Nos. 09-73942, 09-73944, 10-70166, 10-70368

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

ALASKA ESKIMO WHALING COMMISSION, *et al.*,
Petitioners,

v.

KEN SALAZAR, Secretary of the Interior, *et al.*,
Respondents,

and

SHELL OFFSHORE INC., SHELL GULF OF MEXICO INC., and STATE OF ALASKA,
Intervenor-Respondents.

Petitions for Review of Department of Interior Decisions

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 RESPONDENTS

Steven J. Rosenbaum
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, DC 20044-7566
(202) 662-5568
(202) 778-5568 fax
Attorneys for Amici

April 7, 2010

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 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.

/s/ Steven J. Rosenbaum
Counsel for Amici

April 7, 2010

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

I. Congress Dictated That The Outer Continental Shelf Be Made Available For Expeditious Exploration And Development 3

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 10

A. The Five-Year Leasing Program 11

1. Legal Requirements 11

2. Application Here 12

B. The Lease Sale 15

1. Legal Requirements 15

2. Application Here 16

C. Exploration 19

1. Legal Requirements 19

2. Application Here 23

D. Development And Production 27

1. Legal Requirements 27

III. Petitioners Seek To Thwart Congressional Intent With Respect To The Approval Of Exploration Plans. 30

A. An Environmental Impact Statement Is Not Required 30

B. DOI Correctly Relied Upon Existing Information 33

C. An Exploration Plan Can Be Denied Only If It Will Cause Serious Harm Or Damage 34

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

California v. Watt,
668 F.2d 1290 (D.C. Cir. 1981).....4, 13, 34

California v. Watt,
712 F.2d 584 (D.C. Cir. 1983).....13

Center for Biological Diversity v. Department of the Interior,
563 F.3d 466 (D. C. Cir. 2009).....14

Douglas County v. Babbitt,
48 F.3d 1495 (9th Cir. 1995) 32

Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,
426 U.S. 776 (1976).....30, 31

Native Village of Point Hope v. Kempthorne,
No. 1:08-cv-4 (D. Ak.).....19

Natural Res. Def. Council, Inc. v. Hodel,
865 F.2d 288 (D.C. Cir. 1988).....13

Natural Resources Defense Council v. Nuclear Regulatory Comm.,
647 F.2d 1345 (D.C. Cir. 1981).....32

North Slope Borough v. Kempthorne,
No. 07-72183 (9th Cir.) 22

North Slope Borough v. Minerals Management Service,
2008 WL 110889 (D. Alaska 2008), *aff'd*, 2009 WL 2635023 (9th Cir. 2009) 17, 18

Secretary of Interior v. California,
464 U.S. 312 (1984).....10, 15

Trustees for Alaska v. U.S. Dep't of the Interior,
919 F.2d 119 (9th Cir. 1990) 22

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) 22

Village of False Pass v. Clark,
733 F.2d 605 (9th Cir. 1984) 33

Winter v. Natural Resources Defense Council,
129 S.Ct. 365 (2008).....33

STATUTES

43 U.S.C. § 1332(3) 3

43 U.S.C. § 1337(a) 10

43 U.S.C. § 1337(a)(1).....15

43 U.S.C. § 1337(b) 10

43 U.S.C. § 1340(c) 19, 20, 34

43 U.S.C. § 1344(a) 11

43 U.S.C. § 1344(a)(1).....11

43 U.S.C. § 1344(a)(2).....12

43 U.S.C. § 1344(c)(3).....12

43 U.S.C. § 1346(d) 20, 29

43 U.S.C. § 1351 28

43 U.S.C. § 1351(c) 28

43 U.S.C. § 1351(e)(1).....29

43 U.S.C. § 1351(f).....29

43 U.S.C. § 1351(h) 29

43 U.S.C. § 1802 9

43 U.S.C. § 1802(1) 3, 4, 5, 7

43 U.S.C. § 1802(2)(A).....3

43 U.S.C. § 1866 32

REGULATIONS

30 C.F.R. § 250.231 31

30 C.F.R. § 250.1715 22

30 C.F.R. § 250.1716 22

40 C.F.R. § 1503.1(a)(4) 32

40 C.F.R. § 1506.6(c) 32

40 C.F.R. § 1506.10(b) 32

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 are trade associations representing a wide spectrum of economic interests that are part of, or directly affected by, this country's energy industry. Their members 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.

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. 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 and Chukchi Sea are allowed to move forward, and in a timely fashion. These petitions threaten that objective.

Furthermore, these legal challenges seek to 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 thirty-one OCS exploratory wells that have already been drilled in the Beaufort Sea, and the five OCS exploratory wells that have already been drilled in the Chukchi Sea. Over twenty-five million barrels of oil have already been produced from federal leases in the Beaufort Sea OCS.

The instant petitions threaten to thwart Congress's intention that such exploration move forward expeditiously, and the statutory scheme designed to ensure that it would. When Congress has unambiguously insisted upon expedition

with respect to a specific class of regulatory approvals, courts should be loath to rely upon the general requirements of the National Environmental Policy Act to foil that objective.

The petitions should be denied.[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*

[1] All parties have consented to the filing of this brief amicus curiae. Some petitioners conditioned their consent on amici filing this brief on the due date for respondents' briefs, which amici have done.

exploration of our almost untapped domestic oil and gas resources in the Outer 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 nine percent of total domestic oil production in 1981, that figure had tripled to twenty-seven percent by 2007.[3] Moreover, the government predicts the OCS will account for more than forty

---

[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/mcrfp3fm1a.htm, http://tonto.eia.doe.gov/dnav/pet/hist/mcrfp5f1A.htm.

percent of all domestic oil production, and twenty-five percent of natural gas production, by 2012.[4]

Gazing out further, the federal government estimates that the OCS contains sixty percent of the nation's remaining undiscovered technically recoverable oil, and forty 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-

---

4 http://www.mms.gov/ooc/testimony/FINAL5-YRPlanTestimony6-27-07.pdf.

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.

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 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 in December 2009 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

---

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

[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.

resources, imported oil is projected to fall by nearly 1.5 million barrels a day between 2008 and 2020.[13]

The central role played by OCS production in these developments is exemplified by the industry's 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 or Chukchi Seas, 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 nineteen 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).

---

13 *Id.*

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.

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, representing forty-four 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 2009 having collected more than $76

---

[16] 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.*

billion in up-front lease bonuses on OCS oil and gas leases,[20] and an additional $120 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. Absent clear evidence of a substantial statutory violation, interference with the federal government's approval of Shell's Beaufort Sea and Chukchi Sea exploration plans 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/lsesale/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=2009&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 be

conducted, and sets forth a timetable that accommodates that undertaking (while still promoting expedition). With respect to exploratory drilling, 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(s) and the antecedent lease sale(s).

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 Program. The 2002-07 five-year leasing program, pursuant to which were issued the Beaufort Sea leases upon which Shell intends to drill, was promulgated pursuant to a 121-page Secretarial decisional document,

---

[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.

backed by a 1,001-page environmental impact statement.[24] The 2002-07 program provided for, *inter alia*, three lease 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]

---

[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.

[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).

The 2007-12 Program. The 2007-12 five-year leasing program, pursuant to which were issued the Chukchi Sea leases upon which Shell intends to drill, was promulgated pursuant to a 146-page Secretarial decisional document, backed by a 1,400-page environmental impact statement.[27] The 2007-12 program provided for, *inter alia*, three lease sales in the Chukchi Sea, and the environmental impact statement analyzed the environmental impacts of oil and gas development there.[28]

Several organizations, including ones bringing the instant legal challenge, filed suit challenging the program. The D.C. Circuit rejected seven of the petitioners' eight substantive claims, but agreed that DOI had erred in its methodology for evaluating one of the nine OCS Lands Act Section 18 statutory criteria pertinent to establishing the five-year program's schedule of lease sales, that which calls for a ranking of the relative environmental sensitivities of the geographic program areas.[29] Upon remand, DOI conducted a new environmental sensitivity analysis and ranking, and on March 31, 2010 issued a 222-page

---

[27] MMS, Proposed Final Outer Continental Shelf Oil and Gas Leasing Program 2007-2012 (April 2007), http://www.mms.gov/5-year/PDFs/MMSProposedFinalProgram2007-2012.pdf; Outer Continental Shelf Oil & Gas Leasing Program: 2007-2012, Final Environmental Impact Statement (April 2007), http://www.mms.gov/5-year/2007-2012FEIS.htm.

[28] *Id.*

[29] *Center for Biological Diversity v. Department of the Interior*, 563 F.3d 466 (D. C. Cir. 2009).

preliminary revised program that left in place the Chukchi lease sale that had previously taken place pursuant to the program.[30]

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 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 there is 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.[31]

---

[30] *See* Preliminary Revised Program, Outer Continental Shelf Oil and Gas Leasing Program 2007-12; http://www.doi.gov/whatwedo/energy/ocs/upload/PRP2007-2012.pdf.

[31] *See, e.g.*, Minerals Management Service, Beaufort Sea Multiple Sales 186, 195, and 202, http://www.mms.gov/alaska/cproject/beaufortsale/index.htm.

2. Application Here.

The Beaufort Sea. Seven Beaufort Sea OCS lease sales were conducted pursuant to five-year programs preceding the 2002-07 program.[32] 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).[33]

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

---

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

[33] 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.

Slope."[34] 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.[35]

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.[36] No legal challenges were filed by petitioners or any other party to Lease Sales 186 or Lease Sale 195 (the sale at which was issued one of the two Beaufort Sea 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.*

---

[34] 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.

[35] 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.

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

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 Beaufort Sea leases on which Shell plans to conduct exploratory drilling.[37] 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.*

The Chukchi Sea. Two Chukchi Sea OCS lease sales were conducted pursuant to five-year programs preceding the 2007-12 program.[38] MMS in 2007 prepared a three-volume environmental impact statement analyzing the potential environmental impact of the first Chukchi Sea lease sale proposed to take place pursuant to the 2007-12 leasing program, which was scheduled to occur in 2008 (Lease Sale 193).[39]

This environmental impact statement focused exclusively on the Chukchi Sea, and analyzed in depth, *inter alia*, issues relating to "effects from

---

[37] *Id.*

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

[39] Chukchi Sea Planning Area, Oil and Gas Lease Sale 193, Final Environmental Impact Statement, http://www.mms.gov/alaska/ref/EIS%20EA/Chukchi_FEIS_193/feis_193.htm.

accidental oil spills on the environment"; "disturbance to bowhead whale-migration patterns from resulting activities"; "protection of subsistence resources and the Inupiat culture and way of life;" "habitat disturbances and alterations, including discharges and noise;" and "cumulative effects of past, present, and reasonably foreseeable future activities on the people and environment of Alaska's North Slope."[40]

Lease Sales 193 took place as scheduled, with 487 leases sold.[41] A legal challenge to Lease Sale 193 is currently pending.[42]

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 of thirty 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*,

---

40 *Id*., 20th page.

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

42 *Native Village of Point Hope v. Kempthorne*, No. 1:08-cv-4 (D. Ak.).

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 thirty days, based upon existing available information. In this fashion, Congress sought to fulfill its primary goal — the expeditious exploration of the OCS, *see* pp. 3-4 *supra*.

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(s) 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 weeks or months.[43]

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 below the sea floor, 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

---

[43] Environmental Protection Agency, Economic Analysis at 3-2, http://www.epa.gov/guide/sbf/proposed/econa.pdf.

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 sixteen thousand OCS exploratory wells have been drilled on the OCS pursuant to exploration plans submitted to and approved by the Secretary.[44] The Secretary's practice has been to prepare an environmental assessment with respect to exploration plans, and not an environmental impact statement.[45]

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).

---

[44] 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

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

2. Application Here.

The Beaufort Sea. Thirty-one OCS exploratory wells have already been drilled in the Beaufort Sea pursuant to approved exploration plans.[46] Twelve of those exploratory wells have been drilled in the immediate vicinity of Shell's proposed exploration.[47] Shell proposes to drill two exploratory wells on two leases Shell acquired in Beaufort Sea OCS lease sales in 2005 and 2007, near the Camden Bay area of the Beaufort Sea OCS Planning Area.[48] Over twenty-five million barrels of oil have been produced to date from federal leases in the Beaufort Sea OCS.[49]

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.[50] After the two planned exploratory wells have been drilled and evaluated, they will be permanently plugged and abandoned.[51]

---

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

47 Beaufort AR 278 at 26.

48 *Id.*

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

50 Beaufort AR 82 at 17.

51 *Id.* at 216.

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.[52]

Consistent with decades of past practice, the Secretary prepared an environmental assessment of Shell's exploration plan.[53] 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.[54] MMS also had available a draft environmental impact statement prepared in 2008 that addressed proposed future lease sales in the Beaufort and Chukchi Seas.[55]

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

---

[52] Beaufort AR 82 at 199-339; Beaufort AR 278 at 45, 46, 47, 50-53, 62, 7071, 7073.

[53] Beaufort AR 278 at 26.

[54] *Id.* at 19.

[55] *Id.*

seafloor biological communities or habitats have been identified at the proposed drill sites.[56] MMS further concluded that Shell is not proposing to use any new or unusual technology.[57]

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.[58]

The Chukchi Sea. Five OCS exploratory wells have already been drilled in the Chukchi Sea pursuant to approved exploration plans.[59] All of those exploratory wells have been drilled in the vicinity of Shell's proposed exploration.[60] Shell proposes to drill up to three exploratory wells on five leases Shell acquired in Chukchi Sea OCS Lease Sale 193, using the same drill ship that will drill the Beaufort Sea exploratory wells.[61]

Exploration drilling activities will last less than four months, beginning on or about July 4, 2010 and running through approximately October 31,

---

56 *Id.* at 49.

57 *Id.* at 20-21.

58 Beaufort AR 288 at 4.

59 http://www.mms.gov/alaska/fo/wellhistory/CK_WELLS.HTM.

60 Chukchi AR 369 at 31.

61 *Id.* at 33.

2010.[62] After the planned exploratory wells have been drilled and evaluated, they will be permanently plugged and abandoned.[63]

As with the Beaufort Sea EP, Shell submitted a wealth of information in connection with its Chukchi Sea exploration plan, including a detailed environmental impact analysis, and numerous environmental safeguards and mitigation measures, with additional safeguards imposed by MMS.[64]

The Secretary prepared an environmental assessment of Shell's exploration plan.[65] That 132-page assessment explicitly relied upon, for example, the environmental impact statement prepared for Chukchi Sea Lease Sale 193.[66] MMS also had available a draft environmental impact statement prepared in 2008 that addressed proposed future lease sales in the Beaufort and Chukchi Seas.[67]

MMS concluded that environmental conditions at the proposed drill sites do not deviate from the general conditions described in the Chukchi 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

---

62 *Id.*

63 *Id.*

64 Chukchi AR 370.

65 Chukchi AR 369.

66 Chukchi AR 369 at 23.

67 *Id.*

generally described in that environmental impact statement; and that no sensitive seafloor biological communities or habitats have been identified at the proposed drill sites.[68] MMS further concluded that Shell is not proposing to use any new or unusual technology.[69]

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.[70]

D. Development And Production.

1. Legal Requirements.

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

---

68 Chukchi AR 369 at 36, 58.

69 *Id.* at 24.

70 Chukchi AR 369 at 4.

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 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 that 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).[71] 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 (sixty 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 (thirty-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.

---

[71] 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.

III. Petitioners Seek To Thwart Congressional Intent With Respect To The Approval Of Exploration Plans.

The multi-phase OCS process, including the federal government's review of Shell's exploration plans, has operated as Congress intended, and there is no basis for judicial interference with that process now. Three of petitioners' contentions are notably inconsistent with the carefully devised congressional scheme.

A. An Environmental Impact Statement Is Not Required.

DOI's finding of no significant impact with respect to Shell's exploration plans, and hence that no environmental impact statements are necessary with respect to either plan, moots the question whether an environmental impact statement should be prepared with respect to any OCS exploration plan. Petitioners are in any event clearly incorrect in contending that an environmental impact statement should be prepared with respect to OCS exploration plans.[72]

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

---

[72] *See, e.g.*, Brief of Native Village at 27, 31, 36; Brief of Alaska Eskimo at 25.

Disclosure Act, given that: (a) the Disclosure Act provides that a statement of record becomes effective automatically thirty days after filing unless the Secretary acts affirmatively, within that time, to suspend it for inadequate disclosure, and (b) "[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." 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 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 statutorily-imposed approval deadline for exploration plans is also thirty 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.

Furthermore, because an environmental impact statement requires that the agency (not the applicant), after issuance of the draft environmental impact statement, undertake a public notice and comment period, including a public hearing, and not issue a final decision for ninety days (40 C.F.R. §§ 1503.1(a)(4), 1506.6(c), 1506.10(b)), the process could not possibly be completed within thirty days even if the agency somehow imposed on the applicant the preparation of the draft environmental impact statement itself.

The 30-day approval requirement for exploration plans does not impermissibly "amend, modify or repeal" the National Environmental Policy Act, *see* 43 U.S.C. § 1866, given that NEPA itself acknowledges that its requirements do not apply to the extent that the "law applicable to [the] agency's operations…makes full compliance with one of the [NEPA] directives impossible." *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995), quoting H.Conf.Rep. No. 765, 91st Cong., 1st Sess. (1969), reprinted in 1969 U.S.C.C.A.N. 2767, 2770.

Indeed, a "congressional concern with expedition" with respect to specified agency decision-making "runs directly counter to the notion that a formal EIS was intended to be a precondition to" Governmental action. *Natural Resources Defense Council v. Nuclear Regulatory Comm.*, 647 F.2d 1345, 1386 (D.C. Cir. 1981) (Robinson, J., concurring). NEPA's general procedural

requirements (*see Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 376 (2008)) cannot be applied to thwart specific congressional objectives. That conclusion is particularly apt when "this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment" (*id*.), with thirty-six exploratory wells having already been drilled in the Beaufort and Chukchi Seas, *see* pp. 23, 25 *supra*.[73]

B. DOI Correctly Relied Upon Existing Information.

Respondents have shown why the information upon which DOI relied in approving the two exploration plans was more than adequate, and fully considered. Petitioners' claims that additional information should have been gathered and additional analyses performed[74] are not well taken in light of this showing.

Moreover, petitioners' position is simply irreconcilable both with Congress's explicit mandate that exploration plan approval decisions be based

---

[73] *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), addressed a challenge to a lease sale, not an exploration plan. Its discussion of the environmental requirements attendant to exploration plans (733 F.2d at 614) was thus *dicta*, and directed at the fact that an environmental analysis is performed at the exploratory stage, rather than the specific kind of environmental analysis (an environmental assessment or an environmental impact statement) to be performed at that stage.

[74] *See, e.g.*, Brief of Native Village at 26, 28, 30; Brief of Alaska Eskimo at 37, 43, 53.

upon "existing information," *see* p. 20 *supra*, and with the 30-day statutory deadline for such approval decisions.

C. An Exploration Plan Can Be Denied Only If It Will Cause Serious Harm Or Damage.

Respondents have demonstrated that the prospect of harm from the planned exploratory drilling is remote, consistent with real world experience with respect to thousands of previous OCS exploratory wells. Moreover, petitioners' reliance upon speculative impacts as grounds for challenging the approval decision[75] cannot be reconciled with the specific statutory standard for exploration plan approval: "the Secretary *shall approve* such plan [unless] 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." 43 U.S.C. § 1340(c) (emphasis added); *see California v. Watt*, 668 F.2d at 1316 ("The first stated purpose of the Act. . .is to establish procedures to

---

[75] *See, e.g.*, Brief of Native Village at 14, 32, 40, 47; Brief of Alaska Eskimo at 25.

expedite exploration and development of the OCS, recogniz[ing] that some degree of adverse impact is inevitable.")

CONCLUSION

Critical national interests and explicit statements of congressional intent, coupled with the extensive review and analysis that have been conducted in this matter, dictate that the approved exploration of the Beaufort Sea and Chukchi Sea be permitted to move forward. The petitions should be denied.

Respectfully submitted,

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, DC 20044-7566
(202) 662-5568
(202) 778-5568 fax
Attorneys for Amici

April 7, 2010

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 6993 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: April 7, 2010

/s/ Steven J. Rosenbaum
Attorney for Amici

CERTIFICATE OF SERVICE

I, Steven J. Rosenbaum, a member of the Bar of this Court, hereby certify that on April 7, 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" 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