Nos. 11-72891, 11-72943, 12-70440, 12-70459

ORAL ARGUMENT SCHEDULED: May 15, 2012
BEFORE: Kozinski, Chief Judge, Bea, and Ikuta, Circuit Judges

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF POINT HOPE, ALASKA WILDERNESS LEAGUE, CENTER FOR BIOLOGICAL DIVERSITY, DEFENDERS OF WILDLIFE, GREENPEACE, INC., NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, OCEAN CONSERVANCY, OCEANA, PACIFIC ENVIRONMENT, RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS, SIERRA CLUB, and THE WILDERNESS SOCIETY,

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Petitioners,

v.

KEN SALAZAR, Secretary of the Interior, and BUREAU OF OCEAN ENERGY MANAGEMENT,

Respondents,

SHELL OFFSHORE INC., SHELL GULF OF MEXICO, INC., STATE OF ALASKA,

Respondents-Intervenors.

ON CONSOLIDATED PETITIONS FOR REVIEW OF DECISIONS OF DEPARTMENT OF THE INTERIOR PURSUANT TO 43 U.S.C. § 1349(c)

SUPPLEMENTAL BRIEF OF RESPONDENTS

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JURISDICTION

Respondents agree that this Court has jurisdiction over these petitions for review pursuant to 43 U.S.C. §1349(c). On December 16, 2011, the Bureau of Ocean Energy Management ("BOEM") conditionally approved a revised exploration plan ("EP") submitted by Shell Gulf of Mexico, Inc. ("Shell") which proposes exploratory drilling to evaluate the oil and gas resource potential of six of the company's Outer Continental Shelf ("OCS") leases in the Chukchi Sea off northern Alaska. Petitioners' Excerpts of Record ("ER") 1-5. The petition for review of the Native Village of Point Hope, et al., was timely filed on February 13, 2012, and the petition for review of the Inupiat Community of the Arctic Slope was timely filed on February 10, 2012.

STATEMENT OF ISSUES

1. Did BOEM's regulations require BOEM to more thoroughly assess Shell's plans for a well capping and containment system before BOEM could conditionally approve Shell's EP?

2. Was it arbitrary or capricious for BOEM to rely on Shell's estimate of the time it would take to drill a relief well in the event of an uncontrolled blowout?

STATEMENT OF THE CASE

A. Nature of the Case.

These petitions for review challenge BOEM's December 16, 2011, decision conditionally approving Shell's revised EP for exploratory drilling on six of its leases in an area of the Chukchi Sea. ER1-6. The parties agreed that these petitions should be consolidated with the petitioners' earlier challenges to BOEM's approval of Shell's revised EP for exploratory drilling in the Camden Bay area of the Beaufort Sea (the "Camden Bay case"), and that the parties would submit supplemental briefs limited to the issues raised in that case. On March 12, 2012, this Court granted the parties' joint motion to proceed on this basis. Accordingly, in this supplemental brief we address petitioners' claims as they specifically relate to Shell's Revised EP for the Chukchi Sea, but rely on our responding brief in the Camden Bay case to provide the legal context for these claims.

B. Statement of Facts.

1. Shell's Revised Chukchi Sea EP.

BOEM received Shell's Revised Outer Continental Shelf Lease Exploration Plan, Chukchi Sea, Alaska, on October 11, 2011. Shell's EP is a 162-page document with 1,400 pages of Appendices covering all aspects of Shell's planned

exploratory activities for the expected year term of the project. See ER290-93 (table of contents) and ER289-352 (excerpts from Shell EP).

In accordance with BOEM regulations on the content of EPs, Shell included information in Section 8.0 of its EP that summarizes Shell's plans for responding to any oil spill, including details about dedicated response vessels, skimmers, and other equipment for both nearshore and offshore operations in case of a spill, and identification of an oil spill response contractor. ER308-10. As there noted (ER308), Shell's response plans are more fully described in Shell's regional oil spill response plan ("OSRP"), which Shell refers to as its Chukchi Sea Regional Exploration ODPCP [Oil Discharge Prevention and Contingency Plan].

In compliance with 30 C.F.R. §550.213(g), Shell's EP presents a blowout scenario for the well (the Burger J well) that Shell expects would have the highest volume flow of oil in the case of a blowout. ER309-310. The EP also discusses "the availability of a rig to drill a relief well," as required by the regulation.

> The *Discoverer* will serve as its own primary relief well drilling unit in the unlikely event of a well blowout. * * * If the *Discoverer* cannot be used to drill the relief well, a second drilling unit would be brought in for that purpose. This second drilling unit would be the conical drilling unit *Kulluk (Kulluk)*. * * * The *Kulluk* is anticipated to be in the Camden Bay area in the U.S. Beaufort Sea and could be mobilized to the Burger Prospect and drill a relief well and kill flow within 34 days. Alternatively it could be located in Dutch Harbor (if not drilling in the Beaufort) and could be mobilized to the Burger Prospect

> and drill a relief well and kill flow in 38 days. The *Kulluk* has no constraints. It was designed specifically to operate in arctic conditions, with a conical hull shape designed to operate in first year ice up to 4.0 ft (1.2 m) thick.

ER303. The EP further discusses the time estimated for drilling a relief well in Appendix L to the EP, the Well Control Plan. ER348-52. Shell there explains why a relief well can be drilled in less time than it would take to drill the exploratory well itself. ER350, and see discussion *infra* at 18-19.

In addition to these various response efforts, Shell would also respond to an uncontrolled blowout by having available a subsea capping stack and surface separation equipment on a containment vessel. ER313. The EP describes how a capping stack is attached to a well to seal the well against further flows, or else to divert flows for separation and disposal, and notes that it will be designed for conditions found in the Arctic including ice and cold temperatures. *Id*.

2. BOEM's Review of the EP.

BOEM considered all aspects of whether Shell's proposed exploratory operations comported with the Outer Continental Shelf Lands Act ("OCSLA") and the relevant regulations.[1/] BOEM prepared a thorough 301-page Environmental

[1/] The OCSLA requires that BOEM disapprove an EP if it finds that any activity under the plan would result in "serious harm or damage" to the marine, coastal, or human environment. 43 U.S.C. §1340(c)(1), *see also* 43 U.S.C. §1334(a)(2)(A)(i). BOEM's regulations at 30 C.F.R. §550.202 require that an EP demonstrate that the applicant can carry out proposed activities in a manner that complies with

Assessment ("EA") under the National Environmental Policy Act, which considered Shell's proposed activities and their potential effect on all aspects of the environment. The EA carefully considered the possibility of oil spills, including from an uncontrolled blowout. *See* Respondents' and Intervenors' Joint Supplemental Excerpts of Record ("JSER") at 61-62, 67-87. The EA concluded that the likelihood of a large or very large oil spill, such as from an uncontrolled blowout, was very low. SER79-81. Nevertheless the EA fully considered the consequences to all relevant aspects of the environment from a worst case discharge oil spill. ER143-68.

BOEM also considered how Shell planned to respond to any oil spills, including a worst case blowout, should that unlikely event occur. JSER65-66. The EA reviewed the equipment that Shell would have available for use in the unlikely event of a blowout, including Shell's plans to have capping stack equipment available to either seal the well or divert the flow of oil to a surface vessel. JSER66. BOEM concluded that Shell would have access to sufficient equipment and personnel to respond to a worst-case discharge event. JSER70.

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applicable law and lease provisions, is safe, conforms to sound conservation practices, does not unreasonably interfere with other uses, and does not cause undue or serious harm or damage to the human, marine, or coastal environment. Petitioners do not assert that either the statutory or the regulatory standards for disapproving an EP were met here.

3. Approval of the Revised Chukchi EP.

On December 16, 2011, BOEM approved Shell's Revised Chukchi Sea Exploration Plan for 2012, subject to numerous conditions. BOEM recognized that Shell would need additional approvals before drilling could occur. BOEM stated that no exploratory drilling operations could be conducted "until Shell has satisfied the Bureau of Safety and Environmental Enforcement (BSEE) requirements with respect to the Oil Spill Response Plan (OSRP)." ER1. Nor could any drilling be conducted "without an approved Application for a Permit to Drill (APD) issued by BSEE." *Id.*

In order to provide a greater opportunity for response and cleanup in the unlikely event of a late season oil spill, BOEM imposed a condition on its approval of the EP that "[n]o exploratory drilling will be allowed below the last casing point set prior to penetrating a zone capable of flowing liquid hydrocarbons in measurable quantities into the well within 38 days of a 'trigger date' established each year by BOEM, based upon the date of first ice encroachment over the drill site within any of the last 5 years." ER2. The trigger date this year will be November 1; accordingly, Shell will not be able to drill below the point identified in the condition after September 24, 2012.

BOEM also provided that "[p]rior to commencement of exploratory drilling operations, Shell must confirm the final staging location and schedule for mobilizing the designated relief well rig to the drill site and the consistency of response times for commencement and completion of a relief well with the approved EP." ER3. Shell also will have to demonstrate that the relief well drilling unit meets regulatory requirements found at 30 C.F.R. §250.417 and confirm that Shell has received approval from BSEE for the relief well drilling unit. *Id*.

With respect to Shell's proposed capping stack, approval of the EP was conditioned on Shell confirming that it has documented to BSEE that the "system is designed for the projected worst case discharge conditions" and confirming that it had received approval from BSEE of Shell's procedures "for deployment, installation and operation of the system under anticipated environmental conditions" before Shell commences any drilling. ER3-4.

STANDARD OF REVIEW

Respondents incorporate by reference the discussion of the appropriate standard of review in their Camden Bay brief at 16-17.

SUMMARY OF ARGUMENT

1. Shell's EP complied with BOEM's regulations governing the content of EPs by providing a full description of its plans for responding to the unlikely event of a blowout and oil spill. Among other measures, the EP describes Shell's plan to have available a capping stack, a device which has been used successfully to seal well blowouts including the Macondo well after the Deepwater Horizon blowout in the Gulf of Mexico. BOEM reasonably relied on this information in the EP. Nothing in the regulations required BOEM to perform a detailed assessment of the feasibility of using particular oil spill response equipment, such as the capping stack. Issues regarding the adequacy of a company's oil spill response plan are resolved by BSEE when it approves such plans, not BOEM when it approves EPs.

2. Shell's EP provided a reasonable estimate of the amount of time it would take to drill a relief well, and explained why drilling a relief well in response to a blowout emergency takes less time than drilling a normal exploratory well. BOEM's determination to rely on Shell's estimate of the time needed for drilling a relief well is entitled to substantial deference, and was well supported on this record.

ARGUMENT

As they did in the Camden Bay case, petitioners here claim that BOEM's approval of Shell's EP was flawed by insufficient analysis of certain aspects of Shell's plans for dealing with the unlikely event of an uncontrolled blowout and oil spill. They contend that: 1) BOEM should have more thoroughly assessed Shell's plan for use of a capping stack as part of its plan for responding to a blowout and oil spill (Br. 22-24), and 2) BOEM should have resolved alleged conflicts in the record regarding the amount of time needed to drill a relief well (Br. 24-27). Petitioners contend that BOEM's alleged failure to more thoroughly assess these two matters violated BOEM's own regulations regarding EPs, and amounted to arbitrary and capricious decision making.

As we show below, BOEM's assessment of both these issues complied fully with the regulations and was not arbitrary or capricious. The OCSLA gives BOEM substantial discretion to determine the required content of an EP, and the degree of detail in which particular issues must be addressed.

> An exploration plan submitted under this subsection shall include, *in the degree of detail which the Secretary may by regulation require*, (A) a schedule of anticipated exploration activities to be undertaken; (B) a description of equipment to be used for such activities; (C) the general location of each well to be drilled; and (D) *such other information deemed pertinent by the Secretary*."

43 U.S.C. §1340(c)(3) (emphasis added). Pursuant to this authority, BOEM has promulgated regulations that require applicants for EP approvals to provide a general description of the equipment they intend to use to respond to oil spills. *See e.g.*, 30 C.F.R. §550.211(c) (requiring a description of the drilling unit and associated equipment and "a brief description of its important safety and pollution prevention features"); 30 C.F.R. §550.213 (requiring "general information" on, *inter alia*, a "[b]lowout scenario" including the "maximum duration of the potential blowout" and an "[e]stimate [of] the time it would take to drill a relief well").

As we show below, Shell's EP complied with BOEM's regulations by providing adequate information regarding the equipment it planned to use to respond in the unlikely event of a major blowout, including information about using a capping stack. It also provided a reasonable estimate of the amount of time it would take to drill a relief well and explained why this would take less time than drilling a normal exploratory well.

A more detailed review of a lessee's oil spill response plans is carried out when the lessee submits an oil spill response plan ("OSRP"), or revisions thereto, to BSEE for approval pursuant to the Oil Pollution Act. As we noted in our Camden Bay brief at 20-21, whether or not the measures identified in Shell's OSRPs are adequate to meet the relevant legal standards under the Oil Pollution Act is a matter

beyond the jurisdiction of this Court in a suit like this brought pursuant to 43 U.S.C. §1349(c)(2). *See Edwardsen v. U.S. Dept. of the Interior*, 268 F.3d 781, 790-91 (9th Cir. 2001). The only issue before this Court is whether BOEM's reliance on Shell's statements and estimates in the EP was rational in light of BOEM's decision to conditionally approve Shell's EP. As we show below, it clearly was.[2/]

[2/] In the Camden Bay case, petitioners also contend that Shell's reliance on proposed revisions to an approved OSRP violated the requirement of 30 C.F.R. §550.219(a)(2) that an EP include a "[r]eference to your approved regional OSRP." *See* Opening Brief in Camden Bay case at 35-39. Petitioners do not make that claim here, even though Shell submitted similar revisions to its Chukchi Sea OSRP, which were pending approval at the time of BOEM's December 16, 2012, conditional approval of Shell's Chukchi Sea EP. *See* JSER117-18. Petitioners may have concluded that any issue regarding compliance with the requirement to include a reference to an approved OSRP became moot for purposes of this case when Shell's revised OSRP for the Chukchi Sea was approved by BSEE on February 17, 2012. *See* http://www.bsee.gov/OSRP/Chukchi-Sea-OSRP-Letter.aspx (approval letter) attached as Exhibit 1 to Respondents' April 3, 2012 Motion for Judicial Notice. Respondents would agree that this subsequent approval moots any issue regarding compliance with §550.219(a)(2). *See Center For Biological Diversity v. Lohn*, 511 F.3d 960, 963-64 (9th Cir. 2007) (challenge to alleged failure to list species under the Endangered Species Act was mooted by agency's listing of the species during pendency of appeal); *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 698 (9th Cir. 1984) ("[w]e cannot take jurisdiction over a claim as to which no effective relief can be granted"). Similar revisions to Shell's Beaufort Sea OSRP were approved on March 28, 2012. *See http://www.bsee.gov/BSEE-Newsroom/Press-Releases/2012/press03282012.aspx*, (attached as Exhibit 2 to Motion for Judicial Notice). That approval likewise would render moot the issues in the Camden Bay case regarding 30 C.F.R. §550.219(a)(2).

I

IT WAS NOT ARBITRARY FOR BOEM TO APPROVE AN EP THAT INCLUDED A CAPPING STACK AS ONE ELEMENT OF A RESPONSE TO AN UNCONTROLLED BLOWOUT

BOEM's regulations at 30 C.F.R. §550.211(c) require that an EP include in its discussion of the planned drilling unit and associated equipment, "a brief description of its important safety and pollution prevention features." Shell's EP complied with that regulation by describing in Section 9.0(f) Shell's plans for "surface intervention" to deal with the unlikely event of an uncontrolled blowout. ER313-14. A set of devices, generally known as a capping stack, is described in the EP as follows:

> The devices include ram-type BOP [blowout preventer] bodies equipped with blind and/or pipe rams, spacer spools, flow crosses (or mud crosses) for pumping kill weight fluid into the well or for flowing the well in a controlled manner through piping to the surface and connectors to attach to the upper H4 connector mandrel, the high-pressure wellhead housing if the entire BOP stack has been removed or the flanged connection on top of the lower marine riser package (LMRP).

ER313. The EP notes that "[t]his equipment will be stored aboard a designated vessel in Alaska with a marine crew aboard, warm-stored and ready for use," describes how this equipment will be designed "to provide flexibility to deal with a wide variety of capping situations," and notes that it will be "designed for conditions found in the Arctic including ice and cold temperatures." *Id.* As

BOEM's EA noted, the capping stack is one of several measures proposed to be used by Shell that "supplement * * * requirements imposed by applicable laws, regulations, permits, authorizations, and lease stipulations." JSER63, 66.

Petitioners do not explain why the EP description was not an adequate "brief description" as required by 30 C.F.R. §550.211(c) of this particular aspect of Shell's plans for dealing with a possible blowout. Instead, they create from whole cloth a purported requirement that BOEM complete an "assessment" of any such equipment that has not yet been completely designed and tested in the region where operations will take place, and contend that this assessment should "address" previous statements by the applicant about the feasibility of equipment. Br. 21.

Petitioners point to nothing in the OCSLA or BOEM's regulations that would require such a detailed assessment of the technical feasibility of various types of oil spill response equipment as part of BOEM's review of an EP. This is not surprising, since issues regarding the effectiveness of a particular technology for responding to oil spills are under the purview of BSEE, which considers these issues when it approves an OSRP under authority of the Oil Pollution Act. *See* 30 C.F.R. §254.1(a) (operators must submit a spill response plan to BSEE and "[y]our spill-response plan must demonstrate that you can respond quickly and effectively whenever oil is discharged from your facility"). Petitioners' request that this Court

impose a requirement for a redundant detailed assessment of the OSRP during BOEM's review of the EP is improper. *See Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (*en banc*) (courts "are not free to impose on the agency [our] own notion of which procedures are best or most likely to further some vague, undefined public good. Nor may we impose procedural requirements [not] explicitly enumerated in the pertinent statutes.") (Internal citations and quotation marks omitted).[3/]

It was reasonable for BOEM to review Shell's EP on the basis of the plainly adequate information contained in that document, as well as additional information found in the administrative record. That record includes Shell's revised Chukchi Sea OSRP, which explains that:

> Subsea well capping capability has recently been developed that will secure a blowout by installing a purpose-built capping stack directly onto the top of the wellhead or a component of the original BOP stack. These techniques have been utilized and proven effective in dealing with several wells in the Gulf of Mexico following storm damage to platforms that initiated a well control event. Additionally, well capping was successfully employed to stop the flow from the

[3/] Petitioners' Statement of Issues refers to 30 C.F.R. § 550.213(d), which requires a "description and discussion of any new or unusual technology" that will be used to "carry out [the] proposed exploration activities." Assuming that bare citation is sufficient to preserve the issue in this case, we rely on our discussion in our Camden Bay brief at 33-34 regarding inapplicability of this regulation, and point out that the description in Shell's Chukchi Sea EP discussed *supra* at 12-13 would be a sufficient description and discussion to satisfy this regulation in any event.

> Macondo well blowout in deep water. When compared to the time required for drilling a relief well, well capping can be more rapidly implemented to reduce or stop flow of oil escaping into the water column thereby reducing associated environmental impacts.

ER283.

Petitioners complain (Br. 22) about the capping stack being in the design stage at the time of EP approval, but nothing in the regulations suggests that all aspects of an applicant's spill response plan must be completely designed at the time an EP is approved. BOEM reasonably recognized that BSEE would be responsible both for approving Shell's revised OSRP and for approving any applications for permits to drill ("APD") before drilling could commence. It therefore conditioned approval of the EP on Shell satisfying BSEE regarding the adequacy of its capping system to deal with a worst case discharge and the adequacy of its procedures for deployment and operation of the capping stack. ER3-4. As we explained in our brief in the Camden Bay case, BOEM has authority under its regulations to grant conditional approval of EPs, as it did here. Camden Bay Brief at 41, citing to 30 C.F.R. §550.233(b)(1).

Petitioners' Statement of Issues refers to 30 C.F.R. §250.107(c), although the opening brief presents no argument regarding purported application of this regulation. This regulation requires that operators use the best available and safest

technology ("BAST") whenever practical on all operations, and states that "[i]n general, we consider your compliance with BSEE regulations to be the use of BAST." 30 C.F.R. §250.107(c). For reasons fully set out in our Camden Bay brief at 35-37, 30 C.F.R. §250.107(c) plainly does not require BOEM to analyze whether all of the equipment described in an EP constitutes BAST before approving the EP. As in the Camden Bay case, BOEM here made clear in response to comments regarding possible application of BAST that BSEE will conduct a full review of issues raised by BAST requirements when issuing any APD. JSER27-28.

Petitioners contend (Br. 13, 22-23) that BOEM should have expressly addressed the fact that Shell had not proposed use of capping stack equipment in earlier EPs or OSRPs in the Arctic. Petitioners cite (Br. 13) Shell's 2010 regional Chukchi Sea OSRP, which proposed to respond to a well blowout by dynamic surface control measures (which chiefly involve pumping fluids down the well) and then by drilling a relief well. ER566-67. That OSRP, which has been superseded, noted that while "[w]ell capping techniques have been proven to be both efficient and effective in regaining control of damaged wells," Shell did not at that time regard capping as "an effective option for regaining well control while operating from a moored vessel." ER567. Shell's current EP and OSRP clearly indicate that Shell now considers a capping stack to be an appropriate and feasible addition to its

arsenal of techniques for responding to a possible deep well blowout. *See* ER313-14. This is unsurprising, given that recent evidence, including from the Macondo blowout, supports the effectiveness of capping stacks in securing a blowout. ER283.

Contrary to petitioners' contention, no doctrine of administrative law required BOEM to "reconcile" past statements by the applicant that might be seen as inconsistent with the applicant's current views regarding effective technology, as expressed in the EP pending before the agency. Petitioners rely (Br. 23) exclusively on cases involving failures by *agencies* to explain their own shifts in position. Those cases do not speak to the situation here where an applicant for agency approval may have shifted its position. What Shell said about the feasibility of technology in years past is irrelevant to BOEM's decision whether to approve Shell's current EP in light of up-to-date information that takes account of recent developments like the Macondo oil spill.[4/]

[4/] Petitioners' Statement of Facts at 17 cites to a December 7, 2011, letter from the National Marine Fisheries Service ("NMFS") to BOEM, providing comments on Shell's EP. ER16. As this letter is not mentioned in the Argument, petitioners have not preserved any argument based on the letter. In any event, NMFS's comments regarding Shell's proposed capping stack are consistent with BOEM's position that questions about the effectiveness of this equipment can and should be reviewed going forward, rather than serving as a ground for denying the EP. See ER17 (NMFS states that, "[i]f this device or its application is in any way novel, it should be tested as part of the initial phase of the drilling program"). To the extent that NMFS raised concerns about the possibility of oil movement outside the drill

II

IT WAS NOT ARBITRARY FOR BOEM TO RELY ON SHELL'S ESTIMATE OF THE TIME NEEDED TO DRILL A RELIEF WELL

In its EP, Shell estimated that the total duration from the start of a blowout to well killing through a relief well would be approximately 25 days at the Burger prospect. ER351. If Shell's drillship for the Chukchi wells, the *Discoverer*, is unavailable for relief well drilling, Shell will suspend drilling in the Beaufort Sea and move the *Kulluk* to the site, which Shell estimates will take an additional nine days. If the *Kulluk* is not in the Beaufort Sea, it will be at Dutch Harbor, and transit is estimated to take 13 days. *Id*. BOEM reasonably relied on Shell's estimate that drilling a relief well at Burger Well J would take between 34 and 38 days if the *Kulluk* is utilized for this task. JSER57.

Petitioners do not claim that the EP violated BOEM's regulations, which simply require that an EP "[e]stimate the time it would take to drill a relief well." 30 C.F.R. §550.213(g). Rather, they assert that record evidence would support what they believe is "a more realistic estimate of the time it takes to complete an emergency relief well." Br. 26-27. Petitioners claim that BOEM's "failure to grapple" with this alleged problem was arbitrary. Br. 25, 26.

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pipe or casing, BOEM responded appropriately with an explanation of how post-Macondo enhanced drilling safety rules address improved well-design, casing, and cementing to prevent that from occurring. JSER98-99.

Whether an EP applicant has provided a realistic estimate of the time it would take to drill a relief well is a technical issue that lies squarely within the agency's scientific expertise. Accordingly, BOEM's decision to rely on Shell's estimates must be given "great deference" by a reviewing court. *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 869 (9th Cir. 2003).

Here, there was a reasonable basis for BOEM's decision to rely on Shell's estimate that it would likely take approximately 25 days to drill a relief well at Burger Well J.[5/] Petitioners claim (Br. 26) that this is unrealistic, in light of Shell's estimate that drilling an exploratory well at this site would take 32 days. ER320. Petitioners do not challenge Shell's estimates for transit time for the *Kulluk* from either the Beaufort Sea or Dutch Harbor.

Petitioners' claim is unfounded. The EP at Appendix L explains why drilling a relief well to control a blowout is not comparable to drilling a well for the purpose of assessing an areas potential for producing oil and gas. For a relief well:

> [A]ll available resources are quickly accessed and funneled into drilling the relief well and killing the blowout as quickly as possible. Resupply of critical supplies and equipment, mobilization of specialized equipment and assignment of drilling personnel and well control specialists occurs rapidly in this type emergency situation. Normal time

[5/] Burger Well J was used by Shell for the blowout scenario required by 30 C.F.R. §550.213(g) because it has the highest estimated flow rate of any of Shell's planned wells. ER309.

> requirements for planning and scheduling activities are compressed and deliveries are expedited. All reasonable and safe measures are employed to kill the blowout as quickly as possible.

ER351.

Another example of how Shell would respond differently to this emergency situation is that it would plan to dispense with the initial drilling of a mudline cellar. ER350.[6] The EP also points out that drilling a relief well may take less than 25 days, since it is "often" possible to "intercept a blowout at some point above the true vertical depth" of the well where the blowout occurs. ER351.

Petitioners incorrectly claim (Br. 26) that BOEM's analysis here was inconsistent with a generic analysis of a blowout scenario found in the Final Environmental Impact Statement for Lease Sale 193 in the Chukchi Sea, which estimated that relief well drilling could take from 39 to 74 days, depending on a variety of factors including the possibility that the needed drill ship might be as far as a 30-day journey away from the site. Br. 26, citing ER183-84. That generic analysis was plainly not intended to control over a specific estimate provided by a

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[6] Mudline cellars "are designed to protect the wellhead, casing and blowout preventers from potential ice gouge events." ER301. While that is a reasonable precaution for protecting a normal exploration well, it would not make sense in many circumstances to delay the drilling of a relief well out of concern for possible ice gouge events. See ER96 (BSEE agrees that it may be appropriate to dispense with mudline cellar for relief well drilling, depending on circumstances).

particular operator that knows the equipment to be used, its likely location, and the geological characteristics of a particular well site.

Petitioners also point (Br. 15) to a general statement in Shell's OSRP indicating with respect to relief wells that "technology application may be seasonally limited" which could lead to durations of 60-180 days. ER287. But it was reasonable for BOEM to rely on the data from Shell's EP pertaining to the length of time for drilling a relief well at the particular well (Burger J) utilized for the worst case discharge scenario, rather than on this general and equivocal statement in the OSRP. Moreover, BOEM reasonably responded to any problem of seasonal limitations on relief well drilling by imposing a condition that exploratory drilling below a depth capable of flowing liquid hydrocarbons must cease 38 days before the date when ice may be expected to first encroach on the area. ER2. As there was substantial evidence in the record supporting BOEM's reliance on Shell's estimated time for drilling a relief well, BOEM's determination must be regarded as "conclusive." *See* 43 U.S.C. §1340(c)(6).

III

IN THE EVENT OF A REMAND, BOEM'S DECISION SHOULD NOT BE VACATED

For the reasons discussed in Respondents' Brief in the Camden Bay case at 48-49, the Court should not vacate BOEM's approval of Shell's Revised Chukchi EP even if it finds merit in petitioners' arguments. Both of the alleged analytical deficiencies discussed *supra* could easily be cured prior to the approval of any permits for actual drilling. If necessary, additional conditions could be imposed on drilling, or drilling could be prohibited if it appeared after reanalysis that drilling would result in "serious harm or damage" to the marine, coastal, or human environment. 43 U.S.C. §1340(c)(1), *see also* 43 U.S.C. §1334(a)(2)(A)(i). The OCSLA expressly authorizes a reviewing court to remand for further agency action rather than vacate, 43 U.S.C. §1349(c)(6), and that should be the course taken here should this Court find any deficiency in BOEM's decision approving the EP.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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s/ David C. Shilton

STATEMENT OF RELATED CASES

Respondents identify the following related cases pending in this Court:

1. *Native Village of Point Hope v. Salazar*, Nos. 11-72891 and 11-72943 (consolidated with this case).

2. *Resisting Environmental Destruction on Indigenous Lands (REDOIL) v. U.S. Environmental Protection Agency*, No. 12-70518 (Clean Air Act challenge to permits authorizing air emissions during operation of drillships for Shell's oil exploration activities in Chukchi Sea and Beaufort Sea).

s/ David C. Shilton
David C. Shilton

CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I certify that the foregoing Brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 5,331 words. I relied on my word processing software, Word Perfect X3, to obtain this word count.

April 3, 2012
Date

s/ David C. Shilton
David C. Shilton, Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2012, I electronically filed the foregoing Supplemental Brief of Respondents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ David C. Shilton
David C. Shilton