No. 18-73400

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Petitioners,

v.

DAVID BERNHARDT, SECRETARY OF THE INTERIOR, et al.,
Respondents,

and

HILCORP ALASKA LLC,
Intervenor.

On Petition for Review from the Bureau of Ocean Energy Management

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GLOSSARY

APA	Administrative Procedure Act
BOEM	Bureau of Ocean Energy Management
DPP	Development and Production Plan
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLIR	Forward-Looking Infrared Cameras
Hilcorp	Hilcorp Alaska LLC
ITR	Incidental Take Regulation (MMPA)
ITS	Incidental Take Statement (ESA)
MMPA	Marine Mammal Protection Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
OCSLA	Outer Continental Shelf Lands Act
RPMs	Reasonable and Prudent Measures
The Service	U.S. Fish and Wildlife Service

INTRODUCTION

The Bureau of Ocean Energy Management ("BOEM") of the U.S. Department of the Interior has conditionally approved the "Liberty project," an offshore oil drilling and production facility to be built on a small artificial island off Alaska's North Slope. Petitioners filed this petition for review to challenge that approval and the related biological opinion prepared by the U.S. Fish and Wildlife Service (the "Service") under the Endangered Species Act ("ESA"). Petitioners' challenge fails because BOEM's analysis of the potential greenhouse gas emissions of this project was exhaustive, and the Service's biological opinion fully complies with the law. Accordingly, the petition for review should be denied.

STATEMENT OF JURISDICTION

(a) This petition challenges BOEM's conditional approval of a development and production plan under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1351. The petition also challenges a biological opinion prepared by the U.S. Fish and Wildlife Service under the ESA, 16 U.S.C. § 1531.

(b) This Court has original jurisdiction over the challenge to BOEM's approval pursuant to 43 U.S.C. § 1349(c)(2). The Court also has jurisdiction over the challenge to the Service's biological opinion because it is intertwined with BOEM's conditional approval. *See American Bird Conservancy v. FCC*, 545 F.3d 1190, 1191 (9th Cir. 2008). But as explained in Part III of the Argument below, the Court lacks jurisdiction over the claim that BOEM's conditional

approval violated the ESA, because Petitioners failed to give the 60-day notice required by the ESA's citizen's suit provision, 16 U.S.C. § 1540(g)(2)(A)(i).

(c) BOEM issued its conditional approval on October 17, 2018. 1 E.R. 1–5. The 60th day thereafter was Sunday, December 16, 2018, and the petition for review was filed on Monday, December 17, 2018. DktEntry 1-4. The petition is timely under 43 U.S.C. § 1349(c)(3).

STATEMENT OF THE ISSUES

1. Did BOEM's analysis of the greenhouse gas emissions of the Liberty project comply with NEPA?

2. Did the Fish and Wildlife Service's biological opinion comply with the ESA?

3. Does this Court lack jurisdiction over Petitioners' ESA claim against BOEM, where Petitioners failed to provide the 60-day notice to BOEM required by the ESA as a prerequisite for jurisdiction?

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations that were not contained in the addendum to Petitioners' opening brief are provided in the addendum following this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Outer Continental Shelf Lands Act ("OCSLA")

Congress has declared that the oil and natural gas reserves beneath the "Outer Continental Shelf"—defined as "all submerged lands" beyond the

lands reserved to the States up to the edge of the United States' jurisdiction and control, 43 U.S.C. § 1331(a)—are "a vital national resource." *Id.* § 1332(3). It enacted OCSLA to make those reserves "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." *Id.*

OCSLA divides the process of oil and gas exploration and development on the Outer Continental Shelf into four stages: (1) the Department of the Interior develops a "five-year leasing program"; (2) Interior holds lease sales (through a competitive sealed-bid auction); (3) lessees file exploration plans to obtain approval to conduct exploration; and (4) if valuable oil and gas deposits are discovered, lessees file "development and production plans" ("DPPs") so that they may produce oil and gas from their leaseholds. 43 U.S.C. §§ 1337, 1340, 1344, 1351.

2. National Environmental Policy Act ("NEPA")

NEPA, 42 U.S.C. §§ 4321 et seq., is a procedural statute designed to foster better and more informed decisionmaking by federal agencies. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (holding that NEPA's mandate is "essentially procedural" and is meant only "to insure a fully informed and well-considered decision"). NEPA requires federal agencies to prepare an "environmental impact statement" ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). Once a reviewing court is satisfied that the agency "has

taken a 'hard look' at a decision's environmental consequences," judicial review "is at an end." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

3. Endangered Species Act ("ESA")

Section 7(a)(2) of the ESA requires every federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of" its designated critical habitat. 16 U.S.C. § 1536(a)(2). The ESA requires federal agencies to carry out that duty "in consultation with" the U.S. Fish and Wildlife Service or the National Marine Fisheries Service ("NMFS"), depending on the species. *Id.* Following formal consultation, the Service (or NMFS) prepares a "biological opinion" that determines whether the proposed action is likely to cause "jeopardy" for any listed species (or the destruction or adverse modification of critical habitat). *Id.* § 1536(b).

4. Marine Mammal Protection Act ("MMPA")

The MMPA is the principal federal statute protecting marine mammals (including polar bears). 16 U.S.C. § 1361. The MMPA prohibits the "taking" of any marine mammal, subject to certain exceptions. *See* 16 U.S.C. § 1371(a), 1372(a)(2)(A). The MMPA authorizes the Interior to promulgate "incidental take regulations" that allow the taking of marine mammals where Interior is "assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter." *Id.* § 1371(a)(3)(A).

5. ESA Section 4(d) Regulations for the Polar Bear

While the conservation of the polar bear has been managed under the MMPA for decades, it was also listed as a "threatened" species under the ESA in 2008. 73 Fed. Reg. 28,212 (May 15, 2008). At the time of listing, the Service promulgated a rule under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), that "synchronizes the management of the polar bear under the ESA with management provisions under the MMPA" and ensures that the MMPA remains "the primary regulatory mechanism" for managing polar bears. 78 Fed. Reg. 11,766, 11,768 (Feb. 20, 2013) (codified at 50 C.F.R. § 17.40(q)).

B. Factual background

There is oil under the Beaufort Sea along the northern coast of Alaska. 2 E.R. 119. To develop and produce that oil, intervenor Hilcorp Alaska LLC ("Hilcorp") proposes to build the "Liberty project," a small artificial island in Foggy Island Bay, where it will drill oil wells and install production facilities, and then transport the extracted oil to shore through an undersea pipeline. *Id.* Hilcorp anticipates production of about 120 million barrels of oil over the project's 25-year-life. 2 E.R. 119, 127; 3 E.R. 464. The Liberty project will be the seventh such artificial island built in the Beaufort Sea (but the first in federal waters). 1 S.E.R. 2.

BOEM conditionally approved a development and production plan for the Liberty project under OCSLA on October 17, 2018. 1 E.R. 1–5. Before approving the plan, BOEM prepared an environmental impact statement under NEPA and consulted with both the Service and NMFS under the ESA.

The Service and NMFS issued biological opinions. 1 E.R. 25–115; 3 E.R. 468–710. Both agencies found that the Liberty project is not likely to jeopardize the continued existence of any threatened or endangered species (or to destroy or adversely modify its designated critical habitat). 1 E.R. 90–91; 3 E.R. 666.

BOEM imposed conditions on its approval of Hilcorp's development and production plan that require Hilcorp to obtain a series of permits and approvals before it can begin construction and operation of the Liberty project; these include "letters of authorization" under the MMPA from the Service and NMFS. 1 E.R. 1. Hilcorp has not obtained all of those permits and approvals, and so Hilcorp has not yet begun construction of the project.

Petitioners filed a petition for review of BOEM's conditional approval of this development and production plan and the Service's biological opinion on December 17, 2018.

SUMMARY OF ARGUMENT

1. BOEM's analysis of the greenhouse gas emissions of the Liberty project complied with NEPA. Specifically, BOEM completed a comprehensive analysis of the effects of this project, its alternatives, and the "no action" alternative on greenhouse gas emissions. That analysis ensured that BOEM's decision was "fully informed and well-considered" and was more than adequate to meet NEPA's requirements. BOEM found that the "no action" alternative would actually result in greater greenhouse gas emissions because U.S. energy consumers would rely more heavily on foreign oil to meet their energy needs. BOEM rationally concluded that it was not feasible to estimate

how the "no action" alternative would affect greenhouse gas emissions in foreign countries, because the only way to reliably estimate that effect would be to build a model that simulates the energy market of every country in the world. NEPA does not require BOEM to undertake that impossible task.

2. The Fish and Wildlife Service's biological opinion complies with the ESA. Specifically, the Service completed an opinion for this project, but deferred the authorization of incidental take and the designation of measures to minimize such take until that take was first authorized under the MMPA. This was not only lawful, but also required by the ESA, which Congress expressly amended to ensure that MMPA take authorization comes first. The deferral is also consistent with special regulations that require the Service to manage the conservation of the polar bear primarily under the MMPA, which is more protective than the ESA in some respects. The Service was not required to quantify how many polar bears might be disturbed by the noise and human activity associated with this project because that kind of disturbance is not a "take" under the Service's ESA regulations. Nor did the Service rely on uncertain or unenforceable mitigation measures to reach its "no jeopardy" conclusion.

3. This Court lacks jurisdiction over Petitioners' ESA claim against BOEM because they did not provide the 60-day notice required by the ESA, which is a prerequisite for jurisdiction.

This petition for review should be denied.

STANDARD OF REVIEW

This Court reviews both BOEM's compliance with NEPA and the Service's biological opinion under the Administrative Procedure Act ("APA"). *NRDC v. NMFS*, 421 F.3d 872 (9th Cir. 2005); *Bennett v. Spear*, 520 U.S. 154 (1997). Under the APA, courts uphold an agency's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA's standard of review is "highly deferential, presuming the agency action to be valid." *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011) (quoting *Northwest Ecosystem Alliance v. Fish & Wildlife Service*, 475 F.3d 1136, 1140 (9th Cir. 2007)); *accord Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998).

ARGUMENT

I. BOEM's analysis of the greenhouse gas emissions of the Liberty project fully complies with NEPA.

A. BOEM completed an in-depth analysis of the greenhouse gas emissions of this project.

BOEM's conditional approval of the development and production plan for the Liberty project was preceded by preparation of an environmental impact statement to ensure that the agency's decision would be "fully informed and well-considered." *Vermont Yankee*, 435 U.S. at 558. The 600-plus pages of analysis in that environmental impact statement considered a wide range of possible effects of this project on the environment, including potential oil spills, its effects on air quality and wetlands, how the project might affect subsistence

hunting by Alaska Native communities, and its effects on all kinds of wildlife, from invertebrates to fish to birds to mammals. 2 E.R. 315–22; 1 S.E.R. 4–13. BOEM weighed all of these possible effects not only for the proposed action, but also for a series of alternatives, including alternate locations for the project. 2 E.R. 156–59. BOEM also evaluated the "no action" alternative, under which this project would not be approved or developed, and no oil or gas would be extracted. 2 E.R. 154.

BOEM additionally prepared a multi-faceted and comprehensive climate change analysis. 2 E.R. 183–91, 339–41. In that analysis, BOEM summarized the latest scientific evidence on the effects of climate change on environmental resources around the world and within the Beaufort Sea specifically. 2 E.R. 183–91. And it weighed the potential direct, indirect, and cumulative impacts of the Liberty project against the backdrop of a changing climate and related challenges like sea level rise, ocean acidification, loss of sea ice, and changes in plant and animal communities. *Id.* That analysis included a "lifecycle" analysis of the potential greenhouse gas emissions of the project. 2 E.R. 183–91, 339–41. That lifecycle analysis considered both the "upstream" emissions from the project—that is, the emissions that result from the construction and operation of the project itself—as well as the "downstream" emissions that result from the consumption of the oil that would be produced by the project. 2 E.R. 340.[1]

[1] The full methodology for this lifecycle analysis is described in a BOEM report that is part of the administrative record. *See OCS Oil and Natural Gas: Potential Lifecycle Greenhouse Gas Emissions and Social Cost of Carbon* (Nov. 2016), *reproduced in* 4 E.R. 1283–1334.

BOEM weighed those emissions against the greenhouse gas emissions that would occur under the no action alternative. BOEM acknowledged that no oil from the Liberty project would be developed or consumed under that no action alternative, while also recognizing the principle of "market substitution" under which "market forces dictate that if oil were not produced from the Liberty prospect, energy would be procured from other sources to keep energy supplies in step with energy demand." 2 E.R. 340. In other words, even if the status quo is maintained and the Liberty project is not built, U.S. energy consumers will still need energy, and they will buy oil from other sources or other kinds of energy to satisfy that demand. 3 E.R. 464–65. To gain a fuller picture of the effects of the no action alternative, BOEM estimated the "emissions associated with the other fuels . . . that would be produced and consumed in lieu of oil from the Liberty prospect" if the project were not built. 2 E.R. 340; 3 E.R. 463–64.

Importantly, BOEM did not assume "perfect market substitution"—that is, it did not assume the same total amount of oil would be consumed whether or not the Liberty project were built. 2 E.R. 340; 3 E.R. 463. Instead, BOEM based its analysis on a sophisticated economic model that simulates the response of U.S. energy markets to the production of oil and gas from new projects on the Outer Continental Shelf. 2 E.R. 340. BOEM estimated that, if the Liberty project were not built, a "slightly lower amount of energy would be consumed domestically overall," and BOEM credited that marginal difference

in energy consumption—and the resulting greenhouse gas emissions—to the no action alternative. 2 E.R. 340.[2]

BOEM found that, despite the lower level of demand, greenhouse gas emissions would actually be *greater* under the no action alternative than under the Liberty project: the total lifecycle emissions under the no action alternative would be 89,940,000 metric tons of carbon dioxide[3] compared to 64,570,000 metric tons if the Liberty project is approved (both over the 25-year life of the project). 2 E.R. 340.[4] BOEM explained that this result obtains because, "if oil is not obtained from" projects like the Liberty project, then the U.S. energy

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[2] In comparing the Liberty project to the no action alternative, BOEM's analysis uses the no action alternative as the "baseline" for comparison. 1 S.E.R. 31 (Figure 3.7-1) (comparing effects of five-year leasing program to "effects baseline" under "alternative D" no action alternative). Thus, that analysis describes the energy substitutions that will occur—and the resulting changes in greenhouse gas emissions—if the project is built. But because the analysis is comparative, the same analysis could be done using the Liberty project as the baseline, and the magnitude of the "net" differences in energy consumption and greenhouse gas emissions would be the same; they would simply be described in the other direction, that is, as the energy substitutions that would occur without the oil production from the Liberty project.

[3] The combustion of crude oil produces several different kinds of greenhouse gases, including not only carbon dioxide (CO_2), but also methane (CH_4) and nitrous oxide (N_2O), which have different potential values as greenhouse gases. 2 E.R. 339. For ease of reference, BOEM converted all of these different emissions into "CO_2 equivalents" in the EIS. *Id.*

[4] Lifecycle greenhouse gas emissions from the Liberty project would account for only about 1% of the emissions of the U.S. oil and gas industry, which releases an estimated 231 million metric tons of carbon dioxide annually (including both upstream and downstream emissions). 2 E.R. 339–40.

market will satisfy its demand for energy with "substitute sources"—"largely imported oil"—that have "higher lifecycle" greenhouse gas emissions. 3 E.R. 465; *see also* 2 E.R. 340 (explaining that "the mix of replacement fuels" consumed under the no action alternative have greater greenhouse gas emissions "largely due to comparatively weaker environmental protection standards associated with exploration and development of the imported product and increased emissions from transportation").

BOEM's economic model and this method of analyzing the greenhouse gas emissions of the no action alternative were upheld by the D.C. Circuit in *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 603–04 (D.C. Cir. 2015). That court acknowledged that it is "somewhat counterintuitive" to think that "*not* drilling for fossil fuels" on the Outer Continental Shelf "would harm the environment." *Id.* at 603 (emphasis added). But as the court recognized, "[m]eeting national energy demands" with other sources of energy—including foreign oil—"carries its own environmental risks and harms, distinct from the familiar risks associated with extraction from the" Outer Continental Shelf. *Id.*

B. BOEM used the same method to estimate the greenhouse gas emissions of both the action and no action alternatives.

Petitioners claim that BOEM's analysis is defective because the agency applied "different methods to assess emissions from the action and no-action alternatives." Opening Brief 19. More specifically, they claim that BOEM compared the "gross" emissions of the action alternatives to the "net" emissions from the no action alternative. *Id.* at 26.

Petitioners are mistaken: BOEM used only a single method, applied comparatively to all of the alternatives. BOEM's lifecycle emissions analysis used its economic model (MarketSim) to calculate how oil production from the project would affect the U.S. energy market and, in particular, how oil from this project would substitute for the other sources of oil and other kinds of energy that would be consumed if the project were not built. 2 E.R. 340. This methodology is comparative: it simulates the U.S. energy market both with and without the Liberty project, and, by comparing those two simulations, estimates the "net" differences in energy consumption between the Liberty project and the no action alternative. Moreover, the studies cited by Petitioners use the same comparative method. *See, e.g.,* 5 E.R. 1016 (calculating the "net effect" by comparing emissions under federal oil leases to emissions by "substitute" fuels without federal oil leases), *cited in* Opening Brief 28.

Having modeled U.S. energy consumption patterns with and without the introduction of oil from the Liberty project, BOEM then calculated the "downstream" emissions that would occur under both the action alternatives and the no action alternative. 2 E.R. 340. Again, the same methodology was used to compare all of these alternatives, and the analysis provides "a relative comparison." 1 S.E.R. 35–39 (explaining the methodology of the lifecycle emissions analysis used here); 2 E.R. 340 (noting that BOEM "derived" the lifecycle emissions estimate for the Liberty project from the cited EIS). BOEM concluded that approving the Liberty project will reduce greenhouse gas emissions by 25,000,000 metric tons of carbon dioxide compared to not

approving the project because, if the project is not approved, U.S. energy demands (though somewhat reduced) will be met with foreign oil and other substitutes, which will increase greenhouse gas emissions. 2 E.R. 340.[5]

Thus, BOEM did not use different methods to compare these alternatives. Nor did it try to hide the obvious fact that the no action alternative would leave this oil in the ground: the agency repeatedly explained, under the no action alternative, "[n]o mineral resources would be extracted from the three leases comprising the Liberty Unit and none of the impacts (both positive and negative) described in" the EIS "would be realized." 2 E.R. 123; *see also, e.g.,* 2 E.R. 340 (observing that, under the no action alternative, "no oil from the Liberty Project would be transported or consumed"). Again, BOEM's analysis shows that not building the Liberty project—and relying instead on other sources of energy to meet U.S. energy demands—"carries its own environmental risks and harms." *Center for Sustainable Economy v. Jewell*, 779 F.3d at 603.

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[5] Petitioners suggest in a footnote that BOEM never explained how it performed this analysis. Opening Brief 29 n.2. But BOEM's methodology is laid out clearly in the EIS. BOEM explained that it "derived this estimate using methods originally developed for a programmatic analysis conducted for its 2017-2022 5-Year Programmatic EIS." 2 E.R. 340. That analysis is described fully in the administrative record. 6 E.R. 1283–1334. BOEM then applied the results of the model from that programmatic analysis to the Liberty project to estimate the economic effects of this specific project. 2 E.R. 340 ("However, rather than estimating the emissions associated with upstream activities (i.e., exploration, development, production, and transport of resources) using the Offshore Environmental Cost Model (OECM), BOEM used the [greenhouse gas] emissions reported in the Liberty DPP.").

C. BOEM rationally concluded that it is not feasible to estimate the effect of marginal changes in foreign consumption on greenhouse gas emissions.

1. Reducing the supply of oil can reduce foreign consumption.

Petitioners also complain that BOEM's analysis of greenhouse gas emissions "selectively excluded an important variable"—"how Liberty would affect foreign oil consumption." Opening Brief 27. Petitioners contend that "each barrel of oil left undeveloped under the no action alternative would result in approximately a half-barrel decrease in global oil consumption." *Id.* at 30. That reduction in foreign oil consumption, they claim, would also reduce foreign greenhouse gas emissions, and they argue that BOEM should have credited that reduction to the no action alternative. *Id.* at 31.

To be clear, Petitioners are not arguing that some of the oil from the Liberty project would be sold and consumed in foreign markets, and that BOEM failed to account for the greenhouse gas emissions from such foreign consumption. In fact, BOEM's analysis accounts for all of the "downstream" emissions of the oil that would be produced at Liberty. 2 E.R. 340 (observing that this analysis emissions "from the transportation and consumption of oil produced at Liberty"); 4 E.R. 1299.

Instead, Petitioners are raising the more subtle argument that building the Liberty project will increase the total global supply of oil very slightly, which will cause global oil prices to drop (almost imperceptibly), which in turn will cause foreign consumers to buy and consume slightly more oil. Petitioners

argue that the no action alternative should get "credit" for foreign greenhouse gas emissions that would be avoided if the project is not built.

2. It is not feasible to calculate how reduced supply might affect foreign greenhouse gas emissions.

BOEM recognized this potential effect and addressed it directly, both in the environmental impact statement at issue here and in the documentation for its economic model. 3 E.R. 466 (under the heading "marginal changes in foreign consumption"); 4 E.R. 1315 (BOEM report, *supra* n.1, explaining why the "reduction in foreign consumption of oil and gas in a no action analysis is not taken into account" in this model). BOEM properly concluded that it was "not feasible" to calculate how reduced supply might affect foreign greenhouse gas emissions because BOEM does not have "reliable information on foreign emissions factors and consumption patterns" and consequently cannot "reliably estimate these marginal differences." 3 E.R. 466.

That is because calculating the magnitude of this effect globally—and crediting those greenhouse gas emissions to the no action alternative—would require BOEM to simulate the entire global oil market with detail adequate to predict where reductions in consumption might happen. And even that would only be the first step: BOEM would also have to simulate the energy markets of every other country in the world, to determine how their energy consumption would change in response to this almost-imperceptible change in price. Only then could BOEM translate those changes in energy consumption into changes in greenhouse gas emissions.

BOEM's model of the U.S. energy market illustrates just how difficult these global calculations would be. As Petitioners note, that model does simulate the interaction of the U.S. energy market with world energy markets, and it could be used to estimate the effects on foreign oil consumption if the Liberty project were not built. Opening Brief 30. But that alone is insufficient to determine how the no action alternative would affect greenhouse gas emissions; it is only the first step because, if this project is not built, foreign consumers will still consume energy from other sources. 3 E.R. 464–65. Thus, BOEM would have to calculate not only the reductions in foreign demand but also the "mix of substitute energy sources" to which those foreign consumers would turn because "each substitute energy source entails a different capacity to produce" greenhouse gas emissions. 3 E.R. 464. In other words, if higher oil prices cause foreign consumers to turn to wind, solar, or nuclear energy, the greenhouse gas emissions of the no action alternative would be reduced. 4 E.R. 1303. But if they turn instead to coal or imported oil, those greenhouse gas emissions would increase. *Id.* These substitutions will vary by country.

To analyze how market substitutions would affect greenhouse gas emissions in the United States alone, BOEM had to build a detailed model that simulates the entire U.S. energy market, including "end-use domestic consumption of oil, natural gas, coal, and electricity" across four economic sectors ("residential, commercial, industrial, and transportation"), as well as primary energy production, and the transformation of primary energy into electricity. 4 E.R. 1303. To conduct the same analysis for foreign markets,

BOEM would have to build a model that also simulates the energy markets of *every other country in the world*.

Again, that would only be the first step. Once market substitutions are identified, BOEM still has to calculate the lifecycle greenhouse gas emissions for each of those substitutes. In its analysis of the U.S. energy economy, BOEM weighed both the upstream emissions of these substitute energy sources—including, for example, the greater fuel costs and emissions of importing foreign oil—as well as the different downstream emissions that result from the consumption of different energy sources; using foreign oil as motor gasoline, for example, releases less greenhouse gases than using it as asphalt and road oil. 4 E.R. 1300–01 (dividing U.S. oil consumption into twelve categories with different greenhouse gas emissions). To complete the same analysis for foreign consumption under the no action alternative, BOEM would have to know not only to what substitutes foreigners would turn if supply is constrained but also how those substitute sources of energy are produced, transported, and consumed in each of those countries. Only then could BOEM estimate how a reduction in foreign consumption of oil would affect foreign greenhouse gas emissions.

In short, BOEM required an enormous amount of data on the U.S. energy market alone just to generate a "nuanced and realistic estimate for how market substitution would work and how much lifecycle" greenhouse gas "emissions would likely result from substitute energy sources" in the domestic market. 3 E.R. 464. BOEM rationally concluded that it is simply "not feasible"

to make the same kind of "nuanced and realistic estimates" for foreign markets because BOEM lacks the same kind of "reliable information on foreign emissions factors and consumptions patterns." 3 E.R. 466; *see also* 4 E.R. 1297 (limiting the model to U.S. consumption due to "the insufficient data available for the kind and proportion of oil products used and a lack of information on overseas energy substitutions"). Thus, even if Petitioners are correct that the no action alternative is likely to reduce foreign consumption, BOEM had no "reliable" way to estimate how that reduction would translate into greenhouse gas emissions. *Id*.

NEPA requires agencies to consider the indirect effects of their actions, but only if they are "reasonably foreseeable" and not if they are "highly speculative or indefinite." 40 C.F.R. § 1508.8(b); *see also Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1163 (9th Cir. 1998). It does not require agencies to have a "crystal ball" or to "foresee the unforeseeable." *NRDC v. Morton*, 458 F.2d 827, 837 (1972); *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Here, NEPA did not require BOEM to take on the impossible task of calculating how the effects of this relatively small oil project would ripple through global energy markets and affect greenhouse gas emissions around the world. BOEM rationally concluded that it was not feasible to analyze how reduced supply under the no action alternative might affect foreign greenhouse gas emissions. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (holding that NEPA allows agencies to

limit the scope of their analysis based on "practical considerations of feasibility").

3. BOEM properly dealt with this issue by adhering to NEPA's regulations on "incomplete or unavailable information."

NEPA has specific regulations for addressing situations where, as here, there is "incomplete or unavailable information," such that "the *nature*" of some effect "is reasonably foreseeable but its *extent* is not." 40 C.F.R. § 1502.22 (emphasis added); *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549–50 (8th Cir. 2003) (noting the need to use of the procedure in § 1502.22). BOEM applied those regulations, 3 E.R. 466, acknowledging that "marginal changes in foreign consumption" could have an effect on greenhouse gas emissions, but explaining that it lacked the necessary data on "foreign emissions factors and consumption patterns" to estimate the magnitude of that effect. *Id*. BOEM also concluded that this information was "not essential to a reasoned choice" and would not "change the end results of BOEM's analysis to a meaningful extent," because "the Liberty project could only have a negligible impact on worldwide oil prices and, as a result, only a negligible impact on foreign consumption and emissions levels." *Id*. These statements satisfied NEPA's regulatory requirements for addressing "incomplete and unavailable information."

4. The D.C. Circuit has already rejected a demand for this kind of analysis.

Importantly, no court has ever required the kind of analysis of "marginal reductions in foreign consumption" that Petitioners demand here. The D.C. Circuit rejected a similar argument in *Sierra Club v. U.S. Department of Energy*, 867 F.3d 189 (D.C. Cir. 2017). There, petitioners challenged the Department of Energy's grant of a permit allowing the export of liquefied natural gas, arguing that the agency was required to model how those natural gas exports would compete with other energy sources in foreign markets and how changes in those markets would affect greenhouse gas emissions. *Id.* at 197–98, 202. As here, such an analysis would have required the agency to model how every different kind of "fuel source (nuclear, renewable, etc.) would be affected in each potential" natural gas-importing nation. *Id.* As here, such a model "would require consideration of the dynamics of all energy markets in" every affected nation. *Id.* at 202.

The court upheld the agency's decision not to prepare such an analysis both because the analysis would have been "too speculative" and because it was appropriate for the agency to restrict its analysis based on "practical considerations of feasibility." *Id.* (internal quotation marks omitted). This Court should reach the same conclusion in this case. *See also Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (opining that, while agencies may be required to engage in "reasonable forecasting" of greenhouse gas emissions,

quantification is not required "every time those emissions are an indirect effect of an agency action.").

5. The studies in the record illustrate the difficulty of estimating how reduced foreign consumption would affect greenhouse gas emissions.

Petitioners argue that BOEM's economic model could provide a rough estimate of the marginal reduction in foreign consumption of oil in terms of barrels of oil. Opening Brief 30; *see* 4 E.R. 1315. But the fundamental problem with the task demanded by Petitioners is not arriving at a rough estimate of how many fewer barrels of oil would be consumed abroad but rather with translating those barrels of oil into an estimate of greenhouse gas emissions. Petitioners avoid this hard work by framing their arguments solely in terms of "barrels of oil"; they never propose any way to convert those "barrels of oil" into a reliable estimate of foreign greenhouse gas emissions. *See, e.g.,* Opening Brief 30. To be sure, some of the studies cited by Petitioners have tried to solve this difficult problem. The limitations of those studies—and their resulting estimates—confirm that BOEM rationally concluded that this kind of analysis is not feasible.

For example, a 2016 study cited by Petitioners estimates that prohibiting production under certain U.S. federal oil leases could suppress global demand for oil and reduce global greenhouse gas emissions by 31 million metric tons of carbon dioxide in 2030. Peter Erickson & Michael Lazarus, Stockholm Environment Institute, "How would phasing out U.S. federal leases for fossil

fuel extraction affect CO_2 emissions and 2°C goals?" (2016), *reproduced in* 5 E.R. 1011, 1016. But to get to that estimate, the study had to make simplistic assumptions that fell well short of the detailed model that BOEM used to analyze the U.S. energy market.

BOEM's model, for example, examines the effects of the Liberty project on four sectors of the U.S. energy market: residential, commercial, industrial, and transportation. 3 E.R. 464; 4 E.R. 1303. The Erickson/Lazarus study, in contrast, considers only the transportation sector. 5 E.R. 1015. That study also assumes, perhaps optimistically, that significant numbers of global energy consumers will substitute biofuels, compressed natural gas, and electricity for this lost oil, reducing their greenhouse gas emissions by 15%. 5 E.R. 1015. Unlike BOEM's analysis, this study makes no attempt to determine whether the remaining energy demand that would still be met by oil would be satisfied through the use of domestic or foreign oil, or, importantly, what the effect of using importing oil would be on greenhouse gas emissions. The study instead simply aggregates all global oil demand and global greenhouse gas emissions and ignores that issue.

Moreover, the authors acknowledge the limitations of their own study in an attached "sensitivity analysis" (omitted by Petitioners from their excerpts of record). 1 S.E.R. 77–80. In that analysis, the authors concede that different assumptions about global energy markets could have yielded a reduction as small as 4 million metric tons of carbon dioxide or as large as 64 million metric tons. *Id.* at 78. That means that their estimate—that eliminating certain U.S.

federal oil leases would reduce global greenhouse gas emissions by 31 million metric tons of carbon dioxide—has a potential margin of error of nearly 100%.

Of course, no model—not even BOEM's detailed economic model—can provide "[o]ne hundred percent accuracy," but that does not mean that models are not useful. 3 E.R. 466 (noting that BOEM's model provides "a reasonable approximation of what is likely to occur under each alternative"). But here, the wide range of results produced by the Erickson/Lazarus study is the result of the broad assumptions that they have made in the absence of actual data on individual markets. That defect, coupled with the fact that the study ignores the factor that BOEM found most significant—the increased environmental costs of satisfying U.S. energy demand with foreign oil—supports BOEM's conclusion that it is not feasible to reliably estimate reductions in greenhouse gas emissions from reduced foreign consumption.

The record shows that Petitioners attempted to apply this same methodology to the Liberty project themselves. 1 S.E.R. 92–93. Using the same method, they estimated that not building the Liberty project would reduce global greenhouse gas emissions by 12.73 million metric tons of carbon dioxide (both in the U.S. and abroad). *Id.* Petitioners made no attempt to assign any margin of error to their estimate. But even ignoring that significant problem with the reliability of Petitioners' study, their analysis does not show that the no action alternative would significantly reduce greenhouse gas emissions. Even if they are right, 51,840,000 metric tons of carbon dioxide would still be generated under the no action alternative compared to the

64,570,000 metric tons generated by the Liberty project (over the lifespan of the project). *See* 2 E.R. 340. And their analysis simply ignores the factor that BOEM found to be most significant: that, under the no action alternative, the U.S. will meet its energy demands by importing more foreign oil, which increases greenhouse gas emissions.

The other studies cited by Petitioners suffer from similar flaws. One study estimates that eliminating all restrictions on U.S. oil exports would have a "net impact" on global greenhouse gas emissions of between -57 to +168 million tons of carbon dioxide. Jason Bordoff & Trevor Houser, Columbia University Center on Global Energy Policy, *Navigating the U.S. Oil Export Debate* (2015), *reproduced in* 4 E.R. 869, 927. That incredibly broad range again shows how difficult it is to make reliable estimates of these effects and how sensitive those estimates are to different assumptions. Another study cited by Petitioners concludes that eliminating all U.S. tax preferences for the entire oil industry would "negligibly" affect climate change. Gilbert E. Metcalf, Council on Foreign Relations, *The Impact of Removing Tax Preferences for U.S. Oil and Gas Production* (2016), *reproduced in* 5 E.R. 1048, 1067 (relying on "a simple market equilibrium model of world oil supply and demand").

None of these studies casts any doubt on BOEM's conclusion that it is simply not feasible to generate a reliable estimate of how reductions in foreign consumption will affect greenhouse gas emissions. To the contrary, the studies confirm that conclusion.

6. None of the cases cited by Petitioners required the kind of analysis demanded by Petitioners.

None of the cases cited by Petitioners required an agency to analyze the effects of marginal reductions in foreign consumption on global greenhouse gas emissions. In fact, none of those cases addresses that issue at all. Instead, these cases stand for a series of undisputed principles that are irrelevant here. For example, Petitioners cite a series of cases holding that agencies may not simply ignore "reasonably foreseeable" "downstream" greenhouse gas emissions. *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1216–17 (9th Cir. 2008) (holding that agency was required to consider "downstream" greenhouse gas emissions resulting from automotive fuel efficiency rule); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019) (holding that agency failed to consider "downstream" greenhouse gas emissions of oil and gas leases); *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014) (rejecting agency analysis due to omission of "any estimate" of greenhouse gas emissions caused by combustion of coal). But BOEM did not ignore "downstream" greenhouse gas emissions; it calculated them in detail.

Petitioners also cite a series of cases in which agencies tried to avoid analyzing how their actions would affect greenhouse gas emissions by assuming "perfect market substitution." *WildEarth Guardians v. U.S. BLM*, 870 F.3d 1222, 1228 (10th Cir. 2017) (holding that agency erred by assuming "perfect market substitution"); *Mid States Coalition for Progress*, 345 F.3d at 549–50 (holding that agency erred because it assumed that "the proposed project

will leave demand for coal unaffected"); *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (holding that it was improper for agency to conclude "there would in fact be *no* effects from those emissions, because other coal would be burned in its stead"); *High Country Conservation Advocates*, 52 F. Supp. 3d at 1196–98 (agency erred by assuming "perfect market substitution"). Again, BOEM did not assume "perfect market substitution" here; it relied on the results of a sophisticated economic model to determine how the Liberty project and the no action alternative would affect demand on the U.S. energy market.

In contrast to the irrelevant cases cited by Petitioners, the D.C. Circuit has held that agencies are not required to model how their actions will affect global energy markets and how those market changes will, in turn, affect foreign greenhouse gas emissions. *Sierra Club*, 867 F.3d at 202. That kind of analysis is simply "too speculative" and infeasible to be required under NEPA. *Id*. The Court should reach the same conclusion here.

Therefore, BOEM's analysis of the greenhouse gas emissions of the Liberty project fully complies with NEPA.

II. The Fish and Wildlife Service's biological opinion complies with the ESA.

A. The Service's incidental take statement complies with the law and protects the polar bear.

The polar bear is listed as a "threatened" species under the ESA. 1 E.R. 50–62. That means that every federal agency must ensure that its actions—and

the actions approved by it—are not likely to jeopardize the continued existence of the polar bear (or adversely modify its designated critical habitat); agencies must fulfill that duty in consultation with the U.S. Fish and Wildlife Service. 16 U.S.C. § 1536(a)(2). BOEM consulted with the Service before it conditionally approved the development and production plan for the Liberty project. The Service found that the Liberty project could have some adverse effects on the species through "disturbance, increased polar bear-human interactions, habitat loss, and spills and authorized discharges," 1 E.R. 79–89, but that it was not likely to cause "jeopardy," 1 E.R. 90–92. The Service estimated that these adverse effects might result in the take (by "injury and/or death") of "no more than 1 polar bear over the life of the project." 1 E.R. 92.

When the Service finds that an action is not likely to cause jeopardy but is likely to cause some "incidental" take of a listed species, the Service authorizes that take by including an "incidental take statement" ("ITS") in its biological opinion. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). The ITS quantifies how much incidental take will occur (either numerically or through some surrogate). 16 U.S.C. § 1536(b)(4). It also identifies "reasonable and prudent measures" to minimize the incidental take, as well as "terms and conditions" to ensure that those measures are implemented. *Id.* Any take that occurs in compliance with an ITS is exempt from the ESA's prohibition against take. *Id.* § 1536(o)(2).

The Service's biological opinion for the Liberty project includes an incidental take statement. 1 E.R. 92. That statement, however, defers both the

authorization of incidental take and the designation of mitigation measures until after take is also authorized under the separate process required by the MMPA. 1 E.R. 92–93. Once incidental take has been authorized under the MMPA, the Service's ESA incidental take statement will automatically authorize incidental take under the ESA as well—subject to "compliance with all requirements and stipulations set forth in the MMPA authorization"—and will incorporate by reference any mitigation measures identified under the MMPA "to also serve" as mitigation measures (and "terms and conditions") under the ESA. *Id.*

Petitioners object to the Service's decision to defer these aspects of the incidental take statement until after take is authorized under the MMPA. *See, e.g.,* Opening Brief 41–42, 52. But that decision was not only lawful, it was compelled by the law. Why that is so, and how this decision also fully protects the polar bear, is a function of the complex and overlapping requirements of the ESA, the MMPA, and the special regulations under Section 4(d) of the ESA that apply to the polar bear.

The Service did not authorize any incidental take of polar bears at this time—indeed, it could not—because the polar bear is also protected under the MMPA, which also prohibits the take of polar bears. 16 U.S.C. § 1371(a). Congress amended both the MMPA and the ESA in 1986 "to clarify the relationship between the two statutes," and the amendments to the ESA unequivocally state that the Service may not authorize the take of a marine mammal under the ESA (through an ITS) unless that take has already been

authorized under the MMPA. 16 U.S.C. § 1536(b)(4) (allowing the Service to issue an ITS under the ESA only if "the taking is authorized pursuant to section 1371(a)(5) of this title," i.e., pursuant to the incidental take provisions of the MMPA); *see also* Act of Nov. 14, 1986, Pub. L. No. 99-659, § 411, 100 Stat. 3706, 3741–42.

Members of Congress understood that coordination between these two statutes would be difficult and could be a "potential problem." 132 Cong. Rec. H10453 (daily ed. Oct. 16, 1986) (statement of Rep. Jones). The MMPA allows the Service to authorize incidental take of depleted marine mammals through "incidental take regulations" ("ITRs"), which must be promulgated through notice-and-comment rulemaking. The ESA, in contrast, "generally requires the consultation process"—including the formulation of the incidental take statement—"to be completed within 90 days." *Id.*; *see also* 16 U.S.C. § 1371(a)(5)(A)(i). That will almost always be "too short" to complete the MMPA process. 132 Cong. Rec. H10453 (daily ed. Oct. 16, 1986) (statement of Rep. Jones).

This leaves the Service in a dilemma: in many cases, the Service will be required to complete its ESA biological opinion before take has been authorized under the MMPA, but the law does not allow the Service to authorize incidental take under the ESA under those circumstances. One way for the Service to resolve this dilemma is to "proceed with the issuance of the biological opinion and section 7(b)(4) incidental take statement in a timely manner"; however, with "respect to the incidental take statement," the agency

"should indicate that the findings and conditions applicable to affected marine mammals are subject to final completion of the MMPA section 101(a)(5) process and that the [incidental take] statement would subsequently be revised to reflect the outcome of that review." 132 Cong. Rec. H10453 (daily ed. Oct. 16, 1986) (statement of Rep. Jones); *see also* FWS & NMFS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act*, at 4-60 to -61 (Mar. 1998) (recommending that the Service amend its biological opinion to authorize incidental take of marine mammals after such take is authorized under the MMPA), *available at* https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

Here, the Service took a slightly different approach: instead of revising or amending its biological opinion after MMPA take is authorized, this ITS will authorize ESA incidental take automatically once MMPA take is authorized, and it will also incorporate by reference the mitigation measures (and terms and conditions) identified under the MMPA. 1 E.R. 92–93. That approach makes sense—and is consistent with the law—because the Service has issued a special rule under Section 4(d) of the ESA that makes the MMPA, not the ESA, "the primary regulatory" mechanism for managing polar bears. 78 Fed. Reg. 11,766, 11,768 (Feb. 20, 2013) (codified at 50 C.F.R. § 17.40(q)).

Species like the polar bear that are listed as "threatened" and not "endangered" are not automatically subject to the ESA's take prohibitions. *See* 16 U.S.C. § 1538(a)(1)(B) (prohibiting take of "any endangered species").

Instead, Section 4(d) of the ESA allows the Service to extend all, some, or none of the protections for endangered species to threatened species at the time of their listing as necessary for the conservation of the species. *Id.* § 1533(d). The Service issued a Section 4(d) rule making the MMPA "the primary regulatory" mechanism for the conservation of the polar bear because, by the time the species was listed as "threatened" under the ESA in 2008, it had already been managed under the MMPA for decades. 78 Fed. Reg. at 11,768. The MMPA, as the Service noted, is more protective than the ESA in certain respects. For instance, while the ESA protects species as a whole, the MMPA protects not only species, but also individual stocks (or "subpopulations") of a species, which makes it "much more protective than the ESA for activities" (like the Liberty project) "that occur only within one stock of a listed species." *Id.* at 11,770, 11,772. The MMPA is also more protective because it defines take—in particular, "harassment"—more broadly than that term is defined under the Service's ESA regulations. *Id*. at 11,770.

The Service, moreover, had also managed take of polar bears by the oil and gas industry under the MMPA for decades. In fact, the Service has issued a long series of incidental take regulations under the MMPA to ensure that all oil and gas activities in the Beaufort Sea (and the adjacent northern coast of Alaska) will take only a "small number" of polar bears and, collectively, cause only "negligible impacts" to this polar bear stock. *See, e.g.,* 81 Fed. Reg. 52,276–320 (Aug. 5, 2016) (codified at 50 C.F.R. §§ 18.121–18.129).

Accordingly, when the Service listed the polar bear under the ESA, it concluded that "managing take of polar bears under the MMPA" already "adequately provides for the conservation of" the species. 78 Fed. Reg. at 11,722. Moreover, the Service determined that, if a party already has take authorization under the MMPA, there is no "conservation basis" to require that party to "implement further measures under the ESA." *Id.* Thus, the Service issued a special Section 4(d) rule that "synchronizes the management of the polar bear under the ESA with management provisions under the MMPA." *Id.* at 11,766, 11,768. That rule provides that, for the polar bear, the ESA's prohibitions against take do not "apply to any activity that is authorized or exempted under the" MMPA (provided that the party complies with all terms and conditions imposed by the MMPA). 50 C.F.R. § 17.40(q)(2). In other words, "if an activity is authorized or exempted under the MMPA . . . (including incidental take), no additional authorization under [the ESA's regulations] for that activity will be required." 78 Fed. Reg. at 11,768.

The Service's incidental take statement here implements the requirements of the ESA, the MMPA, and that special Section 4(d) rule. Because this project does not yet have take authorization under the MMPA, the Service could not—and did not—authorize any incidental take of polar bears under the ESA at this time. 1 E.R. 92. The Service expressly stated that it was "*not* authorizing take of marine mammals under the ESA at this time because such take has not yet been authorized under the Marine Mammal Protection Act." *Id.* (emphasis added). Instead, the Service "delay[ed]" that

authorization of ESA take until after the MMPA process is completed: "After take has been authorized under the MMPA, take under the ESA that results from actions conducted in compliance with all requirements and stipulations set forth in the MMPA authorization will be considered by the Service to also be authorized under the ESA." *Id*. at 92, 93.

The Eleventh Circuit addressed a similar issue in *Defenders of Wildlife v. U.S. Department of Navy*, 733 F.3d 1106, 1122–25 (11th Cir. 2013), and held that it was appropriate for NMFS to "postpone" issuance of its ESA incidental take statement until take had first been authorized under the MMPA, especially where "no take of any listed species" was expected in the meantime. *Id*. at 1123–24 (concluding that the biological opinion "can be upheld on that ground alone"). The same is true here: no take has been authorized (under the ESA or the MMPA), and no lawful take can occur unless and until Hilcorp obtains take authorization under the MMPA.

For these reasons, the Service's incidental take statement is entirely consistent with the law. It is consistent with the specific amendments that Congress made to the ESA in 1986 that require MMPA take authorization to come first. It is consistent with the polar bear's ESA Section 4(d) rule, which provides that no additional authorization is required under the ESA for incidental take of polar bears that has been authorized under the MMPA. It fully protects the polar bear because no take has been authorized yet: any take of polar bears by this project remains unlawful at this time. 1 E.R. 1 (requiring Hilcorp to obtain MMPA take authorization before commencing operations).

B. The Service was not required to quantify how many polar bears might be disturbed by the noise and human activity of the Liberty project.

The Service's incidental take statement quantifies how much incidental take the Liberty project is likely to cause; it estimates that the project will cause the "injury and/or death of no more than 1 polar bear over the life of the project." 1 E.R. 92. The Service also found that noise and human activity near the Liberty project might disturb a small number of polar bears. 1 E.R. 79–80. Petitioners argue that the Service's ITS is defective because, while it quantifies the number of potential injuries or deaths (one), it fails "to specify the amount or extent of the far more common form of take—nonlethal harassment." *Id*. at 51–52. Petitioners are wrong. The Service was not required to quantify how many polar bears may be disturbed by noise and human activity at the Liberty project because that disturbance is not "take" under the ESA and the Service's ESA regulations.

The ESA defines "take" to include harassment, but it does not define what constitutes harassment. *See* 16 U.S.C. § 1532(19) (defining to "take" to include "harass"). The Service has promulgated a regulatory definition of "harassment," under which an act, to constitute harassment under the ESA, must not only "significantly disrupt normal behavioral patterns," it must also create "the likelihood of injury to wildlife." 50 C.F.R. § 17.3 (definition for "harass"). Consequently, if a polar bear, annoyed by the noise and human activity surrounding the Liberty project, leaves or avoids the area, that is

"take" under the ESA and the Service's regulations only if the harassment is so great that the bear is likely to actually be injured.[6]

This is not to suggest that the Service has ignored how noise and human activity from oil and gas drilling and production may disturb polar bears and alter their behavior. To the contrary, it has carefully weighed those effects, both in its biological opinion for the Liberty project and when it promulgated its MMPA incidental take regulation for oil and gas industry activities in this area of Alaska. When it promulgated that regulation, the Service found that, while the total population of polar bears is about 26,000, they are widely distributed throughout the Arctic, and only about 900 bears live in this area (the Southern Beaufort Sea). 1 E.R. 51, 65–66. Those 900 bears are spread over a huge area, and only a small part of their range is affected by oil and gas activities at all, such that encounters between the bears and oil and gas projects are "infrequent." 81 Fed. Reg. 52,276, 52,304 (Aug. 5, 2016); 1 S.E.R. 128.

In fact, the Service estimates that all oil and gas exploration, development, and production in the Beaufort Sea and adjacent coastal areas of northern Alaska—taken together—will disturb only 68 polar bears each year, about 7.5% of the Southern Beaufort Sea stock. 81 Fed. Reg. at 52,304; 1 S.E.R. 125. Those disturbances, moreover, are expected to be "nonlethal" and

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[6] We note that the MMPA defines harassment somewhat more expansively. *See* 16 U.S.C. §§ 1362(18)(A)(i), (A)(ii), (C), (D), 1532(19) (defining harassment to include acts that not only have "the potential to injure a marine mammal," but also "the potential to disturb a marine mammal"). But Petitioners do not argue in this petition that BOEM's approval of the Liberty project violates the MMPA.

involve "only minor temporary changes in bear behavior." 1 S.E.R. 125. As a result, they are not "harassment" or "take" under the ESA and the Service's ESA regulations. *See* 81 Fed. Reg. at 52,304; 1 S.E.R. 125.

The Service also analyzed the effects of the much smaller Liberty project and reached the same conclusion—that the effects of the project would be modest and would not rise to the level of ESA "take." 1 E.R. 92. The Service acknowledged that construction, traffic, drilling, and production at the Liberty project could disturb denning and non-denning polar bears. 1 E.R. 79–81, 87–89. Perhaps most seriously, the Service noted that denning female bears have sometimes abandoned their dens as a result of this kind of noise and human activity. 1 E.R. 79. But such events "have been infrequent and isolated," the Service found, and some denning female bears have also been observed to tolerate industry activity. 1 E.R. 79. Polar bears, moreover, den only at "low densities" in the area around the Liberty project, 1 E.R. 79, and the effects of the project will not extend very far—only about one mile, 1 E.R. 87.

The Service did conclude that there was a risk that a bear might be injured or even killed at the project, but not by "disturbance." Instead, the Service found that trained personnel at the Liberty project may need to "haze" polar bears to deter them from entering the project itself and endangering both the humans that work there and the bears themselves. 1 E.R. 80–81. But polar bears are not common in this area, encounters between bears and humans generally do not require such hazing, and most hazing does not result in any injury to the bear. 1 E.R. 81. Nonetheless, the Service estimated that "small

numbers" of such "annual deterrence events" may occur each year, and the Service concluded that while it was "extremely unlikely," it was possible that an attempt to deter a polar bear from the site using non-lethal methods could result in the injury or death of a bear if it was "performed incorrectly." 1 E.R. 81, 92. As such, the Service estimated that the Liberty project—over its entire 25-year life—was likely to injure or kill "no more than 1 polar bear," but only if an accident occurred during an attempt to haze a bear. 1 E.R. 92.

Taking all this together, the Service concluded that the Liberty project is likely to "adversely affect polar bears through disturbance," but that such adverse effects are not likely to rise to the level of "take" under the ESA and the Service's ESA regulations. 1 E.R. 90. Because this disturbance is not "take," the Service was not required to quantify exactly how many bears might be disturbed, and Petitioners' argument fails.

Importantly, the Service included a trigger in the biological opinion that will require BOEM to reinitiate ESA consultation if the effects of the Liberty project exceed the effects that the Service analyzed. *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 913 (9th Cir. 2012) (observing that a "primary purpose" of an ITS is "to provide a trigger for reinitiating consultation"). BOEM must reinitiate consultation if "human-polar bear interactions result in injury and/or death of more than 1 polar bear over the life of the project." 1 E.R. 94. But BOEM is also required to reinitiate consultation if the levels of "disturbance" caused by the project exceed those analyzed in the biological opinion: for example, "if observations in the Liberty DPP action area indicate

levels of interaction with polar bears" are "increasing significantly over time" or are "resulting in chronic or repeated interference with normal polar bear behavior." 1 E.R. 94.

Notably, because the Service did not authorize any "take" of polar bears by disturbance, if even a single polar bear is "taken" by disturbance—i.e., if its behaviors are altered so significantly by the project's noise and human activity that it is likely to be injured or killed—that take would be unlawful and BOEM would be required to reinitiate consultation. *See* 1 E.R. 94 (requiring that action whenever the "amount or extent of incidental take for listed species is exceeded over the life of the project"). Petitioners complain that "there is no trigger" because the biological opinion does not quantify how many bears may be disturbed and thus "no action can exceed it." Opening Brief 55. But this is plainly untrue: the "take" of even a single bear by disturbance would require the reinitiation of consultation. The Service's decision not to authorize such take means that "the 'trigger' for reinitiating consultation is set to its strictest setting, not that there is no trigger." *Defenders of Wildlife*, 733 F.3d at 1124.

Petitioners also cite the district court's decision in *NRDC, Inc. v. Evans*, 279 F. Supp. 2d 1129, 1187 (N.D. Cal. 2003), where that court found that setting the trigger for reinitiation at the take of a single animal was not sufficient. But the action at issue in *Evans* was loud enough to cause "take" of animals up to 40 miles away, and the court was concerned both that the agency would not "be able to detect takings of smaller endangered creatures, such as salmon and sea turtles" and that the trigger had been arbitrarily limited

to just two kilometers. *Id*. Here, in contrast, Hilcorp is required to monitor the area around the Liberty project, and such monitoring has been found to be effective. 1 S.E.R. 123. Moreover, the scientific evidence confirms that the "effect of disturbance" by this project is "negligible beyond" about 1 mile. 1 E.R. 87. *Evans* does not apply here.

Petitioners also argue that the Service's biological opinion must be unlawful because NMFS, unlike the Service, quantified how many whales and seals would be disturbed by the Liberty project. Opening Brief 54 (citing 3 E.R. 669). NMFS, of course, was dealing with entirely different marine mammals (namely, bowhead whales, arctic ringed seals, and bearded seals) that occur at higher densities in this area than the polar bear (and during different seasons), and that are more susceptible to in-water noise from construction and vessel traffic. 3 E.R. 468 (listing species); *see, e.g.,* 3 E.R. 564 (noting that ringed seals are present in the action area year-round and are expected to be "the most commonly occurring pinniped in the action area year-round"). In addition, the Service and NMFS use similar, but not identical, definitions of "harassment" under the ESA: the Service's definition is set out in a regulation, 50 C.F.R. § 17.3 (definition of "harass"), which NMFS has not adopted. The fact that NMFS took a somewhat different approach to this incidental take statement does not show that the Service's biological opinion was unlawful.

Finally, Petitioners cite a series of cases that address when the ESA requires the Service to quantify the level of incidental take with a specific numerical limit and when the Service is allowed to rely instead on some

ecological surrogate. *See, e.g., Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service*, 273 F.3d 1229, 1249–51 (9th Cir. 2001). Those cases are irrelevant here because the so-called "take" that the Service allegedly failed to quantify—the disturbance of small numbers of polar bears near the project—is not "take" at all and thus is not properly part of an incidental take statement. The Service, moreover, did identify a specific numerical limit for the actual take that may occur, namely, the "injury and/or death of no more than 1 polar bear over the life of the project." 1 E.R. 92. Thus, the Service's biological opinion complies with the principles announced in those cases.

C. The Service did not rely on "uncertain" mitigation measures to avoid jeopardy.

Petitioners further contend that the Service violated the ESA because the agency allegedly based its "no jeopardy" conclusion on mitigation measures that are not "reasonably specific" and "certain to occur." Opening Brief 40–48. In particular, Petitioners argue that it was improper to rely on mitigation measures that will be "formulated in MMPA letters of authorization that do not yet exist" because such measures are "unspecified," "nonbinding," and "uncertain." Opening Brief 40.

Petitioners' argument fails for several reasons. First, the Service did not base its "no jeopardy" conclusion on these mitigation measures; it reached a "no jeopardy" conclusion because this is a small project that will only disturb a few polar bears and will occupy only a very small part of the polar bear's habitat. Second, even if the Service had relied on mitigation measures yet to be

defined in future "letters of authorization" under the MMPA, it would be lawful and appropriate to do so because such measures are enforceable under both the ESA and the MMPA (as well as OCSLA). Third, Petitioners have simply ignored the complex interaction of the ESA and the MMPA, as well as the terms of the polar bear's ESA Section 4(d) rule. Fourth, and finally, the Ninth Circuit precedent cited by Petitioners does not apply here.

1. The Service did not rely on these mitigation measures to reach its "no jeopardy" and "no adverse modification" conclusions.

First, the fundamental premise of the Petitioners' argument—that the Service's "no jeopardy" and "no adverse modification" conclusions are predicated on mitigating the harms caused by this project—is wrong. The Service did not reason that this project would jeopardize the continued existence of the polar bear unless its harms were mitigated. 1 E.R. 90–91. Rather, it reasoned that this project will not cause jeopardy (or "adverse modification" of critical habitat) because it will affect only a very small area of the polar bear's habitat, is not located in prime denning habitat, will disturb only a few bears, and will (at most) result in the injury or death of one polar bear over its entire 25-year lifespan. *Id*. The Liberty project is simply too small to affect the polar bear species or its habitat as a whole.

This is easy to see in the Service's "no jeopardy" conclusion. *Id*. There, the Service acknowledges that this project could adversely affect a "small number of polar bears . . . through disturbance." 1 E.R. 90. But those "adverse

effects are expected to impact only small numbers of individuals in the [Southern Beaufort Sea] polar bear stock and therefore, we do not expect population-level impacts as a result of the proposed Liberty DPP." 1 E.R. 90. The Service then concludes that "the proposed action is *not likely to jeopardize the continued existence of polar bears*." 1 E.R. 90–91 (emphasis in original). No part of this analysis relies in any way on mitigation measures to avoid "jeopardy." The Service's "no jeopardy" conclusion is based instead on the fact that this is a small project with small effects.

That conclusion is fully supported by the administrative record. There are 26,000 polar bears worldwide and 900 in the Southern Beaufort Sea stock. 1 E.R. 51, 65–66. The Liberty project will occupy only an "extremely small subset" of the polar bear's available habitat—about 26 acres out of a total habitat of more than 3,600,000 acres. 1 E.R. 85. Only a "small proportion" of the habitat around the project is suitable for denning at all, and polar bears den at "low densities" in the area. 1 E.R. 79. The effects of the project's noise and human activity do not extend very far, i.e., only about one mile from the project itself. 1 E.R. 87. The most significant effects, moreover, will be limited to the construction of the project, over about two years, and not the drilling and production that will follow. 1 E.R. 87. The project, in short, will "impact a small geographic area and the majority of disturbance would not persist beyond the construction period." 1 E.R. 89. All of this supports the Service's conclusion that only a "small number" of bears will be affected and that this small project is not likely to cause "jeopardy."

The Service's conclusion that the project will not destroy or adversely modify the bear's designated critical habitat follows the same logic. 1 E.R. 84–89. Again, the Service observes that the project will affect only "an extremely small subset of available designated terrestrial denning habitat" (26 acres out of 3,620,588 acres). 1 E.R. 85. It notes that only "a small proportion" of those 26 acres contain the "physical or biological features" necessary to be suitable for polar bear denning. *Id*. The "direct effects" of the project would be "limited to the construction phase." *Id*. For all these reasons, the Service concludes that "we would not anticipate adverse effects to terrestrial denning critical habitat from construction and operation of the Liberty DPP." *Id*.

The Service reiterates that same conclusion—that this project will have *no* adverse effects on the polar bear's critical habitat—in both its summary of the effects and its conclusion. 1 E.R. 89, 91. But in those two discussions, the Service also finds that MMPA mitigation measures will further reduce the effects of the project from some adverse effects to "no effect." 1 E.R. 89 (noting that "multiple mechanisms under the MMPA impart further protective measures to polar bears and their habitat by regulating disturbance and human-polar bear interactions"); 1 E.R. 91 (noting that "terms and conditions associated with authorizations under the MMPA would minimize the level of persistent disturbance that may result from the Proposed Action"). From this, Petitioners conclude that the Service was able to reach its conclusion that this project will not cause "destruction or adverse modification" of critical habitat only by relying on these MMPA mitigation measures.

But Petitioners have confused "adverse effects" with "adverse modification," which are not the same. Adverse effects to critical habitat trigger the obligation to engage in a formal ESA consultation, but they rise to the level of "adverse modification" only if they "appreciably diminish[] the value of critical habitat for the conservation of a listed species" as whole. 50 C.F.R. § 402.02 (definition for "destruction or adverse modification"). As the Service explained when it promulgated this definition, "minor" adverse effects to critical habitat that are not biologically significant to the conservation of the species do not constitute "destruction or adverse modification." 81 Fed. Reg. 7214, 7218 (Feb. 11, 2016) (rejecting the view that "every diminishment, however small, should constitute destruction or adverse modification").

Here, the Service never found that this project would cause the "destruction or adverse modification" of the bear's critical habitat under any circumstances. To the contrary, it found that the project would have very limited adverse effects on a very small area of habitat. Again, those conclusions are fully supported by the administrative record: this is a small project that will affect only a small area of habitat for a short time. Petitioners have proffered no evidence that this project—even if were to disturb a nearby bear enough to cause it to abandon its den—could somehow "appreciably diminish" the value of the polar bear's vast critical habitat to the conservation of the species as a whole.

Petitioners' argument stumbles at the gate because it is based on a false premise. The simple fact—as shown by the biological opinion and the

administrative record—is that the Service found that this project would not cause "jeopardy" or "adverse modification" because it is a small project with small effects, not because its effects would be further mitigated through the MMPA process.

2. These mitigation measures are reasonably specific, certain to occur, and enforceable under the ESA and the MMPA.

Even if the Service had relied on these mitigation measures to reach its "no jeopardy" and "no adverse modification" conclusions, that would have been lawful because these measures are reasonably specific, certain to occur, and enforceable under the ESA and the MMPA. Take the den detection surveys as an example: not only has Hilcorp already committed to conduct them in its "development and production plan," making them enforceable under OCSLA, 43 U.S.C. § 1351(j), they are also enforceable under both the ESA and the MMPA. They are enforceable under the ESA because Hilcorp "committed" to perform them and they are thus part of the "proposed action" that was the subject of this consultation. 1 S.E.R. 171–73; *see also, e.g., Center for Biological Diversity v. U.S. BLM*, 698 F.3d 1101, 1114 (9th Cir. 2012) (holding that the "enforceability of mitigation measures turns on their integration into the proposed action."). If Hilcorp does not perform these surveys, it runs the risk that any "take" caused by this project will be unlawful under the ESA, and BOEM would be required to reinitiate consultation with the Service. 1 E.R. 94.

These surveys will also be enforceable under the MMPA. As discussed above, this biological opinion does not authorize any incidental take of polar bears; instead, Hilcorp must first obtain an MMPA "letter of authorization" under the relevant "incidental take regulation." But that regulation requires "[a]ll holders" of a "letter of authorization"—including, eventually, Hilcorp—to have "an approved . . . polar bear safety, awareness, and interaction plan" that includes "polar bear observation and reporting procedures." 50 C.F.R. § 18.128(a)(1)(iii), (iii)(F). Similarly, when Hilcorp carries out onshore activities in this area during the denning season, the incidental take regulation requires it to "make efforts to locate occupied polar bear dens within and near areas of operation, utilizing appropriate tools, such as forward-looking infrared (FLIR) imagery and/or polar bear scent-trained dogs." *Id.* § 18.128(b)(1). If a den is found within one mile of the project's activities, "work must cease and the Service contacted for guidance." *Id.* § 18.128(b)(2). These requirements are not merely among the possible mitigation measures that the Service might impose on this project in the letter of authorization: they are part of an "'umbrella' set of requirements" that apply to all industry activities authorized under this regulation, including Hilcorp's. 81 Fed. Reg. 52,308 (Aug. 5, 2016).

Thus, even if the Service had relied on these mitigation measures to reach its "no jeopardy" and "no adverse modification" conclusions, that reliance would have been lawful because these measures—including the den detection surveys—are reasonably specific, certain to occur, and enforceable under OCSLA, the ESA, and the MMPA.

3. The law required the Service to defer these mitigation measures to the MMPA.

Petitioners argue that it was unlawful for the Service to defer these "reasonable and prudent measures" based on "a promise of future compliance with the MMPA" because MMPA compliance cannot "substitute for meeting the specific requirements of the ESA." Opening Brief 41. But Petitioners are wrong: not only was it lawful for the Service to defer its identification of mitigation measures to the MMPA authorization of take, but that approach also was compelled by the law.

As discussed in Section II.A above (pp. 27–34), the ESA did not permit the Service to authorize incidental take here until that take is first authorized under the MMPA. Moreover, the Service's ESA Section 4(d) rule for the polar bear specifically makes the MMPA—not the ESA—the "primary regulatory" mechanism for the conservation of the polar bear. 78 Fed. Reg. at 11,768. Under that rule—and, consequently, as a matter of law—any incidental take that is authorized under the more-protective standards of the MMPA does not require any additional authorization under the ESA. 50 C.F.R. § 17.40(q)(2); 78 Fed. Reg. at 11,768. Thus, it was lawful and appropriate for the Service to "defer to the mitigation measures that will be included in the Letters of Authorization issued to Hilcorp" and to incorporate those measures to "serve as RPMs and T&Cs for this Incidental Take Statement." 1 E.R. 93.

The cases cited by Petitioners do not show otherwise. As Petitioners note, this Court has held that "Congress did not contemplate leaving the

federal government's protection of endangered and threatened species to mechanisms other than those specified by the ESA." Opening Brief 42 (citing *Center for Biological Diversity*, 698 F.3d at 1117). But the other "mechanisms" in that case were the Natural Gas Act and the Mineral Leasing Act, statutes whose primary purpose is plainly not the conservation of species. *Center for Biological Diversity*, 698 F.3d at 1115. Here, in contrast, the other mechanisms are the MMPA, which the Service has used to protect the polar bear for decades, and the polar bear's special ESA Section 4(d) rule, which was promulgated specifically to "synchronize" the conservation of the species under these statutes. Moreover, the mitigation measures at issue in that case were not enforceable under the ESA, *id*. at 1117, unlike the mitigation measures here, which will be enforceable under both the ESA and the MMPA (as well as OCSLA).

Petitioners also argue that this Court has held that the MMPA does not "affect[] the issuance or contents of the biological opinions for polar bears." Opening Brief 39 (citing *Center for Biological Diversity v. Salazar*, 695 F.3d at 911). The Court did hold in *Salazar* that the Service was required to prepare an incidental take statement for a proposed "incidental take regulation," despite the polar bear's ESA Section 4(d) rule and even though incidental take of polar bears would not be authorized under that regulation until a "letter of authorization" was also issued. *Id*. at 910–11. But *Salazar* did not hold that the Service was required to identify "reasonable and prudent measures" before MMPA take authorization was completed. More importantly, the Court

reached those conclusions because the action at issue in that case was itself an MMPA incidental take regulation whose "very purpose" was the authorization of incidental take. *Id.* at 910. Here, in contrast, the purpose of this action—a development and production plan under OCSLA—is not to authorize incidental take. These cases do not apply here, and it was not unlawful for the Service to defer the "reasonable and prudent measures" to the MMPA process.

4. The biological opinion does not violate Ninth Circuit precedent on mitigation measures.

In a series of cases, this Court has held that federal agencies cannot avoid the requirements of the ESA—and take actions that are likely to cause "jeopardy" now—simply by promising to find some way to undo the damage later. In *National Wildlife Federation v. NMFS*, 524 F.3d 917, 925 (9th Cir. 2008), for example, NMFS initially concluded that the operation of the dams along the Columbia River was likely to jeopardize the continued existence of certain listed salmon and steelhead species. In its next biological opinion, however, NMFS reached a "no jeopardy" conclusion by assuming that conditions would improve after the installation of "removable spillway weirs." *Id.* at 935. This Court rejected that "no jeopardy" conclusion because there were no "specific and binding plans" or "guarantees" that those removable spillway weirs would actually be built, and there was little more than a "sincere general commitment." *Id.* at 935–36. That vague promise was insufficient to "offset" the "certain" and "immediate negative effects" that the operation of the dams would have. *Id.* at 936.

Petitioners cite many other cases reaching the same conclusion. *Sierra Club v. Marsh*, 816 F.2d 1376, 1379 (9th Cir.1987); *National Wildlife Federation v. NMFS*, 839 F. Supp. 2d 1117, 1126–27 (D. Or. 2011); *Center for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1003–04 (D. Ariz. 2011); *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002). But Petitioners wrongly contend that the Service's biological opinion here runs afoul of this line of decisions. Opening Brief 40–48.

First, as discussed in Section II.C.1 above (pp. 42–46), this case is not like *National Wildlife Federation*, in which the agency was only able to avoid "jeopardy" (or "adverse modification" of critical habitat) by relying on mitigation measures.

Second, there is no immediate harm to the species here. This Court has recognized that all of the cases discussed above involved "mitigation measures aimed at certain immediate negative effects." *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1258 (9th Cir. 2017) (internal quotation marks omitted). In *National Wildlife Federation*, for example, the operation of the dams was having "immediate negative effects" on the species that would only be offset later. 524 F.3d at 936. Here, in contrast, the Service has not yet authorized any incidental take under the ESA or the MMPA, the project is not yet being built, and there are no "immediate negative effects." Nothing can happen here until mitigation measures are in place under the MMPA and the ESA.

Third, the mitigation measures at issue in this case are not vague and unenforceable. Hilcorp has already committed to conducting den detection

surveys in its development and production plan and has made them part of the proposed action. The surveys are, as a result, enforceable under OCSLA and the ESA. The MMPA incidental take regulation that applies here, moreover, includes measures, including den detection surveys, that apply to all holders of letters of authorization, which will include Hilcorp.

In short, this is not a case where an agency is offsetting "jeopardy" today with a vague promise to fix things tomorrow. Instead, this is a case involving a relatively small project that does not threaten "jeopardy" and cannot proceed until further enforceable mitigation measures are in place. The cases cited by Petitioners do not apply.

Therefore, the Fish and Wildlife Service's biological opinion complies with the ESA.

III. The Court lacks jurisdiction over Petitioners' new ESA claim against BOEM because Petitioners did not satisfy the ESA's jurisdictional prerequisites.

Petitioners also claim that BOEM violated Section 7 of the ESA by relying on the Service's allegedly unlawful biological opinion. Opening Brief 56. Petitioners did not include this ESA claim against BOEM in their petition for review, and the Court lacks jurisdiction over it.

The ESA expressly provides that "no action" may be brought under its citizen's suit provision "prior to sixty days after written notice of the violation has been given to the Secretary and to any alleged violator." 16 U.S.C. § 1540(g)(2)(A)(i). That 60-day notice is a jurisdictional prerequisite to any

ESA citizen's suit and, without it, Petitioners' claims must be dismissed for lack of subject matter jurisdiction. *See, e.g., Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520–21 (9th Cir. 1998). Because Petitioners did not provide the required 60-day notice, the Court lacks jurisdiction over this ESA claim against BOEM.

Even if the Court had jurisdiction over this claim, it should be denied because, as discussed above, the Service's biological opinion was not unlawful. Consequently, it was not unlawful for BOEM to rely on the opinion.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The undersigned is aware of no related cases within the meaning of Circuit Rule 28-2.6.

ADDENDUM

Statutes

16 U.S.C. § 1361 ..... A-1 to A-2

16 U.S.C. § 1362(18)(A)(i) ..... A-3 to A-4

16 U.S.C. § 1371(a) ..... A-5 to A-12

16 U.S.C. § 1533(d) A-13

42 U.S.C. § 4321 ..... A-14

42 U.S.C. § 4332(2)(c) A-15

43 U.S.C. § 1332(3) ..... A-16 to A-17

43 U.S.C. § 1337 ..... A-18 to A-45

43 U.S.C. § 1351(j) A-46

Regulations

40 C.F.R. § 1502.22 ..... A-47 to A-48

40 C.F.R. § 1508.8(b) A-49

50 C.F.R. § 17.3 ..... A-50

Marine Mammal Protection Act, 16 U.S.C. § 1361

Congressional findings and declaration of policy

The Congress finds that—

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either—

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce, and that the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

Marine Mammal Protection Act, 16 U.S.C. § 1362(18)(A)(i)

§ 1362. Definitions

For the purposes of this chapter—

. . .

(18)(A) The term "harassment" means any act of pursuit, torment, or annoyance which—

(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or

(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

(B) In the case of a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note) or a scientific research activity conducted by or on behalf of the Federal Government consistent with section 1374(c)(3) of this title, the term "harassment" means—

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or

(ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered.

(C) The term "Level A harassment" means harassment described in subparagraph (A)(i) or, in the case of a military readiness activity or scientific research activity described in subparagraph (B), harassment described in subparagraph (B)(i).

(D) The term "Level B harassment" means harassment described in subparagraph (A)(ii) or, in the case of a military readiness activity or scientific research activity described in subparagraph (B), harassment described in subparagraph (B)(ii).

Marine Mammal Protection Act, 16 U.S.C. § 1371(a)

§ 1371. Moratorium on taking and importing marine mammals and marine mammal products

(a) Imposition; exceptions

There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

. . .

(5)(A)(i) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment—

(I) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 1379(f) of

this title or, in the case of a cooperative agreement under both this chapter and the Whaling Convention Act of 1949 (16 U.S.C. 916 et seq.), pursuant to section 1382(c) of this title; and

(II) prescribes regulations setting forth—

(aa) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses; and

(bb) requirements pertaining to the monitoring and reporting of such taking.

(ii) For a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), a determination of "least practicable adverse impact on such species or stock" under clause (i)(II)(aa) shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

(iii) Notwithstanding clause (i), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that—

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(D)(i) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a

species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned—

(I) will have a negligible impact on such species or stock, and

(II) will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b), or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title.

(ii) The authorization for such activity shall prescribe, where applicable—

(I) permissible methods of taking by harassment pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title,

(II) the measures that the Secretary determines are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence uses pursuant to subsection (b) or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title, and

(III) requirements pertaining to the monitoring and reporting of such taking by harassment, including requirements for the independent peer review of proposed monitoring plans or other research proposals where the proposed activity may affect the availability of a species or stock for taking for

subsistence uses pursuant to subsection (b) or section 1379(f) of this title or pursuant to a cooperative agreement under section 1388 of this title.

(iii) The Secretary shall publish a proposed authorization not later than 45 days after receiving an application under this subparagraph and request public comment through notice in the Federal Register, newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication. Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in clause (i), the Secretary shall issue an authorization with appropriate conditions to meet the requirements of clause (ii).

(iv) The Secretary shall modify, suspend, or revoke an authorization if the Secretary finds that the provisions of clauses (i) or (ii) are not being met.

(v) A person conducting an activity for which an authorization has been granted under this subparagraph shall not be subject to the penalties of this chapter for taking by harassment that occurs in compliance with such authorization.

(vi) For a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), a determination of "least practicable adverse impact on such species or stock" under clause (i)(I) 1 shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of

Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

(vii) Notwithstanding clause (iii), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(E)(i) During any period of up to 3 consecutive years, the Secretary shall allow the incidental, but not the intentional, taking by persons using vessels of the United States or vessels which have valid fishing permits issued by the Secretary in accordance with section 1824(b) of this title, while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) if the Secretary, after notice and opportunity for public comment, determines that—

(I) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;

(II) a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and

(III) where required under section 1387 of this title, a monitoring program is established under subsection (d) of such section, vessels engaged in such fisheries are registered in accordance with such section, and a take reduction plan has been developed or is being developed for such species or stock.

(ii) Upon a determination by the Secretary that the requirements of clause (i) have been met, the Secretary shall publish in the Federal Register a list of those fisheries for which such determination was made, and, for vessels required to register under section 1387 of this title, shall issue an appropriate permit for each authorization granted under such section to vessels to which this paragraph applies. Vessels engaged in a fishery included in the notice published by the Secretary under this clause which are not required to register under section 1387 of this title shall not be subject to the penalties of this chapter for the incidental taking of marine mammals to which this paragraph applies, so long as the owner or master of such vessel reports any incidental mortality or injury of such marine mammals to the Secretary in accordance with section 1387 of this title.

(iii) If, during the course of the commercial fishing season, the Secretary determines that the level of incidental mortality or serious injury from commercial fisheries for which a determination was made under clause (i) has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock, the Secretary shall use the emergency authority granted under section 1387 of this title to protect such species or stock, and may modify any permit granted under this paragraph as necessary.

(iv) The Secretary may suspend for a time certain or revoke a permit granted under this subparagraph only if the Secretary determines that the conditions or limitations set forth in such permit are not being complied with. The Secretary

may amend or modify, after notice and opportunity for public comment, the list of fisheries published under clause (ii) whenever the Secretary determines there has been a significant change in the information or conditions used to determine such list.

(v) Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this subparagraph.

(vi) This subparagraph shall not govern the incidental taking of California sea otters and shall not be deemed to amend or repeal the Act of November 7, 1986 (Public Law 99–625; 100 Stat. 3500).

(F) Notwithstanding the provisions of this subsection, any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note) shall not be subject to the following requirements:

(i) In subparagraph (A), "within a specified geographical region" and "within that region of small numbers".

(ii) In subparagraph (B), "within a specified geographical region" and "within one or more regions".

(iii) In subparagraph (D), "within a specific geographic region", "of small numbers", and "within that region".

. . .

Endangered Species Act, 16 U.S.C. § 1533(d)

§ 1533. Determination of endangered species and threatened species

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

National Environmental Policy Act, 42 U.S.C. § 4321

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

National Environmental Policy Act, 42 U.S.C. § 4332(2)(c)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible:

. . .

(2) all agencies of the Federal Government shall—

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Outer Continental Shelf Lands Act, 43 U.S.C. § 1332(3)

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.1

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

Outer Continental Shelf Lands Act, 43 U.S.C. § 1337

§ 1337. Leases, easements, and rights-of-way on the outer Continental Shelf

(a) Oil and gas leases; award to highest responsible qualified bidder; method of bidding; royalty relief; Congressional consideration of bidding system; notice

(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—

(A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;

(B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage

continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold;

(H) cash bonus bid with royalty at no less than 12 and ½ per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease; or

(I) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of

this subchapter, except that no such bidding system or modification shall have more than one bid variable.

(2) The Secretary may, in his discretion, defer any part of the payment of the cash bonus, as authorized in paragraph (1) of this subsection, according to a schedule announced at the time of the announcement of the lease sale, but such payment shall be made in total no later than five years after the date of the lease sale.

(3)(A) The Secretary may, in order to promote increased production on the lease area, through direct, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease for such area.

(B) In the Western and Central Planning Areas of the Gulf of Mexico and the portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude and in the Planning Areas offshore Alaska, the Secretary may, in order to—

(i) promote development or increased production on producing or non-producing leases; or

(ii) encourage production of marginal resources on producing or non-producing leases; through primary, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease(s). With the lessee's consent, the Secretary may make other modifications to the royalty or net profit share terms of the lease in order to achieve these purposes.

(C)(i) Notwithstanding the provisions of this subchapter other than this subparagraph, with respect to any lease or unit in existence on November 28,

1995, meeting the requirements of this subparagraph, no royalty payments shall be due on new production, as defined in clause (iv) of this subparagraph, from any lease or unit located in water depths of 200 meters or greater in the Western and Central Planning Areas of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, until such volume of production as determined pursuant to clause (ii) has been produced by the lessee.

(ii) Upon submission of a complete application by the lessee, the Secretary shall determine within 180 days of such application whether new production from such lease or unit would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph. In making such determination, the Secretary shall consider the increased technological and financial risk of deep water development and all costs associated with exploring, developing, and producing from the lease. The lessee shall provide information required for a complete application to the Secretary prior to such determination. The Secretary shall clearly define the information required for a complete application under this section. Such application may be made on the basis of an individual lease or unit. If the Secretary determines that such new production would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph, the provisions of clause (i) shall not apply to such production. If the Secretary determines that such new production would

not be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i), the Secretary must determine the volume of production from the lease or unit on which no royalties would be due in order to make such new production economically viable; except that for new production as defined in clause (iv)(I), in no case will that volume be less than 17.5 million barrels of oil equivalent in water depths of 200 to 400 meters, 52.5 million barrels of oil equivalent in 400–800 meters of water, and 87.5 million barrels of oil equivalent in water depths greater than 800 meters. Redetermination of the applicability of clause (i) shall be undertaken by the Secretary when requested by the lessee prior to the commencement of the new production and upon significant change in the factors upon which the original determination was made. The Secretary shall make such redetermination within 120 days of submission of a complete application. The Secretary may extend the time period for making any determination or redetermination under this clause for 30 days, or longer if agreed to by the applicant, if circumstances so warrant. The lessee shall be notified in writing of any determination or redetermination and the reasons for and assumptions used for such determination. Any determination or redetermination under this clause shall be a final agency action. The Secretary's determination or redetermination shall be judicially reviewable under section 702 of title 5, only for actions filed within 30 days of the Secretary's determination or redetermination.

(iii) In the event that the Secretary fails to make the determination or redetermination called for in clause (ii) upon application by the lessee within

the time period, together with any extension thereof, provided for by clause (ii), no royalty payments shall be due on new production as follows:

(I) For new production, as defined in clause (iv)(I) of this subparagraph, no royalty shall be due on such production according to the schedule of minimum volumes specified in clause (ii) of this subparagraph.

(II) For new production, as defined in clause (iv)(II) of this subparagraph, no royalty shall be due on such production for one year following the start of such production.

(iv) For purposes of this subparagraph, the term "new production" is—

(I) any production from a lease from which no royalties are due on production, other than test production, prior to November 28, 1995; or

(II) any production resulting from lease development activities pursuant to a Development Operations Coordination Document, or supplement thereto that would expand production significantly beyond the level anticipated in the Development Operations Coordination Document, approved by the Secretary after November 28, 1995.

(v) During the production of volumes determined pursuant to clauses 1 (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, any production of oil will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clause (ii) or (iii). Estimated royalty payments will be made if such average of the closing

prices for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vi) During the production of volumes determined pursuant to clause (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal units, any production of natural gas will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clauses 1 (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $3.50. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vii) The prices referred to in clauses (v) and (vi) of this subparagraph shall be changed during any calendar year after 1994 by the percentage, if any, by which the implicit price deflator for the gross domestic product changed during the preceding calendar year.

(4)(A) The Secretary of Energy shall submit any bidding system authorized in subparagraph (H) of paragraph (1) to the Senate and House of Representatives. The Secretary may institute such bidding system unless either the Senate or the

House of Representatives passes a resolution of disapproval within thirty days after receipt of the bidding system.

(B) Subparagraphs (C) through (J) of this paragraph are enacted by Congress—

(i) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but they are applicable only with respect to the procedures to be followed in that House in the case of resolutions described by this paragraph, and they supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(C) A resolution disapproving a bidding system submitted pursuant to this paragraph shall immediately be referred to a committee (and all resolutions with respect to the same request shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(D) If the committee to which has been referred any resolution disapproving the bidding system of the Secretary has not reported the resolution at the end of ten calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution

with respect to the same bidding system which has been referred to the committee.

(E) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same recommendation), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(F) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same bidding system.

(G) When the committee has reported, or has been discharged from further consideration of, a resolution as provided in this paragraph, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(H) Debate on the resolution is limited to not more than two hours, to be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion

to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(I) Motions to postpone, made with respect to the discharge from the committee, or the consideration of a resolution with respect to a bidding system, and motions to proceed to the consideration of other business, shall be decided without debate.

(J) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a bidding system shall be decided without debate.

(5)(A) During the five-year period commencing on September 18, 1978, the Secretary may, in order to obtain statistical information to determine which bidding alternatives will best accomplish the purposes and policies of this subchapter, require, as to no more than 10 per centum of the tracts offered each year, each bidder to submit bids for any area of the outer Continental Shelf in accordance with more than one of the bidding systems set forth in paragraph (1) of this subsection. For such statistical purposes, leases may be awarded using a bidding alternative selected at random for the acquisition of valid statistical data if such bidding alternative is otherwise consistent with the provisions of this subchapter.

(B) The bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered

for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter.

(6) At least ninety days prior to notice of any lease sale under subparagraph (D), (E), (F), or, if appropriate, (H) of paragraph (1), the Secretary shall by regulation establish rules to govern the calculation of net profits. In the event of any dispute between the United States and a lessee concerning the calculation of the net profits under the regulation issued pursuant to this paragraph, the burden of proof shall be on the lessee.

(7) After an oil and gas lease is granted pursuant to any of the work commitment options of paragraph (1) of this subsection—

(A) the lessee, at its option, shall deliver to the Secretary upon issuance of the lease either (i) a cash deposit for the full amount of the exploration work commitment, or (ii) a performance bond in form and substance and with a surety satisfactory to the Secretary, in the principal amount of such exploration work commitment assuring the Secretary that such commitment shall be faithfully discharged in accordance with this section, regulations, and the lease; and for purposes of this subparagraph, the principal amount of such cash deposit or bond may, in accordance with regulations, be periodically reduced upon proof, satisfactory to the Secretary, that a portion of the exploration work commitment has been satisfied;

(B) 50 per centum of all exploration expenditures on, or directly related to, the lease, including, but not limited to (i) geological investigations and related activities, (ii) geophysical investigations including seismic, geomagnetic, and gravity surveys, data processing and interpretation, and (iii) exploratory drilling, core drilling, redrilling, and well completion or abandonment, including the drilling of wells sufficient to determine the size and a real extent of any newly discovered field, and including the cost of mobilization and demobilization of drilling equipment, shall be included in satisfaction of the commitment, except that the lessee's general overhead cost shall not be so included against the work commitment, but its cost (including employee benefits) of employees directly assigned to such exploration work shall be so included; and

(C) if at the end of the primary term of the lease, including any extension thereof, the full dollar amount of the exploration work commitment has not been satisfied, the balance shall then be paid in cash to the Secretary.

(8) Not later than thirty days before any lease sale, the Secretary shall submit to the Congress and publish in the Federal Register a notice—

(A) identifying any bidding system which will be utilized for such lease sale and the reasons for the utilization of such bidding system; and

(B) designating the lease tracts selected which are to be offered in such sale under the bidding system authorized by subparagraph (A) of paragraph (1) and the lease tracts selected which are to be offered under any one or more of the bidding systems authorized by subparagraphs (B) through (H) of paragraph (1),

and the reasons such lease tracts are to be offered under a particular bidding system.

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall—

(1) be for a tract consisting of a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit;

(2) be for an initial period of—

(A) five years; or

(B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions, and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon;

(3) require the payment of amount or value as determined by one of the bidding systems set forth in subsection (a) of this section;

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter;

(5) provide for suspension or cancellation of the lease during the initial lease term or thereafter pursuant to section 1334 of this title;

(6) contain such rental and other provisions as the Secretary may prescribe at the time of offering the area for lease; and

(7) provide a requirement that the lessee offer 20 per centum of the crude oil, condensate, and natural gas liquids produced on such lease, at the market value and point of delivery applicable to Federal royalty oil, to small or independent refiners as defined in the Emergency Petroleum Allocation Act of 1973 2 [15 U.S.C. 751 et seq.].

(c) Antitrust review of lease sales

(1) Following each notice of a proposed lease sale and before the acceptance of bids and the issuance of leases based on such bids, the Secretary shall allow the Attorney General, in consultation with the Federal Trade Commission, thirty days to review the results of such lease sale, except that the Attorney General, after consultation with the Federal Trade Commission, may agree to a shorter review period.

(2) The Attorney General may, in consultation with the Federal Trade Commission, conduct such antitrust review on the likely effects the issuance of such leases would have on competition as the Attorney General, after consultation with the Federal Trade Commission, deems appropriate and shall advise the Secretary with respect to such review. The Secretary shall provide such information as the Attorney General, after consultation with the Federal Trade Commission, may require in order to conduct any antitrust review

pursuant to this paragraph and to make recommendations pursuant to paragraph (3) of this subsection.

(3) The Attorney General, after consultation with the Federal Trade Commission, may make such recommendations to the Secretary, including the nonacceptance of any bid, as may be appropriate to prevent any situation inconsistent with the antitrust laws. If the Secretary determines, or if the Attorney General advises the Secretary, after consultation with the Federal Trade Commission and prior to the issuance of any lease, that such lease may create or maintain a situation inconsistent with the antitrust laws, the Secretary may—

(A) refuse (i) to accept an otherwise qualified bid for such lease, or (ii) to issue such lease, notwithstanding subsection (a) of this section; or

(B) issue such lease, and notify the lessee and the Attorney General of the reason for such decision.

(4)(A) Nothing in this subsection shall restrict the power under any other Act or the common law of the Attorney General, the Federal Trade Commission, or any other Federal department or agency to secure information, conduct reviews, make recommendations, or seek appropriate relief.

(B) Neither the issuance of a lease nor anything in this subsection shall modify or abridge any private right of action under the antitrust laws.

(d) Due diligence

No bid for a lease may be submitted if the Secretary finds, after notice and hearing, that the bidder is not meeting due diligence requirements on other leases.

(e) Secretary's approval for sale, exchange, assignment, or other transfer of leases

No lease issued under this subchapter may be sold, exchanged, assigned, or otherwise transferred except with the approval of the Secretary. Prior to any such approval, the Secretary shall consult with and give due consideration to the views of the Attorney General.

(f) Antitrust immunity or defenses

Nothing in this subchapter shall be deemed to convey to any person, association, corporation, or other business organization immunity from civil or criminal liability, or to create defenses to actions, under any antitrust law.

(g) Leasing of lands within three miles of seaward boundaries of coastal States; deposit of revenues; distribution of revenues

(1) At the time of soliciting nominations for the leasing of lands containing tracts wholly or partially within three nautical miles of the seaward boundary of any coastal State, and subsequently as new information is obtained or developed by the Secretary, the Secretary shall, in addition to the information required by section 1352 of this title, provide the Governor of such State—

(A) an identification and schedule of the areas and regions proposed to be offered for leasing;

(B) at the request of the Governor of such State, all information from all sources concerning the geographical, geological, and ecological characteristics of such tracts;

(C) an estimate of the oil and gas reserves in the areas proposed for leasing; and

(D) at the request of the Governor of such State, an identification of any field, geological structure, or trap located wholly or partially within three nautical miles of the seaward boundary of such coastal State, including all information relating to the entire field, geological structure, or trap.

The provisions of the first sentence of subsection (c) and the provisions of subsections (e)–(h) of section 1352 of this title shall be applicable to the release by the Secretary of any information to any coastal State under this paragraph. In addition, the provisions of subsections (c) and (e)–(h) of section 1352 of this title shall apply in their entirety to the release by the Secretary to any coastal State of any information relating to Federal lands beyond three nautical miles of the seaward boundary of such coastal State.

(2) Notwithstanding any other provision of this subchapter, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case of Alaska, partially until seven years from the date of settlement of any boundary dispute that is

the subject of an agreement under section 1336 of this title entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or, (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

(3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the

coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

(4) The deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury in securities backed by the full faith and credit of the United States having maturities suitable to the needs of the account and yielding the highest reasonably available interest rates as determined by the Secretary of the Treasury.

(5)(A) When there is a boundary dispute between the United States and a State which is subject to an agreement under section 1336 of this title, the Secretary shall credit to the account established pursuant to such agreement all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly or partially within three nautical miles of the seaward boundary asserted by the State, if that money has not otherwise been deposited in such account. Proceeds of an escrow account established pursuant to an agreement under section 1336 of this title shall be distributed as follows:

(i) Twenty-seven percent of all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978, of any tract which lies wholly within three nautical miles of the seaward boundary asserted by the Federal Government in the boundary dispute, together with all accrued interest thereon, shall be paid to the State either—

(I) within thirty days of December 1, 1987, or

(II) by the last business day of the month following the month in which those revenues are deposited in the Treasury, whichever date is later.

(ii) Upon the settlement of a boundary dispute which is subject to a section 1336 of this title agreement between the United States and a State, the Secretary shall pay to such State any additional moneys due such State from amounts deposited in or credited to the escrow account. If there is insufficient money deposited in the escrow account, the Secretary shall transmit, from any revenues derived from any lease of Federal lands under this subchapter, the remaining balance due such State in accordance with the formula set forth in section 8004(b)(1)(B) of the Outer Continental Shelf Lands Act Amendments of 1985.

(B) This paragraph applies to all Federal oil and gas lease sales, under this subchapter, including joint lease sales, occurring after September 18, 1978.

(6) This section shall be deemed to take effect on October 1, 1985, for purposes of determining the amounts to be deposited in the separate account and the States' shares described in paragraph (2).

(7) When the Secretary leases any tract which lies wholly or partially within three miles of the seaward boundary of two or more States, the revenues from such tract shall be distributed as otherwise provided by this section, except that the State's share of such revenues that would otherwise result under this section shall be divided equally among such States.

(h) State claims to jurisdiction over submerged lands

Nothing contained in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.

(i) Sulphur leases; award to highest bidder; method of bidding

In order to meet the urgent need for further exploration and development of the sulphur deposits in the submerged lands of the outer Continental Shelf, the Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding sulphur leases on submerged lands of the outer Continental Shelf, which are not covered by leases which include sulphur and meet the requirements of section 1335(a) of this title, and which sulphur leases shall be offered for bid by sealed bids and granted on separate leases from oil and gas leases, and for a separate consideration, and without priority or preference accorded to oil and gas lessees on the same area.

(j) Terms and provisions of sulphur leases

A sulphur lease issued by the Secretary pursuant to this section shall (1) cover an area of such size and dimensions as the Secretary may determine, (2) be for a period of not more than ten years and so long thereafter as sulphur may be produced from the area in paying quantities or drilling, well reworking, plant construction, or other operations for the production of sulphur, as approved by the Secretary, are conducted thereon, (3) require the payment to the United States of such royalty as may be specified in the lease but not less than 5 per centum of the gross production or value of the sulphur at the wellhead, and (4) contain such rental provisions and such other terms and provisions as the Secretary may by regulation prescribe at the time of offering the area for lease.

(k) Other mineral leases; award to highest bidder; terms and conditions; agreements for use of resources for shore protection, beach or coastal wetlands restoration, or other projects

(1) The Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding leases of any mineral other than oil, gas, and sulphur in any area of the outer Continental Shelf not then under lease for such mineral upon such royalty, rental, and other terms and conditions as the Secretary may prescribe at the time of offering the area for lease.

(2)(A) Notwithstanding paragraph (1), the Secretary may negotiate with any person an agreement for the use of Outer Continental Shelf sand, gravel and shell resources—

(i) for use in a program of, or project for, shore protection, beach restoration, or coastal wetlands restoration undertaken by a Federal, State, or local government agency; or

(ii) for use in a construction project, other than a project described in clause (i), that is funded in whole or in part by or authorized by the Federal Government.

(B) In carrying out a negotiation under this paragraph, the Secretary may assess a fee based on an assessment of the value of the resources and the public interest served by promoting development of the resources. No fee shall be assessed directly or indirectly under this subparagraph against a Federal, State, or local government agency.

(C) The Secretary may, through this paragraph and in consultation with the Secretary of Commerce, seek to facilitate projects in the coastal zone, as such term is defined in section 1453 of title 16, that promote the policy set forth in section 1452 of title 16.

(D) Any Federal agency which proposes to make use of sand, gravel and shell resources subject to the provisions of this subchapter shall enter into a Memorandum of Agreement with the Secretary concerning the potential use of those resources. The Secretary shall notify the Committee on Merchant Marine and Fisheries and the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate on any proposed project for the use of those resources prior to the use of those resources.

(l) Publication of notices of sale and terms of bidding

Notice of sale of leases, and the terms of bidding, authorized by this section shall be published at least thirty days before the date of sale in accordance with rules and regulations promulgated by the Secretary.

(m) Disposition of revenues

All moneys paid to the Secretary for or under leases granted pursuant to this section shall be deposited in the Treasury in accordance with section 1338 of this title.

(n) Issuance of lease as nonprejudicial to ultimate settlement or adjudication of controversies

The issuance of any lease by the Secretary pursuant to this subchapter, or the making of any interim arrangements by the Secretary pursuant to section 1336 of this title shall not prejudice the ultimate settlement or adjudication of the question as to whether or not the area involved is in the outer Continental Shelf.

(o) Cancellation of leases for fraud

The Secretary may cancel any lease obtained by fraud or misrepresentation.

(p) Leases, easements, or rights-of-way for energy and related purposes

(1) In general

The Secretary, in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal Government, may grant a lease, easement, or right-of-way on the

outer Continental Shelf for activities not otherwise authorized in this subchapter, the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 et seq.), or other applicable law, if those activities—

(A) support exploration, development, production, or storage of oil or natural gas, except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;

(B) support transportation of oil or natural gas, excluding shipping activities;

(C) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or

(D) use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under this subchapter, except that any oil and gas energy-related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium.

(2) Payments and revenues

(A) The Secretary shall establish royalties, fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease, easement, or right-of-way granted under this subsection.

(B) The Secretary shall provide for the payment of 27 percent of the revenues received by the Federal Government as a result of payments under this section from projects that are located wholly or partially within the area extending

three nautical miles seaward of State submerged lands. Payments shall be made based on a formula established by the Secretary by rulemaking no later than 180 days after August 8, 2005, that provides for equitable distribution, based on proximity to the project, among coastal states that have a coastline that is located within 15 miles of the geographic center of the project.

(3) Competitive or noncompetitive basis

Except with respect to projects that meet the criteria established under section 388(d) of the Energy Policy Act of 2005, the Secretary shall issue a lease, easement, or right-of-way under paragraph (1) on a competitive basis unless the Secretary determines after public notice of a proposed lease, easement, or right-of-way that there is no competitive interest.

(4) Requirements

The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for—

(A) safety;

(B) protection of the environment;

(C) prevention of waste;

(D) conservation of the natural resources of the outer Continental Shelf;

(E) coordination with relevant Federal agencies;

(F) protection of national security interests of the United States;

(G) protection of correlative rights in the outer Continental Shelf;

(H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;

(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

(J) consideration of—

(i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and

(ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;

(K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and

(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.

(5) Lease duration, suspension, and cancellation

The Secretary shall provide for the duration, issuance, transfer, renewal, suspension, and cancellation of a lease, easement, or right-of-way under this subsection.

(6) Security

The Secretary shall require the holder of a lease, easement, or right-of-way granted under this subsection to—

(A) furnish a surety bond or other form of security, as prescribed by the Secretary;

(B) comply with such other requirements as the Secretary considers necessary to protect the interests of the public and the United States; and

(C) provide for the restoration of the lease, easement, or right-of-way.

(7) Coordination and consultation with affected State and local governments

The Secretary shall provide for coordination and consultation with the Governor of any State or the executive of any local government that may be affected by a lease, easement, or right-of-way under this subsection.

(8) Regulations

Not later than 270 days after August 8, 2005, the Secretary, in consultation with the Secretary of Defense, the Secretary of the Department in which the Coast Guard is operating, the Secretary of Commerce, heads of other relevant departments and agencies of the Federal Government, and the Governor of any affected State, shall issue any necessary regulations to carry out this subsection.

(9) Effect of subsection

Nothing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.

(10) Applicability

This subsection does not apply to any area on the outer Continental Shelf within the exterior boundaries of any unit of the National Park System, National Wildlife Refuge System, or National Marine Sanctuary System, or any National Monument.

Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(j)

§ 1351. Oil and gas development and production

(j) Cancellation of lease on failure to submit plan or comply with approved plan

Whenever the owner of any lease fails to submit a plan in accordance with regulations issued under this section, or fails to comply with an approved plan, the lease may be canceled in accordance with section 1334(c) and (d) of this title. Termination of a lease because of failure to comply with an approved plan, including required modifications or revisions, shall not entitle a lessee to any compensation.

40 C.F.R. § 1502.22, Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and

(4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have

catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

40 C.F.R. § 1508.8(b), Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

50 C.F.R. § 17.3, Definitions.

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

Harass in the definition of ''take'' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

This definition, when applied to captive wildlife, does not include generally accepted:

(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,

(2) Breeding procedures, or

(3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 18-73400

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This brief contains 13,847 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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