Nos. 11-72891 and 11-72943

ORAL ARGUMENT SCHEDULED: April 2, 2012
BEFORE: Kozinski, Chief Judge, Bea, and Ikuta, Circuit Judges

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IN THE 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.; NATURAL RESOURCES DEFENSE COUNCIL; NATIONAL AUDUBON SOCIETY; NORTHERN ALASKA ENVIRONMENTAL CENTER; OCEANA; PACIFIC ENVIRONMENT; RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS (REDOIL); SIERRA CLUB; and THE WILDERNESS SOCIETY;

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Petitioners,

v.

KENNETH SALAZAR, Secretary of the Interior, and BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT,

Respondents,

STATE OF ALASKA and SHELL OFFSHORE INC.,

Respondent-Intervenors.

Petitions for Review of Department of Interior Decision

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INTRODUCTION

The Bureau of Ocean Energy and Management (BOEM) violated the Outer Continental Shelf Lands Act (OCSLA) in three ways when it conditionally approved Shell's Exploration Plan.[1] First, OCSLA's exploration plan regulations require a company to show that its exploration plan is consistent with an "approved regional [oil spill response plan]." 30 C.F.R. § 550.219(a)(2). Shell's New Beaufort Spill Plan, upon which the Exploration Plan relies, is still not approved; nevertheless, BOEM approved the Exploration Plan. Respondents' defense is that the Exploration Plan can rely on a different, previously approved spill plan, which does not contemplate an oil spill or cleanup sufficient to cover the current drilling activities, to meet OCSLA's requirements. This argument contradicts the plain language of the OCSLA regulation.

Second, BOEM acted arbitrarily when it approved the Exploration Plan with a new, not-yet-designed well capping and containment system, without reconciling this proposal with record evidence showing Shell has for years previously rejected well capping as unsafe and unworkable for its Arctic drilling operations. The only discussion of well capping in the record Respondents can cite in defense fails entirely to address this contrary evidence, and, as a result, the agency's action was arbitrary.

[1] Petitioners use the same defined terms in the reply brief, as those they originally defined in the opening brief.

Third, BOEM failed to explain its conclusion regarding Shell's description of a "maximum duration" blowout, which contradicts record evidence questioning Shell's assertions that it will be able to drill a relief well to stop a blowout faster than a regular well. Respondents' argument in response cites irrelevant documents or consists of *post hoc* explanations offered by counsel, which the Court cannot accept. Even those arguments, however—essentially, an assertion that shorter relief wells are possible—are inconsistent with the plain language of the regulation.

In short, BOEM violated its own OCSLA regulations when it approved the Exploration Plan before it could determine whether Shell was prepared to control and contain an oil spill caused by its exploration drilling activities.

ARGUMENT

I. PETITIONERS ALLEGE BOEM'S APPROVAL OF THE EXPLORATION PLAN VIOLATED OCSLA – NOT THE OIL POLLUTION ACT.

As an initial matter, Respondents consistently mischaracterize Petitioners' claims in this case as a challenge to the legal adequacy of Shell's oil spill response plans. *See, e.g.*, Fed. Br. 13; *id*. at 17; Shell Br. 24. This case does not address claims under the Oil Pollution Act, and Petitioners are not asking the Court to opine as to the substantive adequacy of Shell's spill plans—indeed, a separate

agency is charged with reviewing the current spill plan and has yet to approve or disapprove of it.

Respondents' mischaracterization leads them to contend erroneously that *Edwardsen v. U.S. Department of the Interior*, 268 F.3d 781 (9th Cir. 2001) is instructive or even dispositive of Petitioners' claims in this case. *See, e.g.*, Fed. Br. 17, 19-20, 34; Shell Br. 24. The petitioners in *Edwardsen* attempted to challenge the adequacy of the oil spill response plan in a direct challenge to the Ninth Circuit as part of their OCSLA case. 268 F.3d at 790-91 ("Edwardsen contends that . . . the spill plan response plan is defective under OPA[.]"). The court declined to review the Oil Pollution Act claims, noting that "jurisdiction lies in the district court for actions challenging the approval of a spill response plan or modifications to such a plan." *Id*. at 790.

In contrast, Petitioners' arguments in this case are based solely on the OCSLA regulations governing BOEM's review and approval of exploration plans. As explained below, in approving the Exploration Plan, BOEM violated 30 C.F.R. § 550.219 and acted arbitrarily and capriciously with regard to 30 C.F.R. §§ 550.213(d), 250.107(c), 550.213(g), each of which are independent OCSLA regulations. The Court should reject Respondents' effort to confuse the issues.

II. THE EXPLORATION PLAN CANNOT RELY ON THE UNAPPROVED REGIONAL OIL SPILL PLAN.

OCSLA's exploration plan regulations require that certain "information regarding potential spills of oil . . . *must accompany* [an exploration plan]." 30 C.F.R. § 550.219 (emphasis added). The OCSLA regulations require further that the oil company must include a "[r]eference to [its] approved regional [oil spill response plan]" that includes certain specified elements regarding the spill response and containment capabilities contained in that approved plan. *Id*. § 550.219(a)(2). BOEM violated this requirement because it approved the Exploration Plan even though it relied on a yet-to-be-approved spill plan. The only argument Respondents advance in defense is that the Old Beaufort Spill Plan, which was approved in 2010, satisfies these requirements for purposes of the 2012 drilling and beyond. Fed. Br. 23-25. In contrast, Petitioners contend the regulation means what it says: the Exploration Plan must include information to show the approved spill plan is consistent with the proposed drilling activities. In this case, the Exploration Plan fails that standard.

Respondents ask the Court to defer to the agency's reading of 30 C.F.R. § 550.219 to mean the required elements of § 550.219(a)(2)(i)-(v) do not have to describe the relationship between an "approved" spill plan and the possible oil spill

contemplated by the exploration drilling activities.[2] *See* Fed. Br. 26; Shell Br. 21. The agency's interpretation, however, is not entitled to deference because the regulation is unambiguous. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position [where the regulation is unambiguous] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."); *Casares-Castellon v. Holder*, 603 F.3d 1111, 1112-13 (9th Cir. 2010) (agency's interpretation is owed no deference when a regulation is unambiguous). As explained below, the language of 30 C.F.R. § 550.219 is clear and contrary to the agency's interpretation. As a result, the Court must enforce its plain language. Even if the Court finds ambiguity in § 550.219(a)(2), however, the agency's interpretation must be rejected because it is "plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).

[2] Respondents' reliance on *Edwardsen* highlights the fallacy of their position. In *Edwardsen*, there was an approved spill plan supporting the drilling proposal before the agency approved the plan; the agency approved the spill plan in June 1999 and the drilling plan in September 1999. *Edwardsen*, 268 F.3d at 790-91. The Court concluded that "[a]t the time the [drilling plan] was being considered by [BOEM's predecessor], the spill response plan had already been approved by that agency. Therefore, [the drilling plan] had to be accompanied by no more than a reference to the spill response plan that the [BOEM's predecessor] approved in June 1999." *Id*. at 790. Thus, in *Edwardsen*, the agency approved the spill plan that supported the drilling plan prior to approving the drilling plan, which further highlights the infirmity in this case.

OCSLA's exploration plan regulations require a company to include in an exploration plan a discussion of the company's "approved regional [spill plan]." 30 C.F.R. § 550.219(a)(2). The company must discuss that spill plan, *id.* § 550.219(a)(2)(i), identify the location of its equipment base and staging area in that plan, *id*. § 550.219(a)(2)(ii), and identify the oil spill removal organization(s) for equipment and personnel provided for in that plan, *id*. § 550.219(a)(2)(iii). In the exploration plan, the company must explain the worst case discharge scenario that could result from the proposed drilling, *id*. § 550.219(a)(2)(v), and compare that spill volume and cleanup scenario with the scenario in the "approved regional [spill plan]," *id*. § 550.219(a)(2)(iv).

Respondents ask the Court to divorce the OCSLA requirements to: (1) have an approved regional spill plan accompany an exploration plan; and, (2) include a discussion in the exploration plan that compares various elements of spill response and readiness with the contents of the approved regional spill plan. *See* 30 C.F.R. § 550.219(a)(2)(i)-(v). The most obvious weakness in Respondents' argument is that they ignore the explicit requirement to "compar[e] . . . the appropriate worst case discharge scenario *in [the] approved regional [spill plan]* with the worst case discharge scenario that could result from [the] proposed exploration activities. . . ." 30 C.F.R. § 550.219(a)(2)(iv) (emphasis added). The Federal Respondents at least cite the regulation, only to omit the operative language regarding the comparison to

the approved spill plan. Fed. Br. 24. And, despite four pages of argument, Shell simply ignores the provision entirely. Shell Br. 21-25. The plain language of section 550.219(a)(2)(iv) does not permit an interpretation that allows a company to rely on the provisions of an unapproved spill plan or a prior version of the plan that does not address the potential worst case discharge associated with the current exploration proposal. Respondents' interpretation to the contrary cannot be reconciled with the plain language.

The agency's current interpretation also conflicts with statements its predecessor made when it updated the exploration plan regulations. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (A court should not defer to the agency's interpretation where an "alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.") (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)). When a commenter "question[ed] the need for a worst-case discharge scenario comparison and suggest[ed] that simply making the statements should suffice," the agency responded that the comparison "is necessary for . . . [the agency] to determine if [a drilling] plan complies with [the Oil Pollution Act]." 70 Fed. Reg. 51,478, 51,496 (Aug. 30, 2005) (Oil Spills Information (250.219 and 250.250)); *see also id*. at 51,486 (The agency uses the information as a "streamlined means to ensure compliance with requirements of the Oil Pollution

Act."). To meet its OCSLA obligations,[3] the agency promulgated this regulation as a check on the drilling plan's compliance with the Oil Pollution Act, which prohibits an offshore facility from "handl[ing], stor[ing], or transport[ing] oil unless . . . [its oil spill] response plan *has been approved*" and the "*facility is operating in compliance with the plan*." 33 U.S.C. § 1321(j)(5)(F)(i)-(ii) (emphasis added). BOEM's assertion that the Exploration Plan can rely on an as-yet-unapproved spill plan is inconsistent with this regulatory history. Fed. Br. 22-30; *see also* Shell Br. 21.

As a practical matter, this case epitomizes why the regulation requires a comparison between an exploration plan and an approved spill plan to determine if they are consistent. Here, the Exploration Plan contemplates an oil spill from one of Shell's wells, ER 228 (9,468 barrels (bbl)/day for 30 days or 284,040 bbl), that is 70 percent greater than the volume addressed in Shell's only approved plan, the

[3] To be clear, the agency was acting pursuant to its OCSLA authority when promulgating this requirement:

> The regulations at 30 CFR part 250 subpart B are intended to enable [the agency] to carry out these responsibilities under the OCSLA.

70 Fed. Reg. at 51,478.

Old Beaufort Spill Plan.[4] ER 535 (5,500 bbl/day for 30 days or 165,000 bbl). Respondents do not, nor could they, suggest Shell can rely on a spill plan that does not address a spill volume equal to or greater than the volume contemplated from its drilling. Respondents do not suggest that all of Shell's response procedures, equipment and personnel, including the new well capping and containment technique and equipment, are included in Old Beaufort Spill Plan. *See* 30 C.F.R. § 550.219(a)(2)(i)-(v). As a result, the Exploration Plan does not compare the worst case discharge scenario contemplated by the drilling proposal with an appropriate scenario in an approved spill plan as required by the regulation. *Id.* § 550.219(a)(2)(iv). Instead, in the Exploration Plan, Shell relies on the as-yet-unapproved New Beaufort Spill Plan to make this comparison and demonstrate it

[4] This directly contradicts an argument that Shell advances, Shell 24-25, suggesting that the Old Beaufort Spill Plan reflects a sufficient skimming capacity to respond to a spill volume contemplated by the current activities. Shell points to a chart in the plan outlining skimming equipment potential, but this is only one of the components of the worst case discharge scenario and Shell does not suggest all the other components are adequate to address its current operations. *See* FER 3-6 (chart summarizing 14 other aspects). Considering all these components, the Old Beaufort Spill Plan itself concludes it addresses a "total worst case discharge" of 165,000 bbl. ER 535.

can support its exploration drilling activities.[5] ER 228 ("details an oil spill response capability" of 480,000 bbl); *see also* ER 550.

Because 30 C.F.R. § 550.219(a)(2) unambiguously requires the Exploration Plan to refer to an "approved regional [spill plan]" and compare the appropriate worst case discharge scenario from that approved plan to the scenario contemplated by the proposed exploration drilling activities, BOEM's assertion, Fed. Br. 24-25, that reference to an unapproved spill plan satisfies this requirement should be accorded no deference. *See Christensen*, 529 U.S. at 588. Shell did not comply with the unambiguous regulatory requirement set out by section 550.219(a)(2), and as a result, BOEM violated this regulation when it approved the Exploration Plan even though the spill plan it relies on is unapproved.

III. BOEM ACTED ARBITRARILY BECAUSE IT NEVER RECONCILED THE EVIDENCE QUESTIONING THE SAFETY AND VIABILITY OF WELL CAPPING IN THE ARCTIC.

Respondents contend BOEM was justified when it approved Shell's proposal to use a new well capping stack and containment system. Yet they do not dispute that well capping technology has never been used in BOEM's Alaska

[5] Shell's suggestion that it voluntarily revised the Old Beaufort Spill Plan, Shell Br. 14, is irrelevant to the Court's inquiry. The issue is whether it is lawful to rely on an unapproved spill plan. Moreover, the suggestion ignores both governing regulations and key portions of the record. *See, e.g.*, 30 C.F.R. § 254.30(a) (requiring biennial review of spill plans); ER 535a (agency explaining that "[t]he next biennial review of [the Old Beaufort Spill Plan] will be required on or before October 20, 2011."); ER 574-78 (responding to agency direction, Shell provided additional safety and spill response information following *Deepwater Horizon*).

Region or in Arctic operating conditions. They do not dispute that Shell has consistently asserted it is not appropriate or safe technology for operations from a moored vessel. They also do not dispute that at the time BOEM acted on Shell's proposal, Shell had not even designed, built, or tested the capping system. In response to Petitioners' argument that BOEM was obligated to reconcile Shell's new proposal with this record, Respondents can point only to discussions in the record that fail entirely to address these record contradictions. As a fallback, they contend these requirements are only required by the Oil Pollution Act and not contemplated by OCSLA. As explained below, both arguments are without merit and, as a result, it was arbitrary and capricious for BOEM to approve the Exploration Plan.

A. BOEM Failed to Examine the Relevant Data Regarding the New Capping and Containment System and Articulate an Explanation for its Approval of the Exploration Plan.

In the Opening Brief, Petitioners illuminated Shell's repeated recent conclusions that well capping will not work in Arctic operations from a floating vessel that is moored to the ocean floor. Op. Br. 20-22, 42-44. Time and again, Shell explained: "Well capping is not feasible for offshore wells from moored vessels with [blowout preventers] sitting below the mud line in a well cellar (glory hole). . . ." ER 602; *see also* ER 540 (same); ER 606; ER 544. Petitioners also highlighted other record evidence raising similar concerns. Op. Br. 25-26. Yet,

BOEM arbitrarily approved the Exploration Plan without resolving this inconsistency.

In response, the Federal Respondents point to BOEM's environmental assessment to suggest the agency considered the well capping issues. Fed. Br. 32-33. Yet this assessment does not address Shell's reversal regarding the safety and viability of well capping in the Arctic during its exploration activities. The assessment also does not address any of the concerns raised during the public comment process, including hydrate formation, late season ice conditions, the ability to keep a vessel stable over the blowout, reduced buoyancy, and the availability of trained and qualified personnel to operate the new system. *See, e.g.*, ER 63-68. In fact, the agency's discussion refers to a "containment dome," which Shell is no longer proposing to use.[6] Fed. Br. 32. The assessment completely ignores the fact that Shell's well capping has been at the center of the controversy surrounding Shell's proposed exploration activities. ER 136 (explaining questions were first posed in December 2010). As the Court has explained, an agency "cannot avoid its duty to confront . . . inconsistencies by blinding itself to them." *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (explaining that the agency's "seemingly inconsistent approach" had "occupied the center of this controversy from the start"). Here, BOEM simply ignored Shell's own prior

[6] Shell is now proposing to use a capping stack – not a containment dome or cofferdam, as it originally suggested. ER 237; ER 578.

conclusions and the comments questioning Shell's proposal to use well capping for the first time and, as a result, the agency's decision is arbitrary.

For its part, Shell first suggests that the explanation in the Exploration Plan is sufficient.[7] Shell Br. 28. Like the environmental assessment, however, the Exploration Plan does not explain Shell's shift in position or address any of the concerns raised in comments to the agency.

Shell then mischaracterizes the nature of Petitioners' argument. *See, e.g.*, Shell Br. 28 ("Petitioners do not and cannot cite any authority in support of their implicit assertion that this description and discussion is inadequate under Subsection 213(d)."). Petitioners do not argue implicitly or explicitly that the OCSLA regulation requires a particular level of description, rather they object to the agency's failure to reconcile the contrary evidence in the record about well capping when it concluded Shell's submission met the regulatory requirements.

[7] Shell contends that Petitioners failed to explain why conditions in the Arctic Ocean are different than those companies confront in the Gulf of Mexico in this regard. Shell Br. 31. To do so, Shell ignores its own assertions regarding well capping, public comments, briefing, and citations to the record demonstrating that the Arctic Ocean is a dramatically different environment than the Gulf of Mexico. *See, e.g.*, ER 259a ("We will attempt the capping and containment first and we should be able to control the well before ice becomes too much of a problem."); Op. Br. 7-9 (detailing conditions in the Beaufort Sea, including those related to oil spill containment and response); *id*. 14 (explaining that the National Oil Spill Commission concluded that "[s]uccessful oil-spill response methods from the Gulf of Mexico, or anywhere else, cannot simply be transferred to the Arctic").

It is a basic tenet of administrative law that the agency must articulate the reason or reasons for its decision. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1072 n. 9 (9th Cir. 2004); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv*., 273 F.3d 1229, 1236 (9th Cir. 2001). The Court, moreover, "may only sustain an agency's action on the grounds actually considered by the agency." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 686 (9th Cir. 2007). Here , BOEM acted arbitrarily because it failed to explain its decision in light of Shell's historical position regarding the safety and viability of well capping, failed to examine the public criticism of Shell's proposed system, and, ultimately, failed to provide an explanation to support its conclusions in approving an exploration plan that included well capping as one of the fundamental cornerstones to well control and containment.

B. The Discussion of Capping and Containment is Required by OCSLA.

Apparently recognizing the agency's infirmity, Respondents also contend BOEM had no obligation to explain its conclusions regarding well capping because those issues relate to oil spill containment and response. *See* Fed. Br. 34 (arguing capping and containment go to the adequacy of the spill plan); Shell Br. 29-30 (arguing the capping and containment system is not part of its exploration

activities). This position is unsupported by the plain language of OCSLA's exploration plan regulations.

As a general matter, and as the Federal Respondents admit, 30 C.F.R. § 550.211(c) requires that exploration plans include a brief description of the "important safety and pollution prevention features[.]" Fed. Br. 31 (*quoting* 30 C.F.R. § 550.211(c)). Exploration plans also must include a description of the company's worst case discharge scenario, which explicitly includes a description of the spill response equipment and resources. 30 C.F.R. § 550.219(a)(2)(v); *see also id.* § 254.26(d)-(e) (requiring the company to describe its response equipment, deployment, personnel, and explain that the equipment is "suitable" for the "environmental conditions anticipated" during the drilling). Thus, safety and pollution prevention features are plainly within the scope of BOEM's exploration plan regulations.

More specifically, the regulations require a "description and discussion of any new or unusual technology . . . [the company] will use to carry out [its] proposed exploration activities."[8] 30 C.F.R. § 550.213(d) (citing 30 C.F.R. § 550.200). The capping stack is new or unusual technology per section 500.200 as

[8] Shell contends that well control technology, like its capping stack, is not designed to carry out "exploration activities." Shell Br. 29. Yet, the very regulation Shell relies upon requires "important safety and pollution prevention features" to be included in the company's description of its "exploration activities." *See* 30 C.F.R. § 550.211(c).

Respondents concede (by omission), Shell Br. 31; Fed. Br. 33, that there is no evidence in the record that well capping has been used in the Alaska OCS Region, in Arctic drilling operations, or from a moored vessel.[9] *See* 30 C.F.R. § 550.200(b)(1)-(2) (defining "new or unusual technology"). In fact, Shell previously rejected well capping as a viable means of achieving well control during its Arctic exploration activities. *See, e.g.*, ER 594 ("There is no technology . . . that can do that without interfering with [Shell's] anchoring system. That's one of the biggest problems."); ER 591-592; ER 540; ER 542-543. The discussion of new or unusual technology is an OCSLA requirement and BOEM acted arbitrarily because it failed to address any of these concerns prior to its approval of the technology.

The OCSLA regulations also explain that Shell "must use the best available and safest technology (BAST) whenever practical on all exploration, development, and production operations." 30 C.F.R. § 250.107(c). Respondents argue that this regulation is limited to an unidentified list of technologies, Fed. Br. 35-65; Shell

[9] Shell contends that 30 C.F.R. § 550.200(b)(1) should be read as meaning the technology has been used anywhere in the United States, rather than in a particular BOEM OCS Region. Shell Br. 31. This suggestion is inconsistent with the plain language of the regulation, which explicitly focuses on the specific BOEM Regions, not the United States as a whole. Even if Shell were correct, the regulation also characterizes technology as "new and unusual" if it has not been used "under the anticipated operating conditions," 30 C.F.R § 550.200(b), and there is no dispute this technology has not been used in Arctic operating conditions or from a moored vessel.

Br. 30 n.12, but neither the statute nor the regulation limit the obligation to use best available and safest technology to a list of particular technologies generated by the Secretary. *See* 43 U.S.C. § 1347(b); 30 C.F.R. § 250.107(c). To the contrary, the regulation states: "In general, we consider your compliance with [BOEM] regulations to be the use of [best available and safest technology]." 30 C.F.R. § 250.107(c). Thus, in light of the conflicting record, BOEM had an obligation to explain how the Exploration Plan met OCSLA's best available and safest technology requirement.

In short, there is no evidence in the record that the agency grappled with Shell's prior inconsistent conclusions regarding the anchoring problems, the issues regarding the blowout preventer in a mudline cellar, or any of the other identified complications prior to approving the Exploration Plan and, as a result, BOEM's approval was arbitrary and capricious. Alternatively, and as explained below, BOEM acted unlawfully when it conditionally approved the Exploration Plan and required Shell to provide additional information regarding the proposed well capping and containment system at some undisclosed point in the future.

C. Neither OCSLA Nor Its Regulations Allow BOEM to Conditionally Approve Exploration Plans That Do Not Comply With OCSLA Regulations.

As Petitioners explained, Op. Br. 46-47, the agency's conditional approval conflicts with OCSLA, because Congress gave BOEM only three options after it

reviews an exploration plan and those options do not include conditional approval. *See* 43 U.S.C § 1340(c)(1) (The agency can: reject the plan, approve the plan "as submitted," or require modifications to meet OCSLA's requirements and approve the re-submitted plan "as . . . modified."). "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen*, 529 U.S. at 583 (quoting *The Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. 269, 270 (1871)). Stated more directly, when "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

In response to Petitioners' argument, the Federal Respondents jump to the next step in OCSLA's process, the application for the permit to drill. Fed. Br. 40. The argument, however, is unpersuasive because it ignores the statutory language governing the agency's decision at issue here, the approval of an exploration plan. Whatever it can do after it approves an exploration plan is irrelevant to the question of what authority Congress gave the agency in exercising its discretion to approve exploration plans. *See* 43 U.S.C. § 1340(d) (requiring an "approved exploration plan"). Here, Congress has spoken directly to the question of the review and approval of exploration plans, so the Court's inquiry is at an end. *Chevron*, 467 U.S. at 842. BOEM acted contrary to 43 U.S.C § 1340(c)(1) and, as

a result, acted unlawfully in conditionally approving Shell's Exploration Plan. *See The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1062 (9th Cir. 2003) (concluding as unambiguous, under *Chevron* step one, that an enumerated list did not include un-enumerated items).

Despite the statutory language to the contrary, Respondents argue OCSLA's regulations allow for conditional approval of exploration plans, relying on 30 C.F.R. § 550.233(b)(1). Fed. Br. 41; Shell Br. 33. Yet, they ignore the fundamental premise of that regulation; the exploration plan must first "compl[y] with all applicable requirements" and only then, can the agency impose additional conditions. 30 C.F.R. § 550.233(b)(1). Here, as Petitioners have explained, *see supra* at 11-17, Shell's Exploration Plan did not comply with applicable regulations. As a result, the approval process is governed by 30 C.F.R. § 550.233(b)(2), which provides:

> If . . . [t]he Regional Supervisor finds that [the exploration plan] is inconsistent with . . . the regulations prescribed under the Act . . . [t]he Regional Supervisor will notify you in writing of the decision and describe the modifications you must make to your proposed [exploration plan] to ensure it complies with all applicable requirements.

30 C.F.R. § 550.233(b)(2). The OCSLA regulations reflect Congress' directive that if an exploration plan does not comply with the OCSLA regulations, the agency cannot approve the plan as "submitted." 43 U.S.C § 1340(c)(1).

Finally, the Federal Respondents contend Petitioners are precluded from litigating the issue of whether OCSLA permits BOEM to conditionally approve exploration plans as a result of the decision in *Native Village of Point Hope v. Salazar*, 378 Fed. Appx. 747 (9th Cir. 2010). The argument fails because the Federal Respondents provide an incomplete characterization of what was argued and what the Court decided in that case.

The petitioners in the prior case argued that Shell's exploration plan did not contain information required by OCSLA's regulations. *Point Hope*, Pet. Br. 51-54.[10] In response, both the Federal Respondents and Shell argued that the plan did contain the required information.[11] *See Point Hope*, Fed. Br. 113-114; *Point Hope*, Shell Br. 53-55. Petitioners also argued that the agency could not rely on its conditional approval letter to fill in the required elements at some later point, because OCSLA does not allow for conditional approvals. *Point Hope*, Pet. Br. 53. The Court upheld the agency's decision. *Point Hope*, 378 Fed. Appx. 747.

The *Point Hope* decision, however, does not explain upon which of the two bases the Court decided the issue and, as a result, Petitioners in this case are not precluded from litigating the issue of conditional approvals under OCSLA. *See Wolfson v. Brammer*, 616 F.3d 1045, 1065 (9th Cir. 2010) ("Where a decision

[10] This briefing is the subject of Respondents' Motion for Judicial Notice. *See* Dkt. 33-1, 33-2.

[11] Petitioners ask the Court to take judicial notice of these briefing excerpts. *See* Dkt. 54-1, 54-2, Petitioners' Motion for Judicial Notice.

could have been rationally grounded upon an issue other than that which the defendant seeks to foreclose from consideration, collateral estoppel does not preclude relitigation of the asserted issue.") (internal quotation omitted). The Court might have decided, as the Federal Respondents and Shell argued, that the exploration plans contained the required information. If so, the Court never reached the issue of whether OCSLA allows BOEM to conditionally approve exploration plans. *See Little v. U.S.*, 794 F.2d 484, 487 (9th Cir. 1986) ("[I]f there is doubt, collateral estoppel will not be applied, especially if the previous decision could have been rationally grounded on an issue other than that which the defendant seeks to foreclose from consideration.") (internal quotation and citation omitted); *Davis & Cox v. Summa Corp*., 751 F.2d 1507, 1518–19 (9th Cir. 1985) (issue not precluded where not clearly reached) (overruled on other grounds by 28 U.S.C. § 1961). Thus, Petitioners are not precluded from pursuing the issue in this case.

Here, BOEM created its own undefined process called a "conditional approval" of an exploration plan that did not comply with OCSLA regulations. BOEM did not comply with 43 U.S.C § 1340(c)(1) or its own regulations and, as a result, the "conditional approval" is unlawful.

IV. BOEM ACTED ARBITRARILY IN APPROVING SHELL'S "MAXIMUM DURATION" BLOWOUT SCENARIO.

OCSLA regulations require exploration plans to describe a blowout scenario that contemplates the "maximum duration of [a] potential blowout," including the time required to drill an emergency relief well. 30 C.F.R. § 550.213(g). In the Opening Brief, Petitioners identified the evidence in the record that contradicts Shell's assertion that it will be able to drill a relief well faster than the original wells. Op. Br. 27-29, 52-56. Respondents do not offer any record evidence demonstrating the agency addressed that conflict. The only other response is a *post hoc* rationalization advanced by counsel to defend BOEM's failure, which is impermissible. *See Auer*, 519 U.S. at 462. Even if the Court considers the *post hoc* explanations, however, the suggestion that Shell might be able to drill an emergency relief well faster does not support the agency's approval of Shell's "maximum duration" blowout scenario. As a result, the agency acted arbitrarily in approving the Exploration Plan.

A. Respondents Offer No Record Evidence Demonstrating the Agency Confronted the Relief Well Assertion.

During the agency review period, Petitioners and other stakeholders challenged Shell's blowout scenario, providing evidence contrary to Shell's assertion that it could drill a relief well faster than it can drill one of the original wells. Op. Br. 27. Respondents fail to point to anything in the record suggesting

the agency actually considered the concerns raised questioning the blowout scenario.[12]

The Federal Respondents point to a file memorandum, but it fails to address the concerns regarding relief well drilling. *See* Fed. Br. 45 (citing SER 2). It never even mentions the number of days needed to complete a relief well or Shell's characterization of a "maximum duration" blowout. To the contrary, the memorandum actually supports the position the relief well could take longer.[13]

Thus, when it approved the Exploration Plan, the agency erred by ignoring contrary evidence in violation of its obligation to reconcile conflicting evidence.[14] *See Humane Soc.*, 626 F.3d at 1051; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008) (requiring the agency to "examine the relevant data and articulate a satisfactory explanation for its action") (quoting *State Farm*, 463 U.S. at 43).

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[12] The Federal Respondents also defend the lack of analysis based on the agency's conditional approval. Fed. Br. 46. The approval letter does not solicit additional information from Shell regarding the differences in drilling times for an emergency relief well and a regular well, ER 2-3, but even if it did, such an action would be unlawful, *see supra* at 18-21.

[13] When BOEM analyzed the Exploration Plan's compliance with OCSLA, agency staff included a memorandum describing Shell's last exploration plan. *See* SER 5-7. The staff analysis explained that in 2009 Shell contended it could take up to 34 days to complete an emergency relief well. SER 6. In contrast, Shell now contends it would take between 20-25 days. ER 229; ER 274.

[14] The Federal Respondents' suggestion that as long as there is an estimate, it does not matter if it is legitimate, is inconsistent with its legal obligation. Fed. Br. 44 (arguing that Shell provided an estimate and "[t]hat is the extent of the inquiry this Court should make under 43 U.S.C. § 1349(c)").

B. The Court Cannot Accept the *Post Hoc* Explanations to Support a Conclusion That Shell's Scenario Constitutes the "Maximum Duration" Blowout.

In lieu of an explanation from the agency, Respondents' counsel attempt to cover over this mistake by offering an explanation the agency never provided. Fed. Br. 46-47; Shell Br. 40-41. Counsel for Respondents contend the estimate is justified because Shell will be operating in an "emergency situation." Fed. Br. 46; Shell Br. 40. They also suggest Shell might intercept the well at a more shallow point that the original well. Fed. Br. 47; Shell Br. 40. Shell's lawyers add that the company might not have to drill a mudline cellar.[15] Shell Br. 40.

But these are only *post hoc* explanations and the Court cannot "accept appellate counsel's *post-hoc* rationalizations for agency action." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1120 (9th Cir. 2010) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (internal quotation and citation omitted). Moreover, even if the Court considers these *post hoc* rationales, none of them justify the agency's conclusion regarding Shell's characterization of the "maximum duration" blowout.

[15] The agency has consistently pushed back on Shell's assertion that a mudline cellar might not be required. *See, e.g.*, SER 7 ("[BOEM] concludes that there are circumstances where drilling a relief well without a [mudline cellar] could be appropriate but [the agency] is not convinced that this can always be assumed."); ER 2 (requiring Shell to have the capability to construct a mudline cellar for its relief well).

During its rulemaking, the agency added the phrase "maximum duration" to clarify the length of the scenario's requirement. 70 Fed. Reg. at 51,485 (The State of Florida recommended adding the word "maximum" to qualify "timeframe."). As the regulation does not define the phrase "maximum duration," its words must be read to give effect to their plain meaning. *See Crown Pac. v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1038 (9th Cir. 1999) ("A regulation should be construed to give effect to the natural and plain meaning of its words.") (internal quotation and citation omitted). The term "maximum" means "the greatest quantity or amount possible[.]" Webster's New Universal Unabridged Dictionary 886 (1994); *see also* Webster's Third New International Dictionary of the English Language Unabridged 1396 (2002) ("greatest in quantity or highest in degree attainable"). The term "duration" means the "state of lasting for a period of time." Webster's Third New International Dictionary of the English Language Unabridged 703 (2002). Thus, the phrase "maximum duration" in 30 C.F.R § 550.213(g) must be read to mean the greatest length of time possible.

Respondents point to a handful of factors that might make drilling a relief well faster, thereby shortening the duration of the blowout scenario.[16] Petitioners do not dispute those factors could shorten the drilling time, but that is not what 30 C.F.R § 550.213(g) requires. The regulation required Shell to contemplate a blowout scenario of "maximum duration" based on the time it takes to complete an emergency relief well, not a "best case duration" scenario. The arguments offered by counsel—that the time might be less—would not meet the regulatory requirements even if the agency had relied on them.

In sum, it is not the Court's job to sift through the record looking for an explanation that the agency failed to provide. To the contrary, the Court "may only sustain an agency's action on the grounds actually considered by the agency." *Bonneville Power*, 477 F.3d at 686. The record shows that it often takes as long as, or even longer, to drill an emergency relief well as it takes to drill the original well. BOEM failed to reconcile that evidence and explain its conclusion approving of

[16] Respondents have no empirical evidence of a relief well ever being drilled faster than the original well. Instead, they challenge the evidence in the record, which suggests that relief wells take longer than original wells. Fed. Br.47; Shell Br. 42-43. The record speaks for itself; across geographic areas and different types of wells a relief well can take as long as or longer to drill than the original well. Even BOEM itself concluded it could take roughly three times as long to drill an Arctic relief well, as Shell predicts. ER 292. Yet the agency failed to consider this evidence when it approved Shell's characterization of a "maximum duration" blowout.

Shell's characterization of a "maximum duration" blowout. As a result, BOEM acted arbitrarily in approving the Exploration Plan.

V. THE COURT SHOULD VACATE BOEM'S APPROVAL OF THE EXPLORATION PLAN.

Respondents dedicate their briefing on relief to an argument Petitioners did not make. Petitioners do not seek an injunction. Rather, they request the ordinary remedy of vacatur for an action taken arbitrarily and not in compliance with law. *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998) (*citing* 5 U.S.C. § 706(2)). In response, Respondents and the American Petroleum Institute *amici* have sought to blur the important distinctions between vacatur and injunctions, and to subject the request here for vacatur to the much more stringent requirements for an injunction. Petitioners do not contend vacatur is presumed or automatic, but Respondents have shown no basis for denying the normal remedy of vacatur. Petitioners ask the Court to exercise its discretion under OCSLA and vacate the decision.

Respondents are wrong to conflate vacatur with injunctions. They are different remedies. The "general rule" in Administrative Procedure Act cases is to vacate actions not sustainable on the record. *Asarco, Inc. v. OSHA*, 647 F.2d 1, 2 (9th Cir. 1981). This is what courts "[o]rdinarily" do. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). It is the "normal remedy." *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir.

2007), *rev'd on other grounds sub nom. Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S.Ct. 2458 (2009). In stark contrast, "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2761 (2010).

Monsanto illustrates this difference. There, the Supreme Court assumed without deciding that the district court acted lawfully in vacating the challenged agency action and proceeded to address the propriety of injunctive relief. *Id*. at 2756. The Court described vacatur as "a less drastic remedy" that, in the circumstances of that case, obviated the need for "the additional and extraordinary relief of an injunction . . . ." *Id*. at 2761.

Following this guidance, Petitioners here sought only the "less drastic" remedy of vacatur, rather than an injunction. Vacatur is a sufficient remedy here. Respondents and American Petroleum Institute attempt to subject this ordinary remedy to the multi-part test applicable to the extraordinary remedy of injunction, but do so without the benefit of any legal authority. For this reason, the injunction cases cited by Respondents and the *amici* are inapplicable.

Respondents failed to identify any circumstances here that would warrant denying vacatur. Although vacatur is the ordinary remedy, it is certainly true that the courts have discretion in some circumstances to leave a rule in place while the agency corrects its errors on remand where doing so is necessary to serve statutory

purposes. *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995); *Asarco*, 647 F.2d at 2. Vacatur in this case would ensure BOEM properly considers Shell's readiness and ability to control and respond to an oil spill before the company moves ahead with exploration drilling as required by OCSLA.

Respectfully submitted this 15th day of February, 2012.

s/ Holly A. Harris

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,935 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Respectfully submitted this 15th day of February, 2012.

s/ Holly A. Harris

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2012, I electronically filed the foregoing PETITIONERS' REPLY BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that on February 15, 2012, four (4) copies of PETITIONERS' FURTHER EXCERPTS OF RECORD were sent by Express Mail to the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, 95 Seventh Street, San Francisco, CA 94119-3939. One (1) copy was served by Express Mail on each of the following:

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[Colored Page in Printed Brief]

ADDENDUM

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Outer Continental Shelf Lands Act

43 U.S.C.A. § 1340

§ 1340. Geological and geophysical explorations

. . .

(d) Drilling permit

The Secretary may, by regulation, require any lessee operating under an approved exploration plan to obtain a permit prior to drilling any well in accordance with such plan.

. . .

Oil–Spill Response Requirements for Facilities Located Seaward of the Coast Line
Subpart B. Oil–Spill Response Plans for Outer Continental Shelf Facilities

30 C.F.R. § 254.30

When must I revise my response plan?
Effective: October 1, 2011

(a) You must review your response plan at least every 2 years and submit all resulting modifications to the Regional Supervisor. If this review does not result in modifications, you must inform the Regional Supervisor in writing that there are no changes.

. . .

Oil and Gas and Sulphur Operations in the Outer Continental Shelf
Subpart B. Plans and Information
Contents of Exploration Plans (Ep)

30 C.F.R. § 550.211

What must the EP include?
Effective: October 1, 2011

Your EP must include the following:

. . .

(c) Drilling unit. A description of the drilling unit and associated equipment you will use to conduct your proposed exploration activities, including a brief description of its important safety and pollution prevention features, and a table indicating the type and the estimated maximum quantity of fuels, oil, and lubricants that will be stored on the facility (see definition of "facility" under § 550.105(3)).

. . .