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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA WILDERNESS LEAGUE, *et al.*,

RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS, *et al.*, and

NORTH SLOPE BOROUGH and ALASKA ESKIMO WHALING COMMISSION,

Petitioners,

v.

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

Respondents,

and

SHELL OFFSHORE INC.

Respondent-Intervenor.

Petition for Review of a Final Decision by Minerals Management Service

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BRIEF OF RESPONDENT-INTERVENOR, SHELL OFFSHORE INC.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Shell Offshore Inc. is a wholly owned subsidiary of SOI Finance Inc., which is a wholly owned subsidiary of Shell U.S. E&P Investments LLC, which is in turn a wholly owned subsidiary of Shell Oil Company. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc. Shell Petroleum Inc. is a wholly owned subsidiary of Shell Petroleum N.V. Shell Petroleum N.V. is a wholly owned subsidiary of Royal Dutch Shell plc, whose shares are publicly traded. The other parent companies of Shell Offshore Inc. identified above are not publicly traded. No publicly held company has a ten percent or greater ownership interest in Royal Dutch Shell plc.

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JURISDICTIONAL STATEMENT

Shell Offshore Inc. joins in the Statement of Jurisdiction of Dirk Kempthorne, Secretary of Interior, and the Minerals Management Service as well as their argument that the Court lacks jurisdiction over the late-filed petitions in Case Numbers 07-71989 and 07-72183.[1]

[1] *See* Brief of Respondents, filed Oct. 5, 2007 ("Resp't Br.") at 1-2, 24-30.

STATEMENT OF ISSUES

1. The Outer Continental Shelf Act ("OCSLA" or the "Act") required that the Minerals Management Service ("MMS" or the "Agency") approve Shell Offshore Inc.'s ("SOI") Exploration Plan if the plan is consistent with OCSLA, its implementing regulations, and the governing leases, unless exploration would result in serious harm to the environment that cannot be mitigated. This Court must uphold the Agency's findings if they are supported by "substantial evidence." The issue under OCSLA is whether the Agency had substantial evidence to support its findings that SOI's Exploration Plan met these requirements.

2. MMS regulations implementing OCSLA provide for review of exploration plans under the standards set forth in the National Environmental Policy Act ("NEPA"), making NEPA review a subset of the Agency's OCSLA review. The issues under NEPA, to the extent it is incorporated into OCSLA by regulation, are whether the Agency took a "hard look" at the environmental consequences of SOI's proposed activities and whether its approval of SOI's Exploration Plan and its preparation of an Environmental Assessment (the "Assessment") was arbitrary, capricious, or otherwise contrary to law.

STATEMENT OF THE CASE

SOI incorporates MMS's Statement of the Case.[2] SOI adds that SOI petitioned the Court for reconsideration and rehearing *en banc* of the panel's August 15, 2007, order staying MMS's approval of the Exploration Plan pending resolution of the petitions on the merits. SOI's requests were denied on September 13, 2007.

STATEMENT OF FACTS

SOI incorporates MMS's Statement of Facts.[3] SOI adds that the Outer Continental Shelf is a vital national resource containing valuable oil reserves.[4] To reduce this Nation's dependence on foreign oil, OCSLA calls upon the Department of Interior, through MMS, to issue oil and gas leases and to make these reserves available for development as rapidly as possible, while balancing protection of the human, marine, and coastal environments.[5] The Beaufort Sea off the northern coast of Alaska is one of these vital areas where leases have been sold for more than two decades.[6] This case concerns a small group of those leases that SOI purchased in

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[2] Resp't Br. 19-20.

[3] *Id.* 8-19.

[4] 43 U.S.C. § 1332(3).

[5] *Id.*; *see also* H.R. Rep. No. 590, 95th Cong., 1st Sess. 53 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1460.

[6] SER37-38 (Multi-Sale EIS). "ER" refers to Petitioners' Excerpt of Record: "SER" refers to Respondent's Supplemental Excerpt of Record; and "ISER" to Intervenor SOI's Supplemental Excerpt of Record.

2005 through Lease Sale 195. SOI spent over $200 million to develop an exploratory program for those leases.[7]

SUMMARY OF ARGUMENT

MMS's conditional approval of SOI's Exploration Plan met OCSLA's requirements. Its findings that SOI's proposed activities would not cause serious harm to the environment and that any such harm could be mitigated through conditions imposed on approval of the Exploration Plan were fully supported by substantial evidence in the record. These determinations should not be second-guessed by this Court. MMS had before it extensive information concerning the likelihood of oil spills and their potential impact, and the types and degree of noise resulting from exploration activities. The Agency fully considered the same in concluding that the planned operations would not cause serious harm to the environment and subsistence resources at issue. Further, MMS imposed a series of conditions on its approval, including monitoring requirements to verify the effectiveness of required mitigation measures. MMS fully satisfied the requirements of OCSLA and NEPA.

Petitioners' argument that MMS failed to consider particular potential impacts of the proposed plan is belied at every turn by substantial evidence in the record addressing each identified concern, including an Environmental Impact Statement

[7] *See* ISER151-164 (Decl. of Chandler T. Wilhelm, ¶ 22 (executed on May 10, 2007)).

("EIS") that MMS conducted with respect to the very lease area of the Beaufort Sea that SOI plans to explore. MMS's reliance on that EIS and other earlier environmental studies is specifically authorized by OCSLA. Similarly, MMS properly relied on monitoring and mitigation measures to address any significant impacts that may materialize. OCSLA expressly permits MMS to condition approval of an exploration plan on mitigation measures and modifications that will ensure no serious environmental harm.

Petitioners are left to cherry-pick pieces of information they consider favorable to their position (including selected statements from internal agency email debates) and ask this Court, based on that subset of information already considered by MMS, to substitute its judgment for that of the Agency. Petitioners' argument ignores both basic principles of administrative law and the careful statutory scheme set forth by Congress to promote the expeditious and orderly development of oil and gas resources in the Outer Continental Shelf. MMS took a "hard look" at all pertinent factors and made findings based on substantial evidence. Therefore, it has met the requirements of OCSLA, and its decision cannot fairly be challenged as arbitrary and capricious under NEPA. This Court should uphold MMS's determinations in all respects.

ARGUMENT

I. STANDARD OF REVIEW

OCSLA requires MMS to approve an exploration plan if it is consistent with the Act, the regulations thereunder, and the lease, unless exploration "would result" in

serious harm or damage to the marine, coastal or human environment, and the proposed exploration activity cannot be mitigated to avoid such condition.[8] OCSLA mandates a circumscribed and highly-deferential judicial review of MMS's findings, providing that those findings, "if supported by substantial evidence on the record as a whole, shall be conclusive."[9]

NEPA, the primary basis of Petitioners' challenge here, is a subset of MMS's OCSLA review. MMS's regulations require evaluation of the environmental impacts of the proposed activities and preparation of environmental documentation under NEPA and its implementing regulations.[10] A court's review of an agency's NEPA analysis is limited to determining whether the agency took a "hard look" at the environmental consequences of the proposed action,[11] and whether its decision was arbitrary and capricious.[12]

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[8] 43 U.S.C. § 1340(c)(1).

[9] 43 U.S.C. § 1349(c)(6).

[10] 30 C.F.R. §§ 250, 232(c)(2007).

[11] *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005).

[12] *See Ass'n of Public Agency Customers v. EPA*, 126 F.3d 1158, 1183 (9th Cir. 1997).

II. MMS'S APPROVAL OF SOI'S EXPLORATION PLAN MET THE STANDARDS OF NEPA AS INCORPORATED INTO OCSLA.

A. Petitioners Ignore the Separate and Unique Requirements for Approval of Exploration Plans under OCSLA.

Petitioners, in contending that MMS's environmental analysis was inadequate, view the case wholly from the perspective of NEPA and largely ignore OCSLA's requirements.[13] Although MMS's regulations provide for review of the environmental consequences of an exploration plan under NEPA standards, the nature of this review must be informed by OCSLA's statutory framework. This framework establishes a phased program for leasing, exploration and development of minerals in the Outer Continental Shelf and assigns each phase discrete informational, review and approval criteria. In reviewing MMS's approval of SOI's Exploration Plan, the Court must consider both the particular phase that exploration plans occupy in the statutory timeline and the substantive and procedural requirements unique to such plans.

OCSLA is built around the following statement of purpose:

> The [O]uter Continental Shelf is a vital national resource reserve held by the Federal Government for the public; which should be made 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.[14]

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[13] Petitioners Alaska Wilderness League, *et al.*, ("AWL") devote less than 3 pages to OCSLA; Petitioners North Slope Borough ("NSB"), *et al.*, incorporate the AWL's argument. AWL Br., 46-48; NSB Br., 54.

[14] 43 U.S.C. § 1332(3).

The Act is designed to "[e]xpedite the systematic development of the [Outer Continental Shelf], while protecting our marine and coastal environment.... The basic purpose...is to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."[15]

To further this balance between expeditious and orderly resource development and environmental safeguards, the Act establishes four distinct stages of offshore development: (1) formulation of a five-year leasing plan; (2) lease sales; (3) lease exploration; and (4) lease development and production.[16] Each phase carries its own regulatory review requirements and deadlines, tailored to the activity contemplated and information available for the particular phase.[17] "Under [the Act's] segmented approach, [a court] must uphold the [Agency's] actions so long as they meet the standards applicable to each stage."[18] Consequently, MMS's NEPA review of SOI's Exploration Plan must be evaluated against the role OCSLA assigns to exploration activities.

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[15] H.R. Rep. No. 590 at 53.

[16] *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1187 (9th Cir. 1988); *Village of False Pass v. Clark*, 733 F.2d 605, 616 (9th Cir. 1984) ("[s]taged development encourages staged consideration of uncertain environmental factors").

[17] *See, e.g., Sec'y of the Interior v. California*, 464 U.S. 312, 337 (1984); *Akutan*, 869 F.2d at 1192 ("the amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA's stages").

[18] *Akutan*, 869 F.2d at 1195.

Leasing plan stage: This first stage consists of "[a] schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which [the Secretary] determines will best meet national energy needs for the five-year period following its approval or reapproval."[19] This phase includes an EIS. In 2003, MMS issued an EIS for three Beaufort Sea lease sales – 186, 195, and 202 ("Multi-Sale EIS") – in connection with its five-year leasing plan.[20] The Multi-Sale EIS covers 9,770,000 acres, an estimated production rate of 460 million barrels for each sale,[21] and assumed 35 exploration and delineation wells would be drilled.[22] None of the Petitioners challenged the Multi-Sale EIS.

The scope of activities studied in the Multi-Sale EIS encompassed all of the activities in SOI's Exploration Plan.[23] For example, the Multi-Sale EIS analyzed bowhead whale migration patterns and other resources throughout the area, including the leases in SOI's Exploration Plan.[24] Further, SOI's Exploration Plan proposes the drilling of only 12 wells – far less than the 35 analyzed in the Multi-Sale EIS, none of

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[19] 43 U.S.C. § 1344.

[20] SER2 (Multi-Sale EIS).

[21] SER11-12; ISER006 (Multi-Sale EIS).

[22] ISER102 (Multi-Sale EIS).

[23] ER1104 (Assessment) ("The activities proposed in [SOI's Exploration Plan] represent a small portion of the projected activities originally analyzed for a Beaufort Sea Lease Sale").

[24] SER28 (Multi-Sale EIS).

which have been drilled,[25] and far short of the 30 wells previously drilled in the Beaufort Sea.[26]

Lease sale stage: This stage involves issuing offshore leases.[27] A NEPA analysis accompanied each lease sale here. For example, the Multi-Sale EIS served as the NEPA decision document for Sale 186. MMS subsequently prepared separate environmental assessments for Sales 195 and 202.[28]

Exploration stage: During the third stage, the stage at issue here, regulatory review is expedited and limited to exploration activities and to the amount of data available before exploration. The lease holder submits an exploration plan, which must be approved or modified by MMS *within 30 days* so long as the plan meets the statute, the regulations and the lease terms, unless the proposed activity "would result" in serious harm or damage to, among other things, the marine, coastal or human environment and "cannot be modified to avoid such a condition."[29] Thus, by statute, review of the exploration plan must be completed on an expedited schedule and

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[25] ISER102 (Multi-Sale EIS).

[26] ISER125 (NMFS Biological Opinion).

[27] 43 U.S.C. §1337(a).

[28] SER2 (Multi-Sale EIS). NSB and the Alaska Eskimo Whaling Commission ("AEWC") challenged the 2006 environmental assessment for Sale 202, seeking an injunction on the grounds that the sale required the Agency to prepare a supplemental environmental impact statement to the Multi-Sale EIS. The District Court for the District of Alaska denied the injunction. *N. Slope Borough v. MMS*, No. 3:07-cv-0045, 2007 U.S. Dist. LEXIS 27487 (D. Alaska, Apr. 12, 2007).

[29] 43 U.S.C. § 1340(c)(1).

approval (with modifications and further review as necessary to ensure compliance with OCSLA, implementing regulations, and the lease) is to be granted *unless* MMS makes the specific finding that serious harm or damage would result.

Development and Production stage: OCSLA recognizes that there is more data available at the final development and production phase. The statute accordingly builds in more time for review at this stage. The lessee must submit a development and production plan to the Agency containing additional and updated information.[30]

If an EIS is prepared for a development and production plan, OCSLA affords MMS 60 days *after* the release of the final environmental impact statement to approve, disapprove or require modification of the development and production plan.[31] At the development and production stage, in contrast to the expedited and limited review contemplated at the exploration stage, the statute builds in sufficient time to prepare an EIS if MMS determines that one is necessary, and then provides *additional* time for the Agency to approve the development and production plan.

OCSLA's carefully staged program has important implications in this case: the levels of review and information necessary to support MMS's determinations vary depending on the particular stage of the program under OCSLA. SOI is at the initial exploration stage – Stage 3. Petitioners overstate the type of information required

[30] 43 U.S.C. § 1351; 30 C.F.R. § 250.242.

[31] 43 U.S.C. § 1351(h)(1).

under OCSLA and demand a level of review commensurate with Stage 4 – development and production, which contemplates and provides time for the preparation of an EIS. At the exploration stage, however, it would be all but impossible for MMS to draft, circulate, receive comments, and then review and revise an EIS consistent with the 30-day statutory time frame.[32] This impossibility suggests that NEPA's EIS procedures cannot apply to MMS's review of exploration plans under OCSLA.[33] Putting aside whether an environmental assessment would have been sufficient at the development and production stage, it is clear that MMS's review of SOI's exploration plan, and its decision to prepare an environmental assessment rather than an EIS, unquestionably met OCSLA's requirements *at this stage.*

B. MMS's Findings That SOI's Exploration Activities Will Not Cause Significant Impacts Are Not Arbitrary and Capricious.

Substantial evidence supports MMS's determination that SOI's proposed exploration activities will not significantly impact the quality of the environment. Because MMS had before it all of the necessary information, and because it incorporated pre-existing environmental studies of the same geographic area in

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[32] *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 778-90 (1975) (noting that it is "inconceivable" that an EIS process could be accomplished in 30 days).

[33] *See* 40 C.F.R. § 1500.6 (NEPA does not apply when "existing law applicable to the agency's operations...makes compliance impossible."); *Westlands Water District v. U.S. Dep't of Interior*, 43 F3d 457, 460 (9th Cir. 1994).

accordance with both OCSLA and NEPA, MMS's decision cannot be fairly characterized as arbitrary and capricious under NEPA and must be upheld.

While on one hand recognizing that MMS may rely on information in other environmental documents, Petitioners on the other hand ignore all of the information in these other documents.[34] Notwithstanding their blind eye, both NEPA and OCSLA, as well as this Court's precedents, fully support MMS's reliance upon existing environmental analyses in making its findings.

The Council on Environmental Quality's NEPA regulations specifically encourage "tiering" in the NEPA process. Tiering allows the agency to "eliminate repetitive discussions of the same issues and focus on the actual issues ripe for decision at each level of environmental review."[35] OCSLA similarly instructs the Agency to utilize pre-existing environmental documents, rather than devote time and resources to recreating what already exists.[36]

Finally, this Court encourages tiering: "[a] comprehensive programmatic impact statement generally obviates the need for a subsequent site-specific or project-

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[34] *E.g.*, AWL Br., 37.

[35] 40 C.F.R. § 1502.20; *see* 40 C.F.R. § 1500.4(i) (requiring agencies to reduce paperwork by "[u]sing program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues").

[36] 43 U.S.C. § 1346(c) ("To the extent that other Federal agencies have prepared environmental impact statements, are conducting studies, or are monitoring the affected human, marine or coastal environment, the Secretary may utilize the information derived therefrom in lieu of directly conducting such activities").

specific impact statement, *unless* new and significant environmental impacts arise that were not previously considered."[37]

MMS appropriately relied on the tiering process to address all of Petitioners' areas of concern, and to support its final action in this case. MMS tiered its Assessment and Finding of No Significant Impact here to the 1500-page Multi-Sale EIS that covered Sales 186, 195, and 202 and to the Assessments for Sales 195 (which included the SOI leases at issue here) and 202.[38] When MMS prepared its Assessment for SOI's Exploration Plan, it already had analyzed "potential *areawide* effects of exploratory drilling" in the Multi-Sale EIS,[39] updated this analysis with *site-specific* information in the Assessment for Sale 195, and then further updated these analyses with the Sale 202 Assessment. MMS considered all of this information in reviewing SOI's Exploration Plan.[40] MMS's action in tiering is not arbitrary and capricious.

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[37] *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768, 783 (9th Cir. 2006) (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355-56 (9th Cir. 1994)) (internal quotation marks omitted) (emphasis added).

[38] The areas offered in these three Lease Sales were identical; each area was re-offered after the expiration of its five-year lease term. *See* ISER104 (Sale 195 Assessment); ISER127 (Sale 202 Assessment).

[39] ER1051 (Assessment) (emphasis added).

[40] *Id.*

Ultimately, at the exploration stage, OCSLA requires a limited NEPA review and a determination by the Agency of whether an action is one "*significantly affecting* the quality of the human environment,"[41]

> [t]he critical term . . . is "significantly." Whether a project is "significant" depends on the project's "context" and its "intensity." 40 C.F.R. § 1508.27. Context refers to the scope of the action, while intensity refers to the severity of the impact . . . . The regulations include a list of ten intensity factors . . . .[42]

Out of those ten intensity factors, Petitioners claim that seven demonstrate that MMS should have prepared another EIS for SOI's Exploration Plan.[43]

This Court has acknowledged that an agency is not required to examine *each and every* factor,[44] and the application of the intensity factors is a matter squarely within the expertise of the responsible agency.[45] Each of the factors cited by Petitioners is discussed below, and none supports second-guessing MMS's expert determinations.

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[41] 42 U.S.C. § 4332(C)(emphasis added).

[42] *Envtl. Prot. Info. Ctr. ("EPIC") v. United States Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006).

[43] NSB Br., 51-54 (citing 40 C.F.R. §§ 1508.27(b)(2), (3), (7), (8), (9)); AWL Br., 44-45 (citing 40 C.F.R. §§ 1508.27(b)(3), (4), (5), (7), (9)). Petitioners do not discuss the other three factors.

[44] An agency need only consider factors that are relevant. *See Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 937 (N.D. Cal. 2006) (analyzing only the relevant factors under section 1508.27).

[45] *See, e.g., Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002) ("the Ninth Circuit has shown considerable deference for factual and technical determinations implicating substantial agency expertise").

1. MMS's finding that SOI's exploration activities would not adversely impact endangered or threatened species is not arbitrary and capricious.

One NEPA intensity factor is "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973."[46] The endangered or threatened species at issue here are the bowhead whales and Spectacled and Steller's Eiders. The two potential impacts that Petitioners cite are oil spills (for both species) and noise (for bowhead whales).[47]

(a) The potential impacts from oil spills on bowhead whales and eiders are not significant.

MMS's determination that oil spills would not significantly impact bowhead whales or eiders is not arbitrary or capricious. Since 2002, MMS has conducted environmental analyses concerning spills from oil and gas activities in the Beaufort Sea for the lease areas at issue. These analyses, including the Assessment, all employ the same general approach. First, MMS distinguished between three categories of oil spills: (i) small (less than 1,000 barrels); (ii) large (greater than or equal to 1,000

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[46] 40 C.F.R. § 1058.27(b)(9).

[47] Petitioners complain about oil spill and noise impacts to other species (beluga whales, other birds, fish, and caribou) that are not endangered or threatened species. The regulatory factors relevant to those species are discussed *infra*. Petitioners additionally claim that SOI's plan contained insufficient information regarding polar bears. To the contrary, the Assessment fully analyzes impacts on polar bears. ER1080 (Assessment). The polar bear population in the southern Beaufort Sea is stabilizing near habitat carrying capacity. ISER123 (Sale 195 EA).

barrels); and (iii) very large (greater than or equal to 150,000 barrels).[48] (There have been no spills from drilling activities greater than 150,000 barrels in United States waters.[49] The analysis of very large oil spills, therefore, is based on a very large blowout scenario, even though no large oil blowouts from exploration have occurred in the Beaufort Sea in the past 30 years.)[50] Second, MMS engaged in a two-step analysis, where it did precisely what AWL argues MMS should have done: considered *both* (i) the likelihood of occurrence, *and* (ii) the potential impacts of a crude oil spill.[51]

In framing their challenge, Petitioners confuse the different types of oil spills and ignore MMS's two-step analysis. MMS's Assessment, however, is *more* than adequate. The Court should reject Petitioners' invitation to second-guess the Agency's judgment.

The 2002 and 2003 Oil Spill Analyses: In 2002, MMS conducted an Oil Spill Risk Analysis ("Risk Analysis"), including estimation of the risk of oil-spills contacting sensitive offshore and onshore environmental resources.[52] MMS estimated *both* the probability of an oil spill occurring *and* the potential for it to reach a sensitive

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[48] ER122 (Multi-Sale EIS).

[49] SER232 (Multi-Sale EIS).

[50] ER1116 (Assessment).

[51] AWL Br., 36.

[52] ISER002 (Risk Analysis).

resource area.[53] MMS took an "environmentally conservative approach" by assuming that a spill would *not* be cleaned up and that there would be no chemical or biological weathering of the spill to diminish its contact with geographic areas or environmental resources.[54]

In 2003, MMS updated the Risk Analysis with the Multi-Sale EIS. Utilizing the same environmentally conservative approach, it again estimated *both* the chance that an oil spill would occur, and if so, whether it would contact a specific environmental resource or geographic area.[55] The chance of one or more *large* spills occurring from a drilling vessel (the type to be used by SOI) was five to six percent for all three lease sales over time.[56] Based on this low percentage, MMS found that "a *large* oil spill is *unlikely* to occur."[57] Despite this conclusion, MMS analyzed the effects of a large oil spill, just as AWL argues it should have done.[58]

The Multi-Sale EIS also determined that blowouts, which constitute the very large spill category, are "unlikely events" during exploration.[59] For the Alaska North

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[53] *Id.*

[54] ISER003 (Risk Analysis).

[55] ER197-200 (Multi-Sale EIS).

[56] ER122, 200 (Multi-Sale EIS).

[57] ER122 (Multi-Sale EIS) (emphasis added).

[58] ISER005 (Multi-Sale EIS), ER122-123 (Multi-Sale EIS).

[59] ER189 (Multi-Sale EIS). A blowout "involves oil that travels upwards from the well at the ocean floor to the water surface. The resulting plume of oil is driven by (con't) . . .

Slope, the best available information indicated that only one out of ten blowouts over a 30-year period was an oil (as opposed to a gas) blowout.[60] In fact, only four of 13,142 exploration wells drilled in the Outer Continental Shelf between 1971 and 2005 have had blowouts resulting in oil releases to the ocean.[61] This equates to a 99.97 percent chance that a blowout will not occur. And, there were no large spills from blowouts.[62] Despite this *de minimis* potential of a very large spill from a blowout occurring, MMS analyzed the effects of a 180,000-barrel blowout because "it [was] a significant concern to the public."[63] Finally, MMS analyzed the effects of *small* spills, which "generally are routine and expected."[64]

The Assessments for Lease Sales 195 and 202 further updated this analysis. The Sale 195 Assessment - the lease sale through which SOI obtained the leases at issue - explained that the "[i]nformation regarding the source, type, and sizes of oil spills; their behavior; the estimated path they follow; and the conditional and

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ocean currents and wind." ISER143 (Oil Spill Plan). Gas, by contrast, dissipates quickly into the atmosphere.

[60] ER189 (Multi-Sale EIS). This isolated blowout, which occurred in 1950, "was unspectacular and could not have been avoided, because there were no casings [or] blowout preventors available" – precautionary measures that ***are*** available today. Thus, the "drilling practices from 1950 would not be relevant today." *Id.*

[61] ER1115 (Assessment).

[62] ER189 (Multi-Sale EIS).

[63] *See* page 29 *infra*..

[64] ER124 (Multi-Sale EIS).

combined probabilities remain[ed] the same as discussed in the [Multi-Sale EIS]."[65] Thus, there was no "new and significant" information for the specific geographic area covered by Sale 195 that was "not [already] previously considered."[66]

Oil Spill Analysis in the Assessment: MMS incorporated its prior analyses into its Assessment for SOI's Exploration Plan. Appendix II to the Assessment contains a nearly ten-page oil spill analysis for the three categories of spills described above. Consistent with its previous analyses, and based on the lack of any significant new contrary information, MMS determined that for *large* or *very large* oil spills, "no crude oil spills [would be] assumed from exploration activities."[67] This conclusion finds substantial support in the record. During the past 30 years, industry drilled 35 exploratory wells in the Beaufort and Chukchi Seas.[68] Not only were there *no blowouts resulting in very large spills* during that time, there was *only one large spill*, which occurred in the Canadian Beaufort Sea under different drilling operations that those involved here.[69]

MMS's Assessment additionally analyzed the likelihood of and potential effects from blowouts causing very large spills. Relying on data reported in the

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[65] ISER106, ISER111 (Sale 195 Assessment).

[66] *Pit River*, 469 F.2d at 783.

[67] ER1071 (Assessment).

[68] ER1115 (Assessment).

[69] ER1116 (Assessment).

Multi-Sale EIS, which remained valid and current, MMS determined that "*[n]o* exploratory drilling blowouts have occurred in the Alaska OCS."[70] Indeed, out of *all* OCS areas (including Pacific, Atlantic, and Gulf of Mexico) over a 30-year period, there were only 66 blowouts, resulting in only four releases to the ocean, out of a total of 13, 142 exploration wells drilled.[71] Importantly, there were no large spills from blowouts during exploratory drilling over this period.[72] In fact, the amount of oil released as a result of these blowouts ranged from .8 barrels to a high of 200 barrels.[73]

The Assessment also analyzes small spills. Based on exploratory wells drilled in the Beaufort and Chukchi Seas since 1981, MMS estimated that small oil spills (25 barrels or less) could be a "typical scenario during exploratory drilling[,]" but are often onto containment "platforms, facilities, or gravel islands or onto ice and may be cleaned up."[74] Even so, MMS conservatively "assumed that a small spill could occur."[75] For purposes of the analysis, MMS assumed a small oil spill of 48 barrels – the size SOI identified in its Oil Discharge and Prevention Plan (the "Oil Spill Plan")

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[70] ER1115 (Assessment) (emphasis added).

[71] *Id.*

[72] *Id.*

[73] ER1120 (Assessment).

[74] ER1115 (Assessment).

[75] ER1071 (Assessment).

as the potential *worst case scenario* for exploratory drilling activities.[76] Through modeling, MMS determined that a 48-barrel spill could evaporate and disperse within 48 hours.[77] Consequently, MMS concluded that such small spills were unlikely to cause significant impacts.

In addition, MMS had before it SOI's Oil Spill Plan submitted with SOI's Exploration Plan. The Oil Spill Plan contains multiple measures designed to prevent spills and discharges – including ice monitoring and forecasting techniques, visual and instrumental discharge detection, redundant emergency shutdown systems, and a world-class oil spill response fleet.[78] The Oil Spill Plan provides further support for MMS's conclusions that the potential for large oil spills and blowouts is negligible.

AWL mischaracterizes the record when it asserts that MMS failed to consider oil spills during exploration. When MMS prepared its Assessment for SOI's Exploration Plan, it already had analyzed "potential *areawide* effects of exploratory drilling" in the Multi-Sale EIS,[79] updated this analysis with *site-specific* information in the Assessment for Sale 195, and then further updated these analyses with the Sale

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[76] ER1114 (Assessment); ISER140 (Oil Spill Plan). The fact that regulations require SOI to submit an oil spill response plan does not undermine the Agency's Assessment or make SOI's exploration activities "significant." MMS's Brief further explains why submission of this response plan is irrelevant to whether oil spills will have a significant impact. *See* Resp't Br., 42.

[77] ER1071, 1114 (Assessment).

[78] ISER145-149 (Oil Spill Plan).

[79] ER1051 (Assessment) (emphasis added).

202 Assessment. MMS considered all of this information in reviewing SOI's Exploration Plan.[80]

AWL wrongly claims that MMS should have considered even the negligible risks of *large* spills if those risks *could have* dramatic consequences. MMS, however, had already considered the potential impacts from a large oil spill,[81] and there was no new information – and AWL identifies none – for MMS to consider:

> The chance of a large spill is low (≥1,000 bbl), *but the potential consequences were analyzed in the [Multi-Sale EIS]* section IV.C. and [2006 Biological Evaluation for Eiders prepared by the Agency]. . . . The conditional probabilities estimated by the [Oil Spill Risk Analysis] model . . . of a spill ≥1,000 bbl contacting environmental resource areas or land segments within a given time frame . . . are discussed in [the Multi-Sale Statement and the 2004 and 2006 Biological Evaluations]. In the *unlikely event* of a large accidental oil spill the potential for significant impacts exist as identified in [the Multi-Sale Statement] or [2006 Biological Evaluation]. *No new significant effects are identified from this [SOI] proposal.*[82]

The cases on which AWL relies do not support its assertion either. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission* is inapplicable.[83] There, the agency claimed that it was categorically excluded under NEPA from having to consider a potential terrorist attack. MMS does not claim here that it was

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[80] *Id.*

[81] ER122-23 (Multi-Sale EIS)

[82] ER1116 (Assessment) (emphasis added).

[83] 449 F.3d 1016 (9th Cir. 2006); AWL Br., 38.

categorically excluded from considering oil spills; instead, it did consider and fully analyzed the likelihood of spills occurring and their impact.

Equally inapplicable is *Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Commission*.[84] The *Limerick* court reviewed the administrative record and found that the agency had *not* concluded that the risk of spills was "remote and speculative."[85] Here, by contrast, MMS clearly stated that the risk of large or very large oil spills is remote and speculative, and grounded its final action on this conclusion.

Finally, contrary to AWL's argument, *City of New York v. United States Department of Transportation* supports MMS's analysis.[86] There, the court explained that "[w]ith respect to environmental consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess."[87] Indeed, the risks of some events are "too far afield for consideration."[88] Here, where a small spill during exploration will evaporate and dissipate before reaching a resource area, and where the data supports the conclusion that the occurrence of large spills or

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[84] 869 F.2d 719 (3d Cir. 1989); AWL Br., 38-39.

[85] 869 F.2d at 741 ("the Commission's conclusion as to whether the risk is remote and speculative is ambiguous . . . we are unwilling to read into the Commission's statements a finding that the risk is remote and speculative").

[86] 715 F.2d 732, 750 (2d Cir. 1983); AWL Br., 39-40.

[87] 715 F.2d at 750.

[88] *Id.*

very large spills is unlikely, any risks associated with such events are too far afield to require additional analysis. AWL's inflated accusations hinge on nothing more than speculation, relying on MMS's recognition of "*the possibility* of a crude oil spill from exploration drilling."[89] MMS's conservative approach did recognize the possibility; but further analysis showed that any impacts from a spill would not be significant. AWL entirely ignores this second step in the analysis.[90]

Bowhead whales: MMS explained that a small spill likely would dissipate into the water column within two days, "so the effects on bowheads would probably be immeasurable even during the migration."[91] Even in the *unlikely* event of a large spill, the estimated chance of that spill contacting the bowhead whale migration *corridor* is between 0.5 and 35 percent within a 30-day time period during the summer open-water period.[92] The probability of oil contacting *individual* whales

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[89] AWL Br., 16 (emphasis added).

[90] AWL also cites early comments from the State of Alaska that oil spills from exploration present the "highest spill risk." AWL Br., 16 (quoting ER184 (Multi-Sale EIS)). The State of Alaska, however, "fully supports [SOI's] efforts to conduct exploratory drilling in the Beaufort Sea" and was "very encouraged by the level of commitment of [SOI] in 'raising the bar' to protect the offshore environment and the people who depend on it." ISER150 (Letter from Sarah Palin, Governor of Alaska to John Goll, MMS (February 8, 2007)).

[91] ER1076 (Assessment).

[92] *Id.*

would be "considerably less."[93] Again MMS employed a conservative approach: Even though it had concluded that a large spill was unlikely, it analyzed the impact of such an unlikely occurrence on bowhead whales. MMS's modeling "suggest[s] that only a small number of the Beaufort Sea bowhead population would be affected by a large oil spill."[94] Indeed, the greatest number of modeled contacts resulting from an unlikely large spill involved *no more than* 1.9 percent of the population.[95] Further, "[m]odels commonly overestimate the impact of a spill" and "few, if any, cetaceans [in general] have been claimed by spilled oil."[96]

Thus, MMS properly concluded that there will be no significant impacts on bowhead whales from oil spills. The possibility that there may be "some negative effects" does not mean that these effects "rise[] to the level of demonstrating a significant effect" on bowhead whales and eiders.[97] It is "not arbitrary and capricious for [the Agency] to determine that although there will be some effect on

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[93] ISER005 (Multi-Sale EIS); *see* ER1076 (Assessment) (stating that even if there were contact with the migration corridor, the "chance of contact with individual bowheads might be low").

[94] ER137 (Multi-Sale EIS).

[95] *Id.* (citing model by Reed *et al.* (1987)).

[96] *Id.* (discussing Geraci and St Aubin (1990)).

[97] *EPIC*, 451 F.3d at 1010-11 (quoting *Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005)).

individual[s]...this will not cause a significant adverse effect on the species and require an EIS."[98]

Spectacled and Steller's Eiders: Any potential impacts to eiders is equally speculative. MMS's Risk Analysis predicted that in the unlikely event of a large oil spill that lasts 30 days (which assumes there is no clean-up or dispersion), there is *only* "*up to* [a] 16% chance" that such a spill will reach resource areas important to eiders, in part, because of the distance between the drilling activities and the eider habitats.[99] As for small spills, AWL ignores that such spills would persist for approximately two days and, therefore, would be unlikely to reach resource areas used by eiders.[100] Thus, MMS concluded that in the unlikely event of a spill, it was "improbable" that the oil would reach eider habitats.[101] Moreover, the SOI Oil Spill Plan explains SOI's uses of the National Oceanic and Atmospheric Agency's Environmental Sensitivity Maps to identify areas of major concern in order to formulate a very specific shoreline clean-up plan.[102]

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[98] *EPIC*, 451 F.3d at 1011.

[99] ER1077 (Assessment); *see* ER142 (Multi-Sale EIS) ("the low probability of such an event, the likelihood that a spill will not move into all portions of a given area, and the seasonal nature of the resources inhabiting the Beaufort Sea region, make it unlikely that a large oil spill would occur and contact substantial proportions of the eider populations").

[100] ER1077-78 (Assessment).

[101] *Id.*

[102] ISER144 (Oil Spill Plan).

(b) Potential impacts from noise on bowhead whales are not significant.

Petitioners make three arguments regarding MMS's review of noise impacts to bowhead whales. First, Petitioners assert that MMS failed to analyze noise impacts from icebreakers.[103] Second, Petitioners argue that the Assessment should have undertaken a project-specific analysis.[104] Third, Petitioners claim that MMS failed to look at the biological significance of the project on whales.[105] All of these arguments fail because the Petitioners ignore the evidence in the record.

The Agency's consideration of noise from icebreakers: AWL admits that the Agency considered the impacts of underwater noise on bowhead whales,[106] but criticizes MMS for "focusing on the drillships themselves, not attendant icebreaking ships."[107]

This contention is simply wrong. The Assessment incorporates the 2006 MMS Biological Evaluation and the 2006 Biological Opinion from the National Marine Fisheries Service. Both documents cite numerous studies addressing icebreaker noise levels and potential impacts to bowheads and other whales,[108] and both support

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[103] AWL Br., 28-29.

[104] AWL Br., 28-29; NSB Br., 24-25.

[105] AWL Br., 28.

[106] *Id.* at 29.

[107] *Id.* at 31.

[108] ISER113-118 (Biological Evaluation); ER443-447 (Biological Opinion).

MMS's conclusion that icebreaker activity will not significantly impact bowhead whales.[109] As MMS notes, the exploration and development assumptions underlying the Biological Opinion "covers the [SOI] Operation."[110]

The Assessment also tiers to the Multi-Sale EIS which in turn cites numerous studies discussing icebreakers. For example, the Multi-Sale EIS discusses the findings of an aerial survey over a previous Beaufort Sea drilling location in which bowhead whales were observed within 30 kilometers north of the drilling location.[111] The aerial survey found that even though three icebreakers had been actively managing ice periodically during the day, the whales were not avoiding the icebreakers.[112] This study, along with others,[113] supported MMS's conclusion in the Multi-Sale EIS that vessel activities associated with exploration, including icebreaker activity, were "not expected to disrupt the bowhead migration, and small deflections in individual bowhead-swimming paths and a reduction in use of possible bowhead-

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[109] ISER116 (Biological Evaluation) (explaining finding that exposure to single playback of variable icebreaker sounds can cause "statistically but probably not biologically significant effects on movements and behavior"); ER446 (Biological Opinion) (explaining that available information does not indicate long-term adverse effects on Western Arctic stock from high level of seismic surveys and exploration drilling during the 1980s in the Beaufort and Chukchi seas).

[110] ER1074 (Assessment).

[111] SER124 (Multi-Sale EIS).

[112] SER124 (Multi-Sale EIS) ("The study did not indicate what the whale's behavior was, but it did not appear to be avoiding the icebreakers").

[113] *See* SER 106-143 (Multi-Sale EIS).

feeding areas near exploration units should not result in significant adverse effects on the species."[114] The EIS also references observation of bowhead avoidance during seismic operations in 1996 – 1998, which demonstrated that avoidance activities ceased 12 hours after the seismic operations stopped.[115]

Thus, contrary to Petitioners' claims, MMS's conclusion that noise from exploratory drilling, with icebreaker support, would not jeopardize the bowhead whale population is fully supported by the record. Further, despite its finding that noise from exploratory activities would not significantly affect bowhead whales,[116] MMS imposed mitigation measures on SOI to ensure that significant impacts would not occur during exploration activities.

The Agency's consideration of the specific impacts of SOI's proposal on bowhead whales: Second, Petitioners complain that "the [SOI] plan and the EA do

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[114] SER126 (Multi-Sale EIS). AWL requests that excerpts from a 2005 National Research Council report be added to the record to show that the Agency failed to consider relevant factors. AWL Br., 9 n 2. This request demonstrates the extent of AWL's unfamiliarity with the record in this case. The 2006 Programmatic Assessment examined these issues and extensively quoted from the very National Resource Council report that AWL now wants to add to the record. ISER122. Indeed, the Programmatic Assessment includes a large block quote from the report containing the exact language on which AWL relies in its brief. *Id.* Thus, it is unnecessary for the Court to supplement the record because MMS plainly considered the relevant factors regarding bowhead whale breeding, nurturing, and parental care that appears in AWL's excerpts from the National Resource Council report.

[115] SER113 (Multi-Sale EIS).

[116] *E.g.* ER1075 (Assessment).

not even describe most of the actual drilling locations."[117] Contrary to Petitioners' assertions, the noise analysis in the Assessment is based on the locations, drillships, icebreakers, support vessels, and the aircraft that SOI will use for its proposed action.[118] Both SOI's Exploration Plan and the Assessment describe twelve leases on six specific prospects as potential exploration targets – all of which are included in the Multi-Sale EIS.[119] NEPA does not require MMS to identify precise longitude and latitude of the drilling locations where, as here, the boundaries of the Outer Continental Shelf prospects are well-defined and MMS performed a lease-by-lease examination of potential environmental effects.[120] Petitioners do not provide any reason why the well location would impact whale migration or other resources in any material manner that differs from the impacts identified in MMS's prior lease-wide analysis.

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[117] AWL Br., 30.

[118] ER1047-49 (Assessment).

[119] ER1047 (Assessment). The Assessment notes that three of the specific prospects are located in Camden Bay (Sivulliq, Lonestar, and Olympia), two are located 25 and 40 miles to the east of Barter Island and about 10 miles offshore, and the sixth prospect is located 20 miles north of the Colville River delta. All told, SOI's leases cover 60,000 acres – which is less than 1 percent of the area covered by the Multi-Sale EIS. SER11(stating that the multi-sale program covers 9,770,000 acres); ISER006 (Multi-Sale EIS).

[120] ISER097-101 (Multi-Sale EIS); ISER141-142 (Oil Spill Contingency Plan); *see N. Alaska Envtl.Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006) (concluding that the government was not required to do a parcel-by-parcel examination at the lease stage where lessees had not yet done exploratory work to determine which sites would be most suitable for development).

The Exploration Plan's inclusion of well locations for the first year only is entirely consistent with MMS's regulations: An applicant may modify a plan to identify new well locations, and an applicant may not drill a well absent a permit to drill – which requires site specific information.[121] Approval of the Plan in the absence of specific well locations for subsequent exploration years accords with MMS's regulations and practice in approving multi-year exploration plans. MMS recognized in the preamble to its 1988 regulations that because "[t]here is a high degree of uncertainty involved in projecting future wells[,]" information about well locations is only provided to give plan reviewers a general idea of the frequency and duration of exploration activities.[122] Thus, the fact that the Plan included the *lease* locations, but not the *well* locations for the subsequent years, is not a reason to supplant MMS's plan approval.

The Agency's inclusion of mitigation measures respecting whales: Third, Petitioners argue that the Assessment "fails to analyze the biological significance of exploration drilling operations on whales."[123] Actions or activities are "biologically significant" only if the effects on individual whales have "population-level

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[121] 30 C.F.R. §§ 250.232(d), 250.410; *see also* ER1029 (Feb. 9, 2007 e-mail from Deborah Cranswick, MMS's Alaska Regional Office Leasing and Environment Program Office: "[i]n essence: the [Exploration Plan] is the roundtrip reservation, plan approval is the roundtrip tickets, the Application for Permit to Drill is the boarding pass").

[122] 53 Fed. Reg. 10609 (Apr. 1, 1988).

[123] AWL Br., 31.

consequences and affect the viability of the species."[124] There is substantial evidence that sound disturbances affecting the migration pattern of a "[v]ery low percentage of the Beaufort Sea stock" would not affect the viability of the species or have population-level consequences.[125]

Notwithstanding MMS's conclusion that migration deflection will not have a significant biological impact on bowhead whales,[126] the Assessment again takes the most environmentally conservative approach by requiring mitigation measures to ensure protection of bowhead whales. For example, it explains that SOI will be

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[124] ER295. According to the "NRC Guidance on Determining when Noise Causes Biologically Significant Effects," the term "biologically significant" has the following meaning: "An action or activity becomes biologically significant to an individual animal when it affects the ability of the animal to grow, survive, and reproduce. Those are the effects on individuals that can have population-level consequences and affect the viability of the species." *Id.*

[125] MMS determined the effect is not significant because "the harassment would consist of *temporary* and *short-term* displacement within the zones affected by noise from drilling activities and associated support vessels." ER1072 (Assessment) (emphasis added). Based on estimates for impulsive and continuous sound, SOI estimated "a maximum non-lethal 'take' of about 500 whales." *Id.* MMS determined this impact is not biologically significant because: (i) 500 whales is a "very low percentage of the Beaufort Sea stock[;]" (ii) "there is no conclusive evidence that bowheads have been displaced from feeding activities[;]" and (iii) bowheads return to the swim paths they were following at relatively short distances after their exposure to sounds over 160 dB." *Id.*; ER295.

[126] The Assessment and the Multi-Sale EIS provide substantial support for MMS's conclusion that noise-based deflection of individual bowhead whales is temporary, nonlethal, and not a significant effect. SOI incorporates by reference Respondents' comprehensive discussion of the many different occasions within the Assessment and Multi-Sale EIS that MMS considered the biological significance of whales being deflected from their migratory route by noise. Resp't Br., 35-39.

required to conduct monitoring, and "information from monitoring surveys will be reviewed by MMS to determine if there is any indication that bowheads have been displaced out of the areas in which they frequently feed."[127] With respect to noise from icebreakers, SOI's Marine Mammal Monitoring Plan states that "noise from ships with ice-breaking capabilities will be measured during periods of ice-breaking activity. These measurements will be used to determine the sound levels produced by various equipment and to establish any safety and disturbance radii if necessary."[128] SOI will use acoustic localization methods and aerial surveys to ensure that noise from ice-breakers has no significant impact on bowhead whales.[129]

MMS has the right to modify SOI's exploratory operations based on any new information obtained through these monitoring activities: "The [Agency] has the authority to modify approved operations to ensure that significant biological populations or habitats deserving protection are not subject to a threat of serious, irreparable, or immediate harm."[130] The governing lease states that the Agency will limit or suspend any operations on a lease "whenever bowhead whales are subject to a threat of serious, irreparable, or immediate harm to the species."[131] MMS, therefore,

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[127] ER1075 (Assessment).

[128] ISER131-132 (Marine Mammal Monitoring and Mitigation Plan).

[129] ISER132-135 (Marine Mammal Monitoring and Mitigation Plan).

[130] ER1075 (Assessment).

[131] ER1070 (Assessment).

has the authority to modify *or suspend* SOI's operations *at any time* if MMS believes there to be serious, irreparable or immediate threat based on real-time monitoring activities.

In light of these measures, any potential impact on bowhead whales from icebreaking noise or other exploratory activities, even were it deemed to be "serious" – which it is not – will be avoided entirely or mitigated.

Individual opinions of Agency employees do not supplant the evidence in the record or MMS's final decision: Given the extensive data and analysis supporting MMS's conclusions, Petitioners resort to cherry-picking emails and other communications from certain agency employees during internal agency deliberation and debate.[132] Judicial review of agency action is based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision.[133] This Court has recognized that an agency retains broad discretion under NEPA to resolve differing opinions within the agency, and internal agency

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[132] AWL Br., 31-33; NSB Br., 26-27.

[133] *See PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999) ("We do not think the evidence that two Commissioners initially flirted with an impermissible rationale suffices to demonstrate that the permissible rationale given a year and one-half later in the Commission's published opinion was a mere pretext").

disagreements and preliminary assessments are not sufficient to overturn an agency's final decision under a statute it must implement.[134]

Petitioners' reliance on selected communications from Dr. Charles Monnett, Ms. Jill Lewandowski and Dr. Jeffrey Gleason is further undermined because these communications do not analyze all of the data contained in the Multi-Sale EIS, the Lease Sale 195 Assessment, or the Assessment. More important, the comments by Monnet, Lewandowski and Gleason do not raise environmental issues that were ignored by MMS.

Petitioners rely heavily on the opinion of Dr. Charles Monnett to support their claims regarding impacts to bowhead whales. Dr. Monnett, however, prefaced his comments by admitting that his conclusions are based on only "a cursory reading/skimming of the [Multi Sale EIS] document. . . ."[135] Dr. Monnett was not involved in the drafting process, and it appears his opinions were not informed by the documents in the record.

Petitioners misleadingly cite emails from Ms. Lewandowski that were written *before* her suggestions were incorporated into the Assessment by the responsible

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[134] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2530 (U.S. 2007)("The 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").

[135] ER1009 (Draft Assessment).

Agency officials.[136] On February 15, 2007, Ms. Lewandowski provided her comments regarding bowhead whales after a "brief review" of the draft Assessment.[137] The next day, an official responsible for drafting the Assessment responded that "*[a]ll* of Jill's suggested changes were made."[138] Thus, MMS not only adequately considered Ms. Lewandowski's concerns, but it incorporated her suggestions.

Dr. Gleason's comments similarly fail to raise new environmental issues or concerns regarding bowhead whales. Rather, they cover topics that are addressed in the record. For example, Dr. Gleason's comments complain that the Assessment "tends to" analyze bowhead whale migration in relation to normal or average ice conditions.[139] To the contrary, the Assessment discusses the decline in ice cover,[140] and notes that individual whales enter shallower water during light ice years.[141] The Assessment accordingly contains a complete discussion of the risk to bowheads and a reasoned evaluation of this risk. If there were differing opinions within MMS, the law

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[136] AWL Br., 22, 32.

[137] ER1162-63.

[138] ER1161 (emphasis in original).

[139] ER1392.

[140] ER1052 (Assessment).

[141] ER1055 (Assessment).

requires the Court to defer to the Agency's broad discretion to resolve conflicts among its own experts.[142]

MMS had before it sufficient data on which to base an informed decision. MMS gave full consideration to all relevant issues. It made a determination that no further study was warranted. NEPA requires nothing more.

2. MMS's Finding that SOI's exploration activities would not adversely impact public health or safety is not arbitrary and capricious.

The second intensity factor is consideration of "[t]he degree to which the proposed action affects public health or safety."[143] NSB and AEWC (collectively, "NSB") argue that noise from drilling and icebreaking activities during SOI's exploration will deflect bowhead whales, thereby increasing the risk to whaling crews and impacting the subsistence harvest. They further argue that MMS failed to provide sufficient information to the public concerning this issue.[144]

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[142] *See EPIC*, 451 F.3d at 1017 ("When specialists express conflicting views, [courts] defer to the informed discretion of the agency."); *Price Rd. Neighborhood Ass'n, Inc. v. U.S. DOT*, 113 F.3d 1505, 1511 (9th Cir. 1997) (rejecting attempts to engage in a battle of the experts); *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993) (refusing to decide which experts had more merit).

[143] 40 C.F.R. § 1508.27(b)(2).

[144] NSB Br., 24, 51-52.

The fact that NSB does agree with the MMS's conclusions regarding the "severity" of the impacts does not render the analysis inadequate.[145] The most significant risk to the subsistence hunting of bowhead whales is a change in migration patterns.[146] The Multi-Sale EIS addressed this risk in a 21-page examination of the existing data and studies concerning the effect on whale migration patterns from all aspects of exploration activities – seismic surveys, various types of drilling operations, and vessel and air traffic.[147] With respect to sounds from seismic surveys, for example, the Multi-Sale EIS described with specificity the different types of surveying activity, the nature, location, frequency and strength of the emitted sounds, and existing studies relating to the effect on bowhead whales of each type of seismic activity. The studies reflect activities producing a range of decibel levels from, for example, airguns used in deep-seismic surveys. In one particular study, the most notable behavioral change in whales was the temporary cessation of feeding when the surveying vessel was three-kilometers away. Feeding resumed within 40 minutes after the seismic noise ceased.[148]

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[145] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

[146] NSB Br., 12.

[147] SER106-127 (Multi-Sale EIS).

[148] SER110 (Multi-Sale EIS).

Based on this information, the Multi-Sale EIS concluded that any effects to bowhead whales will be *temporary* and *non-lethal*, and that migration patterns are therefore unlikely to be affected on a long-term basis:

> We do not believe these disturbances or avoidance factors will be significant, because the level of industrial activity anticipated is not sufficiently intense to cause repeated displacement of specific whales. There is insufficient evidence to indicate whether or not industrial activity in an area for a number of years would adversely impact bowhead use of that area...*but there has been no documented evidence that noise from OCS operations would serve as a barrier to migration.*[149]

"Although 'significance cannot be avoided by terming an action temporary,'...an adverse effect still must be significant to require an [environmental impact statement]."[150] Here, MMS concluded that any temporary non-lethal deflection of bowhead whales will not cause safety issues for whaling crews, particularly given the mitigation measures required of SOI.

The Assessment described these measures, and how they will prevent even the unlikely and remote potential impacts noted in the Assessment:

> The [SOI Exploration Plan] acknowledges that reasonably foreseeable adverse impacts potentially include the migratory deflection of bowhead whales that may result in increase effort, risk, and expense associated with additional travel to conduct the subsistence hunt, and may contribute to an unsuccessful hunt. To help avoid such effects, the [SOI Exploration Plan] explains that all offshore work would be done in accordance with the terms of a conflict avoidance agreement (CAA) with the North Slope whalers...Stipulation 5 requires that [SOI] consult with affected subsistence communities prior to submitting an exploration

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[149] SER202 (Multi-Sale EIS).

[150] *EPIC*, 451 F.3d at 1013 (citation omitted).

> plan, and make "every reasonable effort" to assure that company activities are compatible with subsistence whaling.[151]

NSB questions the Agency's use of "some future negotiation process" to mitigate the effects of SOI's exploration activities.[152] NSB ignores the long history of using Conflict Avoidance Agreements to prevent risks to the subsistence hunt. For example, during the 1996-1998 bowhead hunting seasons, pursuant to a Conflict Avoidance Agreement, seismic operations were moved to locations west of Cross Island, the area where Nuiqsut-based whalers hunt for bowheads.[153] As a result of the mitigation measures implemented under that agreement, the 1996-1998 seismic surveys did not adversely affect the accessibility of bowheads to subsistence whalers.[154] MMS's successful use of Conflict Avoidance Agreements in the past strongly supports the Agency's current reliance on Stipulation 5 of the lease agreement requiring that conflict avoidance procedures either be agreed on by industry and the whalers, or imposed by MMS, to ensure that SOI's exploratory activities do not have a significant impact on the bowhead whale subsistence hunt.[155] As noted in the Lease Sale 195 Assessment, "[a]vailable new information does not indicate that there has been any significant negative or other change in the population

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[151] ER1082 (Assessment).

[152] NSB Br., 32.

[153] SER114 (Multi-Sale EIS).

[154] *Id.*

[155] ER1070 (Assessment).

status of the Bering-Chukchi-Beaufort Sea bowhead whale population since the Multi-Sale statement," and that the bowhead whale population is continuing to grow.[156] This statement provides further support for the effectiveness of the mitigation measures used by MMS.

NSB also attacks MMS's NEPA process for failing to "disclose to the public opinions of its own scientists."[157] While NEPA regulations "encourage and facilitate public involvement in decisions,"[158] there is no requirement that the Agency publicly release all documents that generally relate to the administrative decision. Indeed, finding that an agency violated NEPA by failing to release all documents reflecting internal agency deliberations would hinder candid and creative exchanges regarding proposed decisions and alternatives, which might, because of the chilling effect on open discussion within agencies, lead to an overall decrease in the quality of decisions.[159] Unlike the release of essential maps or surveys, internal comments by

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[156] ISER107 (Sale 195 Assessment).

[157] NSB Br., 26.

[158] 40 C.F.R. § 1500.2(d),

[159] *Cf. San Luis Obispo Mothers for Peace v. Nuclear Reg. Comm'n*, 751 F.2d 1287, 1326 (D.C. Cir. 1984) *cert. denied*, 479 U.S. 923 (1986) ("inclusion in the record of documents recounting deliberations of agency members is especially worrisome because of its potential for dampening candid and collegial exchange between members of multi-head agencies").

scientists on *drafts* of the Assessment do not constitute "environmental information" necessary for Petitioners' participation in the environmental process.[160]

3. MMS's conclusion that SOI's exploration activities will not threaten unique characteristics of the geographic area or potential loss of cultural or historic resources is not arbitrary and capricious.

Two other intensity factors are the "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas"[161] and "[t]he degree to which the action . . . may cause loss or destruction of significant scientific, cultural, or historical resources."[162]

AWL makes one conclusory statement, unsupported by any argument, that the proposed exploratory activities will affect a unique geographic area – the Arctic National Wildlife Refuge.[163] The Refuge could potentially be impacted by oil spills, but, as thoroughly discussed above, MMS's extensive oil spill analyses shows that there is no significant likelihood of any such impacts.[164]

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[160] *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1117 (9th Cir. 2002) (reversing lower court's holding that the Forest Service violated NEPA by failing to provide detailed maps or descriptions of potentially affected areas during the scoping period).

[161] 40 C.F.R. § 1508.27(b)(3).

[162] *Id.* § 1508.27(8).

[163] AWL Br., 44.

[164] *See supra* at II.B.1.

NSB claims that SOI's exploration activities will threaten their ecological and cultural subsistence resources.[165] In addition to bowhead whales, non-endangered subsistence resources of concern to NSB are the beluga whales, caribou, and fish, none of which will be significantly impacted by noise from SOI's exploration activities so as to impact Petitioners' subsistence hunt of these species.

(a) Beluga whales

NSB argues that the Assessment "does not address the potential impacts to the subsistenence hunt from vessel movement through the Chukchi Sea or from drilling activities at locations in the Beaufort Sea."[166] This argument ignores that MMS tiered its Assessment to previous NEPA documents, where these issues are covered at length. The Multi-Sale EIS, for example, identifies noise and air traffic from exploration activities as the primary source of disturbance to the beluga whale, but finds that any diversion would be temporary. For example, the Multi-Sale EIS states that vessel traffic associated with exploration could displace marine mammal migration but only for "a few hours to a few days."[167] Thus, "these reactions are not likely to be biologically significant," and likely would not affect the overall distribution of beluga whales.[168]

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[165] NSB Br. at 52-53.

[166] NSB Br. at 33.

[167] SER168 (Multi-Sale EIS).

[168] *Id.*

As to subsistence hunting of beluga whales, the Multi-Sale EIS expressly takes into account Petitioner's concerns by relying, in part, on local Native knowledge for the observation that intense noise causes startle, annoyance, and flight responses from beluga whales.[169] The Multi-Sale EIS explains that the activities associated with exploration, such as vessel traffic, are expected to have only short term (less than a few days) and local (within 1-3 kilometers) displacement effect.[170] MMS therefore found that impacts would be short-term and not significant.[171] The Assessment augments and updates that discussion by applying the analysis in the Multi-Sale EIS to SOI's Exploration Plan, reaching the same conclusion.[172]

Importantly, NSB ignores the mitigation measures imposed to prevent these temporary, non-lethal effects. MMS's approval of SOI's Exploration Plan prohibits initiation of any exploratory drilling activities until MMS determines that adequate

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[169] SER204 (Multi-Sale EIS).

[170] SER205 (Multi-Sale EIS).

[171] *Id.*

[172] NSB argues that MMS did not acknowledge or discuss the potential for vessel movement through the Chukchi Sea to interfere with the subsistent hunt of beluga whales at Kasegaluk Lagoon. NSB Br., 33. NSB did not raise this issue before the agency, and rely exclusively on an extra-record declaration created for the purpose of this litigation and dated May 17, 2007, to justify this argument. *Id.*; ER1313. Moreover, there is ample evidence in the record that MMS considered the fact that "Beluga whales from the eastern Chukchi Sea stock are an important subsistence resource for residents of the village of Point Lay, adjacent to Kasegaluk Lagoon, and other villages in northwest Alaska," and that exploration activities would have only short-term affects on the Beluga whale and not affect the overall distribution. ER360; SER168 (Multi-Sale EIS).

conflict avoidance measures are being taken to prevent unreasonable conflicts with subsistence harvests.[173] SOI also must notify MMS of all concerns expressed by subsistence hunters during its operations and of the measures being taken by the company to address the concerns.[174] The impacts identified by Petitioners, therefore, are addressed by these mitigation requirements.

(b) Caribou

NSB overstates the agency's NEPA's obligations regarding the analysis of potential noise impacts on caribou. The Multi-Sale EIS includes an extensive discussion of the effects of aircraft noise on caribou, including aircraft circling at low altitudes.[175] Because the flights associated with exploration activities would involve traveling from one point to another, such as a drilling platform, as opposed to circular flight, MMS concluded that the effects would be brief and would not affect caribou herd distribution and abundance.[176] In discussing the impacts on subsistence hunting of caribou, MMS explained:

> Exploration is expected to have a very brief (few minutes to less than 1 hour) disturbance effects on caribou, muskoxen, grizzly bears, and arctic

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[173] *Id.*

[174] ER1070 (Assessment); ER1153-1154 (Letter from Jeff Walker, MMS to Susan Childs, SOI at 1-2 (Feb 15, 2007)).

[175] ER159.

[176] ER159; SER182 (Multi-Sale EIS). The Multi-Sale EIS elsewhere notes that caribou continually exposed to disturbance activities have become accustomed to human activity and therefore less reactive, but that the caribou in the affected area have not been so exposed. SER182 (Multi-Sale EIS).

foxes, with recovery occurring within a day or less and to have no effect on these populations.[177]

This conclusion is further supported by the mitigation measures in place to ensure that SOI's activities do not significantly impact the caribou subsistence hunt. The applicable lease provisions state that behavioral disturbance "would be unlikely" if aircraft maintain certain horizontal and vertical distances from wildlife concentration areas, and SOI committed to these restrictions.[178] In addition, SOI agreed to adjust the helicopter routes to remain further inland to the extent possible and to notify MMS of the modified helicopter routes so that MMS can advise the affected coastal communities.[179]

Finally, NSB singles out the Kaktovik village, and argues that the Assessment should have disclosed "timing of exploration activities as compared to the timing of the [Kaktovik] subsistence hunt."[180] The record is replete with information regarding the timing of the Kaktovik's subsistence hunt.[181] Moreover, the discussions in the

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[177] SER205 (Multi-Sale EIS).

[178] ISER137 ("The MMS Exploration Plan describes the proposed project activities and mitigation that insures compliance with the ACMP standards, NSBCMP enforceable policies, OCS Sale 195 lease stipulations, and MMS Notices to Lessees").

[179] SER270 ("Helicopter traffic (1,500 feet minimum altitude except in emergency) minimized at Kaktovik and Nuiqsut via designated transportation corridor inland to avoid other subsistence hunts; Kaktovik Communication Center will advise of caribou migration and other subsistence activities").

[180] NSB Br., 35.

[181] *See, e.g.,* ER112 ("With open water comes a period of intense caribou harvest that usually occurs in July. Kaktovik residents hunt caribou by boat along the coast, with (con't) . . .

Multi-Sale EIS, the Lease Sale 195 stipulations, and the conflict avoidance procedures apply equally to caribou subsistence hunting throughout the North Slope Borough. Based on the substantial evidence in the record before it, MMS concluded that any impacts to caribou subsistence hunts, including those by residents of the Kaktovik village, would be insignificant.

(c) Fish

NSB's challenge to MMS's analysis and determinations regarding the subsistence use of fish begins by incorrectly claiming that the Assessment "fails to recognize fish as a subsistence resource."[182] The Assessment in fact states that "regional subsistence activities include whaling, ***fishing***, waterfowl, and sea duck harvests, and hunting for seals, polar bears, walrus and beluga whales."[183] Detailed descriptions of fish, essential fish habitats, and potential impacts on fish, appear throughout the Assessment.[184]

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hunting usually lasting until mid-August when the caribou move inland and are no longer abundant. Approximately 70% of all caribou harvests take place on the coastal plain. By late October, snow buildup allows hunters access to inland caribou. From then on, until the onset of breakup, which usually occurs sometime in May, Kaktovik hunters take caribou by snowmachine in inland mountains and valleys and, to a lesser extent, on the coastal plain. A subsistence-harvest survey conducted by the North Slope Borough Division of Wildlife Management covering the period from December 1994-November 1995 mapped terrestrial harvest locations for this seasonal round and are shown in Figure III.C-16").

[182] NSB Br., 35-36.

[183] ER1054-55 (emphasis added) (Assessment).

[184] ER1066, 1092-96, 1100, 1105-06 (Assessment).

NSB further mischaracterizes the Assessment in arguing that it does not discuss whether SOI's exploration activities will interfere with subsistence uses of fish.[185] The Assessment expressly considers this issue:

> The exploration and drilling activities proposed in [SOI's Exploration Plan] are expected [sic] a small incremental adverse effect to the stresses on coastal and marine birds, marine mammals, *fish, and subsistence activities*. Noise associated with the proposed activities is expected to have adverse impacts on marine mammals and *subsistence activities*. These impacts are expected to be *negligible* as a result of measures required in the MMPA authorizations that are an integral aspect of the proposed action.[186]

The record fully supports this conclusion. The Assessment tiers to environmental documents providing substantial information on fish and essential fish habitats and how mitigation measures – such as avoidance planning and conflict avoidance actions – can be expected to ameliorate impacts to these resources.[187]

Finally, NSB's complaints about an alleged lack of site-specific data[188] fail because NEPA does not require "that complete information concerning the environmental impact of a project must be obtained before action may be taken."[189]

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[185] NSB Br., 36.

[186] ER1105 (emphasis added) (Assessment).

[187] ISER109-110 (Lease Sale 195 Assessment discussion of fishes and essential fish habitat); AR2461 (Programmatic Statement for Seismic Surveys discussion of behavior effects to marine fish and thresholds for typical behavioral effects to fish from sources within the 160-dB to 200-dB range"); SER236-237 (Multi-Sale Statement discussion of potential impacts to fish resulting from oil spills).

[188] NSB Br., 36.

[189] *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973).

Here, MMS specifically considered the issue of limited information on specific fish resources in the Alaskan Arctic. To address the issue, MMS required SOI to conduct acoustic monitoring during exploration and make the information publicly available on the MMS web site.[190] The "[i]mplementation of this acoustic monitoring would provide information that could help evaluate potential fish assessments in the future as well as helping MMS work with local commercial and subsistence users to avoid impacts to fish resources."[191]

4. The potential effects of SOI's Exploration Plan are not highly controversial or highly uncertain.

Two other intensity factors are "[t]he degree to which" the effects on the human environment "are likely to be *highly* controversial" or "*highly* uncertain or involve unique or unknown risks."[192] This Court has explained:

> The use of the word "highly" in the NEPA regulations to modify "controversial" and "uncertain" means that information merely favorable to [Petitioners'] position in the NEPA documents does not necessarily raise a substantial question about the significance of the project's environmental effects. Rather, as our explanation of the NEPA regulations makes clear, something more must exist for this court to label a project highly controversial or highly uncertain. 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.[193]

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[190] ER1097 (Assessment); *see also* ISER121.

[191] ER1097 (Assessment).

[192] 40 C.F.R. §§ 1508.27(b)(4), (5) (emphasis added).

[193] *Native Ecosystems*, 428 F.3d at 1240.

A project is highly controversial only "if a *substantial dispute* exists as to [its] size, nature, or effect."[194] Here, AWL's statements that SOI's exploratory activities are "highly controversial" because of alleged disagreement among the agency's own experts, and that the impacts from SOI's exploratory activities were "highly uncertain[,]"[195] are insufficient to show that MMS should have prepared an EIS.

The fact that qualified experts may disagree does not create a substantial enough controversy to warrant preparation of an EIS.[196] Moreover, "the 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."[197] Preparation of an EIS is mandated only where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent 'speculation on potential . . . effects'. . . ."[198]

Petitioners have not identified any data that MMS failed to collect, or even identified any effects which could be avoided or changed by the collection of more

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[194] *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992) (citation omitted) (alteration in original).

[195] AWL Br., 44.

[196] *See supra* at 40-41 (citing Ninth Circuit precedent that disagreements among experts does not invalidated the NEPA analysis); *see also Native Ecosystem*, 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").

[197] *EPIC*, 451 F.3d at 1011.

[198] *Nat'l Parks v. Babbitt*, 241 F.3d at 722, 732 (9th Cir. 2001) (quoting *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988)) (first ellipses in original).

data. Rather, the Multi-Sale EIS, the Assessments for Sales 195 and 202, and the current Assessment contain *all* available data. The very purpose of the exploration stage is to gather additional data.[199] Thus, to the extent possible at the exploration stage, MMS's tiered analysis avoided "highly" uncertain effects.

5. MMS's analysis and conclusions regarding cumulative impacts are not arbitrary and capricious.

The final intensity factor to consider is:

> [w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.[200]

Consideration of cumulative impacts requires "some quantified or detailed information," and the agency "must provide a useful analysis of the cumulative impacts of past, present, and future projects."[201] The Assessment, together with the Multi-Sale EIS and the Assessments for Sales 195 and 202, more than meet this standard and show that the Agency fully considered the cumulative impacts from the proposed activities.[202]

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[199] *See supra* at II.A.

[200] 40 C.F.R. § 1508.27(b)(7); *see EPIC*, 451 F.3d at 1014 (quoting 40 C.F.R. § 1508.27(b)(7)).

[201] *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1128 (9th Cir. 2004) (citation and internal quotation marks omitted).

[202] *Native Ecosystems*, 428 F.3d at 1244.

Section V of the Multi-Sale EIS contains an 85-page discussion of cumulative impacts.[203] Using a 5-step analysis, MMS: (i) identified "the potential effects of the Beaufort Sea multiple sale on the natural resources and human environment that may occur in the Beaufort Sea, on the North Slope, and along the oil-transportation route;" (ii) "analyze[d] other past, present, and reasonably foreseeable future oil-development activity on the North Slope/Beaufort Sea...;" (iii) "consider[ed] effects from other actions (sport harvest, commercial fishing, subsistence hunting, and loss of overwintering range, etc.);" (iv) "attempt[ed] to quantify effects by estimating the extent of the effects...and how long effects would last;" and (v) "weigh[ed] more heavily other activities that are more certain and geographically in the [zone nearest to shore] and...analyz[ed] more intensively those effects that are of greatest concern."[204] In the Assessments for Sales 195 and 202, MMS updated this analysis, including information on the potential impacts from global warming.[205] Underscoring its thoroughness, the cumulative effects analysis considered the projected effects of oil development and production under all of the leases covered by the Multi-Sale EIS,

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[203] ISER007-095 (Multi-Sale EIS).

[204] ISER012 (Multi-Sale EIS).

[205] ISER108 (Lease Sale 195 Assessment); ISER128-129 (Lease Sale 202 Assessment).

past development and production, reasonably foreseeable development and production, and even speculative development and production prospects.[206]

Properly relying on its previous cumulative impact analyses, MMS determined in the Assessment that:

> The cumulative analyses in the Beaufort Sea multiple-sale EIS and subsequent sale [Assessments] concluded that the incremental contribution from activities that would reasonably result from an [outer continental shelf] lease sale in the Beaufort Sea Planning Area to overall cumulative impacts would likely be quite small. The activities proposed in [SOI's Exploration Plan] represent a small portion of the projected activities originally analyzed for a Beaufort Sea lease sale. Therefore, the incremental contribution of the proposed activities to cumulative impacts is expected to be quite small, and thus not significant.[207]

Accordingly, the Assessment, and the documents on which it is tiered, articulated a careful and extensive cumulative effects analysis that considered the activities with which Petitioners are concerned.

C. MMS's Reliance On Mitigation Measures In Finding No Significant Impacts Is Not Arbitrary and Capricious.

Petitioners admit that an agency may rely on mitigation measures in determining whether to prepare an environmental impact statement.[208] Yet, they simultaneously argue that MMS's reliance on the "future process" of the Conflict

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[206] SER61-65 (Multi-Sale EIS).

[207] ER1106 (Assessment); *see also* ER1029 (Email from Deborah Cranswick (Feb. 9, 2007): "We have areawide cumulative analyses in our recent NEPA documents []," and because there is no new information "[w]e do not need to reanalyze all cumulative impacts").

[208] NSB Br., 28.

Avoidance Agreement and Lease Stipulation 5 invalidates its approval of the Exploration Plan. Contrary to their arguments, these mitigation measures have been used successfully and fully comply with applicable law.

Lease Stipulation 5 requires that exploration activities "[s]hall be conducted in a manner that prevents unreasonable conflicts between oil and gas industry and subsistence activities. . . ."[209] Contrary to Petitioners' claim that the Agency is divorced from this process,[210] if a Conflict Avoidance Agreement cannot be reached between industry and whalers, MMS is responsible for convening a meeting among the parties to broker an agreement. If a voluntary agreement is not reached, MMS must determine the adequacy of the measures identified to prevent unreasonable conflicts. Moreover, the Agency is responsible for enforcing whatever mitigation measures are imposed.[211] Stipulation 5 (and other stipulations not at issue here) has been in Outer Continental Shelf leases since 1992, and according to the Multi-Sale Statement, *were requested by the North Slope Borough and the Alaska Eskimo Whaling Commission.*[212] Throughout its long history, "[t]his stipulation has proven to be effective in mitigating prelease (primarily seismic activities) *and exploration*

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[209] ISER105 (Lease Sale 195 Assessment).

[210] *See, e.g.,* AWL Br., 28.

[211] ISER105 (Lease Sale 195 Assessment).

[212] ER73-74 (Multi-Sale EIS).

activities through the development of the annual oil/whaler agreement between the Alaska Eskimo Whaling Commission and the oil companies."[213]

The law in this Circuit supports MMS's reliance on an applicant's compliance with future conditions, particularly where, as here, the conditions have been in place for a long period of time and have been proven effective. This Court specifically has held that a mitigation plan "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements."[214] The Court need only be satisfied that mitigation measures are "discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated."[215]

In *Okanogan Highlands Alliance v. Williams*, this Court approved an environmental impact statement's discussion of mitigation measures although "the mitigating measures [were] described in general terms and rel[ied] on general processes, not on specific substantive requirements . . . ."[216] Because the impacts could not be predicted with specificity, and the mitigation measures were designed to

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[213] ER74 (Multi-Sale EIS).

[214] *Nat.Parks & Conservation Ass'n v. U.S. DOT*, 222 F.3d 677, 681 n.4 (9th Cir. 2000).

[215] *Carmel-By-The-Sea v. U.S. DOT,* 123 F.3d 1142, 1154 (9th Cir. 1997); see also *Robertson*, 490 U.S. at 352-54; *see also Edwardsen v. U.S. Department of the Interior,* 268 F.3d 781, 789 (9th Cir. 2001)(upholding MMS's approval of a development and production plan in which MMS relied on future compliance with the Clean Air Act's National Ambient Air Quality Standards, which are enforced by EPA).

[216] 236 F.3d 468, 477 (9th Cir. 2000).

be adjusted based on new information created through their implementation, the court in *Okanogan* approved the environmental impact statement.[217] Here, MMS's Assessment thoroughly discusses impacts and potential mitigation measures, and establishes procedures for putting the measures in place. Thus, MMS's approach is fully consistent with this Court's precedent and satisfies the Agency's obligation to present a "reasonably complete discussion of possible mitigation measures."[218]

Citing *National Parks,* Petitioners also claim that the Assessment provides no data supporting the efficacy of the mitigation measures.[219] This project, however, differs from that in *National Parks* because this project incorporates mitigation measures that have long been part of the Beaufort Sea leasing process. Unlike *National Parks*, where the Parks Service proposed to increase the risk of harm to the environment and then perform its studies, the Assessment under review here analyzes the Exploration Plan under the enumerated lease stipulations and concludes, based on history, that any environmental impacts will not be significant. Thus, MMS properly considered mitigation measures in evaluating the environmental impacts of the proposed action.[220]

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[217] *Id.*

[218] *Edwardsen*, 268 F.3d at 789.

[219] *See* NSB Br., 31 (citing *Natl Parks*, 241 F.3d at 734).

[220] *See EPIC*, 451 F3d at 1015 (upholding environmental assessment where agency analyzed timber harvest under the enumerated constraints of the mitigation measures).

III. MMS'S APPROVAL OF THE EXPLORATION PLAN COMPLIED WITH OCSLA IN ALL OTHER RESPECTS.

As detailed above, MMS's evaluation of the environmental impact of SOI's Exploration Plan fully satisfied the NEPA standards that are incorporated into the review process through the Agency's OCSLA regulations. For the same reasons, MMS's determination that SOI's Exploration Plan is consistent with OCSLA and its regulations and would not cause serious harm to the environment that cannot be mitigated[221] is supported by substantial evidence. None of Petitioners' other arguments to the contrary has merit.

For example, largely ignoring OCSLA, Petitioners instead accuse the agency of "rushing" the review process. Petitioners' grievance is really with the timetable in the statute itself, which only Congress can change. "Where approval is warranted, [MMS] must act quickly – within 'thirty days' of the company's submission of a proposed Plan."[222]

Moreover, it is important to view MMS's review and approval of the SOI Exploration Plan in the context of MMS's overall Beaufort Sea leasing program. MMS's study of the environmental impacts of oil and gas activity in the Beaufort Sea started before 1979 when the first lease sale was held. Before the three lease sales under the current five-year plan, MMS had conducted seven lease sales in the

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[221] 43 U.S.C. § 1340(c)(1).

[222] *Mobil Oil Exploration and Producing Southwest, Inc. v. United States*, 530 U.S. 604, 610 (2000).

Beaufort Sea and had prepared an EIS for at least five of those sales. Collectively, these EIS's have analyzed the impacts of 33 seasons of seismic work (a much greater sound source than drilling or ice-breaking) and six seasons of summertime drilling (1985, 1986, 1989, 1991, 1992 and 1993).[223] With more than twenty years of data available to MMS, it can hardly be argued that MMS "rushed" its analysis.

Petitioners also complain that MMS failed to provide a notice and comment period, but it is clear that neither OCSLA nor MMS's regulations requires one. Any such requirement would defeat Congress's intent to provide an expeditious process for exploration, and to reserve a more detailed environmental analysis for the development and production stage, when potentially significant environmental impacts are more likely.[224]

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[223] SER2-3 (Multi-Sale EIS).

[224] The facts of this case illustrate why expeditious agency review is critical in fostering Congress's goal of swift and orderly development of oil and gas resources in the Outer Continental Shelf. A significant delay in agency action jeopardizes a company's ability to operate within the limited open sea season and threatens to strain its investment. This is particularly true in this case. Congress guarded against uncertainty in the timing of administrative review by setting forth a specific time line for agency action. Congress included these specific time lines because it recognized that uncertainties and the potential for delay would strongly discourage companies from making significant investments of time and resources in exploration projects. The Court's placement of this case on an expedited briefing and hearing schedule is particularly important. To conduct exploratory activities in 2008, SOI must rehire and train workers, locate and contract for support vessels and aircraft, and initiate additional start up activities. These organizational, planning and contracting activities must be substantially in place before March 31, 2008, if SOI is to make final commitments for the 2008 exploratory drilling season. *See* Declaration of Chandler T. Wilhelm at ¶¶ 4-5 (being filed simultaneously).

As to Petitioners' other complaint concerning the Assessment conducted here versus an additional EIS, the Department of Interior Manual, which provides NEPA guidance to the Agency, does not suggest an EIS should be done at the exploration stage. In listing actions that "normally will require the preparation of an EIS," the Manual identifies approval of five-year leasing plans, approval of offshore lease sales, and approval of development and production plans declared to be major federal actions.[225] Notably, the Manual does not list "approval of an exploration plan."

Consistent with this overriding objective of promoting "expeditious" development, OCSLA encourages reliance on other environmental studies. Petitioners' attack on MMS's reliance on prior environmental studies is not well taken. OCSLA specifically provides that in conducting its review, "[t]o the extent that other Federal agencies have prepared environmental impact statements, are conducting studies, or are monitoring the affected human, marine or coastal environment, [the Agency] may utilize the information derived therefrom in lieu of directly conducting such activities."[226] The Agency's regulations echo this instruction: "Information and data discussed in other documents previously submitted to the Agency or otherwise readily available to reviewers may be referenced."[227] Thus, for example, MMS's reference to the NMFS Biological Opinion in its analysis

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[225] Department of Interior Departmental Manual, 516 DM 15.4 (2004).

[226] 43 U.S.C. § 1346(c).

[227] 30 C.F.R. § 250.203(c).

of bowhead whales is exactly what is required by OCSLA.[228] Previous environmental studies can make an EIS unnecessary, unless the environmental consequences of the proposed action are significantly different than those already studied. As discussed above, that is not the case here.

Finally, MMS's imposition of continuous monitoring and mitigation measures on SOI's exploration activities is specifically authorized by OCSLA, and provides another ground for affirmance. These conditions will allow for the generation and evaluation of increasing amounts of data in advance of production activities,[229] and will avoid the occurrence of significant environmental impacts in connection with exploration.

The Agency's approval of SOI's plan and issuance of its Assessment (and Finding of No Significant Impact) versus another EIS therefore meets all of OCSLA's requirements.

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[228] *E.g.*, ER1071 (Assessment).

[229] *See infra* Section II.B.

CONCLUSION

MMS's determination to approve SOI's Exploration Plan was supported by substantial evidence as required by OCSLA. MMS also took the hard look required by NEPA, and its decision was not arbitrary and capricious. Accordingly, the Court should affirm the Agency's decision and dismiss each of Petitioners' petitions for review in its entirety, and vacate the stay.

Respectfully submitted,
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By: _____
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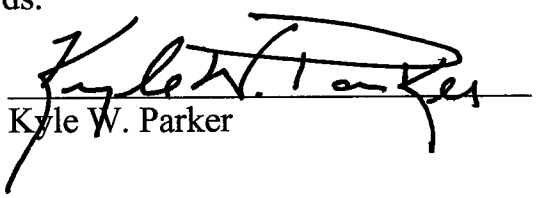
CERTIFICATE OF COMPLIANCE

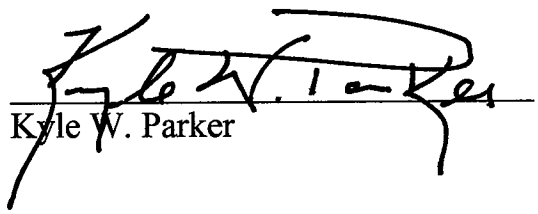
I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Ninth Circuit Rule 32-1, the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,972 words.



Kyle W. Parker

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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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2007, I caused a true and correct copy of the foregoing document to be served electronically and by U.S. Mail on:

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