

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALASKA ESKIMO WHALING COMMISSION and)
INUPIAT COMMUNITY OF THE ARCTIC SLOPE)

and)

NATIVE VILLAGE OF POINT HOPE, ALASKA)
WILDERNESS LEAGUE, CENTER FOR)
BIOLOGICAL DIVERSITY, DEFENDERS OF)
WILDLIFE, NATURAL RESOURCES DEFENSE)
COUNCIL, NORTHERN ALASKA)
ENVIRONMENTAL CENTER, OCEANA, PACIFIC)
ENVIRONMENT, RESISTING ENVIRONMENTAL)
DESTRUCTION ON INDIGENOUS LAND)
(REDOIL), and SIERRA CLUB,)

Petitioners,)

v.)

Nos. 09-73942 &
09-73944

KEN SALAZAR, Secretary of the Interior, and)
MINERALS MANAGEMENT SERVICE,)

Respondents,)

and)

SHELL OFFSHORE INC. and STATE OF ALASKA,)

Proposed Intervenors-Respondents.)

**MOTION OF THE AMERICAN PETROLEUM INSTITUTE, NATIONAL
ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY
COUNCIL, AMERICAN GAS ASSOCIATION, INTERNATIONAL
ASSOCIATION OF DRILLING CONTRACTORS, AND U.S. OIL AND
GAS ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE
IN SUPPORT OF SHELL OFFSHORE INC.'S MOTION FOR A
DETERMINATION THAT PETITIONERS ARE NOT ENTITLED TO A
STAY PENDING REVIEW**

The American Petroleum Institute, National Association of Manufacturers, American Chemistry Council, American Gas Association, International Association of Drilling Contractors, and U.S. Oil and Gas Association respectfully move for leave to file the accompanying brief amicus curiae in support of Shell Offshore Inc.'s motion for a determination that petitioners are not entitled to a stay pending review.

The American Petroleum Institute ("API") is a nationwide trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing. API member companies are active in exploring for and producing oil and natural gas resources in Alaska, including the Beaufort Sea.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The American Chemistry Council (“ACC”) represents the leading companies engaged in the business of chemistry, a \$689 billion enterprise that accounts for ten cents of every dollar in U.S. exports. ACC members apply the science of chemistry to make innovative products and services that make people’s lives better, healthier and safer.

The American Gas Association (“AGA”) represents 202 natural gas utility companies that deliver clean natural gas throughout the United States. There are more than 70 million residential, commercial and industrial natural gas customers in the United States, of which almost 93 percent, more than 65 million customers, receive their natural gas from AGA members.

The International Association of Drilling Contractors (“IADC”) is a global trade association that for 70 years has represented virtually the entire worldwide oil and gas drilling industry, both onshore and offshore. Headquartered in Houston, IADC maintains permanent offices in Washington, Denmark, Dubai, Thailand and The Netherlands, with chapters on every continent except Antarctica.

The US Oil & Gas Association (“USOGA”), located in Washington, D.C., has four Divisions in Texas, Louisiana, Oklahoma and Mississippi/Alabama, with over 4,500 individual members. USOGA membership represents all segments of the oil and gas industry, including major oil and gas companies, independent oil and gas producers, refineries, natural gas and petroleum products

transportation and distribution companies, natural gas generation companies, and other firms and individuals involved in the industry.

Amici's members thus include companies that explore for and produce oil and natural gas, conduct drilling operations, transport the oil and gas once produced, purchase and sell that oil and gas, use the oil and gas to make chemical products, and utilize the energy created with that oil and gas to run the country's manufacturing facilities. In short, amici represent a wide spectrum of economic interests that are part of, or directly affected by, this country's energy industry.

Amici are deeply concerned lest this litigation delay significantly, if not thwart entirely, a meaningful step forward toward the development of substantial, badly needed domestic oil resources. They share a direct interest in opposing any court action that would prevent Shell Offshore from conducting its planned Beaufort Sea exploratory drilling during the brief 2010 open-water drilling season.

Amici believe that their accompanying brief will prove helpful to the Court by providing a succinct discussion focused on two issues directly relevant to the question whether a stay should be granted.

First, amici demonstrate why the organizing principle undergirding the Outer Continental Shelf Lands Act — the “*expedited exploration* and

development of the Outer Continental Shelf” (43 U.S.C. § 1802(1) (emphasis added)) — remains of vital national importance, and would be seriously undermined were a stay to be granted.

Second, amici address the Act’s four stage process for oil and gas activities, and demonstrate that congressional intent with respect to the specific approval process applicable to exploration plans would be greatly frustrated by the issuance of a stay.

Given their wide ranging backgrounds, amici can bring a unique and national perspective to these critical considerations. Amici’s motion for leave to file the accompanying brief amicus curiae should accordingly be granted.¹

Respectfully submitted,

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January 6, 2010

¹ Shell Offshore, Inc. has consented to the filing of this brief. The other parties have either not yet responded to amici’s request for consent or are still formulating their positions.

CERTIFICATE OF SERVICE

I, Steven J. Rosenbaum, a member of the Bar of this Court, hereby certify that on January 6, 2010, I electronically filed the foregoing “Motion of The American Petroleum Institute, National Association of Manufacturers, American Chemistry Council, American Gas Association, International Association of Drilling Contractors, and U.S. Oil and Gas Association for Leave to File a Brief Amicus Curiae in Support of Shell Offshore Inc.’s Motion for a Determination that Petitioners are not Entitled to a Stay Pending Review” with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Steven J. Rosenbaum

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INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS,
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici the American Petroleum Institute, National Association of Manufacturers, American Chemistry Council, American Gas Association, International Association of Drilling Contractors and U.S. Oil and Gas Association disclose that they are all not for profit corporations, that they have no parent corporations, and that no publicly held company has a ten percent or greater ownership interest in any of them.

January 6, 2010

/s/ Steven J. Rosenbaum
Counsel for Amici

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Amici are deeply concerned lest this litigation unnecessarily delay significantly, if not thwart entirely, a meaningful step forward toward the development of substantial, badly needed domestic oil resources. As a result of massive private investment, and sustained technological innovation, the United States has begun to turn the corner on domestic oil production, with 2009 production exhibiting the first increase in over 18 years.

The federal government forecasts continued growth in domestic production, largely as a result of the successful and ongoing development of Outer Continental Shelf ("OCS") resources. Such progress creates an array of benefits, extending from employment, to balance of trade, to economic growth, to national security. But these benefits can only be realized if prudent exploration efforts such

as those being pursued in the Beaufort Sea are allowed to move forward in a timely fashion. This lawsuit, and any stay that would prevent Shell Offshore from conducting its planned exploratory drilling during the brief 2010 open-water drilling season, threaten that objective.

Furthermore, this legal challenge could frustrate fundamental congressional objectives regarding the timing and character of the approval process for OCS activities. Congress in the OCS Lands Act, 43 U.S.C. § 1331 *et seq.*, established a finely tuned, four-step process for OCS operations, with the explicit goal of encouraging the “expeditious” exploration and production of the Outer Continental Shelf. Consistent with the both *limited* and *transient* nature of exploratory drilling, Congress dictated that exploration plan approval decisions be made quite promptly, within 30 days of plan submittal, and be based upon *existing* information.

Literally thousands of OCS exploration plans have been approved under that timetable and standard, including the exploration plans submitted with respect to the 31 OCS exploratory wells that have already been drilled in the Beaufort Sea. Over 25 million barrels of oil have already been produced from federal leases in the Beaufort Sea OCS.

A stay of the federal government’s approval of the most recent Beaufort Sea exploration plan would thwart Congress’s intention that such

exploration move forward expeditiously, and the statutory scheme designed to ensure that it would. Amici therefore fully support Shell Offshore's motion for a determination that no such stay should be granted.¹

I. Congress Dictated That The Outer Continental Shelf Be Made Available For *Expeditious* Exploration And Development.

The organizing principle undergirding the OCS Lands Act is the “*expedited exploration* and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade...” 43 U.S.C. § 1802(1) (emphasis added); *see also* 43 U.S.C. § 1332(3) (the OCS “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...” (emphasis added)). Congress specified that it wished to “make [OCS] resources available to meet the Nation’s energy needs as rapidly as possible...” 43 U.S.C. § 1802(2)(A).

Congress so mandated when it substantially amended the OCS Lands Act in 1978 for the stated purpose of “promot[ing] the *swift, orderly and efficient* exploration of our almost untapped domestic oil and gas resources in the Outer

¹ Amici have filed herewith a motion for leave to file this brief amicus curiae.

Continental Shelf.” (emphasis added).² As the D.C. Circuit observed soon after the 1978 amendments were enacted, “the Act has an objective — the expeditious development of OCS resources...” *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981); *see also id.* (“The first stated purpose of the Act, then, is to establish procedures to expedite exploration and development of the OCS. The remaining purposes primarily concern measures to eliminate or minimize the risks attendant to that exploration and development. Several of the purposes, in fact, candidly recognize that some degree of adverse impact is inevitable.”)

If the “expedited exploration and development” of the OCS were critical national goals in 1978, *see* 43 U.S.C. § 1802(1), they are even more so today. While OCS production represented a mere 9 percent of total domestic oil production in 1981, that figure had tripled to 27 percent by 2007.³ Moreover, the government predicts the OCS will account for more than 40 percent of all domestic oil production, and 25 percent of natural gas production, by 2012.⁴

² H.R.Rep. No. 95-590, 95th Cong., 1st Sess. 53 (1977), U.S.Code Cong. & Admin.News 1978, p. 1450, 1460.

³ U.S. Energy Information Administration, Crude Oil Production Statistics, <http://tonto.eia.doe.gov/dnav/pet/hist/mcrfpus1A.htm>, <http://tonto.eia.doe.gov/dnav/pet/hist/mcrfp3fmla.htm>, <http://tonto.eia.doe.gov/dnav/pet/hist/mcrfp5f1A.htm>.

⁴ Statement of Walter Cruickshank, Acting Director, Minerals Management Service, before the House Comm. on Natural Res., Subcomm. on Energy and Mineral Res. (June 28, 2007), <http://www.mms.gov/ooc/testimony/FINAL5-YRPlanTestimony6-27-07.pdf>.

Gazing out further, the federal government estimates that the OCS contains 60 percent of the nation's remaining undiscovered technically recoverable oil, and 40 percent of its remaining undiscovered technically recoverable natural gas,⁵ which translates to some 86 billion barrels of oil, and 420 trillion cubic feet of natural gas.⁶ Thirty-one percent of these undiscovered technically recoverable resources are located offshore Alaska.⁷

Another key congressional motivation for the 1978 OCS Lands Act amendments — the desire to “reduce dependence on foreign sources” (43 U.S.C. § 1802(1)) — applies at least as fully today as it did thirty years ago. Oil and natural gas currently supply more than sixty-two percent of our nation's energy.⁸ Notwithstanding progress in the development of alternative energy sources, the federal government predicts that oil and natural gas will still contribute over fifty-nine percent of our nation's energy in 2030.⁹ Thus, the development of domestic oil supplies remains the centerpiece of our country's efforts to reduce dependence

⁵ *Id.*

⁶ Minerals Management Service, Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf, 2006 (“MMS Assessment”), Table 1, <http://www.mms.gov/revaldiv/PDFs/2006NationalAssessmentBrochure.pdf>.

⁷ *Id.*

⁸ Energy Information Administration, Annual Energy Outlook 2010 Early Release with Projections to 2035, <http://www.eia.doe.gov/oiaf/aeo/pdf/appa.pdf>.

⁹ *Id.* Although growing rapidly, renewable energy sources are starting from a small base, and expected to supply less than 14 percent of the nation's energy needs by 2030. *Id.*

on less reliable and sometimes hostile foreign sources. Oil and natural gas play a critical role in a wide range of commercial and consumer products, from carbon fiber airplane components to insulation, and from artificial heart valves to aspirin.

Fortunately, through a combination of massive private investment, and the oil industry's continuous development of innovative techniques for locating and producing hydrocarbon resources, the country is making progress toward greater energy self sufficiency. The U.S. Energy Information Administration ("EIA") announced last month that it "expects U.S. crude oil production will average 5.34 million barrels a day in 2009, the first production increase since 1991."¹⁰ This represents a 7.8 percent increase over 2008 domestic production.¹¹ Domestic oil production is projected to continue to increase, to 6.13 million barrels a day by 2020.¹² By contrast, assuming continued development of domestic resources, imported oil is projected to fall by nearly 1.5 million barrels a day between 2008 and 2020.¹³

¹⁰ Energy Information Administration, Short-Term Energy Outlook (Dec. 9, 2009), <http://www.eia.doe.gov/steo>.

¹¹ Energy Information Administration, Short-Term Energy Outlook (Dec. 9, 2009), <http://www.eia.doe.gov/emeu/steo/pub/gifs/fig13.gif>.

¹² Energy Information Administration, Annual Energy Outlook 2010, Early Release Overview (December 2009) at p. 12, <http://www.eia.doe.gov/oiaf/aeo/pdf/overview.pdf>.

¹³ *Id.*

The central role played by OCS production in these developments is exemplified by the industry track record in the OCS. EIA estimates that during calendar year 2010, a single OCS production platform will produce more oil than the combined production of all 18,000 oil wells in the State of Louisiana. If that EIA estimate proves correct, that platform will, standing alone, produce more oil than all but three states.¹⁴ Although this platform is not in the Beaufort Sea, the EIA predicts similarly significant potential in the Alaska OCS.

Taking into account production to date, reserves, future reserves appreciation and undiscovered technically recoverable resources, the federal government estimates that the OCS contains 228 billion barrels of oil equivalent, less than 19 percent of which had been produced through 2007.¹⁵ Thus, the continued development of the OCS is essential in order to “assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade...” 43 U.S.C. § 1802(1).

OCS development and resource utilization are fully consistent with environmental considerations. For example, the oil and gas industry invested an estimated \$58 billion in greenhouse gas mitigation technologies from 2000-08,

¹⁴ Energy Information Administration, Office of Oil and Gas, This Week in Petroleum, Dec. 17, 2008, <http://tonto.eia.doe.gov/oog/info/twip/twiparch/081217/twipprint.html>.

¹⁵ MMS Assessment, Table 2; Gulf of Mexico Federal Offshore Production 2007, http://tonto.eia.doe.gov/dnav/pet/pet_crd_gom_s1_a.htm.

representing 44 percent of the total spent by all U.S. industries and the federal government combined.¹⁶ The amount of oil that seeps into the ocean from natural cracks in the seabed is 150 times greater than the amount of oil spilled from offshore platforms.¹⁷

Furthermore, in today's challenging economic climate, delays in federal decision making hinder much needed economic stimulation and job creation. The oil and gas industry supports 9.2 million full time and part time jobs, accounting for 5.2 percent of total national employment.¹⁸ The industry adds more than \$1 trillion annually to the national economy.¹⁹

OCS leasing and development also contributes substantially to federal coffers, with the federal government through March 2009 having collected more

¹⁶ Center for Energy Economics, Bureau of Economic Geology, The University of Texas, and T2 Associates, Key Investments in Greenhouse Gas Mitigation Technologies by Energy Firms, Other Industry and the Federal Government: An Update, <http://www.scribd.com/doc/16452060/Key-Investments-in-Greenhouse-Gas-Mitigation-Technologies>.

¹⁷ See http://www.doi.gov/secretary/speeches/060719_speech.html.

¹⁸ PricewaterhouseCoopers, The Economic Impacts of the Oil and Natural Gas Industry on the U.S. Economy: Employment, Labor Income and Value Added, http://www.api.org/Newsroom/upload/Industry_Economic_Contributions_Report.pdf.

¹⁹ *Id.*

than \$76 billion in up-front lease bonuses on OCS oil and gas leases,²⁰ and through 2008 an additional \$119 billion in royalties on OCS oil and gas production.²¹

In short, it remains the case that the “expedited exploration and development of the Outer Continental Shelf” serves “to achieve national economic and energy policy goals.” 43 U.S.C. § 1802.

For all these reasons, a court should be quite hesitant to impede planned OCS activities that have been reviewed, evaluated, and approved by the Department of the Interior as required by law. Congress’s desire for prompt action is evidenced throughout the OCS Lands Act, and particularly in connection with exploratory drilling, with respect to which, as we now show, Congress mandated specific, short deadlines for governmental approval decisions. Any stay of the federal government’s approval of Shell Offshore’s Beaufort Sea exploration plan would fly in the face of the congressional value judgment enshrined in that statutory scheme.

²⁰ Minerals Management Service, List of All Lease Offerings, http://www.gomr.mms.gov/homepg/lseale/swiler/Table_1.PDF.

²¹ Minerals Management Service, Leasing Oil And Natural Gas Resources, Outer Continental Shelf, at 37-38, <http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf>; <http://www.mrm.mms.gov/MRMWebStats/FedOffReportedRoyaltyRevenues.aspx?yeartype=FY&year=2008&dateType=AY>.

II. Congress Explicitly Provided for the Prompt Review and Approval of Exploration Plans, In the Context of An Overall Statutory Scheme Designed to Advance the Expeditious Exploration and Development of the OCS.

The OCS Lands Act's statutory scheme fully reflects Congress's desire that the exploration and development of the OCS proceed expeditiously, and in particular that exploration plan approvals proceed without delay, with the Department of the Interior making approval decisions in reliance upon the information it had developed in earlier stages of the process, in combination with the lessee's specific information as to its planned exploratory drilling.

This is exactly what the Department did here. The Court should reject petitioners' efforts to derail the process that has operated precisely as Congress envisioned.

Since the OCS Lands Act was extensively amended in 1978, OCS oil and gas activities have been divided into four stages: the five-year leasing program; the lease sale; the exploration phase; and the development and production phase. *See Secretary of Interior v. California*, 464 U.S. 312, 337 (1984). Responsibility for the OCS program resides principally in the Secretary of the Interior (the "Secretary"), *see* 43 U.S.C. § 1337(b), much of whose authority is delegated to the Minerals Management Service ("MMS"), 43 U.S.C. § 1337(a).

As discussed below, with respect to stages *other than exploratory drilling*, Congress requires that an extensive new environmental analysis, and set

forth a timetable that accommodates that undertaking (while still promoting expedition). With respect to exploration, Congress requires that Secretarial decisions regarding exploration plan approval be made within thirty days of plan submittal, based upon existing information, which includes the information already developed in the environmental impact statements prepared in connection with both the antecedent five-year leasing program and the antecedent lease sale.

A. The Five-Year Leasing Program.

1. Legal Requirements.

The five-year leasing program is the first step in the process, culminating in “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.” 43 U.S.C. § 1344(a).

In deciding upon that five-year leasing program, the Secretary must “consider[] [the] economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.” 43 U.S.C. § 1344(a)(1).

The Secretary’s determination of the timing and location of leasing must be based upon a consideration of, *inter alia*, the relative environmental

sensitivity and marine productivity of the different OCS areas; an equitable sharing of developmental benefits and environmental risks among the various regions; and the relative needs of national energy markets. 43 U.S.C. § 1344(a)(2). To assist in doing so, the Department prepares an environmental impact statement.

The OCS Lands Act does not establish any specific deadline for the promulgation of five-year programs (other than for the first program adopted after the 1978 amendments).²² As a practical matter, however, the Secretary begins preparing a five-year program well before the expiration of the prior program, so that the termination of the prior program and the initiation of the new program are conterminous.²³ Thus, the required preparation of an environmental impact statement does not delay the effective date of the program or activities thereunder.

2. Application Here.

The 2002-07 five-year leasing program was promulgated pursuant to a 121-page Secretarial decisional document, backed by a 1,001-page environmental impact statement.²⁴ The 2002-07 program provided for, *inter alia*, three lease

²² 43 U.S.C. § 1344(c)(3).

²³ See generally Minerals Management Service, Past Five Year Leasing Program Information, <http://www.mms.gov/5-year/history.htm>.

²⁴ MMS, Proposed Final Outer Continental Shelf Oil and Gas Leasing Program 2002-2007 (April 2002); Outer Continental Shelf Oil & Gas Leasing Program: 2002-2007, Final Environmental Impact Statement (April 2002), <http://www.mms.gov/5-year/history2002-2007.htm>.

sales in the Beaufort Sea, and the environmental impact statement analyzed the environmental impacts of oil and gas development there.²⁵

Neither petitioners nor anyone else filed a lawsuit regarding any aspect of the 2002-07 five-year leasing program. Thus, the adequacy of the five-year program's environmental and related analyses, including the environmental impact statement, as well as the Secretary's rationales for deciding which OCS areas to include in the leasing program, including the Beaufort Sea, were not challenged by the petitioners or anyone else and cannot now be challenged.

The lack of challenge by any party is striking, given that legal challenges had been filed with respect to three earlier five-year leasing programs, based upon, for example, purported inadequacies in the environmental analyses; and in some cases, the Secretary was required to perform additional environmental or related study (although in all cases leasing was allowed to proceed).²⁶

B. The Lease Sale.

1. Legal Requirements.

The second stage in the OCS process is the Secretary's conduct of the lease sales provided for in the previously adopted five-year leasing program. 43

²⁵ *Id.*

²⁶ *See Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988); *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983); *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981).

U.S.C. § 1337(a)(1). “Requirements of the National Environmental Protection Act and the Endangered Species Act must be met first.” *Secretary of the Interior v. California*, 464 U.S. at 338.

As with the five-year program, the OCS Lands Act does not establish a deadline for the Secretary to conduct a lease sale, and thus no deadline for completing the required preparatory environmental analyses. However, as a practical matter, preparation of the environmental impact statement and related analyses for a particular sale will commence in time to meet the approximate target date for that sale as set forth in the five-year leasing program.²⁷

2. Application Here.

Seven Beaufort Sea OCS lease sales were conducted pursuant to five-year programs preceding the 2002-07 program.²⁸ MMS in 2003 prepared a four-volume environmental impact statement analyzing the potential environmental impact of the three Beaufort Sea lease sales proposed to take place pursuant to the 2002-07 leasing program, which were scheduled to occur in 2003 (Lease Sale 186), in 2005 (Lease Sale 195), and in 2007 (Lease Sale 202).²⁹

²⁷ See, e.g., Minerals Management Service, Beaufort Sea Multiple Sales 186, 195, and 202, <http://www.mms.gov/alaska/cproject/beaufortsale/index.htm>.

²⁸ Minerals Management Service, Alaska Region Lease Sales, http://www.mms.gov/alaska/lease/hlease/LeasingTables/lease_sales.pdf.

²⁹ Beaufort Sea Planning Area, Final Environmental Impact Statement, Oil and Gas Lease Sales 186, 195 and 202; http://www.mms.gov/alaska/ref/EIS_EA.htm.

This environmental impact statement focused exclusively on the Beaufort Sea, and analyzed in depth, *inter alia*, issues relating to “habitat disturbances and alterations, including discharges and noise; disturbance to bowhead whale-migration patterns from resulting activities; protection of subsistence resources and the Inupiat culture and way of life; effects from accidental oil spills; incorporation of traditional knowledge in the EIS and its use in decisionmaking; [and the] cumulative effects of past, present, and reasonably foreseeable future activities on the people and the environment of Alaska’s North Slope.”³⁰ In addition, given the time lag between the 2003 environmental impact statement and the 2005 and 2007 lease sales, MMS also prepared supplemental environmental assessments for Lease Sales 195 and 202.³¹

Lease Sales 186 and 195 took place as scheduled, with 34 leases sold in Lease Sale 186 in 2003, and 117 leases sold in Lease Sale 195 in 2005.³² No legal challenges were filed by petitioners or any other party to Lease Sales 186, or

³⁰ Beaufort Sea Planning Area, Oil and Gas Lease Sales 186, 195, and 202, Final Environmental Impact Statement, http://www.mms.gov/alaska/ref/EIS%20EA/BeaufortMultiSaleFEIS186_195_202/2003_001vol1.pdf, 14th page.

³¹ Environmental Assessment, Proposed Oil and Gas Lease Sale 195, http://www.mms.gov/alaska/ref/EIS%20EA/BeaufortFEIS_195/Sale195/EA_Sale195.pdf; Environmental Assessment, Proposed OCS Lease Sale 202, http://www.mms.gov/alaska/ref/EIS%20EA/BeaufortEA_202/EA_202.htm.

³² Minerals Management Service, Alaska Region Lease Sales, http://www.mms.gov/alaska/lease/hlease/LeasingTables/lease_sales.pdf.

Lease Sale 195 (the sale at which was issued one of the two leases on which Shell now intends to conduct exploratory drilling). Thus, the adequacy of the environmental impact statement prepared with respect to the Beaufort Sea lease sales, and of the supplemental environmental assessment prepared with respect to Lease Sale 195, went unchallenged.

The leases issued in Lease Sale 202 in 2007 were simply blocks that had previously been made available, but for whatever reason had not been sold, in the two earlier Beaufort Sea Sales 186 and 195. *See North Slope Borough v. Minerals Management Service*, 2008 WL 110889 at * 1 (D. Alaska 2008), *aff'd*, 2009 WL 2635023 (9th Cir. 2009). Ninety leases were sold in Lease Sale 202, including the other of the two leases on which Shell plans to conduct exploratory drilling.³³ One of the petitioners here did bring a legal challenge against Lease Sale 202, notwithstanding its failure to have challenged either of the earlier Beaufort Sea sales. This legal challenge, asserting purported NEPA violations, was rejected by the Alaska federal district court and this court. *See North Slope Borough, supra*.

³³ *Id.*

C. Exploration.

1. Legal Requirements.

The third stage of the OCS process is exploratory drilling, which must be carried out pursuant to an exploration plan submitted by the lessee and approved by the Secretary. 43 U.S.C. § 1340(c).

The OCS Lands Act sets a strict deadline, 30 days, for Secretarial action, triggered by the lessee's submittal of its proposed plan, and a heightened legal standard for any disapproval decision. Specifically, "the Secretary *shall approve* such plan, as submitted or modified, *within thirty days of its submission*, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan *would* result in any condition described in section 1334(a)(2)(A)(i) of this title [serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment] and (B) such proposed activity cannot be modified to avoid such condition." *Id.* (emphasis added).

The OCS Lands Act further dictates the information the Secretary shall use in making exploration plan approval decisions: "The Secretary shall consider *available* relevant environmental information in making decisions

(including those relating to exploration plans...”) 43 U.S.C. § 1346(d) (emphasis added).

Thus, exploration plan approval decisions are to be made quickly, within 30 days, based upon existing available information. In this fashion, Congress sought to fulfill its primary goal — the expeditious exploration of the OCS. Congress’s approach to exploration plan approval, as reflected in 43 U.S.C. §§ 1340(c) and 1346(d), makes perfect sense given the stage in the OCS process at which exploratory drilling occurs, and its temporally and operationally limited nature.

Exploratory drilling takes place after the Secretary has prepared environmental impact statements in connection with both the five-year leasing program and the lease sale at which the lease(s) to be explored were issued. The Secretary thus invariably has substantial environmental analyses upon which to draw in making exploration plan approval decisions.

Moreover, exploratory drilling has a narrow and limited focus and duration. A lessee drills one or more exploratory wells in order to obtain sufficient information to determine whether commercially recoverable hydrocarbons exist. It conducts its exploratory drilling from drill ships or other drilling units *temporarily*

moored in place. Its exploration lasts for a short time period, typically a few months.³⁴

Once the lessee's wells are completed and tested, they are typically not subsequently used for production or any other purpose. Exploratory wells are instead permanently plugged and abandoned by placing a series of cement plugs in the borehole, in order to prevent the migration of fluids within the wellbore or to the sea floor. The wellhead (the pressure-containing component of an oil well at the sea floor) and casings (pipe) are then cut and removed to a designated depth below the sea floor. *See* 30 C.F.R. §§ 250.1715, 250.1716. The drill ship or other drilling unit then leaves the area.

Over 16,000 thousand OCS exploratory wells have been drilled on the OCS pursuant to exploration plans submitted to and approved by the Secretary.³⁵

³⁴ Environmental Protection Agency, Economic Analysis of Proposed Effluent Limitations Guidelines and Standards for Synthetic-Based Drilling Fluids and Other Non-Aqueous Drilling Fluids in the Oil and Gas Extraction Point Source Category, at 3-2, <http://www.epa.gov/guide/sbf/proposed/econa.pdf>.

³⁵ Minerals Management Service statistics, <http://www.gomr.mms.gov/PDFs/2009/2009-022.pdf>; <http://www.mms.gov/alaska/fo/wellhistory/SALEAREA.HTM>; <http://www.gomr.mms.gov/homepg/offshore/atlocs/atlleas.html>; <http://www.mms.gov/omm/Pacific/offshore/currentfacts.htm>

The Secretary's practice has been to prepare an environmental assessment with respect to exploration plans, and not an environmental impact statement.³⁶

Only three lawsuits have ever been filed challenging the Secretary's approval of an exploration plan, and none has ultimately led to the exploration plan being invalidated. *See Trustees for Alaska v. U.S. Dep't of the Interior*, 967 F.2d 591 (9th Cir. 1992) (unpublished opinion, available at 1992 WL 133101) (rejecting challenge to a Beaufort Sea exploration plan as moot); *Trustees for Alaska v. U.S. Dep't of the Interior*, 919 F.2d 119 (9th Cir. 1990) (rejecting challenge to a Chukchi Sea exploration plan as untimely); *North Slope Borough v. Kempthorne*, No. 07-72183 (9th Cir.) (opinion withdrawn, exploration plan subsequently withdrawn and case dismissed as moot).

2. Application Here.

Thirty-one OCS exploratory wells have already been drilled in the Beaufort Sea, pursuant to approved exploration plans.³⁷ Twelve of those exploratory wells have been drilled in the immediate vicinity of Shell's proposed exploration.³⁸ Shell proposes to drill two exploratory wells on two leases Shell

³⁶ A categorical exclusion review is sometimes performed with respect to exploration plans in the Gulf of Mexico, rather than an environmental assessment.

³⁷ http://www.mms.gov/alaska/fo/wellhistory/BS_WELLS.HTM

³⁸ Environmental Assessment, Shell Offshore Inc. 2010 Outer Continental Shelf Lease Exploration Plan, Camden Bay, Alaska, at 9; http://www.mms.gov/alaska/ref/EIS%20EA/mms2009_052_ea/2009_1015_EA.pdf

acquired in Beaufort Sea OCS lease sales in 2005 and 2007, near the Camden Bay area of the Beaufort Sea OCS Planning Area.³⁹ Over 25 million barrels of oil have been produced to date from federal leases in the Beaufort Sea OCS.⁴⁰

Exploration drilling activities will last less than four months, beginning on or about July 10, 2010 and running through approximately October 31, 2010, with a temporary suspension of all operations beginning August 25, 2010 for Inupiat subsistence bowhead whale hunts.⁴¹ After the two planned exploratory wells have been drilled and evaluated, they will be permanently plugged and abandoned.⁴²

Shell submitted a plethora of information in connection with its exploration plan, including a detailed environmental impact analysis, and numerous environmental safeguards and mitigation measures, with additional safeguards imposed by MMS.⁴³

³⁹ *Id.*

⁴⁰ Alaska OCS Region, Minerals Management Service, <http://www.mms.gov/alaska/fo/INDEX.HTM>.

⁴¹ 2010 Outer Continental Shelf Lease Exploration Plan, Camden Bay, Alaska, 17th page; http://www.mms.gov/alaska/ref/ProjectHistory/Shell_BF/2009_final_EP_camden_bay.pdf.

⁴² *Id.* at 216th page.

⁴³ *Id.* at pp. 199-339; Environmental Assessment, Shell Offshore Inc. 2010 Outer Continental Shelf Lease Exploration Plan, Camden Bay, Alaska, at 28, 29, 30, 33-36, 45, 53-54, 56, (continued...)

Consistent with decades of past practice, the Secretary prepared an environmental assessment of Shell's exploration plan.⁴⁴ That 109-page assessment explicitly relied upon, for example, the environmental impact statements prepared for the three Beaufort Sea lease sales, and the two supplemental environmental assessments that had been prepared for the latter two of those sales.⁴⁵ MMS also had available a draft environmental impact statement prepared in 2008 that addressed proposed future lease sales in the Beaufort and Chukchi Seas.⁴⁶

MMS concluded that environmental conditions at the proposed drill sites do not deviate from the general conditions described in the Beaufort Sea lease sale environmental impact statement; that there are no indications from recent studies or site-specific information that the prospect areas differ from what was generally described in that environmental impact statement; and that no sensitive seafloor biological communities or habitats have been identified at the proposed

http://www.mms.gov/alaska/ref/EIS%20EA/mms2009_052_ea/2009_1015_EA.pdf

⁴⁴ Environmental Assessment, Shell Offshore Inc. 2010 Outer Continental Shelf Lease Exploration Plan, Camden Bay, Alaska, at 9; http://www.mms.gov/alaska/ref/EIS%20EA/mms2009_052_ea/2009_1015_EA.pdf

⁴⁵ *Id.* at 2.

⁴⁶ *Id.*

drill sites.⁴⁷ MMS further concluded that Shell is not proposing to use any new or unusual technology.⁴⁸

Based on its review of the proposed exploration drilling activities and relevant scientific information, MMS issued a “Finding of No Significant Impact,” concluding that no significant adverse effects are expected to occur from Shell’s proposed exploration drilling activities.⁴⁹ That finding of no significant impact with respect to Shell Offshore’s exploration plan, and hence that no environmental impact statement is necessary with respect to it, moots the question whether an environmental impact statement should be prepared with respect to an exploration plan, a question amici believe must be answered in the negative.⁵⁰

⁴⁷ *Id.* at 32.

⁴⁸ *Id.* at 3-4.

⁴⁹ Shell Offshore, Inc. 2010 Outer Continental Shelf Lease Exploration Plan, Camden Bay, Alaska, Finding of No Significant Impact at p. 4; http://www.mms.gov/alaska/ref/EIS%20EA/mms2009_052_ea/2009_1015_FONSI.pdf.

⁵⁰ The Supreme Court in *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976), rejected environmental organizations’ contention that a federal agency was required to prepare an environmental impact statement prior to the approval and registration of a statement of record and property report under the Interstate Land Sales Full Disclosure Act, given that (a) “[i]t is inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments,” and (b) the Disclosure Act provides that a statement of record becomes effective automatically 30 days after filing unless the Secretary acts affirmatively, within that time, to suspend it for inadequate disclosure. 426 U.S. at 781, 788-89. Moreover, “while the Secretary may unquestionably suspend an effective date in order to allow the developer to remedy an inadequate disclosure statement, there is no basis in the statute to allow the Secretary to order such a suspension so as to give HUD time to prepare an (continued...) ”

The multi-phase OCS process, including the federal government's review of Shell Offshore's exploration plan, has operated as Congress intended, and there is no basis for judicial interference with that process now.

D. Development and Production.

1. Legal Requirements.

The fourth and final phase of the OCS process, development and production, will be reached here only if exploratory efforts discover commercially recoverable quantities of oil and/or natural gas. The legal requirements attendant thereto are accordingly relevant now only insofar as they provide additional insights into congressional intent with respect to the timing and approval of exploratory activities.

Unlike exploration, whose impacts are temporary and whose presence quickly vanishes, development and production typically entails the construction of a production platform, the installation of processing equipment, and the laying of pipelines for transporting the oil or natural gas onshore. Unlike exploration

impact statement.” *Id.* at 789-90. The Court held that any other “reading of the statute would make such delays commonplace, and render the 30-day provision little more than a nullity.” *Id.* at 791.

The approval deadline for exploration plans is also 30 days. And, just as in *Flint Ridge*, it is no answer that the Secretary can decline to deem an exploration plan complete and require its supplementation if the plan does not contain the information required by departmental regulations, *see* 30 C.F.R. 250.231, given that the required contents of an exploration plan do not include an environmental impact statement, and a plan could therefore not be deemed incomplete on that ground.

equipment, development and production facilities often remain in operation for decades.

Development and production may only proceed pursuant to a plan submitted by the lessee and approved by the Secretary. 43 U.S.C. § 1351. The approval process for development and production differs from that attendant to exploration plans in important respects.

The lessee's development and production plan must set forth the specific work to be performed; all facilities and operations located on the OCS which are proposed to be directly related to the proposed development, including the location and size of such facilities and operations, and the land, labor, material, and energy requirements associated with such facilities and operations; the environmental safeguards to be implemented; the safety standards to be met and how such standards are to be met; an expected rate of development and production and a time schedule for performance; and such other relevant information as the Secretary may by regulation require. 43 U.S.C. § 1351(c).

The OCS Lands Act affirmatively mandates that “[a]t least once the Secretary shall declare the approval of a development and production plan in any area or region...of the Outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action,” thus triggering the preparation of an environmental

impact statement. 43 U.S.C. § 1351(e)(1).⁵¹ The draft statement must be transmitted for comment to the Governor of any affected State and the public, 43 U.S.C. § 1351(f). The deadline (60 days) for the Secretary to approve, disapprove, or require modifications of the development and production plan is triggered only after the release of the final environmental impact statement. 43 U.S.C. § 1351(h).

Thus, in counter-distinction to exploration plans, whose short (30-day) approval deadline is triggered by the submittal of the plan itself, and as to which no mention is made of the preparation of an environmental impact statement, the approval deadline for a development and production plan is triggered by the completion of the environmental impact statement, which is explicitly contemplated at least with respect to the first such plan in the area.

⁵¹ Thus, while the Secretary's approval decision regarding a development and production plan will, like an exploration plan, be based upon existing information, *see* 43 U.S.C. § 1346(d), that information will in the case of a development and production plan outside the Gulf of Mexico include an environmental impact statement addressing the impacts of development and production in the area.

CONCLUSION

Critical national interests and explicit statements of congressional intent, coupled with the extensive review, analysis and comment that has been conducted in this matter, dictate that the approved exploration of the Beaufort Sea at issue here be permitted to move forward. Shell Offshore's motion for a determination that petitioners are not entitled to a stay pending review should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5506 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 with 14-point Times New Roman font.

Dated: January 6, 2010

/s/ Steven J. Rosenbaum
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CERTIFICATE OF SERVICE

I, Steven J. Rosenbaum, a member of the Bar of this Court, hereby certify that on January 6, 2010, I electronically filed the foregoing “Brief Amicus Curiae of The American Petroleum Institute, National Association of Manufacturers, American Chemistry Council, American Gas Association, International Association of Drilling Contractors, and U.S. Oil and Gas Association in Support of Shell Offshore Inc.’s Motion for a Determination that Petitioners are not Entitled to a Stay Pending Review” with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Steven J. Rosenbaum