

Nos. 07-1247, 07-1433
ORAL ARGUMENT SCHEDULED FOR OCTOBER 2, 2008

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

CENTER FOR BIOLOGICAL DIVERSITY,
Petitioner,
v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent,

AMERICAN PETROLEUM INSTITUTE,
Intervenor.

NATIVE VILLAGE OF POINT HOPE, *et al.*,
Petitioners,
v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent,

AMERICAN PETROLEUM INSTITUTE,
Intervenor.

ON PETITIONS FOR REVIEW OF FINAL DECISION BY
THE UNITED STATES DEPARTMENT OF THE INTERIOR

BRIEF FOR RESPONDENT

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

(A) Parties and Amici: Petitioners are: Native Village of Point Hope, Alaska Wilderness League, Pacific Environment, and Center for Biological Diversity. Respondent is the United States Department of the Interior.

This Court has granted the American Petroleum Institute leave to intervene, and has granted leave to participate as amici curiae to Oceana, Ocean Conservancy, The National Audubon Society, The Wilderness Society, Natural Resources Defense Council, W. Michael Hanemann and Charles Kolstad.

(B) Ruling Under Review: Petitioners seek review of the Notice of Availability of the Proposed 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2007-2012 and Final Environmental Impact Statement, 72 Fed. Reg. 24326 (May 2, 2007), and the Secretary of the Interior's Approval of the 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2007-2012 (June 29, 2007).

(C) Related Cases: This case has not been before this Court previously. Respondent is not aware of any related cases.

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GLOSSARY

AR	Administrative Record
ACIA	Arctic Climate Impact Assessment
CBD	Center for Biological Diversity (Petitioner) (referred to in this brief as “the Center”)
CEQ	Council on Environmental Quality
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESI	Environmental Sensitivity Index
ESP	Environmental Studies Program
IPCC	Intergovernmental Panel on Climate Change
MMS	Minerals Management Service
NEPA	National Environmental Policy Act
NHTSA	National Highway Transportation Safety Administration
NMFS	National Marine Fisheries Service (also known as NOAA Fisheries)
NOAA	National Oceanographic and Atmospheric Administration
NVPH	Native Village of Point Hope (Petitioner) (referred to in this brief as “Point Hope”)
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act

ORAL ARGUMENT SCHEDULED FOR OCTOBER 2, 2008

JURISDICTIONAL STATEMENT

Native Village of Point Hope *et al.*, and the Center for Biological Diversity filed timely petitions with this Court on August 28, 2007, and July 2, 2007, respectively, seeking judicial review of the Outer Continental Shelf Oil and Gas Leasing Program: 2007-2012. Petitioners allege violations of the Outer Continental Shelf Lands Act, the Endangered Species Act, and the National Environmental Policy Act. Jurisdiction is proper under 43 U.S.C. § 1349(c).

STATEMENT OF THE ISSUES

1. Whether the Department of the Interior's outer continental shelf leasing program document, which proposes a schedule for offshore lease sales that will be the subject of further study and environmental analysis, was based on adequate environmental information.

2. Whether Petitioners' challenges under the National Environmental Policy Act are ripe, and if so, whether the Department of the Interior's 1,400-page Environmental Impact Statement adequately describes the affected areas.

3. Whether either the Outer Continental Shelf Lands Act or the National Environmental Policy Act required Interior to consider the costs and impacts of carbon dioxide emissions associated with consuming offshore oil and gas.

4. Whether Interior reasonably relied upon a government database of coastline oil spill sensitivity to compare the environmental sensitivity of different leasing areas.

5. Whether a challenge under the Endangered Species Act is ripe at this time, and if so, whether Interior must consult pursuant to that Act before issuing a leasing program that does not affect any endangered species.

STATUTES AND REGULATIONS

Except for 43 U.S.C. §§ 1346 and 1802, and 40 C.F.R. §§ 1502.15, 1502.22, and 1502.28, which are presented in an addendum to this brief, all applicable statutes and regulations are contained in an addendum to the Brief for the Center for Biological Diversity.

INTRODUCTION

The Outer Continental Shelf Lands Act (OCSLA or “the Act”), 43 U.S.C. §§ 1341 *et seq.*, creates a procedural framework under which the Department of the Interior (“Interior”) leases offshore areas for oil and gas development to meet national energy needs. As a first step in the process, the OCSLA requires Interior to propose a schedule of leasing activity that will meet national energy needs for the five-year period following its approval. Interior presents the schedule in a planning document known as a “Five-Year Program.”

Petitioners are Native Village of Point Hope, Alaska Wilderness League and Pacific Environment (collectively “Point Hope”), and Center for Biological Diversity (“the Center”). Point Hope and the Center have filed independent petitions for review challenging the Secretary of the Interior’s approval of the Five-Year Program for the period from 2007 through 2012, officially titled the “Outer Continental Shelf Oil and Gas Leasing Program for 2007-2012.”

Point Hope contends that Interior based its new Five-Year Program on insufficient environmental data, thereby violating both the

OCSLA and the National Environmental Policy Act (NEPA). The Center contends that Interior violated those same statutes by failing to consider the sensitivity of Arctic areas to global warming and the warming-related impacts of consuming oil and gas produced from continental shelf areas. The Center adds that, under the Endangered Species Act (ESA), Interior should have consulted with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (“Fish and Wildlife”) before issuing the Five-Year Program.

STATEMENT OF FACTS

A. The Outer Continental Shelf Lands Act

The OCSLA, as amended in 1978 and 1988, establishes federal jurisdiction over submerged lands, generally starting three miles from State coastlines. 43 U.S.C. §§ 1331 *et seq.* The Act also creates “policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf” that are intended to result in “expedited exploration and development” of those resources consistent with energy, security, economic, and environmental goals. 43 U.S.C. § 1802; *see generally California v. Watt*, 668 F.2d 1290, 1295-1300 (D.C.

Cir. 1981) (*Watt I*). The Secretary of the Interior has delegated his responsibility for administering offshore leasing programs to the Minerals Management Service (MMS).¹

Under the OCSLA, there are “four distinct statutory stages to developing an offshore oil well: (1) formulation of a five year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and production.” *Secretary of the Interior v. California*, 464 U.S. 312, 337 (1984) (hereafter “*Interior v. California*”). This process is “pyramidic in structure, proceeding from broad-based planning to increasingly narrower focus as actual development grows more imminent.” *Watt I*, 668 F.2d at 1297. Congress established this stepwise approach “to forestall premature litigation regarding adverse environmental effects that . . . will flow, if at all, only from the latter stages of OCS exploration and production.” *Interior v. California*, 464 U.S. at 341; *see also* H.R. Rep. No. 95-590, p. 164 (1977) (the Act was designed to avoid “extensive litigation prior to lease sales, when onshore and environmental impacts of production

¹ To reduce the use of acronyms, this brief refers to the actions of “Interior” generally instead of MMS wherever possible.

activity are not yet known”).

Petitioners challenge Interior’s latest Five-Year Program, the first of the four statutory steps that precedes offshore oil and gas development. A Five-Year 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.” 43 U.S.C. § 1344(a). The OCSLA requires Interior to consider several principles when preparing the schedule, including the “economic, social, and environmental value[]” of other offshore resources, and “the potential impact of oil and gas exploration” on those resources and the environment. *Id.* § 1344(a)(1). The Act also says that in proposing the “timing and location of exploration, development and production,” Interior must consider additional factors, including the five that follow:

“[E]xisting information concerning the geographical, geological, and ecological characteristics of such regions;”

“an equitable sharing of developmental benefits and environmental risks among the various regions;”

“the interest of potential oil and gas producers in the development of oil and gas resources as indicated by

exploration or nomination;”

“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.”

Id. §§ 1344(a)(2)(A, B, E, G, H). Interior also has to balance the potential for environmental damage and coastal impacts against the potential for discovering oil and gas. *Id.* § 1344(a)(3).

Five-Year Programs do not make any final decisions about where Interior will sell leases, who it will sell them to, or even whether it will sell them at all. In fact, a Program may list areas in its schedule that Interior does not even expect to lease. (For instance, the current Program includes areas off the Virginia coast that Congress has closed to leasing activity. AR 24875.) After issuing a Five-Year Program, Interior conducts review mandated by NEPA, ESA, and other statutes, and, based on its findings, auctions leases in selected areas to interested bidders. *See* 30 C.F.R. §§ 256.23(b), 256.26(a)-(c). Winning lessees “do[] not . . . acquire an immediate or absolute right to explore for, develop, or produce oil on the OCS.” *Interior v. California*, 464 U.S.

at 317; *see also Mobil Oil Exploration & Prod. Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (lease “amounts primarily to an opportunity to try to obtain exploration and development rights in accordance with [the Act]”). Instead, the leasing stage “provides the lessees and the Secretary with a chance to amass data which will inform future proposals and decisions.” *North Slope Borough v. Andrus*, 642 F.2d 589, 594 (D.C. Cir. 1980). That data helps lessees decide if there may be oil and gas deposits that merit further exploration, and allows Interior “to exercise informed judgment in balancing the dual public interests of protecting the environment and enhancing oil-production capacity.” *Id.*; *see also Interior v. California*, 464 U.S. at 337. After the leasing stage comes the exploration stage, in which lessees submit plans to do exploratory drilling in specified areas. And finally, at the development stage, lessees ask for authorization to commercially extract oil and gas resources.

This Court has described the OCSLA process as “a clear program for thoughtful, graduated, and tightly controlled development,” that allows “continuing review of all activity” growing out of leases. *North*

Slope Borough, 642 F.2d at 594. Interior “retains strict control of an outer continental shelf project for its duration, from lease sale to depleted, run-dry well,” *id.* at 609, and ensures compliance with environmental statutes through a series of “intricate constraints imposed by Congress and the Secretary,” *id.* at 594; *see also Village of False Pass v. Clark*, 733 F.2d 605, 615 (9th Cir. 1984) (citing relevant regulations).

B. The National Environmental Policy Act

NEPA requires federal agencies to prepare a detailed statement on the environmental impact of “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C.

§ 4332(2)(C). The resulting Environmental Impact Statement, or “EIS,” must describe “any adverse environmental effects which cannot be avoided” and “rigorously explore and objectively evaluate” any reasonable alternatives that would minimize the adverse impacts or improve the environment. *Id.*; *see also* 40 C.F.R. §§ 1502.1, 1502.14; *Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006). NEPA’s mandate is procedural; it is designed to “insure a fully informed and

well-considered decision,” not produce any particular outcome.

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978); *see also American Bird Conservancy v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008).

When an agency enacts national policies or procedures that it later carries out through localized activities, NEPA regulations encourage a “tiered” approach. *See* 40 C.F.R. § 1508.28. Under that approach, the agency produces a “programmatic” EIS to address general environmental consequences of the program and later site-specific EISs that incorporate the programmatic EIS by reference and add discussions of locally relevant impacts. *See generally Nevada v. Department of Energy*, 457 F.3d 78, 91 (D.C. Cir. 2006). In the offshore leasing context, Interior prepares a programmatic EIS not only to support later site-specific EISs, but also as a means of satisfying its analytical duties under the OCSLA.

C. The Endangered Species Act

Congress enacted the Endangered Species Act as a means of preventing the extinction of imperiled species. *Tennessee Valley*

Authority v. Hill, 437 U.S. 153, 184 (1978). Section 7 of the ESA, codified at 16 U.S.C. § 1536, requires each federal agency, “in consultation with” Fish and Wildlife or NMFS² to “insure that any action authorized, funded, or carried out” by the 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 designated critical habitat. 16 U.S.C. 1536(a)(2). Under ESA regulations, if a regulated agency determines that an action will not affect any listed species or critical habitat, that action does not trigger the consultation requirements. *Southwest Center for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996). But if the regulated agency concludes that its action “may affect” a listed species, it has to pursue either informal or formal consultation with NMFS or Fish and Wildlife, as appropriate. 50 C.F.R. 402.13, 402.14.

If the regulated agency and the administering agency agree after informal consultation that the action “is not likely to adversely affect”

² Fish and Wildlife and NMFS have joint responsibility for administering the Act. Generally, Fish and Wildlife has jurisdiction over terrestrial species and NMFS over marine species.

the listed species or critical habitat, the consultation process ends. 50 C.F.R. §§ 402.13; 402.14(b)(1). But if either agency concludes otherwise, they both have to engage in formal consultation. 50 C.F.R. 402.13(a), 402.14(a)–(b). The formal process starts when the regulated agency makes a written request for consultation and ends when NMFS or Fish and Wildlife issues a “biological opinion.” 16 U.S.C. 1536(a)(2), (b)(3); 50 C.F.R. 402.14. The biological opinion assesses the likelihood of jeopardy to the species and whether the proposed action will destroy or adversely modify any critical habitat. 50 C.F.R. § 402.14(g); *see also In re: American Rivers and Idaho Rivers United*, 372 F.3d 413, 415 (D.C. Cir. 2004).

D. Factual Background and Procedural History

This case concerns the seventh Five-Year Program that Interior has prepared under the OCSLA. AR 24865. The Program schedules 21 potential lease sales between July 1, 2007, and June 30, 2012, in eight areas: four off the Alaska coast, one off the Atlantic coast and three in the Gulf of Mexico. AR 24872. Potential leasing areas in Alaska include the Beaufort and Chukchi Seas, which lie on the north coast of

the state, and the Bering Sea, within which is the North Aleutian Basin Planning Area. *See* AR 24877 (map).

Interior started developing the Five-Year Program on August 24, 2005, by publishing a request for relevant information in the Federal Register. 70 Fed. Reg. 49,669. Interior then developed a “Draft Proposed Plan,” which it also published. 71 Fed. Reg. 7064 (Feb. 10, 2006). After reviewing further commentary, Interior published a “Proposed Plan” on August 24, 2006, along with an accompanying draft EIS, AR 1337. Then, after still more review, Interior published “Proposed Final Plan” in April 2007, AR 24865, along with a 1,400-page Final EIS, AR 12833-14312. Interior submitted the Proposed Final Plan to Congress and the President as required by law, 43 U.S.C. § 1344(d)(2), and, after the specified sixty-day period, the Secretary approved it. *See generally* AR 24879-24880.

The current Five-Year Program, like its predecessors, does not itself authorize any lease sales, exploration, or development. In fact, the Program does not authorize *any* activity that could impact the environment in proposed leasing areas. Although the Program

schedules lease sales, those sales cannot happen without ESA consultation and NEPA documentation.³ Similarly, Interior will not authorize exploration or production without more study and environmental analysis, and its authorization will be subject to judicial review.

Petitioners filed timely petitions for review raising claims under the OCSLA, ESA, and NEPA. The Court consolidated the two petitions on September 14, 2007.

STANDARDS OF REVIEW

This Court uses a “hybrid standard of review” when examining a Five-Year Program for compliance with the OCSLA. *Watt I*, 668 F.2d at 1300. To review factual findings, the Court applies the substantial evidence test, *id.* at 1302; 43 U.S.C. § 1349(c)(6), which requires that

³ Interior has held four of the lease sales proposed in the 2007-2012 Program, but not before complying with the ESA and NEPA. For example, prior to holding Lease Sale 193 in the Chukchi Sea, Interior prepared an EIS and obtained biological opinions under the ESA. These documents can be found at http://www.mms.gov/alaska/ref/EIS%20EA/Chukchi_FEIS_193/feis_193.htm and http://www.mms.gov/alaska/ref/Biological_opinions_evaluations.htm. Point Hope and other plaintiffs have also challenged Sale 193 in *Native Village of Point Hope v. Kempthorne*, No. 08-0004 (D. Alaska).

the findings be supported by “more than a scintilla, but . . . less than a preponderance of the evidence.” *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002). When reviewing “policy judgments,” the Court only decides whether “the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Watt I*, 668 F.2d at 1302. And when reviewing the Secretary’s interpretation of ambiguous language in the OCSLA, this Court defers to any “permissible construction of the statute” advanced by Interior. *Id.* at 1302-1303.

This Court reviews the adequacy of an EIS under the APA’s arbitrary and capricious standard. 5 U.S.C. § 706; *Nevada v. Department of Energy*, 457 F.3d 78, 87-88 (D.C. Cir. 2006); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989). As long as Interior’s Five-Year Program development was “fully informed” by the EIS and “well-considered,” it must be sustained. *North Slope Borough*, 642 F.2d at 599.

SUMMARY OF ARGUMENT

Congress designed the multi-stage process of the Outer Continental Shelf Lands Act “to forestall premature litigation” against the Department of Interior at early planning stages. *Interior v. California*, 464 U.S. at 341. Point Hope ignores that design to demand that Interior produce detailed biological surveys of offshore oil-bearing areas before scheduling any further review of those areas. The Center, meanwhile, argues that although Congress told Interior to make offshore oil and gas available to American consumers “as rapidly as possible,” it simultaneously expected Interior to second-guess that mandate in light of the threat of global warming. These arguments disregard the text and purpose of the OCSLA.

1. Point Hope claims that Interior did not complete enough baseline biological research before issuing its Five-Year Program. But the OCSLA says that Interior must gather scientific data about offshore areas before making *leasing, exploration, and development* decisions. The Act does not require Interior to gather such information before including an area in a Five-Year Program. And in any event,

Interior reviewed and discussed a tremendous amount of scientific information in the Environmental Impact Statement it produced along with its most recent Program.

Point Hope also challenges Interior’s EIS under NEPA. But the Five-Year Program does not create any legal rights or authorize any activity. So it is not until the leasing stage—at the earliest—that any NEPA challenge would become ripe. And even if it were ripe, Point Hope’s NEPA claim fails on the merits. The EIS “succinctly describes” affected areas as necessary to understand action alternatives.

2. The Center suggests that in deciding when and where offshore leasing should happen under the OCSLA, Interior must factor in the “full-cycle” costs of consuming offshore oil and gas. But what the OCSLA really says is that Interior has to balance the costs of *producing* offshore oil against its overall benefits. The Act does not allow—let alone require—Interior to limit offshore oil production because of generalized climate change concerns. And assuming the time were ripe for the Center to challenge Interior’s EIS, that document did not have to evaluate consumption impacts either; NEPA does not require

agencies that only have authority to regulate the way a commodity resource is produced to examine the impacts of consuming the commodity.

3. The Center's Endangered Species Act claim is no more ripe than its NEPA challenge, and no more meritorious either. Interior did not have to consult with Fish and Wildlife or NMFS before issuing its Five-Year Program because the Program does not authorize, fund, or carry out any activity that could affect an endangered species.

ARGUMENT

I. THE FIVE-YEAR PROGRAM AND THE EIS ARE BASED ON AMPLE DATA FOR THIS STAGE OF THE OCSLA PROCESS.

As discussed above, Interior's Five-Year Program is only the first of several procedural steps that precede offshore oil and gas production. At the Program stage, Interior does not even decide whether to hold the lease sales it has scheduled, let alone whether to allow any exploration or production. It only determines what areas it will consider leasing over the next five years. *See Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 307 (D.C. Cir. 1988) (Interior "legitimately retains flexibility by including many areas at the program stage, subject to

deletion at a later stage”). Put another way, including an area in the Program is a necessary but not sufficient precondition to leasing; at the Program stage, all Interior can do is *exclude* areas from leasing. *Id.* at 308 (“An area excluded from the program cannot be leased.”). Point Hope therefore has no grounds for demanding that Interior close every conceivable “data gap” before moving on to the leasing-stage analysis.

A. Interior had ample basis for including the Bering, Chukchi, and Beaufort Seas in the Five-Year Program.

Point Hope argues that Interior violated the OCSLA by (1) including the Beaufort, Chukchi, and Bering Seas in the Five-Year Program without first developing comprehensive environmental “baseline” data, (2) failing to monitor previously leased areas, and (3) failing to set out a “research and monitoring plan” that will close alleged data gaps before the leasing stage. Br. 28. All three arguments are meritless.

1. The Program is based on adequate data: Point Hope misunderstands the OCSLA when it argues that Interior had to conduct comprehensive baseline research before developing its Five-Year Program. Nothing in the Act requires new research at the

Program stage. Instead, the Act requires Interior to “act on the basis of ‘existing information’” at the program stage, and to consider each factor listed in 43 U.S.C. § 1344(a)(2) “on the basis of the best information available.” *Watt I*, 668 F.2d at 1307 (quoting 43 U.S.C. § 1344(a)(2)(A)). As Interior explained in the record, Program-level documents “provide broad information and analyses that will serve as the starting point for more detailed environmental review” at later stages. AR 13789; *see also* AR 13793. This Court has accordingly recognized that it is the *leasing stage* that “provides the lessees and the Secretary with a chance to amass data which will inform future proposals and decisions.” *North Slope Borough*, 642 F.2d at 594.

In arguing that the Program is not based on enough research, Point Hope appears to rely on 43 U.S.C. § 1346, which requires Interior to conduct environmental studies in offshore areas. Br. 29. But that section only applies after the Secretary approves a Five-Year Program. For example, 43 U.S.C. § 1346(a)(1) requires studies of areas “included in any oil and gas *lease sale*.” Similarly, 43 U.S.C. § 1346(b) requires studies “*subsequent to* the leasing and developing of any area.”

(emphases added).

In any event, a review of the Final EIS (incorporated by reference in the Five-Year Program, AR 24975) shows that Interior discussed a tremendous amount of information about the geology, oceanography, biology, and sociology of the Chukchi, Beaufort and North Aleutian Basin areas. AR 12989-13131. The relevant analyses span more than 140 pages, covering topics ranging from water quality and current patterns, AR 13008-13016, to fisheries resources, AR 13127-13131, to wildlife populations, including over 25 species of marine mammals, AR 13026-13045, various marine and coastal birds, AR 13045-13063, and relevant land mammals, AR 13063-13070. Interior reviewed a dozen studies relevant to the “acoustic environment” of the Beaufort and Chukchi Seas alone. AR 13022-13024. Even a brief glance at these discussions confirms that Interior satisfied its obligation to consider “relevant environmental and predictive information” about the Beaufort, Chukchi, and North Aleutian Basin in developing its Five-Year Program. 43 U.S.C. § 1344(a)(2)(H).

Instead of pointing out studies or information that Interior failed

to consider, Point Hope complains about the gaps that inevitably exist in human knowledge about an area as remote, diverse, and enormous as the Alaskan coast. Br. 30-31. For example, Point Hope demands a “reliable estimate for the Chukchi/Bering Sea Stock of polar bears,” Br. 8 (quoting AR 13029), suggesting that it was not enough for Interior to cite studies estimating the overall Alaskan polar bear population, to note that there is “considerable overlap” between the Chukchi/Bering and Southern Beaufort populations, and to highlight the now-completed listing of the bear as a threatened species. AR 13028-13029. Similarly, Point Hope is not satisfied with Interior’s citation and discussion of ten studies describing the biology and distribution of the bowhead whale, and several more about the impacts offshore development has on the whale in other areas, AR 13026-13028, 13306-13310. It complains instead that Interior has not yet quantified the “amount of feeding [by bowhead whales] in the Chukchi Sea and Bering Sea in the fall.” Br. 9.

Accepting Point Hope’s arguments would turn development of a Five-Year Program into a Sisyphean task; no matter how much

knowledge Interior has about a given area, Point Hope could always demand more. This Court should recognize that by reviewing the best available knowledge regarding the Alaskan waters at issue, Interior satisfied its program-stage duty “to consider each factor listed [in §1344(a)(2)] on the basis of the best information available.” *Watt I*, 668 F.2d at 1307.

2. Interior has properly monitored leased areas: Point Hope also argues that Interior has not complied with its OCSLA’s monitoring obligations. *See* Br. 31 (citing 43 U.S.C. §1346(b)). But the Court lacks jurisdiction over that claim. Citizen suits “to compel compliance with” the OCSLA arise out of 43 U.S.C. § 1349(a)(1), and are properly brought in district court complaints, not petitions for review, *id.* § 1349(b)(1).

Even if Point Hope could challenge the adequacy of monitoring programs here, its claims ring hollow. First of all, Point Hope’s complaints about monitoring in the North Aleutian Basin (Br. 32) ignore the leasing history in that area. The North Aleutian Basin has not been included in the last three Five-Year Programs, and Interior is

not aware of any exploration or drilling in that area since 1985. There have not been any activities there for Interior to monitor.

With respect to the Beaufort and Chukchi Seas, Interior has spent tens of millions of dollars since 1975 to fund environmental research through its Environmental Studies Program. In just the last 15 years, that program has sponsored over eighty studies that have produced maps, circulation models, habitat information, and basic biological data for those two areas.⁴ And there are ongoing studies concerning everything from the effect of artificial lighting on animals of the Beaufort Sea⁵ to the distribution of fish species that live at the bottom of the Chukchi Sea.⁶

Instead of confronting these efforts, Point Hope weaves a monitoring claim out of isolated statements lifted from the record out of context. For example, Point Hope flags Interior's admission that "[f]ew

⁴ A list of completed studies is available at <http://www.mms.gov/alaska/ess/completedstudieslist/comp.pdf>. Many of the studies themselves are available at www.mms.gov/alaska/ref/AKPUBS.HTM.

⁵ http://www.mms.gov/alaska/ess/ongoing_studies/BIO_0410.pdf.

⁶ http://www.mms.gov/alaska/ess/ongoing_studies/BIO_934867.pdf.

studies exist on bowhead whales in the Chukchi Sea, with the last studies conducted in the 1990s,” Br. 32 (quoting AR 13028), but does not mention the accompanying explanation—since the mid-1990s, there have been no active leases in the Chukchi Sea. AR 13027. When oil leasing and exploration were taking place, the record shows that “the Interior funded large scale surveys [for bowhead whales] in this area.” *Id.*

3. Any challenge to research plans is premature: Next, Point Hope argues that Interior lacks any “discernable plan” to get the data it needs before the leasing stage. Br. 32-36. Point Hope contends, in essence, that the record does not prove that Interior can gather enough data in time to make adequate decisions about leasing, exploring and developing Alaskan waters. This argument is misplaced. If Point Hope wants to complain about the adequacy of data supporting a given lease sale, it can do so through a challenge to the relevant lease sale proposal under 43 U.S.C. § 1349(a). Point Hope knows this; in January, it filed suit to challenge a lease sale in Alaska. *See n. 3; see also False Pass*, 733 F.2d at 614 (unavailability of information should not halt

government action, especially where information may still become available and can still influence action).

More fundamentally, Point Hope cites no provision of the OCSLA that requires preparation of a “research plan.” Br. 34-35. It appears to believe that the requirement stems from 43 U.S.C. § 1344(b)(3), which requires Interior to estimate the appropriations and staff required to obtain information. But Point Hope does not argue that Interior failed to provide the necessary estimates. *See* AR 24979. Instead, it argues that the estimates do not provide a “basis for future planning,” Br. 34, do not advise decisionmakers on “whether or how to alter the program,” *id.*, and are not “useful to” decision makers who wish to “lessen . . . environmental impacts.” Br. 34 (citations omitted). But section 1344(b)(3) does not require appropriations estimates to do those things. Nor does the case law that Point Hope cites—as it concedes, Br. 35; the *North Slope Borough* plaintiffs brought a challenge later, at the *leasing* stage.

B. Point Hope’s NEPA challenge is unripe.

Point Hope reprises its informational complaints in the guise of a NEPA claim as well, arguing that the EIS Interior prepared for the Five-Year Program did not adequately describe the environments that might be affected. Br. 43-49. Again, Point Hope does not mention a single study that Interior failed to evaluate, or any alternative course the agency could not consider for lack of relevant information. Instead it demands “independent research” and further study of “baseline biological condition[s]” in potential leasing areas before letting Interior go on to later stages of the OCSLA process. Br. 44-45. The vagueness of these demands is just one of many signals that Point Hope’s NEPA claim is unripe.

The ripeness requirement exists, among other things, to prevent litigants from interfering with agencies until they finalize their decisions and take some action that affects parties in a tangible way. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Applying that requirement here shows that Point Hope’s NEPA claim is premature. Among other things, Five-Year Programs do not affect anyone or any

resource in a “concrete way.” *Id.* Instead, just like the challenge the Supreme Court dismissed as unripe in *Ohio Forestry Association, Inc. v. Sierra Club*, Point Hope’s attack comes at a point where Interior’s actions:

do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.

523 U.S. 726, 733 (1998). Indeed, the EIS that Point Hope challenges discusses a host of impacts that may never even come to pass.

Entertaining the challenge might therefore force this Court to examine findings about the environmental impacts of drilling for oil along the Atlantic Coast (discussed at AR 13452-13519) even though Congress currently *bars* offshore oil production in that area. And finally, delayed review will cause no hardship here. Point Hope can raise its NEPA challenges at later stages of the OCSLA process, as it has proven by challenging the EIS for a proposed lease sale in the Chukchi Sea. *See* n.3, above.⁷ By then, Interior will have supplemented its programmatic

⁷ The fact that Interior issues further NEPA documentation before taking concrete action eliminates any concern that Point Hope’s claim

EIS with more detailed site-specific NEPA documentation, greatly improving the “fitness of the issues for judicial decision.” *Abbott Labs.*, 387 U.S. at 149.

This Court dismissed a similar NEPA challenge in *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999). The plaintiffs in that case challenged the adequacy of an EIS the Forest Service had prepared for its onshore oil leasing activities at an early program stage that involved only “the identification and mapping of areas that *might be* suitable for leasing.” *Id.* at 45 (emphasis added).⁸ The Court explained that an agency does not need to prepare an EIS “until it reaches the critical stage of a decision which will result in ‘irreversible and irretrievable commitment of resources’ to an action that will affect the environment.” *Id.* at 49 (quoting *Mobil Oil Corp. v. FTC*, 562 F.2d 170, 173 (2d Cir. 1977)); *see also Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988). Because the Forest Service would only reach that point when it issued leases, and because it might add more

might “never get riper.” *Ohio Forestry*, 523 U.S. at 737.

⁸ The leasing program at issue was governed by the Onshore Oil and Gas Leasing Reform Act of 1987, codified at 30 U.S.C. § 226(g)-(h).

NEPA materials to the record before then, the NEPA claim was premature. *See also Nevada v. Department of Energy*, 457 F.3d 78, 84-85 (D.C. Cir. 2006) (NEPA challenge to agency plan was unripe because plan had not yet been implemented). Point Hope cannot meaningfully distinguish *Wyoming Outdoor Council*.

C. Point Hope does not identify any information missing from the EIS that was essential to reasoned analysis.

Even if Point Hope’s challenge were ripe, regulations promulgated by the Council on Environmental Quality (CEQ) show that Interior complied with NEPA. According to those regulations, Interior’s EIS “succinctly describe[s] the environment of the area(s) to be affected,” using descriptions “no longer than is necessary to understand the effects of the alternatives.” 40 C.F.R. § 1502.15.

Point Hope suggests that Interior violated another CEQ regulation that guides agencies faced with “incomplete or unavailable information.” 40 C.F.R. § 1502.22. The regulation tells agencies faced with incomplete information first to “make clear that such information is lacking.” *Id.* Then:

If the incomplete information relevant to reasonably

foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

Point Hope reads this regulation as a “Catch-1502.22” by insisting both that Interior acknowledge every gap in available information and then that Interior *close* all such gaps before proceeding. *See, e.g.*, Br. 45. So, for example, when the Five-Year Program EIS heeds section 1502.22 by admitting that there is “considerable uncertainty” about the extent to which bowhead whales feed in the Chukchi Sea in the fall, *see e.g.*, AR 13028, Point Hope demands studies to resolve the uncertainty. Br. 46.

What is missing from Point Hope’s argument is an analysis of *when* section 1502.22 requires agencies to gather information. The regulation answers that question itself by telling agencies to gather missing information only when it is both “relevant to reasonably foreseeable significant adverse impacts,” and “essential to a reasoned choice among alternatives.” These clauses are crucial. They prevent project opponents from turning an EIS into an informational snipe-hunt, and ensure that the resulting document is “analytic rather than encyclopedic.” 40 C.F.R. § 1502.2. To prove a violation of section

1502.22, Point Hope has to do more than flyspeck the EIS for data gaps—it has to show that the gaps are relevant to a consideration of significant impacts and alternatives that might avoid them. *Colorado Env'tl Coalition v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir. 1999) (no violation of section 1502.22 where plaintiffs did not to establish that missing data was essential).

The structure of the OCSLA, especially the environmental reviews it requires before any leasing, exploration, and production activity, further counsels against requiring more data-gathering at the Program stage. Point Hope asks this Court to ignore the OCSLA in applying NEPA, Br. 48, but this Court has done just the opposite in prior cases. For example, in *North Slope Borough*, the Court approved a lease sale EIS in part because any “[u]ncertainty over remote hazards can be rectified as more information is collected” later in the OCSLA process, and observed that “[t]he Secretary plainly cannot be expected or required to wait until the totality of environmental effects is known” before taking action under the OCSLA. *Id.* at 605-606; *see also California v. Watt*, 712 F.2d 584, 596 (D.C. Cir. 1983) (*Watt II*)

“Consideration of specific environmental impacts on an area-by-area basis can be made as the program moves to the leasing, exploration, and development stages.”).

D. Interior reasonably relied on assessments of oil-spill sensitivity to rank the environmental sensitivity of leasing areas.

Since the time it released its very first Five-Year Program, for the years 1980-1985, Interior has determined that the “most significant environmental consequences” of offshore oil and gas production are caused by oil spills in coastal ecosystems. AR 24958; *see also* AR 736 (comment from Fish and Wildlife that possibility of a large oil spill “poses the greatest threat to Service trust resources in Alaska”). That focus reflects not only the views of Congress, which amended the Act in response to a large California oil spill, *Watt I*, 668 F.2d at 1295, but also of this Court, which described a “major oil spill” as the “worst case” scenario for harm under the Act. *North Slope Borough*, 642 F.2d at 605.

To assess the relative sensitivity of coastal areas to spilled oil, Interior consulted the Environmental Sensitivity Index, a database

created by the National Oceanographic and Atmospheric Administration (NOAA). NOAA developed the Index by examining the physical, biological, and environmental characteristics of various kinds of shoreline and placing them on a relative scale of sensitivity to oil spills. *See* AR 24960. NOAA then worked with various federal and coastal state agencies—including the State of Alaska—to apply this scale throughout the United States. The result is a fine-grained profile of national coastline sensitivity. Because the Index is standardized, comprehensive, and based on high quality data, it has become “the most widely used approach to sensitive environment mapping in the United States.”⁹ Those same qualities make it uniquely suited to Interior’s purposes here; using the Index allows Interior to satisfy its OCSLA obligation to make relative sensitivity judgments for coastal regions as different as Galveston Bay and Prince William Sound. AR 24959.

Point Hope argues that using the Environmental Sensitivity Index to determine relative environmental sensitivity violates the

⁹ http://response.restoration.noaa.gov/book_shelf/827_esi.pdf.

OCSLA. Br. 37-42. According to Point Hope, the Index does not evaluate “the relative environmental sensitivity” of leasing areas, 43 U.S.C. § 1344(a)(2)(G), first, because it only considers the physical characteristics of the shoreline. Point Hope’s premise is understandable; Interior stated on the record that “the predominant factor” NOAA used to determine the relative sensitivities of coastal areas was their physical characteristics. AR 24959. But Interior’s statement was incomplete; NOAA’s documentation shows that it actually considered the physical *and* biological characteristics of shorelines when creating the Index.¹⁰

Point Hope also contends that Interior violated the OCSLA by focusing its attention on the sensitivity of shoreline areas rather than offshore areas, Br. 39, thereby ignoring its statutory duty to compare the sensitivity “of different areas,” Br. 38 (quoting 43 U.S.C. § 1344(a)(2)(G)). But this Court has already recognized that the provision Point Hope relies on is ambiguous: it “provides no method by

¹⁰ See <http://response.restoration.noaa.gov/esi/esiintro.html> (“Shorelines are ranked based on their physical and biological character[.]”).

which environmental sensitivity [is] to be measured.” *Watt I*, 668 F.2d at 1311. As a result, Interior’s decision about precisely *how* to examine relative environmental sensitivity is a scientific policy judgment that deserves “substantial deference” from this Court. *Id.* at 1302.

Interior focused on shoreline sensitivity because of the ready availability and accuracy of NOAA’s shoreline Index, and the participation of numerous Alaskan entities, including the state government, in the development of that Index (and the entities’ implicit approval of the result). Many coastal areas have unique offshore features—such as sand shoals or sea ice—that could be affected by an oil spill. Interior could conceivably have catalogued every such feature and then weighed the apples of Alaska against the oranges of Texas. But instead, Interior reasonably concluded that it could best honor Congress’ command to evaluate the “relative sensitivity” of potential leasing areas by comparing the impact of an oil spill on each area’s coastline. Viewed in that light, Interior’s use of the NOAA index to assess relative coastline sensitivity was reasonable. *See Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983)

(court reviewing scientific predictions by an agency within its area of expertise “must generally be at its most deferential”).

II. INTERIOR CONSIDERED ALL RELEVANT CLIMATE CHANGE IMPACTS.

The Center for Biological Diversity contends that the Five-Year Program and accompanying EIS are legally deficient because they do not do enough to examine the ways in which offshore leasing areas are being affected by, and contribute to, global warming. The Center’s NEPA challenges, however, are no more ripe than the ones raised by Point Hope, *see* Part I.B. And in any event, whether they are based on NEPA or the OCSLA, the Center’s arguments all fail on the merits.

A. Interior identified and discussed the impacts that global warming may have on the Arctic.

NEPA requires federal agencies to consider and discuss in EISs any environmental impact associated with their actions if there is “a reasonably close causal relationship’ between the environmental effect and the alleged cause.” *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). In its EIS, Interior

estimated the total amount of greenhouse gas emissions that would result from leasing, exploration, and development in offshore shelf areas. AR 13198. It stated that those activities would release carbon dioxide (CO₂), methane, nitrous oxides, and other gases that would together have a greenhouse impact equal to the release of between 5.77 and 11.33 million metric tons of CO₂. AR 14067.

Interior also examined the cumulative impact of these emissions on the global environment, based on findings made by the United Nations' Intergovernmental Panel on Climate Change. AR 13189-13202. Interior observed that average global surface temperatures have increased by approximately 0.75 degrees in the last 100 years, and that eleven of the last twelve years rank among the warmest ever recorded. AR 13190. Its EIS acknowledged that "the largest effect on global warming is from CO₂ emissions," AR 13190, and that depending on greenhouse gas emission trends, experts predict a global surface temperature increase of 1.8 to 4.0 degrees Celsius by the end of the 21st century. AR 13191.

The Center challenges Interior's treatment of global climate

change impacts on several fronts. It first argues that the EIS “assum[es] that the baseline conditions for the Arctic are static.” Br. 25. That is false. As the Center itself recognizes, the EIS “acknowledges that future global warming impacts are likely to occur in the Arctic,” Br. 28; the EIS even discusses the scientific report that the Center relies heavily upon. AR 13192. Indeed, a fair review of the EIS and its references¹¹ shows that Interior considered global warming impacts on all potential leasing areas, including the Arctic, and also considered the specific effects such warming might have on the physical, biological, and human environment therein.

The record shows that Interior’s analysis led it to agree with the Center that global warming effects have been “most pronounced” in Arctic regions. AR 13679. The EIS notes that the average annual surface temperature in Alaska has been rising at the rate of about 1 degree Celsius per decade, and that precipitation has increased as well.

¹¹ Those references include, among other things, Appendices C and I of the 2004 Environmental Assessment (EA) for Beaufort Lease Sale 195 (hereafter “Sale 195 EA”), *available at* http://www.mms.gov/alaska/ref/EIS%20EA/BeaufortFEIS_195/Sale195/EA_Sale195.pdf. *See* AR 13194.

AR 13194. Similarly, it predicts that continued warming will reduce sea ice thickness and cover in the Arctic; the EIS cites the same study that the Center relies upon to project that additional ice cover declines of 10-50% can be expected by the year 2100. AR 13195.

The EIS also discusses the impact of these changes on the natural environment of the Arctic. Though it concedes that the “precise nature” of changes in ocean temperature are difficult to predict, it notes that “if the Arctic continues to warm at the present rate, large changes in the ocean ecosystems and fisheries can be expected.” AR 13196. Those changes could include reductions in ice-algae that would lead, in turn, to reductions in arctic cod and the species that prey upon them. *See Sale 195 EA at I.8.* Other “ecosystem shifts” could disfavor crab-dominated environments in favor of herring, cod, skates, and flatfish. AR 13196. Similarly, retreating sea ice “will cause increased impacts to coastal areas from storms,” “a loss of prey species” such as invertebrates and fish, and alterations in abundance of animals, like ringed seals, bearded seals, walrus, and some seabirds, that live on the ice. AR 13195-13196, AR 13646-13647. The EIS lists potential effects

on bowhead whales, including the possibility that decreased ice cover will lead to increased shipping traffic in their habitat, Sale 195 EA at I.6, and candidly admits that if sea ice reductions continue, polar bears “would be seriously impacted and may be threatened with extinction.” AR 13196.

These discussions show that the Court should reject the Center’s claim that Interior made a “Panglossian assumption that the environmental baseline for the Program will remain static,” in order to “disregard global warming’s effects on the Arctic.” Br. 25, 27. The Court should also reject another slightly different argument that the Center appears to make: that the EIS failed to consider the impacts that further leasing might have *in light of* changing Arctic climate conditions. *See, e.g.*, Br. 29. As an initial matter, it is important to recognize that Interior constantly updates its environmental analyses to account for changing conditions in offshore leasing areas; among other things, it will issue updated NEPA compliance documents before allowing leasing, exploration, and development pursuant to this Five-

Year Program.¹² Interior’s ongoing NEPA compliance not only highlights again the ripeness concerns posed by the Center’s claim, but also refutes the Center’s suggestion that this EIS is the Interior’s last word on the subject.

On the merits, the Center again understates Interior’s treatment of the issues. For instance, it attacks Interior’s “refusal to account for the increased stresses to the Arctic from global warming,” and “insistence on absolute scientific certainty.” Br. 29. But in the cumulative impact discussion of its EIS, Interior again agreed that “a growing body of evidence shows that climate change is occurring,” AR 13577, and therefore included climate change as “an impact factor” in its cumulative impact analyses for water quality, AR 13642-13643, marine mammals, AR 13646-13648, birds, AR 13649, 13652, land mammals, AR 13655, coastal habitat, AR 13668, subsistence practices, AR 13677, and environmental justice, AR 13679. Interior then assessed, where it could, the cumulative impacts that new offshore

¹² For example, Interior updated discussions of climate change impacts in the Arctic when it prepared an Environmental Assessment for a 2005 lease sale in the Beaufort Sea. Sale 195 EA at I.1-I.14.

leasing would have in light of existing climate change stresses. *See, e.g.*, AR 13648 (“for most marine mammal populations, the overall contribution to the cumulative impacts from new and future OCS leasing during the life of the 2007-2012 program are expected to be mainly short-term in nature”); AR 13649 (combined impacts from habitat loss, oil spills, and gillnets “could impair [various bird species]’ ability to adapt to global warming”); AR 13652 (overall contribution of new leasing to existing cumulative impacts on birds “is expected to be small”); AR 13655 (same for terrestrial mammals); AR 13669 (coastal habitats).

In some cases, Interior did admit that it could not analyze the further impact that new leasing might have in light of certain *indirect* effects of climate change because those indirect effects were too uncertain to predict. AR 13577-13578. So, for example, in discussing the cumulative impact new leasing might have on water quality, Interior stated that because it could not know whether—let alone how—Arctic water quality would change in response to global warming, assessing the combined impact of leasing *and* climate change would be

“speculative at best.” AR 13643.

The Center attacks this approach by pointing to something that Interior does not dispute—the scientific consensus that exists about the existence and direction of *climate change itself*. *E.g.*, Br. 26. The Center does nothing to identify a similar consensus about the nature and direction of the climate change *impacts* that Interior found too speculative to consider in its cumulative impact analysis. Indeed, even the ACIA study the Center relies upon so heavily admits that current knowledge about climate change makes it difficult to discuss synergistic effects. *See* AR 6071 (“limitations in current knowledge do not allow for a full analysis of all the interactions and their impacts”). Given that uncertainty, Interior acted reasonably by stating that it would continue to evaluate “the current state of climate change and its impacts” in subsequent NEPA reviews of lease sales under the Five-Year Program. *E.g.*, AR 13647.

The Center also contends that this Court’s case law prevents Interior from citing or considering “uncertainty” about impacts in its NEPA analysis. But the cases it cites suggest the opposite. In

Scientists' Institute for Public Information v. Atomic Energy

Commission, this Court ordered the Atomic Energy Commission to prepare an EIS for a program to promote certain nuclear reactor technology. 481 F.2d 1079 (D.C. Cir. 1973). The Commission had not done so, in part, out of concern that it could not adequately “detail” the long-term impacts of the program. *Id.* at 1091. As the Center points out, the Court reminded the Commission that “some degree of forecasting” is inherent in the NEPA process. *Id.* at 1092. What the Center omits is that the Court reassured the Commission that NEPA’s rule of reason allows “some degree of flexibility and agency discretion in determining the contents of [EISs]”; in particular, the degree of necessary forecasting varies with the complexity and proximity of the impacts at issue, and an agency need not make forecasts that are not “meaningfully possible.” *Id.* at 1091-92.¹³ Here, Interior was justified

¹³ *Potomac Alliance v. U.S. Nuclear Regulatory Comm’n*, 682 F.2d 1030 (D.C. Cir. 1982), is even further afield. In that case, an agency had declined to consider any impacts of permitting a nuclear waste storage facility that might occur after the term of the permit. Judge Bazelon wrote separately to explain that the agency needed to consider the possibility that the waste would remain on site under a new permit, but he distinguished analyses of this sort of contingency from analyses that are “constrained by the availability of information.” *Id.* at 1037.

in concluding that it was not “meaningfully possible” to predict the cumulative impact of oil leasing in light of potential changes in water quality that might or might not result from climate change. *Id.* at 1092; *see also Watt I*, 668 F.2d at 1301 (on “the frontiers of scientific knowledge,” decisionmaking necessarily takes on a policymaking character).

B. The OCSLA requires Interior to focus its Five-Year Program analysis on the effects of oil and gas *production*, not consumption.

The Center believes that Interior violated the OCSLA by failing to assess the impact of *consuming* oil and gas produced from offshore areas. Br. 35-47. According to the Center, Section 18(a) of the OCSLA, 43 U.S.C. § 1344(a), requires Interior to consider the following two issues when determining the timing and location of offshore leases: (1) the environmental sensitivity of leasing areas to nationwide oil and gas consumption, and (2) the costs and benefits of nationwide oil and gas consumption. But the text of Section 18(a) does not support these positions. Instead, it requires Interior to consider the risk of localized environmental harm to leasing areas due to exploration and

development activities.

1. Sections 18(a)(1) and (a)(3) of the OCSLA require Interior to consider the environmental cost of oil and gas *production*, not consumption.

Under section 18(a) of the Act, 43 U.S.C. § 1344(a), the Secretary must prepare “a schedule of proposed lease sales indicating . . . the size, timing, and location of leasing activity which he determines will best meet national energy needs.” The Act goes on to state that Interior must prepare the schedule “in a manner consistent with” four numbered principles. *Id.* § 1344(a)(1)-(a)(4). Together, the principles require the Secretary to balance the need for oil and gas development with the environmental risks it poses in the areas where it takes place.

The Center asks this Court to read § 1344(a) to require Interior to consider not just the environmental cost of discovery and producing offshore oil and gas, but the cost of *consuming* it as well. The Center first contends that the OCSLA requires a Five-Year Program to consider the “cost” of the greenhouse gas emissions that will arise from the consumption of offshore oil and gas. Br. 40-47. The Center grounds that argument in subparts (a)(1) and (a)(3) of 43 U.S.C. §§ 1344.

Part (a)(1) states:

Management 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.

This language does not back up the Center's claim. It says that Interior has to consider the environmental value of resources "contained in the outer Continental Shelf," and the impact of "oil and gas *exploration*" (emphasis added) on the local marine, coastal, and human environment. Interior has done both; its EIS catalogues the resources in each area at issue as well as the potential impacts that oil and gas exploration might have there.¹⁴ Part (a)(1) part says nothing about the environmental value of resources outside the Continental Shelf, or about the potential impact of oil and gas *consumption*.

The Center also cites part (a)(3), which states:

The Secretary shall select the timing and location of leasing,

¹⁴ In light of the specific reference in part (a)(1) to "marine" and "coastal" environments, the term "human environment" should be understood to refer to the impacts of exploration on human *society* in coastal areas.

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.

§ 1344(a)(3). This part requires Interior to balance the costs and benefits of oil and gas development on an “area-by-area” basis. *Watt I*, 668 F.2d at 1318; *Hodel*, 865 F.2d at 306. Again, however, nothing in it requires an analysis of the impact of oil and gas consumption. The Center apparently wants this Court to read the term “environmental damage” so broadly that it encompasses *all* damage that might somehow be attributed to the Five-Year Program through some circuitous causal chain. But context counsels a narrower reading. Part (a)(3) requires Interior to consider environmental damage when selecting the *timing* and *location* of leasing. Adjusting timing and location can only address problems caused by oil production. It cannot reduce the “environmental damage” associated with *consumption*. See also §§ 1344(a)(2) (listing factors to be considered in setting “timing and location” of oil development). To address consumption-related impacts, Interior would need control over the *quantity* of oil ultimately extracted by offshore lessees—something it does not have. See 43

U.S.C. § 1334(g)(2) (requiring lessees to produce oil and gas at the “maximum rate” that can be sustained without reducing ultimate recovery). The language of other parts of § 1344 reinforces this reading by showing that the OCSLA focuses its concern for the environment on the places where exploration and development takes place. See 1344(a)(2)(A) (requiring consideration of the “ecological characteristics of [oil- and gas-bearing] regions”); (B) (requiring apportionment of benefits and risks “among the various regions”); (G) (discussing regions’ “relative environmental sensitivity”). Accepting the Center’s argument would create research and policymaking obligations for Interior that are inconsistent with the OCSLA’s stated purposes. As this Court put it in *Watt I*, the most important purpose of the Act is “to establish procedures to expedite the exploration and development of the OCS.” 668 F.2d at 1316. The Act’s other purposes, meanwhile, “primarily concern measures to eliminate or minimize the risks attendant to that exploration and development.” *Id.* (emphasis added). Congress required Interior to ensure that oil and gas would be extracted in a responsible manner, but it said nothing to suggest that

Interior should ponder the wisdom of consuming fossil fuels in the first place. In fact, Congress foreclosed such deliberation by commanding Interior “to make [offshore] resources available to meet the Nation’s energy needs as rapidly as possible.” 43 U.S.C. § 1802(2).

2. Similarly, section 18(a)(2) of the OCSLA requires Interior to consider the sensitivity of leasing areas to oil and gas production, not consumption.

The Center also complains that in performing its Section 18(a)(2) analysis, 43 U.S.C. § 1344(a)(2), Interior “ignored the heightened ecological sensitivity of the Arctic” to climate change, and “fail[ed] to account for the disparate impacts of global warming on OCS planning areas.” Br. 37. But just like parts (a)(1) and (a)(3), the text of Section 18(a)(2) itself undermines the Center’s argument. It opens by stating that:

Timing 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 [the factors that follow].

43 U.S.C. § 1344(a)(2).

Despite the Center’s suggestion, Br. 40, section 18(a)(2) does *not* state that Interior shall base the “size” of offshore operations on the

factors listed in the OCSLA. Instead, the provision tells Interior to consider environmental information that is relevant to the “[t]iming and location” of such operations. Information about the CO₂ emissions generated by oil and gas consumption does not fit that criterion.

Carbon dioxide emissions have the same impact on global climate no matter where they arise, let alone where the underlying fuel was produced. Accordingly, considering CO₂ emissions could not affect decisions about *where* to extract oil and gas, and Interior did not violate the OCSLA by omitting future climate change impacts from its section 18(a)(2) analysis.

The opening sentence of Section 18(a)(2) also explains why Interior was not required to assess “the relative environmental sensitivity” of offshore areas to global warming under sub-factor (G). Br. 36. As the text quoted above shows, the OCSLA requires Interior to consider the sub-factors of Section 18(a)(2) in order to determine where and when “exploration, development, and production” of oil and gas should occur. Like sections 18(a)(1) and 18(a)(3), this language forces Interior to examine the impacts of *producing* oil, not the impacts

of *consuming* it. As a result, Interior’s decision to focus its sub-factor (G) relative sensitivity analysis on the most important production-related impact—oil spills—was entirely reasonable, as further discussed in Part I.D, above.

Last, the Center relies on Section 18(a)(2)(A) and (H), which require Interior to consider, among other things, the “ecological characteristics” of, and “environmental and predictive information” about, potential leasing areas in determining when and where leasing should occur. 43 U.S.C. §§ 1344(a)(2)(A), (H). The Center appears to argue that in examining these factors to determine the impact of oil production on the Arctic environment, Interior should consider all existing stresses on that environment, including stresses created by climate change. But this argument just retreads the Center’s claim that the EIS for the Five-Year Program did not adequately consider the impact of climate change on the Arctic. Because the Program document incorporates the EIS by reference, AR 24975, the Center’s argument that the Program “omits any discussion of the present and future effects of global warming” rings hollow.

C. NEPA does not require Interior to consider the impacts of consuming oil and gas extracted from the outer continental shelf.

The Center's last climate change argument is that Interior violated NEPA by failing to consider the impacts of the CO₂ that would be emitted by downstream users of offshore oil and gas resources. Assuming that the Center's challenge is ripe, *see* Part I.C, above, Interior correctly concluded that such impacts were beyond the appropriate scope of the Five-Year Program EIS. AR 12869.

1. Limiting OCS production might actually increase greenhouse emissions.

As a preliminary matter, Interior does not accept the implicit premise of the Center's argument. The Center seems to believe that limiting offshore oil and gas production would lead inexorably to greenhouse gas emission reductions. But that is not necessarily correct.

The Five-Year Program EIS explains that if Interior were not to allow further offshore oil and gas leasing, consumers would respond primarily by switching to other sources of oil and gas (e.g. imports). AR 13561. The EIS predicts that for oil, 88% of lost offshore

production would be replaced by foreign oil imports, a further 3% by domestic onshore oil production, and 4% by switching to natural gas. AR 13561. For natural gas, 16% of lost offshore production would be replaced by foreign imports, 28% by domestic onshore production, and 40% by switching to oil. AR 13561. The EIS does predict that 5% of lost offshore oil production and 16% of natural gas production would be replaced by efficiency gains. AR 13561. Those efficiency gains would reduce CO₂ emissions when considered alone, but they could be offset by the *increases* in emissions caused by fuel-switching. AR 13889. For example, it takes fuel to transport foreign oil. So consuming foreign oil increases overall CO₂ emissions as compared to consuming domestic oil. More importantly, because “oil combustion causes more CO₂ emissions than [natural] gas does,” and because overall oil consumption would actually *increase* as a result of fuel-switching away from natural gas, the net effect of reducing offshore leasing could actually be to increase CO₂ emissions. AR 13889.

2. NEPA does not require agencies to consider the “full cycle” effects of commodity products generated under their regulatory authority.

The Center complains that global warming is an “indirect effect” of offshore leasing, and that Interior must therefore consider it in its EIS for the Five-Year Program. Br. 32. But establishing that an agency action is an indirect cause of an environmental impact in some unyieldingly abstract sense is not enough to require the agency to examine that impact under NEPA. Instead, NEPA only requires federal agencies to consider and discuss environmental impacts if there is “a ‘reasonably close causal relationship’ between the environmental effect and the alleged cause.” *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). That causal limitation is similar to, though not the same as, the proximate cause doctrine in tort law; in both contexts, courts “look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that make an actor responsible for an effect and those that do not.” *Metropolitan Edison*, 460 U.S. at 774 n.7.

Following these principles, the EIS for the Five-Year Program

discusses “indirect effects” of the Program that are relevant to decisions about where and when to schedule offshore leasing. For example, the EIS discusses the potential effects that oil spill cleanup activities might have on the local environments in each leasing area, AR 13318, the impacts of trash created by offshore drilling activities, AR 13329, and the impacts of local gravel mining that petroleum companies would undertake to support their offshore projects, AR 13334. Interior can reasonably expected to examine these impacts because its determination of when and where leasing will occur affects their magnitude and likelihood.

By contrast, Interior drew a “manageable line” between the impacts associated with producing commodity oil and gas and the impacts associated with consuming them. Because Interior has the authority to regulate the location and manner of petroleum production, it makes sense to attribute production-related impacts to the agency’s authorizing “action” under NEPA’s rule of reason. Interior followed this rule by, for example, examining the impacts that oil spills might have in the marine environment. *E.g.*, AR 13316-13318. But since

Interior lacks any direct authority to promote or reduce *consumption* of commodity oil and gas, it was not required to consider the endless cascade of environmental impacts that might flow from such consumption. Those impacts are more properly attributed to market demand and other government actions more directly concerned with managing or controlling demand.

This principle flows directly from *Public Citizen*, where the Supreme Court concluded that an agency required to license trucks crossing the border from Mexico did not have to consider the environmental impacts of allowing those trucks to operate in the United States. 541 U.S. at 752. Because the agency had “no authority to prevent” qualified Mexican trucks from entering, gathering further knowledge about consumption-related impacts “would have no effect” on its decisionmaking process. *Id.* at 766-768. The mere fact that increased truck emissions would be an “indirect effect” of its licensing program within the meaning of 40 C.F.R. § 1508.8 was not enough to require preparation of an EIS. *See id.*

The Center may believe that *Public Citizen* can be distinguished

because the OCSLA requires Interior to consider environmental issues when preparing its Five-Year Program. But as described above in Part II.B, the Act requires Interior to consider the sensitivity of *local* environments and resources to offshore *production* of oil and gas. Just like the agency in *Public Citizen*, Interior has “no statutory authority” to impose or enforce limits on offshore oil and gas production that are unrelated to concerns about the safety of production-related activity. *Id.* at 759. Moreover, as the Court put it in *Metropolitan Edison*, studying the full-cycle impacts of oil and gas consumption would require Interior to “expend considerable resources developing . . . expertise that is not otherwise relevant to [its] congressionally assigned functions.” *Metropolitan Edison*, 460 U.S. at 776. The limits on Interior’s competence and authority distinguish this case from *Center for Biological Diversity v. National Highway Transportation Safety Administration*, 508 F.3d 508 (9th Cir. 2007), *petition for reh’g pending*, where the Ninth Circuit concluded that NHTSA had to consider climate change impacts in an EIS for regulations governing

vehicle fuel efficiency.¹⁵

3. The Center's causation theory is not grounded in NEPA case law.

The Center's causation arguments would expand the scope of the Five-Year Program EIS far beyond what is now required by law.

There is no special NEPA causation analysis that applies to greenhouse pollutants. Nor is there any case law that supports the Center's theory more generally. *See, e.g., Metropolitan Edison*, 460 U.S. at 766, *Public Citizen*, 541 U.S. at 752. As a result, adopting the Center's position could have far-reaching effects.

Federal agencies regulate or facilitate the production of goods ranging from milk to ethanol and from cars to computers. It would defy the rule of reason to require them to analyze the lifecycle impacts of every one of those commodities on the environment. Analogously, *Metropolitan Edison* observed that NEPA would not force a hypothetical agency whose regulations forced hospital closures to

¹⁵ The Center also cites *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), and *Border Power Program Working Group v. DOE*, 260 F. Supp. 2d 997 (S.D. Cal. 2003), in support of its position, but both those cases predated the Supreme Court's *Public Citizen* decision and reached incorrect results.

consider the resulting impact on healthcare availability. 460 U.S. at 773-774. This reasoning explains why the Bureau of Land Management does not analyze the health impacts of eating beef when it issues grazing permits for on federal land. And it also explains why an EIS for a Forest Service timber sale does not have to consider the fact that sawmill lumber frames the homes that contribute to urban sprawl. “Time and resources are simply too limited” to think that Congress viewed for NEPA to reach this far. *Metropolitan Edison*, 460 U.S. at 776.

III. BECAUSE THE FIVE-YEAR PROGRAM HAS NO CONCRETE EFFECTS AND DOES NOT AFFECT ANY ENDANGERED SPECIES, THERE IS NO NEED FOR IMMEDIATE ESA CONSULTATION.

The Minerals Management Service¹⁶ has always honored its ESA obligations by consulting with NMFS and Fish and Wildlife before issuing offshore leases, approving exploration activities, or authorizing production. Those consultations produced, for example, a 2006 biological opinion regarding the effects of oil and gas leasing on

¹⁶ Fish and Wildlife and MMS are both Interior agencies, so to avoid confusion, this Part refers to “MMS” rather than to “Interior.”

bowhead whales in the Beaufort and Chukchi Seas.¹⁷ All in all, MMS typically conducts at least two ESA consultations with NMFS and Fish and Wildlife before approving development at any given site.

Even before these consultations, MMS asks for comments from NMFS and Fish and Wildlife while it is developing a Five-Year Program and its accompanying EIS. *See, e.g.*, AR 744. MMS does not, however, formally consult with those agencies at the Program stage—and they have consistently accepted that approach. In commenting on Interior’s EIS, NMFS recognized that the Five-Year Program “cannot predict specific oil and gas activities that will be undertaken” but that later “lease sale, exploration, development, and/or production activities ultimately resulting from the 5-Year plan” would require ESA consultation “*as more specific plans are developed.*” AR 5780 (emphasis added). This statement reflects views NMFS expressed when it (together with Fish and Wildlife) issued regulations approving “incremental step” consultation in 1986. In a preamble, the agencies explained that OCSLA leasing is the paradigmatic situation

¹⁷ Available at <http://www.mms.gov/alaska/ref/BioOpinions/ARBOIII-2.pdf>.

where a regulated agency cannot consult at the outset: “[a]ny analysis of the impacts of development/production would be mere speculation without knowing what tracts will be leased and without the information on the extent of the petroleum reserves discovered during the exploration phase.” 51 Fed. Reg. 19925, 19955 (June 3, 1986). But despite such statements and Interior’s demonstrable history of ESA compliance, the Center still demands that Interior consult with NMFS and Fish and Wildlife prior to issuing its Five-Year Program.

A. The Center’s ESA claim is unripe.

As discussed throughout this brief and in the record, AR 13731, the challenged Program is not self-executing. It does not create or destroy legal rights. It neither authorizes activities nor commits any resources. And it does not command anyone to do—or not to do—anything. Moreover, before Interior takes any “action” that would do any of those things, it *does* consult with NMFS and Fish and Wildlife to ensure that it avoids jeopardizing any listed species. If necessary, Petitioners can sue to compel such consultations or to challenge their outcome, and will suffer no meaningful hardship due to any intervening delay. The Center’s ESA claim is therefore unripe. It

should be brought, at the earliest, when Interior proposes particular leases.

The cases the Center cites to show that Interior should consult before issuing a Five-Year Program all involve agency actions that had considerably more concrete consequences. The district court decision in *North Slope Borough v. Andrus* discussed ESA consultation in the context of OCSLA lease sales. 486 F. Supp. 332, 351 (D.D.C. 1980). The management guidelines at issue in *Lane County Audubon v. Jamison* and *Pacific Rivers Council v. Thomas* set out harvesting “criteria” for spotted owl habitat and endangered salmon habitat, respectively. 958 F.2d 290, 294 (9th Cir. 1992); 30 F.3d 1050, 1055 (9th Cir. 1994). And *Turtle Island Restoration Network v. Nat’l Marine Fisheries Service*, 340 F.3d 969, 974 (9th Cir. 2003), concerned the issuance of fishing permits. None of these cases requires an agency to complete ESA consultations before issuing a programmatic document that has no binding consequences. Instead, a Five-Year Program is more akin to the “leasing analysis” that was challenged in *Wyoming Outdoor Council*, 165 F.3d at 49-50, and, following that case, the Court should dismiss the Center’s ESA challenge as unripe.

In fact, it is far from obvious that the ESA obliges Interior to consult at the Five-Year Program stage at all. The consultation requirement applies to “any action authorized, funded, or carried out by such agency.” 16 U.S.C. §1536(a)(2). The qualifying terms in that phrase all suggest that it only applies to actions that have some genuine effect. ESA regulations reinforce this reading by giving the following examples of triggering “actions”:

(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02. Though non-exclusive, none of these examples is akin to the issuance of a planning schedule for a rigidly structured regulatory process. *Cf. Holder v. Hall*, 512 U.S. 874, 919 (1994) (even where a statute provides only a list of non-exclusive examples, the nature of the listed examples can provide strong evidence of intent).

B. The Five-Year Program will not affect any listed species.

Assuming the Center’s ESA claim is ripe for review, the claim is meritless because issuing a Five-Year Program does not “affect” any

listed species so as to require consultation. As explained earlier, the ESA's implementing regulations state that consultation is only required only for agency actions that "may affect" a listed species or designated critical habitat. 50 C.F.R. § 402.14(a). Actions that will have no such effect do not trigger consultation obligations. See *Southwest Center*, 100 F.3d at 1447; *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998).

The Center ticks off a range of activities, including "seismic surveys, construction, and vessel and air traffic," that may affect endangered marine mammals if they ever come to pass. Br. 52. But none of them will happen as a result of the Program itself. Instead, Interior first has to sell offshore leases, issue exploration permits, or authorize oil and gas production—all of which will be preceded by ESA consultations. The Program itself has no impact whatsoever; as the Ninth Circuit recognized in *False Pass*, even a *lease sale* cannot jeopardize any endangered species on its own. 733 F.2d at 611 ("[t]he lease sale decision itself could not directly place gray or right whales in jeopardy").

In some circumstances, courts have required agencies that issue

planning documents to consult “comprehensively” on the effects that the planned activities might themselves have on endangered species. *See, e.g., Lane County*, 958 F.2d at 294. But because the OCSLA employs a “segmented approach” that re-evaluates environmental impacts at each decision stage, MMS can properly examine the consequences of its OCSLA actions on a stage-by-stage basis. *See North Slope Borough*, 642 F.2d at 609 (compliance with 16 U.S.C. § 1536 in the OCSLA context “must be measured in view of the full contingent of [the Act’s] checks and balances”); *see also* 51 Fed. Reg. at 19955 (ESA consultation regulations reflect *North Slope Borough* holding); *False Pass*, 733 F.2d at 612; *Conner v. Burford*, 848 F.2d at 1456; *cf. Sierra Club v. EPA*, 353 F.3d 976, 992 (D.C. Cir. 2004) (agency reasonably deferred consultation in light of staged statutory process). Because ESA consultation obligations at the Five-Year Program stage are limited to the effects of that stage alone, and there are no such effects, MMS had no obligation to consult with Fish and Wildlife or NMFS before issuing its new Program.

C. Requiring a biological opinion at the Five-Year Program stage would waste agency resources.

The Center is also wrong to claim that it would be valuable for MMS to consult formally with NMFS and Fish and Wildlife at the Five-Year Program stage. That argument is based on a misunderstanding of what consultation could add to the Program development process. The Center suggests that during ESA consultation, NMFS would give MMS information about the presence of, say, endangered whales in various areas so that Interior could consider that information when deciding what areas to include in the Program. *See, e.g.*, Br. 48 (“this is the only time that consultation can address the *cumulative nationwide impacts* of all the lease sales”). But that is the goal of the *NEPA* process. Accordingly, MMS solicited comments from NMFS and Fish and Wildlife about listed species and critical habitat when it drafted its EIS. AR 735-747, AR 5779-5794. And the Final EIS for the Five-Year Program incorporates those comments in its discussion of direct and cumulative impacts on endangered species. *See, e.g.*, AR 13026-13028 (discussing bowhead whale populations in Alaska); AR 13305-13310 (discussing potential

impacts on bowhead whales in Arctic); AR 13647-13648 (discussing impacts on North Pacific right whale).

A Section 7 consultation, by contrast, helps a regulated agency comply with its legal obligation to make sure that the actions it authorizes, funds or carries out are not “likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” 16 U.S.C. § 1536(a)(2). The biological opinion that comes out of the consultation determines whether a given action meets this standard. In line with this purpose, it is the agency that requests consultation that gives NMFS or Fish and Wildlife specific information about its planned activities, including descriptions of “the action to be considered,” “the specific area that may be affected by the action,” and “the manner in which the action may affect the listed species.” 50 C.F.R. §§ 402.14(c)(1, 2, 4). And as explained throughout this brief, Interior cannot provide such detailed information at the Five-Year Program stage. The Program defines proposed leasing areas “as broadly as possible,” AR 12869, and only excludes areas from consideration if they have “low oil and gas resource value” or are “of little or no interest to the oil and gas

industry at this time.” AR 12862.

Because of the over-inclusiveness and uncertainty of Five-Year Programs, the agencies that administer the ESA have agreed that MMS “cannot predict specific oil and gas activities . . . that will be undertaken,” at the Program stage, and that the ESA accordingly requires consultation for “lease sale, exploration, development, and/or production activities ultimately *resulting from* the 5-Year plan.” AR 5780 (emphasis added). Ignoring this assessment and requiring them to produce a biological opinion at the Five-Year Program stage would be a waste of resources. It would also contradict one of the expressed purposes of the four-step OCSLA procedure: “to forestall premature litigation regarding adverse environmental effects that . . . will flow, if at all, only from the latter stages of OCS exploration and production.” *Interior v. California*, 464 U.S. at 341.

CONCLUSION

The petitions for review should be denied. Petitioners ask this court to set aside the Leasing Program and enjoin any lease sales pending remedial action, but the Government submits that if any relief is necessary, remand alone would be proper. *See* 43 U.S.C. § 1344(d)(3); *but see Natural Resources Defense Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (Randolph, J., concurring).

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**CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME
LIMITATION**

I certify that this brief complies with the type volume limitations set forth in Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a). The brief contains 13,036 words.

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STATUTORY ADDENDUM

43 U.S.C. § 1346	a
43 U.S.C. § 1802	d
40 C.F.R. § 1502.15	f
40 C.F.R. § 1502.22	g
40 C.F.R. § 1508.28	i

43 U.S.C. § 1346. Environmental studies

(a) Information for assessment and management of impacts on environment; time for study; impacts on marine biota from pollution or large spills

(1) The Secretary shall conduct a study of any area or region included in any oil and gas lease sale or other lease in order to establish information needed for assessment and management of environmental impacts on the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil and gas or other mineral development in such area or region.

(2) Each study required by paragraph (1) of this subsection shall be commenced not later than six months after September 18, 1978, with respect to any area or region where a lease sale has been held or announced by publication of a notice of proposed lease sale before September 18, 1978, and not later than six months prior to the holding of a lease sale with respect to any area or region where no lease sale has been held or scheduled before September 18, 1978. In the case of an agreement under section 1337(k)(2) of this title, each study required by paragraph (1) of this subsection shall be commenced not later than 6 months prior to commencing negotiations for such agreement or the entering into the memorandum of agreement as the case may be. The Secretary may utilize information collected in any study prior to September 18, 1978.

(3) In addition to developing environmental information, any study of an area or region, to the extent practicable, shall be designed to predict impacts on the marine biota which may result from chronic low level pollution or large spills associated with outer Continental Shelf production, from the introduction of drill cuttings and drilling muds in the area, and from the laying of pipe to serve the offshore production area, and the impacts of development offshore on the affected and coastal areas.

(b) Additional studies subsequent to leasing and development of area

Subsequent to the leasing and developing of any area or region, the Secretary shall conduct such additional studies to establish environmental information as he deems necessary and shall monitor the human, marine, and coastal environments of such area or region in a manner designed to provide time-series and data trend information which can be used for comparison with any previously collected data for the purpose of identifying any significant changes in the quality and productivity of such environments, for establishing trends in the areas studied and monitored, and for designing experiments to identify the causes of such changes.

(c) Procedural regulations for conduct of studies; cooperation with affected States; utilization of information from Federal, State and local governments and agencies

The Secretary shall, by regulation, establish procedures for carrying out his duties under this section, and shall plan and carry out such duties in full cooperation with affected States. To the extent that other Federal agencies have prepared environmental impact statements, are conducting studies, or are monitoring the affected human, marine, or coastal environment, the Secretary may utilize the information derived therefrom in lieu of directly conducting such activities. The Secretary may also utilize information obtained from any State or local government, or from any person, for the purposes of this section. For the purpose of carrying out his responsibilities under this section, the Secretary may by agreement utilize, with or without reimbursement, the services, personnel, or facilities of any Federal, State, or local government agency.

(d) Consideration of relevant environmental information in developing regulations, lease conditions and operating orders

The Secretary shall consider available relevant environmental information in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders.

(e) Assessment of cumulative effects of activities on environment; submission to Congress

As soon as practicable after the end of every 3 fiscal years, the Secretary shall submit to the Congress and make available to the general public an assessment of the cumulative effect of activities conducted under this subchapter on the human, marine, and coastal environments.

(f) Utilization of capabilities of Department of Commerce

In executing his responsibilities under this section, the Secretary shall, to the maximum extent practicable, enter into appropriate arrangements to utilize on a reimbursable basis the capabilities of the Department of Commerce. In carrying out such arrangements, the Secretary of Commerce is authorized to enter into contracts or grants with any person, organization, or entity with funds appropriated to the Secretary of the Interior pursuant to this subchapter.

43 U.S.C.A. § 1802. Congressional declaration of purposes

The purposes of this chapter are to--

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which

are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.

40 C.F.R. § 1502.15. Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

40 C.F.R. § 1502.22. Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

40 C.F.R. § 1508.28. Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2008, I caused two copies of the foregoing Brief for Respondent to be sent by overnight courier to:

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