

July 1, 2010

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Via Regular and Certified Mail

Re: Notice of Violations of The Outer Continental Shelf Lands Act; The Endangered Species Act, Implementing Regulations; and BP Atlantis Leases

Dear Sirs:

Pursuant to the citizen suit provision of the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1349(a)(2)(A), and the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), we hereby provide you with notice of multiple violations of the law by BP, p.l.c., BP America, Inc. and BP Exploration & Production, Inc. (hereinafter collectively referred to as “BP”), as well as the Department of Interior, through the Bureau of Ocean Energy Management, Regulation, and Enforcement, formerly known as the Minerals Management Service (hereinafter the current and former agency are referred to as “MMS”), with respect to BP’s Atlantis Facility located in the Gulf of Mexico. This letter is written on behalf of former BP sub-contractor Kenneth Abbott, and Food and Water Watch (“FWW”) — a national, non-profit public interest consumer advocacy organization that advocates for environmental protection and supports the long-term well-being of coastal and fishing communities.

As demonstrated below, both BP and MMS are in violation of myriad laws and regulations governing this facility. As further demonstrated, these violations of law pose serious threats of devastation and irreparable harm to the public’s safety, health, and environment — threats that have only been highlighted and exacerbated by the current catastrophe occurring with BP’s Deepwater Horizon facility in the Gulf.

I. RELEVANT STATUTORY AND REGULATORY FRAMEWORK

A. THE OUTER CONTINENTAL SHELF LANDS ACT

The United States, through the Department of Interior (“DOI”), leases the right to explore, develop, and produce the oil and gas contained within certain designated areas, subject to the requirements of the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.A. § 1331 *et seq.* OCSLA provides, *inter alia*, that the Secretary of DOI “shall enforce safety and environmental regulations promulgated pursuant to [the Act].” 43 U.S.C. § 1348 (emphasis added). OCSLA further provides that such regulations “shall include” provisions “for the suspension or temporary prohibition of any operations or activity, including production, pursuant to any lease or permit . . . if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life) . . . or to the marine, coastal, or human environment . . .” 43 U.S.C. § 1334(a)(1)(B) (emphasis added).

OCSLA further provides that “any person having a valid legal interest which is or may be adversely affected may commence a civil action against any person, including the United States . . . for any alleged violation of any provision” of OCSLA “or any regulation” promulgated under the statute, “or of the terms of any permit or lease issued by the Secretary” under OCSLA. 43 U.S.C. § 1349(a)(1). The Secretary of the Interior has authorized MMS to regulate oil, gas, and sulphur exploration, development, and production on the outer Continental Shelf. 30 C.F.R. § 250.01.

To protect the environment and public health, regulations promulgated by MMS require oil and gas operators to “certify” in writing that the design and construction of its production platform and related equipment and facilities meet certain specifications. *See* 30 C.F.R. §§ 250.904, 205.905, 250.912. For example, the regulations provide that to obtain approval for the installation of a oil and gas production facility, the operator must submit the “approved for construction fabrication drawings,” including, e.g., “cathodic protection systems; jacket design; pile foundations; drilling, production, and pipeline risers and riser tensioning systems; turrets and turret-and-hull interfaces; mooring and tethering systems; foundations and anchoring systems.” *See* 30 C.F.R. § 250.905(d). In addition, an “authorized company representative” must sign a “certification statement” stating that:

The design of this structure has been certified by a recognized classification society, or a registered civil or structural engineer or equivalent, or a naval architect or marine engineer or equivalent,

specializing in the design of offshore structures. The certified design and as built plans and specifications will be on file at (give location).

Id. § 250.905(j) (emphasis added).

MMS regulations also require that all deepwater oil and gas operators comply with the American Petroleum Institute (“API”) Recommended Practices for Design and Hazards Analysis for Offshore Production Facilities — API RP 14J. *See* 30 C.F.R. § 250.800(b)(1); 250.901(a)(14). To comply with API RP 14J:

- (a) A facility must maintain Process and Instrument Diagrams (“P&IDs”) and certain other drawings, as the “[t]he minimum safety and environmental information” which “forms the basis of any hazards analysis;”
- (b) Any Hazards and Operability Studies require a “complete set of . . . P&IDs” and other documents;
- (c) P&IDs and certain other drawings needed for a hazards analysis of even the lowest risk facilities must be “up to date;” and;
- (d) P&IDs and certain other documents need to be “maintained throughout the life of a facility.”

API Recommended Practices for Design and Hazards Analysis for Offshore Production Facilities, Second Ed., May 2001; reaffirmed March 2007, Product No. 614 J02, incorporated by reference at § 250.800(b)(1); § 250.901(a)(14), at 32, 39, 44, Appendix A-1 (emphasis added). As explained by Michael Sawyer, a licensed Professional Engineer with 27 years of experience in this industry, API’s requirement that the drawings be “up to date” means that facilities must retain engineering documents that reflect the components and structures “as built.” *See* Exhibit A, Declaration of Michael E. Sawyer, P.E., CSP, June 25, 2010 at 5 (“The development of proactive process safety programs in dependent upon the accuracy of engineering documentation.”).

MMS regulations further require that all oil and gas operators abide by the general regulations “govern[ing] the production safety system” promulgated under 30 C.F.R. § 250.800, which in turn also requires compliance with API RP 14J. As noted above, API RP 14J instructs the facility to maintain complete and accurate “as-built” P&IDs and other drawings independent of other regulatory provisions.

MMS additionally requires that operators submit a specific statement assuring that “[t]he certified design and as built plans and specifications will be on file at (give location)” 30 C.F.R. § 250.905(j), and that operators will “compile, retain, and make

available to MMS representatives for the functional life of all platforms . . . the ‘as-built drawings.’” 30 C.F.R. § 250.903(a).

Finally, MMS requires that all operators “must . . . use [and] maintain . . . all platforms and related structures on the Outer Continental Shelf . . . so as to ensure their structural integrity for the safe conduct of drilling, workover, and production operations.” 30 C.F.R. § 250.900(a). To ensure such structural integrity, it is necessary that operators retain “as-built” documentation.

B. THE LEASE FOR THE ATLANTIS FACILITY

The Atlantis field consists of outer-continental shelf leases, which were entered into between DOI/MMS and BP provide, *inter alia*, that the leases are “subject to the Act [OCSLA]; all regulations issued pursuant to the Act and in existence upon the Effective Date of [the] lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf and the protection of correlative rights therein; and all other applicable statutes and regulations.” See, e.g., Exhibit B, Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act, May 25, 1995, at Section 1 (emphasis added); see also Exhibit C, Unit Operating Agreements, May 4, 2005, at 4. The leases further provide that the lessee (BP) “shall: (a) maintain all places of employment within the leased area in compliance with occupational safety and health standards and . . . free from recognized hazards to employees of the Lessee or of any contractor or subcontractor operating within the lease area; and (b) maintain all operations within the leased area in compliance with regulations or orders intended to protect persons, property, and the environment on the Outer Continental Shelf.” See Exhibit B, Lease, at Section 12 (emphasis added).

C. THE ENDANGERED SPECIES ACT

The purpose of the Endangered Species Act (“ESA”) is to “provide a means whereby the ecosystems upon which the endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.” 16 U.S.C. § 1531(b). The Act uses several mechanisms to achieve its goals. It requires the Secretary of the Interior to “list” species as either “endangered” or “threatened” — designations that entitle those species to protection under the statute. 16 U.S.C. § 1533. An endangered species is one that “is in danger of extinction throughout all or a significant portion of its range,” and a “threatened species” is one that “is likely to become an endangered species within the foreseeable future.” 16 U.S.C. §§ 1532(6); (20).

Unless permission has been obtained from the Secretary of the Interior (for terrestrial species) and the Department of Commerce (for marine species), the statute

makes it illegal to “take” an endangered species, *id.* § 1538, or in other words, to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” the species. *Id.* § 1532(19). This prohibition has been extended by regulation to threatened species as well. 50 C.F.R. §§ 17.21, 17.31.

Section 7 of the Act provides that all federal agencies “shall, in consultation with and with the assistance of the Secretary [of Interior or Commerce], utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of” endangered and threatened species. 16 U.S.C. § 1536(a)(1) (emphasis added). Section 7 further provides that each federal agency “shall,” in consultation with the Secretary, “insure that any action authorized, funded or carried out” by the agency “is not likely to jeopardize the continued existence of any endangered or threatened species . . .” 16 U.S.C. § 1536(a)(2) (emphasis added). Thus, as the Supreme Court summarized, section 7 “require[s] agencies to afford first priority to the declared national policy of saving endangered species,” and to ensure that this priority takes precedence “over the ‘primary missions’ of federal agencies.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978) (emphasis added).

To fulfill its obligations under section 7, federal agencies must review their actions to determine whether they “may affect” an endangered or threatened species. 50 C.F.R. § 402.14(a). If so, the agency must engage in “formal consultation” with either the Fish and Wildlife Service (“FWS”) (for terrestrial species) or the National Marine Fisheries Service (for marine species). *Id.* Based on all “relevant information,” FWS /NMFS must then prepare a “biological opinion” which “detail[s] how the agency action affects the species,” 16 U.S.C. § 1536(b)(3)(A), and sets forth the FWS’s/NMFS’s opinion as to whether those adverse affects are “likely to jeopardize” the continued existence of the species. 50 C.F.R. §§ 402.14(g), (h)(1)-(3). If the FWS/NMFS concludes that an action is likely to jeopardize a species, it “shall suggest those reasonable and prudent alternatives” which, if implemented, would not result in a violation of the Act. 16 U.S.C. § 1536(b)(3)(B). To fulfill its Section 7 obligations to “insure” that its actions will not jeopardize a listed species, an agency is required to “reinitiate” consultation whenever “new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b) (emphasis added).

II. PERTINENT FACTS

BP Atlantis is one of the deepest moored floating dual oil and gas-production facilities in the world. It has a production capacity of 8.4 million gallons of oil and 180 million cubic feet of gas per day, and is the largest oil and natural gas facility in the world. Atlantis is located only 150 miles off the coast of Louisiana, in water nearly 2,000 feet deeper than BP drilled at Deepwater Horizon.

According to BP, the “worst case scenario” should there be a blow-out at the Atlantis facility would result in approximately 200,000 barrels of crude oil being spilled into the Gulf of Mexico each day. *See* Exhibit D, Development Operations Coordination Documents, December 5, 2002, at 37. BP has certified that it can handle this “worst case scenario.” As evidenced by the past six weeks of uncontrollable spillage and the failed attempts to plug the runaway well — a spill far below the Atlantis “worst case scenario” — neither BP nor MMS have the ability to promptly respond.

Thus, in light of the fact that BP has been unable to stop or contain the Deepwater Horizon spill, and that spill is wreaking havoc on the environment of the Gulf of Mexico, bordering states, and beyond, should there be a similar accident at the Atlantis facility, it is clear that BP will also be completely unequipped to deal with the problem, to the great detriment of the public and the already completely taxed ecosystem of the Gulf of Mexico and its bordering states.

Beginning on August 18, 2008, Kenneth Abbott was employed by a BP subcontractor as the “Project Services Lead” to supervise document control on the subsea portions of the BP Atlantis Project. His duties included supervising the databases that maintain all subsea Project documentation, and ensuring compliance with BP’s Project Execution Plan for the Atlantis facility. That Plan required each lead engineer to issue documents reflecting the “as-built” condition prior to deployment to the field.

Soon after Mr. Abbott began his work on the Project, he learned that BP operations did not have the complete “as-built” engineering documents for the many subsea components of the BP Atlantis Project, including such critical systems and P&IDs, mechanical, controls, and installation engineering documents. In fact, on September 2, 2008, Mr. Abbott received an internal email that had been written by his immediate predecessor Barry Duff explaining to the Operations Document Control Division at BP that “[t]he P&IDs for Subsea [components] are not complete,” and “have not been approved or handed over the Operations.” *See* Exhibit E, Internal E-mail Exchange From Barry Duff, August 15, 2008. (emphasis added). Mr. Duff emphasized that in fact “[c]urrently there are hundreds if not thousands of Subsea documents that have never been finalized,” and therefore Operations had no finalized documents in which to reply upon. *See id.* (original emphasis).

As Mr. Duff further explained, “it is fundamentally wrong to turn over documents to Operations (for Operations use and purposes), before they have been finalized,” because “[t]he Operator will assume the drawings are accurate and up to date,” and “[t]his could lead to catastrophic Operator errors due to their assuming the drawing is correct” when it is not. *Id.* (emphasis added). Moreover, “[t]urning over incomplete drawings to the Operator for their use is a fundamental violation of basic

Document Control, the IM [Information Management] Standard and Process Safety Regulations.” *Id.*

Indeed, engineering projects such as Atlantis involve multiple phases of design and construction engineering documents, beginning as design concepts and ending with “as-built” engineering documents — i.e., how the components and overall structures were actually finally built. Because engineering documents may change drastically from the first “issued for approval” drafts to the final “as-built” phase, the “as-built” engineering documents are critical to the efficient and safe operation of the facility as they reflect precisely the design of the components and overall system. Therefore, without properly maintained “as-built” engineering documents, the individuals operating the BP Atlantis facility are operating without the information they need to safely operate the facility, and thus they have no way to insure that another calamitous oil spill, like BP’s ongoing Deepwater Horizon spill, will not recur — with even more calamitous effects for the BP employees, general public, and the environment.

Yet, as of November 28, 2008, according to the BP Atlantis Project Drill Center 1 database, only 274 of the project’s 7,176 drawings (less than 4 %) have been approved as “as-built,” and 6,393 (90%) have never been engineer approved. Mr. Abbott has similarly noted document deficiency problems within the BP Atlantis Project Drill Center 3 database. Exhibit G, Mr. Abbott Email Regarding DC3 Issues, November 19, 2008.

After months of contacting management regarding these problems, on February 3, 2009, Mr. Abbott was fired by BP. On March 4, 2009, Mr. Abbott reported the document deficiency problem to BP’s Ombudsman’s office, which has since verified not only that Mr. Abbott’s concerns about the lack of documentation were “substantiated,” but that Mr. Abbott was not the first employee to report such problems to the BP. See Exhibit F, Letter from Office of the Ombudsman, April 13, 2010, at 1 (“[y]our concerns about the project not following the terms of its own Project Evaluation Plan were substantiated”) (emphasis added); see also *id.* (“The concerns that you expressed about the status of the drawings upgrade project were not unique to you. It was a challenge to the Project and of concern to others who raised the concern before you worked there, while you were there, and after you left”) (emphasis added).

Between March 2009 and May 2010, Mr. Abbott and FWW tried in vain to get MMS to take appropriate enforcement action against BP for its myriad violations of OCSLA regulations. On February 24, 2010 — months before the Deepwater Horizon disaster — nineteen members of Congress wrote to the Director of MMS regarding this matter, stating that the agency “owes it to all American taxpayers to fully investigate the allegations made related to environmental and safety standards of domestic

offshore energy production," because of the "considerable risk to the environment." See Exhibit H, Letter from Congress to Director Birnbaum, Feb. 24, 2010.

However, to date, MMS has failed to take necessary action to enforce these safety and environmental regulations against BP with respect to the Atlantis facility. Moreover, in response to a request under the Freedom of Information Act for copies of the "as-built" drawings that BP is required to maintain under the agency's regulations, the agency replied that "MMS does not require 'as built' drawings for subsea components and therefore has not inspected any "as-built" drawings for subsea installations." See Exhibit I, Letter from MMS to Zach Corrigan, April 30, 2010, at 3 (emphasis added).

III. NOTICE OF VIOLATIONS OF LAW

A. VIOLATIONS OF LAW BY BP

1. Violations of MMS Regulations

As the foregoing demonstrates, BP is in violation of numerous MMS safety and environmental regulations, including (1) the Platform Program and Platform Verification Program, 30 C.F.R. §§ 250.904(a) and (b); (2) the general requirements for production systems, 30 C.F.R. §§ 250.800, 250.903; and (3) Oil Response Plan, 30 C.F.R. § 254.30.

a) Platform Approval Program and Platform Verification Program

As discussed above, MMS regulations require that the construction of deepwater facilities comply with the Platform Approval Program and the Platform Verification Program. 30 C.F.R. §§ 250.904(a); (b). In order to obtain "approval" and "verification" under these programs, BP must submit a statement certifying that "[t]he design of this structure has been certified by a recognized classification society, or a registered civil or structural engineer or equivalent, or a naval architect or marine engineer or equivalent, specializing in the design of offshore structures. The certified design and as-built plans and specifications will be on file at (give location)." 30 C.F.R. § 250.905(k) (emphasis added).

Pursuant to 30 CFR 250.905(k), BP was required to file statement that an engineer had certified the design, and the "as-built" design document would be located on file at a specified location. *Id.*

Freedom of Information Act Requests by FWW for such statements have gone unfilled by MMS. Accordingly, if no such statements were filed by BP, BP is in violation for failure to make the required certification. If the statement was filed, it is

false because, according to BP documents provided by Mr. Abbott, there was: (1) no certified design as almost 90% of BP engineering documentation contained no approval and (2) only 274 out of 7,176 engineering drawings and documents (less than 4%) were “as-built.”

Thus, BP did not have, and could not have truthfully certified to having, either the certified design or a complete set of “as-built” plans and specifications on file. Consequently, BP has failed to “compile, retain, and make available to MMS representatives for the functional life of all platforms: . . . the as-built drawings...[,]” as required under 30 C.F.R. § 250.903(a)(1) (emphasis added). Further, with regard to other subsea components and systems of the BP Atlantis Facility, there exists a lack of requisite “approved for construction” documentation under 30 C.F.R. § 250.905(d) for subsea systems, wellheads, trees, manifolds, pipelines/flowlines, controls, umbilical, installation. According to Mr. Abbott, out of approximately 7,176 documents, only 459 (less than 7%) have “approved for construction” documentation and thus violate the requirements of those programs. *Id.*

In light of these facts it is inconceivable that BP accurately “certified” that it has the necessary approved design drawings, and it is also simply not possible that BP can accurately “certify” that the “as-built plans and specifications” continue to “be on file” at BP as required by the regulations.

The Platform Verification Program also requires approval of a fabrication verification plan, 30 C.F.R. §§ 250.912(b)(3)(ii); (vi), which must include “welding procedures” and “methods and extent of nondestructive examinations for welds and materials.” *Id.* However, according to Mr. Abbott, less than three percent (3%) of the BP Atlantis Facility’s subsea Welding Procedure Specifications and Procedure Qualification Records were listed as “issued for construction” or “issued for design.” Ninety-five percent of the records had no final approval at all, calling into question the quality of thousands of critical welds on subsea components.

Accordingly, because BP has failed to maintain the requisite and complete set of documents for its fabrication verification plan, BP is not in compliance with the Platform Approval or Platform Verification Program regulations.

b) General Requirements of Production Safety Systems

Because, as explained above, BP has not maintained the requisite “as-built” P&IDs and drawings required by the various regulations and API RP 14J, it is also in violation of MMS’s general regulations that provide that “[p]roduction safety equipment shall be designed, installed, used, maintained, and tested in a manner to assure the safety and protection of the human, marine, and coastal environments.” 30 C.F.R. § 250.800(a) (emphasis added).

Because BP lacks the necessary final drawings for the Atlantis facility, it is further in violation of the MMS general regulation that provides that all operators “must . . . use, [and] maintain . . . all platforms and related structures on the Outer Continental Shelf . . . so as to ensure their structural integrity for the safe conduct of drilling, workover, and production operations.” 30 C.F.R. § 250.900(a) (2006). As Mr. Sawyer explains in his declaration:

The absence of up-to-date “as-built” engineering documents introduces substantial risk of large scale damage to the Gulf of Mexico Environment because analyses and procedures based on unverified designs do not portray an accurate assessment of operational risk. Although hazard analysis is an iterative process, each analysis requires the latest information in order to make accurate decisions on risk reduction measures that will be incorporated into the next drawing revision. This iteration continues throughout the design phases until the final approved for construction version drawings are analyzed. The use of inaccurate documents to analyze hazards will mask actual risk. This alone could lead to an incident. But, the danger does not end with a mere misrepresentation of operational risk during hazard analysis. The development of fabrication procedures, suitability for service specifications, maintenance and inspection guides, testing methods, training, and operational instructions are all based upon information gathered from engineering documents. In essence, an error made through use of an inaccurate drawing will be magnified throughout fabrication of the equipment, maintenance, training, and operations.

Exhibit A, Sawyer Declaration, at 8-9 (emphasis added).

c) Oil Response Plan

Finally, all of BP's activities and facilities for the BP Atlantis are covered by the company's Regional Oil Response Plan. Upon information and belief, since the Deepwater Horizon disaster, BP has failed to submit a revised Oil Response Plan pursuant to 30 C.F.R. § 254.30. BP is required to “submit revisions to [Oil Response Plan] for approval within 15 days whenever: (1) A change occurs which significantly reduces your response capabilities; (2) A significant change occurs in the worst case discharge scenario or in the type of oil being handled, stored, or transported at the facility.” The ongoing response to Deepwater Horizon incident certainly must significantly reduce BP's response capabilities. Moreover, the Oil Response Plan approved for operations prior to the Deepwater Horizon incident was based on outdated government models. MMS noted “[t]he oil spill trajectory models currently used by the oil industry for the preparation of oil spill responses (“OSRPs”) may not be

adequate for deepwater. While the basic physical processes affecting the movements of oil and natural gas released by a deepwater pipeline or well blowout are understood well enough to develop a theoretical trajectory jump model, what is needed is a data set from an actual deepwater release to validate and calibrate the model.”¹ The Deepwater Horizon incident has provided such a dataset, and consequently has warranted the submission of a revised plan to reflect new oil spill trajectories. Finally, BP’s actual response to the Deepwater Horizon incident indicates it is not prepared to handle the worst-case scenario projected for a large oil spill from a facility such as Atlantis. Because BP has not filed an amendment to its Oil Response Plan it is in violation of 30 C.F.R. § 254.30.²

2. **BP’s Violations of the Lease**

For the same reasons, BP is also in violation of the lease it entered into with the United States which, as explained *supra*, expressly provides that it is subject to compliance with “all” MMS regulations “which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf and the protection . . . and all other applicable statutes and regulations. See Exhibit B, Lease, at Section 1.

In addition, because BP is also in violation of the “process safety management” requirements included in Occupational Safety and Health Administration regulations 29 C.F.R. § 1910.119(d)(3), and because failure to maintain the “as-built” drawings for the subsea components of the Atlantis facility clearly compromises the safety of the BP employees who work at that facility, BP is also in violation of the lease provision that provides that “the Lessee shall . . . maintain all places of employment within the leased area in compliance with occupational safety and health standards and, in addition, free from recognized hazards to employees of the Lessee or of any contractor or subcontractor operating within the lease area.” See Exhibit B, Lease, Section 12 (emphasis added).

Indeed, as Mr. Sawyer explains in his declaration:

Inaccurate process safety information, if uncorrected, will propagate throughout the safety program in the form of erroneous operating procedures, flawed inspection, testing, and mechanical integrity procedures and practices, including inconsistent operational and emergency response training. Perhaps the greatest danger of inaccurate

¹ Exhibit J, Robert P. LaBelle & James S. Lane, *Meeting the Challenge of Deepwater Spill Response*, 20170-4817, Minerals Management Service, U.S. Dep’t of the Interior.

² MMS also violated 30 C.F.R. § 254.2 (a)(2) when it approved BP’s Regional Response Plan that indicated that BP had the capability of recovering 339,207 barrels of oil per day despite research conducted by MMS proving the contrary. See <http://www.mms.gov/tarprojectcategories/mechanic.htm>

engineering documentation is the susceptibility of safety instrument systems (SIS) to latent failures. SISs are used to sense unsafe conditions prior to human intervention and promptly initiate control measures to return the system to a safe state. SISs are especially necessary in critical environments such as complex and ultra-deep water facilities such as BP Atlantis. Flaws in safety critical controls such as shutdown logic may go undetected until emergency conditions arise. This is especially true if SIS inspection and testing specifications are not based on final, approved “as-built” design. Catastrophic incidents have arisen due to safety systems failing to react as anticipated and operators attempting to compensate.

Exhibit A, Sawyer Declaration, at 7 (emphasis added).

Therefore, because the BP Atlantis facility is certainly not operating “free from recognized hazards to employees” — i.e., it is operating at great risk to the safety of its employees – BP is also in violation of this particular lease provision. See Exhibit A, Sawyer Declaration, at 11 (“Knowingly having all of these accumulated . . . engineering discrepancies represents an inconceivable indifference to the safety and wellbeing of personnel aboard BP Atlantis and the Gulf of Mexico environment”) (emphasis added).

3. Violations of the Notice to Lessees

Because BP has violated numerous MMS regulations with respect to this facility, it cannot possibly be in compliance with the agency’s June 8, 2010 Notice to Lessees, which required BP to certify, by 5:00 p.m. EDT June 28, 2010, that it is “in compliance with” “all operating regulations at 30 CFR 250.” See Exhibit K, National Notice To Lessees and Operators Of Federal Oil and Gas Leases, Outer Continental Shelf (OCS), June 8, 2010

B. VIOLATIONS OF LAW BY DOI AND MMS

1. Violations of OCSLA and the Atlantis Lease

Because DOI and MMS have failed to take any enforcement action against BP for these flagrant violations of the MMS regulations and the Atlantis lease, DOI and MMS are in violation of the command of the OCSLA that it “shall enforce safety and environmental regulations promulgated pursuant to [the Act].” 43 U.S.C. § 1348 (a) (emphasis added); see also *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (“any contention that the relevant provision of [the statute] is discretionary would fly in the face of its text, which uses the imperative ‘shall’”) (emphasis added). DOI, through MMS, is also in violation of 43 U.S.C. § 1334, which provides that its regulations “shall include . . . provisions . . . for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit . . . if there is a threat of serious,

irreparable, or imminent harm or damage to life (including fish and other aquatic life), to property . . . or to the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1)(B) (emphasis added). In light of the gravity of the violations at issue here, and the devastation that has already occurred to the Gulf of Mexico environment as a result of the Deepwater Horizon spill, there certainly can be no doubt that a similar accident at the Atlantis facility poses a "threat" of "irreparable harm or damage" to the environment.

DOI and MMS are also in violation of the lease that it entered into with BP on behalf of the public, which, again is expressly conditioned on compliance with "all" MMS regulations "which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf and the protection . . . and all other applicable statutes and regulations." See Lease at 2; see also 30 C.F.R. § 250.101(a) ("the Director [of MMS] requires that all operations . . . [b]e conducted according to . . . the lease of right-of-way").

These violations by DOI and MMS appear to be symptomatic of what has emerged as a clear pattern and practice by this agency to abdicate its responsibilities to enforce OCSLA. This pattern and practice is evidenced not only by the agency's blatant failure to enforce important safety and environmental regulations,³ but also by its candid pronouncement to FWW that "MMS does not require 'as-built' drawings for subsea components and therefore has not inspected any 'as-built' drawings for subsea installations." See Exhibit I, Letter from MMS to Zach Corrigan, April 30, 2010, at 3. This admission is similar to other statements of non-enforcement that MMS has recently made in public, including, for example, recent testimony by MMS District Drilling Engineer Frank Patton that he "never" ensures that the operators of drilling facilities meet their obligations to handle a "blow-out" at an oil rig, pursuant to 30 C.F.R. § 250.416(e), and that he was never "trained" to do so. See Exhibit L, Investigative Hearings, May 11, 2010, at 275 (Mr. Patton states that he "never looked for a statement on that [assurance that the blind shear ram will prevent a blow-out] in my applications to drill. When I was in training for this, I was never . . . told to look for this statement"); *id.* at 276 ("I have never looked for that statement") (emphasis added). Indeed, Mr. Patton admitted that he "assumes" that this practice of non-enforcement extends to

³ By way of example, DOI MMS have failed to request from BP an updated Development Operations Coordination Document (DOCD) based on BP's lack of safety documentation. See 30 C.F.R. § 250.284(a) ("The Regional Supervisor will periodically review the activities you conduct under your approved EP, DPP, or DOCD and may require you to submit updated information on your activities. The frequency and extent of this review will be based on the significance of any changes in available information and onshore or offshore conditions affecting, or affected by, the activities in your approved EP, DPP, or DOCD."). A proposed DOCD must include an environmental analysis depicting how oil and gas operations will avoid incidental takes under the ESA. 30 C.F.R. § 250.261; see also 30 C.F.R. § 250.227(a)(4). Lack of safety documentation would constitute a significant change warranting the proposal of an amended DOCD.

“other offices” at MMS as well. *Id.*; *see also, e.g.*, DOI Inspector General Report, Sept. 9, 2008, at 3 (reporting “management that through passive neglect, at best, or purposeful ignorance, at worst, was blind to easily discernible misconduct”) (emphasis added); DOI Inspector General Investigative Report, March 31, 2010, at 4-5 (MMS inspector admits that he does not “write up” his friends who work in the industry). In addition, MMS asserts that it lacks the authority or jurisdiction to take required regulatory actions⁴

2. Violations of MMS Regulations

BP has been permitted to engage in dangerous activity at depths far below the sea without regard for critical regulations. By allowing BP to install, commence, and continue production at the Atlantis Facility, DOI and MMS have violated their own regulations and OCSLA prior to and since they received notice of BP’s ongoing violations. *See* 43 U.S.C. § 1348 (a); 30 C.F.R. §§ 250.800(a);(b)(1); 30 C.F.R. § 905(k).

Prior to authorizing installation of the BP Atlantis Facility, MMS regulations require that operators submit a complete set of “approved for construction” structural drawings, 30 C.F.R. § 250.905(d), and a certification that “as-built” plans will be kept on file at a specific location. 30 C.F.R. § 250.905(k). Because DOI and MMS permitted the installation of the BP Atlantis facility without these necessary prerequisites, DOI and MMS were in violation of MMS regulations. 30 C.F.R. § 250.905(d); 30 C.F.R. § 250.905(k).

Further, pursuant to 30 C.F.R. § 250.900(b)(1), prior to the approving the installation of the BP Atlantis Facility, DOI and MMS required that BP follow the “industry standards” listed in 30 C.F.R. § 250.901(b). Such standards include the API RP 14J, which has likewise been codified at 30 C.F.R. § 250.198. As noted by Mr. Sawyer, API RP 14J requires accurate, “as-built” engineering documentation. Exhibit A, Sawyer Declaration, at 5. Because BP could not have maintained a complete set of “as-built” documents, DOI and MMS violated its own regulations in allowing BP to the BP Atlantis Facility. 30 C.F.R. § 250.901(a)(14).

DOI and MMS also violated MMS regulations when they allowed BP to continue production operations after receiving notice of BP’s violations. 43 U.S.C. § 1348(a); 30 C.F.R. § 250.901(a)(14); 30 C.F.R. §§ 250.904(a) & (b); 30 C.F.R. § 250.905(k). Mr. Abbott

⁴ This pattern of non-enforcement appears to result from an inordinately cozy relationship that has developed between MMS and the personnel it is entrusted to regulate. *See, e.g.*, OIG Report (Sept. 8, 2008) (reporting a “culture of ethical failure,” including the fact that a significant number of MMS employees “received a wide array of gifts and gratuities from oil and gas companies with whom [they were] conducting official business); Office of Inspector General Memorandum (May 24, 2010) (“Of greatest concern to me is the environment in which these inspectors operate – particularly the ease with which they move between industry and government”).

and FWW have persistently notified DOI and MMS of BP's violations for over one year to no avail. By allowing production to continue without requisite documentation, DOI and MMS have failed to enforce their own regulations and have subjected the Gulf Coast to "substantial risk of large scale damage to the Gulf of Mexico Environment." Exhibit A, Sawyer Declaration, at 8-9 (emphasis added).

3. Violations of the Endangered Species Act

DOI and MMS are also in violation of its duties under Section 7 of the ESA, which provides that it must "insure" that its actions are "not likely to jeopardize the continued existence of any endangered or threatened species . . ." 16 U.S.C. § 1536(a)(2). Thus, whatever consultation MMS did with respect to its prior approvals of this facility to comply with its obligations under Section 7, in light of the new information it has concerning (a) BP's failure to comply with the applicable safety and environmental regulations at the Atlantis facility; and (b) the current BP disaster occurring in the Gulf of Mexico because of BP's Deepwater Horizon facility, there is no question that the agency must "reinitiate" consultation. See 50 C.F.R. § 402.16(b) (requiring the re-initiation of consultation whenever "new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered") (emphasis added).

There are numerous listed species that depend on the Gulf of Mexico for survival including, but limited to, the following: the West Indian manatee, Alabama beach mouse, Perdido Key beach mouse, piping plover, wood stork, loggerhead sea turtle, leatherback sea turtle, Kemp's Ridley sea turtle, Green sea turtle, Alabama red belly turtle, Gulf sturgeon, Hawksbill sea turtle, Whooping crane, Choctawatchee beach mouse, St. Andrew beach mouse, Florida perforate cladonia, key deer, Key Largo cotton mouse, Lower Keys marsh rabbit, Rice rat, Key Largo woodrat, Roseate tern, American crocodile, Beach jacquemontia, and Garbers spurge. See <http://www.fws.gov/home/dhoilspill/pdfs/FedListedBirdsGulf.pdf> (listing of "Federally Listed Species that Could Potentially be Impacted by Gulf Oil Spill").

Accordingly, because BP's blatant violations of applicable regulations place these species at additional risk, MMS must reinitiate consultation with respect to the Atlantis facility.

IV. CONCLUSION

The Deepwater Horizon disaster has caused an environmental catastrophe that will undoubtedly affect marine life for generations to come. As noted by President Obama, the Deepwater Horizon oil spill has impacted the national psyche "[i]n the same way that our view of our vulnerabilities and our foreign policy was shaped by 9/11," and the disaster will further "shape how we think about the environment and

energy for many years to come.”⁵ While President Obama’s Administration works to establish a “long term plan” to counter the dangers associated with deepwater productions, it must also be ensured that all oil and gas operations comply with regulations and statutes imposed by DOI and MMS. As noted above, BP Atlantis lacks critical documentation required by law and necessary for safe operation and maintenance.

Subsea components and processes exist in depths untouchable by humans, and require exact “as-built” documentation to ensure public safety and health. Without such documentation, “it is virtually impossible for the subsea systems to be properly analyzed, operated and maintained for a substantial period of time.”⁶ Accidents that occur at such depths result in catastrophes, and as recognized by the Government, “[t]he fact that the source of the leak is a mile under the surface, where no human can go, has made it enormously difficult to stop.”⁷

It is undeniable that a major subsea accident at the BP Atlantis Facility would cause significant harm. The Deepwater Horizon disaster has already incurred numerous wildlife fatalities,⁸ and endangered species of sea turtles are creeping closer to extinction while other bird species are losing habitats essential for their breeding, wintering and migrating. Further, the economic survival of many individuals and businesses that rely on the Gulf have been jeopardized by the current disaster, and would undoubtedly suffer if another were to occur. The inability to stop a leak from the BP Atlantis Facility, a facility with production power much greater than the Deepwater Horizon Facility, would simply further devastate the already greatly imperilled Gulf of Mexico.

Indeed, as succinctly stated by the Department of Interior itself, “[t]he BP Oil Spill demonstrates the possibility of a catastrophic event (or multiple catastrophic failures) and, therefore, the need to ensure that oil and gas development on the Outer Continental Shelf can be conducted safely and that another event like the BP Oil Spill never occurs again.” DOI Report, “Increased Safety Measures For Energy Development On The Outer Continental Shelf,” May 27, 2010, at 18 (emphasis added).

Accordingly, on behalf of our clients, Mr. Abbott and FWW, we request that immediate action be taken to halt production and protect the public’s health and the

⁵ Mike Allen, *Gulf Fuels New Energy-Bill Push*, POLITICO, June 14, 2010, <http://www.politico.com/news/stories/0610/38488.html> (President Barack Obama Oval Office Interview with Columnist Roger Simon)

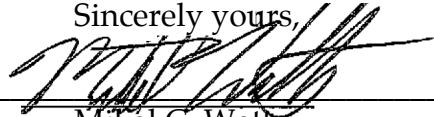
⁶ Exhibit A, BP Atlantis Report of Michael E. Sawyer, P.E., CSP, p. 4, May 12, 2009.

⁷ Remarks by the President on the Gulf Oil Spill, May 27, 2010, <http://www.whitehouse.gov/the-press-office/remarks-president-gulf-oil-spill>.

⁸ See FWS Deepwater Horizon Oil Spill Response: Daily Wildlife Collection Reports, U.S. Fish & Wildlife Service, <http://www.fws.gov/home/dhoilspill/collectionreports.html>.

environment unless and until BP is brought into full compliance with all applicable MMS regulations and its Lease, and MMS also fully complies with its duties under the ESA. If such action is not taken, please be advised that we intend to file suit to request appropriate injunctive relief.

Sincerely yours,



Mikal C. Watts

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Pursuant to 28 U.S.C. § 1746, I verify that all of the factual information contained in this notice letter is true and accurate.


Kenneth Abbott

Date: 6/29/2010