

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

City of Beaufort, et al.,	)	
	)	
Plaintiffs,	)	No.: 2:18-cv-03326-RMG
	)	(Consolidated with 2:18-cv-3327-RMG)
v.	)	
	)	RESPONSE OF
NATIONAL MARINE FISHERIES	)	STATE OF SOUTH CAROLINA,
SERVICE, CHRIS OLIVER, in his official	)	EX REL
capacity as the Assistant Administrator for	)	ALAN WILSON,
Fisheries, and WILBUR ROSS, in his official	)	ATTORNEY GENERAL
capacity as the Secretary of Commerce,	)	TO FEDERAL DEFENDANTS
	)	STATUS REPORT
Defendants.	)	
	)	
And	)	
	)	
State of South Carolina, ex rel Alan Wilson,	)	
Attorney General,	)	
	)	
Intervenor	)	
	)	
South Carolina Coastal Conservation League,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Wilbur Ross, in his official capacity as the	)	
Secretary of Commerce; et al.,	)	
	)	
Defendants.	)	

The Status Report submitted to this Court clearly demonstrates that a preliminary injunction – one halting the imminent authorization of seismic testing off the coast of South Carolina – is warranted. All of the elements for the granting of a preliminary injunction are met in this case. See *The Real Truth About Obama, Inc. v. Federal Election Comm.*, 575 F.3d 342, 346 (4th Cir. 2009) [to obtain a preliminary injunction, plaintiff must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tip in his favor, and (4) that an injunction is in the public interest]. Thus, we respectfully request that this Court grant the preliminary injunction.

The Department of the Interior, given the opportunity to assure the Court in this Status Report that “offshore activities” will be delayed in light of Secretary Bernhardt’s earlier comments to the Wall Street Journal, has done just the opposite. BOEM Acting Director Cruickshank has informed the Court that BOEM’s review of seismic testing permit applications continues. Cruickshanck Decl. at ¶ 6. Because such review by BOEM is proceeding apace, and because the initiation of seismic surveying is imminent, a preliminary injunction is necessary to avoid the irreparable harm to South Carolina and its economy and citizenry which seismic testing will inflict. An imminent decision to begin seismic testing off the coast of South Carolina – a state whose economy is in large part tourism-based, and one where oil leasing has not been authorized for the near future (or for decades in the past) is not in the public interest. Such a decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. 5 U.S.C § 706(2)(A); *Motor Vehicle Manufacturers Assn. v. State Farm*, 463 U.S. 29 (1983).

DOJ and Director Cruickshank respond to this Court's inquiry matter of factly. They state that neither the Department of Interior nor its Secretary have made any "announcement" about "wait[ing] with respect to offshore activities" while appeal of Judge Gleason's decision runs its course. See *League of Conservation Voters v. Trump*, 363 F.Supp.3d 1013 (D. Alaska 2019). A press conference or release by the Department or Secretary is probably not what the Court had in mind in making its inquiry, however. Such a response fails to address the fact that Secretary Bernhardt's interview with the Wall Street Journal in April set off a nationwide frenzy to the effect that the Administration's offshore drilling plans, initiated by the President's Executive Order 13795, had been put "on hold" because of the *League of Conservation Voters* decision. It is easy to see why everyone thought this because in the interview, Secretary Bernhardt stated that "[b]y the time the court [Ninth Circuit] rules, that may be discombobulating to our plan." Indeed, the Charleston Post and Courier reported on April 25, in response to the Secretary's comments, that "[s]earching and drilling for oil offshore South Carolina or along the rest of the U.S. coast won't happen anytime soon, the Interior Department announced Thursday." In addition, Governor McMaster made a statement praising the decision. This Court's order requesting a Status Report ensued. See Attachment 1 (herein).

Notwithstanding all this "fast and fancy footwork" by the Secretary, however, the BOEM Director now states that "[t]he Department is simply evaluating all of its options in light of that recent court decision to determine the best pathway to accomplish the mission entrusted to it by the President." Cruickshank Decl. at ¶ 5 (emphasis added). Such "mission" is obviously the one set forth in the President's Executive Order 13795, and one we believe is *ultra vires*, as well as arbitrary and capricious.

Moreover, in his response to the Court, Director Cruickshank addressed the question of seismic testing directly. He states that the Alaska decision has no effect “on agency authority to approve proposed seismic survey activities (in the Atlantic OCS or elsewhere). BOEM regulations provide that it may authorize seismic survey activity in the OCS even in areas of the OCS that are not open to oil and gas leasing, and BOEM has done so in the past.” (citing legal authorities) Cruickshank Decl. ¶ 4 (emphasis added).

In other words, BOEM is moving full speed ahead on seismic testing, notwithstanding Secretary Bernhardt’s earlier statements and the impressions they may have created, and notwithstanding the Alaska decision. As we have argued previously, Judge Gleason, in an earlier Order denying the federal defendants’ Motion to Dismiss, concluded that there existed an imminent risk of harm for purposes of Article III standing even though federal defendants argued no harm had yet occurred because “there are multiple steps to obtaining leases and drilling permits” and those steps had not yet materialized. *League of Conservation Voters v. Trump*, 303 F.Supp.3d 985, 996 (D. Alaska 2018). In the Alaska Court’s view, “[t]he Executive Order itself demonstrates that oil and gas exploration activities are intended to be imminent.” Here, Director Cruickshank, as stated, expresses an intention to find the “pathway” to “accomplish the mission entrusted to [the agency] by the President” by that Executive Order. Obviously, seismic testing is the first step to carrying out the President’s “mission” and BOEM makes it clear in its Acting Director’s Declaration that it is undeterred by either the *League of Conservation Voters* decision or the Secretary’s earlier remarks; it is proceeding ahead with the seismic permits. Thus, the initiation of seismic testing is imminent.

Furthermore, as we have previously argued, most recently in our Opposition to the Partial Motion to Dismiss, the granting of a preliminary injunction halting seismic testing ‘does not

depend upon BOEM making a final formal decision on seismic testing permits.” Memorandum In Opposition at 27. There, we referenced the Fourth Circuit decision, *Arch-Mineral Corp. v. Babbitt, et al.*, 104 F.3d 660 (4th Cir. 1997), which held that a “functional” approach to ripeness is what is required. We further stated:

According to the *Arch-Mineral Corp.* Court, when the agency decision becomes a “foregone conclusion, simply a formality,” it is ripe. Thus, the Court found that “[g]iven the degree of certainty of OSM’s decision, and our freedom under *Fort Sumter* and *Abbott* not to be bound by a formalistic approach to reviewing decisions, we label OSM’s action ‘final.’” *Id.* at 668. Likewise, in this case, BOEM is already on record in its May 10, 2017 Press Release, entitled “Interior Department Advances America-First Offshore Strategy,” stating that “[s]eismic surveys are not expected to have significant impact on marine mammal populations or the environment...” Moreover, the Release stated:

[t]oday’s action reverses a decision by the previous administration that ordered the Bureau of Ocean Energy Management (BOEM) to deny the permit applications. That decision underestimated the benefits of obtaining updated G&G information and ignored the conclusions of BOEM’s Atlantic G&G Programmatic Environmental Impact Statement and Record of Decision, which showed that no significant impacts are expected to occur as a result of these seismic surveys.

. . . Thus, here, as in the Fourth Circuit decision of *Arch-Mineral Corp.*, the BOEM decision, while it may not yet be technically final, nevertheless, is a “foregone conclusion.” As Judge Anderson concluded in *Stouffer Foods, supra* at * 4, the impact of the Executive Order “is immediate and significant enough to make the issues raised appropriate for judicial review at this stage.” Accordingly, contrary to the federal Defendants’ arguments, the Complaint sets forth a claim for relief in this regard.

Id. at 28-29. Accordingly, based upon the responses in the Status Report and the authorities referenced herein and in previous Memoranda to the Court, the harm to South Carolina is irreparable, tips strongly in South Carolina’s favor, and is imminent.

Moreover, any decision to launch full scale seismic testing in an area which has remained off limits to leasing for decades, and in an area the Department of Interior has deemed immune from leasing in its 2017-2022 leasing plan, is not in the public interest. Further, such a reversal

from BOEM's January 6, 2017 decision to deny seismic testing because no leasing would occur for at least five years, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(a). As we have repeatedly noted, BOEM, in denying the six pending seismic testing permits, advised the public on January 6, 2017 that

“[i]n the present circumstances and guided by an abundance of caution, we believe that the value of obtaining geophysical and geological information from new airgun seismic surveys in the Atlantic does not outweigh the potential risks of those surveys' acoustic pulse impacts on marine life,” said BOEM Director Abigail Ross Hopper. “Since federal waters in the Mid and South Atlantic have been removed from leasing consideration for the next five years, there is no immediate need for these surveys.”

Attachment 2 (herein) (emphasis added).

And yet, BOEM now reverses its earlier prudent decision made by its former Director, as a result of the President's Executive Order 13795 and Secretarial Order 3350. Attachment 3 (herein). The Secretary stated in his Order that the Order “is designed to implement the President's directives and take other actions to ensure that responsible OCS exploration and development is promoted and not unnecessarily delayed or inhibited,” when the previous Administration had shortly before concluded the opposite.

In responding to the Court, Director Cruickshank made it clear that he too was carrying out the President's “mission.” His answer, in indicating BOEM is moving forward on seismic testing, is that BOEM possesses the authority to approve seismic testing, notwithstanding any moratorium or exemption from leasing – a “because we can, we will” approach. Such response disregards BOEM's previous decision that found no “immediate need” for such testing “[s]ince federal waters in the Mid and South Atlantic have been removed from leasing consideration for the next five years. . . .” Clearly, the 2017-2022 Department of the Interior leasing plan, which

excluded the South Atlantic from any leasing whatsoever, remains in place for some time to come, perhaps even to the year 2022. Thus, while seismic testing may be legally authorized, certainly it does not, of course, mean that is rationally based. It is not here.

Former BOEM Director Abigail Ross Hopper, in her January 5 Memorandum issued the day before BOEM's public announcement denying the seismic testing permits, explained in some detail why it is imprudent to authorize seismic testing in an area off limits to leasing. Her directions were as follows:

[t]his Memorandum directs you to deny the pending applications to conduct airgun seismic surveys in the Mid- and South Atlantic Planning areas using the authority granted under Section 11 of the Outer Continental Shelf Land Act (OCSLA). My decision, derived after thoughtful consideration of multiple factors outlined below, is based on the immediate need for seismic survey information in light of the Secretary's decision to remove the Atlantic Program area from the 2017-2022 Five year Oil and Gas Program and the promise of emerging noise-quieting technologies. Additionally, given the risks identified in BOEM's Atlantic Outer Continental Shelf (OCS) Proposed Geological and Geophysical (G&G) Activities Mid-Atlantic and South Atlantic Planning Areas Final Programmatic Environmental Impact Statement ("PEIS"), issued in February, 2014, and the accompanying Record of Decision (ROD), signed in July 2014, the value of obtaining the information from the surveys does not outweigh the risks of obtaining said information, in light of the removal of the Atlantic from consideration for leasing during the next five years.

(emphasis added). The BOEM Director cited authority contained in the OCSLA for her decision:

[c]onsistent with the foregoing, Section 11(g) of OCSLA specifies what determinations must be made by the Secretary before authorizing G&G permits under OCSLA.

- ... (3) such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.

43 U.S.C. § 1340(g) . . . Sections 11(a) and 11(g) of OCSLA do not provide an unrestricted right to the exploration of the OCS and leave to the Secretary the discretion to approve or deny G&G activities governed by Secretary. . . . The Secretary may not authorize G&G activities that are not consistent with the criteria listed in Section 11(g), but otherwise has discretion regarding the G&G permits issued....

Id. at 12.

She explained that the risk of harm to marine mammals was simply too great, given that leasing had been removed (or withdrawn) for a five year period:

. . . mitigation measures outlined in BOEM’s PEIS and included in the ROD should contribute substantially to preventing hearing damage and biologically significant disruption of NARW [North American Right Whale] behavior. However, some NARW’s would doubtless be disturbed by seismic activity in the Atlantic. Given that next Five Year Program excludes the Atlantic from leasing from 2017-2022, and the potential for less intrusive seismic technologies in the near future, the potential disadvantage to the small, critically endangered, and declining population is not worth the risk.

Attachment 3 (herein).

This decision by the former BOEM Director to deny seismic testing based upon a moratorium from leasing has history on its side, in addition to scientific analysis. The South Atlantic has been off limits to seismic testing for decades because there has been no leasing in the South Atlantic during that time. One commentator chronicles a portion of this history as follows:

Resolutions were introduced in the House and Senate to prohibit new OCS energy development in areas currently under moratoria. . . . Senator Kerry (Democrat, Mass.) added an amendment to the Department of the Interior’s appropriations bill that prohibited any pre-leasing activities, including seismic testing, geophysical testing, pilot program, and drilling in OCs protected areas. . . . Senator Kerry stated, “[t]his amendment makes sure drilling in protected areas – rejected by the states and further rejected by the Congress – cannot be achieved by backdoor, stealth actions at the Department of Interior....

The Kerry amendment was incorporated into the Department of the Interior's fiscal 2002 appropriation bill. . . . No pre-leasing, leasing, or development activities can occur in the areas identified by President Clinton in 1998, regarding North Central, and Southern California; the North Atlantic; Washington-Oregon; and the Eastern Gulf, south of 26° North latitude. . . . There is also a ban on leasing in North Aleutian Basin Alaska, outside of the lease sale 181 area in the EGOM, and in the Mid and South Atlantic. . . .

Fitzgerald, "The Seaweed Rebellion: Florida's Experience with Offshore Energy Development," 18 J. Land Use & Envtl. L. 1, 68 (2002). Thus, as Judge Gleason concluded in the most recent *League of Conservation Voters* case, "there would be no apparent incentive for the industry to conduct seismic surveying in areas closed off from drilling." 363 F.Supp. at 1020, n. 34.

In short, the Status Report submitted to this Court provides all the more reason for the granting of a preliminary injunction. Seismic testing is imminent, and such testing poses great harm to South Carolina. As BOEM earlier concluded, the risks of seismic testing outweigh the need for it, considering that the Mid and South Atlantic are off limits to leasing for five years to come and have been for decades. The reversal of this decision is based upon nothing more than carrying out "the mission entrusted to [BOEM] . . . by the President." Cruickshank Decl. at 5. Such a decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and should be enjoined.

Respectfully submitted,

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May 13, 2019

ATTACHMENT 1

**POST AND COURIER ARTICLE: OFFSHORE SC OIL AND GAS
SEARCH PUT ON HOLD AS TRUMP ADMINISTRATION
WAITS ON COURT RULING**

APRIL 25, 2019

SPECIAL COVERAGE

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Offshore SC oil and gas search put on hold as Trump administration waits on court ruling

BY BO PETERSEN BOPETE@POSTANDCOURIER.COM

APR 25, 2019



Anti-drilling concern is turning from the threat of spills from offshore rigs to the industrialization of the South Carolina coast to export natural gas and oil. File/Provided

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Searching and drilling for oil and natural gas offshore South Carolina or along the rest of the U.S. coast won't happen anytime soon, the Interior Department announced Thursday.

In a decision watched on both sides of the country, Interior Secretary David Bernhardt said the department will wait on the result of its appeal to a recent court ruling that centered on the Arctic before going forward anywhere offshore.

The decision came after a court blocked the Trump administration from restarting drilling in areas of the Alaskan Arctic where it was previously banned by the Obama administration.

Berhardt's comments were first reported by The Wall Street Journal.

The surprising announcement set off a wave of social media comment among conservation groups that oppose the work, along with millions of coastal residents and other interests.

"This decision is the result of constant pressure from coastal communities, environmental groups and elected officials who made it abundantly clear that offshore oil and gas drilling is dangerous, unwanted and a threat to our economy and way of life," said U.S. Rep. Joe Cunningham, D-S.C., who ran for office opposing the offshore work.

Cunningham drew both praise and criticism for blowing an air horn in a House subcommittee hearing on drilling to call attention to how loud and disruptive seismic blast-testing is to sea creatures such as whales.

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"However, this fight is far from over. We need legislation to permanently ban offshore oil and gas drilling and make sure that no administration can put our communities at risk. Congress must pass my bipartisan legislation as soon as possible," he said.

Opponents have fought for more than six years against opening the Southeast coast to exploration. The Obama administration closed the waters in 2016. But President Donald Trump restarted the process for the years 2019 to 2023.

In South Carolina, the issue pits a concern for the environment and a multibillion-dollar tourism industry against potential revenue and jobs. Nearly every coastal government in the state, along with hundreds of businesses and thousands of residents, have publicly opposed the move.

S.C. Attorney General Alan Wilson has sued to stop the work, using the same arguments as were made in the Alaska case.

Most coastal state legislators support some sort of ban. At least some inland legislators favor the pursuit of drilling for its economic opportunity and likelihood of attracting business.

After dueling bills that either blocked or promoted onshore infrastructure to support the drilling work each passed a House subcommittee, the Senate last week approved a proviso by Sen. Chip Campsen, R-Isle of Palms, to prevent state or local governments from approving plans to build any support facilities.

The proviso — which is a clause in the proposed budget — would take effect for the budget year. The budget is still being debated.

The first of five interested companies has won a federal permit that could include seismic testing off South Carolina, and is being sued by opponents. A decision on the remaining permits are expected by the end of April. Bernhardt, a former oil and gas industry lobbyist, was expected to push drilling forward after his appointment earlier this month.

Expanding offshore drilling was a campaign promise and has been enough of a priority for Trump that during the partial federal shutdown late last year and earlier this year he called back Bureau of Ocean Energy Management workers — with pay — to keep processing offshore seismic testing permits in the Atlantic.

The testing was expected to be permitted any day now, despite the growing opposition that included Gov. Henry McMaster, an early Trump supporter, and other Republicans who promoted environmental concerns associated with drilling.

“Today’s announcement is great news,” McMaster said in a statement Thursday. “South Carolinians can remain confident that we will continue our efforts to protect our pristine coastline and invaluable tourism industry from the destructive threats of seismic testing and offshore drilling.”

Nat Mund, the Southern Environmental Law Center’s director of federal affairs, said he hoped the move signals the administration is listening to the bipartisan opposition.

“Secretary Bernhardt may be closely aligned with the oil industry but he also recognizes the political reality of such an unpopular proposal,” Mund said.

Randall Luthi, the National Ocean Industries Association president, said the hold was a not a final plan, but called it a hard stop that negates months of environmental and economic analysis for the work.

“While there is no firm guess on what ‘indefinitely’ means, it clearly indicates we won’t see a draft plan tomorrow, nor did we expect to. However, Interior should still evaluate the option of moving ahead with a proposed plan,” he said.

Reach **Bo Petersen** at @bopete on Twitter or 843-937-5744.

BO PETERSEN

Science and environment reporter. Author of *Washing Our Hands in the Clouds*.

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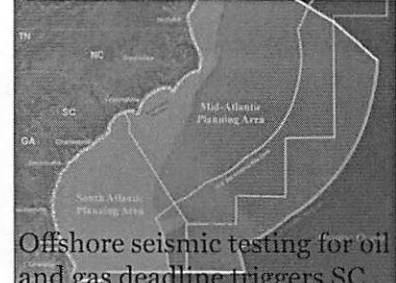
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Despite pause, new laws still needed to protect our coast



Offshore seismic testing for oil and gas deadline triggers SC

ATTACHMENT 2

**BOEM ANNOUNCES FIVE YEAR MORATORIUM ON
LEASING AND SEISMIC TESTING**

JANUARY 6, 2017

1/28/2019

BOEM Denies Atlantic Seismic G&G Permits | BOEM



BOEM Denies Atlantic Seismic G&G Permits

01-08-2017 WASHINGTON, DC

Contact: Connie Gillette
202-208-8387

The Bureau of Ocean Energy Management (BOEM) today announced the denial of six pending geophysical and geological (G&G) permit applications to conduct airgun seismic surveys in the Mid- and South Atlantic Planning Areas of the Atlantic Ocean. The decision is based on a number of factors, including a diminished need for additional seismic survey information because the Atlantic Program Area has been removed from the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program.

"In the present circumstances and guided by an abundance of caution, we believe that the value of obtaining the geophysical and geological information from new airgun seismic surveys in the Atlantic does not outweigh the potential risks of these surveys' acoustic pulse impacts on marine life," said BOEM Director Abigail Ross Hopper. "Since federal waters in the Mid and South Atlantic have been removed from leasing consideration for the next five years, there is no immediate need for these surveys."

Additional factors leading to the bureau's decision to deny the six permits include the possibility that the information would not be used, if the Atlantic is not offered for future oil and gas leasing; the acquired data may become outdated if leasing is far in the future; and the probable development of lower impact survey technology before future geophysical and geological information would be needed.

This decision only impacts the six permit applications for the use of airgun seismic surveys that were proposed for oil and gas exploration deep beneath the ocean floor. The goal of geological and geophysical surveys is to produce maps or models that indicate the earth's geography, stratigraphy, rock distribution and geological structure delineation. Deep penetration seismic surveys are conducted by vessels towing an array of airguns that emit acoustic energy pulses into the seafloor over long durations and large areas. Seismic airguns can penetrate several thousand meters beneath the seafloor. Surveys for other, shallow depth purposes typically do not use airguns. While surveys may have some impacts to marine life, airgun seismic surveys have the potential for greater impacts.

The Bureau of Ocean Energy Management (BOEM) promotes energy independence, environmental protection and economic development through responsible, science-based management of offshore conventional and renewable energy resources.

- BOEM -

ATTACHMENT 3

BOEM DIRECTOR ABIGAIL ROSS HOPPER'S MEMORANDUM

JANUARY 5, 2017



United States Department of the Interior

BUREAU OF OCEAN ENERGY MANAGEMENT
WASHINGTON, DC 20240-0001

JAN - 5 2017

Memorandum

To: Michael Celata
Regional Director, Gulf of Mexico Region

From: Abigail Ross Hopper
Director

Subject: Airgun Seismic Survey Permit Applications

1. Summary

This memorandum directs you to deny the pending applications to conduct airgun seismic surveys in the Mid- and South Atlantic Planning Areas using the authority granted under section 11 of the Outer Continental Shelf Lands Act (OCSLA). My decision, derived after thoughtful consideration of multiple factors outlined below, is based on the diminished immediate need for seismic survey information in light of the Secretary's decision to remove the Atlantic Program Area from the 2017-2022 Five Year Oil and Gas Program and the promise of emerging noise-quieting technologies. Additionally, given the risks identified in BOEM's Atlantic Outer Continental Shelf (OCS) Proposed Geological and Geophysical (G&G) Activities Mid-Atlantic and South Atlantic Planning Areas Final Programmatic Environmental Impact Statement ("PEIS"), issued in February 2014, and the accompanying Record of Decision (ROD), signed in July 2014, the value of obtaining the information from the surveys does not outweigh the risks of obtaining said information, in light of the removal of the Atlantic from consideration for leasing during the next five years.

A. Authority

Section 11(a) of the OCSLA provides that "any person *authorized by the Secretary* may conduct geological and geophysical explorations in the OCS, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area." 43 U.S.C. §1340(a). Consistent with the foregoing, Section 11(g) of OCSLA specifies what determinations must be made by the Secretary before authorizing G&G permits under OCSLA.

Any permit for geological explorations authorized by this section shall be issued *only if the Secretary determines*, in accordance with regulations issued by the Secretary, that

- (1) the applicant for such permit is qualified;
- (2) the exploration will not interfere with or endanger operations under any lease issued or maintained pursuant to this subchapter; and

(3) such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.

43 U.S.C. § 1340(g)(emphasis added). Sections 11(a) and 11(g) of OCSLA do not provide an unrestricted right to the exploration of the OCS and leave to the Secretary the discretion to approve or deny G&G activities governed by Section 11.¹ The Secretary may not authorize G&G activities that are not consistent with the criteria listed in Section 11(g), but otherwise has discretion regarding the G&G permits issued. *Id.*

BOEM G&G regulations implementing Section 11, and which govern permitting OCS G&G activities on unleased lands or on lands under lease to a third party, are found at 30 C.F.R. Part 551. The regulatory provisions for the issuance of G&G permits provide for approval or disapproval of a permit application. 30 C.F.R. 551.5(b). The regulations are not extensive, but provide, "BOEM authorizes you to conduct exploration or scientific research activities under this part in accordance with the Act, the regulations in this part, orders of the Director/Regional Director, and other applicable statutes, regulations, and amendments." 30 C.F.R. 551.3. Concerning the denial of G&G permit applications, the regulations provide that "[i]f BOEM disapproves your application for a permit, the Regional Director will state the reasons for the denial and will advise you of the changes needed to obtain approval." 30 C.F.R. 551.5(b).

The regulations in Part 551 further provide that approved G&G activities must not

- (1) Interfere with or endanger operations under any lease, right-of-way, easement, right-of-use, Notice, or permit issued or maintained under the Act;
- (2) Cause harm or damage to life (including fish and other aquatic life), property, or to the marine, coastal, or human environment;
- (3) Cause harm or damage to any mineral resource (in areas leased or not leased);

¹ The language in Sections 11(a) and 11(g) of OCSLA contrasts sharply with that in Section 11(c) of OCSLA, which provides, in part, that exploration plans "shall be approved by the Secretary if [s]he finds that such plan is consistent with the provisions of this subchapter, regulations prescribed under this subchapter, including regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title, and the provisions of such lease." 43 U.S.C. § 1340(c)(emphasis added). Section 11(c) contains a high standard for the disapproval of exploration plans:

The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title [where the activity "would probably cause serious harm or damage"], and (B) such proposed activity cannot be modified to avoid such condition.

43 U.S.C. § 1340(c). In contrast, the relevant subsections of section 11 do not set forth any circumstances under which applications for seismic permits "shall be approved" nor spell out any findings that must be made in order to decline to issue such permits. Thus the Secretary has greater discretion to deny G&G permit applications than she does to deny exploration plans as those plans must be approved absent unavoidable, probable, serious harm or damage.

- (4) Cause pollution;
- (5) Disturb archaeological resources;
- (6) Create hazardous or unsafe conditions; or
- (7) Unreasonably interfere with or cause harm to other uses of the area.

30 C.F.R. 551.6(a).²

B. Seismic Surveys

G&G activities survey the marine environment to acquire information that could be used to determine the resource potential of oil and gas, aid in siting renewable energy structures, and locate potential non-energy minerals such as sand and gravel. They can also assist in developing energy and other resources safely, efficiently, and without harm to natural or cultural heritage.

G&G activities for oil and gas exploration generally include deep penetration seismic airgun surveys, electromagnetic surveys, deep stratigraphic and shallow test drilling, and various remote-sensing methods. Deep penetration seismic surveys are conducted by vessels towing an array of airguns that emit acoustic energy pulses into the seafloor over long durations and over large areas. Many whale species hear and vocalize at low frequencies which overlap with the low frequencies produced by deep penetration seismic surveys. Seismic airguns penetrate several thousand meters beneath the seafloor. These surveys are controversial because of public concerns over potential impacts of the sound produced by these surveys to marine life.

G&G activities for all three program areas (oil and gas, renewable energy, and marine minerals) include high-resolution geophysical surveys (HRG) and other non-airgun surveys to detect geohazards, archaeological resources, and certain types of benthic communities. Techniques also include bottom sampling and analysis (often referred to as geotechnical surveying) to assess seafloor suitability for supporting structures such as platforms, pipelines, cables, and wind turbines, or to evaluate the quantity and quality of sand for beach nourishment and coastal restoration projects. HRG surveys have far less potential to impact marine life than deep penetration seismic using airguns because HRG surveys use less energy, are at a higher frequency that is less in the range of many marine mammals, and are predominately used over a smaller geographic area for a shorter duration.

The existing seismic survey information for the Atlantic Outer Continental Shelf (OCS) was collected more than 30 years ago, and no additional seismic surveys for oil and gas activity have taken place since then. While the older seismic data can be reprocessed, advances in 2D and 3D seismic survey technology now enable collection of much better information.

In 1990, as part of the U.S. Department of the Interior's annual appropriations act, Congress began a moratorium prohibiting Federal spending on oil and gas development on the Atlantic OCS. On June 12, 1998, President Clinton issued a memorandum to the Secretary of the

² Similar requirements are found in the G&G permit application form (Form BOEM-0327).

Interior, which continued leasing restrictions in the Atlantic. Both Congressional and Presidential moratoria were allowed to expire or were lifted, respectively, in 2008. In 2010, Congress mandated that a programmatic environmental impact statement (PEIS) be prepared to comprehensively review potential environmental impacts of G&G activities off the Atlantic coast. BOEM completed the PEIS in February 2014, and a record of decision (ROD) for the PEIS was signed in July 2014.

BOEM has received a number of applications for G&G surveys in the Atlantic. Since issuance of the ROD, two permits that did not propose the use of airguns have been issued. However, six airgun seismic survey permit applications remain pending BOEM's decision. In making its determination, BOEM must consider the impact of the proposed activities on marine life and other factors. Additionally, each of the pending permits is also required to obtain an Incidental Harassment Authorization (IHA), under the Marine Mammal Protection Act, from the National Marine Fisheries Service (NMFS). No IHAs have yet been issued.

C. Five Year Program and Need for Seismic Data

Section 18 of OCSLA requires the Secretary of the Interior to prepare a nationwide offshore oil and gas leasing program, setting forth a five-year schedule of lease sales designed to best meet the Nation's energy needs. On January 29, 2015, BOEM published the 2017-2022 Draft Proposed Program (DPP), which included lease sales in the Gulf of Mexico, Alaska and the Mid- and South Atlantic Program Area. In March 2016, the Secretary released the 2017-2022 Proposed Program, the second of three proposals required to develop the 2017-2022 Five Year Program. After an extensive public input process, the sale that was proposed in the DPP for leases in the Mid- and South Atlantic area was removed from the program. Many factors were considered in the decision to remove this sale, including potential conflicts with other ocean uses by the Department of Defense and commercial interests; potential harm to competing interests; current market dynamics; limited infrastructure; and opposition from many coastal communities. The range, number, and nature of conflicts in the Atlantic are unique to the region and require extensive work to address these conflicts prior to including a lease sale in the program.

In light of the Secretary's decision to remove the Atlantic planning areas from any leasing in the 2017-2022 Five Year Program, the immediate need for new G&G information in that area is greatly reduced. While BOEM has acknowledged that updated seismic information could be helpful for future decisions concerning oil and gas activities in the Atlantic, there are currently no pending decisions which would depend upon the updated information. Further, if the Atlantic is included in a future 5 Year Program, industry would likely apply to conduct additional G&G surveys closer in time to an actual lease sale if significant time has elapsed since prior surveys were conducted. Therefore, in light of other considerations discussed below and the fact that the immediate need for updated seismic information has greatly decreased since the ROD was issued in June 2014, I have determined that it is not appropriate to issue these permits at this time.

D. Emerging Technologies

An effort to develop "quieting" technology has paralleled improvements in seismic survey capability. BOEM has worked with industry to examine technologies with the potential to reduce noise generated during seismic surveys using airguns. In 2014, BOEM organized a workshop with more than 100 representatives from government, industry, non-governmental environmental organizations, and academia to work together and gain a better understanding of these emerging technologies. The most promising alternative to airguns appears to be marine vibroseis technology. While a number of different types of marine vibroseis technologies are under development, some are being evaluated for commercial use, typically for surveys near sensitive habitat or other biological resources. The economic feasibility of this technology remains to be proven and the potential environmental impacts tested. Industry has hesitated at using marine vibroseis or other quieting technologies until they are better understood. There is no silver bullet. However, by engaging industry and the regulators, I expect technologies will be developed that can produce data that is commensurate to that being produced by currently available airgun seismic survey techniques but with much less environmental impact. In fact, an industry-led study on vibroseis technologies is underway, and industry is regularly updating BOEM on its progress. I believe that BOEM should do what it can to encourage development of these technologies.

D. Marine Mammals

As human presence in the offshore environment has grown, so too has anthropogenic sound. BOEM, and its predecessor MMS, has been a pioneer in sponsoring research on ocean sound, beginning in the 1980s with research on how industrial sounds affect large whales species. The bureau has moved forward since then with studies on an array of topics, including methods to detect, classify and locate marine life near sound sources; improvements in mitigation; quieting technologies; and effects of sound on prey species. BOEM has also begun to examine the even more complex issue of cumulative effects from chronic exposure to anthropogenic sounds.

Deep penetration seismic airgun surveys come with an environmental burden. The high energy sound they produce may damage the hearing or disrupt the behavior of sea animals, particularly marine mammals, if they are too close to the source. For HRG surveys, while injury is possible, it is unlikely given that an animal would need to be within feet of an HRG source for a period of time at enough intensity for the potential to lead to hearing injury. This concern has prompted a wealth of research, guidance, and measures to mitigate potential harm. The PEIS and the accompanying ROD identified various mitigation measures whose application would reduce the potential for hearing damage or disrupted behavior, including, for example, placement of observers on survey vessels, ramp up requirements, exclusion zones around survey vessels, shut down requirements, and closure of areas to surveys at certain places and times when exposure of marine mammals to survey sounds are a particular concern.

I believe the mitigation measures in the ROD contribute substantially to preventing hearing damage and biologically significant disruption of sea animal behavior. However, there is no certainty that in all cases those mitigation measures will avoid all potential impacts.³ I am particularly persuaded by the continually emerging science regarding the North Atlantic right whale (NARW). BOEM's PEIS estimates that between zero and two individual NARWs would potentially experience Level A take (hearing damage) annually and that between zero and 224 individual NARWs would potentially experience Level B take (behavioral disruption) annually if seismic surveys proceed within the parameters established by the PEIS. The assumptions made in these estimates are "conservative," tending to err in overestimating takes. Furthermore, mitigation measures outlined in BOEM's PEIS and included in its ROD should contribute substantially to preventing hearing damage and biologically significant disruption of NARW behavior. However, some NARWs would doubtless be disturbed by seismic activity in the Atlantic. Given that next Five Year Program excludes the Atlantic from leasing from 2017-2022, and the potential for less intrusive seismic technologies in the near future, the potential disadvantage to this small, critically endangered, and declining population is not worth the risk.

II. Directive

As outlined above, new seismic data has benefits to both industry and the federal government in considering any oil and gas activity in the region. However, I have determined that even allowing the *possibility* of impacts to the environment and existing uses in the Atlantic from airgun seismic surveys – even with the most stringent mitigations being implemented – is unnecessary at this time because:

- i. The Secretary decided to remove the Atlantic planning areas from any leasing in the 2017-2022 Five Year Program and there is no immediate need for new G&G data from seismic airgun surveys to inform pending decisions;
- ii. The G&G data to be acquired could become outdated if the Atlantic is offered for oil and gas leasing activities too far into the future, as is the case now with the G&G data currently available;
- iii. Developments in technology might allow for the use of lower impact airguns or other seismic instruments that do not have the potential for the level of impacts on the environment from currently proposed airgun surveys; and

³ The PEIS notes that "the effects of mitigation measures, and other caveats described below, cannot be quantified with precision, and mitigation measures may not be fully implemented. For example, visual and PAM are not 100 percent effective due to factors such as physical conditions (e.g., inclement weather), presence of animals at the surface, difficulty in species identification, lack of vocalizing animals, and limitations in equipment used for monitoring. Further, larger acoustic exclusion zones are more difficult to monitor than smaller zones." PEIS xi-xii

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- iv. Although the mitigation measures included in the Atlantic G&G PEIS may be adequate for purposes of minimizing the level of impacts that airguns could cause on the environment (e.g., NARW and other species), there is no certainty that in all cases those mitigation measures will avoid all potential impacts. Allowing the *possibility* of high intensity impacts from airguns, even if only possible in a nominal number of instances, is unnecessary given the lack of immediate need for acquiring O&G G&G data at this time.

Therefore, please deny forthwith all pending applications to conduct airgun seismic surveys in the Mid- and South Atlantic Planning Areas.