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 ENFIRONMENT,

RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS, 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,

SHELL OFFSHORE, INC.,

Respondent-Intervenor

ON PETITION FOR REVIEW PURSUANT TO 43 U.S.C. § 1349(c)

BRIEF OF RESPONDENTS

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JURISDICTION

The Minerals Management Service (MMS) approved an Exploration Plan (EP) submitted by Shell Offshore, Inc. (Shell) on February 15, 2007. ER 1153.[1/] Section 23(c)(2) of the Outer Continental Shelf Lands Act ("OCSLA") provides that, "[a]ny action of the Secretary to approve * * * any exploration plan * * * under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located," and Section 23(c)(3) provides that "[t]he judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who * * * files a petition for review of the Secretary's action within sixty days after the date of such action." 43 U.S.C. § 1349(c). Petitioners Alaska Wilderness League (AWL), Natural Resources Defense Council, and Pacific Environment filed a petition for review challenging the approval of the EP on April 13, 2007, within 60 days of the approval, and this Court accordingly has jurisdiction over that petition (No. 07-71457). Petitioners Resisting Environmental Destruction on Indigenous Lands (REDOIL), Center for Biological Diversity, and Sierra Club filed a petition for review (No. 07-71989) on May 15, 2007; petitioners North Slope Borough (NSB)

[1/] In this brief we will cite to the Petitioners' Consolidated Excerpts of Record (ER) where possible. Other citations will be to the Respondent's Supplemental Excerpts of Record (SER).

and Alaska Eskimo Whaling Commission (AEWC) also filed a petition for review (No. 07-72183), on May 15, 2007. As these last two petitions were not filed within 60 days of the action they challenge, the Court lacks jurisdiction over them. See infra at 24-30.

QUESTIONS PRESENTED

1. Whether this Court should dismiss those petitions for review that were not filed within 60 days of MMS's approval of the EP, as required by 43 U.S.C. § 1349(c)(3).

2. Whether an Environmental Assessment (EA) prepared by MMS to inform its decision on Shell's proposed EP, which contained detailed analysis of the likely impacts of Shell's proposed activities, and tiered to the even more extensive consideration of impacts in a 2003 environmental impact statement (EIS) covering all phases of oil and gas development in the Beaufort Sea, fulfilled all of MMS's obligations under the National Environmental Policy Act (NEPA).

3. Whether MMS had sufficient environmental and well information to make its decision to approve the Shell EP.

STATEMENT

A. Statutory Background

1. OCSLA

The OCSLA was first enacted in 1953 to clarify federal jurisdiction over offshore oil leasing rights, and was substantially amended in 1978 with the goal of reducing United States dependence on foreign oil. See H.R. Rep. No. 95-590, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 1450, 1460, 1464. The 1978 amendments established a national policy of making the outer continental shelf "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. 1332(3). See Watt v. Energy Action Educational Foundation, 454 U.S. 151, 155 n.2 (1981) ("The 'basic purpose' of the 1978 Amendments was to 'promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf,' and the Amendments were broadly designed to achieve that aim") (quoting H.R. Rep. 590 at 53).

The 1978 amendments to the OCSLA prescribed a four-stage process for oil-and-gas development, with review at each stage. See Sec'y of the Interior v. California, 464 U.S. 312 (1984). This four-level review process provides a

"continuing opportunity for making informed adjustments" to ensure that OCS oil-and-gas activities are conducted in an environmentally sound manner. Sierra Club v. Morton, 510 F.2d 813, 828 (5th Cir. 1975).

During the first stage, the Secretary prepares a Five-Year OCS Oil and Gas Lease-Sale Schedule, and a programmatic environmental impact statement (EIS) is completed. 43 U.S.C. § 1344(b)(3). At the second stage, the Secretary conducts lease sales of tracts on the outer continental shelf. Among other things, the Secretary prepares an EIS for the area under consideration for leasing, and solicits comments from the public, other federal agencies, and the governors of affected states. The highest qualified bidders obtain leases which entitle them to conduct limited preliminary activities such as geophysical surveys. See 30 C.F.R. § 250.207.

This case involves the third stage of the OCSLA process – exploration of the lease sale area. Prior to engaging in any exploratory drilling, a lessee must submit an exploration plan (EP) for review and approval. 43 U.S.C. § 1340(c). The statute requires that "[t]he Secretary shall approve such plan, as submitted or modified, within thirty days of its submission." Id. at § 1340(c)(1). The Secretary must disapprove the plan if he finds that any activity under the plan would result in

"serious harm or damage" to the marine, coastal, or human environment. Id., see also 43 U.S.C. § 1334(a)(2)(A)(i).

The fourth and final stage, development, is reached only if a lessee makes a commercially viable oil discovery. A lessee must submit a detailed development and production plan (DPP). 43 U.S.C. § 1351. The OCSLA states that "[a]t least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action," 43 U.S.C. 1351(e); see also 43 U.S.C. § 1331(p) (defining "major federal action" in reference to NEPA).

2. MMS Regulations

MMS has promulgated detailed regulations implementing the statutory requirements regarding EPs. See 30 C.F.R. §§ 250.211 - 250.228 (defining contents of EPs); 30 C.F.R. §§ 250.231 - 250.235 (defining procedure for processing EPs). The regulations require, *inter alia*, that a proposed EP demonstrate that its proposed plan of operations " [d]oes not cause undue or serious harm or damage to the human, marine, or coastal environment." 30 C.F.R. § 250.202(e).

Within 15 days of receiving a proposed EP, MMS must determine if the applicant has provided all needed information and whether the information is accurate. 30 C.F.R. § 250.231. If the information is found to be sufficient, or if any information deficits are cured by the applicant, the EP is then "deemed submitted." Id. at § 250.231(c). Once the EP is deemed submitted, the 30-day statutory clock begins to run. MMS immediately provides a copy to the relevant state for review under the Coastal Zone Management Act (CZMA); the state is given 21 days to submit comments. Id. at § 250.231(a)(1). During the 30-day review period, MMS determines whether the EP meets all regulatory criteria, and also "evaluate[s] the environmental impacts of the activities described in your proposed EP and prepare environmental documentation under the National Environmental Policy Act * * *." 30 C.F.R. § 250.232(c). After approval of the EP, the lessee must apply for any needed permits or approvals, including permits for drilling wells. 30 C.F.R. § 250.281.

3. Related Review Processes.

Marine mammals in the Beaufort Sea area are protected by the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. 1361-1407. That statute generally prohibits the "take" of marine mammals, 16 U.S.C. 1372, and defines "take" broadly to include "harassment," which includes any "pursuit, torment, or

annoyance" of marine mammals that "has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioural patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding or sheltering," id. § 1362(13), (18)(A)(ii). However, the MMPA provides a mechanism for allowing the incidental taking of small numbers of marine mammals. See id. § 1371(a)(5). Because of the expansive definition of "harassment," the presence of marine mammals in the Alaska Arctic, and the civil and criminal penalties for violations, it has been the consistent practice of lessees in the Alaska Arctic to obtain such authorizations for incidental takings associated with oil and gas activities.

Under its regulations, the National Marine Fisheries Service (NMFS) may issue an incidental harassment authorization (IHA) for species under its jurisdiction, which include whales and seals. NMFS must determine that "the number of marine mammals taken by harassment will be small, will have a negligible impact on the species or stock of marine mammal(s), and will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence." 50 C.F.R § 216.107(b). NMFS may condition an IHA on the applicant agreeing to take specific protective actions. The regulations at subsection (f) provides that an IHA must be modified, withdrawn or suspended if NMFS

determines that the authorized taking, either individually or in combination with other authorizations, is having, or may have, more than a negligible impact on the species or stock or an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

The United States Fish and Wildlife Service (FWS), which has jurisdiction over polar bears and walrus, has implemented § 1371(a)(5) of the MMPA for purposes of oil and gas operations in the Alaska Arctic by issuing regulations which authorize non-lethal, incidental takings of small numbers of these species. On August 2, 2006, FWS issued a regulation covering oil and gas exploration and development operations in the Beaufort Sea and adjacent coast for five years. 71 FR 43926 (2006). Operators planning to conduct activities consistent with this regulation which may result in takings must submit a request for a Letter of Authorization (LOA), which FWS can issue subject to protective conditions. See 50 C.F.R. 18.27(f)(4).

STATEMENT OF FACTS

Oil and gas exploration is not a new phenomenon in the Beaufort Sea. Seven lease sales were held in this same area of the OCS between 1979 and 1988, resulting in the issuance of 688 leases and the drilling of 30 exploration wells. SER 21. One development and production plan has been approved, leading to a

producing development – the Northstar joint federal-state project. Id.; see also Edwardsen v. Dep't of the Interior, 268 F.3d 781, 785 (9th Cir. 2001) ("Edwardsen") (upholding approval of Northstar development and production plan against NEPA challenge).

During the course of more than two decades of exploration and development in the Beaufort Sea, MMS, NMFS, and other agencies have obtained extensive knowledge of wildlife resources and subsistence harvest patterns, and developed and refined protective measures for these resources. MMS has also developed a workable method for applying the requirements of NEPA to the staged OCS process. As described below, MMS prepares a detailed EIS that covers several lease sales along with all the exploratory drilling, seismic and other operations that are projected to occur pursuant to those leases. When particular exploratory activities are proposed, MMS prepares an EA that "tiers" to the EIS to determine if the specific proposed activities are within the range of activities analyzed in the EIS, whether additional mitigation measures are needed, and whether additional NEPA evaluation is required. See 40 C.F.R. § 1502.20 (regulation of Council on Environmental Quality encourages agencies to "tier" to broader environmental analyses). Throughout the process, MMS continues to consult with NMFS, FWS,

the State of Alaska, federally recognized tribes, potentially affected communities, and other local stakeholders. ER 1067-69.

A. The 2003 multi-sale EIS.

In April 2002, MMS issued a proposed five-year offshore oil and gas leasing program for 2002-2007, along with an EIS. SER 2. This program contemplated offering three separate sales in the Beaufort Sea OCS, occurring in 2003 (Sale 186), 2005 (Sale 195), and 2007 (Sale 202). Id. Each of the three sales would cover the same geographic area and offer the same tracts for leasing, minus any tracts already leased.

In February 2003, MMS issued a Final EIS covering the three planned sales within the Beaufort Sea Planning Area. This EIS (the "multi-sale EIS") analyzed the potential environmental effects of leasing and any exploration and development that might occur following the sales. SER 60-66. The multi-sale EIS assumed that exploratory drilling pursuant to sale 195 (under which the leases at issue here were sold) would begin in 2007 and that "a maximum of two drilling rigs would operate at any time." SER 61. It assumed that drillships or other types of floating platforms would be used in waters deeper than 20 meters, that these would be supported by icebreakers and supply boats, and would only operate during the open water season. Id.

The EIS analyzed in detail effects on wildlife and the environment from noise and other effects of anticipated exploration, as well as from production. SER 67-197. It also contained a comprehensive analysis of possible effects from leasing, exploration, and production activities on subsistence harvest, including all species of concern to the petitioners. SER 197-222.

The multi-sale EIS analyzed in detail the effects of a possible oil spill, as well as spill prevention and response. SER 68-74; 85-91; 92-96; 102-104; 128-143 (possible effects of oil spill on bowhead whales); 146-152; 158-166; 173-180 (effects on other marine mammals); 186-190 (effects on caribou and other land mammals); 192-195 (effects on vegetation and wetlands). This discussion was based on a comprehensive analysis, contained in an appendix to the EIS, of oil spill probabilities and trajectories, as well as behavior and fate of spilled oil. ER 188-219.

The multi-sale EIS explained how mitigation measures have been developed in conjunction with the State of Alaska, NMFS, FWS, NSB, AEWC, and potentially affected recognized tribes. SER 24-30. Among these are lease stipulations which the EIS evaluated as "part of the proposed action and alternatives." SER 25. For instance, Stipulation No. 4 requires an extensive bowhead whale monitoring program to be carried out in cooperation with AEWC

and NSB; Stipulation No. 5 requires conflict avoidance mechanisms to protect subsistence whaling and other subsistence activities; Stipulation No. 7 requires placing booms around fuel barges during transfer operations before and during the bowhead whale migration; and Stipulation No. 8 imposes lighting requirements on structures to minimize effects on birds. SER 29-30, 32-33. The EIS evaluates the effectiveness of these and other stipulations. SER 29, 30, 32-33. The EIS also evaluates "information to lessee clauses," which, *inter alia*, advise lessees of the need to comply with statutory protections for marine mammals and endangered species, and of MMS's authority to suspend operations that pose threats of serious, irreparable, or immediate harm to species such as whales. SER 34-39.

B. The lease sales.

Because the multi-sale EIS contained all NEPA analysis necessary for Sale 186, that sale was held in 2003 without further NEPA analysis. SER 21. The multi-sale EIS explained that MMS would prepare EAs for Sales 195 and 202 to determine whether the NEPA analysis in the EIS was still adequate. SER 21-22. MMS prepared an EA for Sale 195 and held that sale in 2004. ER 242-49. The leases at issue here were purchased at this sale. No one sought judicial review of Sale 186 or Sale 195. MMS also prepared an EA for Sale 202, which updated the oil spill risk analysis of the multi-sale EIS with new data regarding likely location

of possible development, among other things. ER 476-517. That sale was held in April 2007.[2] Both of these EAs "tiered" to the multi-sale EIS. ER 485.

C. NMFS's 2006 Biological Opinion.

All exploratory and other operations pursuant to the lease sales are subject to NMFS's jurisdiction over marine mammals under the MMPA, and its jurisdiction over endangered species such as bowhead whales pursuant to the Endangered Species Act (ESA). SER 34. Pursuant to its ESA jurisdiction, NMFS issued in June 2006 a 105-page Biological Opinion ("BiOp") on oil and gas leasing and exploration within the Alaskan Beaufort and Chukchi Seas, and its effects on bowhead whales. ER 369. This BiOp noted the phased nature of the OCS program, and explained that it addressed the leasing and exploration phases of development, including seismic surveys, exploratory drilling, and boat and aircraft activity. ER 370-71. It noted that NMFS had issued numerous BiOps since 1980 for OCS activities in this area. ER 372.

The BiOp considered the same exploration scenario as the multi-sale EIS – that is, a maximum of two drilling rigs operating at any one time (ER 373), accompanied by two or more icebreaking vessels and other support vessels and aircraft (ER 374-75). The BiOp thoroughly considered the effects on bowheads of

[2] Lease sale 202 is the subject of litigation in district court brought by NSB and AEWC. North Slope Borough v. MMS, No. 07-00045 (D. Alaska).

noise from exploratory drilling. ER 430-432; 435-437. Included in this discussion was a thorough review of the effects on bowheads of previous exploratory drilling in the Beaufort Sea by the *Kulluk*, a floating platform that Shell intends to use in this project. ER 437-39. The effects on bowheads of noise generated by icebreakers and other vessel traffic was considered in detail. ER 439-43. The BiOp found that "[o]verall, bowhead whales exposed to noise-producing activities such as vessel and aircraft traffic, drilling operations, and seismic surveys most likely would experience temporary, nonlethal effects." ER 446.

The BiOp also considered the potential effects of oilspills on bowheads. It noted that the historical record indicated that the chance of a large spill during exploration is "remote." ER 452. It found that small spills, such as may occur during fuel transfers, "are unlikely to have significant effects on bowhead * * *." ER 448.

The BiOp concluded that:

> Available data do not indicate that noise and disturbance from oil and gas exploration and development activities since the mid-1970s had a lasting population-level adverse effect on bowhead whales. Data indicate that bowhead whales are robust, increasing in abundance, and have been approaching (or have reached) the lower limit of their historic population size at the same time that oil and gas exploration activities have been occurring in the Beaufort Sea and, to a lesser extent, the Chukchi Sea.

ER 452. After reviewing all impacts of leasing and exploration, including cumulative impacts, NMFS concluded that such activities were not likely to jeopardize the continued existence of bowhead whales. ER 454.

D. Shell's EP.

On November 22, 2006, Shell submitted to MMS a preliminary version of its Beaufort Sea EP for 2007 - 2009. ER 522, 610. MMS thereupon undertook a review to determine the "completeness" of the information provided by Shell. ER 592-93. On December 13, 2006, MMS informed Shell of the information it would need to deem the EP as properly submitted. ER 623. Among other things, MMS requested that Shell "clarify the drilling locations (prospects) for which [MMS] approval is requested," and provide additional information on underwater noise. ER 625. MMS stated that if this additional information was included in an application to NMFS for an IHA, then Shell could append a copy of its IHA application. ER 626.

On December 21, 2006, MMS notified the mayors of North Slope native villages, the Inupiat Community of the Arctic Slope, and AEWC that it expected Shell to submit a completed EP in early January 2007. SER 254-55. MMS stated that it would distribute the EP for public review at that time. It emphasized that the

OCSLA provided only 30 calendar days for review of an EP, and that it would be requesting public comments within 21 days of submission. Id.

In January 2007, Shell submitted an application for an IHA to NMFS, and a copy was provided to MMS. ER 637.[3/] The application provides detailed information regarding Shell's planned operations, including the vessels Shell planned to use. ER 637-39. The application cited studies of noise impacts on bowhead whales from exploratory drilling during 1994 by the *Kulluk*, which Shell intended to use again in 2007. ER 648. Based on that information, Shell stated its expectation that its activities in 2007 would "take" a small number of marine mammals, in particular bowhead whales, by causing a temporary and short-term displacement of whales (and possibly some ringed seals) around its operations. ER 650-52. Shell anticipated that any impacts on the whale and seal populations were likely to be short term and transitory. ER 653. The application noted that the displacement of bowhead whales could affect the availability of this species for subsistence hunting, but proposed to mitigate this effect through negotiation of a Conflict Avoidance Agreement (CAA) with representatives of whaling communities. ER 654, 655-56. Shell included a detailed plan to monitor noise

[3/] As polar bear and walrus are under the jurisdiction of FWS, Shell submitted an application to that entity for these species on December 27, 2006. SER 328.

from drilling ships and seismic exploration,[4/] and its effect on wildlife species of concern. ER 700-34.

Shell submitted its complete EP to MMS on January 17, 2007. ER 739. Included was a detailed Environmental Report (ER 848-901) and an oil spill contingency plan (SER 263-268(index)). MMS immediately provided copies of these documents to an extensive distribution list that included several environmental groups, as well as NSB and native villages, and invited comments. SER 257-262.

Before acting on the EP, MMS completed an 87-page EA on the specific exploration activities being proposed. ER 1044-1152. The EA noted that "[t]he level and types of activities proposed in the Shell EP are within the range of activities described and evaluated in the Beaufort Sea multiple-sale EIS * * *, and updated in EA's for Sales 195 and 202." ER 1104. The EA explained that "these documents are incorporated by reference," id., and they are referenced throughout the EA, see, e.g., id. at 1051-52, 1055-56. The EA thus was able to focus in detail on the particular activities described in the Shell EP, as well as new information arising since MMS prepared the previous NEPA documents. Id. at 1046; see also,

[4/] Seismic activity is not authorized by the EP approval at issue here. Some seismic activity is authorized by the lease itself; other more intensive seismic activities are authorized by a separate permit system.

e.g., ER 1057-59 (assessing new information on polar bears); 1059-61 (assessing new information on subsistence harvest).

On the basis of the information and analysis contained in the EA and the earlier documents, MMS was able to conclude that the activities contemplated by Shell, if carried out consistent with all regulatory requirements, lease stipulations and conditions of approval, would "not significantly affect the quality of the human environment" for purposes of NEPA, and would not cause "undue or serious harm or damage to the human, marine, or coastal environment" for purposes of the OCSLA. ER 1045; see 43 U.S.C. §§ 1340(c)(1)-(2).

MMS approved the EP on February 15, 2007. ER 1153. The approval was subject to many conditions; among these were that Shell obtain a determination from the State that Shell's planned operations were consistent with the Alaska Coastal Management Plan, that adequate measures be taken to avoid conflicts with subsistence harvests, and that Shell obtain a final IHA from NMFS and Letter of Authorization from FWS pursuant to the MMPA. Shell obtained a consistency determination from the State on June 19, 2007.[5/] Shell reached a conflict avoidance agreement (CAA) with AEWC and whaling captains for the 2007 open water season on July 24, 2007. SER 294-326. This CAA provided that Shell would

[5/] See http://www.asrcenergy.com/shell/pdf/ACMPFinalConsistency.pdf.

cease drilling operations on August 25, and move all equipment offsite until completion of the Nuitsuq whale hunt. SER 295. On August 6, 2007, MMS found that this agreement met the requirements of the pertinent lease stipulation. SER 327.[6/]

E. This Action.

Petitioners AWL, et al., filed a petition for review on April 13, 2007, and on April 25, 2007, asked MMS to stay its approval of the EP pending this Court's review. On June 4, 2007, MMS denied the request for stay, explaining that petitioners' concerns regarding possible impacts on the environment were unwarranted due to the extensive protective conditions under which exploration would take place. SER 272-282.

[6/] On April 10, 2007, NMFS issued a Notice in the Federal Register requesting comments on its proposal to grant an IHA to Shell for its operations in 2007. NMFS, Notice of receipt of application and proposed incidental take authorization, 72 FR 17,864 (2007). The notice stated that "NMFS has preliminarily determined that the impact of SOI conducting an exploratory drilling program in the U.S. Beaufort Sea in 2007 will have no more than a negligible impact on marine mammals." Id. at 17,872. The Notice also preliminarily determined "that the short-term impact of conducting exploratory drilling by two drilling vessels and by supporting vessels, including ice management vessels in the U.S. Beaufort Sea may result, at worst, in a temporary modification in behavior by certain species of marine mammals * * *." Id. Since this April 2007 Notice preceded the July 2007 CAA, NMFS was not able to make a determination regarding impacts on subsistence uses of bowhead whales. Id. at 17,872-83. As of the filing of this brief, NMFS has not issued a final decision on Shell's request for an IHA for 2007. FWS has issued Shell's requested Letter of Authorization for incidental takes of polar bears and walrus. SER 328.

As noted supra at 1-2, additional petitions for review were filed in this Court by NSB and REDOIL, more than 60 days after the approval of the EP. MMS moved to dismiss those petitions for lack of jurisdiction. The motion to dismiss was denied by order of the Appellate Commissioner on July 16, 2007, without prejudice to raising the issue in the merits brief. The parties were ordered to include a discussion of the jurisdictional issues in their merits briefs.

All petitioners filed motions for the Court to stay the effectiveness of MMS's approval of the EP. On July 19, 2007, the Court issued an order temporarily staying the approval of the EP. On August 15, 2007, the Court granted the motions for stay pending resolution of the petitions for review and expedited briefing and argument on the merits.

SUMMARY OF ARGUMENT

1. The OCSLA provides a limited grant of jurisdiction to this Court over petitions filed within 60 days of MMS's approval of an EP. 43 U.S.C. § 1349(c)(3). The Act requires MMS to act on an EP within 30 days of its submission. Id. at § 1340(c)(1). A party cannot extend these mandatory time limits by filing an administrative appeal. The Supreme Court has made clear that administrative appeals toll statutes of limitation only where such tolling would not be inconsistent with congressional intent. Here, tolling would be clearly

inconsistent with the intent of the OCSLA to provided expedited administrative action and judicial review. As the 60-day limit for filing petitions for review was not tolled, the late petitions in Nos. 07-71989 and 07-72132 must be dismissed.

2. MMS fully complied with NEPA by preparing a thorough EA on Shell's proposed EP, which led MMS to reasonably conclude that the proposed exploration activities would not have a significant impact on the environment. The EA thoroughly examined the extensive data on prior exploratory drilling and related operations in the Beaufort Sea, and concluded that while drilling and related ice-management operations might cause individual bowhead whales to deflect somewhat from their migratory path to avoid noise, this deflection would have no significant biological impacts on the whales. The EA considered each of the other resources of concern, including all subsistence resources, and likewise concluded that the planned operations, conditioned by numerous protective stipulations, would not cause significant impacts. The EA presented an extensive analysis of oil spill risks, which permitted MMS to reasonably conclude that the only reasonably foreseeable oil spill would be a small spill from fuel transfers, and that such spills would not lead to any significant impacts.

Petitioners' attacks on the EA fail. First, petitioners ignore much of the detailed NEPA analysis found in the multi-sale EIS, to which the EA properly tiers.

Second, petitioners erroneously attack the EA's reliance on mitigation measures. This Court's decisions make clear that where, as here, mitigation measures are built into the proposal itself, and are not hypothetical or undeveloped, they may be considered in determining whether a proposal will have significant impacts on the environment. Third, petitioners repeatedly rely for support on selected statements from internal agency emails. Courts have stressed that these sorts of preliminary and internal statements of staff members should not be used to impeach final agency decisions. Where an agency explains its rationale in a thorough document, that document should be the focus of the Court's review. Here, the 85-page EA shows that MMS considered all of the pertinent factors, and that it reasonably concluded, in light of the many protective conditions imposed on Shell's proposed operations, that there would be no significant impacts on the environment.

3. MMS complied with all requirements of the OCSLA. The thorough EA demonstrates that MMS complied with its duty to "consider available relevant environmental information in making decisions." 43 U.S.C. § 1346(d). MMS clearly complied with the statute's requirement that EPs contain "the general location of each well to be drilled." Id. at 1340(c)(3)(C). Significantly, petitioners do not challenge MMS's well-supported finding that Shell's planned operations meet the substantive environmental standard of the OCSLA – that is, that

operations will not "probably cause serious harm or damage to life (including fish and other aquatic life) * * * or to the marine, coastal, or human environment." 43 U.S.C. 1334(a)(2)(A)(i). This confirms that Shell's proposed operations do not threaten the resources of concern to petitioners.

STANDARD OF REVIEW

Under section 23(c)(6) of the OCSLA, 43 U.S.C. § 1349(c)(6), review of the agency action in approving an EP shall be "solely on the record made before the Secretary." The "findings" of the Secretary shall be conclusive if "supported by substantial evidence on the record as a whole * * *." Id.

NEPA requires a reviewing court to analyze whether the agency took a "hard look" at the likely effects of the proposed action. Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1239 (9th Cir. 2005). Where an EA is prepared, "the Forest Service must 'undertake a thorough environmental analysis before concluding that no significant environmental impact exists.'" Id., quoting from Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998). "Determining whether the Forest Service took the requisite 'hard look' is judged against the APA's arbitrary and capricious standard." 428 F.3d at 1239; see also Environmental Protection Information Center v. U.S. Forest Service, 451 F.3d 1005, 1008-09 (9th Cir. 2006) (EPIC) (applying arbitrary and capricious

standard to question whether EA was adequate). This Court has stated that it is "not free to substitute our judgment for that of the agency as to the environmental consequences of its actions. Instead, our task 'is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" Association of Public Agency Customers v. BPA, 126 F.3d 1158, 1183 (9th Cir. 1997) (citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 555 (1978)).

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THE LATE-FILED PETITIONS OF NSB AND REDOIL

Section 23 of the OCSLA, 43 U.S.C. § 1349, is a detailed jurisdictional provision that specifies precisely how and where Congress intended to permit challenges to the approval of EPs such as the one at issue here. Subsection 23(c)(2) provides that:

> Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

43 U.S.C. § 1349(c)(2). Section 23(c)(7) further provides that, "[u]pon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court

shall be exclusive * * *." 43 U.S.C. § 1349(c)(7). Section 23(c)(3) contains several conditions on the availability of judicial review, including the following provision on timing:

> The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who * * * (C) files a petition for review of the Secretary's action within sixty days after the date of such action.

43 U.S.C. § 1349(c)(3).

The plain language of Section 23 makes clear that a person bringing a challenge to the Secretary's action approving an EP must do so within 60 days of "such action," which refers to the Secretary's action in approving, disapproving or modifying an EP. See Trustees for Alaska v. U.S. Dept. of Interior, 919 F.2d 119, 122 (9th Cir. 1990) ("Challenges to the Secretary's approval of that original [exploration] plan had to have been brought within 60 days"). Here, the Secretary's action approving the EP occurred on February 15, 2007, when the MMS Regional Supervisor approved, with conditions, the Shell EP.[7] Thus, the 60-day time limit began to run on that date and expired on April 16, 2007. REDOIL, however, did not file its petition for review until May 22, 2007, and NSB did not file until May 25, 2007. Accordingly, NSB and REDOIL did not comply

[7] There is no dispute that the Secretary has delegated his authority to approve exploration plans to the MMS Regional Supervisor. 30 C.F.R. § 250.233.

with the statutory condition on judicial review set out in 43 U.S.C. § 1349(c)(2), and the Court lacks jurisdiction over them. See Bowles v. Russell, 127 S. Ct. 2360, 2365-66 (2007) (failure to comply with a statutory time limit on the filing of an action deprives court of jurisdiction).

NSB (NSB Br. 2-3), joined by REDOIL (AWL Br. 2), argues that the "Secretary's action" which started the 60-day limit in this case was not MMS's approval of the EP, but instead a May 4, 2007, order of the IBLA suspending proceedings on administrative appeals filed by NSB and REDOIL. See ER 1197.[8/] They rely on cases decided under the Administrative Procedure Act (APA) and the Hobbs Act holding that administrative appeals render underlying agency decisions non-final and non-reviewable until completion of the appeals. See Acura of Bellevue v. Reich, 90 F.3d 1403, 1407 (9th Cir. 1996); Idaho Watersheds Project v. Hahn, 307 F.3d 815, 829 (9th Cir. 2002); ICC v. Locomotive Engineers, 482 U.S. 270, 284 (1987).

[8/] MMS had moved to dismiss these appeals, on grounds, *inter alia*, that the Department's rules for administrative appeals do not permit appeals from MMS decisions to approve EPs under the OCSLA. IBLA did not rule on the motions to dismiss before suspending proceedings.

Those APA and Hobbs Act cases are not applicable here.[9] The Supreme Court has made clear that while the tolling rule may apply under general review statutes like the APA and Hobbs Act, it does not apply to specific judicial review provisions where Congress has demonstrated an intent for immediate judicial review of administrative decisions. In Stone v. I.N.S., 514 U.S. 386, 405 (1995), the Court stressed that:

> Judicial review provisions * * * are jurisdictional in nature and must be construed with strict fidelity to their terms. * * * This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, "mandatory and jurisdictional," Missouri v. Jenkins, 495 U.S. 33, 45 * * * (1990), and are not subject to equitable tolling.

In Stone, the Court reviewed its earlier holdings under the APA and Hobbs Act, but found that the general tolling rule applied in those cases did not apply universally. 514 U.S. at 392. The Court found that a provision of the Immigration Act giving

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[9] If they were, this Court would lack jurisdiction not only over NSB's and REDOIL's petitions, but also the petition of AWL in No. 07-71457 because there would have been no final order from which any party could seek judicial review. See Acura of Bellevue, 90 F.3d at 1407-1410 (upholding dismissal of APA action on grounds that a pending administrative appeal rendered the agency's decision non-final and non-reviewable). The IBLA's May 4 Order does not finally resolve the two administrative appeals, but merely suspends proceedings pending the outcome of this case. See ER 1198 (order takes motions to dismiss "under advisement" and requires MMS to keep the Board informed of actions that may be relevant to the pending appeals); see generally Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 735 (3d Cir. 1983) (a stay order is not final if it leaves open the possibility of further proceedings).

an alien 90 days to petition for review of a final deportation order, and providing that review with respect to any motion to reconsider would be consolidated with review of the original order (see 8 U.S.C. §§ 1105a(a)(1), 1105a(a)(6)) "is best understood as reflecting an intent on the part of Congress that deportation orders are to be reviewed in a timely fashion after issuance, irrespective of the later filing of a motion to reopen or reconsider." 514 U.S. at 394.

Similar to the Immigration Act, the OCSLA is best understood as reflecting an intent that approvals of EPs are to be reviewed in a timely fashion after approval, irrespective of any attempt by a party to obtain further agency review. The OCSLA provides with respect to EPs that, "[t]he Secretary shall approve such plan, as submitted or modified, within thirty days of its submission * * *." 43 U.S.C. § 1340(c)(1). The fact that Congress mandated definite action on an EP within an extremely short time period clearly indicates that extension of the approval period through administrative appeals was not contemplated. Congress wanted the agency make an expeditious decision which would then be subject to expeditious review by bypassing the district court and placing jurisdiction directly in the court of appeals. This provision for rapid agency decision followed by expeditious judicial review would be entirely frustrated if the finality of an EP

approval was "tolled" upon the filing of administrative appeals, which can take months or years to resolve.

In Stone, the Supreme Court explained that the tolling rule developed in APA and Hobbs Act cases:

> reflects a preference to postpone judicial review to ensure completion of the administrative process. Reconsideration might eliminate the need for judicial intervention, and the resultant saving in judicial resources ought not to be diminished by premature adjudication.

514 U.S. at 399. That general rule, the Stone Court found, did not apply in the context of a specific review provision where Congress had indicated a preference for expedition. In the OCSLA, Congress was highly concerned with expedition. See 43 U.S.C.A. § 1802(1) (policy of the OCSLA is to "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 * * *"). As with the Immigration Act, expedition was clearly more important to Congress than allowing for agency reconsideration before judicial review. Thus, the tolling rule does not apply here, and the late petitions in Nos. 07-71989 and 07-72183 should be dismissed.

The result of that dismissal is that the arguments in the brief filed by NSB and AEWC may not be considered. Nor can petitioners AWL et al. to incorporate

or otherwise raise NSB's arguments, which have to do with subsistence harvest of certain wildlife resources. See NSB Br. 8-17, 23-51. None of the environmental group petitioners in No. 07-71457 have third-party standing to assert the interests of NSB and AEWC in subsistence hunting. See O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (to have standing, a party must have a personal stake in the outcome of the case, and cannot rely on injury to third parties).

II

MMS COMPLIED WITH NEPA BY TAKING A HARD LOOK AT ALL POTENTIAL IMPACTS OF SHELL'S PROPOSED OIL AND GAS EXPLORATION, AND PROPERLY CONCLUDED THAT AN EIS WAS NOT REQUIRED

Petitioners' primary challenge to MMS's approval of Shell's EP asserts that the EA failed to include sufficiently detailed analysis of such matters as the biological effects of various sources of noise on bowhead whales (AWL Br. 28-34), and the impacts of a potential oil spill (AWL Br. 36-43). The NSB petitioners (assuming the Court has jurisdiction over their claims) assert that the EA did not take a sufficiently hard look at potential impacts of exploration on subsistence resources and activities (NSB Br. 23-35). All petitioners contend that an EIS, rather than an EA, should have been prepared. As we show below, the EA in fact provided a thorough analysis of all of these subjects, and MMS reasonably concluded that an EIS was not required.

Petitioners' arguments are flawed at the outset because they overlook that the EA is not a stand-alone document, but is "tiered" to the multi-sale EIS and to the EAs prepared for Sales 195 and 202. The CEQ regulations implementing NEPA specifically encourage such "tiering" of NEPA documents to "eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." See 40 C.F.R. § 1502.20 ("[w]henever a broad environmental impact statement has been prepared * * * the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement * * *."). This Court has approved the use of tiering in similar situations. See, e.g., Envtl. Coal. of Ojai v. Brown, 72 F.3d 1411, 1413-14, 1417-18 (9th Cir. 1995); Ground Zero Ctr. for Non-Violent Action v. Dep't of the Navy, 383 F.3d 1082, 1085, 1089-1090 (9th Cir. 2004).

The tiering approach followed by MMS enabled the agency to fulfill its NEPA obligations at the same time that it complied with the strict time deadlines of the OCSLA. All courts that have considered the question have found that NEPA compliance for OCS projects must be considered in the context of the staged development process provided under the OCSLA. See Village of False Pass v. Watt, 565 F. Supp. 1123, 1136 (D. Alaska 1983), aff'd, Village of False Pass v. Clark, 733 F.2d 605, 609 (9th Cir. 1984); Tribal Village of Akutan v. Hodel, 869

F.2d 1185, 1192 (9th Cir. 1988). Here, the mandatory 30-day deadline for decisions on EPs found in the OCSLA at 43 U.S.C. § 1340(c)(1) in practice has led MMS to develop EAs that tier to an EIS done at the lease sale stage, where there is no similar strict deadline for administrative action. See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776 (1976) (recognizing that mandatory 30-day statutory deadline does not allow enough time to prepare an EIS); see also Westlands Water District v. U.S. Dep't of Interior, 43 F.3d 457, 460 (9th Cir. 1994).

Moreover, reliance on analysis done in environmental documents prepared at an earlier stage of the OCS process has been specifically upheld by this Court. See Edwardsen, 268 F.3d at 786 (upholding MMS's use in a Development and Production stage EIS of oil spill trajectory data and analysis from lease sale stage EIS). Accordingly, the EA at issue here must be considered in the context of the analyses to which it tiers, primarily the multi-sale EIS and the Sale 195 and 202 EAs. Once petitioners' misguided attempt to isolate this EA from this earlier analysis is rejected, their contentions simply collapse.

A. MMS fully considered all potential impacts to bowhead whales. – Petitioners recognize that the EA analyzes underwater noise, but contend (Br. 29) that this analysis "is focused on the drillships themselves, not attendant icebreaking

ships," and complain (Br. 29) that "MMS failed to analyze ice breaker noise." This claim does not withstand scrutiny. All of these studies discussed in the EA considered the responses of bowhead whales to the noise from drillships together with noise from ice management activities. ER 1074 (explaining differences in bowhead migration between 1993, when ice-management vessels were not active around drill site, and 1992, when they were active). The EA provides additional detailed information regarding the particular types of ice-management vessels that Shell plans to use, and how it intends to use them. ER 1048-49. It discusses the propagation of icebreaker noise (ER 1053), the effect on bowheads of noise from drilling and ice management (ER 1072), and the fact that NMFS considered icebreaker and ice-management noise in addition to drilling noise in reaching its conclusion that exploratory drilling and associated activities would not jeopardize bowhead whales (ER 1074).

The multi-sale EIS contains even more detailed discussions of icebreakers and their potential effects on bowheads and other marine mammals. SER 123-24. The EIS points out that bowhead reactions to icebreakers are highly variable. SER 123. Effects are likely to be short-term and not disruptive of migration patterns. SER 126 ("vessel activities associated with exploration are not expected to disrupt the bowhead migration."); SER 167-68 (ice-breakers and other vessel traffic not

likely to adversely affect other marine mammals); SER 172 (ice-breakers could disturb some beluga and gray whales but any effect likely to be "short-term"). Similar conclusions are reached in the BiOp prepared by NMFS, which the EA summarizes and incorporates by reference. ER 446 (NMFS concludes, after considering all types of noise associated with exploration, including from ice-breakers, that effects on bowhead whales would be temporary and non-lethal). Petitioners' contention that MMS failed to analyze noise from ice-breakers is totally unsupported.

Petitioners' more general contention (Br. 29) that the EA lacks sufficient project-specific information also fails. The noise analysis in the EA is specific to the particular drilling vessels (the *Kulluk* and the *Frontier Discoverer*), the particular ice-breakers (the *Kapitan Dranitzyn* and the *Vladimir Ignatyuk*), and the various supply boats and oil spill response vessels that Shell intends to use. ER 1047-49. Many of the noise studies referenced in the EA were conducted on drilling by the *Kulluk* itself, as well as from drillships similar to the *Frontier Discoverer*. ER 1072. In addition, to ensure appropriate implementation of mitigation measures, MMS required field verification of sound levels in the specific operating environment. ER 1072, 1075.

Petitioners fare no better in claiming (AWL Br. 31) that MMS did not consider the biological significance to whales of being deflected from their migratory route by noise. The EA contains a full analysis of underwater noise from operations proposed by Shell (ER 1071-72), and an analysis of the likely impacts of this noise on bowhead whales (ER 1072-75). The EA is able to present detailed descriptions of likely noise and its impacts on bowheads because exploratory drilling in the Beaufort Sea has been extensively studied. The EA presents the results of bowhead whale monitoring during drilling operations in four different years (1985, 1986, 1992, and 1993), under a variety of ice conditions. ER 1074. In light ice years, where there was little need for ice management around drilling operations, bowheads avoided the area around the drill site, but some still passed between the drill site and shore. In heavy ice years, when active ice management was needed, bowheads migrated seaward of the drill sites, avoiding the inner portion of the migration corridor. Id. While individual bowheads have avoided the area around the drilling site, no significant displacement from the overall bowhead migration corridor has been detected. ER 1074-75.

The multi-sale EIS contains a comprehensive 37-page analysis of all possible impacts from drilling and other oil and gas related activities on bowhead whales. SER 106-143. This analysis reviews studies on the biological significance of noise

as it relates to bowheads. The EIS notes that bowheads are unlikely to suffer any hearing impairment from noise because "[g]iven their mobility and avoidance reactions, it is unlikely that whales would remain close to a noise source for long." SER 107. With respect to the impact of noise from exploratory drilling, the multi-sale EIS explains that impacts to the spring bowhead migration are unlikely; for the fall migration, studies indicate that roughly half of the bowheads would likely respond at a distance of 1-4 kilometers from the source of drillship noise. SER 117-118. While some bowheads may change course to avoid drilling noise, they "do not seem to travel more than a few kilometers in response to a single disturbance incident and behavioral changes are temporary." SER 127. Even when bowheads are deflected due to noise, they still travel within the normal migration corridor, which is relatively wide. SER 124. The EIS explains that:

> [t]he energetic cost of traveling a few additional kilometers to avoid closely approaching a noise source is very small in comparison with the cost of migration between the central Bering and eastern Beaufort seas. We do not believe these disturbances or avoidance factors will be significant, because the anticipated level of industrial activity is not sufficiently intense to cause repeated displacement of specific individuals.

SER 127. The EIS notes that "there has been no documented evidence that noise from OCS operations would serve as a barrier to migration." Id. NMFS drew a similar conclusion in the June 2006 BiOp. ER 446 (no evidence that noise from

OCS operations has served as barrier to migration). The EIS concludes that exposure to noise-producing activity from all sources relating to oil and gas development is likely to inflict only "temporary, non-lethal effects" on bowheads. SER 127.

The EA for the Shell EP builds on the multi-sale EIS's discussion of the biological significance of exploratory drilling on whales, with the advantage of knowing Shell's specific plans. ER 1071-75. The EA reviews the pertinent studies and concludes, similar to NMFS, that there is no indication that the overall bowhead migration would be hindered. ER 1075-76. The EA points out that there is no evidence that displacement of individual bowheads due to noise has lasting effects on the bowhead population, and that MMS's significance criteria for purposes of NEPA require an effect to last at least one generation (around 17 years for bowheads) before it is considered significant. Id.[10/] As this Court has noted, NEPA and the CEQ regulations "direct the agency to consider the degree of adverse effect on a species, not the impact on individuals of that species," and thus it is not arbitrary to find that an EIS is not required, even where there is evidence

[10/] The multi-sale EIS contains a full discussion of the MMS significance threshold criteria. For endangered species such as bowheads, the significance threshold is "an adverse impact that results in a decline in abundance and/or change in distribution requiring one or more generation[s] for the indicated population to recover to its former status." SER 59. See discussion infra at 60, n.21.

that individual members of species may be affected. EPIC, 451 F.3d at 1010; see also Native Ecosystems, 428 F.3d at 1240 ("it does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment"). The EA's conclusion that noise-based deflection of individual bowhead whales was not a significant effect on the environment was plainly reasonable.

The EA recognizes the possibility that the effect of Shell's proposed drilling could be greater than in past years because Shell intends to use two drillships simultaneously, with associated ice management vessels. ER 1075. There is no basis in the record, however, for concluding that having a second drill ship in operation would lead to any significant impacts. The EA points out that effects on bowheads will be carefully monitored, including by aerial surveys, and that if there is any indication that bowheads are being displaced out of areas in which they frequently feed, or areas where subsistence whaling is conducted, MMS has retained authority to require Shell to modify its operations to prevent the threat of serious, irreparable or immediate harm. Id.

While petitioners would have preferred more information regarding noise impacts, they overlook that an EA is intended to be a "concise public document" that provide sufficient evidence and analysis to determine whether to prepare an

EIS or a FONSI. 40 C.F.R. § 1508.9. As noted supra at 31, agencies are encouraged to tier environmental documents and eliminate repetitive discussion of the same issues. See 40 C.F.R. § 1502.20. The EA here appropriately focussed on the noise impacts of specific activities proposed in the Shell EP, and tiers to the multi-sale EIS for a more general discussion. The EA thoroughly evaluates all information on effects on bowheads from previous exploratory drilling involving icebreaking that occurred at the same location as Shell's currently proposed activities. ER 1074-75. To require additional information would be contrary to the "rule of reason" that applies to an agency's fulfillment of its duties under NEPA. See Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 579 (9th Cir. 1998).

B. MMS thoroughly considered the risk and effects of oil spills. – Petitioners contend (AWL Br. 36-43) that MMS failed adequately to consider the potential effects of a possible crude oil spill from Shell's exploration activities. Here too, petitioners overlook both the thorough nature of the analysis contained in the EA, and the extensive analysis of oil spills and impacts that is found in the multi-sale EIS and the Sale 195 and 202 EAs to which the EA tiers.

The EA considers the effects of potential oil spills from exploration activities on bowhead whales (ER 1075-76), eiders (1077-78) and other birds (1089-90), polar bears (1081), subsistence harvest (1085-86), and fish (1096-97). These

discussions point out that "[t]he potential impacts from accidental spills are best described by the Beaufort Sea multiple-sale EIS * * * and subsequent NEPA analyses in the Sales 195 and 202 EAs." ER 1077. The EA does not stop there, however. It goes on to focus on the effects of what MMS has determined is the only reasonably foreseeable spill at the exploration stage, which is a diesel fuel oil spill of around 48 barrels resulting from fuel transfer operations. ER 1071. The EA finds that "pre-booming would likely contain this spilled fuel," but that "if spilled fuel were to escape containment, much of it would likely evaporate or disperse" before reaching sensitive areas such as bird rookeries. ER 1077; see also ER 1075-76 (effects of fuel transfer spill on bowheads would "probably be immeasurable even during the migration" due to required oil spill response measures and dissipation of oil into water column).

Petitioners do not directly challenge the EA's analysis of the likely effects of such a fuel transfer spill.[11] Instead, they challenge MMS's finding that large or very large crude oil spills are not reasonably foreseeable during the exploration stage. The EA, however, contains a reasoned and well-supported explanation for

[11] Petitioners do make an unsupported assertion (Br. 40) that "it is undisputed that an oil spill could have dire consequences." In fact, as just noted, the EA shows that the only reasonably foreseeable spill at the exploration stage would likely be cleaned up, or would dissipate naturally, before having any such consequences. ER 1071, 1114. Petitioners have shown no flaw in that analysis.

this finding in Appendix II. ER 1114-22. The EA explains that, from 1971 to 2005, there have been a total of 13,463 exploration wells drilled in all OCS waters of the United States, with only four exploration blowout-related oil spills involving 200, 100, 11, and 0.8 barrels. ER 1115, 1121-22 (table II-5). Thus, no large spills (over 1,000 barrels) have occurred during exploratory drilling on the United States OCS since 1970.[12/] Similarly, the EA explains that there have been only small spills resulting from the 35 exploratory wells drilled on the OCS offshore of northern Alaska, resulting in a total of 26.7 barrels spilled overall, of which approximately 24 barrels were cleaned up or recovered. ER 1115, 1119-20 (Table II-4).

Petitioners contend (Br. 16) that "MMS documents describe crude oil spills during exploration," and then cite a statement in the multi-sale EIS which refers to an 80,000 barrel spill. Br. 16, citing ER 161. However, that spill was not, in fact during exploration, and it preceded the modern era of improved safety regulation. See ER 1121 (Table II-5). Petitioners never come to grips with the critical fact that

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[12/] The last large oil spill from a blowout on the OCS occurred in 1970 in the Gulf of Mexico. Critically, this spill occurred during the development stage, not the exploration stage. In addition, as a result of a blowout spill off the coast of Santa Barbara in 1969, significant new safety requirements were imposed on offshore drilling that greatly reduce the chance of blowouts. Hence, MMS does not consider experience prior to 1971 to provide useful information for determining oil spill risks for blowouts. ER 189.

no large spills have occurred during exploration in the modern period on the United States OCS, which strongly supports MMS's conclusion that such a spill is not reasonably foreseeable from the exploration planned here.[13/]

Petitioners also contend (Br. 38) that the fact that MMS requires oil spill response capability during exploratory drilling indicates that there must be a risk of a large oil spill. The Oil Pollution Act requires an operator of a vessel to have a spill response plan to deal with a "worst case" oil spill. 33 U.S.C. 1321(j)(5)(A)(i). This legal requirement does not indicate that such a large spill is reasonably foreseeable from the exploratory drilling proposed here. Moreover, the required spill response capability is also useful for the sort of small spills that are foreseeable here.

In sum, MMS made a reasonable judgment to focus its analysis in the EA on small spills. This approach is consistent with the CEQ regulations, which instruct agencies to examine the "reasonably foreseeable" environmental effects of their proposed actions, and avoid wasting resources by studying effects of events that are highly unlikely to occur. See 40 C.F.R. § 1508.8(b).

[13/] Petitioners cite (Br. 16) the multi-sale EIS for a statement that five blowouts greater than or equal to 10 million gallons have occurred internationally from 1979-2000, but fail to cite the EIS's explanation that these "mostly were the result of either war or drilling practices that oil companies do not now use and may not use under MMS regulations in the United States." ER 161. Nor is there any indication that any of these blowouts happened during exploration.

At the same time, MMS did not ignore large spills. The multi-sale EIS contains a comprehensive analyses of oil spill risks and potential consequences, including analysis of large (1,000 or more barrels) and very large (150,000 or more barrels) oil spills and likely consequences to all resources. See SER 68-74 (risk analysis), 80-82 (effects on water quality), 85-89 (planktonic communities), 92-96 (fish), 128-35 (bowhead whales), 146-49 & 153-54 (eiders), 158-63 (marine and coastal birds), 173-78 (polar bears, beluga and gray whales and pinnepeds), 186-89 (terrestrial mammals), 208-14 (subsistence harvest), 226-28 (sociocultural systems). The multi-sale EIS presents a lengthy and detailed analysis of the potential consequences of a low-probability, very large oil spill. SER 231-51. The EIS also contains a 123-page appendix setting out the information, models and assumptions used to analyze oil spills and effects. AR 1280-1403.

This analysis of oil spill risks was updated in the Sale 195 EA (ER 244-249), and again in the Sale 202 EA (ER 486). The EA challenged here "tiers" to these analyses of large oil spills and their effects. See ER 1116 ("The chance of a large spill * * * is very low but the potential consequences were analyzed in [the multi-sale EIS] section IV.C. and [the Sale 202 EA]"). The EA points out that those earlier analyses considered the probabilities of a large spill originating from particular launch areas (LAs) contacting various areas of concern, and that several

of the LAs (LAs 10, 15, 17 & 18) correspond to the location of the Shell leases considered in the EP. ER 1116; see also Multi-sale Maps A-4a & b (SER 252-53). Reliance at a later stage of the OCS process on oil spill trajectory analysis from an earlier lease sale EIS has been specifically upheld by this Court in Edwardsen, 268 F.3d at 785-86. It was reasonable to use that approach here as well. Although large oilspills are not reasonably foreseeable from exploratory activities, anyone interested in the possible effects of this low probability event can easily obtain that information from the multi-sale EIS.[14/]

Indeed, petitioners themselves (AWL Br. 13-18) cite frequently to the multi-sale EIS and the two subsequent lease sale EAs when discussing oil spills. But petitioners misunderstand the relationship of this analysis to the Shell EP. The multi-sale EIS makes clear that its oil spill analysis is based on the entire production life of the (assumed) fields. SER 69. The multi-sale EIS assessed in detail the consequences of a large spill, even though it found that chance of such a

[14/] Petitioners state (Br. 43) that 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.'" They then erroneously assert (id.) that "such analysis never occurred." In fact, the EA specifically takes account of a new information to lessee clause protecting polar bears developed for Sale 202, and of new information on polar bears showing the need for additional protections for polar bear concentrations, including in and around Kaktovik. ER 1081. As explained in MMS's denial of requested stay, MMS required Shell to make changes to its oil spill response plan to give additional protection to polar bear concentrations around Kaktovik and Cross Island. SER 277.

spill occurring over the entire life of the assumed fields was small. Id. But this discussion of potential consequences of an event that is unlikely even over the entire life of the field does not portray the likely consequences of a particular three-year exploration plan.[15/]

In sum, MMS has fulfilled its NEPA obligations relating to the subject of oil spills by reasonably concluding that Shell's planned exploration will not significantly affect the environment, while at the same time providing thorough analysis of oil spill risks relating to the entire span of potential oil and gas development in the multi-sale EIS.[16/]

[15/] Petitioners' allegation (Br. 37) that crude oil spills during exploration are "much more likely than spills during production" is based on an erroneous construction of the record. Petitioners refer (Br. 16) to a draft analysis prepared by an MMS staff member prior to the EA. For reasons discussed infra at 50-53, it is inappropriate to rely on a draft. In any event, this draft simply notes that data in one report indicates a higher frequency of "blowouts" for exploratory drilling than production drilling. ER 915. But a higher blowout rate for exploratory drilling would not indicate that there is a higher probability of an oil spill at the exploration stage. As the cited draft points out, very few blowouts involve oil – most are gas only. And as the multi-sale EIS explains, the historical record shows that blowouts involving oil are extremely infrequent under modern practices on the United States OCS, and that no blowout on the OCS since 1971 has resulted in more than 200 barrels being released. ER 1285. Accordingly, blowouts, whether they occur at the exploration or development stage, simply do not add appreciably to the risk of a large oil spill.

[16] The fact that MMS has thoroughly analyzed the risks of oil spills in a NEPA document distinguishes this case from San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1030 (9th Cir. 2006), which petitioners rely on at Br. 38-39. In that case, the agency claimed that it categorically had no obligation under NEPA to consider the risk of a terrorist

C. **MMS properly relied on legally binding mitigation requirements to assure that impacts would not be significant.** – MMS imposed numerous mandatory mitigation measures as conditions of its approval of Shell's EP. These include requirements for protection of specific biological resources, extensive monitoring to detect, *inter alia*, whether bowheads have been displaced out of areas where they normally feed or out of areas in which subsistence whaling is conducted, conflict avoidance provisions to protect subsistence activities, measures to protect resources in the event of oil spills, and measures to protect birds from collisions. ER 1069-71. MMS has reserved authority to modify approved operations to ensure against threats of serious, irreparable, or immediate harm to whales, subsistence users, or the marine, coastal or human environment generally. ER 1070, 1075. MMS also requires that Shell obtain MMPA authorizations from NMFS and FWS before commencing operations. ER 1070.

MMS acted reasonably in finding that these mandatory mitigation measures bolstered the soundness of its conclusion that there would be no significant environmental impacts. "[I]t is clear that an agency may condition its decision not to prepare a full EIS on adoption of mitigation measures." City of Auburn v.

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attack on a nuclear storage facility, even though it had taken significant steps to prevent just such an attack. Not only does MMS make no such claim here as to oil spills, it has thoroughly analyzed the risks of oil spills in the multi-sale EIS, which covers all phases of oil and gas development in the Beaufort Sea.

United States, 154 F.3d 1025, 1033 (9th Cir. 1998). In EPIC, 451 F.3d at 1015, this Court drew a distinction between a case where "the Project incorporates mitigation measures throughout the plan of action, so that the effects are analyzed with those measures in place," and a case such as National Parks & Conservation Association v. Babbitt, 241 F.3d 722 (9th Cir. 2001) ("National Parks"), where an EA analyzes potential impacts of a proposed action and only then develops a plan to mitigate those adverse effects. The Court in EPIC explained that where mitigation measures are incorporated into the project, they are necessarily analyzed as part of the EA. 451 F.3d at 1015. The Court also approved of monitoring as a way to confirm the appropriateness of mitigation measures. Id. at 1015-16.

Here, relevant stipulations and conditions are a part of Shell's underlying leases, and thus were analyzed as a part of the action proposed by Shell. See ER 1075 (analyzing bowhead monitoring requirement of stipulation 4); 1078-79 (analyzing stipulation 7 regarding lighting plan to avoid bird strikes); 1081 (analyzing lease clauses protecting polar bears); 1083-84 (analyzing stipulation 5 and MMS's requirement that Shell obtain IHA before proceeding). These mitigation requirements are legally binding, and, as in EPIC, the agency has

required extensive monitoring in order to confirm the effectiveness of the mitigation. ER 1075.[17]

Petitioners focus (AWL Br. 35) on one requirement – that Shell obtain authorizations under the MMPA before proceeding – and contend that it should not have been taken into consideration because NMFS has not acted on the application for IHA, and thus the eventual scope of any authorization is unknown. In fact, it was entirely appropriate for MMS to rely, in part, on the existence of this statutory scheme designed to protect whales and other marine mammals. See ER 1076, 1083. Under its regulations, NMFS may issue an IHA only where it determines

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[17] This case bears no resemblance to National Parks, where mitigation was not incorporated into the proposal itself, the effectiveness of that mitigation was highly conjectural, and necessary studies were deferred until after commencement of the project. National Parks, 241 F.3d at 733. Here, unlike in National Parks, extensive studies of the impacts of oil and gas activities on the Arctic OCS have been carried out, and a large fund of knowledge obtained about potential impacts on biological resources. Mitigation and monitoring in this case is required simply to assure that the biological resources are in fact being protected and that ongoing studies continue in order to increase knowledge of potential impacts. They are not aimed at filling significant gaps in information needed to determine whether the proposal should have been approved in the first place. This Court has made clear that "the [CEQ] regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are 'highly' uncertain." EPIC, 451 F.3d at 1011 (emphasis in original); see also Native Ecosystems Council, 428 F.3d at 1240 ("Simply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial or highly uncertain"). Particularly in light of the exploratory operations that have already occurred in this area, and been extensively studied, environmental effects are not highly uncertain.

that "the number of marine mammals taken by harassment will be small, will have a negligible impact on the species or stock of marine mammal(s), and will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence." 50 C.F.R. § 216.107(b). The same regulation at subsection (f) provides that an IHA must be modified, withdrawn or suspended if NMFS determines that the authorized taking, either individually or in combination with other authorizations, is having, or may have, more than a negligible impact on the species or stock or an unmitigable adverse impact on the availability of the species or stock for subsistence uses. This statutory scheme insures that NMFS will guard against the possibility of such impacts during the course of the proposed activities.

This Court has permitted agencies to rely on protections of other statutes to reach conclusions under NEPA that resources will not be adversely impacted. Thus, in Edwardsen, this Court found that MMS could reasonably base a conclusion that air impacts of oil development in the Beaufort Sea would be "negligible" upon the fact that the operator must comply with Clean Air Act requirements. See 268 F.3d at 789; see also City & County of San Francisco v. United States, 615 F.2d 498, 501 (9th Cir. 1980) (Navy's decision not to prepare an EIS was reasonable where the lessee "would be required to conform to all applicable pollution control laws and regulations as a condition of tenancy");

Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir. 2000) (agency's NEPA analysis may rely on regulatory enforcement by other entities). As these cases recognize, an agency is entitled in its NEPA analysis to rely on substantive protections stemming from another statute.

MMS carefully considered the IHA protections and their effectiveness. See ER 1083-85 (detailing IHA protections as they relate to bowhead whales); 1091-92 (detailing IHA protections as they relate to beluga whales). Since MMS made obtaining an IHA an express condition of proceeding with exploratory drilling (ER 1086), it was appropriate for MMS to assume that the protections of the MMPA and the IHA regulations would apply and prevent significant impacts. See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1527, 1536 (9th Cir. 1997) (agency's conclusion that a separate legal agreement "alleviated most of the concerns regarding the effect" of a proposal, so as to justify not preparing an EIS, was not arbitrary or capricious).

D. Comments of agency staff during the administrative process do not undermine the rationality of MMS' decision. – Petitioners' selective citations from emails and draft analyses prepared by agency staff do not support their argument that additional analysis was needed. See AWL Br. 30-31. The Supreme Court and other courts have stressed that the sort of preliminary statements by staff

relied on by petitioners here are not properly considered by a reviewing court, which must determine the rationality of the agency decision based on the explanation presented in the final decision. See National Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2530 (2007) ("[t]he federal courts ordinarily are empowered to review only an agency's final action, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious"); Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1122 n.8 (9th Cir. 2000) (upholding agency's decision not to prepare EIS after rejecting reliance on internal memorandum of agency's former project manager). As these cases recognize, it is not uncommon for individuals within an agency to have different opinions on a subject such as whether additional analysis is needed. It is up to the agency to resolve disputes and render the final agency decision. That final decision speaks for itself, and statements of individuals cannot be used to impeach the agency's official statement of its rationale. PLMRS Narrowband Corp. v. F.C.C., 182 F.3d 995, 1001-1002 (D.C. Cir. 1999).

The EA was prepared by a multidisciplinary team that included not only biologists and other environmental scientists, but also engineers, spill response

experts, and regulatory specialists who understand the role of MMS regulations and existing lease stipulations in providing protections to species like the bowhead whale. MMS considered the views of all of its analysts, including those whose emails petitioners cite. SER 276-77. The fact that a particular staff member may have expressed a view at a preliminary point in the EA process sheds no light on the ultimate issue whether the final agency decision was rational and supported by the record.[18/] That individual would not have had the full array of information or the full suite of expertise that ultimately formed the basis for MMS's final decision. Indeed, many of the comments relied on by petitioners show that the commenter may not have understood the nature of an EP approval, or did not realize that MMS had information in its possession that the commenter was unaware of. See, e.g.,

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[18/] Even less meaningful are statements by staff that were not shared with agency decisionmakers at all. In this category is the unsigned, undated memo of Jeffrey Gleason (ER 1389), relied on by petitioners at AWL Br. 22 & 33. This draft memorandum is not part of the record in this case, as it was never shared with MMS decisionmakers during the decisionmaking process on the EP, and thus could not have been considered by them either directly or indirectly. The Supreme Court has held that a court should look for "a strong showing of bad faith or improper behavior" before going outside the record compiled by the agency. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); see also Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993) (requiring "clear evidence" that the administrative record is improper). No such showing has been attempted here. Plainly, the fact that petitioners obtained a copy of this memorandum and included it in their papers filed with the IBLA does not make it part of the record, and their arguments based on the memorandum are improper.

ER 1014, 1029 (supervisor of NEPA process points out that individuals calling for more information misunderstood EP process and nature of required mitigation).

Here, MMS thoroughly explained the agency's findings and reasons in the 85-page EA, which should be the focus of review. Petitioners' attempt to impeach those findings and reasons with selected statements from emails and drafts should be rejected.

E. Assuming this Court has jurisdiction over NSB's subsistence-based claims, it should find that MMS took the necessary hard look at all potential subsistence impacts. – As shown supra at 24-30, the Court lacks jurisdiction over NSB's petition, and accordingly should not reach the contentions in NSB's brief, all of which deal with potential impacts on subsistence harvest. If the Court does reach these contentions, it should find them groundless.

1. MMS took a "hard look" at impacts on subsistence hunting of bowhead whales.

As noted supra at 32-39, the EA contains substantial information and analysis on potential impacts to bowhead whales from Shell's planned activities. Much of that analysis also relates to the continued availability of bowhead whales for subsistence harvest. The EA notes that, notwithstanding ongoing oil and gas activity offshore of northern Alaska over the past 20 years, the bowhead whale stock in the Bering-Chukchi-Beaufort Sea has been increasing, ER 1055, the

bowhead migration has not been displaced, and subsistence whalers have continued to obtain their quota of whales. ER 1059.[19]

The multi-sale EIS contains extensive analysis of subsistence issues. See SER 40-55, 198-222. Particular attention is given to the bowhead whale hunt, and potential effects of oil and gas operations on the success of that hunt. See SER 43-44, 47, 51, 59, 201-04, 208-09, 212, 215-16.

The EA notes that there could be conflicts with subsistence whaling if migrating whales were deflected seaward by noise and did not return to their previous migratory path before reaching areas where subsistence whaling takes place. ER 1082. The EA finds, however, that historically this threat has been effectively mitigated through Conflict Avoidance Agreements (CAAs). ER 1084. The multi-sale EIS points out that "subsistence whalers and industry have been able to negotiate agreements that work for both parties," and gives specific examples of how these yearly agreements have proven to be effective in mitigating impacts to whalers. SER 215. Consistent with this history, a CAA was negotiated between Shell, AEWC, and local whaling captains associations in August of this

[19] The activity planned by Shell is not "unprecedented" as claimed by NSB at Br. 23. As described in the EA, exploratory drilling has taken place at many sites in the Beaufort Sea under a variety of conditions. ER 1074.

year, and would have deferred operations by Shell until after completion of the Nuiqsut whale hunt. SER 295.

Petitioners' contention (NSB Br. 28) that this form of mitigation is "vague and uncertain" is without merit. Petitioners are correct (Br. 29) that "the CAA is an agreement voluntarily entered into between offshore operators (including Shell) and the AEWC on an annual basis," but this does not suggest that protections to subsistence users are uncertain. First, if an agreement cannot be reached, subsistence users or the lessee can request MMS to bring parties together to resolve the issues; in all cases, MMS must be able to determine that adequate measures have been taken to prevent unreasonable conflicts with subsistence before operations may proceed. ER 1153-54, 1086. Second, Shell must obtain an IHA before proceeding, and must demonstrate to NMFS that its proposed operations "will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence." 50 C.F.R. § 216.107(b). Hence, protection is provided even if an agreement cannot be reached.

It was entirely reasonable for MMS to find that conflicts with subsistence would be avoided through the CAA process. As the EA pointed out, at the time that MMS approved Shell's EP in February, 2007, Shell and AEWC had agreed to a timeline for negotiating a CAA for 2007, and were building on the framework

provided by the 2006 CAA. ER 1085-86. Conflict avoidance through this process was not vague and uncertain, but a well-established and successful mechanism for mitigating potential harm, which in fact resulted in an agreement covering the 2007 open water season (SER 295).

Petitioners' concerns about possible conflicts in 2008 and 2009 (NSB Br. 26 & n.9) are unwarranted. There is no reason to conclude that this well-established process will not avoid conflicts in those years as it has before. Petitioners' contention (Br. 31) that MMS has not adequately demonstrated that the CAA process will reduce impacts below the level of significance is also unconvincing. It is not credible that AEWC (one of the petitioners here) and the whaling captains would enter into a CAA that did not reduce impacts below significance; the fact that whalers have met their quotas under past agreements shows that this process works. ER 1084. [20]

[20] Like the AWL petitioners, NSB improperly relies (Br. 26-27) on selected internal emails and comments of MMS staff. The quoted statements illustrate why courts refuse to rely on such "evidence." It is clear that none of the cited commenters considered the effect of conflict avoidance agreements. The agency's final determination, embodied in the EA, explains why concerns regarding conflicts with the subsistence harvest like those raised by some staff members were satisfactorily addressed by Lease Stipulation 5 and the IHA process. ER 1084-85. It is that determination which the Court should review. Nor, contrary to petitioners' contention at Br. 26, is there any requirement in NEPA, the CEQ regulations, or elsewhere that the agency must disclose to the public the preliminary and incomplete analyses of staff members.

2. MMS thoroughly considered other subsistence resources.

Petitioners also err by contending (NSB Br. 32-38) that MMS failed to take the necessary "hard look" at potential impacts to subsistence use of beluga whales, caribou, and fish.

a. Beluga whales

The EA recognizes that beluga whales are plentiful in the Beaufort Sea (a minimum of 32,453 whales), and that belugas are an important subsistence resource, with an average of 53 whales being taken per year for subsistence purposes. ER 1066. The EA analyzes potential impacts to belugas from planned operations; these are likely to be temporary and not significant. ER 1091-92. The EA's analysis tiers to the thorough and detailed treatment of potential impacts on belugas and other marine mammals found in the multi-sale EIS, including consideration of effects on subsistence hunting of belugas. SER 167-180, 204-15. The EIS discusses studies indicating that beluga whales acclimate quickly to typical oil-drilling sounds. SER 170. Effects from exploration are expected to be minimal, "with only brief disturbances of small numbers of * * * beluga whales from air and vessel traffic, with recovery from any disturbance event occurring within less than 1 day." SER 204. Contrary to petitioners' contention (Br. 32-33), MMS specifically considered impacts on subsistence hunting of belugas. SER 172

(considering how ice-breaker traffic could affect the availability of belugas and other marine mammals for subsistence hunting).

b. Caribou

The Multi-Sale EIS includes a discussion of the effects of aircraft noise on caribou. It recognizes that caribou have exhibited flight reactions to aircraft flying at elevations of 1,000 feet or less, although these instances involved circling aircraft. Because the flights associated with exploration activities would involve traveling from one point to another, MMS concluded that the effects would be brief and would not affect caribou herd distribution and abundance. SER 181-82, see also SER 205 (concluding that "[e]xploration is expected to have very brief * * * disturbance effects on caribou * * * and no effect on [] populations").

The EA concluded that Shell's proposed activities will not adversely affect subsistence harvests, and this conclusion applied to all subsistence resources specifically considered in the EA, including caribou. ER 1087, 1068. In its approval of the EP, MMS reminded Shell of Information to Lessee clause "h", which states, "Generally, behavioral disturbance of most birds and mammals found in or near the lease area would be unlikely if aircraft and vessels maintain at least a 1-mile horizontal distance and aircraft maintain at least a 1,500-foot vertical distance above known or observed wildlife concentration areas." ER 1155-56.

Shell has accordingly committed to keep helicopter traffic at 1,500 feet minimum altitude; in addition, it has committed to adjust helicopter routes to remain further inland to the extent possible in order to avoid conflicts with subsistence harvest. SER 270. As the EIS indicates, studies show that caribou react to flights below 1,000 feet (SER 181); hence Shell's commitment to keep helicopters above 1,500 feet provides adequate assurance that caribou will not be affected in a way that might impact subsistence.

c. Fish

The multi-sale EIS contains a thorough analysis of the potential impacts from all phases of OCS activities on fish. See SER 91-104. The EIS notes that, because of extreme conditions, arctic fish populations have adapted to withstand short-term perturbations and fluctuations in the environment. SER 91. It also finds that, "[b]ecause marine fish are widely dispersed and are largely unrestricted in their movements, noises associated with [OCS activities] likely would not have a measurable effect on marine fish populations." SER 92. The EA contains a thorough analysis of potential impacts on fish. ER 1092-97. With respect to exploratory drilling, it concludes that "few fish would ever be expected to experience direct mortality or physiological harm from drilling operations." ER 1093. While the EA finds that it was "possible there will be more than a minimal

level of effect on some species," it concludes that no effects were expected to exceed the established MMS threshold of significance applicable to fish, which is an adverse impact that results in a decline in abundance or change in distribution requiring three or more generations for recovery. ER 1095-96; see also SER 59 (EIS sets out significance thresholds). Petitioners have shown no reason to question the rationality of these conclusions.[21/]

[21/] NSB petitioners' attack (Br. 40-45) on MMS's threshold criteria for "significance" is misguided. The CEQ regulations provide a definition of "significantly" at 40 C.F.R. § 1508.27 to be used when an agency is determining whether an initial EIS is required because the proposal may "significantly affect[] the quality of the human environment," 42 U.S.C. § 4332(2)(C). Petitioners claim that because the significance thresholds used in the multi-sale EIS and the EA are different than the definition in 40 C.F.R. § 1508.27, they violate that regulation. There is nothing inconsistent between the thresholds and the regulation; the thresholds simply fill a gap in the regulation. The regulation requires "considerations of both context and intensity" when determining whether a proposal may significantly affect the environment. 40 C.F.R. § 1508.27. It goes on to explain that "intensity * * * refers to the severity of the impact" and sets forth a series of subjects (e.g., endangered species, cultural and historic resources, cumulative impacts) about which the agency should gauge the intensity of impacts. 40 C.F.R. § 1508.27(b). But nowhere does the regulation explain how much of an impact on these subjects is required for that impact to be sufficiently intense to render it significant. It is that gap that the thresholds address, and MMS's considered determinations in this gap-filling exercise are entitled to deference. See Georgia River Network v. U.S. Army Corps of Engineers, 334 F. Supp. 2d 1329, 1341-42 (N.D. Ga. 2003) (court must defer to agency's determination whether a certain percentage loss of a stream or percentage fragmentation of a basin is significant). Petitioners' claim (Br. 41) that the significance thresholds are solely based on duration is inaccurate. The subsistence threshold, for instance, combines the importance of the resource with the duration of its unavailability. SER 59. The socio-economic threshold looks to the "tendency toward the displacement of existing social patterns" as well as the

As the foregoing shows, MMS took a "hard look at the consequences of its actions, based [its decision] on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant. EPIC, 451 F.3d at 1009 (inner quotes omitted). Accordingly, MMS's approval of the EP complied with NEPA.[22/]

III

APPROVAL OF THE EP WAS FULLY CONSISTENT WITH THE OCSLA

Section 11(c) of OCSLA requires that MMS disapprove an EP if it finds that "any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title," and that "such proposed activity cannot be modified to avoid such condition." The relevant environmental conditions described in the referenced subsection include activities that "would probably cause serious harm or damage to life (including fish and other aquatic life) * * * or to the marine, coastal, or human environment." 43 U.S.C. 1334(a)(2)(A)(i). MMS

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duration of the disruption. Id. These are common sense ways to gauge intensity, well within the agency's discretion.

[22/] Even if this Court disagrees, it should reject the suggestion of the NSB petitioners (Br. 55) to direct MMS to prepare an EIS. The Supreme Court has made clear that when an agency decision is found to be arbitrary and capricious, the proper course for the reviewing court is to remand to the agency, not to make its own determination of what action is required under the statute at issue. National Ass'n of Homebuilders, 127 S. Ct. at 2529.

here found that Shell's EP was consistent with this substantive environmental standard imposed by the OCSLA. ER 1045. Petitioners nowhere attempt to show that MMS's finding was arbitrary or capricious.

Instead, petitioners merely claim that Shell's application should have included more specific information regarding well locations, and that MMS did not consider available environmental information. Petitioners' contention (AWL Br. 45) that Shell's EP violated the OCSLA and implementing regulations because it did not contain adequately specific information about well locations for the 2008 and 2009 seasons is meritless. OCSLA requires that "[a]n exploration plan submitted under this subsection shall include, in the degree of detail which the Secretary may by regulation require * * * (c) the general location of each well to be drilled." 43 U.S.C. § 1340(c). MMS has promulgated regulations pursuant to the OCSLA which state that MMS will consider certain factors "[i]n deciding whether to approve a proposed well location and spacing * * *." 30 C.F.R. § 250.203 (2007). But neither the statute nor the regulations requires that all wells under a multi-year exploration plan be tied to a specific location.

In fact, MMS regulations specifically contemplate that MMS can determine on a case-by-case basis that certain information, like the precise location of future wells, need not be provided in an EP. 30 C.F.R. § 250.201(c) provides that:

> The Regional Director may limit the amount of information or analyses that you otherwise must provide in your proposed plan or document under this subpart when:
>
> (1) Sufficient applicable information or analysis is readily available to MMS;
>
> (2) Other coastal or marine resources are not present or affected;
>
> (3) Other factors such as technological advances affect information needs; or
>
> (4) Information is not necessary or required for a State to determine consistency with their CZMA Plan.

Here, Shell's EP explained that it planned to drill four wells during the 2007 open water season at Sivulliq, and then drill additional prospects on other OCS leases during 2008 and 2009. ER 740, 741 (map showing future drilling locations). Highly detailed descriptions of well locations and other pertinent data were provided for Sivulliq. ER 811-820. The location of wells in 2008 and 2009 will depend in part on what resources are found as a result of the Sivulliq exploration. SER 256. More detailed site information will be available as a result of exploring these early prospects, and MMS can take that information into account when considering particular applications for permits to drill in 2008 and 2009. See 30 C.F.R. § 250.413(h) (requiring applicant for permit to drill to submit report of conditions at proposed site). Supplemental environmental analysis can be done at that time, if there is significant new information. MMS's interpretation of its own

regulations to permit industry to determine the exact location of future wells based on what has been discovered in the first year of exploration is consistent with the statute and regulations and is entitled to substantial deference. Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994).

Petitioners fare no better with their claim of a violation of 43 U.S.C. § 1346(d). That provision simply requires that MMS "shall consider available relevant environmental information in making decisions," including a decision to approve an EP. Petitioners make no showing that there was some "available relevant environmental information" that the Secretary did not consider in this case. As shown supra at 32-61, MMS here considered a voluminous record containing relevant information about all of the environmental impacts of concern to petitioners. OCSLA requires no more than this.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 07-71989 and 07-72183 should be dismissed for lack of jurisdiction, and the petition in No. 07-71457 should be denied.

Respectfully submitted,

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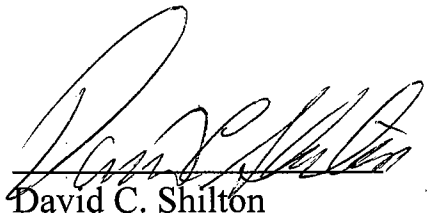
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Ninth Circuit Rule 32-1, and Ninth Circuit Rule 28-4 permitting a 1,400 word enlargement when responding to multiple briefs, the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 15,340 words.



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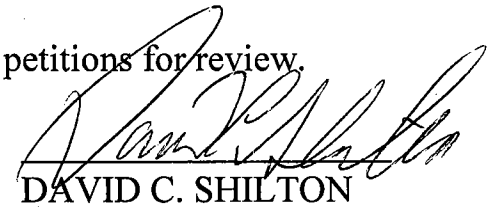
STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the respondents certifies that there are no cases within their knowledge currently pending before this Court that are related to these consolidated petitions for review.



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I certify that copies of the foregoing Brief have been served on October 5, 2007, by FedEx Delivery to:

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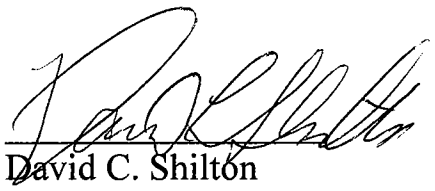

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