CASE NOS. 07-1247, 07-1344
ORAL ARGUMENT SCHEDULED FOR OCTOBER 2, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, Petitioner, v. UNITED STATES DEPARTMENT OF THE INTERIOR, Respondent, AMERICAN PETROLEUM INSTITUTE, Intervenor.	)	Case No. 07-1247 consolidated with
NATIVE VILLAGE OF POINT HOPE, ALASKA WILDERNESS LEAGUE, and PACIFIC ENVIRONMENT, Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, Respondent.	)	Case No. 07-1344

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FINAL REPLY BRIEF OF PETITIONERS NATIVE VILLAGE OF POINT HOPE, ALASKA WILDERNESS LEAGUE AND PACIFIC ENVIRONMENT

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Rebecca Noblin

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GLOSSARY

AR:	Administrative Record
API:	American Petroleum Institute
EIS:	Environmental Impact Statement
EPA:	U.S. Environmental Protection Agency
ESA:	Endangered Species Act
ESI:	Environmental Sensitivity Index
NEPA:	National Environmental Policy Act
NMFS:	National Marine Fisheries Service
NOAA:	National Oceanographic and Atmospheric Administration
OCS:	Outer Continental Shelf
OCSLA:	Outer Continental Shelf Lands Act

SUMMARY OF THE ARGUMENT

The Department of the Interior (Interior) violated both the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C §§ 1331-56 (2007), and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* (2007), in approving the 2007-2012 Oil and Gas Leasing Program (Leasing Program). As discussed below, Interior's effort to avoid this conclusion is unpersuasive.[1]

ARGUMENT

I. INTERIOR'S LEASING PROGRAM VIOLATES OCSLA.

In the circumstances of this case, where Interior admits to large data gaps related to fundamental information about the Beaufort, Chukchi and Bering Seas, and provides neither a discernable explanation of how those gaps can timely be filled nor an explanation of why they need not be filled, Interior violates OCSLA. Furthermore, by equating the environmental sensitivity of offshore environments – especially the ice-dominated Beaufort and Chukchi Seas, and the ice-influenced and fishery-rich Bering Sea – with the characteristics of shorelines, Interior violates OCSLA. Interior's response does nothing to change these conclusions.

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[1] Intervenor American Petroleum Institute (API) does not address petitioner Native Village of Point Hope, et al.'s (Point Hope) direct claims in its brief, focusing instead on (1) petitioners' standing to bring the claims briefed by petitioner Center for Biological Diversity (Center) and joined in by Point Hope; (2) the legal merits of the claims briefed by petitioner the Center; and (3) to what remedy petitioners are entitled. API Brief at 4-25. Point Hope joins in the Center's reply to API on most standing issues and on the merits, and thus addresses below only limited aspects of API's standing arguments as they apply exclusively to the Naïve Village of Point Hope, and the remedy issue.

A. Interior's Failure to Have a Discernable Information Gathering Plan Violates OCSLA.

Interior in large part mischaracterizes petitioner Point Hope's argument concerning whether Interior had sufficient information to approve the Leasing Program. In summary, Point Hope's argument is as follows:

First, OCSLA requires Interior to establish and update baseline information on the Outer Continental Shelf (OCS) planning areas included in its leasing programs. This information is used to inform OCSLA decisions concerning, for example, leasing, exploration and development, and their impact on the environment. Second, the record supporting the 2007-2012 Leasing Program shows that huge gaps exist in this data for the Beaufort, Chukchi and Bering Seas. Third, Interior states in its decision documents that it is deferring the gathering of this data to later OCSLA stages, yet it does not appear possible from the record that Interior can do so in a timely manner. Point Hope Brief at 28-32.

These points, taken together, lead to the conclusion that if Interior is to comply with OCSLA, it must explain how it plans to timely compile this data before those latter OCSLA stages. Providing no such explanation, and offering no permissible explanation of why one is not necessary, Interior is thus in violation of OCSLA.

Interior initially states that Point Hope is asserting that "Interior had to conduct comprehensive baseline research before developing its [Leasing] Program." Interior Brief at 19. This is not so; Interior could choose to proceed with the Leasing Program without having gathered that data, but given the huge gaps in knowledge of the Beaufort, Chukchi and Bering Sea environments, OCSLA requires that it explain how it will get that information before the next OCSLA stages. *See* Point Hope Brief at 32-36.

Interior also misreads OCSLA in making its argument that 43 U.S.C. § 1346(a)(1) does not require studies until after the Leasing Program is complete, and that 43 U.S.C. § 1346(b) does not require studies until after leasing and development. Interior Brief at 20. The studies required by Section 1346(a)(1) were intended to cover the information gathering requirements for *the first lease sales in any given planning area.* This is made clear by Section 1346(a)(2), which as relevant here states that, "Each study required by paragraph (1) of this subsection shall be commenced . . . not later than six months prior to the holding of a lease sale with respect to any area or region where no lease sale has been held or scheduled before September 18, 1978."

Once these studies are done, and subsequent to the initial leasing and development, Interior's Section 1346(b) obligation matures, requiring

> time-series and data trend information which can be used for comparison with any previously collected data for the purpose of identifying any significant changes in the quality and productivity of such environments, for establishing trends in the areas studied and monitored, and for designing experiments to identify the causes of such changes.

Interior's argument that no studies need be done under Section 1346(a)(1) until after the current Leasing Program is approved, and not until after any subsequent leasing and development under Section 1346(b), is inconsistent with this plain language. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (if statutory language at issue has plain and unambiguous meaning, inquiry ends and court applies plain language). It is also nonsensical. *See United States v. Howell,* 78 U.S. 432, 436 (1871) ("[O]ne of the first canons of construction teaches us to avoid if possible [a result] which is at war with the common sense. . .").

OCSLA's procedures "are pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981) (*Watt I*). OCSLA's structure, requiring studies upon the initial decision to lease in a given area, 43 U.S.C. § 1346(a)(1), and studies subsequent to the initial leasing itself, 43 U.S.C. § 1346(b), provide the foundation for this planning pyramid.

In the present context, each of the three planning areas discussed here – Beaufort, Chukchi and Bering Seas – have been included in previous leasing programs and have had lease sales prior to those permitted in the current Leasing Program. App. 404, 434, 606, 889, 450, 441, 1014.[2] Consequently, Interior had an obligation to gather baseline information and continually monitor the environment in these areas. To the extent it has not done so, Interior must explain how it plans to timely gather that data before the next OCSLA stages. This is so because gathering and analyzing this data is fundamental prior to any subsequent action in these Seas. *See, e.g.*, Point Hope Brief at 11-17.

Sidestepping its admissions that it did not have this data, Interior argues in its brief that it actually has gathered sufficient information. Interior Brief at 21-25. Expert agencies, local communities and governments, the conservation community, and the general public all refuted this point, and asserted the need for Interior to gather and analyze baseline data, or develop a plan to do so. *See, e.g.*, Point Hope Brief at 11-17; App. 27-28 (comments of National Marine Fisheries Service (NMFS) that "[i]t is extremely important to gain a better understanding of [baseline biological information]

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[2] Development has occurred in the Beaufort Sea. App. 602, 791.

prior to any exploration, leasing, or development");[3] App. 12-13, 17-18 (similar comments from EPA); App. 49-50, 53 (Fish and Wildlife Service); App. 31-38 (North Slope Borough); App. 1916 (Native Village of Point Hope); App. 14-16, 30(Alaska Wilderness League, Pacific Environment).

Interior does not respond to these comments in the record by arguing that it has the data; rather it repeatedly states that it will gather this data prior to subsequent OCSLA stages. *See, e.g.*, App. 1368 (Interior will address Chukchi Sea data gaps in later OCSLA stages). In fact, Interior received so many comments raising this issue that it generated two generic responses stating that it defers gathering such data until later OCSLA stages. App. 1367 ("General Response #1"); App. 1368-69 ("General Response #2"). Consequently, Interior's assertion that it has gathered sufficient information is not supported by the record.

Interior then states that Point Hope's argument is that Interior has failed to comply with its OCSLA monitoring obligations, and it therefore is bringing an action to "compel compliance" with the OCSLA monitoring requirements that can only arise as a citizen suit.. Interior Brief at 23. This is incorrect; Point Hope's argument is that Interior cannot rationally approve the 2007-2012 Leasing Program when it lacks baseline and monitoring data, and provides no rational explanation for how it plans to timely gather that information. OCSLA requires that such a claim exclusively be brought in a petition for review. 43 U.S.C. § 1349(c)(4).

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[3] As a sub-agency within the Department of Commerce, which Interior is supposed to involve "to the maximum extent practicable" in carrying out its 43 U.S.C. § 1346 responsibilities, 43 U.S.C. § 1346(f), Interior should, but did not, give NMFS's views special consideration.

Knowing its weakness, Interior then argues that it has properly monitored these areas. Interior Brief at 23-25. Interior supports this argument with bald information assertions and with information outside the formal administrative record. *See* Interior Brief at page 24, notes 4-6 and accompanying text. It should thus be rejected. *NRDC v. Hodel*, 865 F.2d 288, 300 (D.C. Cir. 1988) (record must show that Interior's factual determinations are based on substantial evidence); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156-57 (1991) (*post hoc* rationalizations not entitled to deference). Interior's Leasing Program must stand or fail on the rationale and information presented in the administrative record, *id.*, and that record includes Interior admissions about the lack of fundamental data on the biology of these Seas, and the likely impacts of oil and gas activities on the Seas and the life present within them. Even if the Court were to consider this outside-the-record information, moreover, Interior places it in no understandable context in relation to identified information needs, and the timing and location of planned oil and gas leases.

Finally, at the end of its response on this issue, Interior frames the relevant question: whether the record proves that "Interior can gather enough data in time to make adequate decisions about leasing, exploring, and developing Alaskan waters." Interior Brief at 25. Interior's response is to assert that Point Hope's argument is not relevant at the Leasing Program stage and that OCSLA does not require such a plan. *Id.* at 25-26

The Leasing Program is the foundation for every OCSLA decision that comes after it:

> Once the Secretary approves the leasing program, it achieves important practical and legal significance. No lease may be issued for any area unless the area is included in the approved leasing program and unless the lease contains provisions consistent with the approved program. The approved program also becomes the

> basis for future planning by all affected entities, from federal, state and local governments to the oil industry itself. Compliance with the mandates of section 18, therefore, is extremely important to the expeditious but orderly exploitation of OCS resources.

Watt I, 668 F.2d at 1299.

Further, Interior argues that the required appropriations estimates are irrelevant to whether Interior must provide an explanation of its information gathering plans. Interior Brief at 26, referencing 43 U.S.C. § 1344(b)(3). Interior is wrong. As the legislative history addressing these appropriations estimates states, this section was placed in the law "so as to assure due diligence and compliance with" OCSLA. H.R. Rep. No. 95-590, at 80 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 1450, 1556. This cannot be done in the circumstances of this case without such an explanation.

Contrary to Interior's response, therefore, in the circumstances of this case, where Interior admits that it has huge data gaps, defers to the future the gathering of data to address such gaps, and provides no explanation in the record as to how it can timely fill those gaps, the Leasing Program simply cannot meet its OCSLA function. *Motor Vehicle Mfrs. Ass'n v. State Farm,* 463 U.S. 29, 43 (1983) (agency is arbitrary where it fails to articulate satisfactory explanation); *see also NRDC v. Hodel*, 865 F.2d at 300 (agency decision must be based on a "rational consideration of identified, relevant factors"); *Watt I*, 668 F.2d at 1302 (court reviews Interior's judgments "to ensure that they are neither arbitrary nor irrational – in other words, [courts] must determine whether 'the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment'") (footnote and citation omitted).[4]

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[4] *See infra* section II.A.3 (analysis of impossibility of Interior gathering information before later OCSLA stages).

B. Interior's Reliance on Assessments of Shoreline Characteristics to Rank OCS Environmental Sensitivity Violates OCSLA.

Interior violated OCSLA by equating the environmental sensitivity of the shorelines closest to the OCS regions with the environmental sensitivity of those OCS regions, as it is arbitrary to do so. Point Hope Brief at 37-43. Interior's response to this argument, Interior Brief at 33-37, does not change this conclusion.

OCSLA clearly states that Interior must take into account "the relative environmental sensitivity ... of different areas of the outer Continental Shelf" in crafting its leasing program. 43 U.S.C. § 1344(a)(2)(G). Assessing the relative environmental sensitivity of shorelines that may be impacted by OCS activities is certainly permissible under this section of OCSLA. But the OCSLA requirement is not, as Interior claims, Interior Brief at 34, solely focused on coasts. To craft OCSLA's plain language – "different areas of the outer Continental Shelf" – into a shoreline-focused obligation is to insert words and an analytical structure into OCSLA that simply are not there. *Iselin v. United States*, 270 U.S. 245, 251 (1926) (improper to "supply omissions" in statutes). This misunderstanding of law is the fundamental fault with Interior's defense.

Interior also defends its equation of general offshore environmental sensitivity with that of shorelines by stating in its brief that "Interior has determined that the 'most significant environmental consequences' of offshore oil and gas production are caused by oil spills in coastal ecosystems." Interior Brief at 33, citing App. 2042. Even if this generalization were true and appropriate, and it most certainly is not in the circumstances

of this case, such an administrative finding does not excuse Interior from considering other factors.[5]

Such a finding leaves no room for the consideration of unique attributes of different offshore environments, and thus paints with too broad a brush. What is known about the biology and sensitivity of the Chukchi and Beaufort Seas is that they are driven by the ice-dominated marine environment. *See* Point Hope Brief at 39-42 (referencing record documents concerning key attributes of the offshore environment such as sea ice and polar bears (App. 153, 890), bowhead and other whales (App. 605-09), Pacific walrus (App. 610), seals (App. 610-11), and birds (App. 627-28). Similarly, the Bering Sea is heavily ice-influenced, and supports massive offshore fisheries. *See* Point Hope Brief at 7-11, citing, *inter alia*, App. 610, 617 (Pacific walrus in Bering Sea and their relationship to ice); App. 616-17 (ice seals), App. 706 (fishing industry). The record also demonstrates that there is no proven method to clean up oil in the harsh conditions of these northern Seas, especially in broken and solid ice conditions, App. 1001, thus placing these offshore resources at great risk. Interior nowhere explains why ranking environmental sensitivity based on the characteristics of shorelines covers these issues.

Moreover, Interior does not explain how shorelines can serve as a specific or general proxy for comparative environmental sensitivity when the shoreline is so distant from the planning areas. *See, e.g.*, App. 1983 (Chukchi Sea Planning Area at least 25

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[5] Interior also states in its defense that it has used this administrative finding in each of its previous Leasing Programs. Interior Brief at 33. The citation Interior provides to support this point does not address anything but the leasing program at issue in this case, *see* App. 2042, and Interior does not otherwise support the statement in the record. *NRDC v. Hodel*, 865 F.2d at 300. And even if true, it does not make the finding any less factually incorrect. *Watt I*, 668 F.2d at 1302 (Interior findings must be supported by "substantial evidence").

miles from shore); App. 72 (map of Alaska OCS planning areas, illustrating general distances from shore).

At its essence, Interior's approach to ranking relative environmental sensitivity based on shoreline characteristics is akin to finding that there are no meaningful physical or biological characteristics of the offshore environment worth considering. Interior's environmental sensitivity rankings are simply irrational. *NRDC v. Hodel*, 865 F.2d at 300; *Watt I*, 668 F.2d at 1302.

All other arguments made by Interior do nothing but attempt to obfuscate this conclusion. For example, Interior asserts that the Fish and Wildlife Service supports its myopic shoreline-focus. Interior Brief at 33, citing App. 47. Yet, the referenced Fish and Wildlife Service record document focuses on likely impacts to what the Service calls its "trust" resources, which include offshore resources such as marine mammals, migratory birds and anadromous fish. *See* App. 47 ("Because there are no demonstrably effective techniques for containing, recovering and cleaning up oil spills in Arctic marine environments, particularly during broken ice conditions, a large spill could have significant impacts on a variety of Service trust resources.")

Interior also emphasizes its rationale from the administrative process: the shoreline-focused Environmental Sensitivity Index (ESI) was created by the National Oceanographic and Atmospheric Administration (NOAA) to rank relative environmental sensitivity. Interior Brief at 33-37. As pointed out by Point Hope, however, NOAA created the ESI to rank relative environmental sensitivities of *shorelines*, for the purpose of helping it and other officials establish "protection priorities and ... clean up strategies" in the event of a spill that impacts the shoreline. *See* Point Hope Brief at 42, *citing* App.

2043; *see also* App. 2042-43 (ESI "provides a systematic method for compiling data in standardized formats *to map shoreline sensitivity* to spilled oil") (emphasis added). The ESI was not crafted as a proxy to help determine the comparative environmental sensitivity of offshore environments. Nowhere does Interior respond to this critical point.[6]

II. INTERIOR'S LEASING PROGRAM VIOLATES NEPA.

Interior concedes that there is information missing from its Leasing Program Environmental Impact Statement (EIS), but it argues that Point Hope has failed to explain why the missing information is both: (1) relevant to reasonably foreseeable significant adverse impacts; and (2) essential to a reasoned choice among alternatives. Interior Brief at 31. Interior also argues that the NEPA claims are not ripe. These arguments are rebutted below.

A. The Missing Data Is Significant and Important to a Reasoned Choice Among Alternatives.

As discussed below, the Court needs look no further than Interior's own conclusions in the EIS to see that Interior's NEPA arguments are unfounded.

1. Information Missing from the EIS Is Relevant to Reasonably Foreseeable Significant Adverse Impacts.

Interior asserts that Point Hope has not shown that the data gaps in the Leasing Program EIS are "relevant to a consideration of significant impacts" and thus it is not

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[6] Interior references a NOAA document outside of the record to support its argument that the ESI was crafted with a consideration of not only the physical but also the biological characteristics of various shorelines. Interior Brief at 35. Not only is this information outside the record, *see NRDC v. Hodel*, 865 F.2d at 300, it misses the point; it is irrational for Interior to focus on shoreline characteristics, of whatever type, to determine the relative environmental sensitivity of the Beaufort, Chukchi and Bering Seas as compared to other seas.

necessary to deal with them at the programmatic stage. Interior Brief at 32, *citing* 40 C.F.R. § 1502.22. CEQ regulations define significance to include considerations of "intensity" such as the degree to which the proposed project has uncertain potential impacts, could impact a species listed under the Endangered Species Act (ESA), implicates public health, could establish precedent, or is controversial. 40 C.F.R. § 1508.27(b). Each of these factors is implicated in information Interior failed to include in the Leasing Program EIS. Furthermore, Interior admits in the record that the missing information is significant.

By definition, the broad array of conceded gaps in knowledge, *see* Point Hope Brief at 8-10, makes the effects of the Leasing Program as a whole highly uncertain. 40 C.F.R. § 1508.27(b)(5); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1335 (S.D. Ala. 2002) ("NEPA's purpose is to avoid decisions made without adequate information. Uncertainty is a factor in determining the significance of an action.").

Data gaps regarding endangered species are also significant. For example, polar bears, listed as threatened,[7] occur throughout the Beaufort and Chukchi Seas, App. 607, where a total of five lease sales are scheduled under the Leasing Program. App.459. The EIS lists a number of possible adverse impacts to polar bears, including reduced survival of cubs due to denning disturbances caused by oil and gas activities, App. 463, 890, 897, reduced survival of energetically stressed bears (i.e., bears impacted by climate change) that are forced to swim longer distances to avoid seismic activities, App. 890, and

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[7] The polar bear was proposed for listing under the ESA at the time the EIS was written, App. 460, and Interior treated the polar bear as an ESA-listed species. App. 605, 607. It has since been listed as threatened. 73 Fed. Reg. 28212-28303 (May 15, 2008).

population-level impacts from an oil spill in the program area,[8] especially in areas where polar bears congregate in large groups. App. 895-98.

Despite the possibility of significant impacts, Interior admits that it has no reliable estimate for the Bering/Chukchi population of polar bears, and "its current status is in question." App. 608. The fact that polar bears exist in several leasing areas reinforces the significance of dealing with this information at the programmatic stage.

The Leasing Program EIS also outlines a number of significant impacts the program may have on the highly endangered North Pacific right whale and endangered Steller sea lion, including "population-level impacts" that could occur from "a large spill that contacts Steller sea lion or North Pacific right whale critical habitat in the North Aleutian Basin." App. 487.[9] Furthermore, "[e]ffects to North Pacific right whales may be great should the spill directly impact any individual whales or adversely affect any critical habitat and food sources." App. 904. Interior "acknowledges that the potential for population-level effects from vessel collisions is great with the highly endangered North Pacific right whale." App. 902. In fact, "any perturbation to this small remnant group is likely to affect much of the North Pacific right whale population (and species)." App. 898.

Despite the litany of possible significant impacts on the ESA-listed North Pacific right whale, the EIS shows a crucial lack of information regarding this highly endangered species, *see* Point Hope Brief at 9; App. 612, and it is thus nonsensical for Interior to

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[8] According to Interior, "[t]wo large oil spills are assumed to occur in the Arctic Subregion during the 40-year life of the 2007-2012 program." App. 898.

[9] The EIS assumes that there will be one large oil spill in the North Aleutian Basin during the life of the project. App. 1665 (Table IV-4).

argue that basic information about migratory behavior, population abundance and distribution, growth rate, and more, of this endangered species is not significant. *See* 40 C.F.R. § 1508.27(b)(9).

Large-scale data gaps also exist regarding endangered bowhead whales, important in their own right and as a critical subsistence resource for Alaska Natives, as well as for other subsistence resources. These data gaps are unquestionably significant in that they involve impacts to endangered species and the health and safety of Alaska Native communities affected by the Leasing Program. *See* 40 C.F.R. § 1508.27(b)(2); App. 605, 673, 1001 (discussing importance of subsistence to Native communities and culture); Kingik Decl. ¶¶ 15, 19 (explaining dangers of traveling farther out to sea to catch bowhead whales that are deflected by noise); *see also* Anderson Decl. ¶ 23; Kingik Decl. ¶ 22; Elijah Lane Decl. ¶ 9; Eunice Lane Decl. ¶ 5; Sage Decl. ¶ 14; Schaefer Decl. ¶ 23 (harm to subsistence animals leads to inability to provide healthy food for families).

The EIS describes a variety of adverse impacts to bowhead and other whales from seismic activities and possible oil spills. App. 462-64, 884-89, 894-96. Interior acknowledges that "effects that are biologically significant could result if seismic surveys cause avoidance of feeding areas, resting areas, or calving areas by females with calves, females, or aggregations of whales that likely contain reproductive-aged females over a period of many weeks." App. 887. It also acknowledges that bowhead whales could suffer fatalities if they were to encounter an oil spill in open ice leads through which they are forced to migrate. App. 896, 897.

Impacts to marine mammals include masking of natural sounds (reducing animals' ability to navigate and communicate), behavior disturbance, auditory impacts

(including permanent hearing loss) and "other physiological effects." App. 890. Seismic activities could have chronic effects such as "excluding marine mammals from important habitats (e.g., feeding, resting, or molting areas) at significant times, interfering with their migrations and movements, contributing to habitat degradation, disrupting biologically significant behaviors, and increasing levels of stress." App. 890.

Regarding oil spills, Interior states that

> The impacts of both large and small oil spills are expected to be significant in the Arctic Subregion. An oil spill of more than 1,000 bbl could, depending on the time and location of the spill event, affect the subsistence use of marine mammals in the region where it occurs. Marine mammals are the most important subsistence resource, both conceptually and as food, for these regions. The bowhead whale hunt could be disrupted, as could the beluga harvest and the more general and longer hunt for walrus (west of Barrow).

App. 1001. Furthermore,

> While concern [among local residents] is most typically phrased in terms of the potential effects of oil spills on whales and whaling, it can be generalized to a concern for marine mammals and ocean resources in general. Marine mammals and fish typically comprise 60 percent of a coastal community's diet, and the ocean is frequently referred to in public testimony as "the Inupiat garden."

App. 1001.

Interior even states that, "[t]he importance of the Alaskan Beaufort Sea as a feeding area for bowheads is an issue of concern to Inupiat whalers and *is a major issue in evaluating the potential significance* of any effect that may occur as a result of oil and gas activities in the Beaufort and Chukchi Seas." App. 605 (emphasis added).

Despite all this, Interior published a Leasing Program EIS that contains little information about bowhead whales and other subsistence resources in the Chukchi Sea. *See* Point Hope Brief at 9-11.

Data gaps in the Leasing Program as a whole are also significant because of the precedent set by the Leasing Program. By including a schedule of proposed lease sales for particular areas, the Leasing Program "represents a decision in principle about a future consideration." 40 C.F.R. § 1508.27(b)(6). Thus, Interior cannot argue that critical data gaps only become significant at later stages of the process.

Finally, given the overwhelming expert and general public comment directly on point, and the fact that the polar bear is a highly controversial symbol of the effects of climate change, it cannot plausibly be argued that the lack of baseline data is not a controversial issue. Point Hope Brief at 11-17.

Interior cannot fulfill its monitoring and mitigation promises without first obtaining baseline information, and has no discernable explanation of how it plans to timely do so. The data gaps Point Hope identifies in its opening brief are thus "significant" under NEPA.

2. Information Missing from the EIS Is Essential to a Reasoned Choice Among Alternatives.

Information Interior failed to include in the Leasing Program EIS is also essential to a reasoned choice among alternatives, as a reasoned choice is an informed choice. The Leasing Program stage is when Interior chooses the "size, timing, and location of leasing activity" for five-year periods. 43 U.S.C. § 1344(a). NEPA requires that "environmental information [be] available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Interior cannot rationally weigh the risks and benefits of leasing in the Beaufort, Chukchi and Bering Seas without first determining what significant impacts there might be on endangered species and other natural resources, commercial and subsistence resources, and the human populations

affected by leasing. *See* 43 U.S.C. § 1344(a)(3); 43 U.S.C. § 1346(d) (requiring Interior to take relevant environmental information into account in its OCSLA decisionmaking).

Having this information could have persuaded Interior to choose different alternatives by changing the balance among "the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." 43 U.S.C. § 1344(a)(3). This information is thus essential to a reasoned choice among the alternatives. *See Cabinet Res. Group v. U.S. Fish and Wildlife Serv.* 465 F. Supp. 2d 1067, 1100 (D. Mont. 2006) (holding that information about the range of habitat choices available to grizzly bears and the ongoing mortality problems in their populations was essential to a reasoned choice among the alternative plans under NEPA).

Interior relies on *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999), a case in which the Tenth Circuit held that missing lynx population data was not "essential" to reasoned decision making under NEPA. Interior Brief at 32. However, the court in *Dombeck* based its decision on the fact that despite the agency's good faith efforts to obtain population data on lynx in Colorado, there simply was no such data. *Dombeck*, 185 F.3d at 1169, 1169 n.8. In effect, the appellant sought population data "when no evidence show[ed] a population of [lynx was] present within the relevant planning area." *Id.* at 1170.

The missing data in *Dombeck* is a far cry from the data gaps at issue here. There is no question that polar bears, right and bowhead whales, and other endangered and important subsistence species exist within Leasing Program areas. *See* App. 605-18. Interior simply failed to conduct the studies necessary to comply with NEPA, and provided no discernable plan to do so in a timely manner.

3. Interior Did Not and Cannot Show that Its Vaguely Promised Future Studies Will Be Done in Time for Its Decisionmaking at Later Stages.

Interior relies on the promise that data gaps will be filled "later" at the lease sale stage. Interior Brief at 32. However, the record shows that the few specific studies mentioned by Interior in the EIS bear no clear relation to the lease sale schedule.

The only specific studies Interior mentions in the EIS relate to bowhead whale feeding behavior in the Beaufort Sea, App. 605, and bowhead whale hunting and subsistence activities in the Beaufort Sea. App. 1003; Point Hope Brief at 33. But the critical gaps in information about bowhead whales involve their occurrence in and use of the Chukchi Sea. App. 605-07, 885. Interior mentions no plan to fill this significant data gap, and there is no reference to specific studies that might fill the myriad other identified data gaps. *See* Point Hope Brief at 8-10.

Interior relies for a defense on vague promises of studies done "later" at the lease sale stage. Interior Brief at 32. Yet the leasing schedule does not appear to allow for timely completion of future studies.

In fact, Chukchi Sea Lease Sale 193 already has occurred, and its NEPA process was conducted concurrently with the Leasing Program NEPA process. App. 367, 368 (joint Point Hope public hearing on Leasing Program and draft EIS for Sale 193); App. 375, 376 (same for Barrow); App. 364, 365-66 (Point Lay). This makes it impossible for Interior to claim that it can complete studies on the Chukchi in the promised "later" time frame. And while other sales have firm schedules, *see* App. 459, promised studies have no concrete focus or timetable.

Significant information was not obtained at the Leasing Program stage, and, without an explanation of how it plans to timely gather such data, Interior's promises that

it will gather data before later OCSLA stages are hollow. Interior's argument that it need not apply 40 C.F.R. § 1502.22 in any manner at the Program stage is simply not consistent with NEPA; while requiring the studies, or at a minimum, a discernable plan for timely gathering the data, meshes the requirements of OCSLA with those of NEPA. *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971) (agencies must comply with NEPA "to the fullest extent possible"); *Jones v. Gordon*, 792 F.2d 821, 826-27 (9th Cir. 1986) (NEPA interpretation favored where it also "promotes the predominant congressional purpose in enacting" agency's underlying law).

B. The NEPA Challenge is Ripe.

Interior's assertion that the NEPA claims are unripe fails. First, Congress has mandated that courts review OCSLA challenges at the Leasing Program stage, and Interior has conflated the Leasing Program requirements under OCSLA with the environmental review requirements under NEPA. Second, approval of the Leasing Program and supporting EIS are final acts, not subject to change, and for which no later review is available. Third, NEPA guarantees procedural rights, and any challenge to a breach of procedure is ripe at the time of violation.

Under OCSLA, "[a]ny action of the Secretary to approve a leasing program . . . shall be subject to judicial review . . . ." 43 U.S.C. § 1349(c)(1). The Leasing Program relies heavily on the EIS to support its findings and fully incorporates the EIS by reference. App. 1967-68. The interconnected nature of the two processes is illustrated throughout the documents. OCSLA requires Interior to evaluate OCS natural resources and the potential impact of oil and gas activities on those resources, 43 U.S.C. § 1344(a)(1); to meet this obligation, Interior relies on the EIS. App. 1964; *see also* 43

U.S.C. § 1346(d) (requiring Interior to take relevant environmental information into account in OCSLA decisionmaking). Similarly, in evaluating alternatives for its final decision, including the decision to defer leasing within 25 miles of the Chukchi Sea coastline, Interior relies on the analysis in the EIS. App. 1981; *see also* App. 1995, 2007, 2015.

In its brief, Interior even relies on the EIS to argue that it properly considered climate change under OCSLA. Interior Brief at 53. Accordingly, because the EIS provides the analytical support for the determinations in the Leasing Program, judicial review of the adequacy of the EIS under NEPA is necessarily part of judicial review of the Leasing Program under OCSLA.

Interior relies on *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), to assert that Point Hope's NEPA claims are unripe. Interior Brief at 28-29. But the Supreme Court in *Ohio Forestry* explicitly distinguished the non-reviewable forest plan challenged under the National Forest Management Act (NFMA) from plans that "Congress has specifically instructed the courts to review 'pre-enforcement.'" *Ohio Forestry*, 523 U.S. at 737. The court listed several such reviewable plans, including leasing programs under OCSLA. *Id.* Given that Interior itself concedes that the EIS is an integral part of the Leasing Program, there is no more appropriate time for this court to review the EIS than as part of its statutorily mandated duty to review the OCSLA claims. Indeed, this is just what the Court did in *NRDC v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988).

Moreover, unlike the cases on which Interior relies, approval of the Leasing Program and the supporting EIS are final acts for which there is no later opportunity for review or amendment. *Watt I*, 668 F.2d at 1299. Once the

Leasing Program and its associated environmental review are approved, the next stage of the leasing process begins and the opportunity to challenge or alter the determinations of the Leasing Program is foreclosed. *See* 43 U.S.C. § 1349(c)(3)(C).

Furthermore, only in this EIS can Interior present the Program in its entirety so that the public may have the opportunity to appraise the full, concurrent and cumulative effects of the Leasing Program as a whole. *See DOT v. Public Citizen*, 541 U.S. 752, 768 (2004) (noting that one of the twin goals of NEPA is to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and implementation of that decision").

This statutory process stands in stark contrast to that of NFMA, challenged in *Ohio Forestry*. Unlike the Leasing Program under OCSLA, a later challenge to a site-specific logging plan under NFMA "might also include a challenge to the lawfulness of the present [Land Resource Management] Plan. . . ." *Ohio Forestry*, 523 U.S. at 734. Moreover, unlike the Leasing Program, which became final upon approval, the Land Resource Management Plan could be amended at a later date. *Id.* at 735-36.

Similarly, *Wyoming Outdoor Council v. United States Forest Service* involved a challenge to an EIS that was subject to challenge at a later date. 165 F.3d 43, 50 (D.C. Cir. 1999) ("once the leases were issued by the BLM, [petitioner] was free to challenge the Forest Service's NEPA compliance."); *see also Nevada v. DOE*, 457 F.3d 78 (D.C. Cir. 2006) (challenge to interim plan that was not final determination).

Finally, in *Ohio Forestry*, the Supreme Court distinguished challenges under NFMA from those brought under NEPA, stating that "NEPA, unlike the NFMA, simply

guarantees a particular procedure, not a particular result." *Ohio Forestry*, 523 U.S. at 737. Accordingly, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* The same is true here.

III. PETITIONERS HAVE STANDING TO BRING THIS ACTION.

Interior does not challenge Point Hope's standing. API does not challenge Point Hope's standing as it relates to the claims directly briefed by Point Hope in its opening brief. API does challenge Point Hope's standing as it relates to the claims briefed by the Center, in which Point Hope joined. API Brief at 4-25.

As an initial matter, and as the Center addresses, petitioners here, like the State of Massachusetts in *Massachusetts v. EPA*, 127 S. Ct 1438, 1454 (2007), do not need "special solicitude" to support standing in this case. That said, the Native Village of Point Hope should enjoy any "special solicitude" proffered to sovereign or quasi-sovereign entities. The "special solicitude" discussion in *Massachusetts* centers on the unique relationship between states, as quasi-sovereigns, and the federal government. Because states surrendered certain rights and prerogatives upon their entrance into the Union—such as the power to invade or negotiate treaties—federal court jurisdiction provides an important avenue for states to assert their sovereign rights within the federalist framework. *Id.*

This special relationship with the federal government is shared by Point Hope, which is a sovereign tribe[10] that gave up certain rights.[11] Point Hope, like a state, has a

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10 "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). *See also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns."). The

"quasi-sovereign interest in the health and well-being . . . of its residents in general." *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982) (state can bring suit as a quasi-sovereign entity on behalf of its residents); *see also* Schaefer Decl. ¶ 4 (purpose of the Native Village of Point Hope is to protect "the interests, traditions, and way of life of its members"). And, much like a state, Point Hope has a "stake in protecting [these] quasi-sovereign interests." *Massachusetts*, 127 S.Ct. at 1454. Point Hope should thus be given an equal opportunity to states to protect its sovereign interests in federal court.

IV. PETITIONERS ARE ENTITLED TO MEANINGFUL REMEDIES.

OCSLA expressly empowers this Court to "affirm, vacate, or modify any order or decision or [] remand the proceedings to the Secretary for such further action it may direct." 43 U.S.C. § 1349(c)(6). In addition, injunctive relief is appropriate for an agency's violations of the ESA and NEPA. *See, e.g., Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008); *Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983). API's assertions otherwise, API Brief at 34-37, fly in face of these authorities.

In fact, to date this case stands in contrast to *Watt I*, where OCS areas of environmental concern to petitioners were deleted from the challenged program prior to the conclusion of judicial review, and the court therefore had no need to enjoin any lease sale associated with that leasing program. *Watt I*, 668 F.2d at 1326. The open-ended remand advocated by API would place Alaska's sensitive environment at continued risk

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Native Village of Point Hope is a Tribe. *See* 58 Fed. Reg. 54364 (Oct. 21, 1993); 67 Fed. Reg. 46327-33 (July 12, 2002) (Point Hope on list of federally recognized Native entities of Alaska); *see also* U.S. Department of the Interior, Bureau of Indian Affairs (BIA), Tribal Leaders Directory at 30 (Winter 2008), *available at* www.doi.gov/bia/TLD-Final.pdf (Point Hope on BIA list of tribes).

[11] For instance, Indian Tribes cannot enter into direct commercial or governmental relations with foreign nations, much like quasi-sovereign states. *Baker v. John*, 982 P.2d 738, 755 (Alaska 1999).

and would not provide adequate or appropriate relief for Interior's numerous statutory violations. *See NRDC v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) ("The existence of a stay with time limits . . . will give the agency an incentive to act in a reasonable time, given the other constraints on its resources. . . . A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such.").

CONCLUSION

In light of Interior's violations of OCSLA, NEPA and the ESA, Point Hope respectfully requests the Court set aside, remand the Program for further consideration, and defer further lease sales under the Program in the Alaska region until and unless Interior's violations of OCSLA, NEPA and the ESA are remedied.

Respectfully submitted this 18th day of August, 2008,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

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Dated: August 18, 2008

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PROOF OF SERVICE

I, Peter VanTuyn, am over the age of eighteen years, and not a party to this action.

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 18th day of August 2008, in Anchorage, Alaska.