

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

NOT CALENDARED FOR ORAL ARGUMENT

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

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

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

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

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Petitioner the Center for Biological Diversity (“CBD”) submits this certificate as to parties, rulings, and related cases.

(A) Parties and Amici.

(i) Parties, Intervenors, and Amicus Curiae who Appeared in the District Court.

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the requirement to identify parties, intervenors, and amici who appeared below is inapplicable because D.C. Circuit No. 07-1247 and consolidated Case No. 07-1433 are not appeals from a ruling of a district court.

(ii) Parties to these Cases.

Petitioners are CBD (No. 07-1247); Native Village of Point Hope, Alaska Wilderness League, and Pacific Environment (No. 07-1433).

Respondent is the U.S. Department of the Interior.

Intervenor in support of Respondent is the American Petroleum Institute.

(iii) Amici Curiae.

Oceana is participating as *Amicus Curiae* in support of petition for review.

W. Michael Hanemann and Charles Kolstad are participating as *Amicus Curiae* in support of petition for review.

(iv) Circuit Rule 26.1 Disclosures for Petitioner.

Petitioner CBD states as follows: 1) CBD has no parent companies, and 2) there are no publicly-owned companies that have a 10% or greater ownership in CBD.

CBD is a national 501(c)(3) non-profit corporation whose organizational purpose is to protect native species and their habitats through science, policy, and environmental law.

Dated May 21, 2008



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GLOSSARY

ACIA:	Arctic Climate Impact Assessment
AR:	Administrative Record
CBD:	Center for Biological Diversity
CEQ:	Council on Environmental Quality
CO ₂ :	Carbon Dioxide
EA:	Environmental Assessment
ESA:	Endangered Species Act
EIS:	Environmental Impact Statement
FWS:	Fish and Wildlife Service
MMS:	Minerals Management Service
NEPA:	National Environmental Policy Act
NMFS:	National Marine Fisheries Service
NHTSA:	National Highway Traffic Safety Administration
OCS:	Outer Continental Shelf
OCSLA:	Outer Continental Shelf Lands Act

JURISDICTIONAL STATEMENT

(A) Agency’s Subject-Matter Jurisdiction. Respondent Department of Interior (“Interior” or “Secretary”) is authorized under the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §§ 1331-1356a to sell leases to develop oil and gas deposits in the Outer Continental Shelf (“OCS”). The first stage in the development of offshore oil and gas is the formulation of a five-year leasing program. 43 U.S.C. §§ 1331(b); 1344.

(B) Court of Appeals’ Jurisdiction. OCSLA provides for direct review before this Court of approval of a leasing program by the Department of Interior. 43 U.S.C. § 1349(c)(1). The instant action challenges the Department of Interior’s approval of the Outer Continental Shelf Oil and Gas Leasing Program for 2007-2012 (“Leasing Program” or “Program”). Because violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, alleged in this action arise under OCSLA, this Court has original jurisdiction over these claims.

(C) Appeal from Final Order. This action challenges the final approval of the Leasing Program. The final approval of a leasing program under OCSLA is subject to judicial review. 43 U.S.C. § 1349(c)(1). Judicial review of the approval of the Leasing Program will dispose of all of Petitioner’s claims.

(C) Availability of Judicial Review. Judicial review of the final approval of a leasing program under OCSLA is available to any person that has (1) participated in the administrative proceedings related to the challenged action; (2) is adversely affected or aggrieved by such action; (3) files a petition for review within sixty days after the date of such action; and (4) promptly transmits copies of the petition to the Secretary of Interior and to the Attorney General. 43 U.S.C. § 1349(c)(3).

(1) Petitioner the Center for Biological Diversity (“CBD”) participated in the administrative proceedings for this action. CBD submitted several comment letters throughout the course of the administrative proceedings for the Leasing Program. On March 24, 2006, CBD submitted scoping comments on the proposed Leasing Program. (Administrative Record (“AR”) 394-401.) On November 20, 2006, CBD submitted comments on the Draft Environmental Impact Statement (“Draft EIS”) for the proposed Leasing Program and on the proposed Leasing Program itself. CBD submitted comments on the Draft EIS as part of a coalition of environmental groups (AR 23647-23676), as well as independently (AR 7728-7752).

(2) CBD is adversely affected or aggrieved by the approval of the Leasing Program. CBD and its members have an interest in the wildlife and environment that are adversely affected by the approval of the Leasing Program,

including an interest in the threatened, endangered and sensitive species that occur in each of the areas subject to leasing under the final Program. The failure of Interior when approving the final Leasing Program to adequately analyze the direct and indirect impacts of the Program on these species and ecosystems, to properly balance the adverse environmental impacts of the Program with the anticipated benefits of the Program, and to comply with the procedural and substantive mandates of OCSLA, NEPA, and the ESA when approving the final Leasing Program, has and will result in direct and indirect harm to these species and ecosystems, and to the interests of CBD and its members in these species and ecosystems and in agency compliance with the law. The specific interests and harms suffered by CBD and its members as a result of the approval of the Leasing Program are described in further detail below.

(3) CBD filed a timely petition to challenge approval of the Leasing Program. Pursuant to 43 U.S.C. § 1349(c)(3)(C), CBD timely filed a petition for review within sixty days after the date of the challenged final agency action. The Leasing Program was approved on June 29, 2007, and effective July 1, 2007. (AR 25236.) CBD filed a Petition for Review with this Court to challenge approval of the Leasing Program on July 2, 2007 (Case No. 07-1247).

(4) CBD promptly transmitted copies of the petition to the Secretary of Interior and to the Attorney General. On July 2, 2007, immediately after filing

the Petitioner for Review with this Court, CBD served the Secretary of Interior and the Attorney General with copies of the Petition.

(D) Standing

CBD has standing to sue on behalf of its injured members because at least one member has standing to sue, the organization seeks to protect interests that are “germane” to its purpose, and participation of the individual members is unnecessary in the lawsuit. *Humane Soc’y of the U.S. v. Hodel*, 840 F.2d 45, 52-53 (D.C. Cir 1988) (citing *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977)); (see also Siegel Decl. ¶¶ 4-22).

CBD and its members have suffered injuries traceable to Interior’s actions which are redressible by a favorable court order, and CBD’s environmental grievance falls within the “zone of interests” protected by OCSLA, NEPA, and the ESA. *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998) (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).

CBD’s members have suffered particularized and concrete injuries to their aesthetic interests, as well as procedural and informational injuries, stemming from Interior’s unlawful conduct. CBD’s members use specific areas affected by the Program for recreation, enjoyment, and observation of wildlife, and have strong interests in the health and well-being of these wildlife populations and the

ecosystems which support them. (See Mulvaney Decl. ¶¶ 3-18; Duchin Decl. ¶¶ 2-22; Siegel Decl. ¶¶ 26-36; Bevington Decl. ¶¶ 7-16; Steiner Decl. ¶¶ 2-15.)

Activities that will occur in and affect these areas as a direct result of the approval of the Program (oil and gas leasing and development) and more indirectly (greenhouse gas emissions from the oil and gas produced under the Program) will adversely affect the species and ecosystems of these areas and as a consequence adversely affect the ability of CBD's members to continue to observe and enjoy wildlife in these areas. (See Mulvaney Decl. ¶¶ 3, 10, 17, 19-25; Duchin Decl. ¶¶ 3-4, 9, 22-34; Siegel Decl. ¶¶ 21-25, 34-36; Bevington Decl. ¶¶ 6-7, 9-10, 17-29; Steiner Decl. ¶¶ 5, 7-9, 15-24); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 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 ..."); see also *Animal Legal Def. Fund*, 154 F.3d at 432, 434 (injury to a plaintiff's aesthetic interest in the observation of animals or quality of the environment is sufficient to establish standing).

CBD's interests and the harms to those interests are directly traceable to the actions of Interior. Absent approval of the Leasing Program, the areas that Petitioner and its members are concerned about would not be subject to oil leasing and development and consequent environmental impacts.

Interior's failure to follow the required procedures of NEPA, OCSLA, and the ESA also deprives CBD and its members of procedural rights and information guaranteed by these statutes. *See Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (recognizing "procedural injury" as basis for standing); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20-21 (1998) (finding informational injury); *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1265 (10th Cir. 2002) (under NEPA, an injury results from the agency's uninformed decisionmaking).

Finally, 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 on the species and ecosystems of interest to CBD may change the outcome of the decision toward reducing CBD's injuries. *Massachusetts v. Env't'l Prot. Agency*, 127 S. Ct. 1438, 1453 (2007) (for procedural injury cases, relief need only cause agency to reconsider decision); *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d at 1266 (redressibility requirement satisfied by a court order requiring an agency to undertake a NEPA or ESA analysis to better inform itself of the consequences of its decision).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Interior violated the Outer Continental Shelf Lands Act
by:

a. failing to consider the present and future impacts of global warming on OCS areas and the relative environmental sensitivity of OCS areas to global warming impacts in determining the size, timing, and location of leasing activity under the Program;

b. failing to consider the economic cost of the greenhouse gas emissions resulting from the Program's proposed extraction and foreseeable combustion of 10 billion barrels of oil and 45 trillion cubic feet of natural gas from the OCS.

2. Whether Interior violated the National Environmental Policy Act by:

a. refusing to consider the foreseeable additional stresses to the Arctic environment as a result of global warming when analyzing the environmental impacts over the 40-year life of the activities associated with the Program;

b. failing to analyze the cumulative impacts on global warming from the Program's direct and indirect generation of greenhouse gas emissions.

3. Whether Interior violated Section 7 of the Endangered Species Act by approving the Program without ensuring through consultation that the Program does not jeopardize threatened or endangered species or adversely modify or destroy their critical habitat.

4. Petitioner CBD hereby adopts and incorporates by reference the Issues Presented for Review by Petitioners Native Village of Pt. Hope, *et al.*

STATEMENT OF THE CASE

This Petition for Review challenges the Department of Interior's final approval of the Outer Continental Shelf Oil and Gas Leasing Program for 2007-2012. The Leasing Program, which determines the size, timing, and location of the nation's offshore oil and gas leasing for five years, designated 21 lease sales in three regions of the country, including 8 lease sales in the waters off Alaska. In approving the Leasing Program, Interior failed to comply with OCSLA, NEPA, and the ESA.

Specifically, notwithstanding the billions of tons of carbon dioxide that will be released into the atmosphere as a result of the recovery and combustion of the oil and gas extracted under the Leasing Program, Interior failed to disclose, analyze, or weigh the impacts and costs of these emissions in developing the Leasing Program, as required by Section 18(a), 43 U.S.C. § 1344(a), of OCSLA. Furthermore, despite the fact that the Alaska OCS Region is experiencing the effects of global warming more rapidly and more severely than any place else in the nation, Interior failed to adequately consider these specific impacts and vulnerabilities in analyzing the effects of the Leasing Program on the resources of this region, as required by Section 18(a).

The failure of Interior to disclose, analyze, and weigh the greenhouse gas emissions directly and indirectly resulting from the Leasing Program, their contribution to global warming, and the effects of global warming on the resources affected by the Leasing Program, also violates the environmental review provisions of NEPA.

Finally, notwithstanding the fact that the Section 7 of the ESA, 16 U.S.C. § 1536, requires that federal agencies “insure through consultation” that “any action authorized, funded or carried out” by the agency does not “jeopardize” any threatened or endangered species or “destroy or adversely modify its critical habitat,” and that numerous such species and critical habitats are adversely affected by the Leasing Program, Interior unlawfully decided to forgo entirely the mandatory ESA consultation process when it approved the Leasing Program.

STATEMENT OF FACTS

I. Statutory Framework

A. The Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act authorizes the Secretary of Interior to sell leases to develop oil and gas deposits in the OCS. Oil and gas exploration in the OCS is governed by a five-step process: (1) the promulgation of a five-year leasing program, § 1344; (2) lease sales, § 1337; (3) exploration, § 1340; (4) development and production, § 1351; and (5) sale of recovered oil and gas, § 1353.

The Secretary has delegated many of the responsibilities for compliance with OCSLA to the Minerals Management Service (“MMS”), an agency within the Department of Interior.

The leasing program consists of “a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which [Interior] determines will best meet national energy needs for the five-year period following its approval or reapproval.” 43 U.S.C. § 1344(a). Section 18(a) of OCSLA requires that a leasing program “be prepared and maintained in a manner consistent” with several principles. *Id.* Section 18(a)(1) requires that “[m]anagement of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.” § 1344(a)(1).

Section 18(a)(2) requires that the “[t]iming and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of” several factors, including “existing information concerning the geographical, geological, and ecological characteristics of such regions,” “the relative environmental sensitivity and marine productivity of different areas of the

outer Continental Shelf,” and “relevant environmental and predictive information for different areas of the outer Continental Shelf.” § 1344(2)(A), (G), (H). To comply with Section 18(a)(2), the Secretary must “consider all factors listed in section 18(a)(2) in developing the leasing program” and “base the leasing program upon the result of his consideration of these factors.” *California v. Watt*, 668 F.2d 1290, 1304-05 (D.C. Cir. 1981) (“*Watt I*”).

Section 18(a)(3) requires the Secretary to “select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.” 43 U.S.C. § 1344(a)(3). The failure to consider and factor *all* aspects of section 18(a)(2) into the final Leasing Program precludes the Secretary from obtaining a proper balance to the maximum extent practicable under section 18(a)(3). *Watt I*, 668 F.2d at 1318.

In order to withstand judicial scrutiny, the record must “show that the Secretary’s factual determinations are based upon substantial evidence, that the Secretary’s policy judgments are based upon rational consideration of identified, relevant factors, and that the Secretary’s construction of the statute is permissible.” *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 300 (D.C. Cir. 1988); *see also Watt I*, 688 F. 2d at 1302.

As the first step in the OCSLA process, the five-year leasing program lays the groundwork for every decision made by the Secretary and action taken thereafter under his authority. As this Court has noted:

Once the Secretary approves the leasing program, it achieves important practical and legal significance. . . . The approved program also becomes the basis for future planning by all affected entities, from federal, state and local governments to oil industry itself. Compliance with the mandates of section 18, therefore, is extremely important to the expeditious but orderly exploitation of OCS resources.

Watt I, 668 F.2d at 1299.

B. The National Environmental Policy Act

The National Environmental Policy Act is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA has twin aims:

First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Dep’t of Transp. v. Public Citizen, 541 U.S. 752, 768 (2004) (citation omitted).

These dual objectives require that environmental information be disseminated “early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5. Under NEPA, the agency’s responsibility is to “predict the environmental effects of a proposed action before the action is taken

and those effects fully known.” *Am. Bird Conservancy v. Fed. Commc’ns Comm’n*, 516 F.3d 1027, 1033 (D.C. Cir. 2008) (citation omitted).

Under NEPA, federal agencies must prepare an Environmental Impact Statement (“EIS”) prior to taking “major Federal actions significantly affecting the quality” of the environment. 42 U.S.C. § 4332(2)(C). The EIS must include, among other things, a “detailed statement” describing the reasonably foreseeable environmental impact both of the proposed federal action and of any feasible alternative(s) to the proposed federal action, including non-action. 42 U.S.C. §§ 4332(2)(C)(i), (iii). In reviewing the adequacy of an EIS, “the court ‘should ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors, and to make a reasoned decision.” *Natural Res. Def. Council*, 865 F.2d at 294 (*quoting Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 371 (D.C. Cir. 1981)).

C. The Endangered Species Act

The Endangered Species Act was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species...” 16 U.S.C. § 1531(b). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the

Court “beyond doubt” that “Congress intended endangered species to be afforded the highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). As the Court found, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have delegated this responsibility to the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”). 50 C.F.R. § 402.01(b). NMFS has primary responsibility for administering the ESA with regard to most marine species, including bowhead and right whales, while FWS has responsibility for terrestrial species, as well as some marine mammals such as polar bears and sea otters, and all seabirds.

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in consultation with NMFS or FWS to “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 or result in the adverse modification of habitat of such species . . . determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2) (Section 7 consultation); *see also Am. Bird Conservancy*, 516 F.3d at 1034.

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined in the ESA’s implementing regulations to 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); *see also Fla. Key Deer v. Paulison*, 522 F.3d 1133, ___, 2008 U.S. App. LEXIS 6850, *23 (11th Cir. 2008); *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998).

When a proposed action may affect a protected species, consultation must occur and be completed before the federal action may take place. *Am. Bird Conservancy v. Fed. Comm’n’s Comm’n*, 516 F.3d at 1034; *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *Conner v. Burford*, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

During the course of consultation, NMFS or FWS may “suggest modifications” to the action to “avoid the likelihood of adverse effects” to the listed species. 50 C.F.R. § 402.13. At the completion of consultation, NMFS or FWS issues a biological opinion that determines if the agency action is likely to jeopardize the species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(3)(A); *see also* 50 C.F.R. § 402.02. If so, the agency may not proceed with the action unless the agency adopts reasonable and prudent alternatives as

specified in the biological opinion that will avoid jeopardy and destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b).

II. Factual Background

A. The Worsening Impacts of Global Warming

The significant adverse impacts of global warming on the United States and the world have long been recognized by Congress (*see, e.g.*, Global Change Research Act of 1990, Public Law 101-606, 104 Stat. 3096-3104 (1990), codified at 15 U.S.C. §§ 2921 *et seq.*), the courts (*see, e.g. Massachusetts v. Envtl. Prot. Agency*, 127 S. Ct. at 1455 (“The harms associated with climate change are serious and well recognized.”)), and the Department of Interior itself (*see, e.g.* Secretarial Order 3226, Evaluating Climate Change Impacts in Management Planning (Jan. 19, 2001) *available at* http://elips.doi.gov/elips/sec_orders/html_orders/3226.htm (“There is a consensus in the international community that global climate change is occurring and that it should be addressed in governmental decision making.”))

The extent of future warming depends on if and how rapidly the United States and the rest of the world reduce greenhouse gas pollution. Continued greenhouse gas emissions at or above current rates are projected to cause further warming and increasingly rapid and severe changes in the global climate system. (AR 6071, 7032-33.) If society chooses to substantially reduce its emissions, the induced changes in climate would be smaller and more gradual. (AR 6071); *see*

Massachusetts v. Env'tl. Prot. Agency, 127 S. Ct. at 1458 (“A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”).

At a certain point, changes to the climate may reach a “tipping point,” whereby “the changes associated with global warming will become dramatically more rapid and out of control.” *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d. 295, 313-14 (D. Vt. 2007); (AR 6661-6703 (expert report of James Hansen submitted in *Green Mountain Chrysler v. Crombie*); AR 6543-44 (study by Harvard Center for Health and the Global Environment)). “Because excess carbon dioxide persists in the atmosphere for centuries, it will take at least a few decades for concentrations to peak and then begin to decline even if concerted efforts to reduce emissions are begun immediately.” (AR 6064.) Dr. James Hansen, a chief NASA climatologist, has determined that just ten more years of “business-as-usual” emissions would make it virtually impossible to keep temperature increases within the range necessary to avoid the most drastic consequences of global warming. *Green Mountain Chrysler*, 508 F. Supp. 2d at 312-314, 316; (AR 6763-64). Even using the lowest emissions scenario and the climate model that generates the least warming in response to changes in atmospheric composition, the earth is projected to warm more than twice as much this century as in the past century. (AR 6088.)

B. Impacts to Alaska and the Arctic from Global Warming

The Arctic has experienced some of the most severe and rapid warming associated with global warming. Already the average temperature in the Arctic has risen at almost twice the rate as the rest of the world, and Alaska has warmed an average of 4° F over the past half century. (AR 6070, 13642.) Warming has ushered in a host of alarming ecological changes including the loss of sea ice, shifts in vegetation zones and species' diversity and ranges, and the thawing of permafrost. (AR 6072-73, 13194-96); *Ctr. for Biological Diversity v. Nat'l Highway Transp. Safety Admin.*, 508 F.3d 508, 523 (9th Cir. 2007) (“recent evidence shows that there have already been severe impacts in the Arctic due to warming, including sea ice decline.”).

The impacts of global warming on the Arctic are expected to greatly accelerate due to increased global concentrations of carbon dioxide and other greenhouse gases, primarily from the burning of fossil fuels. (AR 6072, 6187.) The decline in sea-ice extent has sharply accelerated in recent years, with some models showing the disappearance of most summer sea ice by the end of this century and more recent data pointing to a complete loss of sea ice by mid-century or sooner. (AR 6087, 6092, 6812-14.) Similarly, melting of the Greenland ice sheet in 2004 was ten times the rate observed in 2000. (AR 6535.) Indeed,

Greenland and polar ice are now losing mass at rates not thought possible several years ago. (AR 6535.) Moreover,

As sea ice melts in response to rising temperatures, it creates a positive feedback loop: melting ice means more of the dark ocean is exposed, allowing it to absorb more of the sun's energy, further increasing air temperatures, ocean temperatures, and ice melt. The observed changes in the ice cover indicate that this feedback loop is now starting to take hold.

(AR 6814 (from National Snow and Ice Data Center)); *see also Green Mountain Chrysler*, 508 F. Supp. 2d at 314-15 (summarizing testimony of Dr. James Hansen); (AR 6679-81).

Several animals that make their home in the Arctic depend on sea ice, a habitat severely threatened by global warming. For example, the polar bear uses sea ice for hunting seals, mating, and migration, and is likely to become extinct if there is an almost complete loss of summer sea-ice cover. (AR 6120, 6408-21 (Derocher et al. (2004)), 13646.) Global warming also threatens ice dependent seals as well as various seabirds and their prey. (AR 13646, 13649.)

C. The Outer Continental Shelf Oil & Gas Leasing Program: 2007-2012

The Leasing Program determines the size, timing, and location of the nation's offshore oil and gas leasing for the five-year period of 2007 through 2012. (AR 12861, 24872); 43 U.S.C. § 1344(a). The Program authorizes 21 lease sales in three regions, the Alaska Region, the Gulf of Mexico Region, and the Atlantic

Region. (AR 13920, 24872, 24877 (map of Alaska Program areas), 24878 (map of Gulf of Mexico and Atlantic Program areas).) Lease sales convey exclusive rights for exploration, development, and production of offshore oil and gas resources, activities that may themselves extend over a period of 25-40 years. (AR 12851, 12861.)

Interior anticipates that the Program would result in the extraction of approximately 10 billion barrels of oil and 45 trillion cubic feet of gas from the OCS. (AR 24953, 25240.) The combustion of this oil and gas for fuel would result in over 5 billion tons of carbon dioxide emitted into the atmosphere.¹ This is

¹ Although neither the EIS nor the Program quantified the emissions resulting from the foreseeable combustion of the oil and gas extracted from the OCS under the Program, emission factors are readily available to calculate the greenhouse gas emissions released from the consumption of a cubic foot of natural gas and the petroleum products refined from a barrel of crude oil. *See, e.g.,* Energy Information Administration, Voluntary Reporting of Greenhouse Gases Program, Fuel and Energy Source Codes and Emission Coefficients, *available at* <http://www.eia.doe.gov/oiaf/1605/coefficients.html>. Because burning 1,000 cubic feet of natural gas releases 120.593 pounds of CO₂, burning the 45 trillion cubic feet extracted under the program would release 5.43 trillion pounds of CO₂ into the atmosphere, or 2.46 billion metric tons (using conversion factor of 1 pound to 4.54 x 10⁻⁴ metric tons). The refining of one barrel of oil yields numerous petroleum products, including approximately 19.30 gallons of finished motor gasoline, 10.70 gallons of distillate fuel oil, and 3.92 gallons of jet kerosene. *See* Energy Information Administration, Petroleum Products: Supply, *available at* <http://www.eia.doe.gov/neic/infosheets/petroleumproducts.html>. Combustion of the motor gasoline produced from 10 billion barrels of oil generates over 1.71 billion metric tons of CO₂ (19.564 lbs CO₂/gallon * 19.30 gallons/barrel * 10 billion barrels * 4.54 x 10⁻⁴ lbs per metric ton). Combustion of the distillate fuel produced from 10 billion barrels of oil generates approximately 1.09 billion metric tons of CO₂ (22.384 lbs CO₂/gallon * 10.70 gallons/barrel * 10 billion barrels * 4.54 x 10⁻⁴ lbs per metric ton).

a vast amount, approaching the annual greenhouse gas emissions of the United States. (AR 14067 (U.S. emitted 6.891 billion metric tons of total greenhouse gas emissions in 2003)); *see also Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. at 1457 (characterizing 1.7 billion metric tons as “an enormous quantity of carbon dioxide.”).

The Leasing Program greatly expands oil and gas leasing offshore of Alaska with eight lease sales scheduled, including four lease sales in the Beaufort Sea and Chukchi Sea Planning Areas, contiguous areas spanning the entire northern border of Alaska. (AR 12880, 13920, 24873.) Proposed Alaska lease sales will impact numerous threatened and endangered animals protected by the ESA, including several marine mammals such as bowhead whales, Steller sea lions, sea otters, the critically endangered North Pacific right whale, and three seabird species. (AR 13026-42, 13046-60, 13958-63.) Two of the lease sale areas overlap with critical habitat for protected species: the Steller sea lion has critical habitat in the Cook Inlet; and North Pacific right whale has critical habitat in the North Aleutian Basin.

4.54 x 10⁻⁴ lbs per metric ton). Combustion of the jet kerosene produced from 10 billion barrels of oil generates approximately 0.375 billion metric tons of CO₂ (21.095 lbs CO₂/gallon * 3.92 gallons/barrel * 10 billion barrels * 4.54 x 10⁻⁴ lbs per metric ton). Thus, even excluding the carbon dioxide pollution generated from the burning of other types of petroleum products refined from a barrel of crude oil, combustion of the 10 billion barrels of oil extracted under the Program would release approximately 3.18 billion metric tons of carbon dioxide. Combined with the 2.46 billion metric tons of CO₂ from the combustion of the natural gas extracted under the Program would result in well over 5 billion metric tons of greenhouse gas pollution.

(AR 13327-29, 13034, 13961 (Steller sea lion); AR 13790, 13963 (North Pacific right whale).) Additionally, the polar bear, proposed for listing at the time of Leasing Program approval, has now been listed as threatened, 73 Fed. Reg. 28212 (May 15, 2008), while several other sensitive species inhabiting proposed lease sale areas, such as the Kittlitz's murrelet, Cook Inlet beluga whale, Pacific walrus, and ribbon seal are under review for ESA listing. 73 Fed. Reg. 16617 (March 28 2008) (ribbon seal 90-day finding); 72 Fed. Reg. 69034 (Dec 6, 2007) (Kittlitz's murrelet candidate finding); 72 Fed. Reg. 19854 (April 20, 2007) (proposed "endangered" listing for Cook Inlet beluga); (AR 13035, 13038, 13946). Moreover, habitat for some of these species, such as bowhead whales and spectacled eiders, spans several areas identified for leases in Alaska, multiplying the impacts of the Leasing Program on those species. (*See, e.g.*, AR 13026-28, 13046-47, 13053.)

The Leasing Program also schedules 11 lease sales in the Gulf of Mexico, where the majority of oil and gas production will occur under the Program, and one Atlantic lease sale off the coast of Virginia. (AR 24916-17, 24925; *see also* AR 24878 (Map B).) Numerous threatened and endangered species occur within these Program areas. The Gulf of Mexico provides habitat for several protected whales, West Indian manatee, gulf sturgeon, smalltooth sawfish, and several ESA-listed seabirds. (AR 12932, 12939-40, 12945-46.) Five species of listed sea turtles also

inhabit the Gulf and nest on its beaches including green, hawksbill, Kemp's ridley, leatherback, and loggerhead. (AR 12952.) Two species of threatened corals, elkhorn and staghorn, occur in the Gulf of Mexico. (AR 7744-76.) The proposed lease sale in the Atlantic Region contains many of the same listed species likely to be affected by the Program as the Gulf of Mexico. (AR 13146-61.)

SUMMARY OF ARGUMENT

The 2007-2012 Leasing Program is the first leasing program under OCSLA to be prepared in the face of overwhelming evidence of the present and future impacts of global warming on the planet, and in particular, the Arctic, which is "extremely vulnerable to observed and projected climate change and its impacts." (AR 6072); *see also Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. at 1455 ("The harms associated with climate change are serious and well recognized."). Nonetheless, despite every climate model pointing to continued disproportionate and accelerated stresses to the Arctic ecosystem and significant losses of sea ice as a result of global warming, the Program does not so much as mention global warming as a potential factor to consider in determining the size and location of future lease sales under OCSLA. (AR 24865 – 24979.) Similarly, while the EIS acknowledges the present impacts of global warming, it refused to evaluate Program impacts in light of a rapidly warming Arctic environment. As the Program sets in motion a chain of events resulting in 40 years of oil and gas

exploration in the OCS, the EIS' assumption that global warming and its impacts will not worsen severely downplays Program impacts to the Arctic. By turning a blind eye to the realities of global warming in developing the Program, Interior failed to take a "hard look" at Program impacts under NEPA and to perform the requisite consideration of environmental factors under OCSLA.

In addition to failing to examine the potential exacerbation of Program impacts from global warming, Interior failed to assess the impact of the Program on global warming. Global warming is primarily the result of the increase in the atmospheric concentration of carbon dioxide from the burning of fossil fuels. (AR 6534); *see also Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. at 1446. By planning for the extraction of 10 billion barrels of oil and 45 trillion cubic feet of natural gas from underneath the OCS for sale and consumption, the Program would result in the release of over five billion tons of carbon dioxide currently sequestered underneath the earth into the atmosphere. In violation of NEPA, the EIS failed to assess the cumulative impact of the greenhouse gases generated by the Project on global warming. In violation of OCSLA, Interior ignored data on the enormous economic costs of these emissions.

Finally, Interior illegally refused to consult NMFS and FWS regarding the Program's impacts on numerous threatened and endangered species.

I. Interior Violated NEPA in Approving the Program.

The failure to properly consider the effects of the Leasing Program in the context of a warming Arctic runs afoul of NEPA's requirements for informed decisionmaking. In addition, as a classic example of a cumulative effects problem, the EIS violated NEPA by failing to disclose and analyze the cumulative impact on global warming of both the direct and indirect greenhouse gas emissions resulting from the Program.

A. The EIS Fails to Take a Hard Look at the Environmental Consequences of the Program by Refusing to Analyze Program Impacts in Light of Foreseeable Future Stresses to the Arctic as a Result of Global Warming.

Despite overwhelming and undisputed evidence that the Arctic environment will continue to deteriorate as a result of global warming, the EIS concludes that “[i]t is not possible at this time to identify the likelihood, direction, or magnitude of any changes in the environment of Alaskan waters due to changes in the climate, or how climate change could impact marine mammals in these waters.” (AR 13647.) By assuming that the baseline conditions for the Arctic are static over the 40-year life of Program activities, the EIS drastically understates Program impacts. The EIS’ refusal to assess Project impacts in the context of an environment with a diminishing capacity to withstand external stresses precludes the requisite “hard look” at Program impacts required under NEPA.

The EIS' conclusory assertion that it is "not possible" to determine the likelihood or direction of changes in the Alaskan environment due to climate change is squarely contradicted by the scientific evidence in the record. The 2004 Arctic Climate Impact Assessment ("ACIA") is a synthesis of scientific findings on the impact of climate change on the Arctic prepared at the request of the Arctic Council, a high-level intergovernmental forum that provides a mechanism to address the common concerns and challenges faced by Arctic people and governments. (AR 6061.) Noting that the average temperature in the Arctic has risen at almost twice the rate of the rest of the world, the ACIA determined that "[a]n *acceleration* of these climate trends is projected to occur during this century, due to ongoing increases in concentrations of greenhouse gases in the earth's atmosphere." (AR 6070 (emphasis added); *see also* AR 6084-6095 (summary of evidence supporting finding of accelerated Arctic warming).) Indeed, "[r]egardless of the emissions scenario or computer model selected, *every* model simulation projects significant global warming." (AR 6089 (emphasis added).) Even using the lowest emissions scenario leads to a projection that the earth will warm more than twice as much in this century as it did over the past century. (*Id.*) Moreover, the ACIA found that "the Arctic is likely to experience noticeable warming particularly early and intensely." (*Id.*; *see also* AR 6090 (showing future projections of overall global warming as compared to elevated Arctic warming

under a variety of emissions scenarios); 6819-6822 (study published in *Science* concluding that “the rate of future [ice-sheet] melting and related sea-level rise could be faster than widely thought.”).) The ACIA also details the many impacts that will result from increased warming, including increased loss of sea ice and negative impacts to ice-dependent marine mammals such as the polar bear and walrus. (AR 6120-21; *see also* AR 6403-6421 (scientific studies assessing impact to walrus and polar bear from loss of sea ice); *see generally* AR 6108-6185.) Thus, with every climate model pointing to additional and accelerated warming in the Arctic with a corresponding exacerbation of existing stresses to the Arctic ecosystem, the EIS’ assessment of Program impacts over a 40-year period based on the environmental state of the Arctic as it exists today contravenes NEPA’s fundamental directive that an agency take a “hard look” at all of the environmental consequences of proposed federal actions before the action occurs. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also* 40 C.F.R. § 1500.1(b) (NEPA requires “[a]ccurate scientific analysis”).

Where, as here, voluminous and uncontroverted scientific evidence points to increasingly severe Arctic warming and resulting environmental impacts, the EIS cannot legitimately disregard global warming’s effects on the Arctic on the grounds that “the magnitudes of the changes produced by climactic change are

poorly known.” (AR 13643.) As set forth in *Scientists’ Institute for Public Information v. Atomic Energy Commission*:

[T]he basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects are fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as a “crystal ball inquiry.”

481 F.2d 1079, 1092 (D.C. Cir. 1973); accord *Potomac Alliance v. U.S. Nuclear Regulatory Comm’n*, 682 F.2d 1030, 1036-37 (D.C. Cir. 1982). In light of the numerous climate models projecting Arctic impacts, Interior could readily have made some reasonable assumptions, such as choosing a mid-range scenario model, from which to assess Program impacts. Indeed, the EIS itself acknowledges that future global warming impacts are likely to occur in the Arctic. (*See, e.g.*, AR 13192-96 (EIS noting that “a certain degree of climate change and their related impacts could occur within the period of the proposed 5-year program activities” which, among other things, “could cause large-scale changes in marine ecosystems and could threaten populations of marine mammals, such as polar bears and ringed seals that depend on ice.”).) However, merely recognizing that the Arctic will continue to be impacted by global warming is meaningless if the EIS does not incorporate these changing conditions into its analysis of Program impacts. In the face of universal scientific agreement that the Arctic will continue to deteriorate as

a result of global warming, Interior's apparent insistence on absolute scientific certainty as to the specific magnitude of Arctic impacts before accounting for global warming in its impact analysis is the exact shirking of its responsibility that NEPA forbids. *Scientists' Inst. for Public Info.*, 481 F.2d at 1092.

Interior's refusal to account for the increased stresses to the Arctic from global warming in analyzing the Program's cumulative impacts is also contrary to guidance by the Council on Environmental Quality ("CEQ"). As recognized by CEQ in its guidance on assessing cumulative effects under NEPA, a 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." CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 27, 29 (Jan. 1997), also available at <http://www.nepa.gov/nepa/ccenepa/ccenepa.htm>; see also *id.* at 24 (recognizing "cumulative additions of pollutants that contribute to global warming" as trend from which to analyze cumulative effects). The CEQ Guidance on cumulative impacts is recognition of the obvious fact that an already stressed environment is less resilient to additional impacts. By disregarding scientific evidence and making the Panglossian assumption that the environmental baseline for the

Program will remain static in the face of all evidence pointing to deteriorating Arctic conditions over the life of the Program, the EIS fails to accurately assess Program impacts.

B. The EIS Fails to Analyze the Program’s Cumulative Impact on Global Warming.

The EIS violates NEPA because it contains no assessment of the cumulative impact on global warming from the direct and indirect greenhouse gas emissions generated by the Program. An EIS must “consider the cumulative impact of the proposed action.” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) (citations omitted); 40 C.F.R. §§ 1508.7, 1508.27(b)(7).² Global warming is ultimately the result of the cumulative contributions of many individual sources of greenhouse gas pollution. As a problem fueled by “individually minor but collectively significant actions taking place over a period of time,” 40 C.F.R. § 1508.7, “the impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” *Ctr. for Biological Diversity*, 508 F.3d at 550 (environmental assessment inadequate for failing to discuss the cumulative impact of the proposed action on global warming); *Border Power Plant Working Group*

² CEQ regulations define a cumulative impact as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions.” 40 C.F.R. § 1508.7.

v. Dep't of Energy, 260 F. Supp. 2d 997, 1029 (S.D. Cal. 2003) (“Because [greenhouse gas] emissions have potential environmental impacts and were indicated by the record, the Court finds that the EA’s failure to disclose and analyze their significance is counter to NEPA.”); *see also* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 13 (identifying greenhouse gases as a cumulative effects issue).

The EIS’ analysis of the Program’s cumulative impact on global warming is limited to the quantification of the Program’s direct generation of greenhouse gas pollution. According to the EIS, greenhouse gas emissions for projected activities directly associated with the Program would range from 5.77 to 11.33 million metric tons of CO₂ equivalent emissions, or between 0.084-0.164 percent of total U.S. emissions in 2003. (AR 13198, 14067.) As an initial matter, the EIS’ assessment of the greenhouse gas emissions generated by the Program is incomplete because it fails to include the billions of tons of carbon dioxide pollution resulting from the burning of the 45 trillion cubic feet of natural gas and 10 billion barrels of oil extracted under the Program. In an effort to avoid an analysis of the impacts of the consumption of the oil and gas extracted under the Program, the EIS states:

The consumption of the refined oil is not considered because the scope of this EIS is limited to issues that have a bearing on the decisions for the proposed leasing program. Consumption of hydrocarbons is considered at a broader level when decisions are

made regarding the role of oil and gas generally, including domestic production and imports, in the Nation's overall energy policy. At the refinery stage, OCS oil is mixed with oil from other sources such that the OCS contribution to subsequent environmental impacts is not discernable.

(AR 12869-70.) The EIS' rationale for the omission of analysis on the impacts of the consumption of the resources extracted under the Program improperly side steps NEPA's required analysis of the "indirect effects" of a federal action.

Under NEPA, federal agencies must evaluate both the "direct effects" of an action as well as the "indirect effects." 40 C.F.R. § 1508.8. "Indirect effects" are defined as those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable" and may include "effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b). Here, the Program's purpose is to extract oil and natural gas from the Outer Continental Shelf for energy use. (AR 12861.) Combustion of the fossil fuels extracted under the Program will release over five billion tons of greenhouse gas emissions into the atmosphere and thereby exacerbate the impacts of global warming. (*See* Statement of Facts § II.C n.1 *infra*.) While consumption of oil and gas may continue to occur with or without the Program, fossil fuels are a finite resource. Oil and gas that remain in the ground are not burned and consequently, the carbon content stored in these fuels is not released into the atmosphere. Thus, the EIS' effort to distract from the greenhouse gas emissions resulting from the

Program by claiming that fossil fuels would be supplied from elsewhere absent exploration in the OCS misses the mark. (AR 12869-70.) Because the emissions released from burning the fossil fuels extracted under the Program are a “reasonably foreseeable” effect, this impact must be addressed in the EIS. 40 C.F.R. § 1508.8(b); *Scientists’ Inst. for Public Info.*, 481 F.2d at 1092 (“[r]easonable forecasting and speculation is [] implicit in NEPA...”); *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 550-551 (8th Cir. 2003) (EIS was required to examine effects on increased coal consumption resulting from proposed construction and improvements of rail lines to coal mines); *Border Power Plant Working Group*, 260 F. Supp. 2d at 1017 (in action to construct and operate transmission lines, NEPA requires analysis of emissions from turbines that would utilize transmission line because the “turbine and the [] transmission line are two links in the same chain...”).

In addition to its failure to quantify the reasonably foreseeable emissions generated by the Program, the EIS also fails because it does not analyze the cumulative impact of the Program’s direct or indirect greenhouse gas emissions on global warming. Like the environmental assessment in *Center for Biological Diversity*, which only quantified the greenhouse gases resulting from the action at issue, the EIS for the Program falls short of NEPA’s requirements because it does not analyze “the potential impact of such emissions on climate change.” 508 F.3d

at 556. While the millions of tons of greenhouse gases emissions directly generated by Program activities and the billions of tons generated by the burning of the fossil fuels extracted under the Program are far from trivial when viewed in isolation, when considered in conjunction with other past, present, and reasonably foreseeable future actions, “it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(b)(7); *see also Ctr. for Biological Diversity*, 508 F.3d at 550 (“[W]e cannot afford to ignore even modest contributions to global warming. If global warming is the result of the cumulative contributions of myriad sources, any one modest in itself, is there not a danger of losing the forest by closing our eyes to the felling of the individual trees?”) (*quoting City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 501 (D.C. Cir. 1990) (Wald, C.J., dissenting)). To comply with NEPA, the EIS must provide the necessary contextual information about the cumulative and incremental environmental impacts of the Program and other OCS activities “and other past, present, and reasonably foreseeable future actions, regardless of what agency undertakes such other actions.” *Ctr. for Biological Diversity*, 508 F.3d at 550; *see also Kern*, 284 F.3d at 1075 (“[i]t is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now.”).

II. The Secretary Failed to Properly Analyze the Program Under OCSLA by Ignoring Both the Disparate Impacts of Global Warming on OCS Areas and the Economic Cost of the Billions of Tons of Greenhouse Gases Resulting from the Program’s Extraction of Oil and Gas.

The significant flaws in the NEPA analysis render any reliance on the EIS in carrying out the balancing process under OCSLA arbitrary. Moreover, like its NEPA analysis, Interior’s review of the Program under OCSLA itself is fundamentally flawed because it did not consider the foreseeable impacts of global warming on OCS resources and the relative environmental sensitivity of each of these areas in the context of a rapidly warming Arctic. In addition, by ignoring the impacts and costs of the billions of tons of greenhouse gas emissions resulting from the Program’s extraction of oil and gas, Interior failed to properly consider and balance the economic, social, and environmental values of the renewable and nonrenewable resources of the OCS.

A. The Secretary’s Failure to Consider the Extreme Environmental Sensitivity of the Arctic to Observed and Projected Impacts of Global Warming, Including the Program’s Contribution to Such Warming, Violates OCSLA Section 18(a)(2).

In developing a leasing program, the Secretary must “consider all factors listed in section 18(a)(2)” and “base the leasing program upon the result of his consideration of these factors.” *Watt I*, 668 F.2d at 1305. Factors to be evaluated under section 18(a)(2) include “existing information concerning the . . . ecological

characteristics of [OCS] regions,” “the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf,” and “relevant environmental and predictive information for different areas of the outer Continental Shelf.” 43 U.S.C. § 1344(a)(2)(A), (G), (H). Importantly, “[t]hese factors by their very terms require the Secretary to engage in a comparative analysis” of the various OCS regions. *Watt I*, 668 F.2d at 1306. Nonetheless, the Secretary refused to consider the Program’s contribution to global warming, much less the effect the Program would have on OCS resources in light of the ecological characteristics of the various OCS regions, their relative environmental sensitivity and marine productivity, or the relevant environmental or predictive information regarding these regions. 43 U.S.C. § 1344(a)(2)(A), (G), (H).

While all of the OCS regions face serious warming-related impacts, Alaska’s place at the top of the globe gives it a unique ecological, geographic, and geologic status. *See* 43 U.S.C. § 1344(a)(2)(A). Its coastal and marine ecosystems are dominated by seasonal sea ice; its terrestrial areas influenced by permafrost. These ecosystems and all of the ecological services they provide cannot be replaced once they have melted away. The uniqueness, extreme productivity, and fragility of Alaska’s ecosystems render the area far more ecologically sensitive than other areas. (*See, e.g.*, AR 6070-73 (summarizing Arctic impacts).) Although the Arctic has experienced warming at twice the rate of the rest of the world and is

“extremely vulnerable to observed and projected climate change and its impacts” (AR 6072), the Secretary ignored the heightened ecological sensitivity of the Arctic in developing the Leasing Program. The Program’s sensitivity analysis only looked at shoreline sensitivity to oil spills, omitting any discussion of how oil and gas activities might exacerbate the relative present and future global warming stresses in OCS area. (AR 24958-61.) Indeed, nowhere in the Leasing Program itself does the Secretary even acknowledge global warming or its impacts. (AR 24865-979.) By failing to account for the disparate impacts of global warming on OCS planning areas in developing the Leasing Program, the Secretary fell short of his obligations under section 18(a)(2) of OCSLA.

In addition, the Secretary’s failure to account for the future impacts of global warming precluded a legitimate consideration of the “relevant environmental and predicative information for different areas of the outer Continental Shelf” as required under section 18(a)(2)(H). The Program omits any discussion of the present and future effects of global warming on the environment of the OCS areas. (AR 24865- 24979.) While the EIS acknowledges the present and projected future impact of global warming to OCS areas (AR 13192-98), it simultaneously refused to actually factor in future impacts into its environmental analysis on the specious grounds that “responses of the ecosystems to climate change are unpredictable.” (AR 13888.) As discussed in § I.A., *infra*, all climate models predict that the

Arctic will suffer additional warming. By turning a blind eye to the best available science on future global warming impacts to OCS areas, the Program failed to account for “relevant environmental and predictive information” as required under section 18(a)(2)(H).

“[T]he factors specified in section 18(a)(2) are of such a nature that, practically, they can be fully analyzed only at the program stage.” *Watt I*, 668 F.2d at 1306. It is only at the programmatic stage that the Secretary can holistically compare the various OCS regions and determine which of those regions should be subject to oil and gas exploration. In making this determination, the Secretary is required to “make a good faith determination of the relative environmental sensitivity and marine productivity of the various regions based upon the best ‘existing information’ available to him.” *Id.* at 1313.

This Court has made clear that Secretary may not elude his duties under section 18(a)(2) by claiming that global warming impacts are “too speculative” to factor into his decision or by deferring their consideration to a later stage.

We fully recognize that at the leasing program stage, much of the information culled from an assessment of the section 18(a)(2) factors may be predictive or speculative in nature. This does not mean, however, that consideration of any particular factor may be deferred until some later date.

Watt I, 668 F.2d at 1307. While the “speculative nature” of some information may affect the weight accorded to it by the Secretary, “section 18(a)(2) nonetheless

requires the Secretary at the program stage to consider, each factor listed therein on the basis of the best information available, and to base the leasing program upon the information thereby obtained.” *Id. See also id.* at 1313. The Secretary had sufficient information to analyze potential Program impacts to specific areas in the context of global warming. The Secretary was obligated to take the best available information into account *and* base his decisions on it regardless of some degree of uncertainty regarding the exact level of predicted warming or the exact nature of its impacts. The Secretary fell far short of that duty.

Unlike *California v. Watt*, 712 F.2d 584, 596 (D.C. Cir. 1983) (“*Watt II*”), this is not a case where the Secretary has properly deferred consideration of site specific impacts like local oil discharges until later stages of the OCSLA process. Rather, the impacts the Secretary has chosen not to consider at this “most general stage of the offshore leasing process” are precisely the sort that the *Watt II* court found most essential to consider – that is, “the impact having the largest and most wide-spread effect on the environment.” *Id.*³

³ In addition, Interior Department Secretarial Order 3226 explicitly requires consideration of such impacts at the programmatic level such as with the adoption of the Leasing Program: “Each bureau and office of the Department will consider and analyze potential climate change impacts when undertaking long-range planning exercises...when developing multi-year management plans, and/or when making major decisions regarding the potential utilization of resources under the Department’s purview. Departmental activities covered by this Order include, but are not limited to, programmatic and long-term environmental reviews undertaken by the Department, management plans and activities developed for public lands,

Existing information is clear that global warming is and will continue to impact all areas of the OCS and that the Arctic is and will continue to be impacted with disproportionate severity. (*See, e.g.,* AR 6059-6187.) By making a determination on the size, timing, and location of oil and gas exploration in the OCS without considering global warming and its relative effects on the various OCS regions, the Secretary ran afoul of section 18(a)(2).⁴

B. The Secretary Violated Section 18(a)(1) and (a)(3) of OCSLA by Failing to Account for the Cost of the Billions of Tons of Greenhouse Gas Emissions Released into the Atmosphere as a Result of the Program’s Extraction of Fossil Fuels from the OCS.

The Leasing Program also falls far short of OCSLA requirements because it completely ignored the substantial costs associated with the Program’s greenhouse gas emissions and their contribution to climate change. OCSLA section 18(a)(3) requires that the Secretary “make a good-faith effort to balance environmental and economic interests.” *Watt I*, 668 F.2d at 1317. The Secretary has read section 18(a)(3) to call for a cost-benefit analysis, an interpretation endorsed by the D.C. Circuit. *Natural Res. Def. Council*, 865 F.2d at 306; *Watt I*, 668 F.2d at 1318. While the Secretary retains discretion to choose a reasonable method of cost-

planning and management activities associated with oil, gas and mineral development.” Dept. Interior, Secretarial Order 3226 (Jan. 19, 2001).

⁴ Moreover, the failure to base the Leasing Program upon a consideration of the factors required by section 18(a)(2) precludes the proper balance between the costs of environmental damage and potential benefits of oil and gas discovery under section 18(a)(3). *Watt I*, 668 F.2d at 1318.

benefit analysis, OCSLA requires that he account for all environmental and social costs and, where existing information permits, quantify those costs for inclusion in the cost-benefit analysis. Thus, in *Watt I* the Court found that the Secretary's failure to quantify impacts from oil spills violated OCSLA, where those environmental costs were "not inherently insusceptible of quantitative analysis." *Watt I*, 668 F.2d at 1319. Even costs that are not quantifiable must nonetheless be factored into the Secretary's determination of the proper balance between the Program's costs and benefits:

The 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 measurement. Because of this, they must be considered in qualitative as well as quantitative terms.

Watt I, 668 F.2d at 1317; *see also Watt II*, 712 F.2d at 603 (upholding 18(a)(3) analysis where Secretary did not quantify all costs but qualitatively considered "costs which he determined could not be quantified" after performing a cost-benefit analysis using quantifiable costs).

The general presumption employed in selecting areas to include in the Leasing Program is that "an area should be included on the schedule if the expected net social value is positive, *i.e.*, if the anticipated benefits of oil and gas activities in that area exceed the expected costs." *Natural Res. Def. Council*, 865 F.2d at 306. The Secretary's omission of the substantial social and environmental

costs associated with the Program's greenhouse gas emissions prevented him from obtaining anything close to an accurate estimate of net social value, and thus an appropriate balance between the costs and benefits of the Program

Here, the record before the Secretary provided ample data to enable a quantitative analysis of the costs associated with the Leasing Program's enormous greenhouse gas emissions. *Compare Watt II*, 712 F.2d at 603 (upholding Secretary's decision to consider costs of smaller oil spills in a qualitative manner because the record before the Secretary "contained very little reliable evidence on which the calculation could be based."). For example, a comprehensive study by Watkiss et al. (2005) estimates that carbon dioxide emissions in 2010 will come at a minimum price of \$73 per tonne carbon; the actual cost of these emissions could be as much as \$293 per tonne carbon. (AR 7736-37 (CBD comments); AR 7690 (Watkiss et al. 2005).) Another report by Stern et al. (2005) estimated the cost of carbon dioxide emissions at \$85 per tonne carbon. (AR 7324.) The Stern report and others emphasized that the economic cost of carbon emissions will continue to escalate unless emissions are quickly reduced since additional emissions commit the climate to more warming and therefore more devastating environmental and social impacts. (AR 7324-25; *see also* AR 7166-72 (risks associated with increased warming); AR 7608 (models used to estimate cost of emissions show

sharp increase in cost for future emissions); AR 7690 (showing that emissions in 2050 carry nearly triple the cost of emissions in 2000).)

While the Secretary acknowledged that economic studies provide estimates of the cost of greenhouse gas emissions, he brushed aside those estimates as “too tentative to use in an analysis.” (AR 13891.) However, OCSLA requires the Secretary use the best available information even where cost figures cannot be determined with absolute certainty. *See Watt I*, 668 F.2d at 1319 (noting that estimates of potential oil and gas production “are necessarily speculative to a considerable degree” and holding that failure to quantify oil spill impacts that also required some speculation violated OCSLA). Indeed, there is nothing “tentative” about the finding of numerous studies that greenhouse gases have an economic cost. In a similar context, the Ninth Circuit held that the NHTSA acted arbitrary in assigning a zero value to carbon dioxide emissions where plaintiffs showed that “the scientifically-supported range of values” did not start at zero. *See Ctr. for Biological Diversity*, 508 F.3d at 533 (“while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero.”). Like the economic data on the value of carbon dioxide presented to NHTSA, the administrative record presents a positive range of estimated costs associated with carbon dioxide. Moreover, there is nothing in the record that assigns a zero cost to carbon. Accordingly, the Secretary was required to exercise his discretion to select

a positive value for carbon dioxide emissions. Instead, he made the arbitrary and capricious decision to ignore its cost altogether.

The Secretary's failure to account for the economic cost of the carbon is exacerbated by the simultaneous assignment of admittedly speculative estimates of oil and gas production to quantify potential benefits of the Program. For example, with regard to oil and gas development in Alaska, the Secretary readily assumed quantified benefits associated with "fully dedicated efforts in frontier areas as opposed to those that might result from more conservative ventures" even while admitting that "actual future benefits depend far more on the decisions of a handful of companies to be pioneers or to abandon plans for exploration or development." (AR 24954.) The Secretary's disingenuous decision to arbitrarily monetize uncertain benefits while wholly ignoring quantifiable costs renders the Program invalid. *See Ctr. for Biological Diversity*, 508 F.3d at 534-35 (NHTSA's refusal to monetize the benefits of emission reductions associated with a more stringent corporate average fuel economy standard while simultaneously monetizing uncertain benefits from the rule was arbitrary and capricious).

The Secretary's belief that the economic cost of the greenhouse gases generated by the Program cannot be assessed because "one cannot really estimate such economic impacts from a single program as one can attempt this only in a cumulative context" is also without merit. (AR 13891.) Economists routinely

assign a cost of carbon on a per ton basis. The “cumulative context” is irrelevant for the purposes of this analysis. (*See, e.g.* AR 7324, 7690.) The Secretary had before him discrete estimates of how much oil and gas will be produced under the Leasing Program and from there could have calculated the tons of carbon dioxide generated from the combustion of these fuels and assigned a per ton cost to these emissions.

The arbitrariness of the Secretary’s decision to ignore the economic cost of the greenhouse gases generated by the Program is compounded by the failure to explain the basis for this decision in anything but the most cursory and conclusive terms. The Secretary does not offer any explanation for why he was allegedly unable to undertake an analysis of the costs associated with the Leasing Program’s greenhouse gas emissions or support his assertion that the economic costs of greenhouse gas emissions can only be analyzed in some unspecified “cumulative” context. By failing to adequately explain the assumptions and decisions underlying a cost-benefit methodology and ensure that it accounts for all costs and benefits rather than a select subset, the Secretary violated OCSLA. *Watt I*, 668 F.2d at 1320-21 (finding that the Secretary failed to adequately explain his determination of net economic value, especially economic effects of delaying leasing); *Watt II*, 712 F.2d at 600 (upholding cost-benefit analysis where Secretary undisputedly explained methodology).

The need for environmentally sound, properly balanced energy decisions has never been more urgent. By ignoring the economic and social costs associated with greenhouse gas emissions resulting from the Program, Interior effectively inflated the value of non-renewable OCS oil and gas resources.⁵ Such uninformed decision-making is anathema to the purpose to section 18(a), which was designed to ensure that competing values were fully considered and properly balanced before the timing, location, and scope of lease sales were selected. The fact that limiting domestic oil and gas consumption may not by itself eliminate fossil fuel consumption does not excuse Interior from giving due consideration to the greenhouse gas emissions from consumption of OCS oil and gas produced under the Leasing Program. Indeed, OCSLA's legislative history demonstrates that Congress expected the proper balance to shift away from intensive extraction of oil and gas. In 1978, when OCSLA section 18(a) was enacted, Congress sought to promote "orderly and efficient exploitation" of "almost untapped domestic oil and gas resources." Continental Shelf Lands Act, Pub. L. No. 95-372, 3 U.S.C.C.A.N.

⁵ Reflecting the nation's shifting needs, Congress amended OCSLA in August 2005 via the Energy Policy Act, to provide Interior with the authority to develop renewable energy such as wind, wave, and solar in the OCS. (AR 13779); Energy Policy Act, P.L. 109-58, 119 Stat. 594 (Aug. 8, 2005), codified at 43 U.S.C. §1337(p)(1)(C). Arbitrarily failing to assign a cost to the carbon generated by extracted non-renewable resources from the OCS precludes an accurate assessment of the relative costs and benefits of the renewable and nonrenewable energy available in the OCS.

1450, 1460 (1978). Congress recognized that this was more a stop-gap measure than a long-term solution to the nation's energy needs:

Development of our OCS resources will afford us needed time – as much as a generation – within which to develop alternative sources of energy before the inevitable exhaustion of the world's traditional supply of fossil fuels. It will provide time to bring on-line, and improve energy technologies dealing with, solar, geothermal, oil shale, coal gasification and liquefaction, nuclear, and other energy forms.

Id. Indeed, this Court has also recognized that “[t]he weight of [OCSLA section 18(a)] elements may well shift with changes in technology, in environment, and in the nation's energy needs, meaning that 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. The Secretary's unsupported dismissal of the costs arising from the Program's carbon dioxide emissions in no way represents a good-faith effort to achieve “a proper balance” between the Program's costs and benefits. Rather, it represents an arbitrary decision to tip the scale towards prolonging our dependence on fossil fuels and disregarding the grave environmental threats posed by global warming.

III. Interior Violated Section 7 of the ESA by Failing to Consult on the Program's Impacts on Threatened and Endangered Species.

While the violations of NEPA and OCSLA associated with the approval of the Leasing Program concern *how* Interior purported to carry out its obligations

under those statutes, its violations of the Endangered Species Act are even more plain: Interior simply refused to engage in *any* consultation on the impacts of the Program on threatened and endangered species as required under the statute. This is patently unlawful and cannot be allowed to stand.

The mandate of Section 7 of the ESA is unequivocal:

Each Federal agency shall, in consultation with [the Services], 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 or result in the destruction or adverse modification of habitat of such species which is determined...to be critical.

16 U.S.C. § 1536(a)(2) (emphasis added). As the Supreme Court has stated, this provision “admits of no exception.” *Tenn. Valley Auth.*, 437 U.S. at 173. Nevertheless, despite overwhelming evidence in the record, including statements in the FEIS and final Leasing Program itself, that the Program will adversely affect numerous listed species, Interior arbitrarily and unlawfully declared Section 7 inapplicable to the Leasing Program, asserting that it would comply with Section 7 only at later stages in the OCSLA process. This is not enough.

It is imperative that Interior consult at the Leasing Program stage because this is the only time that consultation can address the *cumulative nationwide* impacts of all the lease sales under the Leasing Program on threatened and endangered species *before* those impacts are set in motion through separate lease sales. Interior’s failure to consult vitiates a core purpose of the ESA – protecting

threatened and endangered species from federal actions that might otherwise drive them toward extinction – and does so at the stage in Program activities where Interior has the greatest ability to prevent harm.

To prevail on a Section 7 claim, Petitioners need only show that the action at issue is an “agency action”, that action “may affect” listed species, and no consultation has occurred. *See, e.g. Am. Bird Conservancy*, 516 F.3d at 1034; *Fla. Key Deer*, 522 F.3d 1133, ___, 2008 U.S. App. LEXIS 6850 at *23.

A. The Leasing Program Is an “Agency Action” Under the ESA.

Interior’s assertion that it does not need to consult under the ESA because the “program does not fit the definition of a Federal action” (AR 12868) is flatly contradicted by the plain language of the ESA and its regulations. By its terms, section 7(a)(2) applies to “any action authorized, funded, or carried out” by the agency at issue. 16 U.S.C. § 1536(a)(2) (emphasis added). ESA regulations in turn define “agency action” to mean “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). This Court need look no further than the language of these regulations to conclude the obvious: the Leasing Program fits within the category of “all programs of any kind.”

Courts have repeatedly held that the ESA requires that “agency action” be interpreted expansively to cover every possible action. *See, e.g., North Slope*

Borough v. Andrus, 486 F. Supp. 332, 351 (D.D.C. 1980) (citing *Tenn. Valley Auth.*, 437 U.S. 153 (1978)), *rev'd on other grounds North Slope Borough v. Andrus*, 642 F.2d 589, 607-08 (D.C. Cir. 1980); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003).⁶

That the Leasing Program is a programmatic document rather than a more limited site-specific action does not change this result. Courts have repeatedly found that the approval of programs setting criteria and guidelines for the harvesting of resources within threatened or endangered species' habitat constitutes "agency action" under the ESA. *Lane County Audubon Soc'y*, 958 F.2d at 294; *Pacific Rivers Council*, 30 F.3d at 1051-52 (holding that programmatic documents

⁶ Only one limited circumstance excuses an action agency from its section 7(a)(2) consultation duties – that is, when an agency lacks discretion to consider impacts on listed species. *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2533-34 (2007). The ESA's implementing regulations interpret Section 7's consultation requirements to apply "to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added); *see also Turtle Island Restoration Network, v. Nat'l Marine Fisheries Serv.*, 340 F.3d at 974 (finding that the ESA's consultation requirement attaches whenever an agency has discretion to inure to the benefit of a protected species). This narrow exception in no way applies to Interior's approval of the Leasing Program. OCSLA specifically *requires* that Interior consider the Program's impacts on the environment. 43 U.S.C. § 1344(a)(1)-(3) (requiring consideration and balancing of impacts to ecosystems and environmental values). These provisions give Interior ample discretion to consider threatened and endangered species and their habitats. *See Fla. Key Deer*, 522 F.3d 1133, ___, 2008 U.S. App. LEXIS 6850 at *20 (statute authorizing National Flood Insurance Program allowed agency to consider land management, including threatened and endangered species, and therefore mandated compliance with ESA's section 7(a)(2)).

that set out guidelines for resource management such as identifying lands for timber sales, allowable harvest targets, and schedules for timber production are agency action requiring ESA consultation). For example, in *Lane County Audubon Society*, 958 F.2d at 294, the Ninth Circuit held that the “Jamison Strategy,” an interim timber management program, was “‘without a doubt’...an agency action ‘authorized, funded or carried out by the [agency]’” requiring ESA consultation because it set timber management standards and outlined the criteria used to develop multi-year timber sales.

Similarly, the Leasing Program sets forth the schedule of proposed lease sales for 2007-2012 as well as the size, timing, and location of OCS oil and gas activity. In doing so, the Program establishes the criteria and guidelines for upwards of 30 years of offshore oil and gas development nationwide. The Program, as approved, will set in motion lease sales, exploratory activities, construction and development of oil and gas wells and infrastructure, for the estimated extraction of 10 billion barrels of oil and 45 trillion cubic feet of gas. In short, the Leasing Program is a textbook example of an “agency action” under the ESA. 50 C.F.R. § 402.02.⁷

⁷ Interior prepared an EIS under NEPA for the Leasing Program. If the Program meets the NEPA threshold for a major federal action, then it certainly meets the ESA threshold for agency action, which is more broadly defined. *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

B. The Leasing Program “May Affect” Listed Species.

ESA regulations require that if an activity or program “may affect” listed species or critical habitat, “an agency must initiate formal consultation with the Service[s].” *In re: Am. Rivers*, 372 F.3d 413, 415 (D.C. Cir. 2004); 50 C.F.R. § 402.14(a), (c); *Am. Bird Conservancy*, 516 F.3d at 1034. Interior’s own Program EIS unequivocally shows that the Program will have serious adverse impacts on numerous threatened and endangered species and their critical habitats.

The threats described in the Final EIS are many. Throughout all program areas, noise from seismic surveys, construction, and vessel and air traffic may injure or disturb whales and other marine mammals. (*See e.g.*, AR 13231-33, 13306-11, 13320-21, 13327-28, 13463-64, 13483, 13589, 13644.) Collisions with vessels may also cause injury or death for whales, manatees, and sea turtles. (AR 13234-35, 13256, 13315-16, 13323, 13329-30, 13465 , 13483-84, 13645, 13697.) Oil spills are a serious threat to listed species that may become oiled or ingest toxins—sea otters and seabirds are particularly at risk from oil spills. (AR 13236-37, 13259-61, 13316-18, 13330-31, 13474, 13587, 13590, 13643, 13647, 13650, 13654, 13699.) Some critically imperiled species, such as the North Pacific right whale, may suffer population level effects from any adverse interactions with oil

federal action’ is the more exclusive standard”); *Fla. Key Deer*, 2008 U.S. App. LEXIS 6850, *23-24 (determining when agency action requires section 7(a)(2) consultation is materially indistinguishable from NEPA framework).

and gas activities. (AR 13648.) Interior’s specific admissions that the Program “may affect” ESA-listed species make it quite clear that Interior should have initiated formal consultation, and all the more egregious that it chose not to do so.⁸

C. The Program Triggered Interior’s Duty to Consult and Interior Is in Violation of Section 7 of the ESA.

As the above demonstrated, the Leasing Program is an “agency action”, and that action “may affect” listed species. That is the end of the matter; Interior’s obligations under the ESA are plain and no “policy” or “practicality” excuses Interior may offer change this essential fact.

Interior’s assertion that “ESA Section 7 consultation (whether informal or formal) at the 5-year program level is premature” (AR 12868), simply is not a valid legal excuse. As noted above, Section 7 “admits of no exception.” *Tenn. Valley Auth.*, 437 U.S. at 173. By using the word the word “shall”, Congress clearly communicated that Section 7 consultation is a mandatory duty. *Bennett v. Spear*, 520 U.S. at 172 (use of “shall” creates a “categorical requirement”); *Nat’l Ass’n of Homebuilders*, 127 S. Ct. at 2532 (language of Section 7(a)(2) is “imperative”).

⁸ Additionally, some listed species such as bowhead whales and spectacled eiders migrate through different lease sale areas and may be affected by activities in more than one area, making consultation at the Program level rather than just the lease sale level all the more important. (*See, e.g.*, AR 13026-28, 13046-47, 13053.)

Interior may wish that Congress used the word “may” instead of “shall”, but it did not. *Tenn. Valley Auth.*, 437 U.S. at 173 (“One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.”).

Moreover, Interior’s excuse that consultation is “premature” directly contradicts the ESA’s requirement that Interior determine “at the earliest possible time,” whether the Program “may affect” any listed species or critical habitat; and initiate formal consultation. 50 C.F.R. § 402.14(a). The broad application of the ESA’s consultation duty is best understood in light of its policy of “institutionalized caution.” *Tenn. Valley Auth.*, 437 U.S. at 194. Careful review at the earliest stage is particularly critical in the OCSLA context because the Program determines the scope of the nation’s offshore oil and gas activities and provides the *only* opportunity to discern the true *overall* impacts of those activities on species’ populations and habitats across the nation.

Future consultations at later stages of the OCSLA process, though mandatory, cannot substitute for this most basic look at whether the entire suite of Program activities will jeopardize listed species or destroy or adversely modify their critical habitat. The ESA’s implementing regulations specifically allow for consultation to occur in incremental steps only if “[t]he Federal agency continues

consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step.” 50 C.F.R. § 402.14(k)(emphasis added).

Consultation is the fundamental mechanism by which federal agencies fulfill their duties under the ESA to avoid jeopardy to species and adverse modification to critical habitat. For that reason, the ESA’s consultation duty is both a procedural and a substantive mandate, and must be strictly enforced because the “procedural requirements are designed to ensure compliance with the substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 763-64 (9th Cir. 1985).

The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond doubt” that “Congress intended endangered species to be afforded the highest of priorities.” *Tenn. Valley Auth.*, 437 U.S. at 174. Interior’s failure to consult on the Leasing Program’s effects on threatened and endangered species violates the clearest, most basic requirements of the ESA. Interior’s decision to throw aside its “highest of priorities” and proceed without ESA consultation is illegal, and must be set aside.

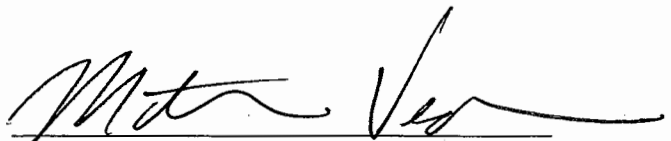
IV. Joinder of Claims Brought by Petitioner Native Village of Point Hope *et al.*

CBD hereby joins in all claims brought by petitioners Native Village of Point Hope et al.

CONCLUSION AND RELIEF REQUESTED

For all of the above reasons, CBD respectfully requests that this Court find that Interior's approval of the 2007-2012 Leasing Program was arbitrary and capricious, and otherwise unlawful, in violation of OCSLA, NEPA, and the ESA. This Court should set aside and remand the Program for further consideration by Interior, so as to properly take into account both the greenhouse gas emissions directly and indirectly resulting from the Program, and the impacts of the Program in the context of global warming. Additionally, any further lease sales under the Program in the Alaska region should be deferred until and unless Interior has completed a revised final EIS consistent with NEPA, initiated and completed consultation on the impacts of the Program on threatened and endangered species under the ESA, and issued a revised final Program correcting the deficiencies raised by Petitioner in this brief.

Respectfully submitted this 21st day of May, 2008,



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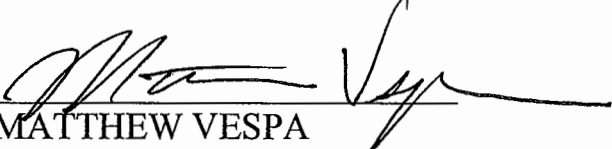
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Dated May 21, 2008


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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 21st day of May 2008, in San Francisco, CA.


Sabine Reynaud