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

City of Beaufort, et al, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, CHRIS OLIVER, in his official capacity as the Assistant Administrator for Fisheries, and WILBER ROSS, in his official capacity as the Secretary of Commerce, 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.	)	**No.: 2:18-cv-03326-RMG** **(Consolidated with 2:18-cv-3327-RMG)** **MEMORANDUM OF STATE OF SOUTH CAROLINA, EX REL ALAN WILSON, ATTORNEY GENERAL IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AS TO FEDERAL DEFENDANTS**

The State of South Carolina ex rel Alan Wilson, Attorney General (State), submits this memorandum in support of its motion for a preliminary injunction in these consolidated cases as to the National Marine Fisheries Service, Chris Oliver, in his official capacity as the Assistant

Administrator for Fisheries, and Wilber Ross, in his official capacity as the Secretary of Commerce (Federal Defendants). This preliminary injunction is necessary to prevent the offshore seismic airgun blasting / testing based in part upon incidental harassment authorizations (IHAs) issued by the National Marine Fisheries Service (NMFS) which, as discussed below, would be contrary to applicable law and would have a disastrous impact on marine life and therefore, the economy of South Carolina and the recreational and commercial interests of its citizens. The issuance of permits by the Bureau of Ocean Energy Management (BOEM) pursuant to the IHAs could come as early as today, March 1, 2019. (Cruickshank declaration, Dkt. # 72-1, ¶8). The State asks that any seismic testing be enjoined pursuant to this motion and that the effectiveness of the IHAs be stayed.

Because of compelling arguments made in the Memoranda of the Coastal Plaintiffs and the City of Beaufort Plaintiffs' Motions and the factual support in their exhibits, the State does not need to restate those points here. See memoranda and exhibits of the Coastal Plaintiffs (Dkt. No's 124-1 through 124-52) and the City of Beaufort Plaintiffs (Docket No's 143-1 through 143-15). When those memoranda and exhibits support the granting of preliminary injunctions to those parties, they also support granting the State's Motion for Preliminary Injunction. To those arguments and facts, the State also adds the arguments and exhibits referenced below. This authority shows that the State meets the requirements for the issuance of a preliminary injunction, the issuance of which is necessary to protect South Carolina and its citizens from the irreparable harm that would be caused by seismic testing off its coast and the Atlantic Seaboard in general.

INTRODUCTION AND BACKGROUND

This section is covered by the sections of the memoranda of the Coastal Plaintiffs (Dkt. No. 124-1, ECF stamped pp. 13 – 20 (Memorandum pp. #'s 1 - 8)) and City of Beaufort Plaintiffs (Dkt. No. 143-1, ECF stamped pp. 6 and 7 (Memorandum pp. #'s 1 & 2).

STANDARD OF REVIEW

This section is covered by the memoranda of the Coastal Plaintiffs (Dkt No. 124-1, ECF pp. 20 & 21 (Memorandum pp. #'s 8 & 9)) and City of Beaufort Plaintiffs (Dkt. No. 143-1, ECF stamped p. 7 (Memorandum p. # 7)). The State adds the following regarding the standards for a preliminary injunction:

> A moving party must establish the presence of the following: (1) "a clear showing that it will likely succeed on the merits"; (2) "a clear showing that it is likely to be irreparably harmed absent preliminary relief"; (3) the balance of equities tips in favor of the moving party; and (4) a preliminary injunction is in the public interest. *Real Truth About Obama, Inc. v. Fed. Election Comm.*, 575 F.3d 342, 346–47 (4th Cir. 2009); *W. Va. Assoc. of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). These standards follow the newly articulated requirements for preliminary injunction set forth by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22–23, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Unlike the Fourth Circuit's previous "balance of hardship" test set forth in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 196 (4th Cir. 1977), the moving party seeking a preliminary injunction must establish the presence of each of the four requirements, satisfying the standards of each as articulated. *Real Truth About Obama, Inc.*, 575 F.3d at 347.

United States v. South Carolina, 840 F. Supp. 2d 898, 914 (D.S.C. 2011), *modified in part*, 906 F. Supp. 2d 463 (D.S.C. 2012), *aff'd*, 720 F.3d 518 (4th Cir. 2013); *see also, Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 255 (4th Cir. 2017) (affirming grant of a preliminary injunction). "[T]he irreparable harm to the plaintiff and the harm to the defendant are the two most important factors." *HCI Technologies, Inc. v. Avaya, Inc.*, 241 Fed. Appx. 115, 121, 2007 WL 2022066, at *5 (4th Cir. 2007). The State meets these standards as discussed below.

I

LIKELIHOOD OF SUCCESS

This section is covered in Part I of the Argument section in Coastal Plaintiffs' memorandum (Dkt. No. 124, ECF stamped pp. 21 – 40 (Memorandum pp. #'s 9 -28)). In addition, the State asserts the following arguments which independently show that the State has a likelihood of success on the merits of this case.

A

The 2017 Executive Order Of The President And The Secretarial Order Of The Secretary Of The Interior Are Invalid

The Executive Order of the President and the Secretarial Order of the Secretary of the Interior issued in April and May of 2017, respectively, are invalid as discussed below. Attachments C and D. Actions complained of and taken by the National Marine Fisheries Service, as well as BOEM, in proceeding to permit applications for seismic testing, as recognized in this Court's Order of January 18, 2019 (granting stay and Writs Act Injunction), are based upon these two 2017 Orders. In our view, this Executive Order and Secretarial Order are unconstitutional, *ultra vires* and arbitrary and capricious in violation of the APA. See *League of Conservation Voters v. Trump*, 303 F.Supp.3d 985 (D. Alaska 2018). Such arguments provide additional grounds for a preliminary injunction to stay the effectiveness of NMFS's harassment authorizations.

As the Court stated in *Trump*,

> On April 28, 2017, President Trump issued Executive Order 13795 entitled "implementing an American First Offshore Energy Strategy. . . . The Executive Order reverses President Obama's January 27, 2015 and December 20, 2016 withdrawals in the Arctic and Atlantic Oceans. The stated purpose of the order is to encourage energy exploration and production of the outer

> continental shelf. On April 29, 2017, the Secretary of the Interior issued an order implementing the Executive Order, calling for expedited consideration of seismic permitting applications for the Atlantic Ocean. . . .
>
> There is industry interest in oil and gas activities in the Arctic and Atlantic Oceans, including industry groups expressing interest in conducting seismic surveys in those oceans. After the President issued the Executive Order, one seismic industry trade group called for seismic surveying in the previously withdrawn areas to proceed "without delay." Several seismic operation companies have applied to conduct "deep-penetration seismic surveys." . . .
>
> The Executive Order mandates expedited consideration of seismic survey permits, instructs revision of the schedule of oil and gas lease sales to include annual lease sales in the Arctic and Atlantic Oceans, and directs review of offshore safety and pollution-control regulations and guidance documents. The Executive Order itself demonstrates that oil and gas exploration activities are intended to be imminent.

303 F.Supp.3d at 990-91, 997-98.

What is being proposed here by the President, Secretary and federal authorities is nothing short of unprecedented. Since at least 1982, the South Atlantic Region, including the entire portion of the Continental Shelf off the South Carolina coast, has been deemed "off limits" to seismic testing, leasing, exploration, and drilling for oil and gas. See Comay, "Five Year Program For Federal Offshore Oil and Gas Leasing: Status and Issues In Brief," at 10-11, Congressional Research Service (January 8, 2018), Attachment A. However, the current proposal by the Trump Administration immediately to initiate seismic testing and to launch a new five year leasing plan after the 2017-2022 plan had just been completed, "would be the first offshore Atlantic oil and gas lease sales since 1983." *Id.*

Either through Congressional action, presidential withdrawal or administrative regulation, this pristine area has, for decades, remained free of all oil and gas exploration activities. *Id.* An overriding factor for imposing these various moratoria has been the threat of oil and gas speculative exploration to the economy and environment of the South Atlantic coastal areas, as

well as conflicts with ongoing Department of Defense activities in the region. Attachment AA. (DOD study recognizing the interference which oil operations imposes upon the military). Now, the Administration, without any reasoned analysis, would substantially alter these longstanding moratoria, through immediate seismic testing, scheduled for this fall, see Attachment B, an activity which at least one court has found to constitute irreparable harm, because of the dangers to marine life which it inflicts. See *Center for Biological Diversity v. Nat. Science Foundation*, 2002 WL 31548073 (N.D. Cal. 2002). Moreover, even though BOEM had just completed a 2017-2022 oil leasing plan, a few months later, the Secretary of Interior directed BOEM to prepare an entirely new five year plan for 2019-2024, one with full scale oil exploration in the Mid-Atlantic and South Atlantic. See Attachments C and D. As seen below, this directive to BOEM is inconsistent with the law, violates the Constitution, and is arbitrary and capricious.

Based upon environmental, economic and military concerns concerning oil exploration, in 2017 (January 17), the Obama Administration, as part of its responsibility to schedule a five year leasing plan pursuant to the Outer Continental Shelf Lands Act (43 U.S.C. § 1331 et seq., "OCSLA"), finalized a moratorium lasting until 2022 on oil leasing in the Mid-Atlantic and South Atlantic. See Attachment E. Contemporaneously with that five year moratorium, the Obama Administration denied seismic testing in the Atlantic. The January 6, 2017 Directive refusing to allow airgun testing explained that "[s]ince 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 [seismic] surveys." (emphasis added). Moreover, according to BOEM, "[i]n 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 those surveys' acoustic pulse impacts on marine

life." Attachment F.[1] Then Secretary of Interior Jewell explained the reasons for the January 17, 2017 five year moratorium as follows:

> [a]reas off the Atlantic coast are not included in this [leasing] program. After an extensive public input process the lease sale that was proposed in the Draft proposed program in the Mid-Atlantic and South Atlantic area was removed during the earlier Proposed program stage of the process due to current market dynamics, strong local opposition and conflicts with competing commercial and military ocean uses.

Attachment G. Representative Mark Sanford summarized, as he and other leaders implored Interior to prohibit seismic testing, that "[i]t makes little sense to conduct seismic testing off the Atlantic coast, when the Atlantic Ocean has been excluded as a possible site for offshore drilling by the Department of Interior." Attachment GG.

The decision in ***Trump*** stated the following regarding the OCSLA and its purpose:

> [o]ne of the reasons that Congress enacted the [OCSLA] . . . was to provide protection to the environment . . . . Section 12(a) of OCSLA provides that "[t]he president of the United States may, from time to time, withdraw from disposition any of the unleased lands of the Outer Continental Shelf." . . . For the areas that are not withdrawn, OCSLA provides a process for oil and gas development activities, which includes the following: "formulation of a five year leasing plan . . .; (2) lease sales; (3) exploration by the lessees; (4) development and production." [quoting Secretary of the Interior v. California, 464 U.S. 312, 327 (1984)]. . . . Seismic surveying can occur before any of these stages and typically occurs two to four years prior to lease sales in order to lease sales with oil and gas prospects.

303 F.Supp.3d at 990.

[1] It is not at all unusual to ban "preleasing" activities, in conjunction with leasing itself, because seismic testing is a preliminary step to leasing. See e.g. Section 11 of PL 05-83 [prohibiting all preleasing activities]; and Boston Globe 7-13-01 (2001 WLNR 2238768) ["pre-leasing activities would include seismic testing, geophysical tests, and pilot programs."]. As has been recognized, "[t]he first step in an oil and gas operation, both offshore and onshore, is to collect and interpret geological and geophysical information to determine if the area in question contains subterranean structures which constitute potential traps for accumulation of oil and gas." Gates Rubber Co. & Subsidiaries v. Comm. of Internal Revenue, 74 T.C. 1456, 1460 (1980). In other words, it makes common sense to ban seismic testing at the same time as issuing a moratorium on oil leasing. Attachment GG.

Yet, as noted above, immediately after a five year moratorium in the Atlantic was approved as part of the Department of the Interior's 2017-22 leasing program, and the seismic testing permit applications were denied because of that Moratorium, the Trump Administration reversed these decisions. Roughly three months after these decisions of the Obama Administration went into effect, President Trump issued his Executive Order (13795), overturning actions of the Obama Administration, and Secretary of Interior Zinke issued his Secretarial Order (3350) requiring replacement of BOEM's five year moratorium with a brand new five year leasing plan, and moving immediately to reinstate or reconsider applications for seismic testing. See Attachments C and D, *supra*. Such actions are characterized by the directives of the President and Secretary of Interior to BOEM as imposing a "new" five year leasing program as well as expediting an Incidental Take Authorization by NMFS. This decision by the Administration to move in the opposite direction from the previous Administration's policy instructions only a few months earlier has no reasoned, readily identifiable basis justifying the change such as, for example, no changes in circumstance with regard to the need for oil and no changes in survey technology to lessen its damages to marine life or an analysis of any other changes in circumstances. Accordingly, the decision violates separation of powers, is inconsistent with the OCSLA and is *ultra vires*, and is arbitrary and capricious.

As stated, the Department of Interior, in denying applications for seismic testing in the South Atlantic in January, 2017, concluded that the risk of such airgun testing was too great in light of the fact that "federal waters in the Mid and South Atlantic have been removed from leasing consideration for the next five years. . . . [Thus,] there is no immediate need for these surveys." Attachment F. That decision was then reasonable and prudent, and nothing changed in

the few short months following to justify Secretary Zinke's reversal, except for a change in Presidents.

In short, other than the Executive and Secretarial Orders, which directed BOEM radically to change directions by 180 degrees, and thereby engage in full scale oil leasing and seismic testing in the Atlantic for the first time in decades, there is absolutely no reason to have modified the previous decisions which had been made by BOEM in accordance with the OCSLA. "The purpose of the Secretary's Section 18 analysis is to determine what areas will be leased under the five-year leasing program and when these areas will be leased." *State of Calif. v. Watt*, 712 F.2d 584, 608 (D.C. Cir. 1983) (*Watt II*). Exclusions and inclusions of leasing areas "must be reasoned and . . . its basis must be identified. . . ." *Nat. Resources Defense Council v. Hodel*, 865 F.2d 288, 304 (D.C. Cir. 1988). Here, the two orders in question, that of the President and the Secretary, had no such "reasoned," readily identifiable basis, other than the desire by the President and Secretary to engage in full scale leasing and immediate seismic testing, based upon political philosophy. The present five year moratorium, lasting until 2022, and the contemporaneous rejection of seismic testing because of that five year moratorium, should thus be preserved by this Court until expiration of that moratorium. To allow a new Administration to come in and essentially "tear up" a previous leasing plan is to invite chaos.

The legal reasons for enforcing the previous Administration's five year prohibition on leasing, together with its accompanying denial of seismic testing applications, are several. First, such actions by the Obama Administration effectively constituted a limited "withdrawal" by the President, pursuant to the OCSLA, of "unleased lands of the outer continental shelf" from disposition. See 43 U.S.C. § 1341(a). As the Supreme Court long ago recognized,

> [w]ith respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. The

> power is subject to limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any part of it. . . .

Gibson v. Chouteau, 80 U.S. 92, 99 (1871).

Here, Congress, in exercising its constitutional power to delegate the power to "withdraw" OCS lands from leasing or other disposition, bestowed upon the President, pursuant to 43 U.S.C. § 1341(a), only such withdrawal power to withdraw lands generally from the public domain. The action of the Secretary of the Interior is deemed to be the action of the President for purposes of a presidential withdrawal of lands. See *Chicago, Milwaukee and St. Paul Railway Co. v. U.S.*, 244 U.S. 351, 356-57 (1917); *Davis v. Woodring*, 111 F.2d 523 (D.C. Cir. 1940). As the Supreme Court stated in *Wolsey v. Chapman*, 101 U.S. 755, 769-70 (1879), ". . . the acts of the heads of departments, within the scope of their powers are in law the acts of the President." And, as stated in the *Chicago* case, referenced above, "[t]he power to establish the reserve included the power to make the temporary withdrawal, and the act of the Secretary of the Interior in directing the latter was, in legal contemplation, the act of the President." 244 U.S. at 356-57. In short, a presidential "withdrawal" need not assume any particular form or even come from the President himself. In our view, the action of the Secretary of Interior on January 6, 2017 prohibiting seismic testing, based upon its declared five year "removal" of the Atlantic from leasing, constituted a "withdrawal" by the President pursuant to his § 1341(a) powers.[2]

As Secretary Zinke acknowledged in his Secretarial Order, the 2017-2022 OCS Oil and Gas Leasing Program, approved by the previous Secretary of Interior [in the Obama Administration] "exclud[ed] lease sales in the Atlantic Ocean. . . ." Attachment D. Based upon

[2] Typically, Interior's leasing decisions and a formal "withdrawal" by the President, pursuant to § 1341(a), are separate processes. Here, however, as seen below, the removal of seismic testing on January 6, 2017, based upon a five year moratorium, are unique and operated as a presidential withdrawal in this instance.

this "exclusion" of lease sales, seismic testing was simultaneously abandoned. Attachment F. A decision by the Secretary of Interior temporarily to halt oil and gas prospecting permits has been held to constitute a "withdrawal" by the President of lands from "further location, entry and exploration of oil and gas [on] all public land. . . ." *Wilbur v. United States ex rel. Barton*, 46 F.2d 217, 219 (D.C. Cir. 1930), *affd. sub nom. U.S. ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931). As one Court has stated, "seismographic geophysical testing [has] long been recognized as a common, if not precedent, exploration method before the lease [is] granted." *Musser Davis Land Co. v. Union Pacific Res.*, 201 F.3d 561, 566 (5th Cir.). Indeed, here, the President was required by the OCSLA to approve the 2017-2022 leasing program. See 43 U.S.C. § 1344(d)(2). President Obama did so. Attachment E.

The BOEM directive of January 6, 2017, concluding that seismic testing was unwarranted over the next five years because of the Administration's moratorium on Atlantic leasing until 2022, thus constituted a presidential "withdrawal" for purposes of § 1341(a). The January 6, 2017 directive stated that BOEM has "removed" federal waters in the Mid- and South Atlantic "for the next five years." As noted, 43 U.S.C. § 1344(d)(2) mandates that Congress and the President approve the five year leasing program which had "removed" the Atlantic from leasing. The word "removed" is synonymous with "withdrawal." See Webster's Collegiate Thesaurus (1976) ("remove"). Moreover, in other contexts, courts have held that leasing decisions, including a decision not to lease, may constitute a "withdrawal." See *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D. Wyo. 1980); *Mountain States Legal Found. v. Hodel*, 668 F.Supp. 1466 (D. Wyo. 1987).

In *Wilbur*, the Secretary of Interior, acting under a different statute than that which authorized the President to withdraw public lands, announced the denial of all oil prospecting

permits. Concluding that the Act of the Secretary was a "withdrawal" by the President, the D.C. Court of Appeals, referencing *Wolsey v. Chapman* stated:

> [i]n the case last mentioned it was held that the Order of the Secretary of the Interior, directing that the lands on the Des Moines River above the Raccoon Fork be reserved from sale, was in contemplation of the law the Order of the President and had the same effect as the same effect as the proclamation mentioned in the Act of September 4, 1841 (5 Stat. 453). The Court said: 'A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular for of such announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserves the lands from sale as was contemplated by the act.' See also United States v. Morrison, 240 U.S. 192, 36 S.Ct. 326, 60 L.Ed. 599; Northern pacific Railway Co. v. Wismer, 246 U.S. 283, 38 S.Ct. 240, 62 L.Ed. 716; Relation of the President to the Executive Departments, 7 Op. Attys Gen. 453.

46 F.2d at 219-220.

Therefore, as in *Wilbur*, the actions of the Obama Administration which culminated in the January 6, 2017 denial of seismic testing permits based upon the imposition of a five year moratorium on leasing constituted a "withdrawal" by the President pursuant to 43 U.S.C. § 1341(a). As one authority has recognized, "[w]hen the President withdraws ocean areas from leasing disposition, BOEM cannot conduct new oil and gas leases in those areas." Comay, supra at 2, n. 13. Likewise, the President, through the Secretary of Interior, may withdraw applications for "prospecting permits" for oil exploration on public lands as was the case in *Wilbur*. Thus, while seismic testing permits may be authorized pursuant to different statutes, President Obama not only withdrew public lands from oil and gas leasing, but also withdrew seismic testing

applications. This was all part of the exercise of a § 1341(a) withdrawal. The President's authority to withdraw lands from leasing, pursuant to § 1341(a) would include the authority also to withdraw pre-leasing activities, such as seismic testing.

Moreover, a successor President does not possess the power to revoke, suspend or cut short an earlier withdrawal. See *State ex rel. Faragner v. Moulton*, 21 P. 804, 806 (Mont. 1923) ["While this provision does not in terms prohibit withdrawal from a withdrawal, it does give recognition only to the right to withdraw . . ., and may be said fairly to indicate a legislative intent that the right shall not be extended further, upon the familiar maxim, expressio unius est altrius."]. As was stated in *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (*en banc*, "[t]here is no general principle that what one can do, one can undo."]. See also Anderson, "Protecting Offshore Areas From Oil and Gas Leasing: Presidential Authority Under The Outer Continental Shelf Lands Act and The Antiquities Act," 44 Ecology L.Q. 727, 746-748 (2018) [noting that authority to "withdraw a withdrawal" must be express; citing opinion of the U.S. Attorney General, concluding that "'My predecessors have held that if public lands are reserved by the president for a particular purpose under express authority of an act of Congress, the president is thereafter without authority to abolish such reservation.'" (39 Op. Att'y Gen. 185, 185-86 (1938))]. As was stated in *Anderson*, "[t]he Supreme Court recently reminded us that 'it is never our job to rewrite a constitutionally valid text under the banner of speculation about what Congress might have done had it faced a question that . . . it never faced.'. . . The terms of OCSLA as written limit presidential authority to making withdrawals. That should be the end of the matter unless Congress acts." *Anderson*, *id.* at 764.

Accordingly, the President's 2017 Executive Order No. 13795 (April 28, 2017), and the Secretary's Order No. 3350, by seeking to revise or revoke the five year moratorium on leasing

in the South Atlantic, unconstitutionally infringed upon the Congressional authority to dispose of public lands pursuant to Art. IV, § 3. These Orders interfere with Congress's power to delegate the power of withdrawal to the President. Such intrusion violates separation of powers and is thus ultra vires. In our view, the federal defendants, as well as BOEM, must honor until 2022 President Obama's decision temporarily to "withdraw" lands from leasing pursuant to § 1341(a), as well as hi withdrawal of seismic testing commensurate therewith.

Secondly, such action by the current President and Secretary of Interior, in seeking to authorize seismic testing – as a prelude to a new five year oil leasing program – is without authority. BOEM has stated that it anticipates that its seismic testing program, together with the "new" five year program, would likely be completed by year's end. Attachment H. As stated, these two activities – seismic testing and a lease program – go hand in hand. One is a prelude to the other.

It is well recognized that "'. . . whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed, from the mass of public lands, and that no subsequent law, or proclamation, or sale would be construed to embrace it, or to operate upon it….'" *Scott v. Carew*, 196 U.S. 100, 110 (1905) (quoting *Willcox v. Jackson*, 38 U.S. 498, 513 (1832)). Thus, as *Scott* held, the setting aside of land by the Secretary of War for a military camp may not be altered by a subsequent patent from the Land Department. Numerous authorities reinforce this rule. Moreover, the same rule is applicable in this instance to the federal defendants, BOEM, the President and the Secretary of Interior. The five year moratorium, approved by the previous Administration, as part of the Department of Interior's leasing plan, together with the denial of seismic testing permits based upon the five year moratorium, are binding under *Scott*, and similar cases. Lands cannot be set

aside one day, and yet the decision to set those lands aside reversed virtually the next. Otherwise, there is complete chaos.

Secretary Zinke explained in Section 3 of his Order that the action of the previous Administration has "foregone considering areas that potentially contain tens of billions of barrels of oil. . . ." Absent a reasoned analysis supported by evidence, this is pure speculation. Thus, based upon policy preferences alone, he directs BOEM immediately to initiate development of a new five year leasing plan. There is no doubt that the previous five year program cannot be tossed aside so easily, however. The D.C. Court of Appeals has made clear in *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 595 (2015) that the first stage of OCSLA oil production,

> . . . involving approval of a leasing program, carries enormous "practical and legal significance." [Cal. v. Watt, 558 F.2d 1290 (D.C. Cir. 1981)] Watt I, 668 F.2d at 1299. The key national decisions as to the size, timing, and location of OCS leasing – as well as the basic economic analyses and justifications for such decisions – are made at this first stage. See 43 U.S.C. § 1344(d)(3). The Program also creates important reliance interests, Federal, state and local governments, and the companies that participate in national and international energy markets form long term plans on the basis of the leasing program. The leasing schedule is therefore "extremely important to the expeditious but orderly exploitation of OCS resources." Watt I, 668 F.2d at 1299.

In other words, concluded *Jewell*,

> [a] leasing program consists of a schedule of proposed lease sales and related planning steps for those sales. See 43 U.S.C. § 1344(a). It serves as the template for the Government's leasing of drilling rights on the OCS for the five year period following its preparation. Drilling on the OCS requires a lease that is included in the approved leasing program and the lease must contain provisions consistent with the approved program. See *id*. § 1344(d)(3).

Id. at 592, n. 6 (emphasis added). The "template" for the Government's leasing program cannot be cast aside by Executive Order. As BOEM has stated, with respect § 1344(d)(3), "[f]or an approved lease sale to be held, it must be included in an approved Five Year Program. A lease

sale cannot be added to an existing Five Year Program without an act of Congress." Attachment I. Further, as one court has stated, ". . . an executive order cannot impose legal requirements on the executive branch that are inconsistent with the express will of Congress." *Utah Assn. of Counties v. Bush*, 316 F.Supp.2d 1172, 1184 (D. Utah, 2004).

Moreover, a five year leasing plan is the equivalent of informal rulemaking for purposes of the APA. *State of Cal. v. Watt*, 668 F.2d 1290, 1301 (D.C. Cir. 1981). And, in *Nat. Resource Defense Council v. Hodel*, 865 F.2d 288, 303 (D.C. Cir. 1988), the Court of Appeals rejected the government's argument that a five year plan does not "impose an obligation, deny a right or fix a legal relation and is therefore not final."

As one authority has tellingly demonstrated, since 1982, no five year plan has overlapped with an approved and current five year program (in this instance Obama Administration's five year program, lasting until 2022), such as the Administration is attempting to do here. See Comay, Humphries, Vann, "The Bureau of Ocean Energy Management's Five Year Program for Offshore Oil and Gas Leasing: History and Proposed Program For 2017-2022," at 10, Congressional Research Service (May 23, 2016). Attachment J. BOEM's efforts at the direction of the President and Secretary of the Interior to supersede the current 2017-2022 five year plan with one styled as a new 2019-2024 plan, is based upon nothing more than the tumult of presidential elections. The Massachusetts Attorney General, in providing Comments to the Draft Plan for 2019-2024, questioned the authority of the Trump Administration to propose this "new" five year plan on the heels of the just completed Obama five year plan. She aptly noted:

> The MA AGO is not aware of any precedent for approving a new leasing program so soon after finalization of an existing program, and BOEM has not cited any such precedent in the Draft Program. To our knowledge, if the Secretary finalizes the 2019-2024 Program, this will amount to only the second time in history that a national OCS leasing program has been superseded. There have been nine prior national OCS oil and gas leasing

> programs, spanning the periods: 1980-1985, 1982-1987, 1987-1992, 1992-1997, 1997-2002, 2002-2007, 2007-2012, 2012-2017, and 2017-2022. See Past Five Year Programs, BOEM, https://www.boem.gov/Past-Five-Year-Programs/. The only prior instance was the 1982-1987 national OCS oil and gas leasing program, which superseded the 1980-1985 program after the D.C. Circuit Court of Appeals remanded that program to the agency for violations of OCSLA—circumstances that do not apply here.

See Comments of Massachusetts Attorney General in Docket No. BOEM-2017-0074 (March 9, 2018) at 8, n. 24 (Attachment K.).

Accordingly, the Administration's actions are unprecedented, and turn the "'enormous practical and legal significance'" of a previously approved five year leasing plan on its head. *Jewell*, *supra*. Congress certainly did not intend the Department of Interior to spend years on a five year Plan, eliciting comments from numerous federal and state officials, as well as citizens, only to have that painstaking work cast aside by the incoming Administration in an effort to deliver on campaign promises. A five year Plan is based upon reasoned analysis, not Presidential politics. Thus, we believe the Executive Order and the actions taken thereunder are *ultra vires* for that reason also.

The federal government is afforded no comfort by virtue of § 1344(e) of the OCSLA. That provision requires an annual review of the approved five year Plan. Such provision states that the Secretary [of the Interior] "shall review the leasing program approved under this section at least once each year. He may revise and reapprove such program, at any time, and such revision and reapproval, except in the case of a revision which is not significant, shall be in the same manner as originally developed."

Section 1344(e) must be read in the context of § 1344(a) which provides:

> (a) Schedule of proposed oil and gas lease sales. The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter. The leasing program shall

> consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet energy needs for the five-year period following its approval or reapproval. Such leasing program shall be prepared and maintained and maintained in an manner consistent with the following principles. . . .

(emphasis added). Both § 1344(a) and (e) are written in the language of a single five year Plan. We are not saying, certainly, that there can never be a circumstance when a "new" plan may not be done. Emergencies or unforeseen circumstances certainly may occur, such as the oil shortage in the 1970s. However, the text of § 1344 does not contemplate a "new" five year Plan overlapping with the first Plan. This is particularly true in light of § (d)(3) which provides in part that ". . . no lease shall be issued unless it is for an area included in the approved leasing program. . . ." In other words, at the very least, § 1344 speaks to "revision and reapproval" of a Plan, not revocation and promulgation of a "new" Plan, as the Administration is attempting to do here.

Thus, the language of § 1344, while broad, in no way fits the situation here so as to authorize it. The Trump Administration., by virtue of the President's Executive Order and Secretary Zinke's Secretarial Order is not engaging in § 1344(e)'s "revision and reapproval" process. Instead, it is turning the Obama plan entirely on its head by proposing an entirely "new" five year program almost immediately after the Obama five year program, together with its rejection of seismic testing, was approved and went into effect. Indeed, BOEM describes the situation as follows:

> [t]he development of a new National OCS Program at this time is a key aspect of the implementation of President Donald Trump's America-First Offshore Energy Strategy, as outlined in the President's Executive Order (E.O.) 13795 (April 28, 2017) and Secretarial Order 3350 (May 1, 2017). E.O. 13795 states that it is "the policy of the United States to encourage energy exploration and production, including on the Outer Continental Shelf, in order to maintain the nation's position as a global energy leader and foster energy security and

> resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible." Secretarial Order 3350 calls for the enhancement of opportunities for energy exploration, leasing and development of the OCS, establishment of regulatory certainty for OCS activities, and enhancement of conservation stewardship, thereby providing jobs, energy security, and revenue for the American people.
>
> The Draft Proposed Program (DPP) would make more than 98 percent of the OCS available to consider for oil and gas leasing during the 2019-2024 period. Including at this stage nearly the entire OCS for potential oil and gas discovery is consistent with advancing the goal of moving the United States from simply aspiring for energy independence to attaining energy dominance.

Attachment L. It is particularly ironic that BOEM speaks of "'establishment of regulatory certainty for OCS activities'" by proposing a brand new five year plan on the heels of the brand new five year plan it had just completed without any new scientific information or other information, or reasoned analysis that would justify changing the plan. No "regulatory certainty" can be provided by imposing one five year plan on top of another.

In any event, BOEM has made it clear that § 1344(e) is an internal annual review process based upon the need to revise the existing five year plan. BOEM has described the § 1344(e) process as an "Annual Progress Report," related to the existing five year program, as follows:

> [u]nder Section 18(e) of the OCS Lands Act, the Secretary must review an approved Five Year Program each year. Historically, this review has been an internal process with BOEM reporting to the Secretary any information or events that might result in the Secretary's consideration of a revision to the program.

Attachment M. Here, however, the 2019-2024 proposed program and its restoration of the applications for seismic testing permitting did not originate with BOEM, or even the Secretary of Interior. Nor is the "new" program part of the § 1344(e) annual review process. Instead, the "new" program originated with the President's Executive Order. As BOEM has stated,

> [c]urrently, BOEM is working under the approved 2017-2022 Program. However, as directed in Executive Order 13795 (April 28, 2017) and Secretary's Order 3350 (May 1, 2017), BOEM is initiating a process to

> develop a new National OCS Program for 2019-2024 that, if approved, will supersede the 2017-2022 Program. The first of three proposals for 2019-2024, the Draft Proposed Program, was released on January 4, 2018. . . .

Attachment N. BOEM advises it anticipates the new 2019-2024 five year Program to be completed and approved by the end of this year. See 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Program, Frequently Asked Questions, Attachment H.

It is evident that BOEM is simply following instructions from the President and Secretary of the Interior, who directed that there be undertaken a brand new five year program which will supersede the one which went into effect in January 2017, and would have lasted until 2022. However, as demonstrated, such a departure from the statutory procedure has never been done. Attachment K. See Also Attachment KK. [Press Release from the White House: "The Department of Interior's latest five-year plan for the Outer Continental Shelf, adopted in 1997, effectively prevents new leasing in federal waters off most of the U.S. coast through 2002."]. No overlap of the five year program already in place has ever been done before outside of intervention by the courts. And the OCSLA does not expressly authorize such a procedure as is being attempted here. Neither an executive order or a Secretarial Order is "law" if not authorized by Congress. See *Kuhn v. Nat. Assn. of Letter Carriers, Branch 5*, 570 F.2d 757, 760-61 (8th Cir. 1978). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ["The President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself."]. Thus, for that reason also, the Administration's actions are *ultra vires*.

Third, the present Administration's immediate reversal of its predecessor's decisions – roughly four months later – is arbitrary and capricious under the Administrative Procedures Act. *Motor Vehicle Mfrs. Assn. of U.S. Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983)

[Order of National Highway Traffic Safety Administration rescinding crash protection requirements of federal motor vehicle safety standards failed to present an adequate basis for rescinding the passive restraint requirement and was violative of the APA]. As the Court noted in *State Farm*, "[w]ithin months of assuming office, Secretary [of Transportation] Brock Adams decided that the demonstration project [involving passive restraints] was unnecessary." 463 U.S. at 37. And, in 1981, NHTSA issued a final rule which rescinded the passive restraint requirements. In the words of the Supreme Court, "[a]n agency's view of what is in the public interest may change, either with or without a change, in circumstances. But an agency changing its course must supply a reasoned analysis." 463 U.S. at 57. As then Justice Rehnquist recognized in *State Farm*, while a new administration is entitled to "evaluate priorities in light of the philosophy of the administration," the "new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions." 463 U.S. at 59 and n.* (Rehnquist, Burger, C.J., Powell and O'Connor, JJ. Concurring in part and dissenting in part). In this instance, other than a change in Administrations and a change in political philosophy, there is no sound reason for the Department of the Interior's sudden switch to full bore oil leasing within three to four months after deciding that a five year moratorium on leasing and seismic tests was in effect in the Atlantic.

Here, there is no question that BOEM based its decision to move forward on the 2019-2024 Plan by revising the previous plan, and reopening seismic testing, solely on the President's Executive Order and the Secretary of Interior's Secretarial Order. As stated in the Notice in the Federal Register, published on January 8, 2018, and requesting comments on the new Draft Plan,

> On April 28, 2017, Presidential Executive Order 13795: Implementing an America First Offshore Energy Strategy (E.O. 13795), directed the Secretary

> of the Interior (Secretary) to give full consideration to revising the schedule of proposed oil and gas lease sales adopted in the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program, which was approved on January 17, 2017. The Secretary issued Secretarial Order 3350 on May 1, 2017, which further directed BOEM to develop a new National Outer Continental Shelf Oil and Gas Leasing Program. As directed by the Secretary, BOEM initiated the development of the 2019-2024 Program by issuing a request for information and comments (RFI) on July 3, 2017 (82 FR 30886). The Program development process required by section 18 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1344, and its implementing regulations, includes the development of a DPP, a Proposed Program, a Proposed Final Program (PFP), and Secretarial approval of the 2019-2024 Program.

Federal Register, Vol 83, No. 5 (January 8, 2018). Attachment N (emphasis added). In addition, BOEM in its FAQ [Frequently Asked Questions], in response to the question "Why Are We Starting Another National OCS Program Now?" responds that such initiation of a new program is at the instruction of the President and Secretary Zinke. Attachment O. "Because the President and Secretary say so" is not a valid reason to abandon a previously prepared five year plan and a moratorium on leasing and testing in the Atlantic. Nothing in § 1344 allows for a "change in Administrations" as the reason to abandon a five year plan.

There is no question that Secretary Zinke's directive to "initiate the development of the 2019-2024 program" and to ensure that Incidental Take Authorizations be expedited was a "final agency decision for purposes of the APA." See *New York v. U.S. Dept. of Commerce*, ___ F.Supp.3d ___, 2019 WL 190285 (January 15, 2019) at 2*. As the Court held in *Hornbeck Offshore Services, LLC v. Salazar*, 696 F.Supp.2d 627, 631 (E.D. La. 2010), the decision by the Secretary of the Interior "directing a six month suspension of all pending, current or approved offshore drilling operations of new deep water wells in the Gulf of Mexico and the Pacific regions" in the wake of the Deep Water Horizon tragedy was a final agency decision under the APA which was deemed arbitrary and capricious. See also *Texas v. U.S.*, 809 F.3d 134, 170 (5th

Cir. 2015) ["At its core, this case is about the Secretary's decision to change the immigration classification of millions of millions of illegal aliens on a class-wide basis."].

The Massachusetts Attorney General well described the irrationality of the "new" five year plan in her comments to the Draft Plan. There, the Attorney General wrote:

> Section 18(a) of OCLSA mandates that any national OCS oil and gas leasing program "shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity" that, in the Secretary's determination, "will best meet national energy needs for the five-year period following its approval. . . . In approving the 2017-2022 Program, the Secretary determined that "national energy needs" would best be met by a program that authorized eleven lease sales in Cook Inlet (off the coast of Alaska) and the Gulf of Mexico. . .
>
> Now, just one year after finalization of the 2017-2022 Program, BOEM proposes to reject the findings and conclusions of the 2017-2022 Program regarding "national energy needs" and expand leasing dramatically. . . The Draft Program proposes 47 lease sales in 25 out of 26 planning areas – amounting to more than 98 percent of the OCS. Nowhere does the Secretary identify any change in "national energy needs" occurring over the past year or freshly anticipated that would justify a 327-percent increase in authorized lease sales.
>
> If the Secretary now believes that dramatically expanded leasing is necessary and appropriate, this new conclusion must be supported by a reasoned justification. . . The Draft Program claims that expanded leasing would help the United States achieve "energy dominance," contribute to the gross domestic product, and provide revenues for the U.S. Treasury. . . But this is far from the reasoned explanation necessary to justify the Secretary's decision that the program adopted just one year ago no longer meets national energy needs. . .

Comments at 8 (Attachment K). (emphasis added).

As in *State Farm*, the Executive Order and Secretarial Order offer no sound reasons to alter the preceding Administration's policies of maintaining a moratorium, and its contemporaneous rejection of seismic testing in the South Atlantic. See also *Mass. v. E.P.A.*, 549 U.S. 497, 534-535 (2007) ["EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore

'arbitrary, capricious . . . or otherwise not in accordance with law.'"]. See also *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009) ["To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing positions. An agency may not, for example depart from its prior policy sub silentio or simply disregard rules that are still on the books."]; *Organized Village of Kake v. USDA*, 795 F.3d 956 (9th Cir. 2015). While energy independence is clearly a laudable goal, such policies must be implemented consistent with the OCSLA and the rule of law. A five year moratorium on Atlantic oil leasing and a commensurate rejection of seismic testing because of that moratorium should not be "turned on a dime" and policy of widespread oil and gas leasing begun a few months later. The OCSLA was put in place to avoid such a "topsy turvy" approach to oil and gas exploration and development on the OCS. In its FAQ response referenced above, BOEM stated: "[t]he development of a new National OCS Program is a multi-step that normally takes two to three years to complete. DOI's goal is to have the Final Program approved by the end of 2019." Attachment H. As a group of Atlantic states wrote the Secretary of Interior on March 9, 2018,

> The 2019-2024 DPP comes just one year after finalization of the 2017-2022 Program. Unlike the 2017-2022 Program, the 2019-2024 DPP proposes new leasing in the Atlantic and Pacific planning areas, including areas off the coasts of our respective states. The 2019-2024 DPP therefore necessarily implies that the program put in place just one year ago does not "best meet[] national energy needs." But the 2019-2024 DPP does not explain why that is the case – that is, why new leasing in the Atlantic and Pacific planning areas was not necessary last year, but is necessary now. Without such an explanation of this extreme change in course, inclusion of these planning areas in the 2019-2024 Program is arbitrary and capricious. . .

Attachment P. Such policy flip flops placed on a fast track for approval are thus arbitrary and capricious in violation of the Administrative Procedures Act.

Accordingly, South Carolina urges this Court to ensure that the moratorium imposed by the previous President continues. This ground alone shows that the State has a likelihood of success on the merits that would support a preliminary injunction against any testing, seismic or otherwise, for the purpose of oil exploration, or in preparation for any leasing until the present 2022 moratorium as to the South Atlantic Region expires.

B

The Federal Government Has Created a Public Nuisance Against South Carolina

In addition, the State contends that the Declarations clearly demonstrate that the federal government has created a public nuisance against South Carolina, which is an adjacent landowner. A "'public nuisance' is defined as a substantial and unreasonable interference with a right common to the general public usually affecting the public health, safety, comfort or convenience." *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 771 (7th Cir. 2011). This definition according to the Seventh Circuit extends "to the environmental and economic destruction . . . caused by the introduction of an invasive, non-native organism into a new ecosystem. . . ." "A court may grant equitable relief to abate a public nuisance that is occurring or to stop a threatened nuisance from arising." 667 F.3d at 781. Such would clearly include the introduction of seismic testing, and the harm which it imposes, into South Carolina's ecosystem.

Moreover, the federal government, including NMFS is subject to a claim by the State for public nuisance. *Michigan v. U.S. Army Corps, id.* As the Court there concluded, 5 U.S.C. § 702 of the APA "subjects the Corps to the plaintiffs' common-law claims for declaration and injunctive relief. 667 F.3d at 776. In that case, the Seventh Circuit concluded that common law nuisance had not been displaced by federal statutory law. Indeed, here, the OCSLA declares that to the extent not inconsistent with federal law, "the civil and criminal laws of each adjacent state,

now in effect or hereafter adopted, amended, or repealed are, declared to be the law of the United States for that portion of the subsoil and seabed of the outer continental shelf. . . ." 43 U.S.C. § 1333(a)(2)(A). Thus, a claim of public nuisance may be asserted here.

As the Supreme Court long ago stated *in State of Georgia v. Tennessee Copper*, 208 U.S. 230, this is not a case merely between private parties. Instead, now that the state has been permitted to intervene, "this is a suit for an injury to it [the State] in its capacity of quasi-sovereign." 206 U.S. at 237. As the *Tennessee Copper Court* further noted,

> [i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property, they should not be left to an action at law.

Id. at 619.

The impact of seismic testing on South Carolina as an adjoining state would be substantial.[3] *See* Part II, *infra* re irreparable harm. *BOEM* itself in denying seismic testing permits in the wake of the five year moratorium, found that the need for seismic testing "does not outweigh the potential risks of those surveys' acoustic pulse impacts on marine life." Attachment F. The numerous Declarations which are part of the Record in these cases amply demonstrate that BOEM's assessment on January 6, 2017 was correct. A "public nuisance will be enjoined where injury is inevitable and undoubted." Neal v. Darby, 282 S.C. 277, 286, 318

[3] Although not addressing the merits of the case or the motions for preliminary injunction that were filed subsequently, this Court's Order of January 18, 2019 (Dkt. # 75) stated that "[s]hould the BOEM issue these permits during the stay, as its own Contingency Plan indicates it may, the states moving to intervene would be directly impacted by the decision with seismic testing potentially starting off their shores."

S.E.2d 18, 23 (Ct. App. 1984). As the Fourth Circuit has recognized, common law public nuisance includes such broad-ranging offenses as "loud and disturbing noises. . . ." North Carolina v. Tenn. Valley Auth., 615 F.3d 291, 301 (4th Cir. 2010). It is no less a public nuisance because the noise directly harms marine life. As demonstrated, seismic testing harms all South Carolinians as well. A court need not wait until the nuisance is fully upon us to abate it.

In this case, the injury to South Carolina from seismic testing is "inevitable and undoubted" and demonstrates a likelihood of success on the merits of this issue. Accordingly, we ask this Court to abate the nuisance and enjoin seismic testing.

II

IRREPARABLE HARM IS LIKELY

"A plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief. . . ." *Winter, supra,* 555 U.S. at 20. The State is likely to suffer irreparable harm for the reasons set forth in the following documents: Coastal Memorandum (Docket No. 124-1, ECF pp. 40 – 46 (Memorandum pp. #'s 28 – 34)); exhibits to the Coastal Motion for Preliminary Injunction (Dkt. No's 124-2 through 124-52). Many of these exhibits demonstrate the harm to marine life that would result from seismic testing. This harm would have a serious adverse impact on recreational and commercial fishing and tourism in South Carolina as demonstrated by the Exhibits Dkt. No's 143-2 through 143-15 to the City of Beaufort Plaintiffs' Motion for Preliminary Injunction, and Attachment Q, Willis and Straka, "*The Economic Contribution of Natural Resources to South Carolina's Economy" Clemson Experiment Station*, December, 2016, cover, and pp. 11 (explaining IMPLAN data), 14, 15, 18-22. The Willis and Straka article shows that the impact of saltwater fishing in South Carolina is $195 million (p. 14) and the annual direct output contribution of the commercial

fishing sector is $25.37 million (p. 15). This economic impact would, of course, affect the entire State of South Carolina, as well as the coastal areas, in lost tax revenue due to drops in commercial fishing and tourism impacted by declining recreational fishing. Everyone would be hurt. Not just the marine life, but the people whose livelihoods depend on it through commercial fishing and tourism, and the people who enjoy recreational fishing. This harm would be irreparable and would support the granting of a preliminary injunction.

III

THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR INJUNCTIVE RELIEF

The public interest favors the granting of injunctive relief as does the balance of equities. These points are discussed in the arguments of the Coastal Plaintiffs' Memorandum (Dkt. No. 124-1, ECF stamped pp. 46 & 47 (Memorandum pp. #'s 34 & 35)) a City of Beaufort's Memorandum, Dkt. No. 143-1, ECF stamped pp.14 - 19 (Memorandum pp #'s 9 – 14).

CONCLUSION

For the foregoing reasons, the State ex rel Alan Wilson requests that this Court issue a preliminary injunction to prevent any seismic airgun testing in the Atlantic, including staying the effect of the IHAs until the Court decides the merits of the Plaintiffs' claims. This injunction is necessary to protect serious harm to the State of South Carolina and its people.

Respectfully submitted,

ALAN WILSON
Attorney General
Federal ID No.10457

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ROBERT D. COOK
Solicitor General
Federal ID No. 285
Email: rcook@scag.gov

/s/ J. Emory Smith, Jr.
J. EMORY SMITH, JR.
Deputy Solicitor General
Federal ID No. 3908
Email: esmith@scag.gov

T. PARKIN C. HUNTER
Senior Assistant Attorney General
Federal ID No. 2018
Email: phunter@scag.gov

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3680
Fax: (803) 734-3677

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Counsel for the State ex rel Wilson