on which to determine that authorizing exploration, development, and permitting activities in the Gulf will satisfy the relevant standards, including whether these activities could cause serious harm to the environment.

III. BACKGROUND

A. Development of the Gulf of Mexico Categorical Exclusion

In 1981, Interior published in the Federal Register, after notice and comment, its appendix of NEPA “compliance guidance.”³⁰ Among the CEs included in the appendix was one for approval “of an OCS exploration or development/production plan in the western Gulf of Mexico[.]”³¹ Interior received only three comments, two from oil companies and none directly addressing CEs.³² In 1986, Interior revised the Gulf of Mexico CE to add a number of exceptions—distinct from the “extraordinary circumstances” under NEPA—such as activities occurring near areas of high biologic productivity or using new or unusual technology while also clarifying the CE’s reach as the “central or western” Gulf of Mexico.³³ This time, a single comment was received, from the Advisory Council on Historic Preservation, expressing concern that some of the actions categorically excluded from the NEPA process could affect historic properties, including archeological sites.³⁴ That version of the CE, which can be found in Interior’s Department Manual, remains in place today.³⁵

²⁸ 43 U.S.C. §§ 1340(c)(1), 1334(a)(2)(A)(i).

²⁹ *Id.* § 1351(h)(1)(D); 30 C.F.R. § 550.271(c)(d).

³⁰ 46 Fed. Reg. 7485 (Jan. 23, 1981).

³¹ *Id.* at 7487. The CE included an exception, later removed, for instances in which lessees were required to provide additional environmental information pursuant to a then-existing policy. *Id.*

³² *Id.* at 7485.

³³ 51 Fed. Reg. 1855, 1857 (Jan. 15, 1986).

³⁴ *Id.* at 1856.

³⁵ See Interior Dep’t Manual, *supra* note 2, at 15.4(c)(10).

Interior has also developed, as part of its NEPA regulations, a number of “extraordinary circumstances” that would prohibit BOEM’s use of a CE, including those that may have “highly uncertain and potentially significant” effects or significant impacts on species listed under the Endangered Species Act (ESA).³⁶ However, according to a government report from 2010, because responsible agency officials had up to that point been “reluctant to conclude that such extraordinary circumstances were present, the rule in practice in the Gulf of Mexico was [to apply] the categorical exclusion[.]”³⁷

B. Deepwater Horizon and Its Aftermath

In May 2009, the Minerals Management Service (MMS), a precursor agency to BOEM, relied on two CEs to approve British Petroleum’s (BP) initial and revised exploration plans (and amendments) for operations on its Macondo Prospect, located a little over 50 miles off the Louisiana coast (a CE to approve the associated EP and a separate CE to approve subsequent applications for permits to drill).³⁸ Approximately one year later, on April 20, 2010, BP’s rig, the *Deepwater Horizon*, suffered a massive blowout and loss of well control while drilling in approximately 5,000 feet of water.³⁹ An explosion tore through the structure, killing eleven crewmembers, causing the rig to sink into the ocean, and allowing oil to erupt unchecked from the seabed.⁴⁰ Over 4 million barrels of oil flowed into the Gulf over the next 87 days, resulting in visible oil fouling more than 43,000 square miles of ocean and more than 1,300 miles of shoreline.⁴¹

The BP disaster prompted a flurry of activity from the federal government. In May 2010, long before the well was permanently sealed, the Obama Administration created the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (Deepwater Commission) to investigate the causes of the disaster.⁴² Around that time, the MMS was dissolved, and BOEM eventually claimed the responsibility for managing the nation’s offshore

³⁶ 43 C.F.R. § 46.215(d), (h); *see also* Section IV.B, *infra*.

³⁷ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* 82 (Jan. 2011) (DWC Report) (emphasis removed).

³⁸ CEQ, *Report Regarding the Minerals Management Service’s National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development* 12, n.26 (August 16, 2010) (CEQ Report); BOEM, BSEE, *Final Biological Assessment* 3 (Feb. 2013) (Final BA).

³⁹ Final BA, *supra* note 38, at 3.

⁴⁰ *Id.*

⁴¹ Deepwater Horizon Natural Resource Damage Assessment Trustees, NMFS, *Deepwater Horizon Oil Spill: Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement* 1-2 to 1-3, 1-14 (Feb. 2016) (Final PEIS).

⁴² *Weekly Address: President Obama Establishes Bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling*, The White House (May 22, 2010), <https://obamawhitehouse.archives.gov/the-press-office/weekly-address-president-obama-establishes-bipartisan-national-commission-bp-deepwa>.

resources.⁴³ In August 2010, CEQ released a report addressing the policies and practices for implementing NEPA in the OCS.⁴⁴ That same day, BOEM issued a memo stating that the exploration and development CE should not be invoked for activities in deeper waters and announcing its intent to begin the process of a “comprehensive review and evaluation of CEs for offshore oil and gas activities.”⁴⁵ In October, BOEM took the first step, publishing a notice of intent in the Federal Register to review the OCS CEs.⁴⁶

In January 2011, the Deepwater Commission issued its final report.⁴⁷ It concluded that “the breakdown of the environmental review process for OCS activities was systemic and that Interior’s approach to the application of NEPA requirements in the offshore oil and gas context needs significant revision.”⁴⁸ The report cited Interior’s use of categorical exclusions and its failure to conduct site-specific environmental analysis of drilling activities as examples and recommended that Interior “revise and strengthen [its] NEPA policies, practices, and procedures to improve the level of environmental analysis, transparency, and consistency at all stages of the OCS planning, leasing, exploration, and development process.”⁴⁹

This apparent momentum for change then inexplicably stalled. It was not until January 6, 2017, in the final days of the Obama Administration, that BOEM Director Abigail Ross Hopper issued a memorandum directing the agency to stop using the CE for both EP and DOCD approvals.⁵⁰ Director Hopper stated she was discontinuing use of the CE “because of the scale, scope, and complexity of operations and in order to allow for the consideration of alternatives and to provide more transparency.”⁵¹ All future approvals would “require preparation of a site-specific environmental assessment, programmatic environmental assessment, or equivalent

⁴³ *The Reorganization of the Former MMS*, BOEM, <https://www.boem.gov/about-boem/reorganization/reorganization-former-mms>. The agency that replaced MMS was briefly known as the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOMRE). BOMRE was subsequently split into three separate agencies, with BOEM “responsible for managing development of the nation’s offshore resources in an environmentally and economically responsible way.” *Id.* To avoid confusion, this petition will generally refer to BOEM as the relevant agency following the dissolution of MMS.

⁴⁴ See CEQ Report, *supra* note 38. The report was developed in “close consultation” with BOEM and the Interior. Mem. from Michael R. Bromwich, Director, BOEMRE to Walter Cruickshank, Deputy Director, BOEMRE, at 1 (Aug. 16, 2010) (Bromwich Memo).

⁴⁵ Bromwich Memo, *supra* note 44. BOEM defined the scope of the policy based not on actual water depth, but on the type of blowout preventer used, i.e., “a subsea blowout preventer (BOP) or a surface BOP on a floating facility.” *Id.*

⁴⁶ 75 Fed. Reg. 62,418, 62,418 (Oct. 8, 2010) (to “conduct a broad review of its categorical exclusions” for OCS decisions).

⁴⁷ See DWC Report, *supra* note 37.

⁴⁸ *Id.* at 260.

⁴⁹ *Id.* at 261.

⁵⁰ Mem. from Abigail Ross Hopper, Director, BOEM, to Walter Cruickshank, Deputy Director et al., at 2 (Jan. 6, 2017) (Hopper Memo).

⁵¹ *Id.*

environmental document that provides the *hard look* required by the NEPA.”⁵² Director Hopper also stated that BOEM had “decided to propose to delete the BOEM CEs” related to the approval of OCS exploration and development plans and would soon publish the proposal in the Federal Register for public comment.⁵³

Just two months later, however, BOEM’s new Acting Director, Walter Cruickshank, issued a directive reinstating the use of CEs for EP and DOCD approvals.⁵⁴ The only explanation was that the CEs would continue until such time that BOEM formally revised its CEs.⁵⁵ The memo maintained that BOEM was still contemplating revisions to the CEs but allowed that the deepwater policy from August 2010 still applied.⁵⁶

C. Amendments to CEQ’s NEPA Regulations

Rather than confront the acknowledged failings of the CE, the Trump Administration instead substantially revised the NEPA regulations, adding a new provision claiming that CEQ had “determined that the categorical exclusions contained in agency NEPA procedures as of September 14, 2020 are consistent with this subchapter.”⁵⁷ The Biden Administration’s more recent amendments to the regulations restored some of the previous provisions but retained the language regarding CEQ’s view of agencies’ CEs.⁵⁸ The details of CEQ’s alleged evaluation of every CE used by every federal agency have never been made public, and no revisions to BOEM’s OCS CEs were ever formally proposed.⁵⁹

D. Previous Petition

In the midst of the *Deepwater Horizon* disaster, the Center for Biological Diversity (Center), in June 2010, submitted a petition specifically requesting the elimination of “the categorical exclusion of exploration and development drilling plans from detailed review under NEPA.”⁶⁰ Interior did not address the petition until 2016, following a lawsuit by the Center.⁶¹ At that point, it denied the petition, claiming that the rulemaking was ongoing, and moreover, that the APA’s petition provisions do “not establish a procedure by which nongovernmental entities

⁵² *Id.* (emphasis in original).

⁵³ *Id.* at 1.

⁵⁴ Mem. from Walter Cruickshank, Acting Director, BOEM, to Renee Orr, Chief, Office of Strategic Resources et al. (Mar. 7, 2017).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 85 Fed. Reg. 43,304, 43,373 (July 16, 2020) (quoting the final language for 40 C.F.R. § 1507.3(a)).

⁵⁸ 87 Fed. Reg. 23,453 (April 20, 2022).

⁵⁹ In response to a FOIA request for documentation related to CEQ’s alleged assessment of the Interior CE, CEQ asserted that it had no relevant materials to disclose.

⁶⁰ Center for Biological Diversity, *Review of MMS NEPA Policies, Practices, and Procedures for OCS Oil and Gas Exploration and Development 1* (June 15, 2010).

⁶¹ *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 19 (D.D.C. 2017).

can petition for changes to internal agency handbooks or manuals.”⁶² Neither rationale applies here.

First, the review of Interior’s CEs has effectively concluded, after more than thirteen years without any demonstrable progress. Interior cannot rely on its apparently abandoned regulatory process—having never even reached the proposal stage and now with well over a decade of inactivity—to justify rejecting any related requests from the public. In addition to being illogical, doing so would effectively nullify the APA’s command to allow the public the right to petition—and receive a definitive, substantive response within a reasonable time—by creating a permanent barrier to all requests to undertake rulemaking that would implicate any of Interior’s OCS CEs.

Second, the right to petition an agency to adopt, amend, or repeal a “rule” is coextensive with the APA’s expansive definition of a “rule.” A rule includes:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]⁶³

That formulation is extremely broad, capturing “nearly every statement an agency may make[.]”⁶⁴ While the APA does distinguish between legislative and non-legislative rules, the latter are exempted only from notice and comment rulemaking.⁶⁵ These non-legislative rules, “like policy statements, guidances, manuals and memoranda,” nevertheless retain their status as “rules.”⁶⁶ As recognized by one court, the petitioning provision “applies to ‘a rule’ without qualification, a term that . . . encompasses, as the APA itself states, more than legislative rules.”⁶⁷

Moreover, despite appearing in Interior’s Department Manual, the CEs nevertheless qualify as legislative rules. In distinguishing legislative and non-legislative rules, courts evaluate, among other factors, whether the action was published in the Federal Register and whether it has

⁶² Letter from Abigail Ross Hopper, Director, BOEM & Brian Salerno, Director, BSEE, to Miyoko Sakashita, Oceans Director, Center for Biological Diversity, at 4 (June 23, 2016).

⁶³ 5 U.S.C. § 551(4); *cf. id.* § 553(e) (requiring agencies to provide the public the opportunity “to petition for the issuance, amendment, or repeal of a rule”).

⁶⁴ *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980); *see also id.* (“The breadth of this definition cannot be gainsaid.”); *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983).

⁶⁵ *See* 5 U.S.C. § 553(b)(A) (exempting “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”). Legislative rules are also sometimes referred to as “substantive” rules.

⁶⁶ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1315 & n.9 (1992) (emphasis removed).

⁶⁷ *Preminger v. Sec’y of Veterans Affs.*, 632 F.3d 1345, 1351 (Fed. Cir. 2011) (footnote omitted).

a binding effect on the agency.⁶⁸ As noted, Interior has twice published the CEs in the Federal Register for public notice and comment, and Interior is bound to follow these rules when implementing its NEPA obligations. BOEM cannot, for example, proceed with the application of a CE in the Gulf in the face of substantial evidence of an exception, such as “high seismic risk or seismicity,” that would otherwise prohibit its use.⁶⁹ Consequently, a petition is an appropriate vehicle for requesting changes to Interior’s Manual.

IV. INTERIOR’S CATEGORICAL EXCLUSION FOR GULF DRILLING SHOULD BE REPEALED BECAUSE IT DOES NOT COMPLY WITH NEPA

The existing CE violates NEPA for at least two principal reasons. First, Interior reserves its CEs for categories of action that have “no significant individual or cumulative effect on the quality of the human environment.”⁷⁰ Oil and gas activity in the Gulf—cumulatively, if not also on a project-specific level—is significant, warranting revocation of the CE. BOEM cannot continue to issue CEs that isolate instances of drilling from the Gulf’s pervasive oil and gas development and associated infrastructure.

Second, “extraordinary circumstances” exist for essentially every EP and DOCD in the Gulf, making application of the CE inappropriate and requiring further NEPA analysis.⁷¹ The extraordinary circumstances are unavoidable, considering the ever-increasing risks of deepwater drilling in the Gulf as well as BOEM’s chronic failure to adequately assess site-specific harms to marine species, especially in light of the lingering effects of the *Deepwater Horizon* disaster. The fact that extraordinary circumstances almost always exist means EPs and DOCDs should not “normally” qualify for a CE, indicating that the CE should be eliminated.⁷² These two rationales, detailed *infra*, overlap and reinforce one another, but each is an independent justification for BOEM charting a new course.

A. The Cumulative Effects of Gulf Drilling Demand the Elimination of the CE

Interior’s existing NEPA regulations recognize that CEs cannot have “significant individual or cumulative” effects.⁷³ Pursuant to NEPA, the threshold for a finding of

⁶⁸ See, e.g., *Molycorp, Inc. v. U.S. E.P.A.*, 197 F.3d 543, 545 (D.C. Cir. 1999).

⁶⁹ Interior Dep’t Manual, *supra* note 2, at 15.4(c)(10)(1).

⁷⁰ 43 C.F.R. § 46.205.

⁷¹ *Id.* § 46.205(c).

⁷² See 40 C.F.R. § 1501.4(a); *cf.* Sutley Memo, *supra* note 15, at 6 (“If extensive extraordinary circumstances are needed to limit a proposed categorical exclusion, the agency should also consider whether the proposed categorical exclusion itself is appropriate.”).

⁷³ 43 C.F.R. § 46.205. As noted, *supra*, CEQ’s regulations continue to recognize that CEs “normally do not have a significant effect on the human environment.” 40 C.F.R. § 1501.4(a); see also *id.* § 1508.1(g)(3) (noting that cumulative effects can result from “individually minor but collectively significant” actions taking place over time). Indeed, some courts’ willingness to shield the application of a CE from the need to examine cumulative impacts pursuant to CEQ’s

“significance” is relatively low, arising when there “may” be significant effects.⁷⁴ The effects of any one activity include not only its direct effects but also any indirect effects. Indirect effects are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁷⁵

Regardless of whether BOEM considers a single drilling operation to be significantly disruptive, the overarching significance is apparent in the larger context of oil and gas development (and associated industrialization) in the Gulf of Mexico. Both the offshore and onshore environments suffer from the accumulated burdens of oil and gas exploration and extraction over the decades. At bottom, the approvals of EPs and DOCDs in the Gulf have cumulatively significant environmental effects, which BOEM ignores through use of the CE. The inhabitants of the region—human and non-human alike—deserve a more thoughtful approach. And, more importantly, NEPA requires one.

1. Cumulative Harms to the Marine Environment

Offshore drilling in the Gulf of Mexico first began in the 1930s. Since that time, industry has drilled tens of thousands of oil and gas wells, leaving thousands of wells and hundreds of platforms scattered throughout the Gulf, supported by a sprawling network of pipelines laid out across the seafloor.⁷⁶ BOEM has authorized much of this activity with EPs and DOCDs, resulting in profound impacts to the region. Future drilling will only further imperil the environment of the Gulf, calling into question the validity of the CE.

The act of drilling wells harms the environment from the noise of pile driving when installing platforms and from the inevitable oil spills, debris, and other discharges that foul the

regulations springs in part from the fact that the process of developing a CE “already takes cumulative impacts into account.” *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 411 (6th Cir. 2016). In any case, Interior cannot ignore its own binding regulations. *See, e.g., United States v. Nixon*, 418 U.S. 683, 696 (1974).

⁷⁴ *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (observing that plaintiffs need only raise “substantial questions” about whether there “may” be significant effects (cleaned up)); *see also Am. Bird Conservancy v. FCC*, 516 F.3d 1027, 1034 (D.C. Cir. 2008) (noting that if any significant environmental impacts “might result” from the proposed agency action, then an EIS “must be” prepared (cleaned up)).

⁷⁵ 40 C.F.R. § 1508.1(g)(2).

⁷⁶ *Gulf of Mexico Oil Production Data*, Enverus Prism Solutions, <https://www.enverus.com/solutions/energy-analytics/ep-old/prism/global/gulf-of-mexico/> (noting some 90,000 wells drilled in the Gulf to date); BOEM, *Environmental Studies Program: Studies Development Plan - Impact of Abandoned Oil and Gas Wells on Air and Water Quality in the Gulf of Mexico (GOM) (GM-22-01)* (2021), <https://www.boem.gov/sites/default/files/documents/environment/environmental-studies/GM-22-01.pdf> (noting the thousands of abandoned wells); *see also* GAO, *Offshore Oil and Gas Updated Regulations Needed to Improve Pipeline Oversight and Decommissioning*, GAO-21-293 (2021) (examining the problems associated with existing and abandoned pipelines).

surrounding waters.⁷⁷ Operating and servicing offshore platforms creates multiple sources of air and water pollution,⁷⁸ along with requiring thousands of vessel trips that flood the marine habitat with noise and risk collisions with animals that can lead to injury or death.⁷⁹ The installation of pipelines connecting production facilities destroys bottom habitat, while inflicting additional harm from noise, and the pipelines can result in leakages and larger spills.⁸⁰ When production is complete, operators decommission structures using explosives and other methods that can harm nearby animals, or leave them to deteriorate in place and cause various types of environmental harm.⁸¹ The cumulative harm to marine life in the Gulf is also a function of the aftereffects of the *Deepwater Horizon* spill, discussed *infra*.

It is notable that the programmatic Gulf Biological Opinion, which covers EPs and DOCDs, has made “likely to adversely affect” determinations for several species and critical habitats including Rice’s whales (which the biological opinion finds are jeopardized by oil and gas activity), sperm whales, five sea turtle species, oceanic whitetip sharks, giant manta rays, and Gulf sturgeon, and critical habitats for loggerheads and Gulf sturgeon.⁸² This alone raises the possibility that there may be significant cumulative impacts to listed species from all of the approved drilling operations.

Based on effects to the marine environment, the approval of EPs and DOCDs have cumulatively significant effects, precluding the use of a CE for drilling in the Gulf.⁸³

2. Cumulative Harms to Environmental Justice Communities

The impacts from EPs and DOCDs are not limited to the marine environment. Drilling operations have indirect effects in the coastal communities where offshore oil and gas infrastructure is located – infrastructure that has arisen to support and benefit from oil and gas activity and that is responsible for ongoing harms to the coastal residents forced to live among it all.

⁷⁷ NMFS, *Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico* 138–39, 313–22, 452–63, 492–524 (Mar. 13, 2020) (Gulf BiOp).

⁷⁸ *Id.* at 308–12, 313–23, 482–92.

⁷⁹ *Id.* at 334–85, 463–68.

⁸⁰ *Id.* at 305, 493–94.

⁸¹ *Id.* at 435–52.

⁸² *Id.* at 299–300 (tbl.40 & 41); *id.* at 554 (“we find that the proposed action is likely to jeopardize the continued existence of the Gulf of Mexico Bryde’s whale”). The biological opinion’s incidental take statement authorizes the deaths of at least 9,011 green sea turtles, 2,691 Kemp’s ridley sea turtles, 1,228 loggerhead sea turtles, 42 hawksbill sea turtles, 12 leatherback sea turtles, and 21 Gulf sturgeon each year. *Id.* at 603–604 (tbl.132).

⁸³ BOEM has also generally failed to capture the bigger picture during earlier, geographically broader stages. Healthy Gulf et al., *Comment Letter re Gulf of Mexico Lease Sale 259 and 261 Draft Supplemental Environmental Impact Statement* 6–8, 10–16 (Nov. 21, 2022) (LS 259 Cmts).

Nearly half of the country’s petroleum refining capacity and over half of its natural gas processing capacity can be found along the Gulf Coast.⁸⁴ Most of U.S. chemical production naturally takes place there as well, making use of the raw materials that the area’s refiners and processors produce, such as ethylene, propylene, and benzene.⁸⁵ Of the “top 10 production complexes in the world, 5 are located in Texas and 1 is located in Louisiana.”⁸⁶ This concentration of fossil fuel-related industrial activity has resulted in long-standing health and quality of life impacts for local residents, with the effects often falling disproportionately on communities of color already burdened by high rates of poverty and inadequate access to health care.⁸⁷

BOEM has repeatedly recognized the linkage between Gulf of Mexico drilling and Gulf Coast industrial activity. Oil is characterized on two indices, density (heavy to light) and sulfur content (sour to sweet).⁸⁸ Refineries are correspondingly built to handle a particular blend of each. Production from the Gulf of Mexico OCS is composed of medium-to-heavy, sour crudes.⁸⁹ These are “mainly processed in GOM refineries, which are primarily equipped for those types of crudes rather than the light, sweet crude being produced onshore.”⁹⁰ For its most recent Gulf lease sale, BOEM projected that “most (>90%) oil produced . . . would be brought ashore via pipelines to oil pipeline shore bases, stored at these facilities, and eventually transferred via pipeline or barge to GOM coastal refineries.”⁹¹ In fact, BOEM has found that continued production from the OCS is “critically important” in order to “to fulfill the demand at the Gulf Coast refineries for medium/heavy and sour crudes.”⁹²

Consequently, the pollution emitted by onshore oil and gas infrastructure must be captured in any assessment of exploration or development plans as an indirect effect and must be considered in the aggregate.⁹³ Refining, processing, and consumption are certainly “reasonably

⁸⁴ *Gulf of Mexico Fact Sheet*, U.S. Energy Info. Admin., https://www.eia.gov/special/gulf_of_mexico/.

⁸⁵ BOEM, *Gulf of Mexico OCS Oil and Gas Lease Sales: 2017-2022 Final Multisale Environmental Impact Statement*, Vol. I at 3-92 (Mar. 2017) (Multisale EIS); *How a Petrochemical is Produced*, Am. Fuel & Petrochemical Mfrs., <https://www.afpm.org/industries/operations/how-petrochemical-produced>.

⁸⁶ Multisale EIS, *supra* note 85, at 3-92.

⁸⁷ See Healthy Gulf et al., *Comment Letter re 2023–2028 National OCS Oil and Gas Leasing Proposed Program and Draft Programmatic Environmental Impact Statement*, at Section III.B (Oct. 6, 2022) (Five-Year Plan Cmts).

⁸⁸ *Changing quality mix is affecting crude oil price differentials and refining decisions*, EIA (Sept. 21, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=33012>.

⁸⁹ See, e.g., BOEM, *2023–2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program 6-7* (July 2022) (Proposed Program).

⁹⁰ *Id.*

⁹¹ BOEM, *Gulf of Mexico OCS Oil and Gas Lease Sales 259 and 261 Final Supplemental Environmental Impact Statement 3-18* (Jan. 2023) (LS 259 SEIS).

⁹² Proposed Program, *supra* note 89, at 6-18.

⁹³ As noted, Interior’s NEPA regulations recognize that CEs cannot have “significant individual or cumulative” effects. 43 C.F.R. § 46.205.

foreseeable” results of offshore drilling that are “sufficiently likely” such that “a person of ordinary prudence would take [them] into account in reaching a decision.”⁹⁴ The entire purpose of allowing drilling is for the exploitation of offshore oil and gas resources, the vast majority of which—as noted—are destined for mid-stream users along the Gulf Coast. BOEM cannot escape this fundamental connection by highlighting any imprecision around the exact contribution of Gulf oil to the region’s onshore facilities.⁹⁵ Even if true, that fact would demonstrate only “that the *extent* of the effect is speculative. The *nature* of the effect, however, is far from speculative.”⁹⁶ In other words, uncertainty as to how much of the pollution that afflicts onshore environmental justice communities is attributable to the Gulf of Mexico OCS does not justify ignoring the problem altogether.⁹⁷

Approval of EPs and DOCDs has cumulatively significant impacts to environmental justice communities. As a practical matter, without adequate information that considers all the impacts on environmental justice communities from the CEs’ authorization of oil and gas development, both government decisionmakers and the public are deprived of the transparency that NEPA requires.⁹⁸ BOEM should revoke the existing CE given the inescapable cumulative harms to vulnerable communities along the Gulf Coast and the Biden Administration’s commitment to addressing issues of environmental justice.⁹⁹

⁹⁴ *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (cleaned up).

⁹⁵ Multisale EIS, *supra* note 85, Vol. II at 4-486.

⁹⁶ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (emphasis in original).

⁹⁷ *See id.* (finding that when the nature of the effect is known, an agency “may not simply ignore the effect”). These communities also suffer disproportionately from the effects of climate change itself, in some cases magnifying the harms related to onshore oil and gas infrastructure. The health effects of climate change include an “increase in the prevalence of allergic respiratory diseases, exacerbations of chronic obstructive lung disease, premature mortality, and declines in lung function.” Gennaro D’Amato et al., *Climate Change and Air Pollution: Effects on Respiratory Allergy*, 8 *Allergy Asthma Immunol Res.* 391, 394 (Sept. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4921692/>. Climate change is also expected to “increase the frequency of extreme weather and climate events including, but not limited to, cyclones, tropical storms, heat waves, and droughts[.]” Gulf BiOp, *supra* note 77, at 252. Along the Gulf Coast, severe storms have destroyed homes, displaced families, and triggered toxic spills. *See, e.g.*, Aaron B. Flores et al., *Petrochemical releases disproportionately affected socially vulnerable populations along the Texas Gulf Coast after Hurricane Harvey*, 42 *Population & Env’t* 279 (2020).

⁹⁸ *See* Sutley Memo, *supra* note 15, at 3 (noting inappropriate CEs “can thwart NEPA’s environmental stewardship goals”). As with the collective harm to the marine environment, BOEM similarly avoids environmental justice in the earlier stages of the OCSLA process. *See* LS 259 Cmts, *supra* note 83, at 17–21.

⁹⁹ Not only does the CE fail for its cumulatively significant effects on environmental justice communities, but its application is questionable given the potential for drilling operations to have “a disproportionately high and adverse effect on low income or minority populations[.]” 43 C.F.R. § 46.215(j); *see also id.* § 46.215(a) (disallowing a CE when an activity may have “significant impacts on public health or safety”).

3. Cumulative Harms from Greenhouse Gas Emissions

CEQ emphasized in a recent interim guidance that climate change and greenhouse gas (GHG) emissions should be considered when establishing CEs.¹⁰⁰ Although Interior almost certainly overlooked the now well-documented harms related to GHG emissions when it first established the Gulf CE in 1981, Interior must now address those concerns.¹⁰¹

There should be no question that the climate implications of a major new production well in the Gulf of Mexico are grave. Accessing the deeper waters of the Gulf will enable oil and gas companies to tap the region's largest remaining offshore reserves.¹⁰² Even a single well can produce hundreds of millions of barrels of oil over its lifetime,¹⁰³ with each barrel contributing just under a half ton of carbon dioxide when combusted.¹⁰⁴ Emissions of this magnitude jeopardize the ability of the United States to remain within any reasonable "carbon budget," the country's target emissions when accounting for those already locked in from existing commitments. And there is considerable evidence that the United States has already exceeded its estimated limits.¹⁰⁵

Indeed, the science is clear that limiting global temperature rise to 1.5 °C requires governments to immediately halt approval of all new fossil fuel production and infrastructure.¹⁰⁶

¹⁰⁰ 88 Fed. Reg. 1196, 1198 n.20 (Jan. 9, 2023). Agencies "may make use of [the guidance] immediately[.]" *Id.* at 1196; *see also id.* (guidance is "effective immediately").

¹⁰¹ *Id.* at 1196–97 (recognizing that the "United States faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory").

¹⁰² *See* Section IV.B.1, *infra*.

¹⁰³ *ExxonMobil Makes Huge Oil & Gas Discovery in Gulf*, Energy Digital, (May 17, 2020), <https://energydigital.com/utilities/exxonmobil-makes-huge-oil-and-gas-discovery-gulf>. And, in some cases, a find may even exceed a billion barrels. *Id.*

¹⁰⁴ *See Greenhouse Gases Equivalencies Calculator - Calculations and References*, Environmental Protection Agency, <https://www.epa.gov/energy/greenhouse-gases-equivalencies-calculator-calculations-and-references#>. Every barrel of U.S. oil left in the ground results in around a half-barrel drop in worldwide consumption. *Opening public lands and waters to fossil fuel extraction could have major climate consequences*, Stockholm Environmental Institute (Feb. 22, 2018), <https://www.sei.org/about-sei/press-room/public-land-extraction-climate-consequences/>.

¹⁰⁵ Andrea Thompson, *Wealthy Countries Have Blown Through Their Carbon Budgets*, *Sci. Am.* (April 5, 2023), <https://www.scientificamerican.com/article/wealthy-countries-have-blown-through-their-carbon-budgets/>; *see also* Nicole Van den Berg et al., *Implications of various effort-sharing approaches for national carbon budgets and emission pathways*, 162 *Climatic Change* 1805, 1819 (2020) (noting various approaches to calculating budgets "that can lead to (large) negative remaining carbon budgets for developed countries").

¹⁰⁶ Oil Change International, *Drilling Toward Disaster: Why U.S. Oil and Gas Expansion Is Incompatible with Climate Limits* 8 (2019) (recommending a ban on all leases, licenses, and

The committed carbon emissions from just the *existing* fossil fuel infrastructure in the energy and industrial sectors exceed the carbon budget for limiting warming to 1.5 °C, meaning that much of the existing infrastructure must be *retired early* to avoid catastrophic climate harms.¹⁰⁷ If the planet is to avoid the worst of the effects of climate change, associated with 2 °C and above, the United States cannot continue on its current path. Moreover, the United States has committed to cutting its emissions to half of what they were in 2005 by 2030 and achieving net zero by 2050.¹⁰⁸ Continued exploration and development that locks in decades of fossil fuel production in the Gulf will doubtlessly put that goal in jeopardy.¹⁰⁹

This concern is all the more compelling when considering the cumulative weight of the CEs for additional future exploration and production plans across the Gulf. BOEM has estimated that a single lease sale may result in over a billion barrels of oil brought to market, adding hundreds of millions of tons of GHGs to the atmosphere.¹¹⁰ Furthermore, BOEM recently estimated that the Gulf’s undiscovered reserves approach 30 billion barrels of oil, along with over 50 trillion cubic feet of gas, amounts that, if produced and burned, would lead to planetary disaster.¹¹¹

The changes in the ocean resulting from climate change (including ocean acidification, salinity, oceanic currents, dissolved oxygen levels, and nutrient distribution) have the potential to profoundly impact marine species in the Gulf altering their “abundance, geographic distribution,

permits that “enable new fossil fuel exploration or production, or new infrastructure such as pipelines, export terminals, or refineries”); *see also* Dan Welsby et al., *Unextractable fossil fuels in a 1.5 °C world*, 597 *Nature* 230, 230 (2021) (noting that necessary oil and gas reductions render “many operational and planned fossil fuel projects unviable”).

¹⁰⁷ Kelly Trout et al., *Existing fossil fuel extraction would warm the world beyond 1.5°C*, 17 *Env’t Rsch. Letters* 1 (2022) (observing the need to “prematurely decommission a significant portion of those [oil and gas fields and coal mines] already developed”); *see also* Sven Teske & Sarah Niklas, *Fossil Fuel Exit Strategy: An orderly wind down of coal, oil and gas to meet the Paris Agreement* 4, UTS (June 2021) (avoiding catastrophic climate change requires “both an end to exploration and expansion of fossil fuel production, and an active phase down of existing projects”).

¹⁰⁸ *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, The White House (April 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

¹⁰⁹ International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* 21 (Oct. 2021) (stating that “there are no new oil and gas fields approved for development in our pathway” to net zero by 2050).

¹¹⁰ BOEM, *Gulf of Mexico OCS Oil and Gas Leasing Greenhouse Gas Emissions and Social Cost Analysis, Addendum to the Gulf of Mexico Lease Sales 259 and 261 Draft Supplemental EIS and Technical Report* 9 (tbl.4) (Oct. 2022) (GOM Addendum).

¹¹¹ BOEM, *U.S. Outer Continental Shelf Gulf of Mexico Region, Oil and Gas Production Forecast, 2022-2031*, at 3 (2022) (GoM Forecast).

migration patterns, and susceptibility to disease and contaminants, as well as the timing of seasonal activities and community composition and structure.”¹¹² Just this year, a study found that the Gulf of Mexico’s sea surface temperature increased approximately one degree Celsius between 1970 and 2020, twice the rate of warming compared to the global average.¹¹³ That warming can magnify the threats to the Gulf of Mexico ecosystem including sea level rise and the Gulf’s hypoxic conditions that lead to an annual “dead zone.”¹¹⁴ Warming also increases the intensity and frequency of hurricanes, resulting in greater harm to coastal communities and accelerating the loss of wetlands.¹¹⁵ At the same time, “more carbon dioxide is absorbed by the oceans, causing lower pH and reduced availability of calcium carbonate.”¹¹⁶ The Intergovernmental Panel on Climate Change (IPCC) has warned that over the course of this century, the ocean is “projected to transition to unprecedented conditions[.]”¹¹⁷

Cumulatively, the approvals of EPs and DOCDs to access these resources, which result in massive amounts of greenhouse gases added to the atmosphere, have significant impacts, making the CE improper. BOEM cannot pass lightly over the climate implications of approving an EP or DOCD. Each of these decisions should undergo a more robust analysis rather than the cursory review that is associated with granting a CE. As the Ninth Circuit skeptically observed in the context of an expanded coal lease, “If a project of this scale can be found to have no significant impact, virtually *every* domestic source of GHGs may be deemed to have no significant impact[.]”¹¹⁸ Excusing the exceptionally high emissions associated with offshore oil and gas production leads to the same improper result.¹¹⁹

B. The Applicability of “Extraordinary Circumstances” to Virtually Every EP and DOCD Demands the Elimination of the CE

Interior’s regulations set out a number of extraordinary circumstances in which a CE cannot be used. At least two of them—when there are uncertain or unknown risks or significant impacts to ESA-listed species—apply to essentially every EP and DOCD in the Gulf. Several others are likely to apply to the majority of EPs and DOCDs, including a “disproportionately

¹¹² Gulf BiOp, *supra* note 77, at 252; *see also id.* at 250–54 (describing effects of climate change on the ocean environment).

¹¹³ Zhanjun Wang, et al., *Upper-Oceanic Warming in the Gulf of Mexico between 1950 and 2020*, 36 J. of Climate 2721, 2725 (April 15, 2023).

¹¹⁴ *Id.* at 2732.

¹¹⁵ *Id.*

¹¹⁶ Gulf BiOp, *supra* note 77, at 252.

¹¹⁷ IPCC, *Summary for Policymakers, in IPCC SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE* 18, (H.-O. Pörtner et al. eds., 2019).

¹¹⁸ *350 Montana v. Haaland*, 50 F.4th 1254, 1266 (9th Cir. 2022); *see also Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1226 (9th Cir. 2008) (“Petitioners’ evidence demonstrates, overwhelmingly, the environmental significance of CO2 emissions [related to vehicle fuel economy standards] and the effect of those emissions on global warming.”).

¹¹⁹ BOEM’s existing programmatic reviews do not cure this oversight. *See, e.g., Five-Year Plan Cmts, supra* note 87, at 44–46; LS 259 Cmts, *supra* note 83, at 8–9.

high and adverse effect on low income or minority populations,” “highly controversial environmental effects,” and “unresolved conflicts concerning alternative uses of available resources.”¹²⁰ A CE is simply inappropriate for activities where extraordinary circumstances are the rule rather than the exception. The inevitable conclusion is that such activities would in fact “normally” result in significant impacts, contrary to existing NEPA regulations that define the scope of a proper CE.¹²¹ Accordingly, the CE for EPs and DOCDs in the Gulf is inappropriate and should be repealed.

1. *Gulf Drilling Presents Highly Uncertain, Unique, and Unknown Risks*

Extraordinary circumstances include those in which there “may” be “highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.”¹²² It is well established that drilling is riskier in deeper waters, with the chances of well blowouts and uncontrolled oil spills increasing “exponentially” with depth.¹²³ As recognized by the Deepwater Commission, drilling “is an inherently risky business given the enormous pressures and geologic uncertainties present in the formations where oil and gas are found—thousands of feet below the ocean floor.”¹²⁴ In fact, the Commission found that, following the *Deepwater Horizon* disaster, “it is difficult to argue that deepwater drilling is an activity that does not present at least some potentially significant risk of harm to the environment.”¹²⁵

This is true in part because the nature of drilling in the Gulf has fundamentally changed in the decades since the 1981 institution of the CE. In 1975, an operator drilled the first deepwater well in waters deeper than 1,000 feet.¹²⁶ Over time, deepwater drilling has become increasingly common, as the Deepwater Commission documented, *see* Figure 2.4, *infra*. Indeed, as of 2022, deepwater production constitutes “roughly 90% of total production.”¹²⁷ Drilling has now moved into ultra-deep waters (nearly 5,000 feet deep) over the past two decades, and that

¹²⁰ 43 C.F.R. § 46.215(c), (j).

¹²¹ 40 C.F.R. § 1501.4(a).

¹²² 43 C.F.R. § 46.215(d) (extraordinary circumstances exist for actions that “may meet” the specified criteria).

¹²³ Gulf BiOp, *supra* note 77, App. G at 49; *see also id.* at 52 (noting probability of an accident increases by 8.5% for every 100 feet of increasing depth (citing L. Muehlenbachs et al., *The Impact of Water Depth on Safety and Environmental Performance in Offshore Oil and Gas Production*, 55 Energy Policy 699 (2013)).

¹²⁴ DWC Report, *supra* note 37, at 127.

¹²⁵ *Id.* at 261.

¹²⁶ The definition varies, but 1,000 feet is commonly recognized as a threshold for “deepwater” drilling. *See, e.g.*, BOEM, *Deepwater Gulf of Mexico December 31, 2019*, at 1, 6 (Jan. 2021) (Deepwater GoM).

¹²⁷ GoM Forecast, *supra* note 110, at 15. Overall, the downward trend in shallow water production and upward trend in deepwater production are expected to continue over the next decade. *Id.*

trend is continuing. According to BOEM, “[t]he greatest undiscovered resource potential in the OCS is forecast to exist in the deep and ultra-deep waters of the [Gulf].”¹²⁸

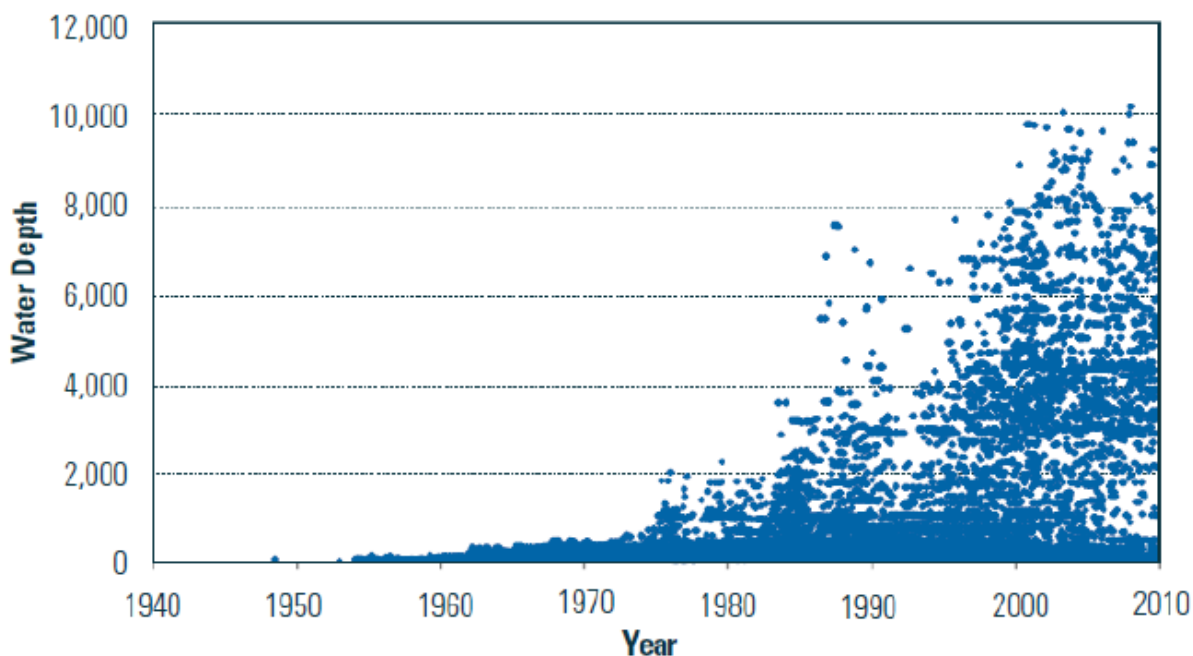


Fig.2.4: Wells Drilled in the Gulf of Mexico by Water Depth, 1940-2010.¹²⁹

CEQ’s *Deepwater Horizon* report included BOEM’s recognition that the CE needs to be reexamined “in light of the increasing number of deepwater wells drilled over time,”¹³⁰ and BOEM disclaimed the use of the CE for exploration plans in deeper waters for that very reason.¹³¹ But the Department Manual, as written, does not include any such limitation on the CE’s application. And more importantly, BOEM continues to routinely approve deepwater DOCDs and EPs using the CE, despite the existence of this extraordinary circumstance.¹³² As a result, the longer-term effects of development, production, and decommissioning can escape adequate review. Given the elevated risks and considerable uncertainties around all deepwater (and ultra-deepwater) drilling—where most of the OCS activity is taking place—BOEM cannot justify the CE as it currently exists.

¹²⁸ Proposed Program, *supra* note 88, at 4-19; *see also* Deepwater GoM, *supra* note 125, at 6–9 (displaying deepwater drilling timeline).

¹²⁹ DWC Report, *supra* note 37, at 41 Fig.2.4.

¹³⁰ CEQ Report, *supra* note 38, at 30.

¹³¹ Bromwich Memo, *supra* note 44, at 1 (noting the “increasing levels of complexity and risk” for Gulf drilling).

¹³² Between January 2018 and December 2022, BOEM approved over 200 new, revised, and supplemental DOCDs and over 60 EPs for wells in deeper waters ($\geq 1000'$) using the CE (data.boem.gov).

2. Gulf Drilling May Significantly Harm Listed Marine Species

The BOEM CE is inapplicable when there “may” be significant impacts on ESA-listed species or the designated critical habitat for those species.¹³³ EPs and DOCDs authorize activities that well exceed the low bar set by a “may” threshold and in fact are likely to harm protected species and habitats. Further, studies demonstrate that the ongoing aftereffects of the *Deepwater Horizon* catastrophe make a NEPA analysis particularly necessary in order to capture the species’ current baselines.

Close to a dozen marine species found in the Gulf of Mexico that are listed under the ESA are affected by oil and gas activities.¹³⁴ They include critically endangered Rice’s whales, struggling with an estimated population of just around 50 individuals found only in the Gulf of Mexico.¹³⁵ Endangered sperm whales inhabit the Gulf’s deeper waters.¹³⁶ Five sea turtle species make use of various Gulf habitats: the endangered Kemp’s ridley, leatherback, and hawksbill turtles as well as listed portions of the threatened loggerhead and green turtles.¹³⁷ Threatened Gulf sturgeon migrate between the Gulf’s nearshore waters and the freshwater habitats where they spawn.¹³⁸ Tellingly, since Interior adopted the CE in 1981, the government has determined that six of the listed marine species that are affected by oil and gas activity require the protections of the ESA.¹³⁹

As noted, *supra*, oil and gas activity can significantly impact species through stressors such as vessel strike, sound from multiple sources (e.g., vessels, drilling), emissions and discharges, entanglement and entrapment, marine debris, and oil spills.¹⁴⁰ Indeed, the National Marine Fisheries Service (NMFS) considers oil and gas activity to represent a particular threat to listed species in the Gulf such as the Rice’s whale and Kemp’s ridley sea turtle.¹⁴¹ Oil and gas

¹³³ 43 C.F.R. § 46.215(h).

¹³⁴ Gulf BiOp, *supra* note 77, at 155 (tbl.26); *see also* Multisale EIS, *supra* note 84, Vol. II at 4-259 to 4-260 (tbl.4-17).

¹³⁵ *See, e.g.*, Melissa S. Soldevilla et al., *Acoustic localization, validation, and characterization of Rice’s whale calls*, 151 J. Acoustical Soc’y Am. 4264, 4264 (2022).

¹³⁶ Gulf BiOp, *supra* note 77, at 158.

¹³⁷ *Id.* at 170.

¹³⁸ *See id.* at 218.

¹³⁹ Compare Gulf BiOp, *supra* note 77, at 155 (tbl.26), with *Threatened and Endangered Species List Gulf of Mexico-Southeast*, NOAA (last updated Jul. 21, 2022), <https://www.fisheries.noaa.gov/southeast/consultations/threatened-and-endangered-species-list-gulf-mexico>.

¹⁴⁰ *See* Gulf BiOp, *supra* note 77, at 138–39.

¹⁴¹ The final listing decision for Rice’s whales includes a list of threats that is heavily weighted towards oil and gas activity: “energy exploration, development, and production, oil spills and oil spill response, vessel collision, fishing gear entanglement, and anthropogenic noise.” 84 Fed. Reg. 15,446, 15,449 (April 15, 2019). NMFS’s recovery plan for Kemp’s ridley sea turtle recognizes that “Kemp’s ridleys could be impacted by the degradation of water quality resulting

activity can adversely affect sperm whales as well,¹⁴² especially given that they are found in the “deeper waters seaward of the continental shelf” where BOEM authorized more recent oil and gas drilling activity.¹⁴³ And the greenhouse gas emissions caused by new oil and gas drilling further threaten species already imperiled by climate change, such as elkhorn corals, staghorn corals, and other ESA-listed coral species.¹⁴⁴

These impacts have sufficient potential to be significant at the project level to trigger the exceptional circumstance and preclude use of the CE. It is consequently crucial to consider site-specific consequences to species. Marine species are not evenly distributed across the Gulf. They favor different habitats in different areas for different purposes.¹⁴⁵ Available information demonstrates that where oil and gas activity occurs and which species it affects matter a great deal when assessing the severity of an activity’s impacts. For example, impacts will be greater from a project in an area where species densities are higher or in an area that is particularly important for a particular life stage.

The logic of requiring such a site-specific examination of effects should be self-evident: an oil spill of any size that results in the death of even a single individual would have devastating impacts on a species like the Rice’s whale. Indeed, NMFS has found that unchecked oil and gas development likely jeopardizes the Rice’s whale’s continued existence.¹⁴⁶ And more recent research demonstrates the Rice’s whale has greater geographic distribution than previously thought, meaning it is more susceptible to oil and gas harms than NMFS understood when it originally made a jeopardy finding.¹⁴⁷

from operational discharges, including oil spills and oil-spill response activities.” NMFS et al., *Bi-National Recovery Plan for the Kemp’s Ridley Sea Turtle (Lepidochelys kempii)*, *Second Revision* I-62 (Sept. 22, 2011).

¹⁴² Gulf BiOp, *supra* note 77, at 156.

¹⁴³ *Id.* at 158, 263 (stating that exploration and development “has moved and will continue to move further offshore into deeper waters of the Gulf”).

¹⁴⁴ See, e.g., *Elkhorn Coral*, NMFS (last updated Mar. 8, 2023), <https://www.fisheries.noaa.gov/species/elkhorn-coral> (noting that “[c]limate change is the greatest global threat to corals”). The effects of climate change are harming listed species in the Gulf through a number of vectors: sea level rise and storm surge destroy coastal habitat; overheated waters disrupt essential behavioral patterns; and ocean acidification threatens to upend the entire ecosystem. See Gulf BiOp, *supra* note 77, at 250–54; Section IV.A.3, *supra*.

¹⁴⁵ This is precisely why the ESA provides for designation of critical habitat, reflecting the reality that species depend on specific areas for essential functions like feeding, breeding, raising young, sheltering, and migrating.

¹⁴⁶ Gulf BiOp, *supra* note 77, at 554.

¹⁴⁷ See, e.g., Melissa S. Soldevilla et al., *Rice’s whales in the northwestern Gulf of Mexico: call variation and occurrence beyond the known core habitat*, 48 *Endang. Species Res.* 155, 156 (2022). See also Natural Resources Defense Council et al., *Comment Letter re Gulf of Mexico OCS Oil and Gas Lease Sales 259 and 261*, at Section II.E (Nov. 21, 2022).

The Gulf of Mexico contains important habitat that is crucial for a variety of marine life.¹⁴⁸ Information on these habitats—their location, which species and functions they support, how they may be harmed by oil and gas development—is readily available. In fact, BOEM launched a cooperative program in 2017 to collect:

[i]mproved information . . . on living marine resource abundance, distribution, habitat use, and behavior in the Gulf of Mexico to properly mitigate and monitor for potential impacts of human activities, including related to offshore energy development. Understanding of cumulative impacts on protected species in the Gulf from both natural and anthropogenic forcing is required to inform NEPA documents and consultations and rulemaking related to [the ESA], Marine Mammal Protection Act (MMPA), and Migratory Bird Treaty Act (MBTA), as well as other statutes that govern bureau activities. The results of this study will provide important information to inform both BOEM and BSEE regulatory needs, as well as other agencies and stakeholders involved in effective management and conservation of Gulf protected species.¹⁴⁹

Indeed, the Deepwater Commission noted the questionable application of a CE for the *Deepwater Horizon* Macondo well “in light of the abundant deep-sea life in that geographic area and the biological and geological complexity of that same area.”¹⁵⁰ Without a site-specific review, BOEM cannot avoid the possibility of impacting those “areas of high biological sensitivity,”—one of the limitations built into the CE itself.¹⁵¹

In addition to considering the site-specific impacts of oil and gas activities on species, it is necessary to put those impacts into the context of how marine populations are currently faring. It is beyond dispute that the *Deepwater Horizon* catastrophe—both the spill and the subsequent response activities—“resulted in adverse effects on listed species and changed the baseline for the Gulf of Mexico ecosystem.”¹⁵² The NMFS-led Deepwater Horizon Natural Resource Damage Assessment Trustees estimated that the disaster killed tens of thousands of ESA-listed marine mammals, in particular causing significant declines to the Rice’s whale and sperm whale

¹⁴⁸ See generally Matthew S. Love et al., *The Gulf of Mexico Ecosystem: A Coastal and Marine Atlas*, Ocean Conservancy (June 2013), <https://oceanconservancy.org/wp-content/uploads/2017/05/gulf-atlas.pdf>.

¹⁴⁹ *GoMMaps*, BOEM, <https://www.boem.gov/gommapps>.

¹⁵⁰ DWC Report, *supra* note 37, at 83.

¹⁵¹ Interior Dep’t Manual, *supra* note 2, at 15.4(C)(10). The Gulf-wide reviews occurring at the program and lease-sale stages are no substitute given their considerably wider scope, spanning much of the entire Gulf of Mexico rather than any one particular drilling location. *Friends of the Earth*, 583 F. Supp. 3d at 135 (observing that a “site-specific environmental assessment may be preferable for certain environmental impacts”); see also DWC Report, *supra* note 37, at 83 (finding that the “flaw in that agency logic is that both those prior NEPA reviews were conducted on a broad programmatic basis, covering huge expanses of leased areas of which the Macondo well was a relatively incidental part”).

¹⁵² Gulf BiOp, *supra* note 77, at 265.

populations.¹⁵³ The catastrophe also killed or harmed tens of thousands, if not hundreds of thousands, of protected sea turtles.¹⁵⁴ It is estimated that it will be decades before these species recover.¹⁵⁵

Given the vulnerability of listed marine species in the Gulf to oil and gas exploration and production—especially following the *Deepwater Horizon* spill—BOEM’s continued reliance on the drilling CE in the face of the need for site-specific reviews is legally and scientifically indefensible.

V. INTERIOR SHOULD IMMEDIATELY HALT USE OF THE CE PENDING ITS REPEAL

For all the reasons discussed above, continued reliance on the CE poses immediate risks to the Gulf’s wildlife and its communities as well as our planet’s climate. While permanent revocation of the CE is necessary to adequately protect these resources, Interior and BOEM should immediately suspend use of the CE pending that formal revocation. BOEM did so in 2017, correctly concluding that immediate suspension was necessary “because of the scale, scope, and complexity of operations and in order to allow for the consideration of alternatives and to provide more transparency,” and to ensure that EPs and DOCDs receive “the *hard look* required by NEPA.”¹⁵⁶ There is no obligation that BOEM continue to apply the CE while it considers this petition or during any rulemaking that follows. CEQ’s NEPA regulations allow that an “agency may prepare an environmental assessment on any action in order to assist agency planning and decision making.”¹⁵⁷ In this context, EAs should be used to more closely assess specific proposals and approvals, evaluating factors included in the terms of the exclusion itself, applying potential “extraordinary circumstances,” and making project-specific determinations about the potential significance of approving activities.

VI. CONCLUSION

The undersigned request that Interior:

- Immediately discontinue the use of the CE and instead prepare EAs (and if needed, EISs) for all EPs and DOCDs in the Gulf of Mexico; and
- Revoke the CE—after undertaking all necessary internal and external reviews—based on the likelihood of significant effects from its use and the pervasive existence of extraordinary circumstances.

What should be obvious from the foregoing is that, for much of its history, BOEM has not undertaken a rigorous examination of the continued suitability of the CE for the Gulf of

¹⁵³ Final PEIS, *supra* note 41, at 4-631 to 4-633.

¹⁵⁴ *Id.* at 4-571, 4-678.

¹⁵⁵ *Id.* at 4-585 (finding that without active restoration, “marine mammal stocks in the northern Gulf of Mexico will require decades to recover from the effects of the DWH oil spill”).

¹⁵⁶ Hopper Memo, *supra* note 50, at 2.

¹⁵⁷ 40 C.F.R. § 1501.5(b).

Mexico and whether use of the CE complies with the dictates of NEPA. Following the *Deepwater Horizon* disaster—the point at which the CE did receive attention—the reviewing commission found that Interior’s use of the CE contributes to the inadequate oversight that has unfortunately continued to plague oil and gas activities in the Gulf. In response, Interior correctly began taking steps towards reform but did not finalize its decision. We urge Interior to pick up where it left off in early 2017 and revoke the CE that allows harmful activities to avoid meaningful NEPA analysis at the exploration and development stages.

Respectfully submitted,



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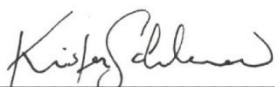
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Enclosures:

- Index of References
- Flash Drive Containing References