Nos. 11-72891, 11-72943

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioners,

v.

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

and

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

Petitions for Review of Department of Interior Decisions

BRIEF AMICUS CURIAE OF THE AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, AND U.S. OIL AND GAS ASSOCIATION IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici the American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Manufacturers, 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
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February 3, 2012

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Amici trade associations represent a wide spectrum of 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; and utilize the energy created to run the country's factories and other businesses, transport people and goods, and heat, air condition and light the nation's homes.

The economic implications of this lawsuit are profound. Only a few weeks ago, the federal Government released an updated assessment estimating that the Beaufort Sea contains 6.3 *billion* barrels of undiscovered oil that is economically recoverable at roughly current market prices. Over eleven billion additional barrels are located in the adjacent Chukchi Sea, which Shell also plans to explore in 2012. Development of these Alaska offshore resources will create an estimated annual average of over fifty-four thousand new jobs over the next forty-five years, generating $145 billion in employee payroll.

Petitioners oppose the exploration and development of this oil and gas; the instant lawsuit is merely their latest salvo. This Court previously rejected their efforts to block Shell's planned exploratory activities in the Beaufort and Chukchi Seas in 2010. Yet petitioners have persisted in their legal challenges, notwithstanding Shell's commitment of even greater financial and operational

resources to reduce further the threat of environmental harm, at a cost of hundreds of millions of dollars.

Petitioners' legal challenge seeks to frustrate fundamental congressional objectives regarding the timing and character of the approval process for Outer Continental Shelf ("OCS") activities. Congress in the OCS Lands Act, 43 U.S.C. § 1331 *et seq.*, adopted the explicit goal of encouraging the "expeditious" exploration and production of the Outer Continental Shelf. Congress dictated that exploration plan approval decisions be made quite promptly, within 30 days of plan submittal, and be based upon *existing* information, with approval to be forthcoming unless exploration would cause serious harm. Literally thousands of OCS exploration plans have been approved under that timetable and standard, including those submitted with respect to the thirty exploratory wells previously drilled in the Beaufort Sea.

Against this statutory backdrop, the Interior Department's approval of Shell's 2012 revised exploration plan, following the preparation of an extensive environmental assessment, plainly complied with the requirements of reasoned decision making.

Furthermore, even assuming *arguendo* a statutory violation, petitioners have failed to show an entitlement to have the approval decision set aside or vacated. This is an extraordinary remedy to be imposed only upon a clear showing that the

applicant satisfies the four traditional equitable factors. Petitioners fall well short of the mark.[1]

ARGUMENT

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

The OCS Lands Act's organizing principle 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) (emphasis added).

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. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."[2] As the D.C. Circuit observed soon thereafter, "the Act has an objective — the expeditious development of OCS resources." *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981).

If the "expedited exploration and development" of the OCS were critical national goals in 1978, they are even more so today. While OCS production represented a mere nine percent of total domestic oil production in 1981,[3] OCS production in 2009 accounted for 31 percent of total domestic oil production and 11 percent of total domestic, marketed natural gas production.[4] The Government estimates that the OCS contains roughly 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 89

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[2] H.R. Rep. No. 95-590, at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N 1450, 1460 (emphasis added).

[3] *See* U.S. Energy Information Administration ("EIA"), 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.

[4] Dep't of the Interior, *Increased Safety Measures for Energy Development on the Outer Continental Shelf* ("*Safety Report*"), at 3 (May 27, 2010), http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598.

[5] http://www.doi.gov/budget/2010/data/pdf/10MMSTestimony.pdf.

billion barrels of oil, and 398 trillion cubic feet of natural gas.[6] Thirty 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. U.S. crude oil production had fallen to 4.95 million barrels in 2008, the lowest level since 1946.[8] But due largely to a combination of massive private investment, the continuous development of innovative techniques for locating and producing hydrocarbon resources, and increased OCS development,[9] that production had risen to 5.36 million barrels a day in 2009,[10] the first year to year production increase since 1991,[11] and the U.S. Energy Information Administration ("EIA") expects U.S. crude oil production to rise to an average 6.7 million barrels a day in 2020.[12] By contrast, assuming

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[6] BOEM, *Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf, 2011*, Table 1 (Nov. 2011) ("*2011 Assessment*"), http://www.boem.gov/uploadedFiles/2011_National_Assessment_Factsheet.pdf.

[7] *Id.*

[8] EIA, Crude Oil Production Statistics, http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=A.

[9] EIA, *Annual Energy Outlook 2010*, at 75, Table A11 (April 2010) (Reference Case), http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2010).pdf.

[10] EIA, *Short-Term Energy Outlook*, at Table 1 (Nov. 9, 2010), ftp://ftp.eia.doe.gov/forecasting/steomonthly/nov10.pdf.

[11] *See* EIA, *Short-Term Energy Outlook*, at 4 (Dec. 8, 2009), http://www.eia.gov/forecasts/steo/archives/dec09.pdf.

[12] EIA, *Annual Energy Outlook 2012 Early Release* (January 2012), (continued…)

continued development of domestic resources, imported oil is projected to fall by nearly 1.6 million barrels a day between 2009 and 2020.[13]

Oil and natural gas currently supply more than sixty-three percent of our nation's energy,[14] and according to Government estimates will still contribute fifty-seven percent of our nation's energy in 2035.[15] Thus, the development of domestic oil and gas supplies remains the centerpiece of our country's efforts to reduce dependence on foreign sources.

Taking into account production to date, reserves, future reserves appreciation and undiscovered technically recoverable resources, the federal government estimates that the OCS contains 240 billion barrels of oil equivalent, only twenty percent of which has been produced to date.[16] 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).

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http://www.eia.gov/oiaf/aeo/tablebrowser/#release=EARLY2012&subject=8-EARLY2012&table=11-EARLY2012&region=0-0&cases=early2012-d121011b.

[13] *Id*.

[14] EIA, *Annual Energy Outlook 2012 Early Release Overview* (January 2012), Figure 8, http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2012).pdf.

[15] *Id*. Renewable energy sources are starting from a small base, and expected to supply only eleven percent of the nation's energy needs in 2035. *Id*.

[16] *2011 Assessment* at 3.

Furthermore, any delays in federal decision making would 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.[17] The industry adds more than $1 trillion annually to the national economy.[18] Development of oil and gas resources offshore Alaska would create through the year 2057 an annual average of 54,700 new jobs — 26,200 of them in Alaska — with $145 billion in new employee payroll, including $63 billion in Alaska.[19]

OCS leasing and development also contributes substantially to the Federal Treasury. A 2010 report recognized that "[s]ince 1953, the Federal Government has received approximately $200 billion in lease bonuses, fees, and royalty payments from OCS oil and gas operators," and in the previous year alone received $6 billion.[20] OCS royalty payments have historically provided the largest non-tax source of revenue to the Government.[21]

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17 *The Economic Impacts of the Oil and Natural Gas Industry on the U.S. Economy: Employment, Labor Income and Value Added*, at 1 (Sept. 8, 2009), http://www.api.org/Newsroom/upload/Industry_Economic_Contributions_Report.pdf.

18 *Id*. at 2.

19 *Potential National-Level Benefits of Alaska OCS Development* (Feb. 2011), at pp. ES-3, 11; http://www.northerneconomics.com/pdfs/ShellOCS/National%20Effects%20Report%20FINAL.pdf.

20 *Safety Report* at 4.

21 http://www.gomr.boemre.gov/homepg/regulate/environ/studies/2004/2004-

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For all these reasons, planned OCS activities that have been evaluated and approved by the Interior Department should not be lightly impeded. Congress's desire for prompt action is evidenced throughout the OCS Lands Act, and particularly in connection with exploratory drilling, with respect to which Congress mandated specific, short deadlines for governmental approval decisions, and a very high bar to any disapprovals. Absent clear evidence of a substantial statutory violation, which petitioners fail to provide, interference with the approval of Shell's revised exploration plan would fly in the face of the congressional judgments enshrined in that statutory scheme.

II. Congress Explicitly Provided For The Prompt Review And Approval Of Exploration Plans.

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 Interior Department 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.

OCS oil and gas activities are divided into four stages: the five-year leasing program; the lease sale; the exploration phase; and the development and production

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phase. *See Sec'y of the 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. § 1331(b), much of whose authority is delegated to the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE"), *see* 30 C.F.R. § 250.101.[22]

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 ("EIS") prepared in connection with both the antecedent five-year leasing program(s) and the antecedent lease sale(s).

[22] BOEMRE, on October 1, 2011 was divided into the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement. *See* 76 Fed. Reg. 64,432 (Oct. 18, 2011). Amici refer herein to BOEMRE, the agency in existence at the time of exploration plan approval, and to the regulations in effect at that time.

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). 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 EIS.

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).[23] 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.[24] Thus, the required preparation of an EIS does not delay the effective date of the program or activities thereunder.

2. Application Here.

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, backed by a 1,001-page EIS. (AR Docs. 11, 12). The 2002-07 program provided for, and the EIS analyzed, *inter alia*, three lease sales in the Beaufort Sea. *Id.*

Neither petitioners nor anyone else filed a lawsuit challenging any aspect of the 2002-07 five-year leasing program. Thus, the adequacy of the five-year program's environmental and related analyses, as well as the Secretary's rationales for deciding to include the Beaufort Sea in the leasing program, cannot now be challenged.[25]

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[23] 43 U.S.C. § 1344(c)(3).

[24] *See generally* BOEMRE, Past Five Year Leasing Program Information, http://www.boemre.gov/5-year/history.htm.

[25] Any such challenge would have to have been brought in the D.C. Circuit, pursuant to 43 U.S.C. § 1349(c)(1).

The lack of challenge is striking, given that legal challenges had been filed with respect to three earlier (and the one subsequent) five-year leasing programs, and in some cases, the Secretary was required to perform additional environmental or related studies (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 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*, 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 EIS and related analyses for a particular sale

[26] *See Center for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir. 2009); *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).

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] The Interior Department in 2003 prepared a four-volume EIS 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). (AR Docs. 14-18).

This EIS 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." (AR Doc. 15, 14th page). In addition,

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[27] *See, e.g.*, AR Docs. 14-18.

[28] BOEM, Alaska Region Lease Sales ("*Alaska Lease Sales*"), http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Regional_Leasing/Alaska_Region/Alaska_Lease_Sales/Alaska%20Lease%20S

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given the time lag between the 2003 EIS and the 2005 and 2007 lease sales, the Interior Department also prepared supplemental environmental assessments for Lease Sales 195 (AR Doc. 20) and 202 (AR Doc. 26).

Lease Sales 186 and 195 took place as scheduled, with 34 leases sold in Lease Sale 186, and 117 leases sold in Lease Sale 195.[29] No legal challenges were filed by petitioners or any other party to these sales. Thus, the adequacy of the EIS prepared with respect to all the Beaufort Sea lease sales, and of the supplemental environmental assessment prepared with respect to Lease Sale 195, are not subject to challenge.

The leases issued in Lease Sale 202 in 2007 were simply blocks that had been made available, but 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. *Id*. Two entities (neither a petitioner here) did bring a legal challenge against Lease Sale 202, notwithstanding their failure to have challenged either of the earlier Beaufort Sea sales. This legal challenge was rejected by the Alaska district court and this Court. *North Slope Borough.*

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ale%20Summary%20Table.pdf.

[29] *See Alaska Lease Sales*.

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*, 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 makes perfect sense. Exploratory drilling takes place after the Secretary has prepared EISs 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 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.[30]

Once the lessee's wells are completed and tested, they typically are 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

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

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 typically cut and removed to a designated depth below the sea floor. *See* 30 C.F.R. §§ 250.1715, 250.1716.

Over sixteen thousand OCS exploratory wells have been drilled on the OCS pursuant to approved exploration plans.[31] Only four completed lawsuits have challenged an exploration plan approval, all filed in this Court. None has ultimately led to the exploration plan being invalidated. *See Native Vill. of Point Hope v. Salazar*, 378 F. App'x 747, 2010 WL 1917085 (9th Cir. 2010) (unpublished opinion) (rejecting on the merits challenge to Beaufort Sea and Chukchi Sea exploration plans); *Trustees for Alaska v. U.S. Dep't of Interior*, 967 F.2d 591, 1992 WL 133101 (9th Cir. 1992) (unpublished opinion) (rejecting as moot challenge to Beaufort Sea exploration plan); *Trustees for Alaska v. U.S. Dep't of Interior*, 919 F.2d 119 (9th Cir. 1990) (challenge to Chukchi Sea exploration plan transferred due to lack of jurisdiction); *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), *vacated and withdrawn*, 559 F.3d 916 (9th Cir. 2009), *dismissed as moot*, 571 F.3d 859 (9th Cir. 2009) (opinion withdrawn, exploration plan subsequently withdrawn and case dismissed as moot).

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[31] BOEMRE/BOEM statistics, http://www.gomr.boemre.gov/PDFs/2009/2009-022.pdf; http://www.boem.gov/uploadedFiles/AlaskaWellsDrilledByYear.pdf; http://www.gomr.mms.gov/homepg/offshore/atlocs/atlleas.html; http://www.boemre.gov/omm/Pacific/offshore/currentfacts.htm.

2. Application Here.

Thirty OCS exploratory wells have already been drilled in the Beaufort Sea pursuant to approved exploration plans,[32] at least seven in the vicinity of Shell's proposed exploration.[33] Shell proposes to drill four exploratory wells on three leases Shell acquired in the 2005 and 2007 lease sales.[34]

Shell submitted a plethora of information in connection with its revised exploration plan, including a detailed environmental impact analysis, and numerous environmental safeguards and mitigation measures, with additional safeguards imposed by BOEMRE.[35] Shell's revised exploration plan sets forth multiple additional environmental enhancements over those included in the 2010 Beaufort Sea exploration plan whose approval this Court previously upheld. By way of example:

— Shell will no longer discharge selected waste streams during drilling operations, even though they are permitted discharges, but will instead collect and barge them to a licensed disposal facility on the mainland.[36]

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[32] BOEM Statistics, http://www.boem.gov/uploadedFiles/AlaskaWellsByPlanningArea.pdf.
[33] AR Doc. 648, at p. 7.
[34] AR Doc. 161, at p. 1-1.
[35] *See* AR Docs. 161, 654.
[36] AR Doc. 161, at p. 1-3.

— Offshore wells employ a Blowout Preventer ("BOP") whose systems typically allow activation of selected components to sever the drill pipe and seal off the wellbore were that to become necessary due to a loss of well control. Shell's revised exploration plan proposes to employ two shearing rams in the BOP for added redundancy, and the capacity to activate the BOP using remotely operated vehicles.[37]

— In the highly unlikely event of a loss of well control and inoperability of the BOP, Shell will now have on site a capping system capable of either sealing the well against further flow, or attaching one or more devices to the well and diverting flow to surface vessels equipped for the separation and disposal of hydrocarbons.[38]

— Should the foregoing measures somehow prove insufficient, and the original drilling rig be damaged and unable to drill a relief well, a second drilling vessel will be available, in Alaska, to perform that function.[39]

The Secretary prepared a 238-page environmental assessment of Shell's revised exploration plan, which explicitly relied upon, *e.g.*, the EIS prepared for the three Beaufort Sea lease sales, the two supplemental environmental

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37 AR Doc. 181, at p. 12-3.

38 SER241.

39 SER242.

assessments that had been prepared for the latter two of those sales, the draft EIS prepared in 2008 that addressed proposed future lease sales in the Beaufort Sea, and the environmental assessment prepared for Shell's 2010 Beaufort Sea exploration plan.[40]

BOEMRE was also guided by and relied upon the multiple environmental analyses and the many resultant additional environmental protections stemming from the Deepwater Horizon incident. Petitioners' claim that BOEMRE or Shell failed to "take to heart the lessons learned from the Deepwater Horizon incident" (Pet. Br. 3) is thoroughly belied by the facts.

Shortly after the Deepwater Horizon spill, the Government initiated a comprehensive program of investigation and regulation "to specifically address issues potentially raised by the incident involving the Deepwater Horizon."[41] The Government reviewed the regulatory controls governing offshore drilling in light of the Deepwater Horizon spill and reported "a set of interim recommendations . . . to address specific policies, practices, and procedures . . . for workplace and environmental safety, even before completion of the investigation into the [Deepwater Horizon blowout]." *Safety Report* at 18.

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[40] SER34.

[41] Dep't of the Interior, *Deepwater Drilling Rig Inspection Report*, at 1 (May 11, 2010), http://www.doi.gov/deepwaterhorizon/upload/05-11-10-MMS-Deepwater-Horizon-Rig-Inspection-Report.pdf.

Over the next five months, the Government issued a series of notices and final rules, many of which directly addressed the environmental risks asserted by petitioners. To wit, the Government directed, *inter alia*, (1) new informational requirements for proposed and existing drilling plans regarding blowout and worst case discharge scenarios;[42] (2) the immediate imposition on an interim final rule basis of "Increased Safety Measures for Energy Development on the Outer Continental Shelf," which include new "drilling regulations related to well control, including: subsea and surface blowout preventers, well casing and cementing, secondary intervention, unplanned disconnects, recordkeeping, well completion, and well plugging," 75 Fed. Reg. 63346, 63346 (Oct. 14, 2010), the purpose of which is to "ensure that there are additional physical barriers in the well to prevent oil and gas from escaping into the environment . . . [and which] will considerably decrease the likelihood of a loss of well control," *id*. at 63353; (3) the immediate imposition on an interim final rule basis of the requirement that lease operators "develop and implement Safety and Environmental Management Systems" in order to identify and address environmental hazards, 75 Fed. Reg. 63610, 63610 (Oct. 15, 2010); (4) "plans and schedules for conducting [enhanced Government] safety

[42] Notice to Lessees No. 2010-N06, http://www.boem.gov/Regulations/Notices-To-Lessees/Notices-to-Lessees-and-Operators.aspx.

inspections of all deepwater drilling facilities;"[43] and (5) new informational requirements regarding lease operators' available spill response and well containment resources.[44]

Among the many steps directly aimed at preventing oil spills were: the mandatory adoption of API's "Standard for Isolating Potential Flow Zones during Well Construction;" requiring the submittal of a certification by a professional engineer that a lessee's casing and cementing program is appropriate for the purposes for which it is intended under expected wellbore pressure; requiring two independent test barriers across each flow path during well completion, as certified by a professional engineer; requirements for independent third party verification that the blind-shear rams in the blowout preventer are capable of cutting any drill pipe in the hole under maximum anticipated surface pressure; a requirement for maintaining a remotely operated vehicle and trained crew on each floating drilling rig on a continuous basis; and requirements for the documentation of subsea blowout inspections and maintenance according to API standard "Recommended

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[43] BOEMRE, *Modifications to Suspension of Deepwater Drilling Operations: Environmental Assessment and Finding of No Significant Impact* ("*Environmental Assessment*") (October 2010), http://www.boemre.gov/eppd/PDF/EAModificationsSuspension10122010.pdf.

[44] Notice to Lessees No. 2010-N10, http://www.boem.gov/Regulations/Notices-To-Lessees/Notices-to-Lessees-and-Operators.aspx.

Practices for Blowout Prevention Equipment Systems for Drilling Wells." *See* 75 Fed. Reg. at 63346 *et seq*.

In addition, the Government prepared an Environmental Assessment of resuming deepwater drilling in light of the new regulatory requirements that "were not in effect at the time of the [Deepwater Horizon] blowout, but will apply to all future applicable drilling activities," *Environmental Assessment* at 26, focusing on the "[s]ubstantial improvements in safety, well containment, and response measures, technologies and operational improvements [that] have occurred since the [Deepwater Horizon] Macondo well blowout on April 20, 2010." *Id*. at 23. The Assessment concluded that "[t]he probability of a catastrophic spill from drilling deepwater exploration and development well[s] remains very low, even remote" and "[t]he knowledge gained and proactive steps taken since the Macondo well blowout further reduces that probability." *Id*. at 34, 35.

BOEMRE appropriately concluded in its Environmental Assessment of Shell's revised Beaufort Sea exploration plan that environmental conditions at the proposed drill sites do not deviate from the general conditions described in the Beaufort Sea lease sale EIS; that there are no indications from recent studies or site-specific information that the prospect areas differ from what was generally described in that EIS; and that no sensitive seafloor biological communities or habitats have been identified at the proposed drill sites.

D. Development And Production.

1. Legal Requirements.

The fourth and final phase of the OCS process, development and production, will be reached by Shell only if the company's exploratory efforts discover commercially recoverable quantities of hydrocarbons. Unlike exploration, development and production typically entails the construction of a production platform, the installation of processing equipment, and the laying of pipelines (or the integration into existing 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 with the Secretary's approval. 43 U.S.C. § 1351; see *also* 30 C.F.R. § 250.201(a)(2), (3). The lessee's development and production plan must set forth *inter alia* the specific work to be performed; all proposed facilities and operations; the environmental safeguards to be implemented; the safety standards to be met and how such standards are to be met; and an expected rate of development and production and a time schedule for performance. 43 U.S.C. § 1351(c); 30 C.F.R. §§ 250.105, 250.201, 250.241-250.262.

The OCS Lands Act 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 EIS. 43 U.S.C. § 1351(e)(1). The deadline (sixty days) for the Secretary to approve, disapprove, or require modifications of the plan is triggered only after the release of the final EIS. 43 U.S.C. § 1351(h).

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 original and revised exploration plans, has operated as Congress intended, and there is no basis for judicial interference with that process now.

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

Petitioners seek to challenge the approval of Shell's exploration plan as "arbitrary and capricious," *see* Pet. Br. 34, a standard of review that is "narrow, and [a court does] not substitute [its] judgment for that of the agency." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (citations and quotation marks omitted). Petitioners' burden here is even greater, because by law "the Secretary *shall approve* [an OCS exploration] 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).

None of the arguments advanced by petitioners approach either the APA or the OCS Lands Act standards.

B. BOEMRE Was Entitled To Provide "Conditional" Approval.

Petitioners' contention that BOEMRE's exploration plan approval decision could not be conditioned on Shell's providing additional information about its capping and containment system (Pet. Br. 47) lacks a factual basis and is also irreconcilable with both long established case law and a specific regulatory provision. First, the capping and containment system was not itself required to be part of the exploration plan, so the Government's treatment of it cannot provide a basis for challenging that plan approval, *see* Shell Br. 26.

Second, imposing a condition on an approval decision is appropriate as long as the condition is rational and consistent with the Secretary's statutory and regulatory powers to regulate offshore oil and gas activities, the terms of the lease, and the Government's contractual obligations as a lessor. "The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval." *Southern Pac. Co. v. Olympian Dredging Co.*, 260 U.S. 205, 208 (1922); *accord Drummond v. United States*, 34

F.2d 755, 759 (8th Cir. 1929) ("The Secretary of the Interior was not compelled to permit Crow to sell her undivided interest to Penn free of restrictions if she was to sell at all….[T]he right to withhold consent includes the right to impose conditions.")

Third, BOEMRE regulations explicitly provide for conditional approvals of exploration plans, *see* 30 C.F.R. § 250.233(b)(1).[45]

It is more than a little ironic that environmental NGOs like petitioners would purport to fault the Government for imposing environmentally protective requirements as a condition to a Governmental approval. Petitioners clearly hope to force the Government and Shell into a temporal loop in which every slight adjustment desired by the Government would require that the plan be "modified" and resubmitted and the entire approval process restarted. One can hardly imagine a system less consonant with Congress's insistence upon expeditious OCS exploration and development.

C. Shell Has An Approved Oil Spill Response Plan.

Petitioners' claim that 30 C.F.R. § 250.219 was violated because Shell does not have an approved oil spill response plan is simply wrong. Shell does have an approved plan pursuant to 30 C.F.R. § 254.2, *see* ER535a, which the Government

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[45] Nor does the capping system constitute "new or unusual technology," given the Government's conclusion that comparable existing systems have been used in (continued…)

has never found inadequate or cancelled. The regulations nowhere require that Government action have been taken on Shell's proposed revisions to that plan (AR Doc. 64) prior to exploration plan approval.

D. BOEMRE's Estimate For The Time Necessary To Drill A Relief Well Was Not Arbitrary Or Capricious.

Nothing could be more firmly committed to agency expertise and judgment than BOEMRE's estimate of the time needed to drill a relief well in the extremely unlikely event that one were necessary. BOEMRE had before it a more than ample factual explanation from Shell as to how quickly that well could be drilled, and BOEMRE's acceptance of that data does not approach being arbitrary or capricious. *See* Gov. Br. 43-48, Shell Br. 39-43.

IV. Petitioners Fail To Satisfy The Test For The Relief They Seek.

Petitioners' request that the plan approval decision be set aside or vacated (*see* Pet. Br. 57) constitutes a request for injunctive relief barring the drilling activities pending additional environmental review. *See*, *e.g.*, *PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed. Cir. 2004) ("[R]elief in the form of an order setting aside the [decision] . . . is tantamount to a request for injunctive relief.") (citing *Samuels v. Mackell*, 401 U.S. 66, 71–73 (1971) for the proposition that when "the practical effect of the two forms of relief will be virtually identical,"

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the Gulf of Mexico, *see* ER276.

the propriety of the relief "should be judged by essentially the same standards"); *see generally Virgin Is Tel. Corp. v. FCC*, 444 F.3d 666, 671–72 (D.C. Cir. 2006) ("set aside" and "vacate" are synonymous); *cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. __, 130 S. Ct. 2743, 2756, 2761 (2010) (finding, *inter alia*, injunction superfluous where vacatur ordered by the district court had the same practical effect, and propriety of vacatur was not challenged before the Court).

"[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Because "[a]n injunction is a matter of equitable discretion[,] it does not follow from success on the merits as a matter of course." *Id.* at 32. Indeed, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). *See also Winter*, 555 U.S. at 31–33 (injunction inappropriate even assuming a NEPA violation arising out of the Government's failure to prepare an EIS).[46] The OCS Lands Act itself presumes

[46] *Winter* postdates all of the case law relied upon by petitioners, *see* Pet. Br. 57-59.

judicial discretion in ordering relief. *See* 43 U.S.C. § 1349(c)(6) (listing relief court "may" order).

"[A] court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *see also Winter*, 555 U.S. at 32 ("[T]he balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent.").

A. Petitioners' Speculative Environmental Harm Is Greatly Diminished By History And Extensive Government And Private Industry Mitigation Measures.

Relying largely upon the Deepwater Horizon spill, petitioners assert that their use and enjoyment of the Alaska offshore for subsistence, cultural, and recreational purposes will be adversely affected by Shell's exploration activities. *See* Pet. Br. 25, 30-33. No one questions that the Deepwater Horizon was a tragic accident. Nonetheless, historically "there have been relatively few major oil spills from offshore oil and gas operations in the U.S. and around the world." *Safety Report* at 5. Given the history of offshore (and deepwater) drilling, petitioners' hypothesized increased risk of environmental harm due to the Deepwater Horizon spill represents little more than recency bias. *Environmental Assessment* at 29, 34 (noting history of deepwater drilling "[s]ince the early 1970s").

Moreover, petitioners ignore the Government's and private industry's extensive mitigation measures undertaken to reduce the risk of similar future events and resulting environmental harms, *see* pp. 20-23, *supra*, which greatly diminish any entitlement to extraordinary relief. *See, e.g.*, *Monsanto*, 130 S. Ct. at 2760 (government limitations on future actions may reduce or eliminate claimed injury); *cf. Winter*, 555 U.S. at 22–23 (lower courts failed to consider both voluntary and unchallenged mitigation measures undertaken by the Government in assessing whether injunctive relief was appropriate). Such changes in circumstances have rendered petitioners' already thin veneer of injury purely speculative. *Cf. Winter*, 555 U.S. at 21–23 (injunctive relief may not issue on mere "possibility" of harm).

B. Petitioners' Speculative Harm Is Greatly Outweighed By The Harm To The Public Interest.

"[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation omitted). Here, the OCS Lands Act explicitly establishes as a deep public interest the expeditious development of OCS oil and gas resources, *see* pp. 3-4, *supra*. Yet granting petitioners' requested relief in this case would delay oil and gas operations in the Alaska OCS and thus threaten future domestic production. This is no small matter, given the country's recent yet still blossoming strides toward energy self-sufficiency, to which Alaska offshore production would

make a very meaningful contribution. *See* pp. 4-6, *supra* (documenting recent gains in domestic oil production and the estimated size of the Alaska OCS resources).

C. Delay Would Have A Serious And Negative Economic Impact, Especially On the Alaska Local Economy.

Petitioners' attempt to forestall Alaska OCS drilling activities would result in particular economic damage to the local economy, resulting in the loss of an average of 26,200 jobs in Alaska over the next 35 years, including $63 billion in Alaska in new employee payroll. *See* p. 7, *supra*. This is precisely the kind of economic harm that strongly counsels against injunctive relief. *See Delaware Dep't of Natural Res. & Envt'l Control v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 2d 546, 563 (D. Del. 2010) (the public interest would be undermined by injunctive relief that would impose "harm [on] the local economy" by reducing ports' shipping capacity and thus "economic vitality").

D. Petitioners' Alleged Harm Is Outweighed By The Damage That Would Be Caused To The Government And To Shell.

Also weighing against petitioners' discounted claims of harm are the Government's and Shell's significant financial, contractual and reliance interests in the exploration of the Beaufort Sea. *See Amoco Prod.*, 480 U.S. at 545 (hypothetical environmental harm outweighed by "committed" oil company investments). The Government receives significant revenue from both the OCS

lease sales and production royalties. *See* p. 7, *supra* (Government revenues of approximately $200 billion). In exchange, lessees obtain valuable contractual and property interests in the purchased leases. *See, e.g.*, *Mobil Oil Exp. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000); *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975). All of these interests would be undermined by the delay that petitioners' requested relief would cause.

These costs are particularly acute in the Alaska OCS, where the drilling season is short, and a lessee must spend, months in advance, hundreds of millions of dollars preparing for drilling operations, including chartering drill ships and bringing them to Alaska. Petitioners' proposed relief would eviscerate Shell's (and similarly situated lessees') rational reliance interests. *Cf. Idaho Power Co. v. FERC*, 312 F.3d 454, 460 (D.C. Cir. 2002) (finding injury where plaintiff requested "an agency [action] that replaces a certain [contract] outcome with one that contains uncertainty").

Coupled with the public interests outlined above, the injuries to the Government's and Shell's interests strongly weight the balance of harms against issuance of petitioners' requested relief. *See Winter*, 555 U.S. at 23–27 (aggregating harm to non-movants with public interest in denying injunctive relief).

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 Shell's approved revised exploration plan be allowed to move forward. Moreover, petitioners are not entitled to their requested relief even if a statutory violation were found. The petitions should be denied.

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 6,977 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: February 3, 2012

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CERTIFICATE OF SERVICE

I, Steven J. Rosenbaum, a member of the Bar of this Court, hereby certify that on February 3, 2012, I electronically filed the foregoing "Brief Amicus Curiae of The American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Manufacturers, 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