No. 15-71656

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA WILDERNESS LEAGUE, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE EARTH, NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, PACIFIC ENVIRONMENT, RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS (REDOIL), SIERRA CLUB, and THE WILDERNESS SOCIETY,
Petitioners,

v.

SALLY JEWELL, Secretary of the Interior, and
BUREAU OF OCEAN ENERGY MANAGEMENT,
Respondents,

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

Petition for Review of Final Decision of the U.S. Department of the Interior

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MOTION OF THE AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, AND U.S. OIL & GAS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND INTERVENOR-RESPONDENTS

Pursuant to Fed. R. App. P. 29, the American Petroleum Institute ("API") the National Association of Manufacturers ("NAM"), the International Association of Drilling Contractors ("IADC"), and the U.S. Oil & Gas Association ("USOGA") (collectively, the "Associations") respectfully move this Court for leave to file a brief *amici curiae*, supporting the Federal Respondents and

Intervenor-Respondents Shell Gulf of Mexico, Inc. and State of Alaska. The Petitioners, Federal Respondents, and all Intervenor-Respondents have consented to the filing of the Associations' brief.[1] Pursuant to Fed. R. App. P. 29(b), the Associations' proposed brief is attached to this Motion.

As grounds for this motion, *amici* state as follows:

A. The Associations Possesses A Strong Interest In This Proceeding.

API is the primary trade association of the oil and gas industry, and represents a wide spectrum of interests that are part of, or directly affected by, this country's energy industry. API's more than 625 members conduct much of the production, refining, marketing and transportation of petroleum and petroleum products in the United States.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers

[1] Because all parties consent to the filing of the Associations' brief, this Court need not proceed further and may immediately accept the proposed brief for filing. *See* Cir. Advisory Committee Note to Rule 29-3. Nevertheless, as set forth herein, a substantial basis exists for filing the Associations' brief.

and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

IADC's contract-drilling members own most of the world's land and offshore drilling units and drill the vast majority of the wells that produce our planet's oil and gas, including virtually all of the drilling rigs operating in areas under the jurisdiction of the United States. Its membership also includes oil and gas producers, oil service companies, and manufacturers and suppliers of oilfield equipment and services.

USOGA is the nation's oldest oil and natural gas trade association, having represented the industry for nearly 100 years. USOGA is a strong advocate for those who build and sustain the U.S. petroleum industry, including companies of all sizes in the domestic industry; majors, independents, family owned companies, small partnerships as well as single entrepreneurships.

The economic implications of the petition's challenge to the Government's approval of Shell's second revised Chukchi Sea exploration plan are profound. The federal Government recently released an updated assessment estimating that the Chukchi Sea contains over 15 billion barrels of undiscovered oil, economically recoverable at roughly current oil prices, as well as over 76 trillion cubic feet of natural gas. Development of these and other Alaska offshore resources represents an enormous source of new jobs and employee payroll. Association members have

been for decades among the principal developers of Outer Continental Shelf ("OCS") leases throughout the United States, and are among the principal users of the oil and gas produced from those leases. They accordingly possess a substantial interest in this matter.

B. The Associations Offer A Special Perspective On The Issues Before The Court.

Given their members' decades-long involvement with national OCS leasing, exploration and development, the Associations can bring to bear particular insights into the OCS Lands Act's four-stage approval process for offshore oil and gas exploration and development, and the manner in which that process has already operated with respect to the leases whose exploration is at issue here.

The Associations are also uniquely situated to comment upon the broad effect Petitioners' requested relief would have on national energy needs, the oil and gas industry as a whole, and the affected regional and national economies. The broad public and private perspectives articulated in the Associations' proposed brief are particularly relevant to the Court's determination of the balance of harms and public interests implicated by the Petitioners' request to vacate approval of the revised exploration plan.

CONCLUSION

For the foregoing reasons, the Associations respectfully request that the Court grant their motion for leave to file a brief *Amici Curiae* in support of respondents and intervenor-respondents.

Respectfully submitted,

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September 25, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2015, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, and served via the Court's CM/ECF system upon the following:

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September 25, 2015

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BRIEF FOR AMICI CURIAE AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, AND U.S. OIL & GAS ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF INTEREST

The American Petroleum Institute ("API"), National Association of Manufacturers ("NAM"), International Association of Drilling Contractors ("IADC"), and U.S. Oil & Gas Association ("USOGA") (collectively, the "Associations") are not for profit corporations, which have no parent corporation, nor does any publicly held corporation hold any stock in the Associations.

API is the primary trade association of the oil and gas industry, and represents a wide spectrum of interests that are part of, or directly affected by, this country's energy industry. API's more than 625 members conduct much of the production, refining, marketing and transportation of petroleum and petroleum products in the United States.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

IADC's contract-drilling members own most of the world's land and offshore drilling units and drill the vast majority of the wells that produce our planet's oil and gas, including virtually all of the drilling rigs operating in areas under the jurisdiction of the United States. Its membership also includes oil and gas producers, oil service companies, and manufacturers and suppliers of oilfield equipment and services.

USOGA is the nation's oldest oil and natural gas trade association, having represented the industry for nearly 100 years. USOGA is a strong advocate for those who build and sustain the U.S. petroleum industry, including companies of all sizes in the domestic industry; majors, independents, family owned companies, small partnerships as well as single entrepreneurships.

Together with their member companies, the Associations are committed to ensuring a strong, viable U.S. oil and natural gas industry capable of meeting the energy needs of our Nation in an efficient and environmentally responsible manner. Association members have been for decades among the principal developers of Outer Continental Shelf leases throughout the United States, and are among the principal users of the oil and gas produced from those leases.

/s/ Steven J. Rosenbaum
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Dated: September 25, 2015

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For several of the Petitioners, this is a sixth attempt to prevent the oil and gas exploration contemplated in Shell Gulf of Mexico Inc.'s ("Shell") second revised Chukchi Sea exploration plan ("Revised Exploration Plan"), in the face of a series of extensive environmental reviews conducted by the Department of the Interior ("DOI") in compliance with the National Environmental Policy Act ("NEPA").[1] Starting in 2009, NEPA challenges were raised and ultimately rejected or resolved with respect to the offshore leasing program and offshore lease sale through which Shell's underlying Chukchi lease was issued, and to two prior Shell plans for the challenged exploration of its lease. The Bureau of Ocean Energy Management's ("BOEM") May 11, 2015 approval of the Revised Exploration Plan is likewise well considered and no basis exists to impede or delay the well-supported and considered plan.

Moreover, Petitioners' challenge to the approval of the Revised Exploration Plan would frustrate fundamental congressional objectives regarding the timing and character of the four stage approval process for offshore oil and gas activities in the Outer Continental Shelf ("OCS"), and Congress's explicit goal—mandated in the Outer Continental Shelf Lands Act ("OCS Lands Act"), 43 U.S.C. § 1331, *et*

[1] 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.

seq.—of encouraging the "expeditious" exploration and production of OCS oil and gas resources. The Government recently estimated that the Chukchi Sea OCS contains over 15 billion barrels of undiscovered oil, economically recoverable at roughly current oil prices, as well as over 76 trillion cubic feet of natural gas.[2] The exploration of those reserves is critical to national energy goals, and should be allowed to proceed as Congress directed.

ARGUMENT

NEPA is a purely procedural statute that "does not mandate particular results, but simply prescribes the necessary process," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), and "[t]he role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or

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[2] BOEM, *Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf, 2011* (Dec. 2014 Update), Table 1, *available at* http://www.boem.gov/2011-National-Assessment-Factsheet/ (last visited Sept. 24, 2015); *see also Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf, 2011* (Dec. 2014 Update), Map, *available at* http://www.boem.gov/2011-National-Assessment-Map-ATL/ (last visited Sept. 24, 2015). This Court may take judicial notice of government records and materials available on government websites. *See, e.g.*, Fed. R. Evid. 201(b), (d); *Banks v. Warner*, No. 94-56732, 1995 WL 465773, at *1 (9th Cir. Aug. 7, 1995) ("It is entirely proper for a court to take judicial notice of records and reports of administrative agencies."); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) ("fail[ing] to see any merit to an objection to the [Fifth Circuit] panel taking judicial notice of the state agency's own website").

capricious," *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97–98 (1983); *see also id.* at 105 ("Our only task is to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made."). "It is well settled that the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006). As the Federal Defendants and Shell have shown, Petitioners have not overcome this formidable hurdle. *See also Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 901–02 (9th Cir. 2012).

In addition, Petitioners wholly fail to address the requirements of the OCS Lands Act, which governs the approval of a lessee's plan for the exploration of oil and gas resources on the OCS. *See* 43 U.S.C. § 1340(c). Yet the overall structure of oil and gas exploration and development under the OCS Lands Act provides the framework for any challenge to the Government's OCS decisions, and environmental claims lodged against those decisions can only be assessed in reference to the underlying statutory and regulatory requirements. *See N. Slope Borough v. Andrus*, 642 F.2d 589, 598 (D.C. Cir. 1980) (considering NEPA and ESA challenges to OCS lease sale, and concluding "that the Secretary of the Interior complied in substance with all requirements and procedures attendant upon an OCS [Lands Act] leasing project"); *Vill. of False Pass v. Clark*, 733 F.2d 605,

608–09 (9th Cir. 1984) (considering "the structure of oil and gas exploration under [the] OCS [Lands Act]" and the proper applications of NEPA to that structure).

The OCS Lands Act's principles and structure recognize the national importance of expeditious OCS exploration and production and foreclose Petitioners' requests—underlying their petition for review—for an Environmental Impact Statement ("EIS") comprising new, future studies of Petitioners' own devising.

I. The OCS Lands Act Mandates Expeditious Exploration And Development Of The Nation's Critical OCS Oil And Gas Resources.

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); *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).

Accordingly, Congress substantially amended the OCS Lands Act in 1978 for the stated purpose of "promot[ing] the swift, orderly and efficient exploitation

of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."[3] 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). *See also id.* ("The first stated purpose of the Act, then, is to establish procedures to expedite exploration and development of the OCS."). "The [Act's] 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." *Id*.

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 total OCS production represented less than ten percent of total domestic oil production in 1981,[4] the OCS currently accounts for over fifteen percent of all domestic oil production, and contains sixty-nine percent of the estimated oil

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

[4] *See* U.S. Energy Information Administration ("EIA"), Crude Oil Production Statistics, *available at* http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFP5F1&f=M, http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS1&f=M (last visited Sept. 24, 2015).

resources in the remaining undiscovered fields in the United States.[5] This translates to some 89 billion barrels of oil, and 398 trillion cubic feet of natural gas.[6] Among this potential OCS oil and gas, BOEM estimates that the Alaska OCS contains 31 percent of the resources (second only to the Gulf of Mexico OCS).[7]

Likewise, another 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. In 2008, U.S. crude oil production had fallen to the lowest level since 1946.[8] But due largely to a combination of massive private investment and the oil industry's continuous

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[5] *Compare* EIA, *Sales of Fossil Fuels Produced from Federal and Indian Lands, FY 2003 through FY 2014*, Table 3 (July 2015), *available at* http://www.eia.gov/analysis/requests/federallands/pdf/table3_4.pdf (last visited Sept. 24, 2015) *with* EIA, Crude Oil Production, *available at* http://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbl_a.htm (last visited Sept. 24, 2015). *See also, e.g.*, BOEM, *Oil and Gas Energy Program, available at* http://www.boem.gov/Oil-and-Gas-Energy-Program/index.aspx. (last visited Sept. 24, 2015) ("The approximately 33 million leased OCS acres account for . . . about 21 percent of America's domestic oil production.").

[6] *Id*.

[7] BOEM, *Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf, 2011* (Dec. 2014 Update), at 2, *available at* http://www.boem.gov/2011-National-Assessment-Factsheet/ (last visited Sept. 24, 2015).

[8] EIA, *Crude Oil Production Statistics*, *available at* http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfpus1&f=a (last visited Sept. 24, 2015).

development of innovative techniques for locating and producing hydrocarbon resources, that production had risen to 8.72 million barrels a day in 2014,[9] and the EIA expects U.S. crude oil production to reach 10.60 million barrels a day in 2020.[10] By contrast, assuming continued development of domestic resources, imported oil is projected to fall by nearly 2.2 million barrels a day between 2012 and 2020,[11] progressing toward the Congress' stated goal of increased energy self-sufficiency.

Oil and natural gas currently supply more than fifty-three percent of our nation's energy.[12] Notwithstanding progress in the development of alternative energy sources, the federal government predicts that oil and natural gas will still contribute over fifty percent of our nation's energy in 2040.[13] The federal government estimates that the OCS contains 243 billion barrels of oil equivalent,

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9 EIA, *Short-Term Energy Outlook* (April 2015), at Table 4a, *available at* http://www.eia.gov/forecasts/steo/tables/?tableNumber=9# (last visited Sept. 24, 2015).

10 EIA, *Annual Energy Outlook 2015*, at Table A11 (Reference Case), *available at* http://www.eia.gov/forecasts/aeo/pdf/0383(2015).pdf (last visited Sept. 24, 2015)

11 *Id*.

12 *Id*., at Table A1.

13 *Id*. Renewable energy sources are starting from a small base, and expected to supply only roughly ten percent of the nation's energy needs in 2040. *Id*.

less than twenty percent of which had been produced through 2014.[14] 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).

Oil and gas production also has ripple effects throughout the national economy. The oil and gas industry supports 9.8 million full time and part time jobs, accounting for 5.6 percent of total national employment.[15] The industry adds more than $1.2 trillion annually to the national economy.[16] Moreover, OCS leasing and development contributes substantially to federal coffers. For example,

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[14] BOEM, *Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf, 2011* (Dec. 2014 Update), at 5, *available at* http://www.boem.gov/2011-National-Assessment-Factsheet/ (last visited Sept. 24, 2015).

[15] PricewaterhouseCoopers, *The Economic Impacts of the Oil and Natural Gas Industry on the U.S. Economy in 2011*, at E-2 (July, 2013), *available at* http://www.api.org/~/media/Files/Policy/Jobs/Economic_impacts_Ong_2011.pdf (last visited Sept. 24, 2015).

[16] *Id*. Indeed, lessees expend billions of dollars to place their leases into production. *See, e.g.*, BOEM, *Annual Progress Report on the Outer Continental Shelf (OCS) Oil and Gas Leasing Program 2012-2017* (Oct. 2013), at 14, *available at* http://www.boem.gov/Five-Year-Program-Annual-Progress-Report-2013/ (describing "newly sanctioned $4 billion development project" by two lessees in the Gulf of Mexico) (last visited Sept. 24, 2015).

total federal oil and gas revenues from the federal OCS amounted to over $7 billion in FY2014 alone.[17]

In short, it remains the case that the "expedited exploration and development of the [OCS]" serves "to achieve national economic and energy policy goals." 43 U.S.C. § 1802(1). A court should therefore hesitate to impede planned OCS activities that have been reviewed, evaluated, and approved by the Interior Department as required by law.

Indeed, Congress's desire for prompt action is evidenced throughout the OCS Lands Act. In particular, Congress mandated specific, short deadlines for governmental approval decisions concerning OCS exploration plans. Absent clear evidence of a substantial statutory violation, which Petitioners wholly fail to provide here, 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. The OCS Lands Act Forecloses Petitioners' Demands For An EIS And Additional Studies Under NEPA.

The Federal Defendants have thoroughly demonstrated, among other things, that (1) contrary to Petitioners' attempts to dodge NEPA's actual requirements, the

[17] *See* DOI, Office of Natural Resource Revenue, Statistical Information, *available at* http://statistics.onrr.gov/ReportTool.aspx (Reported Revenues (Single Year Only), FY2014, Accounting Year, Federal Offshore, All Offshore Regions) (last visited Sept. 24, 2015).

regulations governing unavailable environmental information do not apply to the Environmental Assessment in this case, *see* Govt. Br. at 28; (2) the allegedly missing information from Interior's past EISs covering exploration and development in the Chukchi Sea relevant to Shell's Revised Exploration Plan has been gathered and considered in the Environmental Assessment of the plan, *see*, *e.g.*, Govt. Br. at 18, 32–33; and (3) Petitioners have utterly failed to identify any subject on which the Environmental Assessment lacked site-specific information, *see* Govt. Br. at 44.

Even if the substance of NEPA's requirements and BOEM's review did not dispose of Petitioners' demands for an EIS and additional scientific studies, the OCS Lands Act forecloses those requests. The OCS Lands Act's statutory scheme fully reflects Congress's desire that the exploration and development of the OCS proceed expeditiously, and build upon environmental information developed at earlier stages of the process. This is exactly what happened here. *See* Govt. Br. at 10–22. The Court should reject Petitioners' efforts to derail the process that has operated precisely as Congress envisioned.

A. Congress Designed the OCS Lands Act's Four-Stage Review Process to Expedite OCS Exploration and Development.

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*

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 ("BOEM").

Congress has specified the environmental analyses and standard for review attendant to each stage and, in the case of exploration plans, the timing of approval decisions.

1. The Five-Year Leasing Program.

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 [OCS], and the potential impact of oil and gas exploration on other resource values of the [OCS] 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; 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). *See* 43 U.S.C. § 1344(c)(3). 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.[18] Thus, the required preparation of an EIS does not delay the effective date of the program or activities thereunder.

The 2007-2012 Five-Year Leasing Program, under which the leases Shell intends to explore issued as part of Lease Sale 193, followed development of an extensive 1,400-page EIS.[19] Although the D.C. Circuit largely rejected a subsequent legal challenge (including by several of the present Petitioners), the court remanded part of the Program for further analysis under the OCS Lands Act.

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[18] *See generally* BOEM, *Past Five Year Programs*, *available at* http://www.boem.gov/Past-Five-Year-Programs/ (last visited Sept. 24, 2015).

[19] BOEM, *Outer Continental Shelf Oil & Gas Leasing Program: 2007-2012*, *Final Environmental Impact Statement April 2007*, *available at* http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/2007-2012-Final-Environmental-Impact-Statement.aspx (last visited Sept. 24, 2015).

Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466 (D.C. Cir. 2009). DOI released the resulting revised Program in 2010 complying with the limited remand order,[20] and the petitioners did not challenge the revised Program.

2. The Lease Sale.

The second stage in the OCS process is the conduct of the lease sales provided for in the previously-adopted five-year program. 43 U.S.C. § 1337(a)(1). "Requirements of [NEPA] . . . must be met first." *Sec'y of the Interior*, 464 U.S. at 338.

As with the five-year leasing 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 environmental analyses. However, as a practical matter, preparation of the environmental 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.[21]

Here, Lease Sale 193 was held in February 2008. With respect to Lease Sale 193, BOEM conducted both a Final Environmental Impact Statement ("FEIS") in

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[20] *See generally* BOEM, *2007-2012 5-Year Program*, *available at* http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/2007-2012-5-Year-Program.aspx (last visited Sept. 24, 2015).

[21] *See, e.g.*, BOEM, 2012-2017 Lease Sale Schedule, *available at* http://www.boem.gov/2012-2017-Lease-Sale-Schedule/ (last visited Sept. 24, 2015).

2007 and, following a NEPA challenge (including by several Petitioners), a Supplemental Environmental Impact Statement ("SEIS") in 2011. Among other things, the 2011 SEIS included an "Analysis of Incomplete or Missing Information" that identified and reviewed the missing information previously identified in the 2007 FEIS. *See* IV-ER-584–682. This Court rejected a further NEPA challenge to the 2011 SEIS, holding that "BOEM has reasonably concluded that the missing information from the FEIS and SEIS is not 'essential' to informed decisionmaking at the lease sale stage." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 498 (9th Cir. 2014).

3. The Exploration Stage.

The third stage of the OCS process, and the one at issue in the instant petitions, 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, "[t]he 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." 43 U.S.C. § 1340(c) (emphasis added).[22]

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 promptly, within thirty days of submittal, and based upon existing available information. In this fashion, Congress sought to fulfill its primary goal—the expeditious exploration of the OCS. Whether or not Petitioners believe that the exploration stage is "a critical juncture in the multi-stage offshore development process," Pet. Br. at 1, is beside the point, because Congress has dictated the content and amount of regulatory review permitted.

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[22] Section 1340(c) requires exploration plan approval unless planned activities "would result in any condition described in section 1334(a)(2)(A)(i)." The most natural reading of this language requires that the planned activity would actually result in the condition, and not merely that it would "probably" cause the condition, the standard set forth in 43 U.S.C. § 1334(a)(2)(A)(i) itself. The choice is irrelevant to the instant litigation, where petitioners' proof falls far short of either standard.

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. Exploratory drilling has a narrow 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. The drill ship or other drilling unit then leaves the area.

Exploratory drilling also 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 to draw upon in making exploration plan approval decisions.[23]

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[23] Only a handful of completed lawsuits have challenged the Secretary's approval of an exploration plan, and none has ultimately led to the exploration plan being invalidated. *See Native Vill. of Point Hope v. Salazar*, 680 F.3d 1123 (9th Cir. 2012); *Inupiat Cmty. of the Arctic Slope v. Salazar*, 486 F. App'x 625 (9th Cir. 2012); *Defenders of Wildlife v. BOEM*, 684 F.3d 1242 (11th Cir. 2012); *Gulf Restoration, Inc. v. Salazar*, 683 F.3d 158 (5th Cir. 2012); *Native Vill. of Point Hope v. Salaza*r, 378 F. App'x 747 (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 challenge to a Beaufort Sea exploration plan as moot); *Trustees for Alaska v. U.S. Dep't of Interior*, 919 F.2d 119 (9th Cir. 1990) (transferring challenge to a Chukchi Sea exploration plan); *N. Slope* (continued…)

Here, BOEM approved both Shell's initial exploration plan in 2009 and a revised exploration plan in 2011. *See* II-ER-39. Both plans were issued with Environmental Assessments. And this Court rejected legal challenges, including one under NEPA, to both plans. *See supra* n.23.

Shell's instant second revised exploration plan was deemed submitted on April 10, 2015, and BOEM approved the plan—consistent with the OCS Land's Act's thirty-day deadline—on May 11, 2011. *See* Govt. Br. at 17. Again, BOEM prepared an Environmental Assessment of approval of Shell's revised exploration plan. As the Federal Respondents have shown, BOEM's approval of Shell's Revised Exploration Plan therefore relied on appropriate environmental analysis in the accompanying Environmental Assessment. *See* Govt. Bt. at 18–21, 37–45.

4. Development and Production.

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 more substantial construction of facilities, which often remain in operation for decades. The legal requirements attendant to development and production are accordingly relevant now only insofar

Borough v. Kempthorne, No. 07-72183 (9th Cir.) (opinion withdrawn, exploration plan subsequently withdrawn and case dismissed as moot, 571 F.3d 859).

as they provide additional insights into congressional intent with respect to the timing and approval of exploratory activities.

Development and production may only proceed with the Secretary's approval. *See* 43 U.S.C. § 1351. The 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. *See* 43 U.S.C. § 1351(c).

The OCS Lands Act also provides BOEM at least 120 days to approve or disapprove a submitted development and production plan for specified—including environmental—reasons. *See* 43 U.S.C. § 1351(g), (h); *see also* 30 C.F.R. § 550.270.

B. The Government Properly Approved Shell's Revised Exploration Plan Pursuant to an Environmental Assessment.

The multi-phase OCS process, including BOEM's review of Shell's Revised Exploration Plan, has operated as Congress intended, and there is no basis for interference with that process now. Indeed, BOEM's considered finding of no

significant impact with respect to Shell's Revised Exploration Plan, and hence that no EIS is necessary with respect to that plan, moots the question whether an EIS should be prepared.

Petitioners are in any event incorrect in contending that an EIS should be prepared under NEPA on the ground that "doubt remains about whether there could be significant impacts to the environment." Pet. Br. at 3. *See also id*. at 6 ("NEPA permits preparation of an environmental assessment rather than a full environmental impact statement in limited circumstances in which there remain no substantial questions whether an action may have significant effects."). By statutorily-requiring that an exploration plan be approved within 30 days, Congress precluded an EIS at this stage of the OCS Lands Act.

In a similar situation, the Supreme Court rejected environmental organizations' contention that a federal agency was required to prepare an EIS prior to the approval and registration of a statement of record and property report under the Interstate Land Sales Full Disclosure Act. *See Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976). 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 the Court held that "[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." *Id*. at 788–89.

Moreover, "while the Secretary [of Housing and Urban Development ("HUD)"] 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 likewise thirty days. Yet an EIS requires that the agency (not the applicant), after preparation and issuance of a draft EIS, undertake a public notice and comment period, including a public hearing, and not issue a final decision for ninety days. *See* 40 C.F.R. §§ 1503.1(a)(4), 1506.6(c), 1506.10(b). Thus, an EIS could never be prepared within the statutorily-required 30 day approval period. And, just as in *Flint Ridge*, it is no answer that the Secretary has the authority to decline to deem an exploration plan complete if it does not contain the information required by departmental regulations, *see* 30 C.F.R. § 550.231, given that no regulation requires the preparation of an EIS at the exploration stage.

Nor does the 30-day approval requirement for exploration plans impermissibly "amend, modify or repeal" NEPA. *See* 43 U.S.C. § 1866. To the contrary, 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 Cnty. v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995) (quoting H. Conf. Rep. No. 765 (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" that Governmental decision making. *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1386 (D.C. Cir. 1981) (Robinson, J., concurring).[24]

Accordingly, the NEPA process could not possibly be completed within thirty days, and Petitioners' desired outcome in this case is foreclosed by congressional policy enacted in the OCS Lands Act.

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[24] *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, *see* 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 EIS—to be performed at that stage.

C. BOEM Properly Approved Shell's Revised Exploration Plan Based Upon Existing Information.

Federal Respondents have fully demonstrated that the environmental information that BOEM analyzed in approving the Revised Exploration Plan was more than adequate, and fully considered. *See*, *e.g.*, Govt. Br. at 16–21, 25–45. In addition, Petitioners' claims that further information should have been gathered and additional analyses performed, *see*, *e.g.*, Pet. Br. at 2 ("Now that the Bureau has reached the critical next stage, . . . it has failed to address in the EA the problem of missing information."); *id*. at 31, are hopelessly irreconcilable both with Congress's explicit mandates that exploration plan approval decisions be made within the 30-day statutory deadline for such approval decisions, *see supra*; *see also N. Slope Borough*, 642 F.2d at 605 ("The Secretary [of Interior] plainly cannot be expected or required to wait until the totality of environmental effects is known."), and be based upon "***available*** relevant environmental information . . ." 43 U.S.C. § 1346(d) (emphasis added). With respect to the approval of Shell's Revised Exploration Plan, that existing information includes the new site-specific scientific information noted by the Federal Respondents, *see*, *e.g.*, Govt. Br. at 18–21.

CONCLUSION

The petition for review 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 5,147 words, excluding the parts of the brief exempted by Fed. R. App. 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 using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2015, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, and served via the Court's CM/ECF system upon the following:

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