No. 18-60102

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK; LOUISIANA BUCKET BRIGADE,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, Acting Administrator, United States Environmental Protection Agency; ANNE IDSAL, Region 6 Administrator,

Respondents

On Petition for Review of Final Action of the
United States Environmental Protection Agency

REPLY BRIEF OF PETITIONERS CENTER FOR BIOLOGICAL DIVERSITY, GULF RESTORATION NETWORK, AND LOUISIANA BUCKET BRIGADE

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INTRODUCTION

In issuing the Permit challenged in this case, the Environmental Protection Agency ("EPA") authorized unlimited quantities of waste fluids, including toxic fracking chemicals, to be discharged from offshore oil and gas operations in the Western and Central Gulf of Mexico. Its decision was unlawful in three primary ways.

First, despite recognizing that the Permit constitutes a major federal action, EPA failed to examine a reasonable range of alternatives to the Permit or take a hard look at its environmental impacts as required by the National Environmental Policy Act ("NEPA"). Second, EPA issued a cookie-cutter ocean discharge criteria evaluation under the Clean Water Act ("CWA") that relies on decades-old information while ignoring new data indicating the use of offshore fracking has substantially increased in recent years and that the chemicals used in such practices are toxic to public health and wildlife. Third, EPA failed to include adequate monitoring to ensure authorized discharges, including fracking waste fluids, comply with permit conditions as required by the CWA.

EPA fails to rebut Petitioners' claims or otherwise justify its unlawful decision. Instead, EPA misconstrues its legal obligations and the contents of the record and wants the Court to ignore the agency's legal errors simply because there is some scientific judgment involved. But deference to agency decisionmaking

does not mean acquiescence. EPA's actions frustrate NEPA's fundamental purpose that agencies carefully analyze and disclose the environmental impacts of their decisions before acting. EPA's actions also undermine the goals of the CWA to protect and restore our nation's waters. Intervenor American Petroleum Institute ("API")'s baseless challenge to Petitioners' standing to challenge these violations should not give the Court pause. Petitioners have standing, as EPA has conceded.

In short, this Court should reject EPA's invitation to rewrite the clear commands of NEPA and the CWA. Instead, the Court should remand the Permit to EPA and order it to conduct the careful analyses and monitoring required by law.

ARGUMENT

I. EPA Violated the National Environmental Policy Act

EPA expressly acknowledged the Permit constitutes a major federal action under NEPA. GMG0003144. EPA was therefore required to fully comply with NEPA. 42 U.S.C. § 4332(2)(C)(i), (iii).

But EPA did not. Instead, EPA adopted an environmental impact statement ("EIS") prepared by the Bureau of Ocean Energy Management ("BOEM") that does not evaluate a reasonable range of alternatives to the specific action taken by EPA or take a hard look at the environmental impacts of EPA's action. Put simply, EPA "was not required to adopt [another agency's] document" and its decision to

do so "avoid[s] the task actually facing [EPA]." *Conservation Council for Haw. v. Nat'l Marine Fisheries Serv.*, 97 F. Supp. 3d 1210, 1236 (D. Haw. 2015).

A. EPA Failed to Comply with NEPA Independent of its Status as a Cooperating Agency for BOEM's Lease Sale EIS

EPA's status of a cooperating agency for BOEM's EIS does not automatically make that EIS sufficient for every action EPA takes related to oil and gas activity in the Gulf of Mexico. NEPA requires all federal agencies to evaluate the environmental impacts of and alternatives to *every* major federal action undertaken by that agency. 42 U.S.C. § 4332(2)(C). EPA cannot simply review and adopt BOEM's EIS as the entirety of EPA's NEPA compliance when that EIS does not sufficiently analyze the specific action taken by EPA. Indeed, this Court has previously recognized that adopting the EIS of another agency is improper where that EIS does not satisfy the adopting agency's NEPA duties. *See Davis Mts. Trans-Pecos Heritage Ass'n v. FAA*, 116 Fed. Appx. 3, 13 (5th Cir. 2004) (the "Air Force's reliance on [inadequate] data cannot satisfy the hard look requirement of NEPA" and "[t]his determination applies equally to the FAA, which, as an adopting agency, was required to satisfy itself that the [relevant] discussion in the EIS complied with NEPA.").

That is particularly true here, where the agency actions and the substantive laws governing those actions are dissimilar. BOEM's action involved leasing all unleased federal waters in the Gulf of Mexico, whereas EPA's action involved

permitting discharges in areas excluded from BOEM's action, including already-leased areas, existing facilities and the pipelines and vessels that support them, as well as facilities operating in Texas and Louisiana state waters that discharge in federal waters. GMG0002005.

BOEM took its action "to further the orderly development of [oil and gas] resources" under the Outer Continental Shelf Lands Act, GMG0000013, which establishes a leasing and management scheme for offshore mineral resources. *See* 43 U.S.C. § 1332(3). In contrast, the CWA, the statute under which EPA reissued the Permit, seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with a goal of eliminating water pollution. 33 U.S.C. § 1251(a)(1). Put differently, OCSLA manages mineral development, while the CWA seeks to protect water-quality. Thus, what constitutes a reasonable NEPA evaluation, and a reasonable range of alternatives in particular, will likely be different for actions taken under OCSLA than those taken under the CWA. *See, e.g.*, *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 866 (9th Cir. 2004).

EPA's adoption of BOEM's EIS fails to address these important distinctions. *Cf., Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1520 (10th Cir. 1992) (Corps recognizing that "due to specific mandates of [its] authority to protect the waters of the United States [it] must take a more

conservative approach" than the Forest Service and requiring additional mitigation measures in record of decision ("ROD") adopting Forest Service's EIS).

To the extent EPA wants to rely on BOEM's EIS, it must conduct its own analysis that addresses the shortcomings of that EIS and differences between the leasing action and the water pollution permitting action. But EPA failed to do so. *See* GMG0003083 (EPA's ROD adopting BOEM's EIS as its NEPA analysis for the Permit).

B. EPA Did Not Examine a Reasonable Range of Alternatives to the Permit

The plain language of NEPA instructs that agencies must consider "alternatives *to the proposed action*." 42 U.S.C. 4332(2)(C)(iii) (emphasis added). Here, EPA's proposed action was reissuance of the Permit. GMG0003080. NEPA therefore required EPA to consider alternatives to issuing the Permit, including a no action alternative. EPA's arguments that it did so contradict basic principles of NEPA that what constitutes a reasonable range of alternatives is defined by the purpose and need of the specific action an agency proposes to take, and misconstrue the EIS.

EPA's alternatives must analyze how to manage offshore industry water pollution, not which areas are leased. It defies logic that reasonable alternatives to offshore oil leasing are the same as reasonable alternatives to an agency action whose purpose is to issue a water pollution permit aimed at eliminating water

pollution, or at least the most harmful discharges. As numerous courts have explained, "the scope of reasonable alternatives that an agency must consider is shaped by the purpose and need statement articulated by that agency." *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1097-98 (9th Cir. 2006); *see also Simmons v. Army Corp of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 709 (10th Cir. 2009).

Here, EPA defined the purpose of its proposed action as to "reissue the NPDES general permit (GMG290000)" for new and existing sources. GMG0003080. NEPA therefore required EPA to evaluate a reasonable range of alternatives to reissuance of the Permit. *See Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1343 (S.D. Tex. 1973), *rv'd on other grounds*, 499 F.2d 982 (5th Cir. 1974). But EPA did not.

Even if the alternatives analyzed in BOEM's EIS could somehow be considered alternatives to EPA's reissuance of the Permit (which they cannot), they fail to constitute a reasonable range. Contrary to EPA's assertion, alternatives that weigh not leasing, or leasing in different areas, do not illuminate alternative ways to regulate water pollution.

For example, EPA claims its adoption of the no action alternative in BOEM's EIS—cancellation of the lease sale—satisfied its NEPA obligations "because the environmental impacts of not issuing the Permit are subsumed within

cancelling the lease sales." EPA Br. 28. But BOEM's no action alternative expressly states that "[a]ctivities related to previously issued leases and permits (as well as those that may be issued in the future under a separate decision) related to the OCS oil and gas program *would continue*." GMG0000019 (emphasis added); *see also* GMG0000715, GMG0000743.[1]

In other words, BOEM's no action alternative assumes routine activities pursuant to past lease sales, such as new discharges on the 16 million acres already leased at the time BOEM conducted its analysis, Opening Br. 34, would continue. A no action alternative that "assum[es] the very . . . activities" at issue in the proposed action constitutes a "glaring deficiency" under NEPA. *Conservation Council,* 97 F. Supp. 3d at 1237. This is because it deprives both the agency and the public of the required "benchmark . . . to compare the magnitude of environmental effects of the action alternatives." 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

EPA also argues that had EPA not issued the Permit, operators would seek

[1] EPA's belief that this no action alternative adequately analyzes EPA's action appears partially based on its legally incorrect assumption that EPA need only address the impacts from new sources. While only EPA's issuance of permits for new sources are considered major federal actions under NEPA (as opposed to permits for existing sources), EPA Br. 28; API Br. 40, that does not absolve EPA from considering the impacts of existing discharges. For example, NEPA expressly requires consider of cumulative impacts, broadly defined to include the impacts of past actions, 40 C.F.R. § 1508.7, such as authorizing existing discharges.

individual permits instead, i.e., issuing individual permits would be the no action alternative. EPA Br. 29. EPA claims this would not be a viable alternative because it would be too burdensome. *Id.* However, the whole point of a NEPA alternatives analysis is to evaluate the pros and cons of a particular alternative against the proposed action and other alternatives *in the NEPA evaluation itself*. "Permitting an agency to avoid a NEPA violation through a subsequent, conclusory statement that it would not have reached a different result even with the proper analysis would significantly undermine the statutory scheme." *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1096 (11th Cir. 2004). Had EPA considered such option it might have decided to require individual permits for certain facilities,[2] such as those discharging fracking chemicals given data gaps, or those in shallow waters given EPA's findings that water-quality violations can occur from facilities discharging large quantities of produced water in shallow waters. GMG0003162–63; *see* GMG0002562-15, Draft Environmental Assessment at 1-14, 4-6 (EPA's permit for oil and gas facilities in the Eastern Gulf requiring individual permit inside 200-meter isobath).

Additionally, EPA asserts it evaluated a reasonable range of action alternatives because all the action alternatives eliminated lease sales in certain

[2] "An individual permit is issued to a specific operation and tailored to its pollution issues." *Save the Valley, Inc. v. EPA*, 223 F. Supp. 2d 997, 1007 (S.D. Ind. 2002).

areas and therefore analyzed varying degrees of discharges. EPA Br. 30. This is incorrect. BOEM's EIS expressly states that one of the alternatives, Alternative D, "may only shift the location of. . .activities. . .and not lead to a reduction in offshore infrastructure and activities." GMG0000159. Moreover, none of these alternatives considered the waste fluids from operations in state waters that EPA allows facilities in federal waters to discharge. GMG0002005.

But more importantly, none of the alternatives considered alternatives to the Permit conditions, including conditions EPA uses for offshore oil and gas activities in other areas. Opening Br. 34–36. EPA's briefing claims the agency did consider such alternatives in its response to comments on the draft permit. EPA Br. 31–32.

However, is axiomatic that "[t]he sufficiency of NEPA review must depend on the completeness of the studies themselves." *Sierra Club v. Hodel*, 848 F.2d 1068, 1096 (10th Cir. 1988). Accordingly, "even the existence of supportive studies and memoranda contained in the administrative record in the EIS cannot 'bring into compliance with NEPA and EIS that by itself is inadequate.'" *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) (citations omitted).

Moreover, the explanation in the response to comments is unreasonable. For example, EPA rejected considering an alternative that would limit the amount of produced water discharges by claiming the toxicity testing requirement is more protective than a limit on the overall quantity of produced water discharges. EPA

Br. 31–32. But the general permit issued by Region 9 of EPA requires *both* toxicity testing *and* limits the quantity of produced water discharges. GMG0002562-04 at 13–18. EPA provided no reason why it could not impose both conditions here.

The EIS expressly acknowledged there may be "long-term moderate impacts from the discharge of produced water and WTCW fluids within 1,000 m…from outfalls," that these "impacts are unavoidable" and "no mitigation exist for these discharges." GMG0000474. Had EPA considered reasonable alternatives to Permit conditions, it could have developed alternatives to avoid or mitigate these impacts.

C. EPA Did Not Take a Hard Look at the Permit's Impacts

The EIS's statements that EPA suggests analyze the environmental impacts of its action are insufficient to meet NEPA's hard look standard. EPA failed to take a hard look at the direct, indirect, and cumulative impacts of the discharges authorized under the Permit in three key ways. First, the EIS fails to quantify the total amount of pollution EPA was permitting to be discharged, or the chemicals present in such pollution. Opening Br. 40, 43–44. Second, the EIS fails to disclose or analyze impacts within a 1,000 meter-radius from a discharge point despite acknowledging that adverse impacts exist. *Id.* 39–40. Third, EPA failed to consider the combined impacts of all the various discharges under the Permit, both by failing to consider the impacts of all the various waste streams authorized to be discharged (e.g., the combined impacts of produced water, drilling muds, and well

treatment fluids) within the 1,000-meter radius; and by failing to consider the combined impacts of thousands of these 1,000-meter circles on Gulf water-quality or marine life, including fish, sea turtles, and marine mammals. *Id.*[3]

The EIS's cursory statements about water-quality impacts are insufficient. EPA wrongly claims the EIS disclosed the impacts of the discharges authorized under the Permit, including produced water, by pointing to the EIS's statements that discharges can degrade water and sediment quality. EPA Br. 37. But all this "analysis" does is restate the impact—it does not explain how water-quality will be degraded. *See* GMG0000468. It is well-accepted that an EIS cannot simply declare an impact will occur, it must describe what that impact will be. *See Neighbors of Cuddy Mt. v. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998) (by requiring agencies to "consider" environmental impacts, "some quantified or detailed information is required"); *Davis Mts.*, 116 Fed. Appx. at 8 (whether the EIS "provides sufficient detail" factor in evaluating adequacy of EIS).

[3] In arguing waiver, EPA erroneously casts Petitioners' arguments as solely about cumulative impacts. EPA Br. 35. Petitioners' Opening Brief argued that EPA needed to analyze the aggregate environmental effects of all discharges authorized by the Permit, and supported those arguments by referencing studies in the record indicating there may be substantial impacts from the authorized discharges. *Cf., Chambers v. Mukasey*, 520 F.3d 445, 448 n.1 (5th Cir. 2008) (violation referenced in Statement of Issues but not briefed waived). This is not solely a cumulative impacts argument. Instead, the lacking analysis also concerns the direct and indirect impacts of EPA's permit action. Petitioners have not waived their claims; nor has EPA fulfilled its duties to disclose direct, indirect or cumulative impacts.

EPA also inaccurately claims it considered the combined impacts of discharges on migratory species, pointing to various sections in the EIS that EPA claims analyze these impacts on fish and invertebrates, marine mammals, and sea turtles. EPA Br. 39. The EIS *does not consider the impacts of discharges* on fish and invertebrates. GMG0000620–22. The EIS expressly states the only impact-inducing factors considered for fish and invertebrates are anthropogenic sound, bottom-disturbing activity, habitat modification, and oil spills; and the EIS's discussion of impacts to water-quality from discharges in Chapters 3.1.5 and 4.2 "sufficiently address the potential for adverse impacts to fish and invertebrate habitats." *Id.* But the water-quality discussion in these chapters does not actually analyze the impacts of the discharges of produced water or well treatments fluids on fish. GMG0000213–230. GMG0000466–69. In other words, the EIS does not consider *any* impacts to fish from the discharges under the Permit. This omission is substantial considering record evidence that produced water discharges, including fracking and acidizing waste fluids, can have negative impacts on fish, *see* Opening Br. 42 (citing numerous studies), and that marine mammals and sea turtles are impacted by discharges through contamination of prey resources. GMG0000691, GMG0000728.

While the EIS at least acknowledges discharges could impact sea turtles and marine mammals, it then dismisses the import of these impacts in only a few

sentences, and without considering that these migratory species could be exposed to many of the 1,000-meter areas within which the EIS admits there could be long-term, moderate impacts. *See* GMG0000691 (marine mammals), GMG0000728 (sea turtles). That the EIS might have analyzed impacts from ship strikes or oil spills, EPA Br. 39, does not change this fact.

Fath v. Tex. DOT, No. 17-50683, 2018 U.S. App. LEXIS 19668 (5th Cir. July 17, 2018), is inapposite. In *Fath*, an agency determined the construction of a two-mile overpass to reduce traffic did not require the preparation of an EIS. *Id*. The agency reached this conclusion because the project would enhance safety for cars, pedestrians, and cyclists and would not have direct or indirect impacts on at-risk resources. *Fath*, No. 1:16-cv-234, 2016 U.S. Dist. LEXIS 180971, at *10–11, 15 (W.D. Tex. 2016). The Court upheld the agency's determination that there would not be cumulative impacts in light of these findings. *Fath*, 2018 U.S. App. LEXIS 19668, at *10–13.

Here, in contrast, the EIS repeatedly admits there will be moderate impacts near discharge locations and that these impacts could be "long-term." GMG0000474. But the EIS then fails to explain what those impacts could be, or analyze the impacts of migratory species repeatedly being exposed to those impacts. This does not constitute the hard look required by NEPA.

API suggests EPA should be excused from the hard look requirement because oil drilling activity, including the discharge of pollutants, has been occurring for years. API Br. 39. But this is not how NEPA operates, and the caselaw does not hold otherwise. For example, in *Sabine River Auth. v. U.S. Dep't of the Interior*, an agency prepared an environmental assessment on its acceptance of a negative easement that precluded development in a wetland, and the plaintiffs challenged the agency's decision not to prepare an EIS. 951 F.2d 669, 671 (5th Cir. 1992). The Court upheld that decision, noting the entire purpose of the easement was to "foreclose *any* change in the physical environment" and that "NEPA does not require a federal agency to prepare an EIS in order 'to leave nature alone.'" *Id.* at 679 (citation omitted). Here, EPA is not "leaving nature alone." Rather, it is authorizing oil companies to dump huge quantities of wastewater into the Gulf.

As this Court has recognized, the fact the discharge of wastes has been occurring for years, "does not automatically render the effect of the continued [discharge] insignificant. Such a conclusion would ignore the realities that even a badly damaged body of water may restore itself to ecological health if a disruptive activity is halted" and new sources of pollution "may expand the areas of damage." *Louisiana v. Lee*, 758 F.2d 1081, 1086 (5th Cir. 1985). By issuing the Permit, EPA authorized massive amounts of new polluted wastewater to be discharged into the Gulf, and it was required to analyze the impacts of those discharges. That is

particularly true considering EPA's statutory obligations under the CWA, which require EPA to set increasingly stringent effluent limitations designed to spur industry to adopt new technologies for reducing, and ultimately eliminating, water pollution. 33 U.S.C. § 1311; *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 563–64 (2d Cir. 2015).

II. EPA Violated the Clean Water Act

Petitioners' Opening Brief explained how EPA's issuance of the Permit violated the CWA because EPA conducted an unreasonable ocean discharge criteria evaluation that ignored relevant information, and adopted monitoring requirements that fail to ensure authorized discharges comply with permit conditions. In response, EPA and API claim the Court should defer to EPA's decisions because they involve scientific data. EPA Br. 23; API Br. 3, 35. But the Court's role is not so servile. Deference is not appropriate for "an agency decision that is 'without substantial basis in fact.'" *La. Envt'l Action Network v. EPA*, 382 F.3d 575, 582 (5th Cir. 2004). EPA has not supplied a reasoned basis for its ocean discharge criteria evaluation or Permit monitoring requirements, as its reasoning contradicts record evidence.

A. EPA's Ocean Discharge Criteria Evaluation Is Unreasonable

EPA's ocean discharge criteria evaluation—developed after issuance of the draft permit and just weeks before EPA issued the final permit—is unreasonable.

EPA failed to consider the quantity or composition of pollution authorized to be discharged. And it arbitrarily determined there would be no undue degradation from the Permit despite critical information gaps regarding the impacts of fracking chemicals on the marine environment and available information indicating the practice has greatly increased and that the discharge of such chemicals may have harmful impacts.

EPA claims it does not have to determine that each individual criterion will be met to determine no undue degradation. EPA Br. 41–42. But the CWA prohibits EPA from authorizing discharges into the ocean where "insufficient information exists on *any* proposed discharge to make a reasonable judgment on *any* of the guidelines." 33 U.S.C. § 1343(c)(2) (emphasis added). The CWA thus contemplates that EPA will consider each criterion, and that EPA cannot authorize a discharge where it lacks information to make a reasonable determination regarding any of the ten regulatory criteria. Contrary to EPA's contention, this statutory provision—which is distinct from the requirement that EPA issue ocean discharge criteria based on the factors enumerated in section 1343(b)—did not disappear simply because EPA issued regulations.

While the regulations do not demand that EPA precisely quantify the total load of each discharge, EPA must attempt to evaluate the amount and composition of discharges it is permitting to reasonably determine what their impacts will be.

See 45 Fed. Reg. 65,942 (Oct. 3, 1980) (EPA's statement the regulation requires it to "assess such variables as…the nature of the pollutants to be discharged, *including their quantities* [and] *composition.*…") (emphasis added). Presumably that is why EPA, in reissuing the general permit for offshore oil and gas operations in the Eastern Gulf, estimated the number of facilities it anticipated to register under the permit based on historical level of coverage, GMG0002562-15, Draft Environmental Assessment at 1-14, and issued an evaluation detailing the types of discharges and chemicals present in such discharges. *E.g.*, GMG0002562-15, Draft Ocean Discharge Criteria Evaluation at 3-30 to 3-34. Yet here, EPA's evaluation ignores whole categories of discharges, such as well treatment fluids, and fails to attempt to analyze how much pollution it was authorizing.

EPA points to three roughly 25-year-old documents EPA added to the administrative record after Petitioners filed their Opening Brief. Dkt. No. 00514599136. But, apart from a passing reference to the 1991 ocean discharge criteria evaluation, EPA's instant evaluation does not consider these documents, and EPA cannot now use them to support that evaluation. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–69 (1962).

Regardless, EPA's contention that there is no evidence of significant changes in chemical usage since development of the ELGs, EPA Br. 43–44, contradicts record evidence. Specifically, it contradicts evidence indicating

offshore fracking and acidizing are increasingly being used in the Gulf. For example, a study published in 2007 indicates that *more than 65%* of production wells undergo well stimulation, GMG0000178–79, while EPA's 1991 evaluation and 1993 ELG found that roughly 2.5% of wells undergo well stimulation and 9% are acidized. *See* GMG0002562-15, Draft Environmental Assessment at 2-6 (referencing those documents). It also contradicts evidence indicating that from 2000 to 2014, produced water discharges in deep and ultra-deep water, where additional quantities of chemicals are used to assure production because of flow problems, increased from 6% to 31%. GMG0000223. It further contradicts record evidence indicating that EPA does not know the concentration of chemicals currently used (and discharged) in fracking and acidizing. GMG0003165.

Additionally, EPA claims it reasonably evaluated the impacts of fracking and acidizing chemicals by pointing to the effluent limitations for oil and grease and sheen monitoring requirement. EPA Br. 47. But these requirements do not apply to the discharge of chemicals used in fracking or acidizing. GMG0002021, GMG0002024. EPA also points to toxicity testing requirements but ignores the fact such tests are not required to be done in connection with a well stimulation event. *See* GMG0003105.

And despite previously acknowledging it did not have any information on the impacts of fracking chemicals on the marine environment, GMG0002562-01 at

1, EPA arbitrarily dismissed studies indicating that there may be impacts to marine life. For example, EPA dismissed studies based on offshore fracking operations in the Pacific Ocean by claiming these fracks are "large-scale operations." EPA Br. 48. But record evidence indicates that drilling in deepwater is increasing, GMG0000223, and technical challenges mean "[t]hese deepwater wells may require larger scale fracturing to maximize production." GMG0002562-15, Draft Environmental Assessment at 2-6. Record evidence also indicates that acidizing is a "common" procedure in the Gulf, GMG0000179, and that when acidizing is common, "the total accumulated load of [hydrofluoric acid] in a region *becomes significant*." GMG0002562-06 at 10. (emphasis added). EPA thus failed to consider an important aspect of the problem and made findings for its evaluation that are contrary to the evidence in the record. EPA's ocean discharge criteria evaluation is unreasonable.

B. The Permit Fails to Contain Sufficient Monitoring

The Permit's produced water monitoring provisions are insufficient to ensure that discharges, including fracking wastewater, comply with effluent limits. 33 U.S.C. § 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1)-(2), 122.48(b). First, the visual sheen test, flow reporting, and oil and grease sampling fail to provide data on the toxicity of fracking pollution.

Second, despite the potential of whole effluent toxicity testing to monitor compliance with toxicity limits, the Permit's annual testing is too infrequent to sufficiently monitor produced water—much less capture fracking flowback.[4] CWA regulations require testing be of a "frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring." 40 C.F.R. § 122.48(b). Of the thousands of offshore permittees "the majority of operators perform toxicity tests for produced water on an annual frequency." GMG0003156. Once a year is not representative.

The proposed permit required twice per year toxicity testing for all facilities because, according to the record, "a frequency of once per year is not representative." GMG0002668. In the final permit EPA reversed-course because industry claimed an "economic burden for offshore operators currently testing for toxicity on an annual basis." GMG0003156. Infrequent testing that is not representative of the discharges violates the CWA regulations, 40 C.F.R. § 122.48(b). EPA's economic rationale for annual testing is arbitrary and not in accordance with the law.

EPA's argument that "it is the operator's responsibility to take representative

[4] EPA cites a 25-year old document for the proposition that fracking is rarely done in offshore operations, GMG0004269; while more recent record evidence shows the practice is widespread. GMG0000178–79.

samples," EPA's Br. 51, arbitrarily delegates EPA's oversight duties to the regulated industry. Once per year sampling will not yield representative data for continuous discharges of produced water, *see* GMG0002668; and it is improbable it will yield *any* data on intermittent fracking discharges for which the record shows a need for samples of produced water mixed with well treatment fluids. GMG0002562-05 at 103–04. Yet without clear criteria, it defies common sense that an operator would schedule annual toxicity sampling concomitant with a fracking event, particularly where industry already expressed opposition to doing so. GMG0003157. EPA has ignored the evidence in the record that annual testing is not representative.

EPA's flawed assertion that because the general permit has some toxicity testing it passes muster under *Nat. Res. Def. Council*, 808 F.3d 556, fails because it ignores the fact that it is still impossible to know whether fracking wastewater discharges comply with toxicity limits. Additionally, the case cited by EPA upholding a visual sheen test for oil limits is distinguishable because in that case the record lacked evidence the visual sheen test was ineffective. *Nat. Res. Def. Council v. EPA*, 863 F.2d 1420, 1432 (9th Cir. 1988).

III. Petitioners Have Standing

Petitioners have adequately demonstrated standing. Indeed, "EPA concurs that Petitioners have standing." EPA Br. 1. The Permit authorizes water pollution

from thousands of offshore oil facilities (including platforms, pipelines, vessels, and rigs) into a vast area of the Gulf of Mexico—all federal waters off Louisiana and Texas. GMG0002005. The Permit inadequately protects the quality of the Gulf of Mexico waters that Petitioners' members use and enjoy for fishing, aesthetic, recreation, research, and wildlife purposes. Petitioners have standing to challenge EPA's issuance of the Permit that diminishes water-quality and thus injures their members' aesthetic and other interests in the waters affected by the oil facilities' discharges. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 166-167 (5th Cir. 2012).[5] API's attempts to heighten standing requirements must be rejected.

A. Petitioners Suffer an Injury-in-Fact

The law does not require the specificity demanded by API to show injury-in-fact. There is a "low threshold for sufficiency of injury, even an 'identifiable trifle' will suffice." *Save Our Cmty. v. EPA*, 971 F.2d 1155, 1161 (5th Cir. 1992). The Supreme Court has made clear that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the

[5] The declarations of Sarthou, Rolfes and Galvin are submitted for purposes of associational standing. They demonstrate the germaneness of this case to each of the organization's purposes and that individual members' participation is unnecessary in this case. *See Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000).

challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 183 (2000) (quotations omitted). Here, Petitioners have demonstrated their members' aesthetic interests in the action area, including proximity, and that their use and enjoyment of the area is diminished by water pollution authorized by the Permit. This satisfies the inquiry.

Petitioners have demonstrated injury-in-fact by declarations showing their members spend time and have concrete interests in the Gulf waters for which the permit authorizes discharges. Jonathan Henderson is a native of and lives in New Orleans, Louisiana with a "deep connection" to the Gulf of Mexico. Henderson Decl. at 3. Since childhood he has "fished and boated on the Gulf, its bays and tributaries." *Id*. at 2. Mr. Henderson "ha[s] taken well over 100 trips by boat and plane over the Gulf" to monitor the offshore oil and gas industry and its pollution. *Id*. at 3-4. He "take[s] boat trips and flyovers searching for [] oil leaks in the Gulf of Mexico—including to the areas where there are offshore oil and gas platforms in federal waters;" his trips have included areas offshore of "East Bay, West Bay, Destin, the Mississippi Canyon, and Terrebonne Bay." *Id*. at 3. During these excursions, he enjoys "the natural habitat and the wildlife" and gets "personal enjoyment being out on the water." *Id*. at 4. The Permit's authorization of wastewater and fracking pollution "is putting a damper on [his] enjoyment of the water," including boating, fishing and swimming; and the exposure of sea turtles

and dolphins to oil industry water pollution is harming his interests in those animals. *Id*. at 5. Mr. Henderson does not complain of a generalized grievance shared by anyone; he uses waters with existing facilities (and the potential for new ones) covered by the Permit.

While standing for at least one Petitioner satisfies Article III's case or controversy requirement, *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 193 (5th Cir. 2013), other declarations establish threats to other members' interests from EPA's Permit that inadequately protects the water-quality of waters they use and enjoy. Todd Steiner regularly visits Gulf nesting sites and marine habitat for Kemp's ridley sea turtles, including waters off Galveston and Padre Island, Texas; and his "work includes efforts to create a marine preserve along the Texas coast." Steiner Decl. at 3. Steiner's aesthetic and professional interests are harmed by the Permit that "contribute[s] to water pollution from wastewater and well treatment fluids that can poison and contaminate sea turtles and habitat." *Id* at 4. EPA's failure to analyze the environmental impacts of these discharges "will harm [his] interest in sea turtles because they are vulnerable to water pollution associated with oil and gas activities in the western and central Gulf of Mexico." *Id.*; *see also* Prevost Decl. at 3-4.

Petitioners' interests and harms here are analogous to other cases where this Court has found standing. On point is *Gulf Restoration Network*, in which the

Court held that similar research, recreational and aesthetic interests in the "Gulf of Mexico and the surrounding area, including wildlife, ecosystems, coastal lines, and beaches" conferred standing in a case challenging federal offshore drilling plans. 683 F.3d at 167. "Threats to these interests, which the petitioners argue are posed by the [federal government's] approval of plans for exploration, as well as development and production without properly accounting for their environmental impact, as required by OCSLA and NEPA, are cognizable injuries for the purposes of standing." *Id.*

API's attempts to defeat Petitioners' standing are unavailing. First, there is "no merit" in API's contention that declarants' fears and concerns are insufficient to demonstrate injury. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996). In *Cedar Point*, this Court rejected arguments that concerns and beliefs were insufficient in a standing analysis; and held affiants who "expressed fear that the discharge of produced water will impair their enjoyment of [] activities" met the standing standards. *Id.*

Second, API conflates its merits argument with standing requirements when it suggests Petitioners lack an injury-in-fact because the discharges do not degrade water-quality. "It is inappropriate for the court to focus on the merits of the case when considering the issue of standing." *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986) (citation omitted). Furthermore, API errs asserting

standing is lacking for members whose harm from oil industry pollution predates the Permit because these members are, nonetheless, injured by the addition of *more* pollution via the Permit. *See Grand Canyon Tr. v. FAA*, 290 F.3d 339, 343 (D.C. Cir. 2002) (more pollution "may represent the straw that breaks the back of the environmental camel") (citations omitted).

Third, the injuries are not hypothetical. This case is unlike *Central & South West Servs. v. EPA*, 220 F.3d 683 (5th Cir. 2000), in which this Court found the plaintiffs did not show any likelihood that the disposal of PCB waste at a landfill would cause PCBs to leach into their towns, and thus their alleged harms from such leaching was speculative. *Id.* at 700-01. This Court held the plaintiffs lacked standing because they had hypothetical grievances the same as "any other person in the United States who. . .drinks water in a town that has landfills." *Id.* at 701-02. Here, in contrast, the Permit authorizes pollution into waters used by Petitioners' members, and API has stated that its members discharge pollution pursuant to the terms of the Permit. Dkt. No. 00514388722 at 9. Accordingly, the instant case is analogous to *Laidlaw* and *Cedar Point*, in which the plaintiffs' members used the waterbodies into which the pollution is discharged. *Laidlaw*, 528 U.S. at 183; *Cedar Point*, 73 F.3d at 556. For example, Mr. Henderson frequents Gulf waters near federal platforms off Louisiana, where platforms are authorized to discharge produced waters and other pollution via the Permit. Henderson Decl. at 3;

GMG0002005. Mr. Steiner uses waters off Galveston, among other Gulf waters, to observe and protect sea turtles that feed and migrate through the same waters as facilities covered in the Permit. Steiner Decl. at 3. Discharges under the Permit directly affect Petitioners' members' interests, and their reasonable concerns about the pollution from oil facilities in the Western and Central Gulf give them a stake in the outcome of this case.

Moreover, Petitioners have informational injuries from EPA's inadequate environmental review under NEPA, and "plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Ctr. for Biological Diversity v. BP Am. Prod. Co.*, 704 F.3d 413, 432 (5th Cir. 2013).

B. Petitioners' Injuries Are Traceable to the Permit and Redressable

Petitioners' injuries are traceable to EPA's approval of the Permit because it inadequately protects water-quality by allowing unlimited discharge of produced water, including fracking chemicals, and other pollution into waters depended upon and used by their members and the wildlife they enjoy. Contrary to API's contention that Petitioners must specifically identify that a particular facility's discharges harm a member; this Court has resolved that "the Constitution does not require [Petitioner] to produce an affiant who claims that [the facility's] discharge in particular injured him in some way." *Cedar Point*, 73 F.3d at 558. It is sufficient

to show the discharges into a waterbody contribute to pollution that impairs the plaintiff's use of those waters. *Id.*

Petitioners harms are also redressable. Redressability requirements are relaxed for informational and procedural claims under NEPA. Petitioners need only show "there is a possibility that the procedural remedy will redress [their] injuries." *Gulf Restoration Network*, 683 F.3d at 167. Here, Petitioners' members' injuries are redressable by a favorable court decision because it increases the likelihood water-quality and marine life would be better protected. Petitioners claims under the CWA are also redressable because a favorable ruling could result in more protective permit conditions. *See Fla. Pub. Interest Research Group v. EPA*, 386 F.3d 1070, 1085 (11th Cir. 2004) ("claimed injury may be redressed by requiring the EPA to review the state's Impaired Waters Rule").

CONCLUSION

EPA's issuance of the Permit violated basic tenets of NEPA, the CWA, and administrative law and the Court should remand the matter to the agency.

DATED: September 12, 2018

Respecfully submitted,

/s/ Kristen Monsell

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 18, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Kristen Monsell*
Kristen Monsell

CERTTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,498 words, excluding the parts of the motion exempted by Fed. R. App. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point Times New Roman font.

DATED: September 12, 2018

/s/ *Kristen Monsell*
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United States Court of Appeals

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September 18, 2018

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No. 18-60102 Center for Bio Diversity, et al v. EPA, et al
USDC No. 82 Fed. Reg. 45,845

Dear Ms. Monsell,

The following pertains to your brief electronically filed on September 12, 2018.

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

Table of Contents, Certificate of Service and Certificate of Compliance needs to be listed on the Table of Contents with page references is required, see FED. R. APP. P. 28(a)(2).

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Mary C. Stewart, Deputy Clerk
504-310-7694

cc:
Mr. Jacob Scott Janoe
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Ms. Cari Miyoko Sakashita
Ms. Samara Michelle Spence

United States Court of Appeals

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No. 18-60102 Center for Bio Diversity, et al v. EPA, et al
USDC No. 82 Fed. Reg. 45,845

Dear Ms. Monsell,

We have reviewed your electronically filed Petitioners' Reply Brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

The paper copies of your brief/record excerpts must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief/record excerpts filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief/record excerpts directly from your original file without any header.

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