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Deepwater Exploration in the Gulf: The Eleventh Circuit Balances Energy Independence and Environmental Responsibility post-*Deepwater*

Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.[1]

I. INTRODUCTION

In the aftermath of the *Deepwater Horizon* oil spill, it became apparent there was not one simple cause for the disaster; instead, multiple failures by various actors and regulations resulted in the accident. Thus, the Bureau of Ocean Energy Management ("BOEM") implemented new regulations and stricter requirements for drilling in the Gulf of Mexico,[2] aimed particularly at ensuring the reliability of preventative technologies in deepwater environments. BOEM continued leasing tracts in the Gulf for oil and gas exploration, and this case resulted from a petition for review of BOEM's approval of a Shell Exploration Plan ("Shell EP") for ten wells in ultra-deepwater.[3]

The National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") require agencies to consider the environmental impacts of major actions and issue environmental impact statements if an action may significantly affect the environment, or consult with an expert agency if endangered species or habitats are jeopardized by the proposed action. However, an agency does not have to prepare a statement if it finds the action will not have an affect on the environment. The underlying issue in this case is whether BOEM violated either NEPA or ESA in approving the Shell EP after a finding of no significant impact ("FONSI").[4]

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[1] 684 F.3d 1242 (11th Cir. 2012).
[2] See discussion at note 46, *infra*.
[3] Ultra-deepwater is generally classified as depths greater than 6,000 feet. J.M. SHAUGHNESSY, ET AL., PROBLEMS OF ULTRA-DEEPWATER DRILLING (1999).
[4] *Defenders of Wildlife*, 684 F.3d at 1248.

II. FACTS AND HOLDING

On May 10, 2011, the Bureau of Ocean Energy Management ("BOEM")[5] approved Shell Exploration Plan S-7444 ("Shell EP") for exploratory drilling of ten wells—between 7,100 and 7,300 feet deep—off the coast of Alabama in the Central Gulf of Mexico.[6] BOEM approved the Shell EP after conducting an environmental assessment ("EA" or "assessment") and without issuing an environmental impact statement ("EIS" or "impact statement").[7] Defenders of Wildlife and Gulf Restoration Network ("Petitioners") filed a consolidated petition for review in the United States Court of Appeals of the Eleventh Circuit seeking remand and additional agency consideration pursuant to the Outer Continental Shelf Land Act ("OCSLA").[8] The issues as presented to the Eleventh Circuit were whether the Shell EP violated either the National Environmental Policy Act ("NEPA")[9] or the Endangered Species Act ("ESA").[10]

BOEM regulates oil and gas exploration along with development and production operations on the Outer Continental Shelf ("OCS").[11] An OCS leaseholder must submit an exploration plan ("EP" or "plan") for

[5] BOEM is the result of an organizational restructuring following the *Deepwater* blowout. In June 2010, the Mineral Management Services' name was changed to the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE"). In October 2011, BOEMRE was divided into BOEM and the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue was established to work in conjunction with these two. *See About BOEM, Regulatory Reform*, BOEM http://www.boem.gov/About-BOEM/Reforms/Reforms.aspx (last visited November 20, 2013).
[6] *Defenders of Wildlife*, 684 F.3d at 1246.
[7] BOEM made a finding of no significant impact ("FONSI") prior to approval, thus rendering an EIS unnecessary, *see id.* at 1246-47.
[8] 4*Id.* at 1246; *see* 43 U.S.C. § 1349(c) (2013).
[9] *Defenders of Wildlife*, 684 F.3d at 1246.
[10] *Id.*
[11] *Id.*

approval by BOEM prior to exploratory drilling operations.[12] Pursuant to NEPA, BOEM is required to prepare either an EIS or EA for proposed agency actions.[13] An EIS is not required, however, if an agency determines the action "will not have a significant impact on the environment."[14] In these circumstances, BOEM may conduct an EA and issue a finding of no significant impact ("FONSI") with supporting reasons.[15]

BOEM's environmental assessment for the Shell EP at issue "tiers"[16] from two prior impact statements covering several proposed lease sales in the Central and Western Planning Areas ("CPA" and "WPA") in the Gulf: a 2007 programmatic EIS analyzing eleven proposed lease sales[17] and a 2009 supplemental EIS ("SEIS") covering the remaining seven proposed lease sales under the 2007-2012 program.[18] Both the 2007 EIS and the 2009 SEIS reached similar conclusions, finding oil spills to be "low-probability events" and concluding, "that environmental impacts would not be catastrophic to the region, animal populations, and ecosystems."[19] In response to the *Deepwater Horizon* disaster, BOEM issued a final SEIS for the leases remaining from the 2007-2012 program, reaching conclusions similar to the prior statements.[20] Also in response to

[12] *Id.*
[13] *Id.*
[14] *Id.* at 1246-47.
[15] *Id.*
[16] BOEM applies NEPA regulations using a "tiered process" to "avoid repetitive discussions" whereby the findings of prior broad or programmatic EIS's can be incorporated and relied upon in subsequent EISs and EAs within the scope of the prior EIS. *Id.* at 1247; *see also* 40 C.F.R. § 1502.20 (2013).
[17] *See* MINERAL MGMT. SERV., U.S. DEP'T OF THE INTERIOR, GULF OF MEXICO OCS OIL AND GAS LEASE SALES: 2007-2012: FINAL ENVIRONMENTAL IMPACT STATEMENT (2007).
[18] *See* MINERAL MGMG. SERV., U.S. DEP'T OF THE INTERIOR, GULF OF MEXICO OCS OIL AND GAS LEASE SALES: 2009-2012: FINAL SUPPLEMENTAL IMPACT STATEMENT (2008).
[19] *Defenders of Wildlife*, 684 F.3d at 1247.
[20] *Id.*

the disaster, BOEM began restricting its use of categorical exclusions in issuing permits for offshore drilling in deep waters.[21]

Further, under the ESA, BOEM is required to consult with an expert agency—the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS")—if a proposed action might jeopardize an endangered species.[22] BOEM consulted with both expert agencies in 2007 regarding the 2007-2012 Multisale.[23] NMFS concluded "that exploration development, and production was not likely to jeopardize threatened or endangered species."[24] FWS came to similar conclusions.[25] After the *Deepwater Horizon* disaster, and in accordance with ESA regulations,[26] BOEM reinitiated consultation with NMFS and FWS to consider new information.

BOEM's assessment of the Shell EP considered "whether the Shell EP significantly affected the quality of the environment, considering impacts of Shell's proposed effect on the environment from routine operations and unexpected accidents."[27] The assessment considered the risks, characteristics, and impacts of possible oil spills, as well as provided information incorporating the *Deepwater Horizon* disaster and an analysis of the impact of such another event.[28] BOEM, considering all of this information, "found no indication that the proposed action would significantly affect the quality of the human environment within the meaning of NEPA."[29] After a FONSI, BOEM approved the Shell EP.[30]

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[21] Categorical exclusions are "a category of actions which do not individually or cumulatively have a significant effect on the human environment" and thus do not require a statement or assessment. *Id.*
[22] *See* 50 C.F.R. § 402.14(a) (2013).
[23] *Defenders of Wildlife*, 684 F.3d at 1248.
[24] *Id.*
[25] *Id.*
[26] *See* 50 C.F.R. § 402.16 (requiring agency to reinitiate consultation when previously unexamined information becomes available).
[27] *Defenders of Wildlife*, 684 F.3d at 1248.
[28] *Id.*
[29] *Id.*

Petitioners filed for review in the United States Court of Appeals for the Eleventh Circuit, seeking vacatur and remand.[31]

Petitioners' claim BOEM violated NEPA and ESA in preparing an assessment lacking sufficient site-specific analysis of environmental impacts, finding a FONSI appropriate, and deciding not to prepare an EIS based off of this information.[32] Furthermore, Petitioners claimed that the BOEM cannot "tier" off statements or assessments prior to the *Deepwater Horizon* disaster because they are outdated and BOEM must wait to approve the Shell EP until the consultation is complete.[33]

The Eleventh Circuit reviewed the petition under an "arbitrary or capricious" standard, giving great deference to BOEM in reaching its decision.[34] According to the court, the record demonstrated BOEM under NEPA took the requisite "hard look" at the environmental impacts of the Shell EP necessary before making a FONSI.[35] First, the EA contained "a plethora of site-specific information" including a "Catastrophic Spill Event Analysis" analyzing the impact of a hypothetical catastrophic oil spill.[36] Though the oil spill analysis was not based on a "worst-case discharge" scenario, the Eleventh Circuit concluded that neither NEPA nor precedent required it.[37] Second, NEPA does not prohibit BOEM from preparing an EA that resembles a prior EA in a similar environment[38] and

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 1249.
[34] *Id.* at 1248 ("We have limited discretion to reverse an agency's decision because when it is making predictions, within its area of special expertise . . . as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.") (internal quotations omitted).
[35] *Id.* at 1251 (citing Hill v. Boy, 144 F.3d 1446, 1450 (11th Cir. 1998)).
[36] Defenders of Wildlife, 684 F.3d at 1249.
[37] *Id.* at 1250.
[38] *Id.* at 1249.

in fact regulations encourage BOEM's reliance on prior EIS's.[39] Regarding Petitioners' ESA claim, the Eleventh Circuit concluded that reinitiating consultations with NMFS and FWS did not preclude BOEM from approving the Shell EP until the results of the consultation were known.[40] Importantly, the Eleventh Circuit found no support for this proscription on agency action in either its circuit or relevant statutory language,[41] and dismissed in a footnote Petitioners' direction to a contrary conclusion in a Ninth Circuit decision.[42] Further, BOEM did not abuse its discretion in relying on the results from previous consultations with expert agencies, and recognized its authority under OCSLA to suspend activities should information arise where the action jeopardizes a species or habitat.[43] The Eleventh Circuit thus held BOEM's approval of the Shell EP was not an abuse of discretion in violation of NEPA or ESA, "and instead reflects the agency's balance of environmental concerns with the expeditious and orderly exploration of resources" under OCSLA.[44]

III. LEGAL BACKGROUND

In 1978, Congress amended the Outer Continental Shelf Land Act ("OCSLA")[45] to promote the expeditious and orderly development of the Outer Continental Shelf ("OCS") in the Gulf of Mexico consistent with the maintenance of national needs, and in accordance with environmental safeguards.[46] OCSLA authorizes the Secretary of the Interior ("the Secretary") to administer provisions governing offshore leases of the OCS.[47] Under OCSLA regulations, the Secretary delegated to the Bureau

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[39] *Id.* at 1251.
[40] *Id.* at 1253.
[41] *Id.* at 1252.
[42] *Id.* at fn. 4.
[43] *Id.* at 1253.
[44] *Id.*
[45] 43 U.S.C. §§ 1331-1356 (2013).
[46] *Id.* § 1332(3).
[47] *Id.* § 1334(a).

of Ocean Energy Management ("BOEM") authority to regulate OCS oil and gas exploration, development, and production operations.[48]

The OCSLA amendments established a four-stage process required for the development and production of OCS leases. In *Secretary of the Interior v. California*, the Supreme Court clarified the stages of the leasing program within OCSLA.[49] First, the Secretary prepares a five-year schedule for the proposed sale of oil and gas OCS leases.[50] Second, the Secretary conducts lease sales on OCS tracts.[51] In the third stage, the lessee receives the exclusive right to submit an EP for approval by BOEM prior to any exploratory drilling.[52] Finally, if the plan is approved and exploration is successful, the lessee may proceed with preparing development and production plans.[53] Approval of an EP in the third stage, the one at issue in the instant case, must comply with the provisions of the National Environmental Policy Act ("NEPA")[54] and the Endangered Species Act ("ESA").[55]

Generally, NEPA requires every federal agency to prepare an EIS prior to any major federal action that "significantly affect[s] the quality of the human environment."[56] The EIS acts as an "action-forcing device to ensure" federal agencies implement NEPA policies in the decision-making process.[57] However, a federal agency may, in lieu of a statement, prepare

[48] 30 C.F.R. § 550.101 (2013).
[49] Sec'y of the Interior v. California, 464 U.S. 312, 337 (1984).
[50] 43 U.S.C. § 1344(a).
[51] *Id.* § 1337.
[52] *Id.* § 1340(c)(1). BOEM may approve, approve with modifications, or disapprove the proposed plan.
[53] *Id.* § 1351.
[54] 42 U.S.C. §§ 4332-4370 (2013).
[55] 16 U.S.C. §§ 1531-1544 (2013).
[56] 42 U.S.C. § 4332(C).
[57] 40 C.F.R. § 1502.1 (2013).

an environmental assessment ("EA").[58] An EA provides a brief discussion on the environmental impact of the proposed action to aide in determining whether an EIS or a finding of no significant impact ("FONSI") should be prepared.[59] A FONSI is a document that briefly presents the reasons why a federal action "will not have a significant effect on the human environment" and, thus, describes why an EIS is unnecessary.[60]

NEPA regulations encourage—and BOEM has historically obliged—the use of "tiering" in preparing NEPA documents such as EIS's, EA's, and FONSI's.[61] In essence, when an agency prepares a broad programmatic EIS, subsequent statements and assessments included within the broad statement may summarize and incorporate by reference discussions in the prior broad statement.[62] Thus, subsequent statements or assessments may dedicate efforts to discussing their own specific issues that are ripe for discussion.[63] This method of analysis is within NEPA requirements, designed "not to generate paperwork...but to foster excellent decisions."[64] In addition to these requirements, federal agencies must also comply with ESA provisions.

The ESA requires that federal agencies not take any action "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of such species' habitat.[65] If an agency determines its action may jeopardize endangered or threatened species, it must consult with the appropriate expert agency, either the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS").[66] In addition to initiating consultations, the agency also prepares a biological assessment to facilitate

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[58] *See id.* § 1508.9.
[59] *Id.*
[60] *Id.* at 1508.13.
[61] *Id.* at § 1502.28.
[62] *Id.*
[63] *Id.*
[64] *Id.* § 1500.1(c).
[65] 16 U.S.C. § 1536 (2013).
[66] 50 C.F.R. § 402.14 (2013).

discussions between the agency proposing consultation and the expert agency.[67] If the expert agency finds that the agency action does not jeopardize any endangered or threatened species, the consultation is terminated and no further action is required.[68] Conversely, if the expert agency finds the action does jeopardize any relevant species, formal consultations follow.[69] In addition, a federal agency must reinitiate formal consultations with the expert agency "if new information is subsequently modified in a manner that causes an effect" on an endangered or threatened species or habitat "to an extent not previously considered[,]" or if the action is modified so as to effect a species or habitat in a manner not considered in the expert agency's opinion.[70]

Following the *Deepwater* blowout, there were movements to put into place varying forms of protections against the risks of OCS deepwater drilling.[71] One of these approaches took the form of temporary moratoriums. On May 30, 2010, BOEM's six-month moratorium on deepwater drilling in the Gulf and Pacific Ocean took affect, stopping work on thirty-three rigs.[72] This moratorium encountered strong opposition, and in June the Fifth Circuit found it violated the Administrative Procedure Act.[73] On July 12, 2010, however, the Department of the Interior issued a new moratorium.[74] This one restricted drilling operations based on equipment rather than well depth, and was

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[67] *Id.* § 402.12.
[68] *Id.* § 402.13(a).
[69] *Id.* § 402.14.
[70] *Id.* § 402.16.
[71] One of these movements—MMS's name change, division into two agencies, and the addition of other—has been discussed previously. *See* discussion, *supra* note 46.
[72] NAT'L COMM'N ON BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING at 152 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf.
[73] *Id.*
[74] *Id.*

also challenged in district court.[75] On October 12, 2010, the Department lifted the moratorium before that court reached its decision.[76]

Another approach involved new, stricter regulations of key deepwater drilling equipment, technologies, and operations. These regulations were initially promulgated by BOEM and the Interior in the form of a "Notice to Lessees" in 2010.[77] These notices imposed significant new regulations on deepwater drilling technologies. Of particular concern was ensuring the reliability of blowout preventers ("BOP").[78] The BOP is the industry's last line of defense in the event of loss of well pressure; should the BOP fail, as the Macondo well's did in the *Deepwater* blowout, there is no ready alternative to abate an uncontrolled oil spill into the Gulf at such great depths. Other new requirements, such as BOP fitness verification by a third party, certification of compliance with regulations, and detailed information on BOP's in use serve to put some of the burden of ensuring compliance with safety regulations rightfully on the industry.[79] Though the Notice to Lessees were challenged in court, "[s]hortly before the court rejected the new regulations, [BOEM] published an interim final rule" incorporating many of the previous requirements that "became effective upon publication."[80]

A reviewing court applies an arbitrary or capricious standard to determine an agency's compliance with NEPA and ESA.[81] To be in

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[75] *Id.*
[76] *Id.*
[77] *See generally* MINERALS MANAGEMENT SERVICE, U.S. DEP'T OF THE INTERIOR, NTL NO. 2010-N05, NATIONAL NOTICE TO LESSEES AND OPERATORS OF FEDERAL OIL AND GAS LEASES, OUTER CONTINENTAL SHELF (OCS) (2010) *available at* http://www.doi.gov/deepwaterhorizon/upload/FINAL-Safety-Measures-NTL.pdf.
[78] *Id.*
[79] *See* Mark A. Latham, *Five Thousand Feet and Below: The Failure to Adequately Regulate Deepwater Oil Production Technology*, 38 B.C. ENVTL. AFF. L. REV. 343, 353 (2011).
[80] *Id.* at 354.
[81] 5 U.S.C. § 706(2)(A).

compliance with NEPA, an agency must "accurately identif[y] the relevant environmental concern" and take a "hard look" at the problem in preparing the assessment.[82] If the agency makes a FONSI, it "must be able to make a convincing case for its finding."[83]

IV. INSTANT DECISION

In the instant case, the United States Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit" or "the court") denied Defenders of Wildlife and Gulf Restoration Network's petition for review of the Bureau of Ocean Energy Management's ("BOEM") approval of Shell Exploration Plan S-7444 ("Shell EP").[84] The court found the record provided substantial evidence to conclude BOEM had not acted arbitrarily or capriciously in approving the Shell EP.[85] The broad issues presented to the Eleventh Circuit were whether the Shell EP violated either NEPA or ESA.[86]

A. *Petitioner's NEPA Claims*

The court first addressed Petitioners' claim that BOEM violated NEPA with its decision to make a FONSI instead of issue an EIS because the EA—which the FONSI is based upon—is a mere general summary of environmental impacts and does not contain site-specific information.[87] In particular, Petitioners argue the EA is too similar to a previous EA

[82] Hill v. Boy, 144 F.3d 1446, 1451 (11th Cir. 1998).

[83] Coal. on Sensible Transp., Inc. v. Dole, 263 U.S. App. D.C. 426, 826 F.2d 60, 66-67 (D.C.Cir.1987) (quoting Sierra Club v. United States Dep't of Transp., 243 U.S. App. D.C. 302, 753 F.2d 120, 127 (D.C.Cir.1985)).

[84] *Defenders of Wildlife*, 684 F.3d at 1253.
[85] *Id.*
[86] *Id.* at 1245.
[87] *Id.* at 1249.

covering another area in the Gulf of Mexico,[88] improperly incorporates or "tiers" from the outdated 2007 EIS and 2009 SEIS,[89] and lacks the "worst-case discharge" analysis present in the Shell EP.[90]

Citing to its own precedent, the court noted that before an agency may find an EIS unnecessary and issue a FONSI, it "must 'accurately identif[y] the relevant environmental concern' and take a 'hard look' at the problem."[91] Regarding site-specific information, the court found BOEM's EA contained "a plethora" of information on the impact of exploratory drilling in the challenged lease areas.[92] The court also found that BOEM's reliance on and resemblance to a previous EA in another area of the Gulf[93] was consistent with its requirements under NEPA to take a "hard look" at the problem.[94] In finding this, the court reasoned that the difference in water depth and location between the two EA's did not necessarily indicate "significant differences in resources present and environmental impact because both wells are far from shore and in deep water."[95]

Next, the Court dismissed outright Petitioners' claim that BOEM must include its worst case discharge spill of 405,000 barrels of oil per day to satisfy NEPA.[96] It concluded that neither courts nor NEPA required such analysis.[97] Further, the court added, BOEM determined that a lower

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[88] *Id.*
[89] *Id.* at 1251.
[90] *Id.* at 1250.
[91] *Id.* at 1249 (quoting Hill v. Boy, 144 F.3d 1446, 1450 (11th Cir. 1998)).
[92] *Defenders of Wildlife*, 684 F.3d 1249("[T]he [assessment] describes site-specific atmospheric conditions, water quality characteristics, likely impact on water quality, possible impact on deepwater coral and marine mammals...and effects of accidental events.").
[93] Petitioners argued that the assessment at issue here is too similar to Shell EP S-7445, a separate plan for a different area in the Gulf 130 miles from shore and 2,721 feet deep. *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 1250.
[97] *Id.*

spill rate was more likely than the worst case scenario in the event of a spill.[98] The court also reasoned that the assessment did not have to include information regarding a threat to endangered species in the event of a spill because an oil spill is not part of the projected plan; thus "the *expected* operations under the Shell EP will not have a significant effect on . . . endangered species."[99] Because the purpose of an EA is to provide a brief understanding of whether or not to prepare an EIS, the court concluded that NEPA did not require BOEM to include a worst case discharge analysis or provide complete information on all species affected by the EP.[100]

The next part of Petitioners' NEPA claim the court addressed was whether BOEM must wait to proceed with approving EP's until it issues an EIS with more information regarding the impact of the *Deepwater* blowout. The court disagreed, finding that if BOEM determines an EIS is unnecessary, then "NEPA does not require [BOEM] to wait until all aspects of a previous disaster are determined before moving forward[.]"[101] EP approvals are based upon existing information, and BOEM is required to take the requisite "hard look" at current, available information in making its decision.[102] The court found BOEM's assessment contained enough information about the impacts of an oil spill to conclude the agency took a "hard look" at available oil spill information as required under NEPA.[103]

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[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1250-51.
[102] *Id.* at 1251.
[103] Specifically, the court noted that the assessment "details the known environmental impacts from the *Deepwater Horizon* spill, including impacts to fisheries and fish habitats of the oil, natural gas, and chemical dispersants released as a result of the spill and its effects on water quality." *Id.*

The final NEPA claim the court discussed was whether BOEM violated NEPA by "tiering" from the 2007 EIS and 2009 SEIS after the *Deepwater* blowout occurred in April 2010. Petitioners' argued that because BOEM gave notice of preparations for an SEIS in response to the *Deepwater Horizon* disaster BOEM could not then rely on the outdated statements.[104] Again, the Eleventh Circuit disagreed. The court first noted the purpose of OCSLA[105] and BOEM's responsibility to balance this purpose with the requirements of NEPA.[106] It again noted that NEPA regulations encourage tiering from prior EIS's, and BOEM may rely on this "[a]bsent unique site-specific characteristics[.]"[107] The court concluded that because BOEM included all known information in the EA, and because the most recent SEIS did not alter the conclusions in prior EIS's, BOEM did not act arbitrarily or capriciously in violation of NEPA in relying on the prior statements .[108]

B. *Petitioners' ESA Claim*

Finally, the Eleventh Circuit addressed whether the ESA barred BOEM from approving the Shell EP until reinitiated consultations with National Marine Fisheries Service ("NMFS") and Fish and Wildlife Services ("FWS") were completed.[109] While Petitioners argued that reinitiating consultations following the *Deepwater* blowout "conceded the inadequacy of prior consultations[,]"[110] the Eleventh Circuit reasoned that

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[104] *See id.*
[105] *See id.* ("The purpose of OCSLA is the expedited exploration and development of the Outer Continental Shelf in order to achieve national economic policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.") (internal quotations omitted); *see also* 43 U.S.C. § 1802(1) (2013).
[106] *Defenders of Wildlife*, 684 F.3d at 1251.
[107] *Id.*
[108] *Id.*
[109] Because BOEM approved the Shell EP while consultations were ongoing, BOEM relied on the 2007 biological opinion of the expert agencies, *see id.* at 1252, thus the *Deepwater Horizon* disaster had not yet occurred prior to the issuance of that opinion.
[110] *Id.*

BOEM's reliance on prior expert agency opinions did not necessarily threaten any species or adversely affect any habitat protected under ESA, and Petitioners failed to provide evidence that any species or habitat was in jeopardy.[111] As the Eleventh Circuit saw it, Petitioners' had only challenged the inadequacy of the prior consultations as a result of BOEM's reinitiating consultation with the expert agencies—not as a result of any proof that endangered species were in jeopardy.[112]

In concluding that the ESA does not require BOEM to suspend approval of the Shell EP until reinitiated consultations are complete, the court expressly stated that there is no precedent in the Eleventh Circuit or in NEPA requirements for Petitioners' contention that BOEM's "choice to reinitiate consultation with NMFS and FWS automatically renders the former biological opinions invalid."[113] The court acknowledged that BOEM had extensively considered the environmental impacts of the *Deepwater* blowout, had mitigated the risks posed by a catastrophic oil spill by "new notices of lessees and safety regulations" and "improvements in containment technology[,]" and considered the prior consultations to be in effect while the current consultations were ongoing.[114]

Moreover, BOEM recognized under OCSLA it could suspend exploration activities after approval if the consultations provided information requiring action to protect environments from significant harm.[115] Thus, the court concluded BOEM did not act arbitrarily or

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[111] *Id.*
[112] *Id.*
[113] *Id.* The court, in a footnote, declines to assign any weight to dicta from a Ninth Circuit decision supporting the proposition that reinitiating consultations requires a new expert opinion prior to further agency action. *See* Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1076 (2001).
[114] *Defenders of Wildlife*, 684 F.3d at 1252-53.
[115] *Id.* at 1253.

capriciously in relying on the prior ESA consultations in approving the Shell EP. The Eleventh Circuit went on to hold that BOEM's decision to issue a FONSI after an EA revealed the Shell EP would have no significant impact on the environment was not arbitrary or capricious, but rather reflects the agency's discretion in balancing the environmental analysis requirements of NEPA with the OCSLA's purpose of expeditiously making available resources on the OCS.[116]

V. COMMENT

The *Deepwater* blowout on April 20, 2010, resulted in the "largest accidental marine oil spill in U.S. history[.]"[117] 4.9 million barrels of oil—over 205 gallons—flowed from BP's Macondo well in nearly 5,000 feet of water for eighty-seven days before the well was capped on July 15.[118] The instant decision represents the first post-*Deepwater* challenge to an agency's approval of an EP in the Gulf of Mexico to be decided on the merits.

The Eleventh Circuit, in concluding that BOEM's approval of the Shell EP without issuing an impact statement was not arbitrary or capricious, gives great deference to BOEM's decision in an area of its expertise.[119] It recognizes "tiering" EIS's and EA's from previous broad or programmatic EIS's—"[a]bsent unique site-specific characteristics"—as consistent with NEPA regulations.[120] Further, the court notes the additional protections against the risk of environmental impacts that new regulations and safety protocols provide.[121] However, the Eleventh Circuit's opinion is a troubling sign for environmental groups seeking meaningful judicial review of Gulf OCS drilling operations in increasingly

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[116] *Id.*
[117] NAT'L COMM'N, *supra* n. 73 at 174.
[118] *Id.* at 87.
[119] *See Defenders of Wildlife*, 684 F.3d at 1248-49.
[120] *See id.* at 1251.
[121] *Id.* at 1253.

deeper waters, and at an increased risk of an environmental catastrophe.[122] The court pays inadequate attention to arguably important characteristics that would appear to require BOEM engage in a deeper analysis of the environmental impacts of the Shell EP, preferably in the form of a revised EA. The court's decision suggests that challenges to OCSLA drilling approvals will continue to face formidable challenges in seeking environmental review of agency decisions for NEPA or ESA violations related to exploratory drilling in the Gulf of Mexico.

For future environmental groups or affected citizens seeking similar review, the most concerning part of the Eleventh Circuit's holding is the high deference the court affords BOEM in concluding BOEM took the requisite "hard look" under NEPA in preparing a site-specific EA that relies on and resembles a previous EA at a significantly different depth and in a different area of the Gulf.[123] Though the previous EA that the one in dispute resembles covered three wells in water depths between 4,400 and 4,600 feet shallower than the ones at issue and in a different area, the court believed these distinctions didn't prevent BOEM from issuing a similar EA.[124] According to the court, the difference between the EA's location and depth does not necessarily lead to the conclusion of significant differences in resources or environmental impact "because both areas are in deep water and far from shore."[125]

As the Eleventh Circuit notes, agency decisions in the areas of its expertise are afforded high deference.[126] However, the court makes no reasonable attempt to address the counterargument that BOEM, a federal agency tasked with regulating OCS oil and gas operation, abused its discretion in preparing an EA relying on and resembling an EA in an

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[122] *See* Latham, *supra* note 79 at 343-44.
[123] *See, e.g., id.* at 1249.
[124] *See id.*
[125] *Id.*
[126] *See id.* at 1248-49.

environment far removed from the subsequent one. A basic distinction between the two EA's the court failed to consider is the common distinction between "deepwater" drilling, taking place at depths greater than 1,000 feet, and "ultra-deepwater" drilling taking place at depths greater than 5,000 feet.[127] The prior EA was issued for a group of deepwater wells;[128] the EA challenged in the instant case covered "ultra-deepwater" drilling.[129] There are a number of variables that affect the risk of drilling any particular well, including well depth, technological complexity, geological makeup and structure, location in the Gulf, and pressure fluctuations.[130] Further, there is the increased complexity of drilling a well over a mile below the surface, where it can take 18 hours to lower equipment to the well.[131]

Similarly, NEPA regulations promote tiering as a means to eliminate redundancy and focus discussion on important issues. However, it could be argued that differences in water pressure, geology, and operational complexity at the depths at issue could become significant enough to preclude tiering, and that an EIS or more thorough EA is necessary to determine the risks of an operation at such depths. The Eleventh Circuit found these potential differences do not preclude BOEM from issuing similar assessments for separate wells, nor the conclusion that the agency took the requisite hard look at the environmental impacts of the action.

Also, the court reaffirmed Supreme Court precedent in concluding that NEPA does not require BOEM to include a worst case analysis in its assessment. As originally drafted, regulations required EA's and EIS's contain a worst case analysis for proposed federal action. However, the Supreme Court in 1986 held that NEPA does not require a worst case

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[127] SHAUGHNESSY, ET AL, *supra* n. 3.
[128] *Defenders of Wildlife*, 684 F.3d at 1249.
[129] *Id.* at 1246.
[130] *See* NAT'L COMM'N, *supra* note 73 at 252.
[131] *Id.* at 96.

analysis,[132] and the language was later eliminated from the regulations. The Eleventh Circuit reaffirmed this position, noting that the NEPA's language does not require the BOEM to undergo the analysis.

Further, the court rejects the contention that because the BOEM reinitiated consultations with FWS and NMFS after the *Deepwater* spill, the ESA effectively precludes the BOEM from approving the Shell Plan until consultations are complete.[133] Though the Ninth Circuit has recognized this proposition in dicta,[134] the Eleventh Circuit declined to adopt it, recognizing that the language in ESA regulations does not impose such a requirement.

The court also notes that the Secretary has the ability to stop any operations if new information arises showing the action is affecting the environment. The court makes a wise decision in not adopting the Ninth Circuit's dicta. To delay agency action until consultations completed would be an unnecessary delay in federal OCS leasing.

VI. CONCLUSION

Defenders of Wildlife v. Bureau of Ocean Energy Management represents the first challenge to an agency's approval of an exploration plan in the Gulf of Mexico to be decided on the merits since the *Deepwater* blowout. BOEM's approval of the Shell EP, as the Eleventh Circuit recognizes, implicates two important interests. First, the government's interest in meeting national energy needs and achieving energy independence through the expeditious leasing, exploration, development and production of presently untapped oil and gas resources

[132] Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1986).
[133] *See Defenders of Wildlife*, 684 F.3d at 1252.
[134] *See* Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001).

on the Outer Continental Shelf in the Gulf of Mexico.[135] Second, an interest that became apparent in the wake of the *Deepwater* spill, is ensuring the potentially catastrophic environmental impacts of such exploration and development are given due consideration before agency action is taken.[136]

While the Eleventh Circuit is correct to defer to BOEM's decisions, some of the court's broad language is troubling. For instance, broad language gives the impression that courts reviewing agency actions should not seriously consider BOEM's decision to "tier" from prior documents or issue EAs that resemble prior EAs, whether or not there are significant differences in the general characteristics of the wells. Applying the Eleventh Circuit's decision to future cases, it seems doubtful that challenges will benefit from meaningful judicial review of similar agency actions given a lax interpretation of what is required under the NEPA.

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[135] *See Defenders of Wildlife*, 684 F.3d at1251 .
[136] *Id.*