

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ANIMAL WELFARE INSTITUTE)
900 Pennsylvania Ave., SE)
Washington, DC 20009,)

CENTER FOR BIOLOGICAL DIVERSITY,)
P.O. Box 710)
Tucson, AZ 85702-0710,)

TURTLE ISLAND RESTORATION NETWORK,)
P.O. Box 370)
Forest Knolls, CA 94933)

ANIMAL LEGAL DEFENSE FUND,)
170 East Cotati Avenue)
Cotati, CA 94931,)

Civ. No. 10-1866 (CJB)

v.)

BP AMERICA, INC.)
501 Westlake Park Blvd.)
Houston, TX 77079)

BP EXPLORATION AND PRODUCTION,)
501 Westlake Park Blvd.)
Houston, TX 77079)

BRITISH PETROLEUM PLC)
1 St. James' s Square)
London SW1Y 4PD, UK)

ADMIRAL ROBERT J. PAPP, JR.,)
Commandant)
United States Coast Guard)
2100 Second Street, S.W.)
Washington, D.C. 20593-7000,)

ADMIRAL THAD ALLEN
Head of National Incident Command
United States Coast Guard
2100 Second Street, S.W.

Defendants.

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AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory and injunctive relief pursuant to the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1349(a)(2)(A), to bring an immediate halt to defendants’ actions that are killing endangered and threatened sea turtles in the Gulf of Mexico as part of defendants’ efforts to contain the catastrophic oil spill that has occurred at defendants’ Deepwater Horizon facility in the Gulf. The defendants are BP America, BP Exploration, and Production, and BP PLC (hereinafter collectively referred to as “BP”). As explained below, in an effort to contain the oil spill by burning the oil, defendants are also corralling and burning alive endangered and threatened sea turtles without a permit from the Department of Commerce, in violation of Section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1538(a). Because the lease that governs BP’s operations requires the company to comply with all environmental “statutes and regulations,” BP’s actions in killing and otherwise harming and harassing endangered and threatened sea turtles constitute flagrant violations of its lease with the United States. Accordingly, plaintiffs seek emergency and permanent relief to halt such actions unless and until BP comes into compliance with the law. According to BP, because the United States Coast Guard is directing BP’s containment activities in the Gulf of

Mexico, BP cannot take independent actions to avoid killing, injuring, or otherwise impairing listed sea turtles as part of the burning practices. If this is correct, then the Coast Guard is violating its mandatory obligations under the National Contingency Plan requirements of the Clean Water Act (“CWA”), 33 U.S.C. § 1321(d), to “minimiz[e] . . . risk and damage to fish and wildlife and their habitat” 33 U.S.C. § 1321(d)(M).”

JURISDICTION

2. This Court has jurisdiction over plaintiffs’ claims pursuant to OCSLA, 43 U.S.C. § 1349(a)(1), which provides that “any person having a valid legal interest which is adversely affected may commence a civil action . . . to compel compliance . . . for any alleged violation . . . of the terms of any permit or lease issued by the Secretary” The present action is one to compel compliance by defendants with the terms of its lease for the Deepwater Horizon facility. The Court has jurisdiction over plaintiffs’ CWA claims against the Coast Guard defendants pursuant to 28 U.S.C. § 1331.

PARTIES

3. Plaintiff Animal Welfare Institute (“AWI”) is a non-profit membership organization dedicated to alleviating the suffering inflicted on animals by humans. As part of its mission, AWI works to protect marine life from adverse human impacts. AWI has approximately 25,000 members and constituents throughout the United States, some of whom live near and recreate in the Gulf of Mexico and who very much enjoy observing and having the opportunity to observe endangered and threatened sea turtle species in those waters, including endangered Kemp’s Ridley sea turtles, Leatherback sea turtles, Green sea turtles, and Hawksbill sea turtles, as well as threatened Loggerhead sea turtles. BP’s oil containment actions that

result in killing, injuring, and otherwise harming and harassing these animals diminishes AWI's members' ability to enjoy these species in the future. If BP is required to halt its killing and harming of these animals, this will protect AWI's members' ability to enjoy these species in the future. AWI brings this action on its own behalf and on behalf of its members. If, as BP insists, it is unable to avoid killing, injuring, and otherwise adversely affecting these listed sea turtles because of actions being taken by the Coast Guard, then AWI is also being injured in the same ways by the unlawful actions of the Coast Guard in violation of Section 311(d) of the CWA, 33 U.S.C. § 1321(d).

4. Center for Biological Diversity ("CBD") is a nonprofit membership organization organized under the laws of New Mexico, with its principal place of business in Tucson, Arizona. CBD has hundreds of members who live near and recreate in the waters of the Gulf of Mexico and who very much enjoy observing and photographing, and having the opportunity to observe and photograph the many sea turtle species that live in those waters. BP's oil containment actions that involve igniting fires in waters inhabited by endangered and threatened sea turtles which results in killing, injuring, and otherwise harming and harassing these animals diminishes CBD's members' ability to enjoy these species in the future. A court order enjoining BP from continuing to kill and otherwise harm these animals will protect CBD's members' ability to enjoy these species in the future. CBD brings this action on its own behalf and on behalf of its members. If, as BP insists, it is unable to avoid killing, injuring, and otherwise adversely affecting these listed sea turtles because of actions being taken by the Coast Guard, then CBD is also being injured in the same ways by the unlawful actions of the Coast Guard in violation of Section 311(d) of the CWA, 33 U.S.C. § 1321(d).

5. Turtle Island Restoration Network (“TIRN”) is a non-profit corporation with its principal place of business in Olema, California, and a satellite office in Houston, Texas. It has approximately 17,000 members and supporters throughout the United States and is dedicated to the study, protection, enhancement, conservation, and preservation of the world’s marine and terrestrial ecosystems, including protection and conservation of sea turtles. TIRN members live near and recreate in the Gulf of Mexico and study and enjoy observing endangered and threatened sea turtles. TIRN brings this action on its own behalf and on behalf of its members and staff. BP’s oil containment actions that result in killing, injuring, and otherwise harming and harassing endangered and threatened sea turtles in the Gulf of Mexico diminish TIRN’s members’ and staff’s ability to study and observe these species in the wild, and also greatly impair TIRN’s own ability to study, protect, conserve, and preserve these species. A court order enjoining BP from continuing to kill and otherwise harm and harass these endangered and threatened sea turtles will provide some relief from the aesthetic, educational, and research injuries that TIRN and its members and staff suffer as a result of BP’s actions. If, as BP insists, it is unable to avoid killing, injuring, and otherwise adversely affecting these listed sea turtles because of actions being taken by the Coast Guard, then TIRN is also being injured in the same ways by the unlawful actions of the Coast Guard in violation of Section 311(d) of the CWA, 33 U.S.C. § 1321(d).

6. Animal Legal Defense Fund (“ALDF”) is a non-profit corporation founded in 1979 to protect the lives and interests of animals through the enforcement of laws enacted to protect animals. Based in Cotati, California, ALDF has approximately 100,000 members nationwide, including lawyers, law professors, law students, and other individuals interested in

protecting the lives and interests of animals, including marine species. Like the other plaintiffs, it has members who live near and recreate in the waters of the Gulf of Mexico and who very much enjoy observing and having the opportunity to observe the sea turtle species that live in those waters. BP's oil containment actions that result in killing, injuring, and otherwise harming and harassing these animals diminish ALDF's members' ability to enjoy these species in the future. A court order enjoining BP from killing and otherwise harming these animals will protect ALDF's members' ability to enjoy these species in the future. ALDF brings this action on its own behalf and on behalf of its members. If, as BP insists, it is unable to avoid killing, injuring, and otherwise adversely affecting these listed sea turtles because of actions being taken by the Coast Guard, then ALDF is also being injured in the same ways by the unlawful actions of the Coast Guard in violation of Section 311(d) of the CWA, 33 U.S.C. § 1321(d).

7. Defendant BP PLC is a British-based corporation doing business in the United States as itself and various subsidiaries. Defendant BP America, Inc. is a for-profit wholly-owned corporate subsidiary of BP PLC, organized under the laws of the state of Delaware. BP Exploration & Production, Inc. is also a for-profit wholly-owned subsidiary of BP, PLC, and is also organized under the laws of the state of Delaware. The various BP defendants (hereinafter collectively referred to as "BP") own the license and are subject to the lease under which the Deepwater Horizon facility is being operated. BP is responsible for the Deepwater Horizon oil spill and for the containment operations that are killing, harming, and harassing the endangered and threatened sea turtles in the Gulf of Mexico.

8. Defendant Admiral Papp is the Commandant of the United States Coast Guard and has ultimate responsibility for the actions taken by that agency.

9. Defendant Admiral Allen is the U.S. Coast Guard's Head of National Incident Command, and is directly involved in the Coast Guard's decisions regarding the means that are being used to clean up and contain the Deepwater Horizon spill in the Gulf of Mexico.

**STATUTORY FRAMEWORK AND FACTS GIVING RISE
TO PLAINTIFFS' CLAIMS FOR RELIEF**

10. 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.

11. Pursuant to OCSLA, BP has executed a lease with DOI that allows it to extract oil and gas at the Deepwater Horizon facility. That lease provides, inter alia, that it is conditioned upon compliance with "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." (Emphasis added).

12. The Secretary of DOI has delegated his duties under OCSLA to the Director of the Minerals Management Service ("MMS"). See 30 C.F.R. § 250.101. Regulations issued by the MMS provide that "all operations" subject to that statute must be conducted pursuant to OCSLA, MMS regulations, "the lease or right-of-way, and other applicable laws, regulations, and amendments." Id.

13. OCSLA also contains a broad citizen suit provision that 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 the terms of any permit or lease issued by the Secretary” under OCSLA. 43 U.S.C. § 1349(a)(1).

14. The Endangered Species Act (“ESA”) prohibits the “taking” of any endangered and threatened species. 16 U.S.C. § 1538(a). The ESA defines the term “take” to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The term “harm” includes an act which “kills or injures” an endangered or threatened animal. 50 C.F.R. § 17.3. The term “harass” includes an “intentional or negligent act or omission which creates the likelihood of injury [to an endangered or threatened animal] by annoying it to such extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

15. Section 10(a)(1)(B) of the ESA authorizes the Secretary of Commerce, through the National Marine Fisheries Service (“NMFS”) (with respect to marine species), to issue a “permit” for any act that is otherwise prohibited by Section 9, when the taking of the species is “incidental” to an otherwise lawful activity – *i.e.*, when the taking of the species is not the purpose of the activity.

16. The Act provides that NMFS “shall publish notice in the Federal Register of each application for an exemption or permit which is made under [Section 10].” 16 U.S.C. § 1539(c). “Each notice shall invite the submission from interested persons, within thirty days after the date of the notice, of written data, views or arguments with respect to the application” *Id.*

17. Section 311(d) of the Clean Water Act (“CWA”), 28 U.S.C. § 1321(d), provides that the President “shall prepare and publish a National Contingency Plan (“NCP”) for removal of oil and hazardous substances” The CWA further provides that the NCP “shall include, but not be limited to, the following . . . a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fisheries and wildlife,” *id.* § 1321(d)(2)(C)(iii), and “[a] fish and wildlife response plan . . . for the immediate and effective protection, rescue, and rehabilitation of, and the minimization of risk and damage to fish and wildlife resources and their habitat” *Id.* § 1321(d)(2)(M) (emphasis added).

18. These duties have been delegated by the President to the Coast Guard with respect to oil clean-up response in the Gulf of Mexico. *See* 40 C.F.R. § 300.100; Executive Order 12777, 56 Fed. Reg. 54757 (Oct. 22, 1991). In addition, the federal government’s “Policy For Use Of In-Situ Burning In Ocean, Coastal, And Inland Waters” for Region IV (which covers the Gulf of Mexico) – which is used to implement this NCP – specifically requires the Coast Guard, when undertaking the burning of oil in the Gulf, to undertake measures “to prevent the risk of injury to any wildlife, especially endangered or threatened species,” including, e.g., “moving the location of the burn to an area where listed species are not present; temporary employment of hazing techniques, if effective; and physical removal of individuals of listed species”

19. The Deepwater Horizon rig and wells conduct offshore oil exploration and production in the Gulf of Mexico, and are subject to OCSLA, MMS regulations, and the lease entered into between BP and DOI.

20. On April 20, 2010, an explosion and fire erupted on the Deepwater Horizon drilling rig, which had just completed an exploratory well 52 miles from shore in 4,992 feet of water. Eleven members of the crew are missing and presumed dead. The fire destroyed the rig, which sank on April 22, 2010. The resulting oil spill – which continues to this day – has wreaked devastation on the Gulf of Mexico eco-system and environment. Crude oil continues to flow from a broken pipe on the seafloor, has spread across thousands of square miles, and is damaging local communities, sensitive coastlines, and wildlife throughout the Gulf region.

21. Recently, in an effort to contain the spill, BP began using “controlled burns,” that involve using shrimp boats to create a corral of the oil by dragging together fire-resistant booms and then lighting the enclosed “burn box” on fire. The “burn boxes” are approximately 60-100 feet in diameter.

22. Unfortunately, there are endangered and threatened sea turtles who live in the Gulf of Mexico and who are also being caught in the corrals being created by BP, including the Kemp’s Ridley sea turtle, which is listed as endangered, see 50 C.F.R. § 17.11, and is one of the rarest sea turtles on earth, the endangered Leatherback sea turtles, endangered Green sea turtles, threatened Loggerhead sea turtles, and endangered Hawksbill sea turtles. See 50 C.F.R. § 17.11 (listing all of these species as endangered or threatened). Because the turtles are being caught in the corrals, they are being killed, harmed, or otherwise harassed by BP’s “controlled burns.”

23. Plaintiffs have checked the Federal Register and have found no indication that BP has ever applied for or obtained an “incidental take permit” pursuant to Section 10 of the ESA that would allow it to kill or otherwise harm or harass endangered or threatened species. Accordingly, it is apparent that BP is engaged in the unauthorized “take” of these species.

24. BP could engage in controlled burns without taking endangered or threatened sea turtles – this would require it to spend resources to increase its efforts to ensure that it has removed as many turtles as possible from the relevant areas before burning those animals. However, to date, BP has not taken such actions.

25. By letter dated June 29, 2010, plaintiffs gave notice in writing under oath to BP, Secretary of DOI Ken Salazar, the Secretary of Commerce, and the Attorney Generals of each of the states bordering the Gulf of Mexico that BP is engaged in an unlawful “take” of endangered and threatened species in violation of the ESA and BP’s lease for the Deepwater Horizon facility, and therefore in violation of OCSLA and MMS regulations. That notice was in compliance with the requirements of OCSLA, 43 U.S.C. § 1349(a)(3).

26. Because the burning activities are ongoing and will continue to be used by BP in the immediate future in an effort to contain the Deepwater Horizon spill, the threat of danger and harm to these endangered and threatened species – and hence to the aesthetic, educational, and research interests of the plaintiffs and their members – is immediate. Accordingly, plaintiffs have satisfied the notice requirement of OCSLA, 43 U.S.C. § 1349(a)(3), which provides that plaintiffs may file suit immediately after giving notice when the alleged legal violation “constitutes an immediate threat to the public health or safety or would immediately affect a legal interest of the plaintiff.”

27. Plaintiffs have recently learned that BP takes the position that it does not have complete control over the containment burns and that, in conducting these activities, it is acting under the direction of the Coast Guard. If this is correct, this means that by directing BP to conduct containment activities that are killing, injuring, and otherwise harming endangered and

threatened species, the Coast Guard is in violation of its mandatory duty under the CWA and NCP to conduct these clean-up activities in a way that “minimiz[es]” the “risk of damage to [] fish and wildlife resources” 33 U.S.C. § 1321(d)(M).

PLAINTIFFS’ CLAIMS FOR RELIEF

28. The BP defendants’ actions in allowing endangered and threatened sea turtles to be killed, harmed, and harassed by its oil containment burning practices, without obtaining an “incidental take permit” from NMFS, violate the “take” prohibition of Section 9 of the ESA, 16 U.S.C. § 1538(a). Accordingly, BP is in flagrant violation of its lease for the Deepwater Horizon facility which requires BP to comply with all federal environmental laws, and it is also in violation of MMS regulations, which provide that “all operations” subject to OCSLA must be conducted pursuant to the statute, MMS regulations, “the lease or right-of-way, and other applicable laws, regulations, and amendments.” 30 C.F.R. § 250.101.

29. The federal agency defendants have violated the CWA, 33 U.S.C. § 1321(d)(M), by insisting that BP engage in containment activities that result in killing and injuring endangered and threatened species. Those actions are arbitrary, capricious, an abuse of discretion, and not in accordance with law, under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

30. Defendants’ actions injure the plaintiffs and their members in the ways described in paragraphs 3-6.

WHEREFORE, plaintiffs request that this Court enter an order:

1. Declaring that the BP defendants’ actions violate the ESA and hence BP’s lease with the United States that governs the Deepwater Horizon facility;

2. Immediately and permanently enjoining defendants from continuing to violate the ESA and BP's lease with respect to the illegal take of endangered and threatened sea turtles;
3. Declaring that the Coast Guard defendants' actions violate the CWA and the APA;
4. Enjoining the Coast Guard from engaging in oil containment activities in the Gulf of Mexico with respect to the Deepwater Horizon spill that result in the killing of endangered and threatened sea turtles;
5. Awarding plaintiffs their reasonable attorneys' fees and costs for this action; and
6. Granting plaintiffs such other and further relief as may be just and proper.

Respectfully submitted,

/s/ William S. Eubanks II
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