

**Society for Conservation Biology
The Wildlife Society
Ornithological Council
The Society for Ecological Restoration**

April 20, 2012

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable Dan Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

The Honorable Jane Lubchenco
Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue N.W.
Washington D.C., 20230

Dear Messrs. Holder and Ashe, and Dr. Lubchenco,

Today marks the second anniversary of the largest oil spill in U.S. history. As the Deepwater Horizon well spewed oil for weeks into the Gulf of Mexico, it created a series of lethal and degrading effects upon federally-protected wildlife and birds, which were almost certainly violations of the Endangered Species Act (ESA), the Migratory Bird Treaty Act, and other federal laws.¹ According to the National Marine Fisheries Service, the Gulf oil spill killed hundreds of federally-protected sea turtles and marine mammals, thousands of similarly protected

¹ The spill also harmed listed and candidate plants that are not as well protected but could be aided in their recovery by investing in their restoration some of the funds from fines that should be assessed as discussed below.

migratory birds, and did vast damage to other fish and marine and coastal resources.²

The Society for Conservation Biology (SCB) wrote to you about the spill in 2010,³ and as we have before and since, urged you to use all of the laws and restoration tools at your disposal to restore the harms done by this one deep-water well, and to develop a comprehensive energy strategy that would better control such high-risk and highly polluting energy technologies, and better sustain the living natural resources on which we all depend. SCB took that broad approach in part because we assumed that you would use the tools already at your disposal to deal fully with the great harm that had been done by this one incident, and we hoped you would use the experience to inspire a more forward-looking approach to energy management.

After several informal attempts to encourage you to apply the wildlife laws,⁴ it appears that the Department of Justice (DOJ) has yet to file a civil or criminal complaint seeking fines or other relief for the apparent violations of the Endangered Species Act and other federal wildlife laws. It also appears that neither of the wildlife agencies has assessed the civil fines that they could assess.

Therefore we are writing to formally request that you file one or more complaints, and seek fines for each of the documented and scientifically probable takes that resulted from the spill. In particular we urge you to use a provision that was approved by Congress and President Reagan in 1988 specifically for incidents in which severe harm is done to listed species in violation of the ESA. This provision requires that once fines and penalties from violations of the ESA reach a level above \$500,000 the excess balance is to be transferred and directed to cooperative state and Federal efforts to conserve and recover endangered and threatened species.⁵ This could provide as much as \$57 million for the

² Sea Turtles, Dolphins, and Whales and the Gulf of Mexico Spill, available at: http://www.nmfs.noaa.gov/pr/pdfs/oilspill/species_data.pdf

³ SCB's 2010 letter on the Gulf oil spill and how it should prompt a more careful, comprehensive energy strategy, is one example: <http://www.conbio.org/Activities/Policy/docs/SCB%20Letter%20to%20Obama%20on%20Energy%209-30-10.pdf>. Other organizations are also conveying their concern on this anniversary and parts of this letter reflect shared concerns and recommendations.

⁴ In addition to applying the Clean Water Act and other pollution laws to this incident.

⁵ 16 U.S.C. § 1540(d) states that whenever "penalties or fines, or from forfeitures of property, exceed \$500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund." That fund is available to those States which have entered into a cooperative agreement with the Department of the Interior to participate in voluntary conservation projects for the conservation and recovery of candidate, proposed, and listed species. States and Territories must contribute a minimum non-Federal match of 25% of the total program costs to receive these funds. The Congress may still have a role in appropriating these funds but it was the clear intent of Congress that they be in addition to any planned spending for Section 6.

Cooperative Endangered Species Conservation Fund in response to the documented deaths of sea turtles alone.⁶

Recovered wildlife usually represents only a small fraction of the total mortality and sub-lethal harm in an oil spill event.⁷ Therefore, at least a civil fine reflecting that proportion should be considered for the takes and harm that were almost certainly caused by the spill. An infusion of far more than \$50 million to the Cooperative Endangered Species Fund would provide federal and state efforts to recover candidate species and listed wildlife and other species a much-needed boost.⁸ Funds from oil spill fines allocated through the ESA's Section 6 Cooperative Fund might also be used to help restore some of the listed and candidate plant species that were destroyed or adversely affected by the spill even though they are not as fully protected by the ESA from such harm as are wildlife and fish. Such broader restoration work is essential as wildlife and fish depend on healthy marine, littoral, and estuarial plants. Furthermore, in the next few months, drilling is set to begin in the environmentally sensitive Arctic Ocean, home to many endangered species. Therefore, it is important for you to make it clear that you will not ignore the full suite of existing tools for preventing and redressing civil and criminal violations leading to, or caused by, oil spills that harm Arctic or other ecosystems in the future.

The DOJ should also seek fines under the Migratory Bird Treaty Act. We urge the DOJ to seek the maximum penalty for each of the 7,000 documented bird kills. The facts of the case suggest a pattern of behavior that exemplifies wanton disregard and recklessness.⁹ A strong deterrent is needed to assure that the Deepwater Horizon parties and other oil companies refrain from such conduct in the future. The impacts of the spill on protected birds will persist far into the future

⁶ \$28 million is the potential civil liability under the ESA for the take of 1100 sea turtles based on the \$25,000 statutory fine per civil violation. \$57 million is the potential criminal liability under the ESA for the take of those sea turtles based on the \$50,000 statutory fine per criminal violation.

⁷ Research indicates that during the Exxon Valdez spill, only 4-30% of the seabirds killed in the oil spill were recovered during the cleanup process. A similar study concluded that marine mammal deaths documented during the Deepwater Horizon spill may represent only 2% of total mortality. See John Piatt and Glenn Ford, *How Many Seabirds Were Killed by the Exxon Valdez Oil Spill*, American Fisheries Society Symposium 18:712-19, 1996; Williams et. al., *Underestimating the damage: interpreting cetacean carcass recoveries in the context of the Deepwater Horizon/BP incident*, Conservation Letters 4:228-33, July 2011.

⁸ These potential penalty amounts may seem small when compared to the billions that those found responsible may be liable to pay for violations of the Clean Water Act and Oil Pollution Act but the integrity of the wildlife laws and the restoration they make possible in addition must not be overlooked.

⁹ See, e.g., a recently published, detailed history, as described by a Reuters news service review – “Run to Failure: BP and the Making of the Deepwater Horizon Disaster,” by ProPublica investigative reporter Abraham Lustgarten, offers a detailed portrait of a corporate culture that seemed to value controlling costs above human life.” <http://www.reuters.com/article/2012/03/01/us-bp-oilspill-book-idUSTRE8200AP20120301>

and might require hundreds of millions of dollars in research and restoration to correct the damage.

We offer our members' expertise in helping you develop estimates of the harm and protocols for the restoration work that should follow. We look forward to hearing how you intend to handle this matter soon. Thank you.

Sincerely,

Christien Parsons, Ph. D.
President
Marine Section
Society for Conservation Biology

Paul Krausman, CWB
President
The Wildlife Society

Ellen Paul
Executive Director
Ornithological Council

Mary Travaglini
Interim Executive Director
The Society for Ecological Restoration

cc: Chairs and Ranking Members of committees of Congress with relevant jurisdiction.