

Nos. 07-71457, 07-71989, 07-72183

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALASKA WILDERNESS LEAGUE, NATURAL RESOURCES DEFENSE COUNCIL,
and PACIFIC ENVIRONMENT,

RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS,
a Project of the INDIGENOUS ENVIRONMENTAL NETWORK,
CENTER FOR BIOLOGICAL DIVERSITY, and SIERRA CLUB,

NORTH SLOPE BOROUGH and ALASKA ESKIMO WHALING COMMISSION,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary of the Interior, and
MINERALS MANAGEMENT SERVICE,

Respondents,

and

SHELL OFFSHORE, INC.,

Respondent-Intervenor.

Petition for Review of Department of Interior Decision

**PETITIONERS' CONSOLIDATED BRIEF
IN NUMBERS 07-71457 AND 07-71989**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Petitioners Alaska Wilderness League, Natural Resources Defense Council, Pacific Environment, Resisting Environmental Destruction On Indigenous Lands, a Project of the Indigenous Environmental Network (REDOIL), Center for Biological Diversity, and Sierra Club hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

Petitioners Alaska Wilderness League (AWL), Natural Resources Defense Council (NRDC), Pacific Environment, REDOIL (Resisting Environmental Destruction on Indigenous Lands), Center for Biological Diversity, and Sierra Club (collectively “Petitioners”) challenge the Mineral Management Service’s (MMS) approval of a proposal to drill multiple offshore exploratory oil wells over a three-year period in the Beaufort Sea. The drilling program will take place near the coast of the Arctic National Wildlife Refuge in the migratory route of the endangered bowhead whale. Petitioners challenge the approval under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C §§ 1331-56, because MMS failed to analyze the potential impacts of the drilling on bowhead whales and the potentially catastrophic impacts of a crude oil spill and because MMS did not require full information about where the drilling would occur.

STATEMENT OF JURISDICTION

This is a petition for review pursuant to Fed. R. App. P. 15 of the Secretary of Interior’s approval of an offshore exploratory oil drilling plan under OCSLA, 43 U.S.C. § 1340(c). Under OCSLA, challenges to an exploration plan are subject to judicial review in the court of appeals for a circuit in which an affected state is located. 43 U.S.C. § 1349(c)(2). Petitioners AWL, NRDC, and Pacific

Environment participated in the process leading to the decision, are aggrieved by the decision, and filed their petition on April 13, 2007, within 60 days of the Secretary's initial approval of the exploration plan. 43 U.S.C. § 1349(c)(3).

Petitioners REDOIL, Center for Biological Diversity, and Sierra Club filed an optional administrative appeal of the initial approval decision with the Interior Board of Land Appeals (IBLA) pursuant to 30 C.F.R. § 290.2 (2007). At that time, they requested a stay of the approval to protect their interests while they sought to have the agency reconsider its decision. On May 4, 2007, the IBLA declined to exercise its jurisdiction, stayed all further proceedings, and effectively denied the request for a stay. ER 1197-99. REDOIL, Center for Biological Diversity, and Sierra Club filed their Petition for Review in this case on May 15, 2007, within 60 days of the IBLA's decision. 43 U.S.C. § 1349(c)(3)(C).¹

ISSUES PRESENTED

1. Whether MMS's analysis, which did not consider all impacts to bowhead whales and their biological significance, failed to take a hard look at the impacts of the drilling project it approved, in violation of NEPA.

¹ MMS has challenged the Court's jurisdiction over the REDOIL petition. The North Slope Borough's brief describes the basis of this Court's jurisdiction over the Borough's and REDOIL's post-appeal petitions. *See* NSB Br. at 1-3.

2. Whether MMS's refusal to include an analysis of the impacts of a crude oil spill during exploratory drilling rendered its EA inadequate under NEPA.
3. Whether the potentially significant impacts to bowhead whales and as a result of a potential crude oil spill required MMS to prepare an EIS.
4. Whether MMS violated OCSLA by accepting and approving the exploration plan without specific information about well locations and spacing and potentially affected resources.
5. Whether MMS violated OCSLA's requirement that it adequately consider all relevant available environment information.

STATEMENT OF THE CASE

Petitioners AWL, NRDC, and Pacific Environment filed their petition on April 13, 2007 (No. 07-71457). Shell Offshore, Inc. (Shell), the permittee, filed a motion to intervene on May 14, 2007, and the North Slope Borough and Alaska Eskimo Whaling Commission (collectively "NSB") filed a motion to intervene on May 15, 2007. On May 15, 2007, AWL, NRDC, and Pacific Environment filed an urgent motion for stay requesting the Court preserve the status quo by stopping implementation of the decision until the case could be considered on the merits. On May 22, 2007, after being denied relief by the IBLA, REDOIL, Center for Biological Diversity, and Sierra Club filed a Petition for Review (No. 07-71989), a motion to consolidate, and a joinder in the AWL urgent motion for stay. On that

same date, the NSB filed an independent petition (No. 07-72183), a motion to consolidate, and an urgent motion to stay. Federal Defendants moved to dismiss the REDOIL and NSB petitions on May 25, 2007.

The Court granted the motions to consolidate on July 2, 2007. On July 16, 2007, the Court denied the motions to dismiss without prejudice, granted Shell's motion to intervene, and denied the NSB's motion to intervene. On July 16, 2007, the Court entered an order staying all exploration activities pending oral argument on the motions for stay, which it scheduled for August 14, 2007.

Oral argument was held in San Francisco on August 14, 2007. On August 15, 2007, the Court entered an order granting the motion for stay and finding that petitioners had "(1) shown a probability of success on the merits, combined with the possibility of irreparable harm if relief is denied, and (2) raised serious questions and demonstrated that the balance of hardships tips sharply in their favor." In that order, the Court also set an expedited schedule for resolving these petitions so that the merits can be resolved before next year's drilling season. Shell since has moved for reconsideration and en banc review of that order.

STATEMENT OF FACTS

The Alaska Beaufort Sea stretches from Point Barrow east to the Canadian border. *See* ER 1133. It is situated between the Chukchi Sea in the west and the

Canadian Beaufort in the east. Vast expanses of this area are untouched by industrial activity and provide important habitat for thousands of species of animals, birds, and fish, including endangered and threatened species such as the bowhead whale and spectacled and Steller's eider.

The area also provides important habitat for polar bears, which the United States Fish and Wildlife Service has proposed to list as a threatened species under the Endangered Species Act. *See Proposed Rule To List Polar Bear (Ursus Maritimus) as Threatened Throughout Its Range*, 72 Fed. Reg. 1064 (Jan. 9, 2007). The Southern Beaufort Sea population of polar bears, which is located in the area Shell proposes to conduct its exploration activities, is comprised of 1,500 animals and is in decline. *See id.* at 1069-70.

The eastern portion of the Beaufort Sea, including some of the areas in which Shell plans to conduct exploratory drilling, is offshore of the Arctic National Wildlife Refuge. The Arctic Refuge was created “to conserve fish and wildlife populations and habitat in their natural diversity including, but not limited to, the Porcupine caribou herd . . . , polar bears, grizzly bears, muskox, Dall sheep, wolves, wolverines, snow geese, peregrine falcons and other migratory birds” Alaska National Interest Lands Conservation Act, Pub. L. No. 960487, 94 Stat 2371 (1980). The coastal plain of the Arctic Refuge is recognized for its outstanding wilderness qualities: scenic vistas, varied wildlife, excellent opportunities for

solitude, recreational challenges, and scientific and historic values. *See* ER 1209 (Clusen Decl. ¶ 23); ER 1222, 1224, 1225 (Miller Decl. ¶¶ 11, 14, 16); ER 1290 (Parker Decl. ¶ 6), ER 1254-55 (Lentfer Decl. ¶ 12); ER 1328 (Cummings Decl. ¶ 23); ER 1239-40 (Banerjee Decl. ¶¶ 8, 11, 12).

I. THE PROPOSED EXPLORATION ACTIVITIES

OCSLA establishes four distinct stages: 1) a five-year plan, 2) oil and gas lease sales, 3) exploration, and 4) development and production. *See Sec’y of the Interior v. California*, 464 U.S. 312, 337 (1984). At each stage, the agency must comply with NEPA. *See Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

In April 2002, MMS issued a five-year plan establishing a lease sale schedule for the Outer Continental Shelf in the Gulf of Mexico and Alaska regions for 2002-07. *See* ER 2 (5-year plan FEIS). Pursuant to the plan, and as required by NEPA, MMS prepared an environmental impact statement (EIS) in 2003 to evaluate the impacts of three lease sales in the Beaufort Sea. *See* ER 67-241 (Multi-Sale EIS). Without further NEPA review, MMS held the first lease sale in 2003. MMS prepared environmental assessments (EA) for two subsequent lease sales and, each time, determined that an EIS was unnecessary. *See* ER 476-517 (Lease Sale 202 EA), ER 242-49 (Lease Sale 195 EA). When preparing these analyses, MMS explicitly stated that any subsequent exploration or development

projects would require “further NEPA environmental evaluation using site-specific data, which is not available or needed in the current lease sale EIS.” ER 180 (Multi-Sale EIS); *see also* ER 178 (Multi-Sale EIS) (explaining that MMS’s tiered NEPA approach “builds on the premise that as both the agencies and companies involved move from general planning, to leasing, to exploration, and to possible development, the specificity of the information improves. The accompanying environmental analysis that flows from each stage also is more specific with respect to location, timing, and magnitude.”); ER 497 (Lease Sale 202 EA) (“prior to commencement of exploration, development, and production activities, proposed activities will be analyzed on a case-by-case basis and effective mitigation measures developed accordingly”). Shell’s proposed exploration activities are the first planned for the Beaufort Sea pursuant to these lease sales.

MMS has authorized Shell to drill up to twelve exploration wells on twelve lease tracts in the Beaufort Sea over the next three years. *See* ER 1047 (EA). In the initial year of the plan, Shell had planned to drill four exploration wells at the Sivulliq prospect in Camden Bay, which is offshore of the Arctic Refuge. *Id.* Over the following two years, “Shell proposes to drill an undetermined number of wells on additional prospects.” *Id.* The additional prospects include others in Camden Bay, farther east off the coast of the Arctic Refuge, and off of the eastern boundary of the National Petroleum Reserve-Alaska. *Id.*

To support the drilling activities, Shell plans to employ two drilling vessels, the *Kulluk* and *Frontier Discoverer*, and two large icebreakers. ER 1047-48. In addition, Shell will use “several ice-strengthened supply boats,” including at least three vessels for “ice management, anchor handling, and supplies.” ER 1048. Several of these boats also are characterized as icebreakers. ER 687-89 (IHA Application). Shell also will operate up to six helicopters and fixed-wing aircraft at any one time. *See* ER 1049 (EA).

II. IMPACTS TO BOWHEAD WHALES FROM EXPLORATION

Bowhead whales (*Balaena mysticetus*) are listed as endangered under the Endangered Species Act throughout their range. 50 C.F.R. § 17.11 (2007). There are five recognized stocks of bowheads. Of these, the Western Arctic stock, which includes those found in the Beaufort Sea, “is the most robust and viable of surviving bowhead populations and, thus, its viability is critical to the long-term future of the biological species as a whole.” ER 379.

The bowhead whale is long-lived, and slow growing. ER 380. The species also matures late; females do not reach sexual maturity until 15 to 20 years and reproduce every three years. ER 380-81. A difference in fat content between pregnant and non-pregnant females suggests “a high biological cost of reproduction, a fact noteworthy in considering the potential impact of excluding females from feeding areas.” ER 381. Mothers with calves are the segment of the

population most vulnerable to disturbance and both the National Marine Fisheries Service and the National Research Council have recommended measures to protect cows and calves be put in place. ER 409, 412-13, 443-44 (NMFS biological opinion); ER 259 (2005 NRC Report).²

Each year, the Western Arctic stock of bowheads undertakes two migrations. During the spring, the whales migrate through the Bering Strait, into the Chukchi Sea, through the Alaskan Beaufort, and into the summer feeding grounds in the Canadian Beaufort. In the fall, they migrate back along the same route through the Alaskan Beaufort Sea to the Chukchi and south through the Bering Strait.

² The 2005 NRC report is not part of the administrative record. The court should, nevertheless, consider the report under the well-established rule allowing a court to consider documents outside the record that show the agency failed to consider relevant factors. *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1162 (9th Cir. 2006) (“We allow extra-record materials if necessary to ‘determine whether the agency has considered all relevant factors and has explained its decision.’”) (quoting *S.W. Ctr. For Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)). This exception is particularly important in the NEPA context where “a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.” *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988) (opinion amended by *Animal Def. Council v. Hodel*, 867 F.2d 1244 (9th Cir. 1989)); see *Nat’l Audubon Soc’y v. United States Forest Serv.*, 46 F.3d 1437, 1447-48 (9th Cir. 1994) (applying exception to allow scientific testimony outside the administrative record).

Whales pass through the Bering Strait and eastern Chukchi through new openings in the ice from late March to mid-June. ER 383. Each year, the bowhead migration into the Chukchi Sea “continues at least until June 20.” ER 383. Most calves are likely born in the Chukchi Sea during the spring migration prior to the whales entering the Beaufort Sea. *Id.* In May and June, large whales and cow/calf pairs are seen passing Barrow, the dividing point between the Chukchi and Beaufort Seas. *Id.* Females and calves are among the last whales to begin the spring and fall migrations and may comprise over two-thirds of the cohort that enters the western Beaufort Sea during the final days of the spring migration in any given year. ER 383-84. Bowheads remain in the summer feeding grounds in the Canadian Beaufort until late August or early September. ER 384. Typically, the majority of westward migrating bowheads re-enter the Alaskan Beaufort between mid-September and mid-October. *Id.*

The Alaskan Beaufort Sea, given its place in the migration route, is a key habitat for the bowhead. Feeding takes place along the migration route during both the spring and fall migrations. During migration, bowheads often linger in areas of the Alaskan Beaufort Sea to socialize or feed, sometimes for extended durations. *See* ER 388-89; *see also* ER 390 (“[F]eeding near Barrow during the spring migration is not just occasional, but rather a relatively common event.”). During the spring migration, “the region west of Point Barrow seems to be of particular

importance for feeding . . .” ER 388. While “it is known that bowhead whales feed . . . in the Alaskan Beaufort in late summer/early fall, [a]vailable information indicates it is likely there is considerable inter-annual variability in the locations where feeding occurs during the summer and fall in the Alaska Beaufort Sea, in the length of time individuals spend feeding, and in the number of individuals feeding in various areas in the Beaufort Sea.” ER 388. Bowheads have been observed near Barrow in the mid-summer. ER 383, 384.

“One of the greatest concerns associated with the impact of oil and gas exploration to marine mammals has to do with potential impacts of noise.” ER 406. “Sound travels faster and with less attenuation in water than it does in air.” ER 407. “[H]igh-intensity low-frequency sound travels well enough underwater that animals can detect signals at ranges of tens to hundreds of kilometers from the source. . . . [A] few sources may affect a large fraction of a population.” ER 254.

Bowhead whales are particularly susceptible to harm from anthropogenic noise in the marine environment. At high levels, noise can cause temporary or permanent hearing damage to bowhead whales. *See* ER 410-11. Even temporary hearing changes “have the potential to affect population vital rates through increased predation or decreased foraging sources” ER 256.

Even at much lower levels, however, noise can harm marine mammals by provoking avoidance behaviors and interfering with important biological functions.

See ER 411-12. Studies suggest that “[i]ncreased noise levels could interfere with communication among whales, mask important natural sound, cause physiological damage, or alter normal behavior, such as causing avoidance behavior that keeps animals from an important area or displace a migration route farther from shore.” ER 408; *see also* ER 487 (Lease Sale 202 EA) (documenting avoidance behavior).

Recent scientific evidence indicates that bowheads may be even more sensitive to noise than was previously realized. Indeed, “[r]eceived noise levels as low as 84 dB . . . or 6 dB above ambient may elicit strong avoidance of an approaching vessel at a distance of 4 km (2.5 mi)” ER 426. “Migrating bowhead and gray whales divert around sources of noise, whether actual industrial activities or playbacks of industrial activities . . . with almost all bowheads reacting at received levels of 114 dB re 1 μ Pa.” ER 66c.

Shell’s exploratory drilling and seismic testing will produce noise well in excess of the levels that can affect bowhead whales. *See* ER 1075, 1146 (EA) (indicating that prior exploration drilling in Camden Bay created noise in excess of 180 dB at times and that the 120 dB zone extended from the project to the shore). Available evidence indicates that a single, “relatively low-powered icebreaker” will “commonly” affect the movement and behavior of “typical traveling bowheads” at distances up to 30 kilometers (18.6 miles) and “sometimes” at distances beyond 50 kilometers (31.1 miles). ER 129 (Multi-Sale EIS).

III. IMPACTS FROM CRUDE OIL SPILLS DURING EXPLORATION

One of the “major concerns” associated with industrial activities in the Beaufort Sea is the potential for an oil spill. ER 112 (Multi-Sale EIS). In its EA for this project, MMS identified oil spills as “an issue of great public concern.” ER 1114; *see also* ER 71-72 (Multi-Sale EIS) (listing oil spills as major area of concern and stating that “[t]he Inupiat are concerned that a spill could adversely affect many of the traditional food sources and, thereby, affect the economic and cultural well-being of the North Slope.”); ER 66 (NRC Report).

These concerns are grounded in the general recognition that an oil spill could have dramatic effects on wildlife in the Beaufort Sea. These effects would be especially severe for marine mammals and, in particular, polar bears. *See* ER 489 (Lease Sale 202 EA) (“Spilled oil can have dramatic and lethal effects on marine mammals, as has been shown in numerous studies, and a large oil spill could have major effects on polar bears and seals, their main prey.” (internal citation omitted)); *see also* ER 491-92 (Lease Sale 202 EA) (“Any bears lost to a large oil spill . . . likely would exceed sustainable levels”); 72 Fed. Reg. 1,064, 1079 (stating that a “major Beaufort Sea oil spill would have major effects on polar bears”).

In addition, MMS has recognized that “exposure to oil spills could result in lethal effects” to bowhead and other whales. ER 509 (Lease Sale 202 EA); *see* ER

487 (stating effects of the Exxon Valdez oil spill “suggests that whales may be severely impacted by an oil spill”) (citation omitted). Other marine mammals could suffer similar effects from spilled oil. *See* ER 498 (Lease Sale 202 EA) (stating that ringed seals, spotted seals, bearded seals, walrus, and beluga and gray whales could be killed by spilled oil).

MMS also has noted that protected eiders and other birds that come into contact with spilled oil are not likely to survive and that a spill could have substantial effects on subsistence uses and fish. *See* ER 477-84 (Lease Sale 202 EA) (describing significant mortality to marine and shorebirds, including threatened spectacled and Steller’s eiders, from spilled oil); ER 72, 141-44 (Multi-Sale EIS) (discussing the potential impacts to birds and subsistence use); ER 1092 (stating oil spills are one of the two “primary ways that exploration and delineation drilling operations can affect marine fish and their habitat”).

The effects of a spill would last for many years. Oil spilled from the *Exxon Valdez* persisted in coastal areas in “surprising amounts and in toxic forms” and “was sufficiently bioavailable to induce chronic biological exposures in animals for more than a decade, resulting in long-term impacts at the population level.” ER 491 (Lease Sale 202 EA).

Moreover, MMS has estimated that there is a substantial likelihood that crude oil from a spill in the area in which Shell proposes to drill would reach

important resource areas. If a crude spill were to occur, it would happen in the bowhead whale migration corridor. *See* ER 936 (“[T]he proposed drill sites are all located within the broad corridor through which bowheads migrate . . . ; for that reason, there is a 100% chance of any spill at the drill sites contacting the bowhead migration corridor.”). The agency estimates up to a 49% chance that a spill would contact the shore of the Arctic National Wildlife Refuge. ER 1117.

Potential impacts to polar bears and subsistence harvests from spilled oil were of particular concern to MMS scientists analyzing Shell’s exploration plan. *See* ER 922 (noting the potential “substantial” consequences to subsistence users if an oil spill contacted Cross or Barter islands). The scientists were concerned that “the proposed action has the potential to SIGNIFICANTLY impact polar bears due to oil spill risk.” ER 970 (emphasis in original). One analyst noted, “two of the largest polar bear aggregations on the Beaufort coast . . . are likely to be greased if there is an oil spill.” ER 935.

This concern was carried over into the MMS scientist’s draft of the section of the EA evaluating the potential impacts to polar bears:

Due to the threats posed to coastal polar bear aggregations from an oil spill during the fall open water period, and because Shell has provided nothing in their EP [] that addresses potential threats to polar bears, or even indicates that they considered polar bears in their planning process, our overall finding is that the Proposed Action has the potential to significantly impact polar bears in the event of a large oil spill.

ER 986. Other MMS analysts supported this draft analysis and its conclusions.

See ER 1009; ER 1393; ER 935.

MMS recognizes the possibility of a crude oil spill from exploration drilling. The EA and other MMS documents describe crude oil spills during exploration. *See* ER 1121-22 (showing spills during exploration); ER 161 (Multi-Sale EIS) (noting that a prior blowout on the OCS released 80,000 barrels of oil and stating that “[i]nternationally from 1979 through 2000, five oil-well blowouts greater than or equal to 10 million gallons (238,000 barrels) have occurred”).³ A draft of the EA indicates that as compared to production, blowouts during exploration drilling have occurred over 100 times more frequently per OCS well. *See* ER 915. Since 1990, all of the drilling blowouts on the OCS have occurred during exploration drilling and all have released oil into the environment. *See* ER 1121-22 (EA). The State of Alaska, in its comments on the Multi-Sale EIS, characterizes the risk of a spill during initial exploration of a formation as the “highest spill risk,” even greater than that of production well start-up and shutdown. ER 184 (Multi-Sale EIS). Shell intends to conduct such initial exploration. *See* ER 520 (“Olympia site is a true unknown”).

³ Similarly, Shell acknowledges that “[f]uel or oil spills could occur during exploratory operations.” ER 890 (Exploration Plan).

As part of the NEPA process for all recent Beaufort Sea oil leasing, MMS has explicitly included exploration spills in calculating the likelihood of a crude oil spill. *See, e.g.*, ER 188 (Multi-Sale EIS) (stating that it analyzes oil spills “which could result from offshore oil exploration and development”). The studies underlying these analyses also reflect consideration of the probability of a crude oil spill during exploration. *See* ER 44 (2002 Bercha Report) (explaining how exploration and development wells were considered in the analysis); ER 262 (2006 Bercha Report) (updating the 2002 report and including “exploration, production, and abandonment” in scenario).

Along with its exploration plan, Shell also submitted a plan to MMS that describes how it will respond to an oil spill resulting from a well blowout and crude oil spill. Shell’s “primary response” involves intentionally igniting spilled oil “at the start of the spill.” ER 901b, 901f (Figure 1-12). This plan recognizes that as the Beaufort Sea begins to freeze up, ice would “prevent[] the effective collection of oil,” eventually making it “impossible” to continue physical containment efforts. ER 901f. Shell’s response plan then relies a “concentrated effort” to burn oil by using a “Heli-torch” before it freezes into the sea ice. ER 901g, 901a (showing a helicopter dropping “gelled fuel igniters” on an oil slick). MMS has indicated that burning may only occur when winds would carry smoke plumes away from villages or encampments and that its effectiveness declines as

oil emulsifies, “usually within the first 2-3 days of the spill.” ER 124a (Multi-Sale EIS); *see also* ER 985 (an early draft of the EA discussing the “limited window of opportunity (or time period of effectiveness) to conduct successful burn operations.”).

IV. ADMINISTRATIVE PROCESS

OCSLA regulations require a lessee to submit an exploration plan and obtain approval before conducting exploration drilling on its leases. 30 C.F.R. § 250.201 (2007). The lessee must also submit an oil spill response plan and an environmental impact analysis with its exploration plan. 30 C.F.R. §§ 250.227 & 254 (2007). The environmental impact analysis, intended to assist MMS in complying with NEPA, must be “project specific” and “must describe those resources, conditions, and activities ... that could be affected by [] proposed exploration activities or that could affect the construction and operation of facilities or structures, ... including [s]ensitive biological resources or habitats such as essential fish habitat, refuges, preserves, special management areas identified in coastal management programs, sanctuaries, rookeries....” *Id.* MMS reviews those submissions and the application is not to be deemed submitted until the necessary information is complete. 30 C.F.R. § 250.231 (2007). MMS must then prepare appropriate environmental review under NEPA, 30 C.F.R. § 250.232(c) (2007), and then approve or disapprove the plan. 30 C.F.R. § 250.233(b) (2007).

Early in the administrative process, MMS identified the need for “a full description of [Shell’s proposed exploration] activity ... before people start writing the effects and cumulative sections” of the environmental assessment. ER 518 (October 2006); *see also* ER 519 (similar comment related to oil spill risk assessment) (November 3, 2006). MMS’s December 13, 2006 “Completeness Comments” on Shell’s draft exploration plan stated that the plan identified the leases on which the drilling might take place for only the Camden Bay location, but the environmental report purportedly “addresses all areas of future drilling prospects The [exploration plan] must clarify the drilling locations (prospects) for which [MMS] approval is requested (CFR 250.211.b). This . . . is critical to us because we want our NEPA assessment to cover the appropriate area.” ER 625; *see also* ER 603; ER 610; ER 617.

Shell submitted its final exploration plan and permit application to MMS on January 12, 2007. *See* ER 739. Shell’s exploration plan still failed to identify specific well locations for the 2008 and 2009 seasons; it merely stated that the drilling would occur on any of 12 of its Beaufort Sea leases. ER 1047 (EA). MMS analysts continued to identify the lack of specific well locations and data as a “basic problem.” *See* ER 932 (stating that MMS is being asked to clear more “blocks for [Shell] to drill” even though data is entirely missing for some of the lease blocks); ER 939. This problem was laid out in stark terms in a February 2,

2007 “Brief Summary of Issues” prepared after a meeting of the team charged with preparing the EA:

The [exploration plan] does not provide the detailed analysis for all twelve (12) lease blocks, rather indicates that only two (2) may experience activity in coming years. However, our EA must address all twelve (12) blocks and essentially clear the blocks for future activity. If Shell decides to move to the ten (10) blocks which are not analyzed adequately, MMS is in a vulnerable position.

ER 970.

One of the main substantive issues MMS’s scientists focused on during the review of Shell’s application materials was impacts from noise on bowhead whales; in particular, many of the agency’s experts expressed a need for more information from Shell about the noise generated by ice-breaking vessels. *See* ER 736 (noting that Shell has not provided information about take of whales from icebreaking activities and that such information should be considered); ER 737-38 (including information about noise level thresholds for marine mammals and whales and noting lack of noise level information from Shell); ER 912 (“we don’t have good acoustic information, so the assessment for bowheads and probably other marine mammals will conclude with only estimates of the NEPA level of effect”). Despite these concerns, MMS determined that the application was complete and deemed it submitted to the agency on January 17, 2007. *See* ER 1045.

Shell never provided the requested information about noise generated by the drilling and support vessels:

The requested information on the sound to be generated by the vessels, ice management operations, and drilling is not included in the final plan document as anticipated. . . . This is a critical information need with respect to NEPA analysis of potential impacts to marine mammals from the proposed activity.

ER 911 (emphasis in original); *see also* ER 908.

During the review, MMS's analysts expressed concern that the process was being rushed to complete the approval. MMS biologist James Wilder expressed his "concerns about our NEPA process for work such as this. . . . Now we are in an extreme time crunch and under intense pressure to get this EA done, regardless. Yet we were hamstrung before we even began." ER 934-35; *see* ER 921 ("[W]e are always told not to worry about our lease sale analyses, because the specifics will be addressed later. Yet when specific projects do roll around, we are given neither the time nor the information necessary to adequately analyze and mitigate the proposed activity."). Similarly, Dr. Charles Monnett, a marine ecologist in MMS's Environmental Studies Section stressed,

I was allowed only a few hours to review this extensive document and the associated Exploration Plan and thus, my comment can be only superficial at best. The fact that I have been asked for comments but given little time indicates to me that management is, at best, not treating my expertise with respect, and at worst, not interested in potential comments that I would have to offer.

ER 1009. Dr. Jeffery Gleason, an MMS wildlife biologist, noted, “[i]t is extremely troubling that ESS staff have been asked to provide detailed comments/reviews of a rather lengthy document in less than a 48 hr period. . . . Sacrifices in quality continue to be made simply to meet timelines that cannot be met given present staffing levels (and expertise) and unrealistic goals.” ER 1389.

Despite this rushed review, MMS’s internal experts universally expressed concerns about the potential impact of the exploration drilling on bowhead whales. Dr. Monnett, Dr. Gleason, and Jill Lewandowski, an MMS Protected Species Biologist, all stated that there could be significant impacts to bowheads. *See* ER 1010-12; ER 1391-92; ER 1163.⁴

In addition to these concerns about whales, MMS analysts stressed that Shell’s environmental review did not provide adequate information about polar bears. *See* ER 935 (“Shell did not bother to address the polar bear issues that were raised during the ‘completeness’ review”); ER 998 (“Shell did not address polar bears or polar bear issues in any form or fashion in their EP or oil spill plan,

⁴ Dr. Gleason’s analysis has been excluded from the administrative record and is subject to Petitioners’ Motion to Augment and Compel Completion of the Administrative Record. If that motion is not granted, the Court should consider this document on the grounds that it was properly submitted to the IBLA with the NSB’s appeal before that agency. In the alternative, this document should be considered as evidence outside the record for the reasons explained in footnote 2, *supra*.

and MMS has not held them to it.”); ER 970 (“The EP or ODPCP does not consider polar bears, thus the proposed action has the potential to SIGNIFICANTLY impact polar bears due to oil spill risk”). These analysts were concerned about the potential for accidental oil spills to significantly affect polar bears. In fact, an early draft analysis acknowledged “the potential for significant impacts to polar bears as a result of oil spills during the open water period.” ER 934.

MMS did not provide any period for public comment on its decision to approve the exploration plan and did not provide an opportunity for public review of the EA. Nonetheless, a coalition of conservation groups, including Petitioners AWL, NRDC, and Pacific Environment, submitted a letter to MMS expressing concern with the project and giving reasons for which MMS should prepare an EIS.

On February 15, 2007, MMS issued an EA and Finding of No Significant Impact (FONSI) in which it concluded that the proposed exploration activities “would not significantly affect the quality of the human environment. *See* ER 1045 (FONSI). In reaching this conclusion, MMS did not evaluate the potential impacts of a crude oil spill in its EA. *See* ER 1071 (EA) (“For purposes of this EA analysis, no crude oil spills are assumed from exploration activities.”). Nor did it analyze the full impacts of Shell’s proposed operations on bowhead whales or

disclose the views of its own scientists that noise could have significant effects on bowhead whales. *See* ER 1072-75 (EA).

Petitioners AWL, NRDC, Pacific Environment, Sierra Club and Center for Biological Diversity are national and regional conservation groups dedicated to the appreciation of and preservation of outstanding natural environments and wildlife populations. These conservation groups have members nationwide and in Alaska who use and enjoy the resources of the Beaufort and Alaska's Arctic coast.

Petitioner REDOIL is a grassroots network of Native Alaskans.⁵ REDOIL has members throughout Alaska's North Slope who rely upon the Beaufort Sea ecosystem, including the bowhead whale, and potentially affected terrestrial resources, especially caribou and waterfowl, to sustain their lives nutritionally and culturally. *See* ER 1354-57; 1360-63; 1368; 1370-73; 1381-82; 1384-85.

REDOIL members also enjoy the unspoiled environment and its wildlife for recreational and aesthetic purposes. ER 1361-62; 1371. All petitioners are injured by the approval of the exploration plan because their use and enjoyment of these areas will be adversely affected by the exploration activities. *See* ER 1186-1274; 1280-93; 1318-31; 1340-49; 1375-79.

⁵ REDOIL has subsistence concerns like those voiced in NSB's Brief and supports NSB's arguments regarding the failure of the EA adequately to analyze subsistence resources and impacts on subsistence users.

SUMMARY OF ARGUMENT

MMS violated NEPA and OCSLA by approving Shell's exploratory drilling plan without taking a hard look at the environmental impacts of the project and without first requiring Shell to provide specific information about its well locations. MMS's failure to examine the specifics of Shell's proposal and assess the potential harm to bowhead whales identified by its own experts violated NEPA. Similarly, MMS failed to analyze impacts of a crude oil spill from Shell's drilling, even though its experts identified serious threats to sensitive wildlife species and in particular polar bears from an accidental spill. Contrary to its own assessments of spill occurrences and risk, MMS omitted any analysis of spill impacts from its EA based on an assumption a spill would not happen. MMS's omissions render its EA inadequate. Further, the record evidence illustrates that the impacts to bowheads and of a crude oil spill may be significant, triggering MMS's duty to prepare an EIS. MMS also violated OCSLA by failing to obtain specific well locations as required by the statute and regulations and by failing to consider all environmental evidence before concluding that the plan comports with OCSLA.

ARGUMENT

I. STANDARD OF REVIEW.

The Administrative Procedure Act, 5 U.S.C. § 706, provides the standard of review for the NEPA and OCSLA claims. *See Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir. 2004); *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 306 (9th Cir. 1988). “The agency’s actions, findings, and conclusions will be set aside if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 992 (quoting 5 U.S.C. § 706(2)(A)). The Court’s review under the APA “is ‘narrow’ but ‘searching and careful.’” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))).

II. MMS’S LACK OF ANALYSIS VIOLATED NEPA.

A. The Environmental Assessment Fails Adequately To Analyze Impacts to Bowhead Whales and Potential Crude Oil Spills.

NEPA requires federal agencies to prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). The scope of this requirement is “intentionally broad,” *Found. for N. Am. Wild Sheep v. United States Dep’t of Agric.*, 681 F.2d 1172, 1177 (9th Cir. 1982), and it is intended to “compel agencies

. . . to take seriously the potential environmental consequences of a proposed action.” *Ocean Advocates v. United States Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005). As a preliminary step in this process, federal regulations allow an agency to conduct a less exhaustive environmental assessment (EA) to determine whether the proposed action may significantly affect the environment and thus whether an EIS is required. *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001); *see also* 40 C.F.R. §§ 1501.4(b) & 1508.9. As MMS acknowledges, these NEPA rules apply to agency review of exploration plans. *See* 30 C.F.R. § 250.232(c); *see also Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984); 43 U.S.C. § 1866(a).

“Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process.” *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). An EA is sufficient only if it provides enough “evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (citation omitted). The statement of reasons and the EA must show that the agency took a “hard look” at the potential consequences of the proposed action. *See Anderson*, 371 F.3d at 486. At the OCSLA exploration stage, it is critical that the agency examine the site-specific impacts of the proposed plan. *See Vill. of False Pass v. Watt*, 565 F. Supp. 1123,

1135 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984) (“potential threats to the environment are readily visualized and evaluated” at the later stages of OCSLA process) (quoting *North Slope Borough v. Andrus*, 642 F.2d 589, 595 (D.C. Cir. 1980)). When information necessary to determine the effects is readily available or easily gathered, the law requires that MMS gather the information. *See Nat’l Parks & Conservation Ass’n*, 241 F.3d at 733 (stating agency’s “lack of knowledge does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it.”).

1. *The EA contains inadequate analysis of bowhead whales.*

MMS violated NEPA by failing to take a hard look at the impact of Shell’s exploratory drilling program on bowhead whales in its EA. The noise generated by drilling and ice management has potentially serious consequence for bowhead whales, yet MMS failed to analyze ice breaker noise and did not look at the specifics of Shell’s plan and the timing and locations of important biological resources. The EA also failed to look at the biological significance to whales of being deflected from their migratory route. The only analysis the EA does provide focuses solely on a 1993 drilling operation that was much smaller than what Shell now proposes.

The EA failed to analyze the potential impact of multiple sources of noise on bowhead whales. Icebreakers and drillships generate loud noises that have the

potential to cause substantial disturbance to whale migration and feeding patterns, and MMS's own analysts have made it aware that icebreakers present a potential hazard to whales. *See, e.g.*, ER 518 (“Bowhead and beluga response to icebreaking can be VERY large.”); ER 1010 (noting “high potential” for icebreaker noise to cause bowheads to avoid “important habitat”); ER 907-06. The EA contains three short paragraphs on “Underwater Noise,” but this section is focused on the drillships themselves, not attendant icebreaking ships. *See* ER 1071-72. There is no mention of the specific Shell icebreakers or level of noise they might create, either alone or combined with other actions.⁶ This noise “especially” concerned MMS scientists. *See* ER 1010. Nor is there an analysis of the relationship between specific locations of drillships and whale migration patterns.

To determine the impacts of Shell's proposal, the EA needed to look at the project-specific information about the types of ships and activities and timing and location of activities. As the NMFS biological opinion assessing whale impacts notes, the significance of noise disturbance

is expected to depend on the area in which the vessels are transiting, the total number of vessels in the area, the presence of other vessels ...

⁶ The scant discussion of icebreakers or icebreaking activity merely notes the “relative inactivity” of icebreakers during 1993 exploration activities, which form the basis for much of MMS's discussion. ER 1072.

and variables already identified regarding the number, behavior, age, sex and reproductive condition of the whales. Depending on ice conditions, it is likely that vessels actively involved in ice management . . . would be more disturbing to whales than vessels idling or maintaining their position.”

ER 426-27.

Even MMS’s own analysts emphasized the importance of considering the specific impacts of Shell’s proposal. *See* ER 1010. One of MMS’s experts described exactly what the NEPA review needed to consider with regard to bowhead whales:

MMS needs to look at the actual number of drill rigs and especially the icebreakers that will be present, their size and class, their engines and other noise-makers, their expected noise outputs, noise output from other activities . . . that are likely to cause disturbance in bowhead habitat, and then do site specific analyses that takes into consideration the likely use (based on historic data) of the area by bowheads, including females and calves. Since we now have site specific information about where the activities are likely to occur, and industry has specific information about the icebreakers that will be used, the support vessels, the drilling rigs, and aircraft support, MMS should consider total noise and disturbance budgets that look at both the noise level radii, frequencies, total energy, location of the noise makers, and the duration and time of year . . . the activities will occur.

ER 1010. These things were not analyzed in the EA. Indeed, the Shell plan and EA do not even describe most of the actual drilling locations. *See supra* 19-20. As one MMS expert noted, “[t]he tiered concept assumes that subsequent environmental documents will be required to focus the analysis on site-specific, project-level issues, impacts, and appropriate mitigation measures developed. In

this instance, I definitely do not feel that this has been the case.” ER 934 (emphasis omitted); *see* ER 921 (“we are always told not to worry about our lease sale analyses, because the specifics will be addressed later. Yet when specific projects do roll around, we are given neither the time nor the information necessary to adequately analyze and mitigate the proposed activity”). MMS’s failure to assess the impacts of the actual activities proposed by Shell and gather the information necessary for that assessment makes its EA and FONSI arbitrary.

In addition to failing to examine the actual Shell proposal, the EA completely fails to analyze the biological significance of exploration drilling operations on whales. The entire three-page analysis of effects of noise on bowhead whales is devoted to describing the extent to which whales avoided past industrial activities. *See* ER 1072-75. There is no discussion of the biological impacts of this deflection on the species.

While the EA is silent on this topic, other sources have recognized the potential for whale deflections to have serious impacts and MMS experts expressed their concerns internally. *See supra* at 11-12. For instance, NMFS’s 2006 biological opinion stated, “[s]mall deflections in individual bowhead-swimming paths and a reduction in use of possible bowhead-feeding areas near exploration units may result in *adverse effects on the species.*” *See* ER 427 (emphasis added). Both NMFS and the NRC have noted that special consideration should be given to

the potential impact of noise on pregnant females and cow/calf pairs. *See* ER 409, 412-13, 443-44; ER 259 (NRC 2005) (stating that “[v]ery low thresholds should be considered for any disturbance that might separate a dependent infant from its caregivers.”).

Just a week before MMS finalized the EA, Dr. Charles Monnett, a marine ecologist in MMS’s Environmental Studies Section, circulated this discussion of how to treat the EA’s assessment of potential impacts on bowhead whales:

This action has high potential for causing considerable disturbance over a great distance in areas including some of those historically used by high numbers of bowheads during their summer feeding and/or migration period. ... [W]e cannot rule out potential significant effects on bowheads from this noise and disturbance both from the action itself, and particularly we cannot rule out potential significant cumulative effects on bowheads.

...

Thus, MMS should conclude that significant effects on bowheads, especially cumulative effects, are possible.

ER 1010-11. Throughout the process, experts had raised similar concerns. Jill Lewandowski also was “concerned about the potential for significant impacts to bowhead whale feeding or migration and also subsistence harvesting of this species.” ER 1163. Similarly, Dr. Gleason clearly stated the exploration project

could cause serious impacts to bowhead whales and expressed serious concerns regarding MMS's NEPA process. *See* ER 1397-92.⁷

Instead of analyzing the specifics of Shell's proposal and its potential impacts to bowheads, the EA discusses only the effects of a 1993 exploration project. MMS's discussion notes that, even without ice breaking, sound levels around the drillship in that project were over 180 dB at times, the 120 dB zone extended all the way from the drill site to the shore, and that the project deflected migrating bowheads. *See* ER 1073-74. These noise levels can cause significant disturbance impacts to whales. *See supra* at 11. While MMS acknowledges that whales were deflected by this drilling, it concluded that the impact was "*probably not significant by MMS NEPA standards.*" ER 1075 (emphasis added). The EA goes on, however, to admit the impact of Shell's proposed activities "is likely to be greater" than the 1993 operations because Shell's operations are larger. *Id.* MMS's failure to analyze the actual noise levels likely to accompany this different and larger project renders its EA and FONSI arbitrary.

In its rush to approve Shell's plan without having to prepare an EIS, MMS attempts to rely on an independent process conducted by an other agency to justify

⁷ Another MMS analyst noted "the two very large ice-breaking ships . . . that will be in constant use around the drill rigs are likely to generate effects which impact cetaceans as far as 70-80 miles from the area of operation." ER 924.

its conclusion that Shell's proposed action would not have a significant impact on bowhead whales. It cites a future Incidental Harassment Authorization (IHA) that may be issued by NMFS under the Marine Mammal Protection Act. *See* ER 1076. Since NMFS had not issued a permit to Shell at the time MMS finalized its decision (and has not issued one to date), MMS could not know whether the conditions that may be placed on Shell's actions by NMFS in its MMPA decision-making process will be sufficient to ensure that no significant impacts to bowhead whales will occur.

An agency can rely on mitigation measures to reduce environmental impacts below the significance threshold only when the mitigation measures are identified and their effectiveness analyzed. *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733-36 (holding EIS must be prepared where monitoring and mitigation measures were uncertain); *cf. Env't'l Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1015 (9th Cir. 2006) (agency could rely on mitigation measures where "EA analyzes the Project under the enumerated constraints"). The measures must be supported by "analytical data." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (quoting *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th

Cir. 1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). MMS cannot rely on a yet-to-be issued IHA to support its conclusion that Shell's proposed exploratory drilling activities would not have a significant impact on endangered bowhead whales because the mitigation measures to be applied are as yet unknown.

MMS appears to rely on the substantive standards of the MMPA to insulate it from its NEPA obligations.⁸ *See* ER 1070. The fact that a substantive standard applies, however, has no bearing on the MMS's NEPA duty. This argument boils down to a de facto rule that an EIS is never necessary and, in fact, that an EA never has to consider the impacts of a major federal action on any marine mammal, since the MMPA's protective standards apply to all marine mammals. There is nothing in the MMPA that exempts actions subject to an IHA from NEPA. *Cf. Jones v. Gordon*, 792 F.2d 821, 827-29 (9th Cir. 1986) (holding that permits to take marine mammals for scientific purposes were not exempt from NEPA). In fact, NMFS is currently in the process of preparing an EIS to consider the impacts of IHA permits

⁸ The record suggests that MMS may have relied on the standard as a default simply because it did not have time to do an adequate analysis in its rush to complete the NEPA process. *See* ER 921 ("I don't really feel like I have the time or info to do a sufficient job on this EA . . . After my experiences of trying to pry information out of folks here in the region, I am a bit exasperated and am thinking that my default analysis will be no impacts if Shell operates under an IHA.")

for seismic operations in the Chukchi and Beaufort Seas. *See* 71 Fed. Reg. 66,912 (Nov. 17, 2006).

2. *The EA is inadequate because it fails to examine the impacts of a crude oil spill during Shell's exploration activities.*

A crude oil spill during the exploration drilling proposed by Shell could have catastrophic effects on the environment and resources in the Beaufort Sea and adjacent coastal areas. MMS has acknowledged that there is a risk of a crude oil spill during these types of activities. Nonetheless, MMS refused, based on an “assumption” that no crude oil spills will occur, to evaluate in its EA the potential effects of a crude oil spill during Shell’s exploration activities. *See* ER 1071 (EA). According to MMS, this assumption “is based on the low rate of exploratory drilling blowouts per well drilled and the history of exploration spills on the Arctic OCS” *Id.* This assumption alone is an insufficient basis to ignore in the EA the potential impacts from this Shell drilling plan of a foreseeable event such as an oil spill. Moreover, the agency cannot assess the potential significance of oil spill impacts without considering the likelihood of a spill together with its impacts, something the EA failed to do. Neither does any previous, generic assessment of oil spill impacts meet MMS’s obligation to consider the potential impacts of this Shell drilling plan. Accordingly, its EA and FONSI are arbitrary.

- a. MMS arbitrarily refused to evaluate the effects of a crude oil spill because it assumed in its EA that no spill would occur.

The EA refuses to evaluate the effects of a crude oil spill during Shell's proposed exploratory drilling based solely on MMS's "assumption" that no such spill will occur. In so doing, MMS violated NEPA. An EA must provide sufficient analysis to determine whether a proposed action *may* have significant effects on the environment, and therefore requires preparation of an EIS. *See supra* at 27. That analysis must be supported by evidence and must take a hard look at key potential impacts. *See id.* MMS failed to evaluate a critical issue—the potentially significant impacts of an oil spill from Shell's drilling project.

The EA and other documents in the MMS record recognize that crude spills have occurred during exploration, *see supra* at 16, acknowledge that crude spills during exploration are, in fact, much more likely than spills during production, *see id.*, admit that exploration blowouts can release substantial quantities of oil into the environment, *id.*, and include exploration spills in spill projections, *see supra* at 17.

Although the EA presents the risk as low, it shows that crude oil spills have occurred in the past and may occur during future exploration.⁹

Moreover, MMS's own regulations require that a company prepare an oil spill response plan prior to conducting exploration drilling. *See* 30 C.F.R. §§ 254.1(a) & 254.6. MMS must approve this plan, and it must address crude oil spills, including very large spills. *See* 30 C.F.R. § 254.1(a); *see also* 30 C.F.R. § 254.23(g) (requiring emergency response action plan to include procedures to follow for different spill sizes). Alaska state law has similar requirements. *See* 18 AAC 75.425.

Thus, the acknowledged history of exploration oil spills, MMS's prior analyses, and its own regulations all indicate that a crude oil spill during exploration drilling is reasonably foreseeable, *see* 40 C.F.R. § 1508.8(b), and should have been considered by MMS in its EA. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1030-31 (9th Cir. 2006) (rejecting an agency's refusal to evaluate the impacts of a terrorist attack in light of the agency's substantial efforts to prepare for such an attack); *cf. Limerick Ecology*

⁹ While the EA asserts that "approximately 13,000 wells have been drilled, and four spills resulted in crude reaching the environment from blowouts during exploration," it also notes that only 98 of those wells were drilled in the Alaska OCS. ER 1115 (EA). Of those 98, only "[n]ine exploratory wells have been drilled previously in the Beaufort Sea during the open water period using floating drilling units" like those Shell proposes to use. *See* ER 1046 (EA).

Action, Inc. v. U.S. Nuclear Regulatory Comm'n, 869 F.2d 719, 740 (3d Cir. 1989) (“As the NRC itself has indicated with regard to emergency planning, these ‘regulations are premised on the assumption that a serious accident might occur.’”); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 153-54 (D.C. Cir. 1985) (requiring consideration of the effects of bacteria escape which the agency acknowledges “*is possible*”).¹⁰

- b. By refusing to consider the probability of a crude oil spill together with its consequences, the EA fails to assess potentially significant impacts.

Where an agency action creates a risk of an accident that could have dire consequences, an agency must assess the likelihood together with the consequences of such an accident in deciding whether an EIS must be prepared.

See City of New York v. United States Dep't of Transp., 715 F.2d 732, 746 (9th Cir.

¹⁰ There may, of course be occurrences that are “so ‘remote and highly speculative’ that NEPA’s mandate does not include consideration of their environmental effects.” *San Luis Obispo Mothers for Peace*, 449 F.3d at 1030; *cf. Ground Zero Ctr. For Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004) (finding that NEPA does not require consideration of an accidental explosion where the “infinitesimal” risk is estimated to be “between one in 100 million and one in one trillion”); *No GWEN Alliance v. Aldridge*, 855 F.2d 1380, 1386 (9th Cir. 1988) (finding that NEPA does not require the consideration of an “increase [in] the probability of nuclear war” where the Petitioners agreed that it was “merely speculative”). Given the history of exploration spills and the acknowledged potential for occurrence, exploration oil spills do not fall into this category.

1983) (holding that, in determining whether an uncertain event will have a significant impact, the agency must “undertake risk assessment: an estimate of both the consequences that might occur and the probability of their occurrence”); *Limerick Ecology Action*, 869 F.2d at 738 (“Moreover, as a logical proposition, because risk equals the likelihood of an occurrence times the severity of the consequences, . . . the risk will vary with the potential consequences.”); *Sierra Club v. Watkins*, 808 F. Supp. 852, 867-68 (D.D.C. 1991). Only by considering impacts and the likelihood that those impacts could occur, can the agency determine whether there may be a significant impact to the environment.

In this case, it is undisputed that an oil spill could have dire consequences. *See supra* at 13-15. The EA, however, fails to consider these consequences together with the likelihood of a spill to reach a reasoned conclusion that the potential impacts of this exploration project cannot be significant. Instead, to avoid its obligation to prepare an EIS, the EA simply disregards these consequences based primarily on the assumption that no crude oil spill would occur. *Supra* at 36.

- c. No prior lease sale analysis meets MMS’s obligation to consider the effects of a crude oil spill from Shell’s drilling activities.

Though MMS justifies its refusal in the EA to evaluate the effects of a crude oil spill on its assumption that a spill will not occur, there is buried in the EA a

second and inconsistent rationale. Two sentences in an appendix to the EA reference the Multi-Sale EIS and the Lease Sale 202 EA and state that they identified the potentially significant effects of an oil spill. *See* ER at 1116; *see also* ER 1076, 1077, 1089. The EA provides no explanation for its reliance on the referenced documents. It does not reflect that MMS made a reasoned judgment that these generic analyses could substitute for an evaluation of the effects of a spill during the project actually proposed by Shell. *Cf. Edwardsen v. Dep't of Interior*, 268 F.3d 781, 785-86 (9th Cir. 2001). This pro forma reference to documents prepared to evaluate the effects of lease sales cannot salvage the EA's failure to assess the significance of an oil spill during this exploration project.

When an agency is presented with a particular project, it must conduct a detailed, project-specific analysis of potential impacts. Such detailed analysis is particularly appropriate for an OCS exploration project. *See N. Alaska Env'tl Ctr. v. Kempthorne*, 457 F.3d 969, 976-77 (9th Cir. 2006) (excusing the failure to conduct "parcel by parcel analysis" of possible environmental impacts from onshore oil and gas development at the lease stage because at subsequent exploration and development permitting stages "when the sites, and hence more site specific effects, are identifiable" such examination "must be made"); *Vill. of False Pass*, 565 F. Supp. at 1135 ("potential threats to the environment are readily visualized and evaluated" at the OCSLA exploration analysis stage) (quoting *North*

Slope Borough, 642 F.2d at 595). This detailed analysis must encompass the potentially significant impacts of a large crude oil spill.

The Multi-Sale EIS and Lease Sale 202 EA both predate Shell's initial submission of its exploration plan to MMS. These documents could not, and in fact do not, analyze the effects of an oil spill from exploration drilling with the same timing, location, and magnitude of the project proposed by Shell. *See supra* at 6-7 (quoting ER 180) ("site-specific data . . . is not available or needed in the current lease sale EIS."). Rather, these documents generally estimate potential oil spill impacts throughout the 9.8 million acre Beaufort Sea Planning Area in order to weigh the "relative oil-spill risks" associated with the leasing alternatives considered by the agency. *E.g.*, ER 182 (Multi-Sale EIS). They do not consider the relevant aspects of any specific project—its geographic scope or the locations, seasonal duration, and magnitude of activities involved—together with the suite of relevant resources at risk from a crude oil spill—habitats, migratory wildlife populations and subsistence activities—to determine whether the impacts of a spill from a specific project are potentially significant and require preparation of an EIS. *See, e.g.*, ER 168-69 (noting that impacts of an oil spill on the bowhead subsistence hunt varies depending on the location); ER 165-66 (failing to assess the severity of impacts that an oil spill would cause to wetlands in any particular locale); ER 163-

64 (discussing oil spill impacts to caribou without differentiating between the four herds that inhabit northern Alaska).

In fact, these previous documents recognized that an oil spill could cause significant environmental impacts and that the severity of these impacts could differ substantially from one project to the next. *See, e.g.*, ER 489-90 (Lease Sale 202 EA) (reporting that an oil spill may cause “substantially higher” polar bear mortality depending on its timing and location); ER 169 (Multi-Sale EIS) (severity of effects of an oil spill on the bowhead whale population and on the bowhead subsistence harvest depends on the timing and location of a spill). Accordingly, the Lease Sale 202 EA recognizes the need to further analyze potential oil spill impacts to polar bears from future exploration projects on a “case-by-case basis.” ER 497 (Lease Sale 202 EA). As MMS’s scientists noted, despite the particularly acute threat to polar bears from an oil spill during Shell’s project, *supra* at 15, such analysis never occurred. *See* ER 986; ER 998.

B. The Potentially Significant Impacts of Industrial Noise on Bowhead Whales and the Potential of a Catastrophic Oil Spill Necessitate an EIS for the Exploration Plan.

As the previous argument shows, MMS’s decision not to prepare an EIS is arbitrary because its EA fails to take a hard look at the environmental impacts of drilling. This violation of NEPA justifies a remand to the agency to reconsider its decision on the basis of a complete EA. The facts in this case also support a

further conclusion that an EIS was necessary. The record reveals that substantial enough questions are presented about the potential impacts of the drilling plan that this Court should direct the agency to prepare an EIS.¹¹

“‘[A]n EIS *must* be prepared if substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor.’” *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (citation omitted) (emphasis in original). The Council on Environmental Quality’s (CEQ) NEPA regulations specify factors that must be considered in determining when an action may significantly affect the environment warranting an EIS. *See* 40 C.F.R. § 1508.27(b) (2007). Several of the significance criteria are triggered here. The project affects the Arctic National Wildlife Refuge and increasing delicate Arctic Ocean areas. *See supra* at 5; 40 C.F.R. § 1508.27(b)(3). The comments of the agency’s own experts reflect a high degree of controversy about the impacts of the project. *See supra* at 15; 21-23; 40 C.F.R. § 1508.27(b)(4). Unknowns regarding the size and location of the project and the species affected make the environmental impacts highly uncertain and involve unknown risks. *See*

¹¹ The North Slope Borough’s brief presents a more substantial argument concerning MMS’s obligation to prepare an EIS here, focusing on the impact to subsistence. *See* NSB Br. at 39-54. To avoid repetition, petitioners here present an abbreviated argument that references the potential impacts to subsistence areas, whales, and from a crude oil spill.

supra at 19-23; 40 C.F.R. § 1508.27(b)(5). The project affects endangered species, *see* 40 C.F.R. § 1508.27(b)(9), and there is a clear potential for cumulatively significant impacts. *See supra* at 32; 40 C.F.R. § 1508.27(b)(7). The Ninth Circuit has found that any “one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.” *Ocean Advocates*, 402 F.3d at 865; *see also Nat’l Parks & Conservation Ass’n*, 241 F.3d at 731. Therefore, this Court should remand the exploration plan approval to MMS and direct it to prepare an EIS.

III. THE MMS APPROVAL VIOLATES OCSLA

A. The Exploration Plan Failed To Identify the Specific Drilling Locations in Violation of OCSLA.

MMS’s approval of Shell’s three-year drilling plan violated OCSLA’s requirements that approval be based on specific information about well location and the affected areas. MMS OCSLA regulations require exploration plans to provide specific information about “proposed well location and spacing.” 30 C.F.R. § 250.203 (2007); *see also* 30 C.F.R. § 250.211 (2007) (requiring a map and “description . . . and tentative schedule (from start to completion) of . . . exploration activities including exploration drilling.”). These regulations also require that an exploration plan and environmental review be “project specific” and “describe those resources, conditions, and activities . . . that could be affected by . . . proposed exploration activities” 30 C.F.R. § 250.227. Shell’s exploration

plan failed to meet these requirements because the well sites for 2008 and 2009 were not identified. *See supra* at 19-20. MMS's approval, therefore, violates OCSLA.

B. MMS's Failure To Identify and Analyze all Environmental Impacts Violates OCSLA.

As a result of its rushed analysis, MMS did not meet its OCSLA obligation to "consider available relevant environmental information in making decisions (including those relating to exploration plans . . .)" 43 U.S.C. § 1346(d) (OCSLA § 20(d)). This statutory requirement demands that MMS *adequately* consider *all* relevant available environmental information prepared pursuant to Section 20 of OCSLA. *See* H.R. Rep. No. 95-590, at 155 (1977) *reprinted in* 1978 U.S.C.C.A.N. 1450, 1561 ("Finally, the committee made it explicit that information prepared pursuant to this section should be adequately considered by the Secretary. In making decisions, . . . he is to review, analyze and consider all available and relevant environmental information prepared pursuant to this section.").¹² Moreover, the agency's OCSLA regulations on "Review and

¹² The Ninth Circuit has found that a similar provision of OCSLA, Section 20(a)(1), "implies" that environmental studies required by OCSLA "must meet NEPA standards." *Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

Decision Process for the [Exploration Plan]” provide that the agency “will evaluate the environmental impacts” of the proposed activities “and prepare environmental documentation under the National Environmental Policy Act . . . and the implementing regulations” 30 C.F.R. § 250.232(c) (2007).

Here, the Secretary has relied upon the EA to fulfill its OCSLA obligations. The FONSI states, “Based on our analysis in the EA, we have determined that Shell’s proposed operations . . . will not cause ‘undue or serious harm or damage to the human, marine, or coastal environment.’” ER 1045 (quoting, without citation, 30 C.F.R. § 250.202(e)). Because MMS failed to consider the site-specific threats to bowhead whales and the potential impact of a crude oil spill in the EA, *see supra* at 28-43, MMS did not fulfill its obligation under OCSLA to consider all relevant environmental information.

IV. THE COURT SHOULD VACATE MMS’S APPROVAL OF THE EXPLORATION PLAN AND REMAND TO THE AGENCY.

MMS’s approval of Shell’s exploration plan is based on an arbitrary EA and FONSI and an insufficient evaluation of environmental effects under OCSLA. Accordingly, the Court should vacate that approval and remand to MMS with direction to comply with NEPA and OCSLA.

“Under the APA, the normal remedy for an unlawful agency action is to ‘set aside’ the action. 5 U.S.C. § 706(2). In other words, a court should ‘vacate the

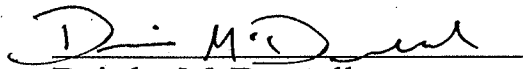
agency's action and remand to the agency to act in compliance with its statutory obligations.”” *S.E. Alaska Conservation Council v. United States Army Corps of Eng'rs*, 486 F.3d 638, 655 (9th Cir. 2007) (quoting *Defenders of Wildlife v. United States Env'tl Prot. Agency*, 420 F.3d 946, 978 (9th Cir. 2005), *rev'd on other grounds*, 127 S. Ct. 2518 (2007)); *see also Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (stating that where a plaintiff “prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order”).

There is no reason to depart from the normal remedy of vacatur in this case. MMS must undertake a full evaluation of the potential impacts of the proposed activities on the environment in compliance with NEPA and OCSLA before allowing them to proceed. Moreover, it is clear that the proposed activities pose a significant threat of harm to the environment, including endangered species such as bowhead whales, from noise, vessel traffic, and spilled oil. *See supra* at 26-43. Petitioners' use and enjoyment of the Beaufort Sea and surrounding area for subsistence, scientific, recreational, and spiritual purposes would be impaired significantly if such harm occurred. *See* ER 1209-16; ER 1240-41; ER 1242-46; ER 1250-52; ER 1260-68; ER 1272-73; ER 1282-84; ER 1290-91; ER 1329-31; ER 1345-48; ER 1356-58; ER 1381-83; ER 1385-87.

CONCLUSION

For the foregoing reasons, Plaintiffs request this Court vacate MMS's approval of Shell's exploration plan and remand to the agency with direction to prepare an EIS or, at a minimum, an adequate EA under NEPA and to comply with OCSLA's requirements to fully assess the impacts of the exploration plan and identify the location of the proposed activities.

Respectfully submitted this 5th day of September, 2007.



Deirdre McDonnell

Eric Jorgensen

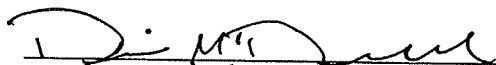
EARTHJUSTICE

Attorneys for Petitioners AWL, *et al.*, and
REDOIL, *et al.*

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R.APP.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBERS 07-71457 AND 07-71989**

I certify that, pursuant to Fed.R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached PETITIONERS' CONSOLIDATED BRIEF IN NUMBERS 07-71457 AND 07-71989 is proportionately spaced, has a typeface of 14 points, and contains 11,662 words.

Dated this 5th day of September, 2007,



Deirdre McDonnell

Eric Jorgensen

EARTHJUSTICE

Attorneys for Petitioners AWL, *et al.*, and
REDOIL, *et al.*

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Petitioners Alaska Wilderness League, Natural Resources Defense Council, Pacific Environment, Resisting Environmental Destruction On Indigenous Lands, a Project of the Indigenous Environmental Network (REDOIL), Center for Biological Diversity, and Sierra Club state that they are not aware of any related cases pending in this Court other than those consolidated in this action.

PROOF OF SERVICE

I, Iris Korhonen-Penn, certify that on September 15, 2007, an original and fifteen (15) copies of PETITIONERS' CONSOLIDATED BRIEF IN NUMBERS 07-71457 AND 07-71989 and five (5) copies of the PETITIONERS' CONSOLIDATED EXCERPTS OF RECORD were sent by first-class mail, postage prepaid, to the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California, 94119-3939. Two (2) copies of PETITIONERS' CONSOLIDATED BRIEF IN NUMBERS 07-71457 AND 07-71989 and one (1) copy of the PETITIONERS' CONSOLIDATED EXCERPTS OF RECORD were served by first-class mail, postage prepaid, on:

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