

**CASE NO. 07-1247, CONSOLIDATED WITH CASE NO. 07-1344**

ORAL ARGUMENT SCHEDULED FOR OCTOBER 2, 2008

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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CENTER FOR BIOLOGICAL DIVERSITY,	)	
Petitioner,	)	
v.	)	Case No. 07-1247
UNITED STATES DEPARTMENT OF INTERIOR,	)	
Respondent,	)	consolidated with
AMERICAN PETROLEUM INSTITUTE	)	
Intervenor.	)	

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NATIVE VILLAGE OF POINT HOPE, ET AL.,	)	
Petitioners,	)	Case No. 07-1433
v.	)	
UNITED STATES DEPARTMENT OF INTERIOR,	)	
Respondent.	)	

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**PETITION FOR REVIEW OF FINAL DECISION BY THE  
U.S. DEPARTMENT OF INTERIOR**

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**REPLY BRIEF FOR PETITIONER  
THE CENTER FOR BIOLOGICAL DIVERSITY**

MATTHEW VESPA  
ANDREA A. TREECE  
MIYOKO SAKASHITA  
Center for Biological Diversity  
351 California St., Suite 600  
San Francisco, CA 94104  
(415) 436-9682

BRENDAN CUMMINGS  
Center for Biological Diversity  
P.O. Box 549  
Joshua Tree, CA 92252-0549  
(760) 366-2232

Attorneys for Center for Biological Diversity

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## **GLOSSARY**

API	American Petroleum Institute
AR:	Administrative Record
CBD:	Center for Biological Diversity
CEQ:	Council on Environmental Quality
CO <sub>2</sub> :	Carbon Dioxide
EA:	Environmental Assessment
ESA:	Endangered Species Act
EIS:	Environmental Impact Statement
FMCSA	Federal Motor Carrier Safety Administration
FWS:	Fish and Wildlife Service
MMS:	Minerals Management Service
NEPA:	National Environmental Policy Act
OCS:	Outer Continental Shelf
OCSLA:	Outer Continental Shelf Lands Act

## SUMMARY OF ARGUMENT

The Department of Interior (“Interior”) violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1331 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, in approving the Outer Continental Shelf Oil and Gas Leasing Program for 2007-2012 (“Program”). Specifically, Interior violated NEPA and OCSLA by failing to analyze the impacts on the Program in the context of a rapidly warming Arctic, and by failing to quantify and analyze the impacts of greenhouse gas emissions ultimately resulting from the Program. Interior also violated the ESA by failing to analyze the impacts of the Program on threatened and endangered species in the Program area. In their response briefs Interior and American Petroleum Institute (“API”) raise a litany of jurisdiction and prudential arguments why CBD’s claims must fail. None of these arguments are availing. CBD’s petition for review must be granted.<sup>1</sup>

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<sup>1</sup> CBD joins and adopts by reference the arguments set forth in the Reply Brief for Petitioners Native Village of Point Hope et al., including arguments regarding ripeness and remedies.

## ARGUMENT

### I. INTERIOR VIOLATED NEPA IN APPROVING THE EIS

#### A. The EIS Fails to Assess Impacts Over the Life of the Program in the Context of Continued Global Warming

Interior's claim that the EIS complies with NEPA because it "identified and discussed the impacts that global warming may have on the Arctic" fails to respond to the argument CBD advanced. (Interior Response Brief ("Int. Br.") at 37.) CBD does not assert that the EIS failed to discuss, as a general matter, global warming and its present and potential future impacts on the Arctic and other Outer Continental Shelf ("OCS") regions. Rather, Interior violated NEPA because it refused to integrate the future impacts of global warming into its analysis of Program impacts in order to properly analyze the Program's cumulative effects. To comply with NEPA, Interior was required to assess the Program's impacts *in conjunction with* the increasing stresses to the environment as a result of global warming through the 40-year life of the Program. *See* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 27, 29 (Jan. 1997) (cumulative impacts assessment should characterize the "stress factors pertaining to each resource, ecosystem, and human community" in order to "determine whether the resources, ecosystems, and human communities of concern are approaching conditions where additional stresses will have an important

cumulative effect.”)<sup>2</sup> Absent this analysis, the EIS understates the impacts of the Program on environments like the Arctic that are disproportionately impacted by global warming and does not “enable the decisionmaker to take a ‘hard look’ at environmental factors, and to make a reasoned decision.” *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (citation omitted).

In an apparent last-ditch attempt to demonstrate that it has in fact considered Program impacts in conjunction with the current and projected effects of global warming, Interior repeatedly cites to an environmental assessment prepared for a *prior* leasing program that is not even part of the administrative record before this court. (Int. Br. at 39 n.11, 40, 41, 42 n.12 (citing to 2004 Environmental Assessment (EA) for Beaufort Lease Sale 195, Appendix I, *available at* [http://www.mms.gov/alaska/EIS%20EA/BeaufortFEIS\\_195/Sale195/EA\\_Sale195.pdf](http://www.mms.gov/alaska/EIS%20EA/BeaufortFEIS_195/Sale195/EA_Sale195.pdf) (“195 EA”)).) The 195 EA specifically “expand[ed] the timeframe of [its] climate change analyses to the life of the project (about 30 years)” and concluded that the project would have additional impacts in the lease sale area in the event of continued warming. 195 EA, Appendix I at 6, 7 (“Partly because of project climate changes, we still conclude that potential effects on polar bears would be a primary concern. We identify ringed seals and other ice-dependent pinnipeds as additional resources of primary concern.”). However, the

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<sup>2</sup> Addendum to CBD Br., Ex. 6; *also available at* <http://ceq.hss.doe.gov/nepa/ccenepa/ccenepa.htm>.

195 EA does not constitute a sufficient level of NEPA analysis for the Program because it applies to only a single lease area in the entire OCS. An assessment at the programmatic level is critical to both understanding the potential impacts of the Program and informed decisionmaking with regard to which lease areas should be slated for oil and gas exploration activities. Interior's suggestion that this analysis could be deferred to "subsequent NEPA reviews of lease sales" (Int. Br. 44) misses the mark because by that point, the location and timing of future leasing will already have been determined and OCS regions like the Arctic that are particularly sensitive to present and future global warming impacts will already have been targeted for oil and gas exploration.

With the exception of the 195 EA, which cannot legitimately be construed as sufficient analysis for the entire OCS, Interior brushes aside the cumulative effect of future global warming on the severity of Program impacts. Interior's bald assertion that the EIS "included climate change as 'an impact factor'" (Int. Br. at 42) is contradicted by the EIS itself, which: 1) does not expand the timeframe of its climate change analysis; and 2) repeatedly asserts that climate change impacts are too "speculative" for analysis. (*See, e.g.*, AR 13578 ("the rates and directions of many of these changes are too speculative to include in the cumulative analyses"); AR 13647 ("[i]t is not possible at this time to determine the likelihood, direction, or magnitude of any changes in the environment of Alaskan waters due to changes

in the climate”); AR 13649 (same).) Indeed, Interior admits that it only analyzed, “where it could, the cumulative impact that new offshore leasing would have in light of *existing* climate change stresses” rather than future stresses. (Int. Br. at 43 (emphasis added).) Interior’s arbitrary assertion that future cumulative impacts *could not* be analyzed is contradicted by both the analysis in 195 EA, *which did analyze* future cumulative impacts over the life of the project and in doing so, discovered additional potential impacts, and the EIS’ own summary of global warming, which describes the adverse and increasingly severe consequences of global warming. (AR 13189-98.) As 195 EA was prepared prior to this Program, Interior cannot credibly argue that scientific uncertainty prevented an analysis of Program impacts on OCS areas increasingly impacted by global warming. By failing to assess the future cumulative impacts of the Program in the context of the rapidly declining state of the Arctic, Interior fell short of its responsibility to “predict the environmental effects of a proposed action before the action is taken and those effects fully known.” *Am. Bird Conservancy v. Fed. Comm’n’s Comm’n*, 516 F.3d 1027, 1033 (D.C. Cir. 2008) (citation omitted).

**B. Interior Failed to Analyze the Effects of the Emissions Resulting From Combustion of Oil and Gas Extracted Under the Program**

Interior and API’s contention that the EIS can disregard the billions of tons of greenhouse gas emissions resulting from the combustion of fuel made available by the Program flies in the case of NEPA’s clear requirement that an EIS assess

impacts that “are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. §§ 1502.16(b); 1508.8(b). Contrary to Interior and API’s unsupported assertions, emissions resulting from the combustion of oil and gas extracted from the OCS are readily calculable and therefore fall well within NEPA’s “rule of reason.” In addition, because Interior’s discretion in setting the size and location of future lease sales gives it control over the extent of future oil and gas extraction, *Dept. of Transp. v. Public Citizen*, 541 U.S. 752 (2004), does not limit Interior’s review obligations under NEPA. Finally, whether or not society will continue to consume oil and gas absent the Program does not excuse Interior from its duty to assess impacts from the irreversible commitment of resources resulting from extraction of fossil fuels from the OCS and the release of greenhouse gases into the atmosphere that will result from their combustion.

Interior’s assertion that an analysis of the greenhouse gas pollution resulting from the combustion of the oil and gas extracted from the OCS “would defy the rule of reason” is without merit. (Int. Br. at 60.) As an agency charged with balancing the “values of renewable and nonrenewable resources contained” in the OCS, an understanding of the external costs associated with nonrenewable resources falls squarely within Interior’s purview. *See* 43 U.S.C. § 1344(a)(1); *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981) (“*Watt I*”) (OCSLA legislative history calling for Interior to “weigh energy potential, and other benefits

against environmental and other risks” in determining the extent of oil and gas extraction.). Moreover, as demonstrated in CBD’s Opening Brief, CBD was able to calculate the greenhouse gas pollution resulting from the combustion of oil and gas extracted under the Program using calculation tools available on the internet.<sup>3</sup> (See CBD Opening Brief (“CBD Br.”) at 20 n.1.) Thus, Interior’s unsupported assertion that such a calculation is outside “[t]he limits of Interiors’ competence” requiring Interior to “expend considerable resources developing ... expertise” is not credible. (Int. Br. at 59.) Finally, the connection between the extraction of fossil fuels and the ultimate release of the carbon stored in these fuels is unwaveringly direct. There is no logical purpose for extracting oil and gas from the OCS other than for use as fuel. The line of causation could hardly be clearer: areas are opened for oil and gas exploitation; oil and gas are extracted from those areas; oil and gas are burned as fuel; and greenhouse gas emissions are produced.

The instant facts stand in stark contrast to those in *Metropolitan Edison*, wherein the Court held that the Nuclear Regulatory Commission need not evaluate the subjective and unquantifiable impacts of “psychological health damage,” for which the Commission had no expertise, in assessing impacts from renewed operation of a nuclear reactor. *Metropolitan Edison v. People Against Nuclear*

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<sup>3</sup> API’s expert declarant only asserts that oil and gas would be combusted with or without the Program, not that CBD’s calculations regarding the greenhouse gas pollution resulting from the combustion of the oil and gas extracted under the Program are inaccurate. (Decl. Russell Jones ¶¶ 5, 11.)

*Energy*, 460 U.S. 766, 775-76 (1983). Unlike *Metropolitan Edison*, where the scope of the inquiry did not “remain manageable,” quantification of the greenhouse gas pollution that is the inevitable consequence of its extraction from underneath the OCS is a straightforward inquiry and well within Interior’s capacity. *Id.* at 776 (citation omitted). Interior’s and API’s glib hypotheticals involving livestock grazing and a light bulb factory are also of no moment. (API Br. at 31; Int. Br. at 61.) Not only is determining emissions from oil and gas combustion a straightforward task well within the “rule of reason,” but unlike the hypotheticals posed by Interior and API, the statutory scheme at issue here specifically requires Interior to weigh the environmental costs associated with nonrenewable resource extraction.

Interior and API’s reliance on *Public Citizen* to assert that the EIS need not analyze the greenhouse gas pollution resulting from the inevitable combustion of oil and gas extracted from the OCS is misplaced. In *Public Citizen*, the Court held that “where an agency has *no* ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.” *Public Citizen*, 541 U.S. at 770 (emphasis added). Thus, in *Public Citizen*, an agency was not required to analyze the environmental effects that proposed safety rules might have on an increased presence of Mexican trucks in the United States because the agency had *no* ability

to prevent or control cross-border operations of Mexican motor carriers. *Id.* at 767. *Public Citizen* therefore “stands for nothing more than the intuitive proposition that an agency cannot be held accountable for the effects of actions it has no discretion not to take.” *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008).

In contrast, Interior has the ability to affect the Program’s impacts on greenhouse emissions because Interior is authorized under OCSLA to determine “the size, timing, and location of leasing activity” and therefore determine the extent to which fossil fuels are extracted from the OCS. 43 U.S.C. § 1344(a). Indeed, nothing in OCSLA mandates that Interior designate a specific number of square miles for leasing or ensure that a specific quantity of oil and gas is made available for future extraction. Rather, OCSLA specifically directs Interior to manage the OCS “in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf.” *Id.* § 1344(a)(1). Thus, Interior’s statutory authority to control the extent of fossil fuel extraction in the OCS readily distinguishes this case from *Public Citizen*. See, e.g., *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 n.20 (9th Cir. 2007) (rejecting assertion that *Public Citizen* allowed Bureau of Land Management to disregard impacts of private logging activities where Bureau had authority to regulate these activities); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 76-80 (D.D.C. 2006) (rejecting argument that

National Park Service was not required under *Public Citizen* to consider impacts caused by activities outside parks where Park Service had authority to affect activities by regulating access to parks).

Finally, Interior's and API's belief that the EIS need not quantify the emissions generated from the combustion of the fossil fuels extracted under the Program because oil and gas would be consumed in relatively similar amounts whether or not the Program moved forward relies on the mistaken presumption that oil and gas are infinite resources. The more fossil fuels extracted from the earth and burned for fuel, the greater the increase in the atmospheric concentration of greenhouse gases and correspondingly, the greater the severity of global warming impacts. (*See, e.g.*, AR 6071, 7032-33); *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1446, 1457-58 (2007). Absent the Program, the 5.6 billions of tons of carbon dioxide stored in fossil fuels in the OCS would not be extracted and therefore would not be consumed and released into the atmosphere. Simply asserting that fossil fuels would merely be supplied from elsewhere and turning a blind eye to the extraction contemplated under the Program flies in the face of NEPA's requirement that an EIS analyze "any irreversible or irretrievable commitments of resources." 40 C.F.R. § 1502.16. Because the Program would result in the irreversible conversion of carbon safely stored in fossil fuels underlying the OCS to atmospheric carbon dioxide that will elevate atmospheric

concentrations of carbon dioxide and magnify the impacts of global warming, Interior abused its discretion by failing to analyze this impact.

## **II. INTERIOR VIOLATED OCSLA IN APPROVING THE LEASING PROGRAM**

### **A. Interior Failed to Account for the Environmental Costs Resulting From Combustion of the Fossil Fuels Extracted from the OCS**

In defending its refusal to incorporate the environmental costs resulting from combustion of nonrenewable resources, Interior asserts that “OCSLA focuses its concern for the environment on the places where exploration and development takes place.” (Int. Br. at 50.) Interior’s narrow interpretation is contrary to the clear text of Section 18(a)(1) of OCSLA, which broadly requires that “[m]anagement of the outer Continental Shelf [] be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf...” 43 U.S.C. § 1344(a)(1). Importantly, OCSLA is a dynamic statute that calls for the incorporation of new understandings of economic and environmental values with each new leasing program. As this Court noted in *Watt I*, “the proper balance for 1980-85 may differ from the proper balance for some subsequent five-year period.” *Watt I*, 668 F.2d at 1317. By refusing to acknowledge and consider the potential contribution of nonrenewable OCS resources to global warming, Interior

“failed to make a good-faith effort to balance environmental and economic interests” of the Program. *Hodel*, 865 F.2d at 308.

The economic and environmental values of fossil fuels like oil and gas – the nonrenewable resources of the OCS – have irrevocably changed since the time of the last leasing program. It is now recognized that the carbon dioxide released from fossil fuel combustion is the primary cause of global warming and that global warming is and will have increasingly severe impacts on the environment and public health. *See, e.g., Massachusetts*, 127 S. Ct. at 1446, 1455; *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d. 295, 313-14 (D. Vt. 2007). Moreover, as set forth in CBD’s Opening Brief, the cost of these carbon emissions can be readily quantified. (CBD Br. at 42-43; AR 7324, 7690, 7736-37.) Thus, Interior’s effort to create an illusory distinction between “exploration” and “consumption” misses the mark because the pertinent question is that of the overall *value* of OCS resources. Because oil and gas – nonrenewable OCS resources – now have a different value than they did at a time when their contribution to global warming was not as clearly understood, this new value must be accounted for under OCSLA.

In addition, Interior’s and API’s claim that OCSLA’s focus on exploration and development preclude consideration of the environmental costs of fossil fuels in determining the “timing and location of leasing” under Section 18(a)(3) is

unavailing. As an initial matter, this argument should be rejected as a *post hoc* rationalization. CBD raised the same issues regarding monetizing the cost of greenhouse gas emissions in its comments on the Draft Program. (AR 7736-37.) At that time, Interior responded only that the estimates of the economic cost of carbon that CBD presented were “too tentative to use in an analysis.” (AR 13891.) Interior may not now advance a wholly new theory in defense of its decision when that theory was not the basis of Interior’s decision at the time it was made. *Federal Power Comm’n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (“we cannot accept appellate counsel’s *post hoc* rationalizations for agency action; for an agency’s order must be upheld, if at all, on the same basis articulated in the order by the agency itself.”) (internal quotation marks and citation omitted).

In any event, Interior’s assertion that a consideration of “CO<sub>2</sub> emissions could not affect decisions about *where* to extract oil and gas” is false. (Int. Br. at 52 (emphasis in original).) Factoring in the environmental costs of combustion of extracted resources is a critical component of a valid assessment of which areas to open to future oil and gas exploration. As this Court held in *Watt I*, “[t]he Secretary must evaluate oil and gas potential, which can be quantified in monetary terms, in conjunction with environmental and social costs, which do not always lend themselves to direct measurements.” *Watt I*, 668 F.2d at 1317. Here, the evaluation of environmental costs is much more straightforward than in *Watt I*.

Interior and API do not now dispute that the combustion of fossil fuels has a quantifiable environmental cost that can be monetized and incorporated into the Program's net benefit assessment. Indeed, Interior's net benefit analysis easily lends itself to incorporating this data. (*See* AR 24953, 24957.) While all program areas would factor in environmental costs associated with the combustion of extracted fossil fuels proportionate to the quantity of oil and gas proposed for extraction, adding in these additional costs can tip the scales for OCS areas where net benefits are already marginal. *See Hodel*, 865 F.2d at 306 (“an area should be included on the schedule if the expected net social value is positive, *i.e.*, if anticipated benefits of oil and gas activities in that area exceed the expected costs.”). Accordingly, including the environmental costs of nonrenewable resource combustion in its analysis of the “location” of leasing under Section 18(a)(3) can function to limit the location, and consequently the extent of oil and gas extraction, in the OCS.<sup>4</sup>

Finally, there is no legitimate basis to strictly limit an evaluation of the environmental costs of oil and gas exploration in the OCS to only direct impacts to lease areas. As the Program recognizes, “[e]nvironmental costs are the costs to

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<sup>4</sup> Whether or not Interior has “control over the *quantity* of oil ultimately extracted by offshore lessees” (Int. Br. at 50) is also irrelevant to the scope of Interior's analysis of environmental costs associated with nonrenewable resource extraction in the OCS. While a lessee may be required to produce oil and gas at the maximum rate, the authority to open OCS areas for development in the first instance falls squarely within Interior's control.

society not directly considered in the calculation of [Net Economic Value]. . . . Such costs . . . are [] imposed, at least in part, on people other than those who produce or purchase the goods and services from which the costs arise.” (AR 24955.) The significant external costs associated with the release of greenhouse gases from the combustion of fossil fuels extracted under the Program fall squarely within this definition.

**B. Interior Failed to Adequately Consider Global Warming Impacts to Sensitive OCS Areas**

While Interior summarily asserts that it considered the increasing impact of global warming on OCS areas (Int. Br. at 53), the Program and the EIS suggest otherwise. First, the Program itself is entirely devoid of any reference to global warming and its present and future impacts on OCS areas. (AR 24865-24979.) In the few instances where the Program does articulate the bases for its deliberations under Section 18(a)(2), a consideration of the present and future impacts of global warming is conspicuously absent. (*See, e.g.*, AR 24959 (listing only “physical characteristic of coastal area” as factor in evaluating environmental sensitivity of different OCS areas under Section 18(a)(2)(G)).) While the Program may incorporate the EIS by reference, the failure of the 110-page Program to even mention global warming indicates that global warming and its disproportionate impact on the Arctic was not part of Interior’s OCSLA analysis.

Second, even if the Program could remedy its silence on global warming impacts through reference to the EIS, as set forth above, the EIS fails to examine how impacts over the 40-year life of the Program may be exacerbated in the context of an environment increasingly impacted by global warming. Thus, exclusive reliance on the EIS to remedy Program deficiencies is unavailing.

### **III. INTERIOR VIOLATED THE ESA BY FAILING TO CONSULT ON PROGRAM IMPACTS TO LISTED SPECIES**

As explained in CBD’s Opening Brief, the ESA requires that every agency “insure that *any* action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2) (emphasis added). Agency “action” is defined in the ESA’s implementing regulations to explicitly include “*all* activities or *programs* of *any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.” 50 C.F.R. § 402.02. (emphasis added). As the Supreme Court observed in *TVA v. Hill*, “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act...This language admits of no exception.” 437 U.S. 153, 173 (1978). In crafting the all-inclusive language of the ESA, Congress “carefully omitted all of the reservations” that would have narrowed the circumstances under which an agency must “insure” that its actions do not jeopardize a species. *Id.* at 182.

Nevertheless, Interior ignores the plain language of the statute, its own regulations, and the unambiguous direction of the Supreme Court by asserting that such consultation is either premature, unnecessary, or somehow “wasteful.” (Int. Br. at 63-70.) Interior’s excuses all fail.

**A. The Program is an Agency Action**

In an attempt to conflate the ripeness doctrine into an exception to a law that “admits of no exception,” Interior asserts that CBD’s ESA claim is unripe. (Int. Br. at 63-65.) The critical threshold question before this Court is whether Interior authorized, funded, or carried out “any action.”<sup>5</sup> As Interior’s approval of the Program is such an action, consultation is required under the ESA.

Interior’s assertion that the Program is not an action because it “neither authorizes activities nor commits any resources” is wrong. (Int. Br. at 63.) Approval of the Program, which determines the size, timing and location of future lease sales, is the necessary trigger for any lease sale in the OCS and ultimately for the oil and gas development that will likely occur in these lease areas. 43 U.S.C. § 1344(a); *Watt I*, 668 F.2d at 1299 (noting that “[n]o lease may be issued for any area unless the area is included in the approved leasing program and unless the lease contains provisions consistent with the approved program.”). Thus, no rights

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<sup>5</sup> In any event, for the same reasons that CBD’s NEPA claims are ripe, its ESA claims are also ripe. (*See* Point Hope Reply discussion of ripeness, incorporated herein by reference).

to lease, explore, drill, or otherwise exploit OCS resources may be conferred without the Program's authorization.

Indeed, Interior's position that the Program is not an action for ESA purposes is undermined by its own determination that the Program constitutes a major federal action requiring NEPA analysis. Both the ESA consultation and NEPA review hinge on the existence of an "agency action." Of the two, the ESA defines agency action more broadly. *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) (NEPA and ESA definitions similar and "[i]f there is any difference, case law indicates 'major federal action' is the more exclusive standard"); *Fla. Key Deer*, 522 F.3d at 1143 ("when agency action requires section 7(a)(2) consultation is materially indistinguishable from [NEPA] framework."). Interior offers no explanation as to why the Program meets "the more exclusive standard" of NEPA but somehow fails to fall into the wider net of agency action under the ESA.

Interior's attempts to distinguish ESA case law regarding the definition of "agency action" also fail. If anything, the Program has a more concrete effect than the forest management guidelines that triggered the ESA's consultation requirement in *Lane County Audubon v. Jamison*. 958 F.2d 290, 294 (9th Cir. 1992). In that case, the court found that a plan setting forth criteria for harvesting spotted owl habitat met the ESA definition of agency action, even though the

management plan did not designate particular timber sale boundaries or confer specific logging rights. *Id.* at 293. Rather, the timber plan merely set forth criteria for deciding where and how logging might be authorized in the future. *Id.* at 294. Here, the Program goes a step further by applying OCSLA criteria and authorizing Interior to open specific areas to oil and gas exploitation.<sup>6</sup>

Finally, contrary to Interior’s assertion, ESA regulations support a determination that Program approval is an agency action under the ESA. Examples of agency action under ESA regulations include “programs” and actions “directly or *indirectly* causing modifications to the land, water, or air.” 50 C.F.R. § 402.02 (emphasis added). “Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.* Because it is reasonably certain that Program approval will trigger oil and gas exploration in OCS areas that will cause modifications to land, water, or air, Interior’s approval of the Program is an agency “action” under the ESA for which consultation is required.

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<sup>6</sup> Interior’s reliance on *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999) to support its claim that the Program is not an action under the ESA fails for at least two reasons. (Int. Br. at 64.) First, *Wyoming Outdoor Council* involved a challenge under NEPA, not the ESA. Second, as discussed more fully in the Native Village of Point Hope’s response to Interior’s ripeness arguments, unlike the statute at issue in *Wyoming Outdoor Council*, OCSLA contemplates a definitive multi-stage process where a final approval at a prior stage is necessary to trigger the subsequent stage of oil and gas exploration. Each stage therefore is an “agency action” for ESA purposes.

**B. The Program Clearly May – and Does – Affect Listed Species, Thereby Triggering Consultation**

Interior’s assertion that it may ignore the ESA’s mandatory duty to consult because “ESA consultation obligations at the Five-Year Program stage are limited to the effects of that stage alone” and “[t]he Program itself has no impact whatsoever” reflects a fundamental misreading of applicable case law and consultation regulations. (Int. Br. at 66.) This Court has made plain that “the segmented approach of OCSLA does not attenuate ESA’s notion of ‘agency action.’” *North Slope Borough v. Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980). The Court therefore found that in the context of lease sales, the agency action for purposes of ESA consultation was the lease sale *and* all subsequent stages of oil and gas activities. *Id.* While courts have held that OCSLA’s “checks and balances” may be factored in when determining whether Interior has complied with its duty to insure against jeopardy, no court has found that the OCSLA process altogether eliminates Interior’s obligation to consult under the ESA, or that it limits consultation to the effects of only the one discrete stage of the overall OCSLA process. *Id.*; *Village of False Pass v. Clark*, 733 F.2d 605, 611 (9th Cir. 1984).

Rather, this Court has explicitly stated:

([C]autious) can only be exercised if the agency takes a look at all the possible ramifications of the agency action. . . . The earlier in the progress of a project a conflict (between a species and the project) is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action.

*North Slope Borough*, 642 F.2d at 608 (citations omitted). See also 50 C.F.R. § 402.14(k) (regulations implementing *North Slope Borough* holding regarding step-by-step consultation and requiring, *inter alia*, determinations that the incremental step would not violate section 7(a)(2) and that “there is a reasonable likelihood that the entire action will not violate section 7(a)(2).”).

The cases Interior cites in support of its assertion that “[a]ctions that will have no [] effect [on listed species] do not trigger consultation obligations” (Int. Br. at 66) further underscore the flaws in Interior’s argument. In each of these cases, the agency had already made a finding, based on a detailed biological assessment, that the action at issue would not affect any listed species, thereby “obviat[ing] the need for consultation.” *Newton County Wildlife Ass’n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998); *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1447 (9th Cir. 1996) (same). Here, Interior can rely on no such finding because none was ever made. Interior did not conduct a biological assessment of Program effects pursuant to the ESA, 16 U.S.C. § 1536(c)(1), nor did it engage in consultation and receive a biological opinion regarding the Program’s likely effects on listed species. To the extent that Interior looked at impacts on listed species, it did so only in the Program EIS, which, while no substitute for consultation, described many significant threats to listed species that would result from the Program. (CBD Br. at 52-53.)

Interior's assertion that stage-by-stage consultation frees it from its duty to consult at all regarding Program impacts fails for the same reason. Whereas prior cases have upheld staged consultation on the basis that future safeguards were sufficient to protect species, here there is no consultation to uphold.

**C. A Purported “Waste of Resources” Is Not a Valid Basis to Ignore the ESA’s Consultation Requirement**

Interior's argument that ESA consultation at the Program stage would be a waste of agency resources is legally irrelevant and factually incorrect. The ESA is clear that Interior may not defer its ESA responsibilities on the ground that complying with the law is too expensive or too time-consuming. “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *TVA*, 437 U.S. at 184. Moreover, as set forth above, consultation at the Leasing Program stage is not a waste of agency resources because it is the *one* opportunity Interior has to take a comprehensive view of possible offshore oil and gas areas and their impacts on listed species. Indeed, the migratory nature of many of the species that will be affected by the Program makes such consultation especially imperative. For example, species such as bowhead whales and spectacled eiders migrate throughout lease sale areas in the Alaskan OCS. (*See, e.g.*, AR 13026-28, 13046-47, 13053.) These species are thus likely to be affected by activities in each of the lease sale areas, making a project-by-project snapshot of adverse impacts insufficient to assess the true risk to

these species and their habitats. Consultation at the Program stage is far from a “waste of resources”; it is an essential step in protecting imperiled species.

#### **IV. CBD HAS STANDING TO BRING ALL OF ITS CLAIMS IN THIS CASE**

In its opening brief and declarations cited therein, CBD demonstrated that it has standing to challenge Interior’s violations of OCSLA, NEPA, and the ESA in approving the Program. (CBD Br. at 4-6.) In response, API asserts that CBD lacks standing with regard to its “climate change claims.”<sup>7</sup> (API Br. at 4.) API’s arguments must fail, as API misunderstands both the relevant law and the nature of CBD’s claims.

As an initial matter, while API broadly labels its argument as one challenging CBD’s standing with regard to “climate change claims,” in actuality, API only challenges CBD’s standing with regard to claims that relate “to the climate change (global warming) purportedly *caused* by the program.” (API Br. at 1-2 (emphasis added).) However, CBD’s climate-related OCSLA and NEPA claims are broader than this, and fall into two general categories: 1) Interior failed to account for the current and foreseeable effects of global warming on OCS regions, particularly the disproportionate impacts in the Arctic, when determining what areas to include in the Program (*see* sections I.A and II.B *supra*); and, 2)

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<sup>7</sup> There is no dispute regarding CBD’s standing with regard to its ESA claims or the OCSLA and NEPA claims raised in the opening brief of Petitioners Native Village of Point Hope, et al. which CBD has joined. (CBD Br. at 8, 55.)

Interior failed to quantify and analyze the effects of greenhouse emissions associated with the extraction and combustion of the oil and gas produced as a result of the Program (*see* sections I.B and II.A *supra*). In other words, one set of claims addresses the effects of the Program on OCS resources *in the context* of global warming, while the other set addresses the effects of the Program *on* global warming. API's arguments only target this second category of claims; standing for the first set of claims is uncontested.

**A. API Misunderstands CBD's Claims**

API frames its standing challenge to CBD's climate-related claims in the context of the Supreme Court's discussion of standing in *Massachusetts*. (API Br. at 8.) While *Massachusetts* is of course highly relevant to any standing analysis related to global warming, and, as discussed below, CBD meets the standards for standing as articulated in that case, CBD's claims here are very different from those of *Massachusetts*. Unlike the petitioners in *Massachusetts*, CBD is not seeking to force regulation of greenhouse emissions, and its injuries are not solely those caused by global warming itself. Instead, CBD's claims are largely procedural in nature.

CBD and its members have strong interest in, for example, the Beaufort and Chukchi Seas off Alaska, and species such as the polar bear that inhabit these areas. (CBD Br. at 4-5; Mulvaney Decl. ¶¶ 3-18; Duchin Decl. ¶¶ 2-22.) These

interests are harmed by the impacts of oil development in the region (e.g. oil spills, habitat loss, aesthetic injuries) that will only occur if these areas are included in the Program. *Id.* See also *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 432, 434 (D.C. Cir. 1998) (injury to a plaintiff's aesthetic interest in the observation of animals or quality of the environment is sufficient to establish standing). CBD's point is that if Interior had considered the environmental impacts and economic costs of the greenhouse emissions associated with leasing under the Program when carrying out its review under NEPA and its balancing under OCSLA, Interior's ultimate decisions regarding "the size, timing, and location of leasing activity" might have been different, and these areas might have been excluded from the Program. 43 U.S.C. § 1344(a). See, e.g., *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed."); *Federal Election Comm. v. Akins*, 524 U.S. 11, 25 (1998) ("[T]hose adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case -- even though the agency (like a

new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason.”) (internal citations omitted).<sup>8</sup>

Consistent with this well-established precedent regarding procedural injuries, CBD need not demonstrate anything more to establish standing. Nevertheless, as demonstrated below, even under API’s framing of the standing analysis, and looking only at the global warming related injuries suffered by its members, CBD meet all the criteria for standing.

## **B. CBD Meets the Requirements for Standing**

### **1. Injury in Fact**

API asserts that because global warming is felt by humanity at large, CBD’s members do not suffer a “particularized” injury. (API Br. at 7.) This argument was explicitly rejected by *Massachusetts*: “That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.” 127 S. Ct. at 1456. Moreover, other cases not involving states and any “special solicitude,” have similarly found injury sufficiently particularized to afford standing even if such injury was widespread. *See, e.g. Akins*, 524 U.S. at 22 (“[“W]here a harm is concrete, though widely shared, the Court has found ‘injury in fact.’”); *United States v. Students Challenging Regulatory Agency Procedures*,

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<sup>8</sup> The failure to include such information and analysis as required under NEPA and OCSLA also results in an informational injury to CBD. *See Akins*, 524 U.S. at 21 (“[A] plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.”).

412 U.S. 669 (1973) (“[S]tanding is not to be denied simply because many people suffer the same injury.”).

In addition to the direct injuries from oil development as discussed above, CBD’s member have suffered injuries related to global warming. (*See, e.g.*, Mulvaney Decl. ¶¶ 7, 10, 22-23; Duchin Decl. ¶¶ 13, 21-22, 26, 28-29 (describing injuries related to global warming impacts on polar bears).) These injuries are sufficiently “particularized” to confer standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230, n.4 (1986) (plaintiff had “undoubtedly” alleged a sufficient injury in fact “in that the whale watching and studying of their members will be adversely affected by continued whale harvesting ...”); *Animal Legal Defense Fund*, 154 F.3d at 432, 434.

## **2. Causation**

API also argues that CBD cannot establish the causation prong of standing. (API Br. at 15-16.) API asserts that because the oil and gas produced under the Program “would simply be replaced by other hydrocarbon sources,” the Program does not “cause” CBD’s injuries. As discussed above, CBD’s members have interest in the places and resources (e.g. the Beaufort Sea, polar bears) directly affected by the oil industry activities that will occur as a result of the Program (e.g. seismic surveys, oil spills, loss of habitat). Global warming is also impacting these

resources and consequently causing injury to CBD's members. The inclusion of these areas in the Program causes both types of harm. Obviously, because an area of the OCS can only be leased if it is in the Program, the inclusion of the area in the Program is a cause of the harm to that area and to the interests of CBD's members. If a lease sale is not in the Program, the area subject to the sale will not be subject to oil exploration and development.

Moreover, CBD's global warming related injuries are caused, at least in part, by the actions of Interior. Regardless of whether or not the oil and gas produced under the Program would be replaced by other sources, the fact remains that absent inclusion in the Program such fossil fuels and the carbon they contain would remain in the ground (see discussion *supra* page 10-11). The over 5 billion tons of carbon dioxide likely to be emitted as a result of the Program is significant. *Cf. Massachusetts*, 127 S.Ct. at 1457 (characterizing 1.7 billion metric tons released annually by U.S. vehicles as "an enormous quantity."); *see also id.* at 1457-58 ("Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.").

Just as "EPA's refusal to regulate such emissions 'contributes' to Massachusetts's injuries," and therefore is a "cause" of such injury for standing

purposes, the emissions associated with the Program are sufficiently linked to CBD's injuries to support standing. *Massachusetts*, 127 S.Ct. at 1457.

### 3. Redressability

Finally, API argues that CBD cannot establish that a ruling in its favor will redress its injuries because the emissions resulting from the Program will simply be replaced by emissions from substitute sources. (API Br. at 16-18.) As discussed above, for CBD's procedural injuries, the relief sought by CBD will redress its injuries because an order setting aside the Program and requiring Interior to properly consider the impacts of the Program may change the outcome of the decision toward reducing Petitioner's injuries.<sup>9</sup> *Massachusetts*, 127 S. Ct. at 1453. Moreover, the Court in *Massachusetts* affirmed that taking *some* effort to address greenhouse emissions was sufficient to satisfy the redressability prong of standing. *Id.* at 1458 ("While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it....A reduction in domestic emissions would slow the pace of global emission increases, no matter what happens elsewhere."). This case is no different.

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<sup>9</sup> In fact, API concedes as much. In its section on remedy, API states that "The purported deficiencies identified by petitioners, assuming they were found to exist and be legally cognizable, would be addressable by DOI on remand." (API Br. at 34 n. 22.)

### C. No “Special Solitude” is Necessary to Find Standing

As demonstrated above, CBD clearly has standing to advance its claims under the analysis provided in *Massachusetts* and other relevant cases. Nevertheless, API argues that because CBD lacks the “special solicitude” afforded states in *Massachusetts*, CBD cannot establish standing for claims related to the greenhouse gas emissions associated with the Program.<sup>10</sup> (API Br. at 8-13.) API’s argument is premised on the mischaracterization of *Massachusetts* as finding standing for petitioners *only* as a result of the “special solicitude” granted the state petitioners. (API Br. at 8-13.) While the Supreme Court affirmed that states should be allowed “to litigate as *parens patriae* to protect quasi-sovereign interests,” 127 S.Ct. at 1456 n. 17, nothing in the majority opinion indicates that without “special solicitude,” petitioners could not have established standing. Indeed, after the Court’s discussion of state standing, it proceeded to evaluate Massachusetts’ standing under the traditional three-pronged test laid out in *Lujan*, 504 U.S. at 560. *Massachusetts*, 127 S.Ct. at 1455-59; *see also id.* at 1466

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<sup>10</sup> As discussed *supra*, no “special solicitude” is needed to find that CBD has standing for its claims related to greenhouse emissions. However, because the Native Village of Point Hope has joined in CBD’s greenhouse claims, and as a sovereign tribal entity likely warrants such solicitude (*see* Point Hope Reply Br. at 16), this Court need never reach the question of CBD’s standing. *Massachusetts*, 127 S. Ct. at 1454 (“Only one of the petitioners needs to have standing to permit us to consider the petition for review.”). Alternatively, if this Court finds CBD has standing for these claims, it need not reach the question of whether Point Hope is entitled to such “special solicitude.”

(Roberts, C.J., dissenting) (“The Court asserts that Massachusetts is entitled to ‘special solicitude’ due to its ‘quasi-sovereign interests,’ but then applies our Article III standing test to the asserted injury of the State’s loss of coastal property.”) (internal citation omitted). Massachusetts did not need, nor was it in fact actually given, any special solicitude by the Court. The central standing inquiry applied to find that petitioners had standing in *Massachusetts* is thus no different than that which applies here. Just as Massachusetts was able to establish it had standing by showing it had suffered an injury caused by respondent’s actions that could be redressed by court intervention, CBD has done so here.

### CONCLUSION

For the reasons set forth above and in CBD’s Opening Brief, CBD respectfully requests that the Court find Interior’s approval of the Program in violation of OCSLA, NEPA, and the ESA.

Respectfully submitted this 18th day of August, 2008,



MATTHEW VESPA  
Center for Biological Diversity  
600 California Street, Suite 351  
San Francisco, CA 94104  
(415) 436-9682  
Attorney for Center for Biological Diversity

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Dated August 18, 2008



MATTHEW VESPA

Center for Biological Diversity  
351 California Street, Suite 600  
San Francisco, CA 94104  
(415) 436-9682

Attorney for Center for Biological Diversity

## PROOF OF SERVICE

I, Sabine Reynaud, am over the age of eighteen years, and not a party to this action. My business address is 1351 California Street, Suite 600, San Francisco, CA 94104.


On August 18, 2008, I served **REPLY BRIEF FOR PETITIONER THE CENTER FOR BIOLOGICAL DIVERISTY** on the following counsel of record via First Class Mail:

Department of Interior  
Sambhav Sankar  
Attorney, Appellate Section  
Environment and Natural Resources Section  
United States Department of Justice  
P.O. Box 23795  
L'Enfant Plaza Station  
Washington, D.C. 20036-3795

American Petroleum Institute  
Steven J. Rosenbaum  
Covington & Burling LLP  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
(202) 662-5568

Native Village of Point Hope *et al.*  
Peter van Tuyn  
Besseney & Van Tuyn, L.L.C.  
310 K St., #200  
Anchorage, Ak. 99501  
(907) 278-2000

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 18th day of August 2008, in San Francisco, CA.

  
Sabine Reynaud