

Nos. 11-72891, 11-72942, 12-70440, 12-70459

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

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.

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

Respondents,

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

Respondents-Intervenors.

On Petitions For Review of Decision of The Bureau of Ocean Energy Mgmt.

SUPPLEMENTAL BRIEF OF RESPONDENT-INTERVENOR SHELL GULF OF MEXICO INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Shell Gulf of Mexico Inc. (“SGOMI”) states that it is a wholly owned subsidiary of Enterprise Oil North America Inc., which is a wholly owned subsidiary of Shell Offshore Inc. (“SOI”), which is a wholly owned subsidiary of SOI Finance Inc., which is a wholly owned subsidiary of Shell US E&P Investments LLC, which is in turn a wholly owned subsidiary of Shell Oil Company. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc., which is a wholly owned subsidiary of Shell Petroleum N.V. Shell Petroleum N.V. is a wholly owned subsidiary of Royal Dutch Shell plc, a publicly traded corporation. Royal Dutch Shell plc has no parent company, and no publicly held company owns 10% or more of its stock.

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PRELIMINARY STATEMENT

These consolidated petitions challenging the Bureau of Ocean Energy Management's ("BOEM's") decision approving Respondent-Intervenor Shell Gulf of Mexico Inc.'s ("SGOMI's") planned exploratory drilling under its Revised Chukchi Sea Exploration Plan ("Revised Chukchi Sea EP") are yet another attempt by these Petitioners to stop oil and gas exploration and development on Alaska's Outer Continental Shelf ("OCS"). Despite their longstanding objections to Arctic exploration, however, Petitioners waited nearly the entire sixty days permitted under OCSLA to file their petitions challenging the BOEM's approval. *See* No. 12-70440 (Dkt. No. 1 filed Feb. 10, 2012); No. 12-70459 (Dkt. No. 1 filed Feb. 13, 2012).

This Court (Kozinski, C.J., Bea & Ikuta, JJ.) denied Petitioners' previous petitions for review of the government's conditional approval of SGOMI's exploration plan for the Chukchi Sea. *See Native Village of Point Hope v. Salazar*, 378 Fed. App'x 747 (9th Cir. 2010). This Court should reject the current petitions as well, along with Petitioners' challenges to Respondent-Intervenor Shell Offshore Inc.'s ("SOI's") Revised Camden Bay Exploration Plan ("Revised Camden Bay EP"), *see* Nos. 11-72891 and 11-72943. Pursuant to this Court's March 12, 2012 Order, Petitioners confine their arguments here to the issues that they raised in challenging the Revised Camden Bay EP. Petitioners' arguments are

no more persuasive as to the Revised Chukchi Sea EP than as to the Revised Camden Bay EP.¹

QUESTIONS PRESENTED

1. Whether BOEM's decision to approve SGOMI's Revised Chukchi Sea EP subject to several conditions, made after a thorough evaluation of the record, was within the agency's discretion and supported by substantial evidence on the record considered as a whole.

a. Whether BOEM's decision to approve the Revised Chukchi Sea EP, subject to well-defined conditions regarding SGOMI's proposed well-capping stack and proposed containment system, complied with the Outer Continental Shelf Lands Act ("OCSLA"), its implementing regulations, and the agency's own longstanding practice.

b. Whether BOEM's acceptance of SGOMI's estimated time for drilling an emergency relief well was supported by substantial evidence where the record, taken as whole, reflects that drilling a relief well takes less time than drilling an exploratory well.

¹ SGOMI incorporates its parent-company SOI's briefing on the Revised Camden Bay EP (referred to herein as "SOI Brief"). SGOMI's supplemental brief principally addresses the arguments raised in Petitioners' supplemental brief ("Pet'rs Supp.") regarding the Revised Chukchi Sea EP and, to the extent they are incorporated by reference in Petitioners' Supplemental Brief, to arguments made in Petitioners' reply brief in the Revised Camden Bay EP briefing ("Pet'rs Reply").

2. Whether, if BOEM failed to comply with OCSLA, BOEM's approval of SGOMI's Revised Chukchi Sea EP should be remanded to BOEM rather than vacated, where Petitioners would suffer no harm from remand, SGOMI would suffer substantial financial harm from vacatur, and vacatur would interfere with the national policy of expeditious exploration and development of the Alaska OCS.

STATEMENT OF THE CASE

SGOMI incorporates the Federal Respondents' Statement of the Case.

STATEMENT OF FACTS

SGOMI incorporates the Federal Respondents' Statement of Facts, as well SOI's discussion of the applicable provisions of OCSLA and the Oil Pollution Act of 1990 (*see* SOI Br. 8-10), and adds the following:

A. SGOMI's Revised Chukchi Sea Exploration Plan

After this Court denied the petitions challenging the approval of SGOMI's 2010 Chukchi Sea EP ("2010 EP"), *see Native Village of Point Hope*, 378 Fed. App'x at 748, the Department of the Interior ("DOI") announced that, as part of its response to the *Deepwater Horizon* incident in the Gulf of Mexico, it would not permit any new drilling in the Alaska OCS during the 2010 season. *See* SOI Br. 10-11.

Shortly thereafter, the U.S. District Court for the District of Alaska enjoined oil and gas operations on leases issued in Lease Sale 193, including the leases that SGOMI seeks to explore, pending resolution of certain issues in the National

Environmental Policy Act (“NEPA”) analysis supporting DOI’s decision to conduct the lease sale. *Native Village of Point Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Alaska 2010). The district court lifted the injunction upon the completion of the remand proceedings, *see id.*, No. 1:08-cv-00004 (Dkt. 247) (Oct. 26, 2011), and subsequently rejected challenges to the adequacy of the remand proceedings and upheld BOEM’s reaffirmation of its decision to conduct Lease Sale 193, *see id.* (Dkt. 269) (Feb. 13, 2012). This litigation and the litigation upholding DOI’s underlying Five-Year Plan is discussed in the brief of *amicus curiae* American Petroleum Institute, *et al.* filed in conjunction with this supplemental briefing.

After DOI promulgated new safety standards and the moratorium on drilling and the District of Alaska’s injunction were lifted, SGOMI submitted the Revised Chukchi Sea EP for its planned Chukchi Sea exploration drilling activities. The Revised Chukchi Sea EP updates the 2010 EP and provides, among other things, for drilling of up to six wells, all in the Burger Prospect of the Chukchi Sea, starting in July 2012 and continuing over multiple open-water seasons until all six wells are completed. SER52. SGOMI also included in its Revised Chukchi Sea EP additional voluntary measures to respond to an oil spill, including—as in the Revised Camden Bay EP—a sub-sea well-capping stack and a separate Oil Spill Response Barge to recover and store any oil in the event of a significant oil spill

(i.e., “containment system”). *See id.* (Table 1 identifying key elements of each plan). SGOMI supplemented its Revised Chukchi Sea EP with additional information including the following documents relevant to these petitions: an approximately 500-page Environmental Impact Assessment that carefully considered a wide range of environmental impacts that might result from the activities in the Revised Chukchi Sea EP (Appendix F); a Plan of Cooperation detailing the measures SGOMI has adopted in consultation with local communities to minimize adverse effects from its drilling on subsistence uses (Appendix H); an Ice Management Plan detailing its strategies and response to the threat of hazardous ice (Appendix K); and a Well Control Plan describing the steps SGOMI will take to prevent and respond to any loss of well control that could result in a spill (Appendix L). ER293 (list of Appendices to Revised Chukchi Sea EP); *see generally* AR36-AR50 (EP with appendices).

B. SGOMI’s 2010 And Revised Chukchi Sea Regional Spill Plans

When DOI suspended shallow-water drilling operations on the Alaska OCS in the spring of 2010, SGOMI had already obtained many necessary approvals and permits for the 2010 season, including an unconditional approval of SGOMI’s Chukchi Sea Regional Exploration Oil Discharge Prevention and Contingency Plan (March 2010) (“2010 Chukchi Sea Spill Plan”) on April 6, 2010. SER147-49. As required by regulation, and as reflected in the approval, the 2010 Chukchi Sea Spill

Plan contained a detailed analysis of SGOMI's spill response planning and mitigation measures for all exploration activities in the Chukchi Sea, including descriptions of the equipment, personnel, and strategies to be deployed in response to a variety of hypothetical oil spill scenarios. *See generally* AR20.

The regulatory changes following the *Deepwater Horizon* incident and the change in methodology for calculating the Worst Case Discharge ("WCD")² prompted SGOMI to update its 2010 Chukchi Sea Spill Plan. SGOMI submitted an update in May 2011. *See generally* AR25. The original draft used formatting consistent with Alaska state regulations, but at BSEE's request, it was reformatted to track BSEE's regulations. BSEE approved SGOMI's reformatted spill plan, the Chukchi Sea Exploration Program Oil Spill Response Plan (May 2011) ("Revised Chukchi Sea Spill Plan") on February 3, 2012.³ *See* Fed. Resps. Mot. for Judicial Notice, Exh. 1 (filed Apr. 3, 2012).

² SGOMI incorporates by reference the discussion of NTL Nos. 2010-N06 and 2010-N10 in the SOI Brief. SOI Br. 13-14.

³ The EPA's Environmental Appeals Board also recently approved the Clean Air Act Outer Continental Shelf Permits issued (a) to SGOMI and SOI for operation of the *Discoverer* drillship in the Chukchi and Beaufort Seas (*see* 77 Fed. Reg. 7148 (Feb. 10, 2012)), and (b) to SOI for operation of the *Kulluk* drilling unit in the Beaufort Sea (*see* http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/66dc56bdbbc6f199f85256e86004869a7/148252b4723f0450852579d100714934!OpenDocument (Mar. 30, 2012)).

C. BOEM's Conditional Approval Of SGOMI's Revised Chukchi Sea Exploration Plan

After evaluating the Revised Chukchi Sea EP in light of OCSLA's requirements and conducting the requisite "hard look" under NEPA, on December 16, 2011, BOEM approved the Revised Chukchi Sea EP subject to fifteen conditions. ER1-7. Six of these conditions (Conditions 2, 3, 5, 6, 10, and 15) prohibit exploratory operations unless SGOMI obtains necessary approvals and permits, such as an approved Application for Permit to Drill from BSEE. ER1-5. Six of these conditions reflect other restrictions on SGOMI's proposed operations:

- Condition 1 requires SGOMI to inform the Regional Supervisor prior to deviating from the activities specified under the EP. ER1.
- Condition 4 imposes adaptive management to determine the last date on which SGOMI can conduct exploratory drilling that will "penetrate[] a zone capable of flowing liquid hydrocarbons in measurable quantities" based upon the date "first ice" is expected at the drill site. ER2. The condition creates a buffer of 38 days prior to the expected first ice date to accommodate relief-well drilling and other response and clean-up activities in the unlikely event of a late-season oil spill. *Id.*; SER9-11. The approval letter states that DOI imposed this condition in order to "reduce risks associated with the proposal by assuring a greater opportunity for response and cleanup in

the unlikely event of a late season oil spill.” ER2. This condition was imposed, in large part, to respond to the comments from Petitioners and others noting their concern regarding late-season spill response. SER37; SER90; SER94-95.

- Conditions 7 and 11 impose ongoing reporting and consultation requirements regarding SGOMI’s compliance with its commitments to accommodate subsistence activities. ER2-4.
- Conditions 12 and 13 impose additional restrictions for the protection of marine mammals and birds. ER4-5.

The final three conditions (Conditions 8, 9, and 14) address technical demonstrations that SGOMI must make to BOEM and BSEE prior to commencing exploratory drilling operations. ER3-5. BOEM mandated the demonstrations in Conditions 8 and 14 to verify that the Revised Chukchi Sea EP’s descriptions of certain elements are consistent with actual operations, and thus will satisfy applicable regulatory requirements or lease stipulations. BOEM’s use of Condition 9, which addresses SGOMI’s well-capping stack and containment system, ensures the efficacy of these additional mitigation measures in the unlikely event of a significant oil spill.

SUMMARY OF ARGUMENT

The petitions should be denied because BOEM's approval of the Revised Chukchi Sea EP complies with OCSLA and its implementing regulations, and is supported by substantial evidence on the record considered as a whole.

First, BOEM properly approved the Revised Chukchi Sea EP subject to certain conditions, as explicitly contemplated in OCSLA's implementing regulations. *See* SOI Br. 16-17, 32-37. Petitioners suggest that BOEM was obligated to require a more detailed description and discussion of the proposed well-capping stack and the containment system pursuant to 30 C.F.R. § 550.213(d) before approving the Revised Chukchi Sea EP. But that regulatory requirement does not apply here, and even if it did, Petitioners have failed to show that the detailed description and discussion in the Revised Chukchi Sea EP is inadequate. Petitioners abandoned this argument in their reply brief challenging the Revised Camden Bay EP, and should not be allowed to revive it here.

Petitioners also suggest that, because ***SGOMI*** reassessed the viability of certain response efforts between 2010 and 2012, ***BOEM*** had a duty to explain that reassessment in the course of approving SGOMI's Revised Chukchi Sea EP. But BOEM had no such duty, and the decisions upon which Petitioners rely apply only when an ***agency*** changes its position without sufficient explanation.

Petitioners also suggest that BOEM failed to address the public comments it received on the well-capping stack and the containment system in SGOMI's Revised Chukchi Sea EP. BOEM, however, had no duty to seek public comment on the Revised Chukchi Sea EP, nor was it obliged to respond to such comments. In any event, BOEM did request public comments on the Revised Chukchi Sea EP, carefully considered the comments it received from Petitioners and others, and imposed conditions on its approval in response to those comments.

Second, BOEM properly accepted SGOMI's estimate of the time it would take to drill a relief well in the unlikely event of an oil spill. Petitioners quibble with the agency's fact-finding in this regard, selectively citing the administrative record in an attempt to show a "discrepancy" between the estimated time needed to drill a relief well as compared to an exploratory well. But the record, considered as a whole, provides ample support for the reasonable conclusion that a relief well could be drilled faster than an exploratory well and within the timeframe that SGOMI submitted.

In sum, Petitioners fail to show that BOEM acted arbitrarily or capriciously in approving SGOMI's Revised Chukchi Sea EP. To the contrary, the administrative record, considered as a whole, reveals a careful and thorough review and approval by an agency whose technical expertise is entitled to deference and whose findings of fact are conclusive. The petitions should be denied.

If the Court concludes otherwise, the proper remedy is a remand to BOEM, not vacatur of the agency's approval of the Revised Chukchi Sea EP as Petitioners urge.

STANDARD OF REVIEW

SGOMI incorporates by reference the standard of review discussion in the SOI Brief. SOI Br. 18-20.

ARGUMENT

I. BOEM'S CONDITIONAL APPROVAL OF SGOMI'S REVISED CHUKCHI SEA EXPLORATION PLAN COMPLIES WITH OCSLA

Petitioners seek vacatur of BOEM's conditional approval of SGOMI's Revised Chukchi Sea EP based on two purported violations of OCSLA.⁴ Specifically, Petitioners contend that BOEM acted arbitrarily, capriciously, or

⁴ In contrast to their challenges to the Revised Camden Bay EP, Petitioners do not contend that BOEM violated its obligations under 30 C.F.R. § 550.219(a) by approving the Revised Chukchi Sea EP prior to BSEE's February 3, 2012 approval of SGOMI's Revised Chukchi Sea Spill Plan.

On March 28, 2012, after the close of briefing with respect to the Revised Camden Bay EP, BSEE approved SOI's Revised Beaufort Sea Spill Plan. *See* Fed. Resps. Mot. for Judicial Notice, Exh. 2 (Apr. 3, 2012). In light of this approval and Petitioners' concession that the approval of the Revised Chukchi Sea EP prior to the approval the Revised Chukchi Sea Spill Plan was not in violation of OCSLA, SGOMI and SOI expect that Petitioners will withdraw the corresponding portion of their challenge to BOEM's conditional approval of the Revised Camden Bay EP. The only factual distinction between the two approval timelines is that BSEE approved SGOMI's Revised Chukchi Sea Spill Plan *before* Petitioners filed their opening merits brief challenging the Revised Chukchi Sea EP, whereas BSEE approved SOI's Revised Beaufort Sea Spill Plan *after* Petitioners filed their briefs challenging the Revised Camden Bay EP.

otherwise contrary to law in approving the Revised Chukchi Sea EP because (1) SGOMI's description of the proposed well-capping stack and the proposed containment system in the Revised Chukchi Sea EP purportedly lacked sufficient information and explanation; and (2) BOEM failed to require a detailed factual explanation for certain statements in the Revised Chukchi Sea EP, including SGOMI's estimate of the time required to drill a relief well. Neither argument has merit.

A. BOEM Properly Approved The Revised Chukchi Sea Exploration Plan Subject To The Submission Of Additional Information Regarding The Well-Capping Stack And The Containment System

SGOMI's newly proposed well-capping stack and containment system result from SGOMI's efforts to augment its previously identified spill-response capabilities in light of the *Deepwater Horizon* incident. OCSLA and its implementing regulations do not require these additional mitigation efforts; they are voluntary measures, above and beyond the necessary response capability required by the statute and regulations. *See* SER63; SER66 (In its Environmental Assessment, BOEM lists capping and containment systems as "additional mitigation measures" in SGOMI's Revised Chukchi Sea EP that "supplement ... requirements imposed by applicable laws, regulations, permits, authorizations, and lease stipulations."); *see also* SOI Br. 11, 26, 29 & n.11.

Rather than applaud these efforts, Petitioners contend that BOEM's approval of the Revised Chukchi Sea EP violates OCSLA because BOEM (1) did not require SGOMI to submit additional information about these measures as forms of "new or unusual technology" prior to approval, (2) failed to reconcile its approval of an EP incorporating use of the well-capping stack and the containment system with SGOMI's prior statements that these systems were not feasible in the Arctic, and (3) ignored public comments regarding these systems. Pet'rs Supp. 11-13, 16-18, 22-24 (incorporating Pet'rs Opening Br. 41-50). SGOMI incorporates SOI's responses to these arguments in the Camden Bay case (*see* SOI Br. 25-31), and expands on them below.⁵

1. The Revised Chukchi Sea Exploration Plan Adequately Describes The Well-Capping Stack And The Containment System

Federal regulations require an EP to contain a "description and discussion of any new or unusual technology" that will be used to "carry out [the] proposed exploration activities." 30 C.F.R. § 550.213(d). In their opening brief in the Camden Bay case (Pet'rs Opening Br. 41-46), Petitioners argued that BOEM had erred in approving the Revised Camden Bay EP because that EP's description and discussion of the proposed well-capping stack and the containment system was

⁵ To the extent Petitioners reassert their argument that OCSLA prohibits BOEM from approving an EP with conditions, SGOMI incorporates SOI's briefing on that issue as well. *See* SOI Br. 32-37.

inadequate under Section 213(d). But Petitioners abandoned this argument in their reply brief. *See* Pet’rs Reply 13 (“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[.]”).

Petitioners’ apparent attempt to revive this argument here after abandoning it in their Camden Bay reply brief should be rejected.⁶ In any event, this argument fails. *First*, Section 213(d) is inapplicable here for the same reasons as in the Camden Bay case. *See* SOI Br. 29-31. *Second*, even if it did apply, the Revised Chukchi Sea EP’s seven-paragraph “description and discussion” of the proposed well-capping stack and the proposed containment system is more than sufficient to satisfy BOEM’s regulation for “new and unusual technology,” 30 C.F.R. § 550.213(d). SER128-129; *see also* SER134. Petitioners have identified no authority demonstrating that this description is inadequate, particularly in light of

⁶ In their Summary of Argument, Petitioners suggest that BOEM “acted arbitrarily when it approved the [Revised Chukchi Sea EP] without first requiring an adequate description and assessment” of the well-capping stack and the containment system. Pet’rs Supp. 21. But Petitioners make no mention in their Argument of the adequacy of SGOMI’s description and discussion of the well-capping stack or the containment system. *See id.* at 22-24. While Petitioners incorporate their arguments in the opening brief challenging the Revised Camden Bay EP, they also incorporate their arguments (and, presumably, their concessions) in the Camden Bay reply brief. *See* Pet’rs Supp. 23-24.

the determination by the agency responsible for administering Section 213(d) that the description and discussion was sufficient.

The record, moreover, reflects that BOEM engaged in a careful review of SGOMI's Revised Chukchi Sea EP and Appendices. On October 12, 2011, BOEM's Alaska OCS Regional Office asked BSEE's Alaska OCS Regional Office to "conduct a completeness review of the proposed EP for environmental and safety issues that will fall under the auspices of BSEE." SER124. On October 26, 2011, BSEE's Alaska OCS Regional Office responded with a memorandum that concluded that the Revised Chukchi Sea EP included "sufficient information on the environmental and safety issues that fall under the auspices of this office," including "information and discussion on emergency plans to respond to a blowout, loss or disablement of the drilling unit, ... in accordance with 30 CFR 550.220(a)." SER122 (also finding compliance with critical operations and curtailment procedures in 30 C.F.R. § 550.220(b)). On November 30, 2011, SGOMI held a briefing attended by representatives from BOEM, BSEE, National Marine Fisheries Service, U.S. Coast Guard, and the Alaska Department of Environmental Conservation, where the well-capping stack and the containment system were described as "a common industry system with a new configuration." SER113. On December 6, 2011, BSEE's Alaska OCS Regional Office reviewed in more detail sections of the Revised Chukchi Sea EP that discussed subsea well-

capping and containment—specifically, Section 9 (Alaska OCS Planning information, including description of SGOMI’s capping and containment systems) and Appendix L (Well Control Plan)—and, in an internal memorandum to the BOEM Regional Supervisor, indicated that SGOMI’s Revised Chukchi Sea EP complied with BSEE’s regulations:

We conclude that discussion and information on the drilling unit, safety systems and application for permit to drill (APD) under BSEE authorities and jurisdiction ***are consistent with BSEE regulations and applicable Notices to Lessees***. This office did not identify any information or activities that would preclude or limit the ability to process our permit responsibilities and authorities. As described in the revised EP, there is no reason that Shell’s proposed exploratory drilling activities could not be conducted in compliance with BSEE safety and pollution prevention regulations.

SER109 (emphasis added). BOEM also considered and responded to public comments it received on the Revised Chukchi Sea EP from Petitioners, the National Oceanic and Atmospheric Association (“NOAA”), and others. *See generally* SER12-36; SER97-100.

In short, BOEM is empowered by OCSLA and its implementing regulations to define the type and level of information required at the EP approval stage, and to dictate when an applicant must provide the information. *See* 43 U.S.C. § 1340(c); 30 C.F.R. § 550.233(b)(1); *see also* SOI Br. 5-6, 33-35; Federal Respondents’ Brief on the Revised Camden Bay EP (“Fed. Resps. Br.”) 20-21. The agency

conducted a close and careful review of SGOMI's Revised Chukchi Sea EP and determined that the EP contained an adequate description and discussion of the proposed well-capping stack and the proposed containment system. In light of this unambiguous record and in the absence of any authority suggesting that the description and discussion in the Revised Chukchi Sea EP was inadequate, Petitioners are left with trivial disagreements over BOEM's technical analysis and judgment during the approval process. But such technical analysis and judgment is entitled to particular deference, as is BOEM's interpretation of the requirements OCSLA and its implementing regulations impose on EPs. *See, e.g., Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009) ("CBD"); *see also* SOI Br. 19-20 (citing authorities according deference to agencies' technical decision-making); Fed. Resps. Br. 16-17 (same). Petitioners present no basis for setting aside BOEM's decision to approve the Revised Chukchi Sea EP.

2. BOEM Was Not Required To Address SGOMI's Reassessment Of The Feasibility Of The Well-Capping Stack And The Containment System

As in their Reply Brief challenging the Revised Camden Bay EP (*see* Pet'rs Reply 11-14), Petitioners assert that SGOMI has changed its position regarding the feasibility of the proposed well-capping stack and containment system in the Arctic (*see* Pet'rs Supp Br. 22-24). The ready availability of a well-capping stack and an oil collection and containment system are new commitments that apply to offshore

oil and gas activities in the Arctic lessons from the *Deepwater Horizon* incident. Since these systems were successfully used in the Gulf of Mexico to respond to the *Deepwater Horizon* incident, SGOMI has invested significant resources designing and constructing them in order to respond in the unlikely event of an oil spill in the Arctic.

It is true that SGOMI's prior spill plans took the position that well-capping stacks and containment systems were not available or feasible in the Arctic. *See, e.g.,* Pet'rs Supp. 11-13, 16-17, 22-23; Pet'rs Reply 11-12. But Petitioners are incorrect to assert that SGOMI's subsequent reassessment of the feasibility of such technology obligated BOEM to "reconcile" SGOMI's prior feasibility determination with the company's new determination. Petitioners rely solely on cases involving an agency's failure to explain adequately a shift in *the agency's own* position. *See* Pet'rs Supp. 23 (incorporating Petitioners' briefs challenging the Revised Camden Bay EP). Specifically, Petitioners cite *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983), *Humane Society v. Locke*, 626 F.3d 1040 (9th Cir. 2010), and *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668, 686 (9th Cir. 2007).⁷ In each of those cases, however, the reviewing court merely

⁷ The other cases cited by Petitioners stand merely for the basic tenet of administrative law that an agency must adequately explain its decision-making. *See* Pet'rs Reply 14.

required the agency to provide an adequate explanation for a decision that contradicted *the same agency's* previous decision. *See State Farm*, 463 U.S. at 34, 48-49; *Locke*, 626 F.3d at 1048-49; *Bonneville Power*, 477 F.3d at 687-88.

Here, by contrast, it is SGOMI, not BOEM, that has reassessed in light of new information its previous determination regarding the feasibility of a well-capping stack and a containment system. Petitioners identify no regulatory bar against SGOMI reassessing the feasibility of such technology over time.⁸ BOEM thus did not violate OCSLA or otherwise abuse its discretion in approving the Revised Chukchi Sea EP without expressly “reconciling” SGOMI’s inclusion—based on lessons learned from the *Deepwater Horizon* incident—of the proposed well-capping stack and proposed containment system with SGOMI’s prior view of the feasibility of such measures in the Arctic.

3. BOEM Adequately Responded To Public Concerns Regarding SGOMI’s Oil Spill Response Capacity

Petitioners also argue that BOEM did not “address any of the concerns raised in the comments to the agency” regarding the proposed well-capping stack and the proposed containment system. Pet’rs Reply 13; *see also* Pet’rs Supp. 16-18 (discussing public comments received); *id.* at 23 (arguing BOEM failed to

⁸ In fact, Congress enacted OCSLA’s best available and safest technology (“BAST”) requirement to encourage industry to “develop newer and safer equipment” and to “require, *if practicable*, such updated equipment” on “all new drilling and production operations.” H.R. Rep. No. 95-950, at 97 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1565.

address public concerns). To begin with, OCSLA nowhere requires a public comment process, even though BOEM often invites public comment on exploration plans in Alaska and did so here (SER119-20). *Compare* 30 C.F.R. §§ 550.231-.235 (regulations describing review and decision process for EPs do not include public review process) *with id.* § 550.267 (regulation describing the review and decision process of development plans requires BOEM to make public a copy to allow for public comment). Nor was BOEM's consideration of SGOMI's Revised Chukchi Sea EP subject to notice and comment under the Administrative Procedure Act ("APA") or NEPA.⁹ And even if BOEM were required to respond to public comments, it need not "discuss every fact or opinion in the public comments," let alone adopt the view expressed in those comments. *State of South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 885 (4th Cir. 1983) (applying that standard in rulemaking context).

⁹ While the APA makes agency rulemaking subject to public notice and comment, *see* 5 U.S.C. § 533, no rulemaking is involved here. This Court has held that agency approval of a permit application involving discrete factual determinations is not subject to the APA's notice-and-comment requirements. *See Natural Resources Defense Council, Inc. v. U.S. Env'tl. Protection Agency*, 966 F.2d 1292, 1309 (9th Cir. 1992) (distinguishing agency approval of permit applications from agency actions postponing regulations on the ground that the former involved only discrete factual questions and did not implement, interpret, or prescribe any general law or policy). Likewise, NEPA's requirement that an agency respond to public comments received on an Environmental Impact Statement, *see* 40 C.F.R. § 1503.4, has no application to comments that BOEM received on SGOMI's *EP*.

In any event, BOEM did conscientiously consider and respond to the comments it received from NOAA, Petitioners, and other stakeholders. BOEM considered comments concerning SGOMI's ability to clean up an oil spill and criticisms concerning SGOMI's well-capping stack and its containment system, and imposed numerous approval conditions to further ensure the adequacy of SGOMI's capacity to respond. *See generally* AR361. For example, addressing comments that SGOMI had not finished or tested its well-capping stack and containment system, BOEM stated that "approval of the design and testing [will be] verified by BSEE[.]" ER8. Responding to concerns about Arctic spill response technology, BOEM further noted "BSEE is responsible for review and approval of the [Oil Spill Response Plan,]" and that "Condition 2 requires Shell to meet BSEE's OSRP requirement before conducting operations." SER35. BOEM also responded to concerns expressed in comments about SGOMI's ability to drill a relief well when ice was present by imposing a late-season hiatus that would cut off certain drilling activities before the encroachment of ice. *See, e.g.*, ER2 (Condition 4 in approval letter); SER111-12 (internal memo discussing late season hiatus as response to area of concern); SER9-11 (same); SER101-04 (internal emails discussing same); SER42 (Finding of No Significant Impact); SER57-59 (Environmental Assessment). BOEM's decision to seek public comment, and its consideration of those comments, thus well exceeded its OCSLA obligations.

B. BOEM Properly Approved SGOMI's Revised Chukchi Sea Exploration Plan With SGOMI's Estimated Time For Drilling A Relief Well

Petitioners next contend (Pet'rs Supp. 24-27) that BOEM's approval of the Revised Chukchi Sea EP was arbitrary because BOEM accepted SGOMI's estimate of the time necessary to drill a relief well at the Burger Prospect that SGOMI proposes to explore. Petitioners argue, specifically, that SGOMI "asserted it will be able to drill a relief well to stop a blowout faster than the evidence in the record suggests is feasible," and fault BOEM for allegedly "fail[ing] to reconcile the differences or the consequences of understating the total volume of oil that could spill during a potential blowout." Pet'rs Supp. 24; *see also id.* at 25 (citing AR238, AR279, and AR294, all added to the administrative record in the public comment process). Petitioners raised the same argument in their challenge to BOEM's approval of SOI's Revised Camden Bay EP (*see* Pet'rs Reply 22-27), and incorporate that briefing in their Supplemental Brief (*see* Pet'rs Supp. 24). Petitioners once again do not contest SGOMI's estimated daily flow rate, instead challenging only its estimate of the time required to drill a relief well under the Revised Chukchi Sea EP. SGOMI accordingly incorporates SOI's prior briefing on this topic in response (SOI Br. 38-43), and adds the following:

First, Petitioners argue (Pet'rs Supp. 26) that drilling a relief well at the Burger prospect "could take 45 days" (32 days for drilling plus 13 days to move

the *Kulluk*), instead of the 25 total days estimated by SGOMI (ER351). This argument, however, is premised on Petitioners' unsupported assertion that SGOMI's estimate for relief-well drilling is inaccurate. SOI refuted this same argument in response to Petitioners' identical challenge to the Revised Camden Bay EP. *See* SOI Br. 39-41.

Like the Revised Camden Bay EP, the Revised Chukchi Sea EP includes a detailed and *site-specific* analysis of well-control options, including relief-well drilling for the Burger Prospect. *See generally* ER348-52. This Well Control Plan identifies a secondary relief rig in the event the primary rig is unable to drill its own relief well, and analyzes transit time for the secondary relief rig to reach the drill site. ER351. The Well Control Plan—like the comparable plan for the Revised Camden Bay EP (*see* SOI Br. 40-41)—provides numerous reasons why drilling a relief well at the Burger Prospect would be faster than drilling the exploratory well. ER351-53.

It was reasonable for BOEM to accept the site- and reservoir-specific estimates in SGOMI's Well Control Plan for the Burger Prospect, notwithstanding the longer time estimated in the Lease Sale 193 "Very Large Oil Spill" ("VLOS") analysis. SER146. Petitioners seek (Pet'rs Supp. 26) to use the Lease Sale 193 VLOS estimate for the Chukchi Sea to trump site-specific estimates, ignoring that in the Lease Sale 193 VLOS analysis BOEM selected a specific "candidate

prospect” whose geological characteristics would drive a high flow rate. SER138; ER353. That analysis was *not* designed to set a standard or expectation for each prospect within the Lease Sale 193 area, but instead was a “hypothetical” intended to identify the worst case for the entire Lease Sale 193 area.

Second, Petitioners assert that BOEM “fail[ed] to grapple with” purportedly different estimates in the record of the time needed to drill a relief well. Pet’rs Supp. 26. Petitioners, however, offer no legal basis for requiring BOEM to analyze the general information that Petitioners supplied in their voluminous attachments to their public comments. Petitioners’ factual assertions and arguments thus amount to, at most, a disagreement with BOEM’s “technical analysis and judgment[], based on an evaluation of ... data within the agency’s technical expertise,” which is committed to the agency’s discretion. *Env’tl. Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 869 (9th Cir. 2003); *see also CBD*, 588 F.3d at 711, 712. The record, including BOEM’s Chukchi Environmental Assessment (e.g., SER4; SER17; SER19; SER31-32; SER57-58) provides substantial evidence and analysis in support of BOEM’s acceptance of SGOMI’s site-specific estimates of relief-well drilling, and its decision is therefore “conclusive” under OCSLA. 43 U.S.C. § 1349(c)(6).

Third, Petitioners contend that reliance on evidence *in the administrative record* to support SGOMI’s relief-well drilling estimate somehow amounts to a

post hoc rationalization by counsel. Pet’rs Supp. 24 (incorporating prior argument, including Pet’rs Reply 22-27). Petitioners are misguided; reliance on evidence considered by an agency does not constitute *post hoc* rationalization.¹⁰ *See, e.g., Arrington v. Daniels*, 516 F.3d 1106, 1112-13 (9th Cir. 2008).

Finally, Petitioners assert that “the phrase ‘maximum duration’ in 30 C.F.R. § 550.213(g) must be read to mean the greatest length of time possible.” Pet’rs Reply 25. From this proposition, Petitioners contend that SGOMI was required 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.” *Id.* at 26. Petitioners, however, offer no rational basis for BOEM to choose a “worst case duration” relief-well drilling scenario rather than the project-specific estimate that SGOMI provided. *See* Pet’rs Opening Br. 53-56 (citing possible scenarios ranging from 60 days to the following open-water season). Any number of events and technical challenges could be imagined, and Petitioners’ position appears to be that BOEM must consider them all in order to come up with the “greatest length of time possible” to drill a relief well. Pet’rs Reply 25. That standard is unworkable

¹⁰ Petitioners cite *Oregon Natural Desert Association v. BLM*, 625 F.3d 1092 (9th Cir. 2010), *cited in* Pet’rs Reply 24, for the proposition that a court may not rely on appellate counsel’s *post hoc* rationalizations. But the rationalizations rejected in that case were determined to be *post hoc* precisely because they had no foundation in the administrative record. *See id.* at 1120 (agency “never advanced such a position in” its decision). Here, by contrast, SGOMI relies exclusively on materials contained in the administrative record and reviewed by BOEM.

in practice and departs from the modest requirement in 30 C.F.R. § 550.213(g) that an EP contain “general information” on a blowout scenario and an “estimate” of the time to drill a relief well—a standard that SGOMI undoubtedly met in its Revised Chukchi Sea EP (*e.g.*, ER351).

II. THE PROPER REMEDY FOR ANY DEFICIENCY IS REMAND TO BOEM, NOT VACATUR

SGOMI incorporates by reference the discussion of remedy in the SOI Brief. SOI Br. 44-48.

CONCLUSION

The petitions should be denied.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Respondent-Intervenor Shell Gulf of Mexico Inc. identifies the following related cases pending in this Court:

- *Native Village of Point Hope v. Salazar*, Nos. 11-72891 and 11-72943.
- *Resisting Environmental Destruction on Indigenous Lands (REDOIL) v. U.S. EPA Region 10*, No. 12-70518.

**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C) & CIRCUIT
RULE 32-1**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 5,888 words.

s/ Kathleen M. Sullivan
Attorney for Respondent-Intervenor

April 3, 2012
Date

CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, a member of the Bar of this Court, hereby certify that on April 3, 2012, I electronically filed the foregoing 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/ Kathleen M. Sullivan
Kathleen M. Sullivan