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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA WILDERNESS LEAGUE; CENTER FOR BIOLOGICAL DIVERSITY; GREENPEACE, INC.; NATIONAL AUDUBON SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; OCEAN CONSERVANCY; OCEANA; PACIFIC ENVIRONMENT; RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS (REDOIL); and SIERRA CLUB;	)	Case No.
Plaintiffs,	)	
v.	)	
UNITED STATES DEPARTMENT OF THE INTERIOR; KENNETH L. SALAZAR, Secretary of the Interior; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, United States Department of the Interior; JAMES WATSON, Director of Bureau of Safety and Environmental Enforcement; and MARK FESMIRE, Regional Director of Bureau of Safety and Environmental Enforcement, Alaska Region,	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(5 U.S.C. §§ 702-706; 33 U.S.C. § 1321; 42 U.S.C. § 4332; 16 U.S.C. § 1536)

SUMMARY

1. The Arctic supports an extraordinary diversity of species and a vibrant subsistence culture, but new offshore drilling prospects in the Arctic Ocean bring the threat of a devastating oil spill. The cleanup efforts surrounding the *Deepwater Horizon* accident demonstrated the oil industry struggled to contain and remove an offshore oil spill even in relatively benign environmental conditions, with the full complement of the nation's oil spill response resources close at hand. An oil company proposing offshore drilling in the Arctic Ocean faces far more dire circumstances; efforts to clean up a spill in the Arctic could occur more than a thousand miles from Coast Guard resources, with the threat of sea ice and icebergs, subzero temperatures, and darkness up to 20 hours a day.

2. This action challenges the Bureau of Safety and Environmental Enforcement's (BSEE)[1] decisions to approve Shell Offshore Inc.'s Beaufort Sea Regional Exploration Program Oil Spill Response Plan in March 2012 (the Beaufort Spill Plan) and Shell Gulf of Mexico Inc.'s[2] Chukchi Sea Regional Exploration Program Oil Spill Response Plan in February 2012, (the Chukchi Spill Plan) (collectively the Spill Plans) pursuant to the Oil Pollution Act's amendments to the Clean Water Act, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). In approving the Spill Plans, BSEE failed to meet its statutory obligations to ensure the Spill Plans are adequate to clean up a worst case oil spill in adverse weather conditions to the maximum extent practicable, and to evaluate the environmental effects of, and alternatives to, Shell's proposed oil spill response efforts prior to approval.

[1] BSEE, as used herein, includes the agency's predecessors, the Minerals Management Service and the Bureau of Ocean Energy Management Enforcement and Regulation, as appropriate.
[2] Shell Offshore Inc. and Shell Gulf of Mexico Inc. are referred to collectively as "Shell".

JURISDICTION

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-02, 33 U.S.C. § 1321(n), and 5 U.S.C. §§ 702-706.

4. Venue is appropriate under 28 U.S.C. § 1391(e) because the action that is the subject of the case (the Spill Plans) addresses activity in BSEE's Alaska Region.

THE PARTIES

5. Plaintiff Alaska Wilderness League is a non-profit organization with approximately 10,000 members and activists. Alaska Wilderness League was founded in 1993 to advocate for protection of Alaska's public lands that are threatened with environmental degradation. Since its inception, it has taken an active role on issues related to oil and gas development in Alaska. Its Alaska office has three full-time employees and houses its Arctic Environmental Justice Program. Through advocacy and education, the Alaska Wilderness League's Arctic Environmental Justice Program works closely with communities in the Arctic affected by development. Alaska Wilderness League is committed to honoring the human rights and traditional values of the people of the Arctic, and the shared interest in protecting critical areas for future generations.

6. Plaintiff Center for Biological Diversity is a non-profit organization with offices in Anchorage, Alaska; San Francisco, Joshua Tree and San Diego, California; Phoenix and Tucson, Arizona; Silver City, New Mexico; Portland, Oregon; and Washington, D.C. The Center's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands, and public health. The Center is actively involved in species and habitat protection issues throughout the United States, including protection of Arctic wildlife in general and the polar bear and Pacific walrus in particular. These efforts include petitioning FWS to list the polar bear under the ESA.

7. Plaintiff Greenpeace, Inc. is a California non-profit corporation with offices in Washington, D.C. and San Francisco. Greenpeace is a non-violent environmental organization. Its mission is to raise public awareness of environmental problems and promote changes that are essential to a green and peaceful future. There are over 320,000 current Greenpeace members in the United States. For more than a decade Greenpeace has been a lead advocacy organization working to raise awareness of global warming and the protection of wildlife, and to pressure for serious cuts in greenhouse gas emissions through local, national and global action. In the United States, Greenpeace has run campaigns aimed at stopping global warming by phasing out fossil fuel use and promoting renewable energy systems. As a part of these efforts Greenpeace has actively worked to protect the Arctic Ocean from the harmful effects of oil and gas activities.

8. Plaintiff National Audubon Society is a not-for-profit organization now in its second century. With its 22 state programs, 47 Centers, and 467 chapters, the mission of the National Audubon Society is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats, for the benefit of humanity and the earth's biological diversity. Audubon brings scientific perspective and support to broader, collective conservation efforts to advance conservation-oriented public policies, including in Alaska. Through the Audubon Alaska state program, with its five local chapters and approximately 1,500 state-based members, Audubon has played an important role in conserving Alaska's natural heritage and has long championed Alaska's special places, including the Arctic Ocean.

9. Plaintiff Natural Resources Defense Council is a non-profit environmental membership organization with more than 550,000 members throughout the United States. It has had a longstanding and active interest in the protection of the environment in Alaska's Arctic, including the Beaufort and Chukchi seas. With its nationwide membership and a staff of

lawyers, scientists, and other environmental specialists, it plays a leading role in a diverse range of land and wildlife management and resource development issues.

10. Plaintiff Ocean Conservancy is a private, nonprofit organization with headquarters in Washington, D.C. and regional offices in other parts of the country, including Anchorage, Alaska. Ocean Conservancy is dedicated to protecting marine wildlife and their habitats and to conserving coastal and ocean resources, including in the Beaufort and Chukchi seas. To further these goals, Ocean Conservancy conducts policy-oriented research, promotes public awareness, education and citizen involvement in the conservation of marine wildlife and resources, and supports domestic and international programs for the conservation of marine wildlife and other habitats. Ocean Conservancy has approximately 103,000 members.

11. Plaintiff Oceana, Inc. is a non-profit, international advocacy organization dedicated to protecting the world's oceans, including the Beaufort and Chukchi seas. Oceana's mission includes seeking to make our oceans as rich, healthy, and abundant as they once were, including by obtaining protection and conservation for Arctic marine ecosystems and wildlife, including marine mammals. Oceana's headquarters are located in Washington, D.C., and it has offices or staff in Alaska, California, Connecticut, Florida, Maryland, and New Jersey. Oceana has more than 245,000 members in the United States and world-wide.

12. Plaintiff Pacific Environment is a non-profit organization based in San Francisco that protects the living environment of the Pacific Rim by promoting grassroots activism, strengthening communities and reforming international policies. For nearly two decades, Pacific Environment has partnered with local communities around the Pacific Rim to protect and preserve the ecological treasures of this vital region.

13. Plaintiff Resisting Environmental Destruction on Indigenous Lands (REDOIL) Plainis a network of grassroots Alaska Natives of the Inupiat, Yupik, Aleut, Tlingit, Gwich'in, Eyak and Denaiana Athabascan tribes, including residents of Arctic Ocean coastal communities, operating as a non-profit educational organization with 501(c)(3) status. REDOIL takes an active role in addressing the human and ecological health impacts of the unsustainable development practices of the fossil fuel industry in Alaska. It advocates for the preservation of subsistence rights for Native Alaskans, self-determination rights of tribes in Alaska, a just transition from fossil fuel development, and the implementation of tribal options for sustainable development.

14. Plaintiff Sierra Club is a national non-profit organization having approximately 750,000 members dedicated to the exploration, enjoyment, and preservation of the scenic and natural resources of the United States, including Alaska. The Sierra Club works towards educating and enlisting the public to protect and restore the quality of the natural environment. The Sierra Club's interests encompass a wide range of environmental issues, including wildlife conservation, public lands and waters, endangered species, clean water and clean air. The Sierra Club has long been active in issues relating to the impacts of oil and gas leasing and development in America's Arctic.

15. Members of the Plaintiff groups reside near, visit, or otherwise use and enjoy the Beaufort and Chukchi seas for subsistence, recreation, wildlife viewing, education, research and other scientific uses, photography, or aesthetic and spiritual enjoyment, or enjoy or otherwise use migratory wildlife from the Beaufort and Chukchi seas.

16. Each of the Plaintiff groups monitor uses of the Beaufort and Chukchi seas, the outer continental shelf, and the marine life that inhabits or migrates to the Beaufort and Chukchi

seas. The Plaintiff groups also monitor compliance with the laws governing management choices affecting these resources, educate their members and the public concerning the management of these resources, and advocate policies and practices that protect the natural value and sustainable resources of these areas. It is impossible to achieve these organizational purposes fully without adequate information and public participation in the processes required by law for management of these public resources. The Plaintiffs' interests and organizational purposes are adversely affected by Defendants' violations of the law as described in this complaint.

17. Defendant United States Department of the Interior oversees all oil exploration and production drilling in federal waters on the outer continental shelf of the United States.

18. Defendant Kenneth L. Salazar is sued in his official capacity as Secretary of the Department of the Interior.

19. Defendant BSEE is an agency of the United States Department of the Interior entrusted with promoting safety, environmental protection, and conservation of offshore resources of the Beaufort and Chukchi seas' outer continental shelf through regulatory oversight and enforcement.

20. Defendant James Watson is sued in his official capacity as Director of BSEE. Director Watson has been delegated authority to regulate safety and environmental enforcement of offshore drilling on the outer continental shelf, including the regulation of oil spill response plans. BSEE's Oil Spill Response Division in Headquarters unconditionally approved the Chukchi Spill Plan on February 12, 2012.

21. Defendant Mark Fesmire is sued in his official capacity as the Regional Director of BSEE's Alaska Region. BSEE's Oil Spill Response Division in the Alaska Region Unit,

which has its offices located in Anchorage, Alaska, unconditionally approved the Beaufort Spill Plan on March 28, 2012.

STATUTORY FRAMEWORK

Oil Pollution Act of 1990 / Clean Water Act

22. Under the Oil Pollution Act of 1990 (Oil Pollution Act), enacted after the Exxon-Valdez spill, federal offshore lessees must have approved oil spill response plans and act in accordance with those plans when conducting offshore drilling operations. The Oil Pollution Act sought to strengthen provisions concerning oil spill prevention efforts and oil-spill response capabilities.

23. Portions of the Oil Pollution Act, which amended Section 311(j) of the Clean Water Act, direct the President to issue regulations requiring owners and operators of offshore oil facilities to prepare and submit plans "for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance." 33 U.S.C. § 1321(j)(5)(A).

24. In the case of an offshore facility, the phrase "worst case discharge" means "the largest foreseeable discharge in adverse weather conditions." 33 U.S.C. § 1321(a)(24)(B).

25. An oil spill response plan "shall . . . identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge." 33 U.S.C. § 1321(j)(5)(D)(iii).

26. By executive order, President George Bush delegated various responsibilities outlined in Section 311(j) of the Clean Water Act to the Department of the Interior, the Department of Transportation, and the Environmental Protection Agency. Exec. Order No.

12777, 56 Fed. Reg. 54,757 (Oct. 18, 1991) (Executive Order 12777). Executive Order 12777 delegated to the Secretary of the Interior the functions vested in the President by Section 311(j)(5) of Clean Water Act and Section 4202(b)(4) of the Oil Pollution Act respecting the issuance of regulations requiring the owners or operators of offshore facilities to prepare and submit response plans and the authority to review and approve of such response plans. *Id*. at 54,761-62.

27. BSEE subsequently promulgated rules implementing the Oil Pollution Act's requirements. *See* 30 C.F.R. pt. 254.

28. BSEE's regulations require owners or operators of offshore facilities to prepare spill response plans. *See* 30 C.F.R. § 254.1(a). Oil spill response plans must include a description of a "[w]orst-case discharge scenario," 30 C.F.R. § 254.21(b)(3)(iii), based on the volume of oil from an uncontrolled well flowing for 30 days. *See* 30 C.F.R. § 254.47(b).

29. In the worst case discharge scenario, an owner or operator must provide an "appropriate trajectory analysis specific to the area in which the facility is located" that identifies the "onshore and offshore areas that a discharge potentially could affect." 30 C.F.R. § 254.26(b). The trajectory analysis "must reflect the maximum distance from the facility that oil could move in a time period that it reasonably could be expected to persist in the environment." *Id*.

30. An owner or operator must provide a "list of the resources of special economic or environmental importance that potentially could be impacted in the areas identified by [the] trajectory analysis." 30 C.F.R. § 254.26(c). An owner or operator "must state the strategies" it will use to protect these resources. *Id*.

31. An owner or operator must provide a description of the worst case discharge scenario in "adverse weather conditions," 30 C.F.R. § 254.26(d), including the response

equipment that will be used "to contain and recover the discharge to the maximum extent practicable." 30 C.F.R. § 254.26(d)(1). "This description must include the types, location(s) and owner, quantity, and capabilities of the equipment." *Id.*

32. An owner or operator must describe "the personnel, materials, and support vessels that would be necessary to ensure that the identified response equipment is deployed and operated promptly and effectively." 30 C.F.R. § 254.26(d)(2). The discussion must describe the "oil storage, transfer, and disposal equipment." 30 C.F.R. § 254.26(d)(3).

33. An owner or operator's discussion of its response to a worst case discharge scenario in adverse weather conditions "must include" an "estimation of the individual times needed for:

a. Procurement of the identified containment, recovery, and storage equipment;

b. Procurement of equipment transportation vessel(s);

c. Procurement of personnel to load and operate the equipment;

d. Equipment loadout (transfer of equipment to transportation vessel(s));

e. Travel to the deployment site (including any time required for travel from an equipment storage area); and

f. Equipment deployment."

30 C.F.R. § 254.26(d)(4).

34. In preparing the discussion required by 30 C.F.R. § 254.26(d), an owner or operator's spill plan must "[e]nsure that the response equipment, materials, support vessels, and strategies listed are suitable, within the limits of current technology, for the range of environmental conditions anticipated at your facility[.]" 30 C.F.R. § 254.26(e)(1). An owner or operator's spill plan must "[u]se standardized, defined terms to describe the range of

environmental conditions anticipated and the capabilities of response equipment." *Id.* § 254.26(e)(2).

35. The phrase "adverse weather conditions means weather conditions found in the operating area that make it difficult for response equipment and personnel to clean up or remove spilled oil or hazardous substances." 30 C.F.R. § 254.6. These conditions "include, but are not limited to: Fog, inhospitable water and air temperatures, wind, sea ice, current, and sea states." *Id.*

National Environmental Policy Act

36. Congress enacted NEPA to require federal agencies to incorporate environmental concerns into the decision-making process. 42 U.S.C. § 4331(a)-(b). In furtherance of this goal, NEPA compels federal agencies to evaluate prospectively the environmental impacts of proposed actions that they carry out, fund or authorize and ensures the public an opportunity to participate in the decision making process.

37. NEPA requires federal agencies to prepare an environmental impact statement (EIS) for any major federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(C). The EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. It "is more than a disclosure document" and "shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." *Id.*

38. The Council on Environmental Quality (CEQ)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA that are "binding on

all Federal agencies[.]" 40 C.F.R. § 1500.3. These regulations require that, unless an activity is "categorically excluded" from NEPA compliance, an agency must either prepare an EIS or an Environmental Assessment (EA), which is used to determine whether an EIS is necessary. *Id*. § 1501.4.

39. An EIS must include (1) the environmental impacts of the proposed action; (2) any adverse environmental effects that cannot be avoided if the proposed action proceeds; (3) alternatives to the proposed action; (4) the relationship between local short-term use of the human environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action, if implemented. 40 C.F.R. § 1502.16.

40. An EIS must analyze the direct, indirect, and cumulative effects of the proposed action and any identified alternatives thereto. 40 C.F.R. § 1508.8. Direct effects are those effects "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects are those effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). "Effects include[] ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8. Cumulative impacts are those impacts that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions." 40 C.F.R. § 1508.7.

Endangered Species Act

41. "The ESA requires federal agencies, through consultation with the National Marine Fisheries Service (NMFS) and the United States Fish & Wildlife Service (FWS) (collectively the Services) to "insure that any action authorized, funded, or carried out by [the] agency … is not likely to jeopardize the continued existence of" any listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). "Action" is defined to include "all activities or programs of any kind authorized, funded, or carried out" by federal agencies, including "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. An agency must initiate consultation with the Services whenever it takes an action that "may affect" a listed species, subject to limited exceptions. 50 C.F.R. § 402.14(a).

42. The result of this consultation process is a biological opinion that evaluates impacts to listed species to determine if the action is likely to jeopardize or adversely modify critical habitat. If the conclusion of the opinion results in a jeopardy determination, then the opinion identifies changes to the action to avoid jeopardy or adverse modifications to critical habitat. 16 U.S.C. § 1536(b). Alternatively, the opinion must identify "reasonable and prudent measures," which are actions necessary to minimize the impacts of incidental take that is anticipated to result from an action that the Services conclude is not likely to jeopardize the species or adversely modify designated critical habitat. 50 C.F.R. § 402.14(i)(1)(ii); *see also* 50 C.F.R. § 402.02.

Administrative Procedure Act

43. The APA authorizes courts to review agency actions and "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). A court must review

BSEE's approval of the Spill Plans under both § 706(2)(A) and for compliance with the Clean Water Act, NEPA, and the ESA.

STATEMENT OF FACTS

The Beaufort and Chukchi Seas

44. The Chukchi Sea is located in the Arctic Ocean north of the Bering Strait and west of the Beaufort Sea. The Beaufort Sea is located in the Arctic Ocean north and east of Barrow, Alaska. The Chukchi and Beaufort seas provide habitat and rich feeding grounds for a variety of marine life. They also provide important subsistence resources upon which many residents of the Chukchi and Beaufort coasts depend for their cultural and nutritional well-being. Alaska Native communities have been vitally connected to the Chukchi and Beaufort seas and their resources for thousands of years. Subsistence hunting and fishing is central to the cultural traditions of these communities and is based predominately upon bowhead whales, walrus, seals, beluga whales, polar bears, birds, and fish. An oil spill in the Chukchi or Beaufort seas could compromise the subsistence way of life communities throughout the North Slope have practiced for thousands of years.

45. The ecosystems of the Chukchi and Beaufort seas are characterized by a short summer season, low temperatures, and limited sunlight. The Chukchi and Beaufort seas are ice-covered most of the year, from as early as October to as late as July. Each winter Arctic pack ice advances across the Chukchi and Beaufort seas and into the Bering Sea and each spring the pack ice retreats. During the summer, the Beaufort and Chukchi seas experience a period of open water (predominantly ice-free, though scattered sea ice may be present) lasting approximately three months in the Beaufort and four months in the Chukchi. During the spring and fall transitions, the Chukchi and Beaufort seas are dominated, to varying degrees depending on the

year, by floating ice. At this interface of ice and open water, the recurring lead systems, coastal polynyas and landfast ice off the coast of northern Alaska support a tremendous diversity of species.

46. A number of these species are protected by the ESA, including endangered bowhead, humpback, and fin whales, and threatened polar bear, Steller's and spectacled eiders. Polar bears from the Beaufort Sea stock and the Chukchi and Bering seas stock inhabit the Beaufort and Chukchi seas, respectively. Critical habitat for polar bears includes barrier islands, sea ice, and terrestrial denning habitat. Spectacled eiders molt in Ledyard Bay in the Chukchi Sea from late June though October, and the area has been designated as critical habitat for the species.

BSEE Approved the Spill Plans

47. Shell submitted proposed spill plans for the Chukchi and Beaufort in May 2011.

48. In June 2011, BSEE accepted public comments on Shell's proposed Beaufort spill plan. Plaintiffs submitted comments to BSEE on the proposed Beaufort spill plan.

49. In December 2011, BSEE accepted public comments on Shell's proposed Chukchi spill plan. Plaintiffs submitted comments to BSEE on the proposed Chukchi spill plan

50. BSEE unconditionally approved the Chukchi Spill Plan on or about February 12, 2012.

51. Upon information and belief, BSEE did not prepare an EIS relating to its approval of the Chukchi Spill Plan.

52. Upon information and belief, BSEE did not prepare an EA relating to its approval of the Chukchi Spill Plan.

53. BSEE unconditionally approved the Beaufort Spill Plan on or about March 28, 2012.

54. Upon information and belief, BSEE did not prepare an EIS relating to its approval of the Beaufort Spill Plan.

55. Upon information and belief, BSEE did not prepare an EA relating to its approval of the Beaufort Spill Plan.

56. BSEE has not identified the review and approval of oil spill response plans for oil and gas exploration activities in the Arctic Ocean as an activity that is categorically excluded from NEPA review obligations.

57. Upon information and belief, BSEE did not engage in ESA consultation with NMFS relating to its approval of the Beaufort Spill Plan.

58. Upon information and belief, BSEE did not engage in ESA consultation with NMFS relating to its approval of the Chukchi Spill Plan.

59. Upon information and belief, BSEE did not engage in ESA consultation with FWS relating to its approval of the Beaufort Spill Plan.

60. Upon information and belief, BSEE did not engage in ESA consultation with FWS relating to its approval of the Chukchi Spill Plan.

61. On or about April 9, 2012, Alaska Wilderness League, Center for Biological Diversity, Greenpeace, National Audubon Society, Sierra Club, and Natural Resources Defense Council sent BSEE a 60-day notice letter pursuant to the ESA, signaling their intent to sue due to the agency's failure to engage in consultation with NMFS and FWS prior to approving the Spill Plans. *See* Exhibit 1.

62. On or about April 10, 2012, REDOIL sent BSEE a 60-day notice letter pursuant to the ESA, signaling its intent to sue due to the agency's failure to engage in consultation with NMFS and FWS prior to approving the Spill Plans. *See* Exhibit 2.

Oil Spill Response in the Arctic Ocean

63. After a subsea oil well leak, released oil rises to the surface and spreads on the water surface. One of the most common response efforts is to tow boom behind a vessel to contain and concentrate the oil for effective mechanical recovery and/or in situ burning. To avoid losing the collected oil, most conventional containment boom must be towed at a speed of less than 1 knot. The speed at which containment boom is towed affects the rate at which the oil slick is encountered.

64. An oil skimmer is a machine that separates oil floating in and on the water. Mechanical skimmers recover varying amounts of water along with the oil. Oil also emulsifies on the water surface prior to recovery. In addition to recovered oil itself, skimmers recover free water and emulsified oil, which increases the total volume of product recovered.

65. According to BSEE, "a large spill of low viscosity oil such as a light or medium crude oil can be scattered over many square kilometers within just a few hours." BSEE, *Technology Assessment & Research (TA&R) Project Categories, Mechanical Containment and Recovery*. The agency has explained that oil recovery systems typically cover only a few meters and "move at slow speeds (1 knot) while recovering oil." *Id*. As a result, the agency observed that "even if response personnel can be operational within a few hours, it will not be feasible for them to encounter more than a fraction of a widely dispersed slick." *Id*. BSEE concluded that: "This is the main reason why containment and recovery at sea rarely results in the removal of

more than a relatively small proportion of a large spill, at best only 10 – 15 [percent] of the spilled oil and often considerably less." *Id*.

66. After boom is deployed it can become damaged by waves or weather. Oil spill boom is even more prone to damage and failure in Arctic conditions because ice floes and ice pieces can impair the boom. Boom can fail when sea ice reaches a certain concentration, due to the strain of the ice on the boom causing the boom to tear or the force of the ice lifting the boom from the water surface.

67. According to BSEE, mechanical skimming efforts typically result in "5 to 30 [percent] [recovery] for open ocean response without broken ice[.]" U.S. Dept. of the Interior, Minerals Mangement [sic] Service, *Arctic Oil Spill Response Research and Development Program, A Decade of Achievement* 14 (2009), *available at* http://www.boemre.gov/tarprojectcategories/PDFs/MMSArcticResearch.pdf (Decade of Achievement). The agency has reported recovery rates drop dramatically in broken ice to between "1 [percent] to 20 [percent] depending on the degree of ice coverage and if responding during freeze-up or spring break-up." *Id*.

68. After the Exxon Valdez oil spill, the mechanical skimming efforts recovered approximately eight percent of the total oil spilled. *See* D.A., Wolfe, et al. (1994), *The Fate of the Oil Spilled from the Exxon Valdez*, 28 Envtl. Sci. & Tech. 561A, at 563A (1994).

69. According to the Deepwater Horizon Oil Budget, the mechanical skimming efforts during the Deepwater Horizon cleanup effort recovered approximately three percent of the total oil spilled. *See* Jane Lubchenco, et al., Deepwater Horizon Oil Budget: What Happened to the Oil? 1 (Aug. 4, 2010), *available at* http://www.noaanews.noaa.gov/stories2010/PDFs/OilBudget_description_%2083final.pdf.

70. The National Oceanic and Atmospheric Administration explained in a letter to BSEE: "Recovery rates of spilled oil in optimum situations (calm weather, in a harbor, rapid response) rarely exceed 20 percent, and response to oil spills in ice in remote areas is substantially more challenging." Letter from Dr. Jane Lubchenco, Undersecretary of Commerce for Oceans and Atmosphere, to Ms. S. Elizabeth Birnbaum, Director, Minerals Management Service (Sept. 21, 2009) at 6, *available at* http://www.peer.org/docs/noaa/09_12_10_NOAA_Comments_on_MMS_5_Year_Plan.pdf.

71. The offshore response exercises in the Alaska Beaufort Sea, held in 2000, demonstrated that the operating limits for mechanical recovery with booms and skimmers in ice-infested waters was close to 10 percent ice coverage and that during fall freeze-up, ice conditions as low as 1 percent coverage constituted the operating limit for a barge-based mechanical recovery system using conventional boom and skimmers.

72. According the National Research Council, oil left behind over winter can travel hundreds of miles either because it is trapped in ice or because it is carried by currents under the pack ice. *See* National Research Council, Committee on Oil in the Sea, *Oil in the Sea III: Inputs, Fates, and Effects* 104-105 (2003), *available at* http://download.nap.edu/catalog.php?record_id=10388. Pack ice can be dynamic, as is the first year ice upon breakup, which means oil ice can spread over a long distance (perhaps as much as 100 kilometers). *Id*. As ice melts it can release the oil, which means the oil spreads over a wide area. *Id*. at 105.

73. In the Spill Plans, Shell acknowledges:

> There is the possibility that an incursion of older, multiyear ice could move in over a subsea blowout, and that a blowout could continue into the winter months exposing it to [a] mix of growing first-year and multiyear ice. While highly unlikely, this scenario could involve the deposition of oil and gas beneath the closely packed ice floes.

Beaufort Spill Plan, H-21; *see also* Chukchi Spill Plan H-17 (same). According to Shell, if the cleanup efforts become "impractical during the winter months, oil deposited beneath and trapped within the ice in this way could be dealt with . . . when it becomes naturally exposed in the spring/summer period." Beaufort Spill Plan, H-22; *see also* Chukchi Spill Plan H-17.

Shell's Worst Case Discharge Cleanup Assumptions

74. The Chukchi Spill Plan explains that "[t]o scale the potential shoreline response assets needed and for planning purposes, the [worst case discharge] scenario assumes that 10 percent of the 25,000-[barrels of oil per day (bopd)] escapes the primary offshore recovery efforts at the blowout." Chukchi Spill Plan, C-11. "The unrecovered 2,500 bopd is assumed to drift toward the mainland, driven by winds out of the [west-northwest]." *Id*. "For purposes of the [worst case discharge] scenario, it is assumed that half of the oil reaching the nearshore environment would be recovered by the skimming systems dispatched from" a large, mobile oil spill response barge and tug known as Task Force 6, or TF-6. *Id*. According to the Chukchi Spill Plan, "[t]he remaining 1,250 bopd are assumed to migrate towards the shoreline where" Shell's shoreline task forces (known as Task Forces 7 and 8 or TF-7 and TF-8) will intercept the oil and deploy boom. *Id*. The Chukchi Spill Plan does not explain the reasoning behind the assumptions described in this paragraph.

75. In the Chukchi, TF-6 "would be mobilized from its staging location in the Beaufort Sea and transit at a conservative planning speed of 5 knots. At this speed, TF-6 would

arrive by Hour 96 in the nearshore zone of the Chukchi Sea" to "support the shoreline protection task force (TF-7)." *Id.*

76. In the Chukchi, Shell's "[s]horeline protection and recovery task forces would set up and maintain multiple teams along the shoreline to recover oil. For planning purposes, each task force would maintain a minimum of six teams that deploy boom to intercept oil moving along the shoreline, a small skimmer, and Fastanks or bladders would be set up on the beach to hold the recovered liquids or oily waste and debris." *Id.*

77. The Beaufort Spill Plan explains that "[t]o scale the potential shoreline response assets needed and for planning purposes, the [worst case discharge] scenario assumes that 10 percent of the 16,000-bopd discharge escapes the primary offshore recovery efforts at the blowout." Beaufort Spill Plan, C-11. According to the Beaufort Spill Plan, "[t]he unrecovered 1,600 bopd is assumed to drift toward the mainland[.]" *Id.* The Beaufort Spill Plan explains that "it is assumed that half of the oil reaching the nearshore environment would be recovered by the skimming systems dispatched from" Shell's nearshore task force (known as Task Force 7 or TF-7). *Id.* According the Beaufort Spill Plan, "[t]he remaining 800 bopd are assumed to migrate towards the shoreline where" Shell's shoreline task force (known as Task Force 8 or TF-8) will intercept the oil and deploy boom. *Id.* The Beaufort Spill Plan does not explain the reasoning behind the assumptions described in this paragraph.

78. In the Beaufort, Shell's Task Force 7 "consists of two skimming vessels – one vessel is configured with two side booms and two LORI skimmers; the other vessel is configured with a single side boom and LORI skimmer." Beaufort Spill Plan, C-11.

79. In the Beaufort, Shell's Task Force 8 "consists of one supervisor and ten laborers (see Table C.4-2 of WCD Scenario)." Beaufort Spill Plan, C-11. "Shoreline recovery teams

would install up to 6,000 feet of the available deflection boom at the shoreline to recover oil (see Table C.4-1 of WCD Scenario)." *Id*. "One team works 10 locations within a 5-mile area. Two crews can manage shoreline operations for 10 miles." *Id*.

Shell's Worst Case Discharge Scenario Oil Spill Trajectories

80. According to the Chukchi Spill Plan, "[i]n the unlikely event strong, sustained winds develop out of the [west northwest], trajectory modeling estimates that six days is the earliest possible time oil could reach shore, even if no containment and recovery operations were conducted." Chukchi Spill Plan, C-11. "The areas of immediate concern include the Wainwright Inlet and Sinaruruk River to Peard Bay." *Id*., C-20. Shell's worst case discharge scenario trajectory in the Chukchi does not show shoreline contact. *Id*., C-3 (Figure C-1) (spill trajectory trending west away from the coastline).

81. According to the Beaufort Spill Plan, Shell expects that a worst case discharge would travel south from the Sivulliq drill site and potentially contact coastal areas between days 5 and 10 but would then reverse course and travel due north and stay in a circular shape offshore for the remainder of the spill. Beaufort Spill Plan, C-4 (Fig. C.2-1) (spill trajectory not reaching Prudhoe Bay). In the previously approved Beaufort Spill Plan, Shell expected the worst case discharge oil slick would travel almost due west along the coastline and contact Barrow, Alaska by Day 19 of the spill.

82. The Spill Plans did not identify the conditions used to develop the trajectory analyses for the worst case discharge scenarios. With regard to wind data, Shell states it used variable wind speed to develop its trajectory analysis. Chukchi Spill Plan, C-2—C-3; Beaufort Spill Plan, C-3 (Shell used "[v]ariable offshore wind data[.]"). With regard to currents, Shell used an "annual means analysis of surface current data" in the Beaufort worst case discharge.

Beaufort Spill Plan, C-3. In the Chukchi Spill Plan, Shell does not explain what current data it used in the worst case discharge trajectory. *See* Chukchi Spill Plan, C-2 (explaining only that oil "spreads as a function of ocean currents and wind"). With regard to ice, Shell never explained how it accounted for ice or icy conditions in its worst case discharge trajectory analyses. *See* Chukchi Spill Plan, C-2—C-3; Beaufort Spill Plan, C-2—C-5.

Shell's Arctic Containment System

83. Shell plans to have a containment system to support its Arctic drilling operations (Arctic Containment System). In September 2011, Pete Slaiby, Shell Alaska Vice President, gave a presentation to the Alaska Oil and Gas Association entitled "Shell Beaufort and Chukchi Sea Program Update" (September 2011). Shell Beaufort and Chukchi Sea Program Update, *available at* http://www.aoga.org/wp-content/uploads/2011/09/09-08-11-Alliance-Pete-Slaiby-Shell.pdf. Mr. Slaiby explained that Shell is "[d]eveloping [an] Arctic Containment System." *Id*. at 7. According to Mr. Slaiby, the Arctic Containment System "provides a toolkit to capture oil for multiple potential well control scenarios." *Id*. Mr. Slaiby identified three "primary components" to this system: subsea, containment vessel, and processing-separation equipment. *Id*.

84. In January 2012, Shell's Susan Childs wrote a letter to BSEE's Chief of Oil Spill Response Division, David Moore, transmitting Shell's Chukchi Spill Plan. *See* Letter from Susan Childs AK Venture Support Integrator, Manager, to David Moore, Director, Chief, Oil Spill Response Division (Jan. 26, 2012). In that letter, Ms. Childs references an animation of Shell's worst case discharge scenario, "which may be helpful in visualizing an escalating sequence of events at location," and is available at www.shell.us/alaska. *See id*., 3. Shell provided the complete narration for this animation in its January 26, 2012 transmittal letter to

BSEE. *Id*. The narration states: "Finally, as part of the initial response, Shell will mobilize an Arctic containment system that is equidistant from both drilling sites." *Id*., 4. The animation includes a graphic of the "Arctic containment system."

85. On March 16, 2012, OffshoreEnergyToday.com published a report describing Shell's Arctic Containment System as a "modular oil containment system." *See, e.g.*, USA: ABS to Class Unique Arctic Containment System, *available at* http://www.offshoreenergytoday.com/usa-abs-to-class-unique-arctic-containment-system/. Based on that report, this system will be installed on the deck of a non self-propelled ice-strengthened barge, which will remain unmanned and on standby until deployed. *Id*. According to the report, Shell "has contracted with Superior Energy, the operator of the [Arctic Containment System], for the containment system to be available during the summer drilling season." *Id*.

86. On July 5, 2012, the Los Angeles Times reported that a barge integral to the Arctic Containment System "has so far failed to acquire final U.S. Coast Guard certification." Shell May Be Ready for the Arctic, but Its Oil Spill Barge Isn't, Kim Murphy (July 5, 2012), *available at* http://www.latimes.com/news/nation/nationnow/la-na-nn-arctic-drilling-shell-barge-20120705,0,4632140.story. According to the story, "[t]he 294-foot barge, being revamped by Superior Energy Marine Technical Services in Bellingham, Wash., is designed to carry an array of sophisticated containment equipment that would collect spilled oil, separate it, flare off any natural gas and pump the remainder onto a storage tanker for removal. It would be deployed in the event that a blowout preventer or a capping device failed to completely halt the flow of oil from a failed well." *Id*. The story reports: "Nicholas Pardi of [BSEE] said the containment

system is part of the company's approved oil spill response plan, and the company is required to get it certified by the Coast Guard before drilling permits can be issued." *Id*.

87. The Spill Plans list Superior Energy Services, Inc. as a service provider of "Equipment Provider and Personnel" for Shell's Arctic operations beginning December 18, 2011. Beaufort Spill Plan, B-1; Chukchi Spill Plan, B-1.

88. The Spill Plans do not describe the Arctic Containment System. *See, e.g.*, Beaufort Spill Plan, Appendix A (Response Equipment); Chukchi Spill Plan, Appendix A (Response Equipment).

89. The Spill Plans do not describe Shell's procedures for mobilizing and deploying the Arctic Containment System (e.g., containment device, processing, etc.).

90. The Spill Plans do not describe Shell's procedures for mobilizing and deploying the Arctic Containment System (e.g., containment device, processing, etc.).

91. The Spill Plans do not describe Shell's procedures for capturing oil using the Arctic Containment System.

92. The Spill Plans do not describe Shell's procedures for containing oil using the Arctic Containment System.

93. The Spill Plans do not describe Shell's procedures for flaring gas, or separating, storing, or transporting oil using the Arctic Containment System.

94. The Spill Plans do not describe how Shell ensured the Arctic Containment System's equipment and techniques are suitable for the anticipated conditions at its Arctic drilling operations.

FIRST CLAIM FOR RELIEF
(Violation of the Clean Water Act)

95. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

96. The Clean Water Act requires oil spill response plans to demonstrate a company is prepared to remove a "worst case discharge" "to the maximum extent practicable[.]" 33 U.S.C. § 1321(j)(5)(D)(iii).

97. The Clean Water Act defines the phrase "worst case discharge," in the case of an offshore facility, to mean "the largest foreseeable discharge in adverse weather conditions." 33 U.S.C. § 1321(a)(24)(B).

98. The phrase "adverse weather conditions" "means weather conditions found in the operating area that make it difficult for response equipment and personnel to clean up or remove spilled oil or hazardous substances," including "inhospitable water and air temperatures, wind, sea ice, current, and sea states." 30 C.F.R. § 254.6.

99. A spill plan's discussion of the owner or operator's response to a worst case discharge scenario in adverse weather conditions must include a "description of the response equipment that [the company] will use to contain and recover the discharge to the maximum extent practicable." 30 C.F.R. § 254.26(d)(1). "For operations at a drilling or production facility, [the] scenario must show how [the company] will cope with the initial spill volume upon arrival at the scene and then support operations for a blowout lasting 30 days." *Id*.

100. To determine the necessary shoreline response assets, Shell relies on a planning assumption in its worst case discharge scenarios that 10 percent of the daily worst case discharge volume escapes the primary offshore recovery efforts at the blowout. Chukchi Spill Plan, C-11 (the "unrecovered 2,500 bopd is assumed to drift toward the mainland"); *see also* Beaufort Spill

Plan, C-11) (the "unrecovered 1,600 bopd is assumed to drift toward the mainland"). Shell assumes that half of the unrecovered 10 percent is recovered by the skimming systems dispatched from the nearshore task forces. *See* Chukchi Spill Plan, C-11; Beaufort Spill Plan, C-11. Thus in total, according to the Spill Plans, Shell anticipates that 5 percent of its worst case discharge volume is unrecovered and assumed to migrate toward the shoreline. *See* Chukchi Spill Plan, C-11; Beaufort Spill Plan, C-11.

101. The assumption that 95 percent of spilled oil could be recovered is contrary to evidence before the agency regarding the effectiveness of offshore oil recovery efforts in general; it is also contrary to the evidence before the agency regarding the effectiveness of offshore oil recovery efforts in the adverse weather and ice conditions in the Arctic in particular. Evidence submitted shows that offshore containment and recovery rates rarely exceed 10-15 percent and in icy conditions can be as low as 1 percent. *See, e.g.*, Decade of Achievement, 14; D.A., Wolfe, et al. (1994), *The Fate of the Oil Spilled from the Exxon Valdez*, 28 Envtl. Sci. & Tech. 561A, at 563A (1994); Jane Lubchenco, et al., Deepwater Horizon Oil Budget: What Happened to the Oil? (Aug. 4, 2010) Figure 1.

102. As a result of Shell's worst case discharge planning assumptions, Shell's nearshore and shoreline protection and recovery task forces are insufficient to address a worst case discharge scenario.

103. The Spill Plans do not explain the basis for the Shell's worst case discharge scenario planning assumptions. *See* Chukchi Spill Plan, Appendix C; Beaufort Spill Plan, Appendix C.

104. Despite the obligation to ensure the Spill Plans contain sufficient resources and personnel to respond to respond to a worst case discharge in adverse weather conditions, BSEE's

approval letters do not explain the agency's basis for accepting Shell's worst case discharge scenario planning assumptions regarding near-shore and shoreline resources. *See* 33 U.S.C. §§ 1321(a)(24)(B), 1321(j)(5)(D)(iii).

105. Due to their planning assumptions, the Spill Plans' worst case discharge scenarios do not satisfy the Clean Water Act's statutory directive to have "personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge[.]" *See* 33 U.S.C. § 1321(j)(5)(D)(iii).

106. In approving the Spill Plans based on these assumptions, BSEE violated the Clean Water Act, 33 U.S.C. § 1321(j), and its implementing regulations, and acted not in accordance with law pursuant to the APA, 5 U.S.C. §§ 702, 706.

107. In approving the Spill Plans based on these assumptions, without analysis or explanation, BSEE also acted arbitrarily and capriciously in violation of 33 U.S.C. § 1321(j)(5)(D)(iii), and its implementing regulations, and the APA, 5 U.S.C. §§ 702, 706.

SECOND CLAIM FOR RELIEF
(Violation of the Clean Water Act)

108. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

109. The Spill Plans must include "[a] discussion of [Shell's] response to [its] worst case discharge scenario in adverse weather conditions." 30 C.F.R. § 254.26.

110. The worst case discharge discussion must include "[a]n appropriate trajectory analysis specific to the area in which the facility is located." 30 C.F.R. § 254.26(b). "The analysis must identify onshore and offshore areas that a discharge potentially could affect. The trajectory analysis chosen must reflect the maximum distance from the facility that oil could move in a time period that it reasonably could be expected to persist in the environment." *Id*.

111. The Spill Plans do not describe adequately the conditions Shell used to develop its trajectory of a "worst case discharge scenario."

112. In Beaufort Spill Plan, Shell provided "one of the possible surface oil trajectories during the month of August[.]" Beaufort Spill Plan, C-3. Shell does not explain why it selected this trajectory to satisfy the worst case discharge scenario obligations.

113. In the Chukchi Spill Plan, Shell does not identify the time period used to develop the worst case discharge scenario trajectory. Chukchi Spill Plan, C-2-C-3. Shell does not explain why the selected trajectory satisfies the worst case discharge scenario obligations.

114. The Spill Plans fail to justify why the trajectories presented reflect the worst case discharge scenarios in adverse weather conditions or why the trajectories Shell presented are "appropriate" such that they reflect the "maximum distance" oil is expected to travel during the time it persists in the environment.

115. In approving the Spill Plans despite these failings, BSEE acted arbitrarily, capriciously and not in accordance with 33 U.S.C. § 1321(j)(5)(D)(iii), 30 C.F.R. § 254.26(b) and the APA, 5 U.S.C. §§ 702, 706.

THIRD CLAIM FOR RELIEF
(Violation of the Clean Water Act)

116. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

117. The Spill Plans must include "[a] discussion of [Shell's] response to [its] worst case discharge scenario in adverse weather conditions." 30 C.F.R. § 254.26(d).

118. The worst case discharge discussion must include "[a]n appropriate trajectory analysis specific to the area in which the facility is located." 30 C.F.R. § 254.26(b). "The analysis must identify onshore and offshore areas that a discharge potentially could affect." *Id.*

"The trajectory analysis chosen must reflect the maximum distance from the facility that oil could move in a time period that it reasonably could be expected to persist in the environment." *Id*.

119. The Spill Plans acknowledge that ice could move in over a subsea blowout, and that a blowout could continue into the winter months exposing it to mix of growing first-year and multiyear ice. Beaufort Spill Plan, H-21; *see also* Chukchi Spill Plan, H-17 (same). Under this scenario, oil could become deposited beneath and trapped within the ice until it was naturally exposed in the following spring/summer period. Beaufort Spill Plan, H-21; *see also* Chukchi Spill Plan, H-17.

120. The Spill Plans do not provide worst case discharge scenario oil spill trajectories that contemplate oil remaining in the water and/or under the ice through the winter. As a result, the Spill Plans fail to meet the requirement that trajectories reflect the time period during which oil "reasonably could be expected to persist in the environment." *See* 30 C.F.R. § 254.26(b).

121. In approving the Spill Plans despite these failing and without explanation, BSEE acted arbitrarily, capriciously and not in accordance with the 33 U.S.C. § 1321(j)(5)(D)(iii), 30 C.F.R. § 254.26(b) and the APA, 5 U.S.C. §§ 702, 706.

FOURTH CLAIM FOR RELIEF
(Violation of the Clean Water Act)

122. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

123. The Spill Plans must include "[a] discussion of [Shell's] response to [its] worst case discharge scenario in adverse weather conditions." 30 C.F.R. § 254.26(d).

124. The worst case discharge discussion must include "[a]n appropriate trajectory analysis specific to the area in which the facility is located." 30 C.F.R. § 254.26(b). "The

analysis must identify onshore and offshore areas that a discharge potentially could affect." *Id.* "The trajectory analysis chosen must reflect the maximum distance from the facility that oil could move in a time period that it reasonably could be expected to persist in the environment." *Id.*

125. The worst case discharge discussion must include a "list of the resources of special economic or environmental importance that potentially could be impacted in the areas identified by [the] trajectory analysis." 30 C.F.R. § 254.26(c). The owner or operator "must state the strategies that [it] will use for their protection." *Id.*

126. The Spill Plans do not identify the "list of the resources of special economic or environmental importance that potentially could be impacted in the areas identified by [a] trajectory analysis" of an overwintering spill, 30 C.F.R. § 254.26(c). Similarly, the Spill Plans fail to describe the strategies that Shell will use to protect the resources affected by overwintering oil. *Id.*

127. In approving the Spill Plans despite these failings, BSEE acted arbitrarily, capriciously and not in accordance with 33 U.S.C. § 1321(j)(5)(D)(iii), 30 C.F.R. § 254.26(c) and the APA, 5 U.S.C. §§ 702, 706.

FIFTH CLAIM FOR RELIEF
(Violation of the Clean Water Act)

128. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

129. The Clean Water Act requires oil spill response plans to demonstrate a company is prepared to remove a "worst case discharge" "to the maximum extent practicable[.]" 33 U.S.C. § 1321(j)(5)(D)(iii).

130. The Clean Water Act defines the phrase "worst case discharge," in the case of an offshore facility, to mean "the largest foreseeable discharge in adverse weather conditions." 33 U.S.C. § 1321(a)(24)(B).

131. The phrase "adverse weather conditions" "means weather conditions found in the operating area that make it difficult for response equipment and personnel to clean up or remove spilled oil or hazardous substances," including "inhospitable water and air temperatures, wind, sea ice, current, and sea states." 30 C.F.R. § 254.6.

132. Shell has repeatedly committed both to BSEE and the public that it intends to have an Arctic Containment System to support its Arctic exploration activities beginning in 2012. Despite these assurances and explicit assertions, the Spill Plans do not include the Arctic Containment System.

133. Shell acknowledged the Arctic Containment System is available and appropriate for its Arctic activities, but failed to include the system in the Spill Plans. As a result, the Spill Plans do not satisfy the Clean Water Act's statutory directive that the company is prepared to remove a "worst case discharge" "to the maximum extent practicable[.]" *See* 33 U.S.C. § 1321(j)(5)(D)(iii).

134. In approving the Spill Plans despite these failings, BSEE violated the Clean Water Act, 33 U.S.C. § 1321(j), and its implementing regulations, and acted not in accordance with law pursuant to the APA, 5 U.S.C. §§ 702, 706.

135. In approving the Spill Plans despite these failings, without analysis or explanation, BSEE also acted arbitrarily and capriciously in violation of 33 U.S.C. § 1321(j)(5)(D)(iii), and its implementing regulations, and the APA, 5 U.S.C. §§ 702, 706.

SIXTH CLAIM FOR RELIEF
(Violation of Clean Water Act)

136. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

137. A spill plan must provide a "discussion of [the owner or operator's] response to [its] worst case discharge scenario in adverse weather conditions." 30 C.F.R. § 254.26(d). This discussion must include a "description of the response equipment that [the company] will use to contain and recover the discharge to the maximum extent practicable." 30 C.F.R. § 254.26(d)(1).

138. An owner or operator's discussion of its response to a worst case discharge scenario in adverse weather conditions "must include" a "description of the personnel, materials, and support vessels that would be necessary to ensure that the identified response equipment is deployed and operated promptly and effectively." 30 C.F.R. § 254.26(d)(2).

139. The worst case discharge scenario must describe the "oil storage, transfer, and disposal equipment." 30 C.F.R. § 254.26(d)(3).

140. An owner or operator's discussion of its response to a worst case discharge scenario in adverse weather conditions must include "an estimation of the individual times needed for:

a. Procurement of the identified containment, recovery, and storage equipment;

b. Procurement of equipment transportation vessel(s);

c. Procurement of personnel to load and operate the equipment;

d. Equipment loadout (transfer of equipment to transportation vessel(s));

e. Travel to the deployment site (including any time required for travel from an equipment storage area); and

f. Equipment deployment."

30 C.F.R. § 254.26(d)(4).

141. In preparing the discussion required by 30 C.F.R. § 254.26(d), an owner or operator's spill plan must "[e]nsure that the response equipment, materials, support vessels, and strategies listed are suitable, within the limits of current technology, for the range of environmental conditions anticipated at your facility[.]" 30 C.F.R. § 254.26(e)(1). An owner/operator's spill plan must "[u]se standardized, defined terms to describe the range of environmental conditions anticipated and the capabilities of response equipment." *Id*., § 254.26(e)(2).

142. To the extent Shell's submissions to BSEE regarding its Arctic Containment System reflect an attempt to include the system in the Spill Plans, it does not meet the requirements of regulations. The Spill Plans do not describe the Arctic Containment System. *See*, *e.g.*, Beaufort Spill Plan, Appendix A (Response Equipment); Chukchi Spill Plan, Appendix A (Response Equipment). They do not describe Shell's procedures for mobilizing and deploying the Arctic Containment System. The Spill Plans do not describe Shell's procedures for capturing oil using the Arctic Containment System. They do not describe Shell's procedures for containing oil using the Arctic Containment System. They do not describe Shell's procedures for flaring gas, or separating, storing, or transporting oil using the Arctic Containment System.

143. The Spill Plans do not describe how Shell ensured the Arctic Containment System's equipment and techniques are suitable for the anticipated conditions at its Arctic drilling operations. They also do no use standardized, defined terms to describe the range of environmental conditions anticipated and the capabilities of the Arctic Containment System.

144. In approving the Spill Plans despite these failings, BSEE acted arbitrarily, capriciously and not in accordance with the CWA, 33 U.S.C. § 1321(j)(5), 30 C.F.R. § 254.23, 30 C.F.R. § 254.26(d), 30 C.F.R. § 254.26(e), and the APA, 5 U.S.C. §§ 702, 706.

SEVENTH CLAIM FOR RELIEF
(Violation of NEPA)

145. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

146. NEPA requires all agencies of the federal government to prepare a "detailed statement" regarding all "major [f]ederal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). To determine whether to prepare an EIS, an agency can prepare an EA. 40 C.F.R. § 1501.4.

147. The purpose of oil spill response planning is to ensure that spill response readiness and assessment is conducted in advance of an activity that could cause an oil spill and to ensure that adequate equipment, personnel, and response capabilities will be available in the event of a spill. After an oil spill occurs, there is insufficient time and resources available for BSEE assess the environmental impacts of oil spill response activities, techniques, and equipment or to evaluate alternatives to the proposed spill response activities.

148. Ill-informed decision-making regarding oil spill response choices can cause significant harm to marine resources and people who depend on a healthy marine environment for their livelihoods and aesthetic enjoyment. For example, inadequate spill response planning and readiness can lead to ill-conceived and excessive use of in situ burning and chemical dispersants, both of which have significant environmental and health effects that should be assessed before these techniques are used.

149. To the best of Plaintiffs' knowledge, BSEE failed to analyze in an EA or EIS the potentially significant impacts of the Spill Plans' response activities prior to approval, in violation of NEPA.

150. To the best of Plaintiffs' knowledge, BSEE failed to analyze alternatives to the proposed response techniques and equipment in an EA or EIS, including considerations based on temporal and spatial sensitivities, prior to approving the Spill Plans, in violation of NEPA.

151. BSEE's decision to approve the Spill Plans without complying with NEPA was arbitrary, capricious and not in accordance with law and violated NEPA, 42 U.S.C. § 4332(C), and the APA, 5 U.S.C. §§ 702, 706.

EIGHTH CLAIM FOR RELIEF[3]
(Violation of the ESA)

152. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 94.

153. Pursuant to Section 7 of the ESA, 16 U.S.C. § 1536, each federal agency undertaking an action which might adversely affect threatened polar bears or Steller's or spectacled eiders must consult with FWS to insure that its action is not likely to jeopardize the continued existence of those species or modify the critical habitat of those species.

154. Pursuant to Section 7 of the ESA, 16 U.S.C. § 1536, each federal agency undertaking an action which might adversely affect endangered bowhead, humpback, and fin whales must consult with NMFS to insure that its action is not likely to jeopardize the continued existence of those species.

[3] Alaska Wilderness League, Center for Biological Diversity, Greenpeace, National Audubon Society, Sierra Club, Natural Resources Defense Council, and REDOIL are pursuing this claim.

155. The decisions to approve the Spill Plans may affect polar bears and Steller's and spectacled eiders, which are listed as threatened under the ESA. FWS administers the ESA with respect to threatened polar bears and eiders. Accordingly, BSEE was required to consult with FWS prior to approving the Spill Plans. To the best of Plaintiffs' knowledge, BSEE did not consult with FWS prior to approving the Spill Plans.

156. The decisions to approve the Spill Plans may affect bowhead, humpback, and fin whales, which are listed as endangered under the ESA. NMFS administers the ESA with respect to endangered whales. Accordingly, BSEE was required to consult with NMFS prior to approving the Spill Plans. To the best of Plaintiffs' knowledge, BSEE did not consult with NMFS prior to approving the Spill Plans.

157. BSEE's decisions to approve the Spill Plans without complying with the ESA was arbitrary, capricious and not in accordance with law and violated the ESA, 16 U.S.C. § 1536(b) and the APA, 5 U.S.C. §§ 702, 706.

PRAYER FOR RELIEF

Therefore, Plaintiffs respectfully request that the Court:

1. Declare that BSEE, Kenneth Salazar, James Watson, and Mark Fesmire have violated the Clean Water Act and BSEE's relevant implementing regulations, 30 C.F.R. Pt. 254, and that the actions as set forth above are arbitrary, capricious and not in accordance with law;

2. Declare that Defendants BSEE, Kenneth Salazar, James Watson, and Mark Fesmire have violated NEPA and that the actions as set forth above are arbitrary, capricious and not in accordance with law;

3. Declare that Defendants BSEE, Kenneth Salazar, James Watson, and Mark Fesmire have violated the ESA and that the actions as set forth above are arbitrary, capricious and not in accordance with law;

4. Vacate the Defendants' approvals of the Chukchi Spill Plan and Beaufort Spill Plan;

5. Enter appropriate injunctive relief to ensure that the Defendants comply with the Clean Water Act, NEPA, and the ESA and to prevent irreparable harm to Plaintiffs and to the environment until such compliance occurs, including by requiring BSEE to prohibit Shell from engaging in offshore oil and gas activity until such time as Defendants comply with the Clean Water Act as required by 33 U.S.C. § 1321(j)(5)(F);

6. Award Plaintiffs the costs of this action, including reasonable attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

7. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 10th day of July, 2012.

s/ Holly A. Harris

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