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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al., Plaintiffs, v. BUREAU OF LAND MANAGEMENT, et al., Defendants, and CONOCOPHILLIPS ALASKA, INC., Intervenor-Defendant.	No.: 3:20-cv-00290-SLG
CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, v. BUREAU OF LAND MANAGEMENT, et al., Defendants. and CONOCOPHILLIPS ALASKA, INC., Intervenor-Defendant.	No.: 3:20-cv-00308-SLG

OPPOSITION BRIEF BY CONOCOPHILLIPS ALASKA, INC. (L.R. 16.3(c)(2))

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I. INTRODUCTION

In August 2020, the U.S. Bureau of Land Management ("BLM") issued a Final Environmental Impact Statement ("FEIS") for the Willow Master Development Plan (the "Willow Project"). The Willow Project is an oil and gas production project that is carefully planned to connect to existing infrastructure within the 23-million-acre National Petroleum Reserve in Alaska (the "Petroleum Reserve" or "NPR-A"), and will provide an important domestic energy supply while minimizing on-the-ground impacts. The FEIS is the product of methodical analyses and dozens of public meetings over two-and-a-half years, resulting in numerous project improvements made in response to public comments on the draft and supplemental environmental impact statements.

The Willow Project is designed to comply with the 2013 Integrated Activity Plan for the Petroleum Reserve (the "2013 IAP"), which contemplated the development of *eight* new central processing facilities, *82* new production pads, *29* new gravel runways, *31* new gravel mines, and *hundreds of miles* of new roads and pipelines.[1] The 2013 IAP was resoundingly supported by environmental groups as a "responsible and balanced management plan for the Reserve."[2] The Willow Project is limited to *one* central processing facility, up to *five* oil production pads, *one* airstrip, and *two* gravel mines.[3] It

[1] BLM_AR269525-527 (Table 4-14, Alternative B-2).

[2] BLM_AR270657, 270663-664, 270892.

[3] BLM_AR186055.

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will generate essential public revenue streams for communities on Alaska's North Slope under a Congressionally mandated revenue sharing program.

Two groups of plaintiffs—the Sovereign Iñupiat for a Living Arctic, *et al*. ("SILA") and the Center for Biological Diversity, *et al.* ("CBD" and collectively "Plaintiffs")—have challenged BLM's analysis of the Willow Project under the National Environmental Policy Act ("NEPA"), as well as the related biological opinion issued by the U.S. Fish and Wildlife Service ("FWS") under the Endangered Species Act ("ESA") and the approval of wetland fill permits by the U.S. Army Corps of Engineers ("Corps") under the Clean Water Act ("CWA"). Although many of the Plaintiffs supported the 2013 IAP as a "responsible and balanced" approach to management of the Petroleum Reserve, they have since changed their tune, filing multiple lawsuits aimed to frustrate or prevent the sale,[4] exploration,[5] and, now, development of leases in the Petroleum Reserve. To date, all of the adjudicated claims have been rejected as either untimely or lacking merit (or both).

[4] *N. Alaska Envtl. Ctr. v. U.S. Dep't of Interior*, 983 F.3d 1077 (9th Cir. 2020).

[5] *Native Vill. of Nuiqsut v. Bureau of Land Mgmt.*, 432 F. Supp. 3d 1003 (D. Alaska 2020).

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In this most recent lawsuit, Plaintiffs' claims suffer from similar flaws. They are untimely, cannot be reconciled with the extensive administrative record, and are contrary to applicable law. Plaintiffs' motions for summary judgment should therefore be denied.[6]

II. BACKGROUND

A. The History of the Petroleum Reserve.

The Petroleum Reserve was initially established as the Naval Petroleum Reserve No. 4 by President Harding in 1923.[7] The Petroleum Reserve was one of four reserves established in the United States between 1912 and 1924, with the purpose of providing emergency oil supply to the Navy for national defense.[8]

The Petroleum Reserve stayed largely in standby mode for the next 50 years with limited exploration activities, until the Organization of Petroleum Exporting Countries ("OPEC") imposed an oil embargo against the United States in 1973 and 1974.[9] The OPEC "oil embargo during the 1970s established that the Nation had a need for oil that exceeded the needs of the Navy."[10] Congress promptly authorized the United States

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[6] SILA has not pursued Claims 3, 4, and 5 of its First Amended Complaint (Case No. 3:20-cv-00290-SLG, Dkt. 36), and has therefore waived those claims. *See Native Vill. of Nuiqsut*, 432 F. Supp. 3d at 1036 n.229.

[7] BLM_AR182389.

[8] *See* Report to Congress: Capability of the Naval Petroleum and Oil Shale Reserves to Meet Emergency Oil Needs, at 1 (1972), https://www.gao.gov/assets/b-66927.pdf.

[9] *See* George Gryc, The National Petroleum Reserve Alaska, 1974-1982, U.S. Geological Survey Professional Paper 1240-C, at C14-C15 (1985), https://pubs.usgs.gov/pp/1240c/report.pdf.

[10] *N. Alaska Envtl. Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005).

Geological Survey ("USGS") to begin a program of exploratory drilling in the Petroleum Reserve in 1974 that lasted through 1982.[11]

In 1976, Congress passed the Naval Petroleum Reserves Production Act ("NPRPA"), which renamed the Naval Petroleum Reserve the "National Petroleum Reserve in Alaska," and transferred jurisdiction over the Petroleum Reserve to the Secretary of the Interior (the "Secretary").[12] The purpose of the Petroleum Reserve "was redirected to augment domestic supplies of crude oil,"[13] and the NPRPA authorized the Secretary to begin consideration of "development" that would be "regulated in a manner consistent with the total energy needs of the Nation."[14] Congress mandated a comprehensive study of how best to utilize and develop the Petroleum Reserve before authorizing production.[15] The USGS completed that study on December 15, 1979.[16]

The year after receiving the USGS study, Congress authorized development and production in the Petroleum Reserve through an appropriations bill that amended the

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[11] *See* Gryc, *supra* note 9 at C15.

[12] Pub. L. No. 94-258, 90 Stat. 303 (Apr. 5, 1976).

[13] *See* Gryc, *supra* note 9 at C15.

[14] Pub. L. No. 94-258.

[15] Pub. L. No. 94-258, § 104; H.R. Conf. Rep. 94-942, 21, 1976 U.S.C.C.A.N. 516, 523 ("SEC. 104 makes it absolutely clear that only exploration is authorized at the National Petroleum Reserve in Alaska. After the studies are completed and transmitted to the Congress, as required by the legislation, then the Congress will determine how future development and production will take place.").

[16] *See* USGS, An Environmental Evaluation of Potential Petroleum Development on the National Petroleum Reserve in Alaska, December 15, 1979.

NPRPA (the "1980 Amendment").[17] The 1980 Amendment authorized "an expeditious program of competitive leasing of oil and gas" in the Petroleum Reserve.[18] That legislation "was passed as part of an effort to combat the difficulties caused by the energy crisis."[19] In 1981, BLM issued regulations governing leasing, issued lease forms, and amended its development and production regulations to cover activities within the Petroleum Reserve.[20] BLM's initial program consisted of five lease sales.[21]

B. Planning, Conservation, and Development in the Petroleum Reserve.

Despite initial efforts, development of the Petroleum Reserve remained practically infeasible until the mid-1990s when oil was discovered on adjacent state lands.[22] In response to renewed interest, BLM, under the Clinton Administration, developed new

[17] *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 57 (D.D.C. 2009) ("Authorization for such production came in December 1980, when Congress passed the appropriations bill for the fiscal year ending September 30, 1981."); Pub. L. No. 96-514, 94 Stat. 2957 (Dec. 12, 1980).

[18] Pub. L. No. 96-514.

[19] *Wilderness Soc'y*, 603 F. Supp. 2d at 57.

[20] 46 Fed. Reg. 55,494 (Nov. 9, 1981) (final rules governing lease sales); 46 Fed. Reg. 55,432 (Nov. 9, 1981) (final oil and gas lease form); 46 Fed. Reg. 58,304, 58,305 (Dec. 1, 1981) (amending existing operational regulations to include the Petroleum Reserve, and explaining that "exploration, development, and producing operations within the NPR-A will utilize technology and operating procedures which closely parallel those which have been used on Federal lands elsewhere on the North Slope").

[21] *Kunaknana v. Clark*, 742 F.2d 1145, 1147 (9th Cir. 1984).

[22] BLM_AR182389; *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1072 (D. Alaska 2014); *See Nat'l Audubon Soc'y v. Kempthorne*, No. 1-05-cv-00008-JKS, 2006 WL 8438583, at *2 (D. Alaska Sept. 25, 2006) ("little activity occurred in the NPR-A from the mid-1980's through the mid-1990s"); BLM_AR273384-85 (discussing history of development in Petroleum Reserve).

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lease sale programs under integrated activity plans for the Northeast and Northwest portions of the Petroleum Reserve.[23]

In 1998, ConocoPhillips received permits to begin construction of the Alpine facility on lands to the east of the Petroleum Reserve, and, in 2004, BLM completed an EIS in support of developing satellite drill sites, CD-3 through CD-7.[24] Satellite drill site CD-5 was located within the Petroleum Reserve on land owned by the State of Alaska and Kuukpik Corporation.[25] CD-5 has produced oil since 2015.

In 2013, the Obama Administration took a holistic approach to management by creating a comprehensive integrated activity plan (the 2013 IAP) governing the entire Petroleum Reserve.[26] The 2013 IAP (supported by a 2012 EIS) allowed 11.8 million acres of the Petroleum Reserve to be open for oil and gas leasing (subject to rigorous protective measures), but closed 11 million acres, including 3.1 million acres within the Teshekpuk Lake Special Area to "protect[] critical areas . . . for the roughly 400,000 caribou found in the Teshekpuk Lake and Western Arctic Caribou Herds."[27] The 2013 IAP describes ConocoPhillips' Alpine facility as the "model" for future oil and gas

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[23] *See* BLM_AR258411 (1998 integrated activity plan for Northeast Petroleum Reserve); BLM_AR258456 (2004 integrated activity plan for Northwest Petroleum Reserve).

[24] *Kunaknana*, 23 F. Supp. 3d at 1072.

[25] *Id.*

[26] BLM_AR271550 (2013 Record of Decision); BLM_AR258411 (1998 Record of Decision).

[27] BLM_AR271555.

development in the Petroleum Reserve, utilizing methods that minimize ground disturbance such as directional drilling techniques, fewer gravel drill pads, and closer well spacing to reduce gravel pad size.[28] Whereas development of the older North Slope fields had utilized hundreds of production pads, the 2013 IAP contemplated development in the Petroleum Reserve at a fraction of that scale.[29]

In 2014, BLM approved development of GMT-1, the first oil production drill site within the Petroleum Reserve on federal leases.[30] GMT-1 (originally called CD-6) is located approximately 14 miles from ConocoPhillips' Alpine facility and connects to CD-5 by gravel road and pipelines.[31] In 2018, BLM approved the development of GMT-2 (originally, CD-7).[32] GMT-2 is located approximately nine miles west of GMT-1 and is connected to GMT-1 by gravel road and pipeline.[33] Construction of GMT-2 is expected to be complete in 2021. Because of the associated public benefits, the North Slope Borough has supported these developments.[34]

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[28] BLM_AR270347.

[29] BLM_AR270310 (Table 4-38), 269524 (Table 4-14).

[30] BLM_AR271664.

[31] BLM_AR271664, 271668, 271735, 271747.

[32] BLM_AR273367.

[33] BLM_AR273411.

[34] *See* Case No. 3:30-cv-308-SLG, Dkt. 74-4 ¶ 20.

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C. The Willow Project.

ConocoPhillips approached BLM in December 2017 regarding the potential development of the Willow Project in the Bear Tooth Unit.[35] ConocoPhillips formally requested BLM to initiate NEPA review on May 10, 2018.[36] As contemplated throughout the permitting process and described in the FEIS, the Willow Project is compliant with mitigation measures described as "Best Management Practices" ("BMPs") in the 2013 IAP.[37] Pursuant to existing BMPs, ConocoPhillips has collected multiple years of baseline scientific information on resources such as birds (BMP E-11), wildlife habitat (BMP E-12), fish (BMP E-14), and caribou (BMP K-5), and provided that data to BLM in connection with Willow permitting.[38] The Willow Project includes 117 design features intended to minimize and reduce impacts, as well as road routes that were carefully screened to minimize stream crossings and avoid yellow-billed loon habitat.[39] The total gravel footprint of the Willow Project, including roads, airstrips, and pads, is 454 acres, or about 0.002% of the 23-million-acre Petroleum Reserve.[40]

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[35] BLM_AR149558.

[36] BLM_AR149685.

[37] BLM_AR182371-72, 182407-08, 186075-093. Although BLM adopted a new NPR-A IAP on December 31, 2020, and incorporated updated mitigation measures in Willow permits issued after the Willow ROD, Willow does not depend on the 2020 IAP.

[38] BLM_AR271596-1651; *see, e.g.*, BLM_AR157062-064, 256710-827, 238198-270.

[39] BLM_AR185864-875, 185888-898.

[40] BLM_AR182372. The total area of wetlands fill (including gravel) is 481 acres. An additional 135.8 acres of wetlands will be converted to open water for a total permanent impact of up to 616.9 acres.

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The Willow Project encompasses an interrelated series of infrastructure components that would be constructed over approximately 10 years, with up to five drill sites, a central processing facility, an infrastructure pad, gravel access roads and pipelines connected to GMT-2, an airstrip, delivery of modules for the central processing facility, and development of gravel mines.[41] The proposed drill sites were chosen to maximize oil recovery "while minimizing the number of drill site pads" using ConocoPhillips' innovative advances and success in long-reach drilling operations.[42]

BLM proceeded to conduct a transparent NEPA review process that lasted more than two years. BLM assumed the lead agency role and engaged the Corps, the FWS, the U.S. Environmental Protection Agency ("EPA"), the State of Alaska, the North Slope Borough, the Native Village of Nuiqsut, the City of Nuiqsut, and the Iñupiat Community of the Arctic Slope as cooperating agencies.[43] On August 17, 2018, BLM issued a Notice of Intent to prepare an EIS and proceeded to hold six public scoping meetings through September 2018 in Utqiaġvik, Fairbanks, Anchorage, Atqasuk, Anaktuvuk Pass, and Nuiqsut.[44]

On August 30, 2019, BLM released a draft EIS, solicited public comments, and held more public meetings in Utqiaġvik, Fairbanks, Anchorage, Atqasuk, Anaktuvuk

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[41] *Id*.

[42] BLM_AR149686.

[43] BLM_AR182390-391.

[44] BLM_AR100005, 182876.

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Pass, and Nuiqsut.[45] In response to stakeholder concerns, ConocoPhillips made revisions to its plans for module transport to reduce environmental impacts, and, on March 26, 2020, BLM issued notice of a supplemental EIS to address those proposed changes.[46] BLM then solicited another round of comments and held a third round of public meetings, this time by video and teleconference due to the COVID-19 pandemic.[47] A copy of the presentation was translated into Iñupiaq and aired six times on KBRW radio in Utqiaġvik, Point Hope, Point Lay, Wainwright, Atqasuk, Nuiqsut, Prudhoe Bay, and Kaktovik.[48]

On August 14, 2020, BLM published its notice of availability of the FEIS.[49] Shortly thereafter, ConocoPhillips wrote to BLM and formally asked the agency to withhold its approval for two of the five drill sites contained in the original application.[50] As explained in that letter, some stakeholders had raised concerns about the potential impact of drill sites BT-4 and BT-5, and related roads, on caribou migration, and ConocoPhillips desired further engagement with those stakeholders prior to a BLM decision authorizing those two drill sites.[51]

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[45] BLM_AR100007, 182892.
[46] BLM_AR100008, 178271-272.
[47] BLM_AR183052.
[48] *Id.*
[49] BLM_AR100009.
[50] BLM_AR162443.
[51] *Id.*

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On October 26, 2020, BLM issued its Record of Decision ("ROD"), approving the Willow Project subject to mitigation measures. As requested by ConocoPhillips, BLM did not authorize the BT-4 and BT-5 drill sites (and connecting roads and pipelines), allowing time for further engagement with stakeholders regarding those drill sites.[52] Appendix A to the ROD sets forth comprehensive mitigation measures for the Willow Project, including both IAP-based mitigation measures and additional measures specific to the Willow Project.[53]

Following completion of the FEIS, the Corps issued ConocoPhillips a discharge permit on December 20, 2020, pursuant to Section 404 of the CWA.[54] The permit allows the fill of 481.1 acres of wetlands for the Willow Project, subject to numerous terms and conditions.[55] The Corps' ROD explains that Alternative B in the FEIS (ConocoPhillips' proposed alternative) is the "least environmentally damaging practical alternative" and sets forth appropriate mitigation to offset the unavoidable wetland impacts of the project.[56]

In parallel, FWS issued a biological opinion for the Willow Project on October 16, 2020 ("BiOp").[57] The BiOp concluded that the Corps and BLM approvals were not likely

[52] BLM_AR186056.
[53] BLM_AR186075.
[54] Corps_AR00001-00144.
[55] Corps_AR00003.
[56] Corps_AR000158, 000161.
[57] FWS_AR000813-976.

to jeopardize the continued existence of the polar bear or result in the destruction or adverse modification of critical habitat.[58] The Willow Project is south of polar bear critical habitat in a location where few bears are present, and FWS determined that disturbances (if any) to polar bears associated with construction and operation of the Willow Project would be at most intermittent and "would not be biologically significant."[59]

III. STANDARD OF REVIEW

Plaintiffs seek judicial review under the Administrative Procedure Act ("APA"). The APA directs courts to "hold unlawful and set aside" an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[60] The Supreme Court has held that "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."[61]

IV. ARGUMENT

A. Plaintiffs' NEPA Claims Are Time-Barred.

Plaintiffs' NEPA claims are barred by the NPRPA's 60-day statute of limitations. The NPRPA was amended in 1980 to provide:

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[58] FWS_AR000942-944.

[59] FWS_AR000942.

[60] 5 U.S.C. § 706(2)(A).

[61] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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> *Any action* seeking judicial review of the adequacy of *any program or site-specific environmental impact statement under* [NEPA] *concerning oil and gas leasing* in the National Petroleum Reserve–Alaska shall be barred unless brought in the appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register.[62]

Plaintiffs' lawsuits are "actions" that challenge an EIS under NEPA "concerning oil and gas leasing."[63]

In denying Plaintiffs' motion for a preliminary injunction, the Court concluded that Plaintiffs' NEPA claims are "quite likely" barred by the 60-day limitations period.[64] The Court's decision was well-reasoned and supported by the text of the statute and its history, objective, and purpose. Plaintiffs make no effort to explain why that prior analysis was wrong.[65] In fact, deliberative consideration confirms that the Court's prior analysis was correct and Plaintiffs' contrary interpretation is incorrect because the latter fails to consider the statute as a whole, runs contrary to established principles of statutory interpretation, and ultimately makes little practical sense.

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[62] 42 U.S.C. § 6506a(n)(1) (emphasis added).

[63] *Id.*

[64] *See* Case No. 3:20-cv-00290-SLG, Dkt. 44 at 22.

[65] Plaintiffs put much stock in the ruling by the Ninth Circuit's motion panel, which concluded only that Plaintiffs raised "serious questions." Serious questions is "a lesser showing than likelihood of success on the merits." *Se. Alaska Conservation Council v. U. S. Forest Serv.*, 413 F. Supp. 3d 973, 979 (D. Alaska 2019).

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Initially, SILA and CBD both rely on a "strong presumption" that is inapposite.[66] The presumption they cite applies to construction of statutes that make agency actions altogether *unreviewable*,[67] not, as here, a situation in which an agency action is expressly reviewable so long as timely filed *within the Congressionally afforded window for judicial review*. There is no presumption in favor of allowing untimely claims against the government. Rather, a "statute of limitations" that applies to suits against the government "must be construed strictly *in favor of the government*."[68] A challenge to an EIS will always be a suit against the government, and thus this rule of construction weighs strongly in favor of this Court's prior conclusion that the NEPA claims are barred by the 60-day NPRPA limitations period.

Presumption aside, the language chosen by Congress in the 1980 Amendment to the NPRPA—"any action" challenging "any" EIS "concerning" oil and gas leasing in the Petroleum Reserve—connotes a very broad reach. "Read naturally, the word 'any' has an

[66] SILA Br. at 9; CBD Br. at 20.

[67] *See Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179, 181 (9th Cir. 1990); *Love v. Thomas*, 858 F.2d 1347, 1355 (9th Cir. 1988).

[68] *Tosello v. United States*, 210 F.3d 1125, 1127 (9th Cir. 2000) (emphasis added); *Badaracco v. Comm'r*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement. This is especially so when courts construe a statute of limitations, which must receive a strict construction in favor of the Government.") (quotations and citations omitted); *Fed. Deposit Ins. Corp. v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1309 (9th Cir. 1989) ("To the extent that a statute is ambiguous in assigning a limitations period for a claim, we will interpret it in a light most favorable to the government.").

expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[69] CBD contends that "any" modifies "action," which is true, but ignores the second "any" in the same sentence that modifies the phrase "program or site-specific environmental impact statement under [NEPA] concerning oil and gas leasing." Repeated use of the word "any" "in the particular phrase at issue" only underscores the broad application of the provision.[70]

Similarly, contemporaneous dictionaries define the word "concerning" in broad terms.[71] Blacks' Law Dictionary from 1979 defines "concerning" to mean "[r]elating to; pertaining to; affecting; involving; being substantially engaged in or taking part in."[72] Webster's New Twentieth Century Dictionary from 1978 defines "concerning" as "pertaining to; regarding; about; having relation to; with reference to" and also "affecting the interests."[73]

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[69] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New Int'l Dictionary 97 (1976)).

[70] *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220-21 (2008).

[71] *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) ("When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them."); *see also Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (courts commonly look to "dictionaries in use when Congress enacted" a provision).

[72] *See* Exhibit A (Black's Law Dictionary, 5th Ed. at 262 (1979)).

[73] *See* Exhibit B (Webster's New Twentieth Century Dictionary of the English Language (unabridged), 2d Ed. at 376 (1978)).

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Plaintiffs' NEPA claims fall squarely within the ordinary meaning of "any" action challenging the adequacy of "any" EIS "concerning" oil and gas leasing. The Federal Register notice for the FEIS explains that the FEIS "analyzes an oil and gas development project proposed by ConocoPhillips Alaska, Inc. *on federal oil and gas leases* it holds in the northeast region of the [Petroleum Reserve]."[74] The FEIS itself explains that the "purpose" of the proposed action is "to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources *under leaseholds* in the northeast area of the NPR-A, consistent with the proponent's federal *oil and gas lease and unit obligations*."[75] The FEIS further explains that the "leases" provide the "right to develop" oil and gas resources, and that development is "subject to a variety of *lease* stipulations" and the best management practices set forth in the 2013 IAP for the leasing program.[76] In short, the Willow Project is being developed on lands under lease, pursuant to lease obligations, and subject to lease stipulations. Plaintiffs are clearly challenging an EIS "concerning"—*i.e.*, "[r]elating to; pertaining to; affecting; [or] involving;"—oil and gas leasing.

Faced with these facts, Plaintiffs try to rewrite the statute's language in their favor. CBD would have the Court rewrite the limitation to apply to "EISs concerning the

[74] 85 Fed. Reg. 49,677, 49,677 (Aug. 14, 2020) (emphasis added).

[75] BLM_AR182369 (emphasis added).

[76] BLM_AR182371-372 (emphasis added).

particular act of leasing."[77] But Congress said "concerning oil and gas leasing," not "concerning the particular act of leasing." Courts "ordinarily resist reading words or elements into a statute that do not appear on its face,"[78] and that caution should apply with greater force when, as here, the court is interpreting a statute of limitations that must be strictly construed in favor of the government.[79] SILA, for its part, would simply strike "concerning oil and gas leasing" in favor of "analyzing the impact of lease sales."[80] This would obviously change both the language and meaning of the statute, and "our constitutional structure does not permit this Court to rewrite the statute that Congress has enacted."[81] If Congress intended to apply the limitation only to claims challenging an EIS "analyzing the impact of lease sales," then Congress would have used those words.[82]

Plaintiffs next invoke the "rules of proper grammar" to argue that "leasing" is a discrete event that occurs only once and begins and ends with the signing of the lease.[83] But in their resort to grammar, SILA and CBD cannot even agree between themselves

[77] CBD Br. at 17.

[78] *Dean v. United States*, 556 U.S. 568, 572 (2009) (quotations and citation omitted).

[79] *Tosello*, 210 F.3d at 1127.

[80] SILA Br. at 9.

[81] *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016) (quotations and citation omitted).

[82] In the 1980 Amendment, Congress said "leasing program" when it meant leasing program, "lease sale" when it meant lease sale, and "concerning oil and gas leasing" when it meant something different than either of those terms. *See* 42 U.S.C. § 6506a(e), (n)(1), (n)(2).

[83] CBD Br. at 13, 15; SILA Br. at 9-10.

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whether the word "leasing" is a verb or a noun (a gerund form of lease) and they both avoid any discussion of "leasing" as a present participle.[84] There is no need to pull out the grammar primer. The verb "lease" is commonly understood to be not just the act of granting a lease, but includes "to hold under a lease" and to "be under a lease."[85] In the common-sense and ordinary use of the word, ConocoPhillips is presently "leasing" lands from BLM in the Petroleum Reserve, just like a tenant in an apartment is "renting" or "leasing" that apartment.[86] ConocoPhillips did not stop "leasing" lands in the Petroleum Reserve when it signed the lease. It is currently "leasing" those lands from BLM and it will continue to do so—subject to all of its ongoing obligations under those leases (including the obligation to timely develop resources)—through the term of the lease. In

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[84] CBD Br. at 13; SILA Br. at 9; *Laube v. Allen*, 506 F. Supp. 2d 969, 980 (M.D. Ala. 2007) ("'Proving,' as used in the statute, is a present participle, which denotes action that is continuing or progressing, as distinct from 'having proved,' a perfect participle that denotes completion.").

[85] *Harry F. Chaddick Realty, Inc. v. Maisel*, 762 F.2d 534, 537 (7th Cir. 1985) (quoting Webster's Third New Int'l Dictionary); *see also* Exhibit C (Webster's Ninth New College Dictionary at 681 (1984) (defining "leasing" to include "to hold under a lease")).

[86] Other examples of this common-sense usage abound. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 825 (10th Cir. 2020) (oil and gas company "is leasing federal land"); *Prairie Land Holdings, L.L.C. v. Fed. Aviation Admin.*, 919 F.3d 1060, 1063 (8th Cir. 2019) ("the FAA is leasing the property for long-term public safety reasons"); *In re Mitchell*, 108 B.R. 166, 168 (Bankr. S.D. Ohio 1989) ("the debtor is leasing the washer and dryer under a 'Rental–Purchase Agreement'"); *SCM Corp. v. Xerox Corp.*, 394 F. Supp. 384, 385 (D. Conn. 1975) ("Xerox contends it is leasing the machine"); *Anspec Co. v. Johnson Controls, Inc.*, 788 F. Supp. 951, 954 (E.D. Mich. 1992) ("Montgomery is leasing the site back to Anspec"); *Nichols v. Roper-Whitney Co.*, 843 F. Supp. 799, 802, n.4 (D.N.H. 1994) ("the company is leasing said property from Forest Industries, Inc., for a ten-year term").

parallel, BLM is also "leasing" these lands to ConocoPhillips. BLM must continue to perform various critical leasing obligations as the lessor leasing the lands, such as collecting and accounting for rents and royalties, receiving and adjudicating applications for permits (including publishing EISs) in support of development, and enforcing the terms of the lease and mitigation measures in the ROD.

This common-sense reading of "concerning oil and gas leasing" is entirely consistent with the purpose and nature of oil and gas leasing. An oil and gas lease "is a contract by which a lessee is granted the right to *explore for* and *produce* mineral resources on the lands of another."[87] "An oil lease primarily contemplates production and a royalty consideration,"[88] and "[a]n *implied covenant to explore and reasonably develop the leased premises* is part of an oil and gas lease unless the lease provides otherwise."[89] There is no sensible way to divorce production and development from "leasing." Production and payment of royalties is *the primary purpose* of entering into an oil and gas leasing arrangement, and the 1980 Amendment confirms this then-understood nature of oil and gas leasing by including provisions that address royalties on oil and gas "produced from" the leases.[90]

[87] 17 Williston on Contracts § 50:57 (4th ed.) (emphases added).

[88] *Elliott v. Pure Oil Co.*, 10 Ill. 2d 146, 152, 139 N.E.2d 295, 299 (1956).

[89] 17 Williston on Contracts § 50:63 (4th ed.) (emphasis added).

[90] Pub. L. No. 96-514; *see also* Dkt. 43 at 18. CBD also argues that the use of the word "site-specific" restricts the scope of the judicial review provision because lease sales can

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Without a basis in the text of the statute for its erroneous reading, CBD looks to a different statute—the Outer Continental Shelf Leasing Act ("OCSLA")—for help.[91] But OCSLA only undermines CBD's position. In amending OCSLA, Congress chose to provide *different* venues in the circuit courts for "[a]ny action of the Secretary *to approve a leasing program*" and for "[a]ny action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan."[92] Two years later, when amending the NPRPA, Congress chose *not* to make a distinction between challenges to approvals of leasing programs and challenges to actions that occur under those leasing programs (or to vest jurisdiction in the circuit courts). Instead, Congress allowed (time-limited) judicial review of "any" challenge to "any" EIS "concerning oil and gas leasing." OCSLA just shows that "[i]f Congress intended to" limit the application of the NPRPA statute of limitations to approval of the leasing program, "it knew how to do so."[93]

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also have site-specific EISs. CBD Br. at 15-16. It is true that lease sales could have site-specific EISs, but this is irrelevant. The use of the words "program or site-specific environmental impact statement" evinces Congressional intent that a challenge to "any" EIS, however labeled, "concerning" oil and gas leasing, be filed within the 60-day limitations period.

[91] CBD Br. at 14 (quoting 43 U.S.C. § 1349(c)).

[92] 43 U.S.C. § 1349(c)(2).

[93] *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753 (9th Cir. 2003). OCSLA also imposes a 60-day deadline to seek administrative review of *both* the leasing program and the development and production plans. 43 U.S.C. § 1349(c)(3). This undermines CBD's argument that providing different limitations periods for leasing and production makes "practical sense." CBD Br. at 19.

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CBD also cherry picks snippets of legislative history to argue that the 1980 Amendment was only concerned with leasing and exploration, not development or production.[94] But the Court has already seen through this ruse: "There is no reason to issue oil and gas leases without the expectation of exploration and production activities."[95] A lease is not an end unto itself; the purpose of an oil and gas lease is to "grant[] the right to *explore for* and *produce*" on the lands subject to the lease.[96] In 1980, Congress took action that "would increase the domestic supply of oil and gas and lessen our reliance on imports."[97] Congress "included language providing for accelerated review" and believed that "the shift from Federal to private exploration and *development* of the reserve's strategic oil and gas potential can be accomplished quickly without neglecting essential environmental considerations."[98] There is no logical or practical way to read the 1980 Amendment as addressing only the act of issuing leases, and indeed, in 1981, BLM proceeded to amend its *development* and *production* regulations to cover the

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[94] CBD Br. at 19.

[95] Dkt. 43 at 18-20.

[96] 17 Williston on Contracts § 50:57 (4th ed.) (emphasis added)

[97] 126 Cong. Rec. S29489, S31196 (1980) (statements of Sen. Stevens) ("The events of the last weeks in the Middle East should serve warning that we can no longer delay efforts which would increase the domestic supply of oil and gas and lessen our reliance on imports.").

[98] Senate Report No. 96-985 (Sept. 23, 1980) (emphasis added); *see also* 126 Cong. Rec. S29485 (1980) ("We are agreeing with House language that authorizes leasing the reserve for private oil and gas exploration and development with amendments to accelerate judicial review . . . ."); 126 Cong. Rec. S31190 (1980) (discussing "private exploration and development under accelerated authority also provided in the bill").

Petroleum Reserve so that it could "exercise regulatory jurisdiction over the operations which will commence after the issuance of the leases."[99]

For its part, SILA incorrectly argues the "prohibition on production and development" remained in place until 2005.[100] The 1976 version of the NPRPA prohibited "production of petroleum from the reserve . . . until authorized by an Act of Congress."[101] The 1980 Amendment "rescinded" that withdrawal "for the purposes of the oil and gas leasing program authorized herein."[102] As one court succinctly explained, "[a]uthorization for such *production* came in December 1980, when Congress passed the appropriations bill for the fiscal year ending September 30, 1981."[103]

Finally, CBD retreats to policy arguments, claiming that (in their view) it makes "practical sense" to have a deadline for challenges to an EIS for lease sales, but not an EIS for development. However, there are perfectly good historical and contemporary policy reasons supporting a plain reading of the statute of limitations as applying to any actions concerning leasing, not merely lease sales. In 1980, Congress was operating against the backdrop of an urgent need for domestic oil to solve an energy crisis. This

[99] 46 Fed. Reg. 58,304, 58,305 (Dec. 1, 1981) (amending 30 C.F.R. pt. 221 to include the Petroleum Reserve within regulations that "govern development and production of oil and gas contained in lands that are owned or controlled by the United States and are under the jurisdiction of the Secretary of the Interior").

[100] SILA Br. at 12.

[101] Pub. L. No. 94-258, § 104(a).

[102] Pub. L. No. 96-514.

[103] *Wilderness Soc'y*, 603 F. Supp. 2d at 57 (emphasis added).

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was coupled with a history of NEPA litigation against the construction of the trans-Alaska pipeline, which resulted in substantial delays and ultimately legislation exempting the pipeline from further NEPA review *and* from judicial review.[104] For the Petroleum Reserve, Congress retained NEPA review and judicial review, but applied a 60-day limit to "any" challenge to "any" EIS "concerning oil and gas leasing."[105] Application of this broad language to EISs for federally approved actions that occur during the course of NPR-A leasing (like the Willow Project) is entirely consistent with Congress's expressed intent to enlist private enterprise in the expeditious development of the remote (high-cost) Petroleum Reserve to increase domestic oil supplies. And to provide a reasonable contemporary regulatory structure for private investment, it makes perfect sense for Congress to maintain a 60-day limitations period for judicial review of an EIS. Plaintiffs' contrary policy preference would give *six years* to challenge NEPA compliance for such actions, directly undermining Congressional intent and thwarting reasonable reliance on major permitting events.[106]

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[104] *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 243 (1975); Pub. L. No. 93-153, 87 Stat. 576 (Nov. 16, 1973) (exempting trans-Alaska pipeline from NEPA review and judicial review); 126 Cong. Rec. H2035 (July 30, 1980) (Statement of Rep. Young) (expressing desire to get the Petroleum Reserve "on line" with the pipeline and discussing 1973 trans-Alaska pipeline legislation and the need to "produce the oil that we know is there").

[105] Pub. L. No. 96-514.

[106] CBD mistakenly argues that its lease-sale-only interpretation is supported by the BLM regulations. CBD Br. at 9 n.4. The regulation at 43 C.F.R. § 3130.2 applies *only* to the Petroleum Reserve. *See* 43 C.F.R. pt. 3130. The other two BLM regulations cited by

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In sum, full consideration of the plain language of the statute in context affords only one reasonable result. The FEIS falls within the scope of the NPRPA statute of limitations, and Plaintiffs were required to file their NEPA claims within 60 days. They failed to do so and their NEPA claims must be dismissed.

B. Plaintiffs' NEPA Claims Lack Merit.

Because Plaintiffs' NEPA claims are untimely and must be dismissed, there is no need for the Court to consider the merits of the claims. For completeness, however, ConocoPhillips addresses the claims below.

NEPA requires federal agencies to take a "hard look" at the environmental consequences before taking a major action.[107] However, "[t]he reviewing court may not flyspeck an EIS or substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action."[108] "If the agency has taken a 'hard look' at a decision's environmental consequences, the decision must not be disturbed."[109] As

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CBD are of general applicability and are not specific to the Petroleum Reserve. *See* 43 C.F.R. §§ 3152.1-3152.7 (exploration regulations applicable to all exploration in Alaska—not just the Petroleum Reserve); 43 C.F.R. pt. 3160 (applicable to oil and gas exploration and development generally). It would make little sense for either of these regulations to restate the NPRPA's statute of limitations as that provision is not applicable to oil and gas development outside the Petroleum Reserve.

[107] *Balt. Gas and Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

[108] *Half Moon Bay Fishermen's Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (internal quotation marks and citations omitted).

[109] *Id.* (citing *Kleppe*, 427 U.S. at 410 n.21).

explained below, BLM and the Corps took the requisite hard look and Plaintiffs' arguments to the contrary are unavailing.

1. SILA's "Information" Arguments Ignore the Record.

SILA fires a shotgun of arguments claiming that the Corps and BLM lacked essential design or project information sufficient to allow a hard look at environmental impacts.[110] The record belies these arguments.

First, SILA argues that BLM and the Corps lacked "design information" about how bridges and culverts would be constructed.[111] That is not true. Both the BLM and the Corps were provided detailed construction design drawings for each type of culvert and each bridge to be constructed.[112] The FEIS also contains a section describing bridge design in considerable detail,[113] which notes, "*[s]pecific bridge crossings details are in Appendix D.1, Sections 4.3 through 4.5*."[114] Appendix D.1 provides a table listing the

[110] SILA Br. at 12-16.

[111] SILA Br. at 12.

[112] Corps_AR005074-76 (culverts); 005077-090 (bridges); BLM_AR143903.

[113] *See* BLM_AR182400 ("Bridges would be designed to maintain bottom chord clearance of 4 feet above the 100-year design-flood elevation or at least 3 feet above the highest documented flood elevation . . . . Bridges crossing Judy (Iqalliqpik) and Fish (Uvlutuuq) creeks would be designed to maintain a bottom chord clearance of at least 13 feet above the 2-year design flood elevation (open water) to provide vessel clearance . . . . Shorter, single-span bridges would be designed to avoid placement of piers in main channels. Multi-span bridges would be constructed on steel-pile pier groups, positioned approximately 40 to 70 feet apart with sheet-pile abutments located above ordinary high water (OHW).").

[114] *Id.* (emphasis added).

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location, length, and number of piles below the ordinary high water level for each of the seven waterbody crossings for the Project.[115] Likewise, the FEIS discussed culvert design standards, impacts of culvert operation, and potential mitigation.[116]

Second, SILA asserts that the FEIS contained "little or no information on the length or location of proposed roads, or the amount of gravel needed for each road, or the site-specific impacts from infrastructure placement."[117] This claim is also false. The FEIS provides all relevant information about the location, length, and environmental consequences for gravel road infrastructure associated with each action alternative.[118] Indeed, the FEIS has an *entire appendix* dedicated to the discussion of road route selection, explaining how each road segment was located to minimize impacts to wetlands, avoid stream buffers, avoid yellow-billed loon habitat, and address key stakeholder concerns.[119] And here too, BLM and the Corps were both provided detailed engineering drawings for construction of all the roads.[120]

Third, SILA claims that BLM failed to take a hard look at aquatic and

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[115] BLM_AR183240.

[116] BLM_AR183451, 182478, 182481, 182485, 185534-535.

[117] SILA Br. at 13.

[118] *See* BLM_AR182387 (map showing location of infield roads); BLM_AR182410-414, 182449-452, 182753-756.

[119] BLM_AR185888-898.

[120] Corps_AR005021-5050; BLM_AR143903. SILA also incorrectly argues that BLM is "ignoring" the number of wells that will be drilled on each well site. SILA Br. at 13. The FEIS estimates 40 to 70 wells per pad, and a total of 251 wells. BLM_AR182398.

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hydrological impacts and improperly deferred analysis to the Corps' permitting.[121] But the EIS and its appendices dedicate nearly 100 pages to addressing project impacts to water resources,[122] wetlands and vegetation,[123] and the cumulative impacts to both.[124] The Corps was provided extensive geographic information system ("GIS") data delineating all wetlands in the project site, and the location of all project infrastructure.[125]

Fourth, SILA tries to undermine the agencies' process by suggesting that BLM and the Corps did not receive any detailed project information until February 3, 2020, when ConocoPhillips formally submitted its application for a CWA 404 permit.[126] SILA misunderstands the permitting process. ConocoPhillips submitted its draft Environmental Evaluation Document to BLM on May 29, 2018,[127] and then proceeded to refine its design and provide the agencies additional details in responses to nearly 100 separate BLM Requests for Information ("RFIs") over the next two years, including detailed engineering environmental construction designs, GIS data, and wetlands data, spanning nearly 29,000 pages in the administrative record.[128] The Corps also received the revised

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[121] SILA Br. at 13.

[122] BLM_ AR182470-493, 185504-545.

[123] BLM_AR182493-506, 185546-560.

[124] BLM_AR182674-680.

[125] Corps_AR005013-5137, 005774-6206; BLM_AR185546-547.

[126] SILA Br. at 14.

[127] BLM_AR116649.

[128] *See* generally BLM AR Index Code 1.3.2 ("RFIs with CPAI" from BLM_AR116783-145665.)

Environmental Evaluation Document on September 21, 2019, and received a wetland delineation and maps on November 14, 2019.[129] Aside from ignoring this detailed record, SILA's argument fails to appreciate that NEPA does not require a proposed action be fully formulated at the outset of a proposal, but anticipates that proposed actions will be informed by and improved throughout the environmental review process.[130]

Fifth, SILA complains about mitigation measures and mistakenly tries to draw a comparison to the EIS rejected in *Northern Plains Resource Council, Inc. v. Surface Transportation Board*.[131] In that case, the EIS did "not provide baseline data" for analysis and instead the agency planned to gather that data as part of post-approval mitigation.[132] Here, by contrast, BLM had substantial data on the affected environment, and, as discussed above, detailed information on project design.[133] Although BLM imposed post-construction monitoring requirements on culverts, that was a reasonable mitigation

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[129] Corps_AR007977-8420, 005774, 005775-6206.

[130] *See* 40 C.F.R. § 1501.2(a) ("Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts."); *see also* 40 C.F.R. § 1502.9(d)(1)(i) (process supplemental review); *Hunters v. Marten*, 470 F. Supp. 3d 1151, 1161 (D. Mont. 2020) ("NEPA also allows the agency to modify its projects in light of public input").

[131] 668 F.3d 1067 (9th Cir. 2011).

[132] *Id.* at 1083.

[133] *See, e.g.,* BLM_AR182470-493, 185504-545.

measure—*not* a substitute for analyzing the anticipated impacts of the action. This is entirely appropriate under NEPA.[134]

Finally, SILA complains that BLM needed more information, such as "flow data," about the Colville River crossing (a temporary ice crossing) and that BLM "never obtained key baseline information."[135] These arguments are also incorrect. On March 25, 2020, ConocoPhillips finalized and produced a field study of water resources associated with the Colville River ice crossing, including flow data,[136] and followed that up with a detailed report showing a revised construction plan for the Colville crossing and discussing considerations related to winter river flow and overflow based on field observations.[137] This was more than enough to provide a baseline for BLM's evaluation of potential environmental impacts from the ice crossing. In sum, SILA's attempts to flyspeck the FEIS's baseline information ignore the record, misconstrue the law, and should be rejected.

2. The FEIS Considers a Reasonable Range of Alternatives.

Under NEPA, "an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available

[134] *See Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013) (distinguishing *N. Plains Res. Council*).

[135] SILA Br. at 16.

[136] BLM_AR145089-146

[137] BLM_AR145464-530.

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alternative."[138] Accordingly, "the EIS need not consider an infinite range of alternatives, only reasonable or feasible ones."[139] "Whether an alternative is reasonable and appropriate depends on the stated purpose for the proposed action."[140]

Here, the FEIS states: "The purpose of the Proposed Action is to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources under leaseholds in the northeast area of the NPR-A, consistent with the proponent's federal oil and gas lease and unit obligations."[141] CBD does *not* challenge this express purpose. Instead, it argues that BLM failed to consider a reasonable range of alternatives.[142] As explained below, these arguments ignore the record and project purpose, and misconstrue the law.

First, contrary to CBD's assertion, the fact that each action alternative would construct the facilities necessary to fulfill the purpose of the project does not make the

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[138] *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (quotations and citation omitted).

[139] *League of Wilderness Defs. v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012) (quotations and citation omitted); CEQ's 40 Most-Asked NEPA Questions, No. 2a ("reasonable alternatives" are practical or feasible from a technical, economic, and common-sense standpoint).

[140] *Native Vill. of Nuiqsut*, 432 F. Supp. 3d at 1041 (citing *Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005)).

[141] BLM_AR182369. The need for the proposed action is also "established by BLM's responsibilities under various federal statutes…. Under the NPRPA, BLM is required to conduct oil and gas leasing and development in the NPR-A." *Id.*

[142] CBD Br. at 23-27.

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action alternatives "virtually identical" or "indistinguishable."[143] The action alternatives differ in key respects in their approaches to facilitating access to ConocoPhillips' leases (consistent with the project purpose) and minimizing impacts to the environment. Moreover, the action alternatives respond directly to issues raised in the comprehensive public scoping process by stakeholders regarding the surface infrastructure layout.[144]

For example, ConocoPhillips' proposed project (Alternative B) would extend the all-season gravel road from GMT-2 to the Willow Project site, thereby connecting Willow to ConocoPhillips' facilities in the Greater Moose's Tooth Unit ("GMTU") and at Alpine. Alternative B would also connect all Willow facilities with in-field gravel roads for year-round use.[145] Alternative C, on the other hand, presents a "Disconnected Infield Road" alternative, which has no gravel road or bridge connecting the Willow Processing Facility to the BT-1, BT-2, and BT-4 drill sites, and is intended to "reduce effects to caribou movement and decrease the number of stream crossings required."[146] Alternative D, the "Disconnected Access" alternative, eliminates the gravel road connecting Willow

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[143] *Cf. Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (agency failed to consider a reasonable range of alternatives where EIS considered only a no-action alternative and two "virtually identical" action alternatives that differed only in re-labeling a portion of lands transferred as a "donation" rather than an "exchange"); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (holding two action alternatives proposing the *same* user capacity limits on recreational visitors to National Park were "virtually indistinguishable").

[144] BLM_AR165582.

[145] BLM_AR182396.

[146] BLM_AR182396-397.

to ConocoPhillips' facilities in the GMTU. It has the least amount of gravel roads and bridge crossings, but significantly more ice roads, water use, and vehicle trips.[147] Alternatives C and D would construct fewer miles of gravel roads but would also require additional infrastructure (*i.e.*, airstrips or processing facilities) to compensate for the lack of year-round road access to Willow and GMT's central infrastructure.[148] For each action alternative, BLM considered three very different module delivery options for the transportation of supplies and equipment to construct the project, all of which presented different impacts.[149]

All of these alternatives were informed by public comments, agency expertise, and the project purpose. Indeed, as a testament to the interactive nature of the NEPA process, the Colville River Crossing module delivery option (Option 3) was developed in response to comments on the draft EIS to address concerns from local stakeholders over potential impacts to subsistence whaling from the proposed construction of a gravel module transfer island in Harrison Bay.[150] This responsive project modification led to an EIS

[147] BLM_AR182375-382, 182397.

[148] BLM_AR186061-062.

[149] BLM_AR182408-409.

[150] *See* BLM_AR178275 ("In response to concerns and comments from stakeholders over the proposed [module transfer island] in module delivery Options 1 and 2, CPAI developed a new option to complete sealift module delivery to the Project area"); *see also* BLM_AR178253 ("The [Alaska Eskimo Whaling Commission] would like to express our appreciation for ConocoPhillips' initiative in meeting with our Board of Commissioners and with the [Nuiqsut Whaling Captains Association], and for listening to the whaling communities of Nuiqsut and Utqiaġvik as it developed Option 3.").

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supplement and an additional comment period.[151] In the FEIS, BLM transparently described and evaluated the benefits and drawbacks of alternatives in terms of environmental impacts, safety, access, and overall project feasibility.[152] CBD's argument ignores this record.

Second, CBD's assertions that BLM was required to fully analyze alternatives that avoid the Teshekpuk Lake and Colville River Special Areas, eliminate permanent roads, and only allow seasonal drilling, are legally and factually flawed.[153] NEPA requires only a brief discussion of alternatives that were considered but ultimately eliminated from detailed study.[154] An agency need not carry forward for full analysis alternatives that are infeasible or do not meet the purpose of the proposed action.[155]

BLM and its cooperating agencies surveyed a total of 33 alternative components to evaluate whether they were reasonable in light of the Willow Project's purpose. The FEIS explains:

> Of these, 26 alternative components were eliminated from further analysis because they did not meet the overall Project purpose, were not considered economically or technically

[151] BLM_AR186064.

[152] *See, e.g.*, BLM_AR182410-415.

[153] CBD Br. at 26-27.

[154] *See* 40 C.F.R. § 1502.14(a); *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir. 1999).

[155] *Kempthorne*, 457 F.3d at 978 ("An agency need not, therefore, discuss alternatives . . . which are 'infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area.'") (quoting *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990)).

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> feasible or practicable…did not address substantive issues raised during scoping; did not provide benefits over an alternative already being considered; or were determined to be more appropriate as potential mitigation or minimization measures. [156]

The FEIS then describes the alternatives that were considered and the rationales for eliminating them from further analysis, including the alternatives CBD erroneously contends the FEIS failed to consider.[157]

For example, the FEIS *does* reflect BLM's consideration of alternatives without gravel roads. Specifically, BLM considered an "Ice Road or Tundra Access Only" alternative, which would eliminate the construction of gravel roads and airstrips in favor of winter ice roads and the use of low-ground pressure vehicles to minimize disruption to the tundra in the summer.[158] BLM reasonably rejected this concept because it would not provide for reliable year-round access to facilities, which would "create unacceptable hazards for safety and emergency response" including "[h]eavy equipment necessary for fire, rescue, and spill response, as well as critical medical equipment such as an ambulance."[159] The FEIS also considers a roadless Willow Production Facility alternative

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[156] BLM_AR183180.

[157] BLM_AR182395-415, 183156-328.

[158] BLM_AR183188-189.

[159] *Id.*

as well as an alternative that removed gravel road connections to the BT-2 and BT-4 drill sites and detailed the reasons why these alternatives were rejected.[160]

In addition, BLM expressly addressed why CBD's "seasonal drilling only" alternative was not viable:

> Drilling only during the winter season would reduce drilling to approximately 2 months per year, and the ice road season is only about 4 months, meaning the drill rig would have to be mobilized, rigged up, drilled, and demobilized in that time period. This would eliminate the economic feasibility of the Project. This would also effectively extend the impacts many decades.[161]

BLM also explained why CBD's comparison to the roadless drill site at CD-3 was inapt. CD-3 has its own airstrip, allowing for access whenever weather allows for flying, as well as access via boat during the open water season on navigable waters that are connected to the Alpine Central Facilities. These options provide year-round access for safety and emergency response even in the absence of all-season gravel road access.[162]

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[160] *See, e.g.*, BLM_AR183180-186 (Table D.3.2, Component Numbers 3, 6, and 8).

[161] BLM_AR183014. CBD also ignores BLM's incorporation by reference of its prior analysis of a roadless alternative with seasonal-only drilling in the GMT-2 Supplemental EIS, which was determined to be unviable. *See* BLM_AR183012, 274464-477. This is expressly allowed by the NEPA regulations. *See* 40 C.F.R. § 1502.12; *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 792 (9th Cir. 2014) ("The CEQ regulations also require agencies to incorporate by reference NEPA and non-NEPA documents.").

[162] BLM_AR183012; *see also* BLM_AR272176 (noting the "[l]imitations associated with aircraft and ice-road only access…affect response capability for emergency health and safety measures.").

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CBD's argument that BLM should have fully considered an alternative prohibiting infrastructure in the Teshekpuk Lake and Colville River Special Areas is also baseless. CBD glosses over the fact that the 2013 IAP provided more granularity than just special areas and areas that are not designated as special. Under the 2013 IAP there were no-leasing areas, no-infrastructure areas, a caribou habitat area, and other specific designations.[163] Development *is allowed* in the Petroleum Reserve's special areas. As the FEIS explains:

> The purpose and need cannot be met without any infrastructure in the TLSA [Teshekpuk Lake Special Area]. Parts of the infield road system, as well as BT2 and BT4, would be within the TLSA in an area that is available to oil and gas leasing…. All else being equal, the TLSA is only an administrative boundary, and Project impacts would not necessarily be greater within the TLSA than they would outside the TLSA.[164]

Drill sites BT2 and BT4 (which is not authorized under the ROD) are located in leased areas within the TLSA where infrastructure is allowed and anticipated to occur under the 2013 IAP.[165] Indeed, BLM's decision to make portions of the Petroleum Reserve's special areas available for oil and gas leasing and exploration has been upheld by this Court.[166] Moreover, even though there is no statutory or regulatory requirement

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[163] *See* BLM_AR182753 (Figure 1.4.1).

[164] BLM_AR183012.

[165] BLM_AR182753.

[166] *See Native Vill. of Nuiqsut*, 432 F. Supp. 3d 1003; *see also N. Alaska Env't Ctr. v. Norton*, 361 F. Supp. 2d 1069 (D. Alaska 2005), *aff'd*, 457 F.3d 969, 978 (9th Cir. 2006).

prohibiting infrastructure in the Petroleum Reserve's special areas, BLM still implemented design modifications to minimize impacts.[167]

Finally, rather than grapple with the record, CBD erects the strawman argument that "BLM's primary reason" for rejecting CBD's preferred alternatives is "asserted limits on its authority to restrict ConocoPhillips activities."[168] BLM was *required* to consider the limits on its authority and properly did so.[169] In any event, as explained above, those limits were plainly not the only, or primary, reason for rejecting CBD's preferred alternatives. And BLM was only required to fully consider alternatives that met the stated purpose (which CBD does not contest).[170] For all of these reasons, CBD's range of alternatives argument should be denied.

3. The FEIS Sufficiently Evaluates Greenhouse Gas Effects.

Section 3.2 of the FEIS evaluates the expected greenhouse gas impacts associated with the Willow Project, including the "downstream" emissions associated with

[167] *See* BLM_AR183187 (relocating the BT-4 drill site outside of the K-5 Teshekpuk Lake Caribou Habitat area for *all action alternatives* in response to comments).

[168] CBD Br. at 23.

[169] *See infra* Section IV.B.3 (discussing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767-68 (2004)).

[170] *League of Wilderness Defs.*, 689 F.3d at 1071 ("An agency need not consider alternatives that extend beyond those reasonably related to the purposes of the project." (quotation simplified)). *See* BLM_AR183110 ("the siting of oil and gas facilities is largely dependent on the location of the subsurface resources to be extracted"); BLM_AR183012 ("[I]t was determined that the Project proponent had already optimized these Project components to minimize impacts to wetlands and other environmental resources, while still being able to access the target resources.").

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combustion of fuel produced by the Willow Project.[171] The FEIS's analysis of the greenhouse gas emissions is supported by detailed technical appendices specifically addressing "Climate and Climate Change"[172] and "Market Substitutions and Greenhouse Gas Downstream Emissions Estimates," which assess the impact of increased domestic production of oil at Willow on emissions.[173] BLM thus took the required "hard look" at the greenhouse gas-related impacts of the Willow Project.

Plaintiffs second-guess BLM's detailed analysis, arguing that it should also have included an analysis of how Willow production would impact foreign consumption and emissions within its "Market Substitution" model. But, the FEIS explains that "lower prices for oil and other energy sources associated with increased U.S. production as a result of the Willow [Project] would affect both domestic and foreign energy consumption"[174] and that BLM and the Bureau of Ocean Energy Management ("BOEM" – the agency that developed the market substitution modeling) currently do not have "the ability to estimate differences in greenhouse gas emissions caused by changes in foreign consumption."[175] BLM further explained this conclusion in detail:

> It is unreasonable to extend BOEM's limited modeling of foreign oil markets used in establishing an equilibrium price in the model to global GHG emissions estimates comparisons

[171] BLM_AR182418-428.
[172] BLM_AR183482-500.
[173] BLM_AR183502-509.
[174] BLM_AR183508.
[175] *Id.*

> between a Willow MDP Project alternative and a No Action Alternative. The issue is the uncertainty and lack of reliable data as to the likely distribution of demand changes among countries, the oil-substitutes available in other countries and those countries' incremental substitution patterns (cross-price elasticities) and resulting energy mix of oil and the various substitutes, and the GHG intensity of at least the major substitutes in each country. The incremental substitution patterns and the GHG emission rates for even the same class of fuels can vary significantly from country to country, and using broad averages in place of weighted averages can result in very different results, especially when the averages hide wide ranges in the underlying factors.[176]

BLM thus qualitatively addressed the impacts of foreign consumption within the limits of reliable scientific and technical modeling and provided a full explanation to support its rationale. Nothing more was required by NEPA.

Plaintiffs' arguments to the contrary rely solely on the Ninth Circuit's recent opinion in *Center for Biological Diversity v. Bernhardt,* but that case is distinguishable.[177] The primary error found by the court in *CBD v. Bernhardt* was BOEM's "perplexing[]" and "counterintuitive" finding that *not* building the proposed Liberty project would result in "25,370,000 *more* metric tons" of carbon dioxide

[176] BLM_AR182957; *see also* BLM_AR183508 ("[E]stimat[ing] differences in GHG emissions caused by changes in foreign consumption. . . would require detailed data on proportional consumption changes and the most likely energy substitutions, as well as on emissions from refineries, natural gas systems, coal processing, and other emission factors specific to the energy substitutes for all countries worldwide."); BLM_AR182947-948, 182956-957, 182963, 182965.

[177] 982 F.3d 723 (9th Cir. 2020) ("*CBD v. Bernhardt*"). The first page of the court's order incorrectly states that the appeal is from a BLM decision.

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emissions than if the project was constructed and produced oil.[178] BOEM's rationale was that "the oil substituted for the oil not produced at Liberty" would come from foreign countries "with 'comparatively weaker environmental protection standards.'"[179] The court found this conclusion to be "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[180] The court also found BOEM's rationale to be at least facially inconsistent with the fact that the agency also determined that it could not estimate the effects on foreign substitution and consumption from Liberty oil if the project were to be constructed.[181] Because BOEM failed to explain this apparent discrepancy, the court concluded that it "cannot supply a reasoned basis for the agency's action that the agency itself has not given."[182]

In contrast, BLM rationally assumed here that *not* developing the Willow Project would result in *zero* downstream carbon emissions.[183] The FEIS therefore does not contain the same problem that "demonstrate[d] the need for further explanation" in *CBD*

[178] *CBD v. Bernhardt*, 982 F.3d at 736.

[179] *Id*. (quoting Liberty EIS).

[180] *Id*. at 739 (quotation simplified).

[181] *Id*. ("It is unclear from the administrative record what justifies these assumptions and not those needed to estimate foreign oil consumption.").

[182] *Id*.

[183] BLM_AR182423 ("GHG emissions in the No Action Alternative are assigned a baseline value of zero in the EIS"); *see also* BLM_AR183493. Because BLM could not select the no-action alternative, it presented that alternative "in the analysis for baseline comparison" only. BLM_AR182396.

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v. Bernhardt.[184] Additionally, unlike the analysis found to be deficient in the Liberty EIS, BLM comprehensively evaluated greenhouse gas emissions for the Willow Project and explained in detail why the lack of reliable data about country-by-country energy substitutions prevented quantification of foreign consumption of oil in its indirect effects analysis. The Liberty EIS, on the other hand, contains merely a two-page section addressing effects associated with greenhouse gas emissions altogether, no technical appendices or other supporting emissions data and analyses, and a terse response to public comments.[185] In terms of the quality of the agency's record, this case is more like *Sierra Club v. U.S. Department of Energy* than *CBD v. Bernhardt*.[186] There, the D.C. Circuit rejected a claim—very similar to CBD's argument here—regarding the NEPA analysis of the foreign consumption of exported liquid natural gas. In *Sierra Club*, the court deferred to the agency's determination that a quantified analysis of foreign impacts "would require consideration of the dynamics of all energy markets in LNG-importing nations, and given the many uncertainties in modeling such market dynamics, the analysis would be 'too speculative to inform the public interest determination.'"[187]

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[184] *CBD v. Bernhardt*, 982 F.3d at 739.

[185] *See* BLM_AR275729-731, 276205.

[186] *See Sierra Club*, 867 F.3d at 202.

[187] *Id*. (citation omitted); *see also id*. ("[T]here are a number of other fuel sources that U.S. LNG might compete with, and '[t]o model the effect that U.S. LNG exports would have on net global [greenhouse-gas] emissions would require projections of how each' fuel source (nuclear, renewable, etc.) would be affected in each potential LNG-importing nation." (alterations in original; citation omitted)).

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Finally, unlike *CBD v. Bernhardt*, Plaintiffs have failed to demonstrate that the foreign consumption issue is even germane to the NEPA analysis for the Willow Project. NEPA is bound by a rule of reason, and NEPA only requires analysis of effects *caused by* the agency action as demonstrated by "'a reasonably close causal relationship' between the environmental effect and the alleged cause."[188] For example, in *Public Citizen*, the Supreme Court rejected a claim that the federal agency failed to consider the indirect emission effects of a rule that allowed cross-border operations of Mexican motor carriers, because the agency had *no authority* to prevent such operations. Therefore, "the environmental impact of the cross-border operations would have no effect on [the agency's] decisionmaking," and "the agency need not consider these effects."[189]

In *CBD v. Bernhardt*, the Ninth Circuit distinguished *Public Citizen* on the grounds that BOEM has "the statutory authority to act on the emissions resulting from foreign oil consumption" and that it might use that information to "approve another alternative included in the EIS or deny the lease altogether."[190] Plaintiffs make the same argument here, claiming that quantifying foreign consumption emissions in this case would show that the project will have comparatively more indirect emissions in relation

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[188] *Pub. Citizen*, 541 U.S. at 767-68 (citation omitted).

[189] *Id*. at 767-70; *id.* at 770 ("We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant '"cause"' of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects. . . .").

[190] 982 F.3d at 740.

to the "no-action" alternative, and, consequently, might cause BLM to deny the project "altogether."[191]

This comparison is inapt. BLM here lacks the discretion to deny the Willow Project "altogether" because BLM has issued non-no surface occupancy ("non-NSO") leases.[192] For non-NSO leases, the "irretrievable commitment of resources" is made at the leasing stage, which is long past.[193] When that occurred, "the non-NSO leases 'relinquish[ed] the 'no action' alternative,'" even though the no-action alternative remains an important part of the comparative analysis that is "the 'heart' of the EIS."[194] In this situation, which is not at all uncommon, the "no action" alternative serves as a baseline for purposes of analysis, not as a viable option.[195] Although BLM must evaluate various alternatives for the project development and associated mitigative measures for

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[191] CBD Br. at 23 (quoting *CBD v. Bernhardt*, 982 F.3d at 740).

[192] *N. Alaska Env't Ctr.*, 983 F.3d at 1086-87.

[193] *Id*.

[194] *Id*. (citation omitted). Plaintiffs already challenged the NPR-A leases at issue here, including based on claims challenging the agency's evaluation of greenhouse gas emissions, and lost. *See id*.; *Nat. Res. Def. Council v. Bernhardt*, 820 F. App'x 520, 523 (9th Cir. 2020).

[195] *See* Forty Most Asked Questions Concerning CEQ's NEPA Regulations, No. 3. ("[T]he regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives."); *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1065-67 (9th Cir. 1998) ("The No-Action Alternative would not meet the purpose and need of the project. It is included here, in compliance with NEPA regulations, to provide a baseline against which the action alternatives are evaluated.").

"surface resources of the National Petroleum Reserve in Alaska,"[196] BLM correctly determined it has no authority to "select th[e] [no action] alternative because CPAI's leases are valid and provide the right to develop the oil and gas resources therein."[197] Thus, even if BLM could have reliably quantified foreign consumption emissions, it was not required to do so because it no longer had authority to "prevent" those indirect emissions and, therefore, was not "responsible for [this] particular effect under NEPA."[198]

4. BLM Took a Hard Look at Caribou Impacts.

CBD also argues that BLM failed to take a hard look at the impacts to caribou. To avoid duplication, ConocoPhillips adopts by reference the arguments set forth in the North Slope Borough's brief (section IV.B.3). As the Borough explains, the FEIS fully evaluated the potential impacts of the Willow Project on caribou, and CBD's claim that Willow presents some unprecedent threat to caribou is unfounded.[199]

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[196] Pub. L. No. 96-514.

[197] BLM_AR182396; *see Pub. Citizen*, 541 U.S. at 767-68. Moreover, even if BLM could have reliably quantified foreign consumption emissions, that data would not be "essential to a reasoned choice among alternatives" because BLM projected the same amount of oil production (and therefore emissions) from each of the alternatives, 40 C.F.R. § 1502.21(b). *See* BLM_AR183506-509 (Tables 1, 3, and 4); BLM_AR182423.

[198] *Pub. Citizen*, 541 U.S. at 767-68.

[199] *See also* BLM_AR182553-575, 185586-613.

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5. BLM Properly Evaluated Cumulative Impacts.

Pursuant to now-repealed regulations, BLM considers cumulative impacts as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions."[200] "Reasonably foreseeable future actions are those for which there are existing decisions, funding, formal proposals, or which are highly probable, based on known opportunities or trends."[201] "Analyzing future actions, such as speculative developments, is not required."[202] Moreover, an agency has discretion to address "cumulative impacts either by individually discussing a previously approved project, or incorporating the expected impact of such a project into the environmental baseline against which the incremental impact of a proposed project is measured."[203]

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[200] *See* BLM, NEPA Handbook H-1790-1 at 57 (2008) ("BLM Handbook"), https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1790-1.pdf (quoting former 40 C.F.R. § 1508.7).

[201] *Id*. at 59.

[202] *Id*.

[203] *See Cascadia Wildlands v. Bureau of Indian Affs.*, 801 F.3d 1105, 1112 (9th Cir. 2015); *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv*., 549 F.3d 1211, 1218 (9th Cir. 2008) (agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate"); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987) ("The NEPA process involves an almost endless series of judgment calls" and "[t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.").

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SILA second-guesses BLM's cumulative impacts analysis with arguments that largely misstate the record. Even assuming a cumulative impact analysis is required following repeal of the NEPA cumulative impact regulations, none of these arguments have any merit.

First, SILA argues that BLM failed to provide "detailed information on Greater Willow," which it calls a "planned expansion" of Willow.[204] But there is no "detailed information" to provide. The record appropriately shows that the so-called Greater Willow is "potential future development" in the Willow area,[205] and that "the exact location, size, or timing of future development" is unknown.[206] Indeed, at this point it is unknown if the full five drill sites for the "original" Willow Project will ultimately be authorized, much less whether there will in the future be a proposal for expansion. "[G]eneral plans for expanded" activity "do not require a cumulative impacts analysis."[207] Although future expansion of Willow is certainly possible, it is by no means "highly probable" and there has been no "formal proposal" for a Willow expansion project.[208] "[W]here plans remain 'speculative and have not been reduced to specific

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[204] SILA Br. at 18.

[205] BLM_AR120534.

[206] BLM_AR121875; *see also* BLM_AR103717 ("The Greater Willow (GW) sites 1 and 2 are included in the EIS for cumulative effects analysis. At this time ConocoPhillips (CPAI) does not have enough information on the potential hydrocarbon deposit and exploration work is ongoing.").

[207] *Jones*, 741 F.3d at 1001.

[208] *See* BLM Handbook at 59.

proposals,' cumulative impacts analysis is not required."[209] Nonetheless, BLM made reasonable assumptions about possible impacts from a potential Willow expansion project and included that in its cumulative effects analysis.[210] Nothing more (and substantially less) was required by NEPA.

Second, SILA incorrectly argues that the cumulative effects analysis failed to "provide detailed information on Nanushuk."[211] The FEIS incorporates the Nanushuk EIS.[212] The FEIS then relies on the detailed information in the Nanushuk EIS to address the cumulative effects of the Willow Project on air quality, socioeconomic factors, and subsistence uses.[213] With respect to other effects, BLM was not required to individually discuss Nanushuk, but could (and did) aggregate those effects into the analysis.[214]

Third, SILA complains that BLM should have separately discussed the future exploration activities near Willow and at Harpoon, and the future development of

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[209] *Chilkat Indian Vill. of Klukwan v. Bureau of Land Mgmt.*, 399 F. Supp. 3d 888, 920 (D. Alaska 2019) (quoting *Jones*, 741 F.3d at 999), *aff'd*, 825 F. App'x 425 (9th Cir. 2020).

[210] BLM_AR182671.

[211] SILA Br. at 18.

[212] BLM_AR182668.

[213] BLM_AR182672-673, 182680-684.

[214] *See League of Wilderness Defs.-Blue Mountains Biodiversity Project*, 549 F.3d at 1218 (agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate").

Narwhal.[215] But as BLM reasonably explained, "[b]ecause the very nature of exploration is speculative it would be impossible to accurately list every exploration project in the area over the life of the project."[216] Accordingly, BLM appropriately "lumped oil and gas exploration as 1 row," and analyzed the cumulative effects in "the big picture, which is that exploration occurs all over and is likely going to continue that way."[217] This was a reasonable approach, given the short-term nature of exploration, and BLM appropriately analyzed the cumulative effects of exploration activities on subsistence and other resources.[218]

Finally, SILA repeats the same cumulative effects arguments, arguing that the FEIS did not evaluate the cumulative effects of Greater Willow, Nanushuk, and exploration activities on fish and polar bears. But BLM discussed the effects of all of the identified reasonably foreseeable future actions (including Greater Willow, Nanushuk, and exploration activities) in the aggregate and concluded that there would be an incremental increase on impacts to fish, and polar bears, that may be compounded by climate change concerns.[219] This was a reasonable level of analysis under the circumstances, as discussed above, where "Greater Willow" is a speculative future action,

[215] SILA Br. at 19-20. Narwhal is a future potential project that may occur from the existing CD-1 or CD-4 pad. BLM_AR135566.

[216] BLM_AR154381.

[217] *Id.*

[218] BLM_AR182682-684.

[219] BLM_AR182675-676, 182675-681.

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exploration activities are speculative and uncertain, and the effects of Nanushuk are fully disclosed in a separate EIS, incorporated by reference. SILA's cumulative effects arguments should be rejected.

In sum, Plaintiffs fail to demonstrate any flaw with BLM's NEPA process or analysis. An EIS is supposed to foster "both informed decision-making and informed public participation."[220] That is precisely what occurred in this case, with early engagement by stakeholders in the scoping process, multiple public review and comment opportunities, informed recommendations by local stakeholders and cooperating agencies, and responsive changes by BLM and ConocoPhillips, resulting in a detailed FEIS of over 2,600 pages and an improved project. Plaintiffs NEPA claims should be dismissed.

C. FWS's Biological Opinion Complies with the ESA.

1. BLM and FWS Properly Addressed Mitigation Measures.

Plaintiffs argue that the FWS's BiOp is flawed because it relies upon mitigation measures that are either "uncertain" (SILA) or "unspecified" (CBD) in reaching its determinations under ESA Section 7.[221] Both Plaintiffs again hang their arguments on *CBD v. Bernhardt*, in which the Ninth Circuit invalidated a biological opinion (the

[220] *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016) (internal quotations omitted).

[221] SILA Br. at 35-37; CBD Br. at 30-34.

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"Liberty BiOp") because it relied on mitigation measures that were not supported by a "clear, definite commitment of resources."[222]

Plaintiffs' arguments have a fatal flaw.[223] The Liberty BiOp and the Ninth Circuit's decision are premised on regulations that have been rescinded and replaced.[224] The Willow BiOp was issued on October 16, 2020, and is governed by the new regulations—regulations that were changed to avoid the exact result reached in *CBD v. Bernhardt*.

For context, to begin a Section 7 consultation under the ESA, the "action agency" (here, BLM) provides a "written request to initiate formal consultation" to the "consulting agency" (here, FWS).[225] That request provides a detailed description of the proposed action, including mitigation measures, and its potential effects, and is usually supported by a "biological assessment," or "BA."[226] The consulting agency then evaluates the information provided by the action agency and prepares a biological opinion as to whether the action is likely to jeopardize ESA-listed species or adversely

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[222] *CBD v. Bernhardt*, 982 F.3d at 746 (quotation simplified).

[223] ConocoPhillips incorporates by reference section III.D.1.a of the Federal Defendants' brief and section IV.C of the North Slope Borough's brief, which explain why FWS's ESA Section 7 determinations did not rely on BLM's commitment to comply with MMPA incidental take authorizations. However, for the reasons explained below, whether or not FWS relied on that commitment is irrelevant because the BiOp fully complies with the law applicable to treatment of mitigation measures.

[224] 84 Fed. Reg. 44,976 (Aug. 27, 2019); 84 Fed. Reg. 50,333 (Sept. 25, 2019).

[225] 50 C.F.R. § 402.14(c)(1).

[226] *Id.*; *id.* § 402.02.

modify or destroy designated critical habitat.[227] As relevant here, some Ninth Circuit courts have held agencies to a "heightened bar of documentation regarding their commitment" to mitigation measures relied upon for the purpose of making ESA Section 7 determinations.[228]

The primary example of this heightened bar is *National Wildlife Federation v. National Marine Fisheries Service* ("*NWF v. NMFS*"), in which the Ninth Circuit held that an agency's commitment to implement future mitigation measures for a dam project could "not be included as part of the proposed action without more solid guarantees that they will actually occur."[229] The court explained that it was "not persuaded that even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, absent specific and binding plans" and a "clear, definite commitment of resources."[230] Finding no such plans and commitments, the court held that the biological opinion was unlawful.[231]

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[227] *Id.* §§ 402.12, 402.14.

[228] 84 Fed. Reg. at 45,003.

[229] 524 F.3d 917, 935-36 (9th Cir. 2008).

[230] *Id.* at 936; *see also Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1258 (9th Cir. 2017) ("[O]ur precedents require an agency to identify and guarantee mitigation measures that target certain or existing negative effects.") (citing *NWF v. NMFS*, 524 F.3d at 936); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) ("Mitigation measures [supporting a biological opinion's no-jeopardy conclusion] must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations.").

[231] *NWF v. NMFS,* 524 F.3d at 936.

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The question presented in *CBD v. Bernhardt* was the same as presented in *NWF v. NMFS*—*i.e.*, "whether the mitigation measures in FWS's BiOp are sufficiently binding or certain to occur."[232] In answering that question, the *CBD v. Bernhardt* court premised its opinion on the standard that "[m]itigation measures relied upon in a biological opinion must constitute a 'clear, definite commitment of resources.'"[233] Applying *NWF v. NMFS*, the court explained that FWS "cannot refer only to generalized contingencies or gesture at hopeful plans," and "must describe, in detail, the action agency's plan to offset the environmental damage caused by the project."[234] The court ruled that the Liberty BiOp was unlawful because it did not meet this standard.

The problem for Plaintiffs is that FWS and NMFS (collectively, the "Services"), changed this standard—quite intentionally—in their recent ESA rulemaking. In making this change, the Services explained:

> [J]udicial decisions have created confusion regarding what level of certainty is required to demonstrate that a measure will in fact be implemented before the Services can consider it in a biological opinion. In particular, the Ninth Circuit has held that even an expressed sincere commitment by a Federal agency or applicant to implement future improvements to benefit a species must be rejected absent "specific and binding plans" with "a clear, definite commitment of resources for future improvements." Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 935-36 (9th Cir.

[232] *Bernhardt*, 982 F.3d at 743.

[233] *Id*. (quoting *NWF v. NMFS*, 524 F.3d at 936 & n.17).

[234] *Id*. at 743.

> 2008). *To address this issue, we are proceeding with the revisions to § 402.14(g)(8)….*[235]

The Services accordingly revised their joint ESA implementing regulations to state that "[m]easures included in the proposed action . . . that are intended to avoid, minimize, or offset the effects of an action *are considered like other portions of the action* *and do not require any additional demonstration of binding plans*."[236]

This regulatory change completely undercuts Plaintiffs' arguments. The new regulation was expressly adopted to address court decisions that "have inappropriately conflated the Services' role [as the consulting agency] with that of the action agency by concluding the Services cannot lawfully consider measures proposed to avoid, minimize, or offset adverse effects unless we second guess the intent and veracity of an action agency's commitments."[237] The Services explained that action agencies "are in the best position to determine whether measures they propose to undertake . . . are sufficiently certain to occur" and that such measures "receive[] a presumption that [they] will occur."[238] In this regard, the Services further explained:

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[235] 84 Fed. Reg. at 45,002 (emphasis added).

[236] 50 C.F.R. § 402.14(g)(8) (emphases added). Knowing this problem, Plaintiffs studiously avoid mentioning the "specific and binding plans" and "clear, definite commitment of resources" standards (even though they rely solely on *CBD v. Bernhardt*).

[237] 84 Fed. Reg. at 45,003 (citing *NWF v. NMFS*, 524 F.3d at 935-36, and *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d at 1152); *cf. Bernhardt*, 982 F.3d at 742 (relying upon *NWF v. NMFS* and *CBD v. Rumsfeld*).

[238] 84 Fed. Reg. at 45,002, 44,979.

> [T]here may be situations where a Federal agency may propose a suite or program of measures that will be implemented over time. The future components of the proposed action often have some uncertainty with regard to the specific details of projects that will be implemented. Nevertheless, a Federal agency or applicant may be fully capable of committing to specific levels and types of actions (e.g., habitat restoration) and specific populations or species that will be the focus of the effort. If the Federal agency provides information in sufficient detail for the Services to meaningfully evaluate the effects of measures proposed to avoid, minimize, or offset adverse effects, the Services will consider the effects of the proposed measures as part of the action during a consultation.[239]

FWS therefore also amended its regulations to state that the action agency's request for consultation must contain "[a] description of the proposed action, *including any measures intended to avoid, minimize, or offset effects of the action* . . . [with] sufficient detail to assess the effects of the action on listed species and critical habitat."[240]

Even though these new regulations supplant the standard applied by *CBD v. Bernhardt*, neither SILA nor CBD claims that BLM and FWS violated the new regulations. Nor do they assert an as-applied challenge to those regulations. SILA does try to sidestep the issue by arguing that the new ESA regulations do "not eliminate the regulatory requirement that mitigation measures considered in an action be identified with

[239] *Id*. at 45,006.

[240] 50 C.F.R. § 402.14(c)(1)(i) (emphasis added); 84 Fed. Reg. at 45,006.

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certainty and specificity."[241] But the only "regulatory requirement" is found in the *new* regulations, and those regulations do not require "certainty." As described above, they require "sufficient detail to assess the effects of the action on listed species and critical habitat."[242] And the Services recognized that, for situations (as here) in which the action agency "propose[s] a suite or program of measures that will be implemented over time," there will necessarily be "some uncertainty with regard to the specific details of projects that will be implemented."[243] None of these regulatory requirements are addressed in *CBD v. Bernhardt* and they are ignored by Plaintiffs. This is fatal to Plaintiffs' ESA arguments.

In any event, the record shows that BLM and FWS easily complied with the regulatory requirements. BLM's BA devotes an entire section (3.4) to "Minimization, Avoidance, and Mitigation," in which it identifies and discusses numerous design features, lease stipulations, best management practices, and mitigation measures that are included in BLM's proposed action and serve to avoid, minimize, and offset adverse effects.[244] It provides detailed appendices, including one that lists *all* of the MMPA mitigation and monitoring measures under the Beaufort Sea incidental take regulation that are applicable

[241] SILA Br. at 37 (citing 84 Fed. Reg. at 45,003, which does not refer to "certainty" or "specificity").

[242] 50 C.F.R. § 402.14(c)(1)(i).

[243] 84 Fed. Reg. at 45,006.

[244] BLM_AR164398-405.

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to the Willow Project.[245] BLM also expressly conditioned its approval of the Willow Project on compliance with the MMPA.[246] FWS then described and considered at length all of BLM's proposed minimization, avoidance, and mitigation measures in the BiOp.[247] The BiOp also expressly references the MMPA mitigation and monitoring measures set forth in Appendix B of the BA and provides descriptions and analyses of the MMPA programs as applied to Willow.[248]

This exchange and evaluation of information was more than sufficient to comply with the new ESA regulations.[249] Moreover, even if the Services had not amended the ESA regulations, the high level of detail about mitigation measures in the Willow BA and BiOp, along with BLM's express commitment to condition all present and future project

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[245] *See* BLM_AR164490-496 (Appendix B to BA); FWS_AR000942 ("[T]he Proposed Action also contains protective measures that provide significant minimization of impacts to polar bears, most importantly BLM's commitment to ensure compliance with the MMPA."); FWS_AR000944; *see also* BLM_AR164474-489 (Appendix A to BA, detailing all design features to avoid and minimize impacts),

[246] FWS_AR000925; *see also id*. FWS_AR000922 ("BLM would not approve project activities absent documentation of compliance under the MMPA."); FWS_AR000855 (same). BLM's commitment to ensure compliance with the MMPA's "negligible impact" standard ensures a lower level of impact than the ESA's "jeopardy" standard requires. *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 913 (9th Cir. 2012); FWS_AR000835-838, 000840, 000843, 000578-579.

[247] FWS_AR000835-860, 000921-938.

[248] FWS_AR000856, 000856-858, 000922-925, 000929-930.

[249] *See* 50 C.F.R. §§ 402.14(c)(1)(i), 402.14(g)(8).

approvals on MMPA compliance, far exceeds the record supporting the Liberty BiOp and distinguishes this case from *CBD v. Bernhardt*.[250]

2. FWS Correctly Specified the Anticipated "Take" in its Incidental Take Statement.

Plaintiffs next attack FWS's incidental take statement ("ITS"), with SILA claiming the ITS "contains contradictory statements about the take of polar bears" and CBD claiming the ITS "omits the amount and extent of take from disturbance."[251] Both Plaintiffs misconstrue the BiOp and the ITS.

Under the ESA, the consulting agency must, *inter alia*, "[e]valuate the effects of the action," which are "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action."[252] *Some* of the effects of the action may include the incidental "take" of ESA-listed species, which means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[253] FWS has defined "harass" as "an intentional or negligent act or omission which creates *the likelihood of injury* to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to,

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[250] *See Bernhardt*, 982 F.3d at 743-47.

[251] SILA Br. at 38; CBD Br. at 35.

[252] 50 C.F.R. § 402.14(g)(3); *id*. § 402.02.

[253] 16 U.S.C. § 1532(19).

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breeding, feeding, or sheltering."[254] The consulting agency's biological opinion must include an incidental take statement that, *inter alia*, "[s]pecifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species."[255]

As applied here, FWS comprehensively evaluated all "effects of the action" in its BiOp, and Plaintiffs assert no challenge to that 33-page analysis.[256] With respect to effects on polar bears, FWS first described many activities associated with the project that could "potentially disturb" bears and the ways in which those activities could cause behavioral disturbance.[257] FWS explained that a "host of construction and production activities associated with the Proposed Action would intermittently incidentally expose small numbers of polar bears of the SBS stock to disturbance[, but that] most of those exposures would not be biologically significant."[258]

Second, FWS developed a model to assess the potential for polar bear den disturbance that may result in "take" of polar bear cubs. That model "estimated a mean take of 2.2 cubs and a median take of 0 cubs . . . (lethal or serious injury) over the 30 year period of activity."[259] FWS used that model to "assess the probability that take would

[254] 50 C.F.R. § 17.3 (emphasis added).
[255] *Id.* § 402.14(i)(1)(i).
[256] FWS_AR000905-938.
[257] FWS_AR000925-929.
[258] FWS_AR000942.
[259] FWS_AR000926.

occur."[260] The modeling results showed an 84% probability of zero den-disturbance takes (over the life of the action), a 16% probability of one or more takes, and a 16% probability of two or more takes.[261] Because of "the high probability of zero bears suffering injury or mortality over the life of the project" due to den disturbance, FWS rationally determined that such take is "not reasonably certain to occur."[262]

Third, FWS assessed the effects that could result from "potentially harmful interactions between humans and polar bears."[263] Of the various types of human-bear interactions evaluated, FWS concluded, "based on historical interactions between humans and polar bears at industry facilities on the North Slope," that less than or equal to two deterrence events could occur that "require the use of contact rounds [to haze away polar bears], causing physical injuries, over the 30-year life of the Proposed Action."[264]

Based on all of these analyses, FWS concluded, in the ITS, as follows:

> Incidental effects to polar bears from the Proposed Action are expected to be in the form of short-term, minor changes in behavior which *do not create a likelihood of injury (much less cause injury)*, or are not reasonably certain to occur and therefore would not constitute harassment or any other form of take as defined by the ESA and implementing regulations (16 U.S.C. 1532(19), 50 CFR § 17.3). However, we anticipate

[260] FWS_AR000927.

[261] FWS_AR000926-927, 000972-976.

[262] FWS_AR000927; 50 C.F.R. § 402.14(g)(7) (incidental take included in ITS must be "reasonably certain to occur").

[263] FWS_AR000929-930.

[264] FWS_AR000930; *see* 50 C.F.R. §§ 17.3 (definitions of "harass" and "incidental taking"), 402.02 (definition of "incidental take").

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> that up to 2 bears may be hazed with non-lethal contact rounds over the life of the project.[265]

Accordingly, FWS's ITS authorizes (i) zero polar bear takes associated with potential behavioral disturbance effects because they do not create a "likelihood of injury," (ii) zero takes associated with potential den disturbance effects because such effects are not "reasonably certain to occur," and (iii) up to two takes resulting from hazing events.[266]

SILA's effort to create confusion is therefore belied by the record. FWS plainly evaluated these three categories of "effects of the action" on polar bears and determined that two of them would not result in "take" and that one of them would result in up to two takes. SILA's statement that the ITS "fails to acknowledge the BiOp's finding that human-bear interactions 'causing physical injuries' would occur"[267] is contrary to the record. The ITS does precisely that by concluding that "up to 2 bears may be hazed with non-lethal contact rounds."[268] This is why the BiOp requires re-initiation of consultation "[i]f human-polar bear interactions result in injury of more than 2 polar bears over the life

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[265] FWS_AR000945.

[266] Take by hazing is carried out in pursuant to MMPA authorizations. Because the ESA does not permit FWS to authorize incidental take of marine mammals until the take has been authorized under the MMPA, FWS made its authorization of the two hazing-related takes contingent upon issuance of the appropriate MMPA authorizations. FWS_AR000945; 16 U.S.C. § 1536(b)(4)(C). This approach is consistent with the ESA and with FWS practice, and has not been challenged by either of the Plaintiffs (although SILA expresses confusion about the meaning of the MMPA authorization provisions, SILA Br. at 39).

[267] SILA Br. at 39.

[268] FWS_AR000945.

of the project."[269] SILA's further allegation that FWS "downplay[ed] the model's findings regarding the probability of take from den disturbance" is also entirely divorced from the record.[270] FWS placed the *exact results* of its probability analysis in the BiOp itself (*see infra*) and then transparently reproduced the entire scientific modeling exercise in Appendix B.[271]

CBD argues that FWS failed "to specify the amount of take from disturbance."[272] But FWS expressly found that *no take* associated with behavioral disturbance would occur because any such disturbance would be in the "form of short-term, minor changes in behavior which do not create a likelihood of injury (much less cause injury)."[273] If disturbance does not create a "likelihood of injury," it does not constitute take by harassment under the ESA.[274] Such a finding was *entirely absent* from the Liberty BiOp, and CBD's attempts to draw parallels to that case are therefore meritless.[275] Ultimately, CBD's argument boils down to a disagreement with FWS's expert judgment that

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[269] FWS_AR000947; 50 C.F.R. § 402.16(a). CBD also attacks the re-initiation notice, misleadingly deleting "human-polar bear" from its complaint about "levels of ~~human-polar bear~~ interactions." *Compare* CBD Br. at 36 *with* FWS_AR000769. Clearly, FWS can and should reinitiate consultation if the level of human-polar bear interactions exceeds what FWS analyzed in the BiOp. 50 C.F.R. § 402.16(a)(1).

[270] SILA Br. at 40.

[271] *See* FWS_AR000926-927, 000972-976.

[272] CBD Br. at 35-36.

[273] FWS_AR000945.

[274] *See* 50 C.F.R. § 17.3.

[275] *CBD v. Bernhardt*, 982 F.3d at 749-50.

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behavioral disturbance effects would be "short-term" and "minor" and would not create a "likelihood of injury."[276] Such scientific determinations are entitled to the highest level of deference.[277]

In sum, Plaintiffs' complaints cannot be squared with the BiOp or the ITS. FWS properly evaluated the "effects of the action," concluded that some of those effects (hazing) could cause "take," and appropriately identified that "take" in the ITS. FWS also rationally concluded that other "effects of the action" would not cause "take," and explained that conclusion in the ITS as well. Plaintiffs' arguments are contrary to the record and should be rejected.[278]

D. The Corps Complied with the Clean Water Act in Issuing the 404 Permit for the Willow Project.

The Corps issued ConocoPhillips a permit pursuant to CWA Section 404 authorizing the fill of approximately 481 acres of wetlands.[279] This 404 permit includes an approved Compensatory Mitigation Plan ("CMP") to offset unavoidable impacts to

[276] In stating that FWS "suggests such disturbance would rise to the level of take under the MMPA," CBD confuses the MMPA's definition of "Level B harassment" (which does *not* require a "likelihood of injury") with FWS's ESA definition of "harassment" (which does). *See* 16 U.S.C. § 1362(18)(A)(ii), (D); 50 C.F.R. § 17.3.

[277] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" (quoting *Kleppe*, 427 U.S. at 412).

[278] Because CBD's claim that BLM violated the ESA relies entirely on CBD's meritless claim that the BiOp is unlawful, it should also be denied. CBD Br. at 44-45.

[279] Corps_AR000001-144.

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aquatic resources.[280] SILA claims that the Corps violated the CWA because it (1) lacked sufficient information to conclude the Willow Project would not cause significant degradation; and (2) neglected to analyze the sufficiency of the proposed mitigation for the Willow Project.[281] SILA's arguments are unsupported and have no merit.[282]

The Section 404 permit process is governed by both the Corps' regulations at 33 C.F.R. parts 320-29 and by the EPA's guidelines at 40 C.F.R. part 230.[283] On judicial review, the proper inquiry is whether "the Corps' 'decision [to issue the permit] was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[284] Additionally, courts exercise deference on matters involving an agency's area of expertise, including review of mitigation measures.[285]

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[280] Corps_AR000326-612.

[281] SILA Br. at 26-33.

[282] Conspicuously absent from SILA's nine pages of CWA argument is citation to *any* caselaw supporting its contention that the Corps violated the CWA.

[283] 33 U.S.C. § 1344; *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 946-47 (9th Cir. 2008).

[284] *Bering Strait Citizens*, 524 F.3d at 949 (brackets in original) (quoting *Marsh*, 490 U.S. at 378).

[285] *See Marsh,* 490 U.S. at 377; *Native Vill. of Chickaloon v. Nat'l Marine Fisheries Serv.*, 947 F. Supp. 2d 1031, 1060 (D. Alaska 2013) ("[T]he record reflects that the agency did consider additional [mitigation measures] and exercised its expertise to determine that they were not necessary."); *Salazar*, 695 F.3d at 908 (rejecting challenges to mitigation measures).

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1. The Corps Had Sufficient Information to Conclude That the Willow Project Would not Cause Significant Degradation.

SILA claims that the Corps violated the CWA because it lacked sufficient information to conclude the Willow Project would not cause significant degradation.[286] SILA makes several arguments, none of which are availing.

First, SILA reprises its NEPA arguments, claiming that the Corps "lacked baseline resource and project information relevant to Willow's direct impacts, including site-specific information on the location and placement of fill materials and water flow levels."[287] SILA is mistaken. ConocoPhillips' CWA 404 permit application provides the location, footprint, and quantity of fill material to be used for each component of the Project.[288] The application provides documentation of each specific type of wetland proposed to be filled, categorized by National Wetland Inventory code.[289] ConocoPhillips also submitted detailed hydrological studies identifying the velocity, flow, depth, water quality, and discharge values for applicable water resources.[290] Nothing more was required.

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[286] SILA Br. at 26-29.

[287] *Id.* at 26.

[288] *See generally*, Corps_AR004942-5604, 4241-478; *see also* Corps_AR004267-269, 004271-272, 004985-988.

[289] *See* Corps_AR004987, 005174-5210.

[290] *See, e.g.,* BLM_AR145089-146, 135405-428, 135483-486, 135515-519.

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Second, SILA erroneously asserts that there was no assessment of the functional values of impacted wetlands.[291] Even though the assessment demanded by SILA is not required, an aquatic site assessment *was* completed for the Willow Project.[292] This analysis "assessed wetlands proposed to be impacted by the Willow Project…as well as wetlands and waterbodies that would receive functional uplift as a result of three compensatory mitigation projects proposed by CPAI."[293] SILA is also incorrect in contending that "the Corps did not actually analyze the loss of functions of wetlands from Willow in the EIS or ROD," and "merely listed the types of wetlands occurring in the project area and examples of functions that could be impacted."[294] The FEIS and its appendices provide extensive information about wetland types, functions, values, and impacts.[295] The Corps explained that it had "participated in the development of the DEIS, SDEIS, and FEIS as a Cooperating Agency and believes that wetland impacts have been

[291] SILA misleadingly claims that the Corps sought to pause the Willow Project's permitting process to perform an aquatic site assessment but was overruled by BLM. SILA Br. at 26-27. SILA's citation to a single document provides no support for this proposition. *Id.* at 27 (citing BLM_AR103085-086). The document contains a single unattributed question: "is there a point where the project can be paused while USACE works through technical issues?" BLM_AR103086. There is no description of who raised the question, what technical issues the unidentified individual was referring to, or whether any pause was actually being requested.

[292] *See* Corps_AR000169, 000453-532.

[293] Corps_AR000461.

[294] SILA Br. at 27.

[295] *See, e.g.,* BLM_AR182493-506, 185546-557.

sufficiently evaluated and addressed in the EIS process."[296] The Corps had all information it needed to evaluate the impacts of the Project.

Third, SILA mistakenly argues that the Corps did not analyze site-specific impacts from fugitive dust or water impoundment in its analysis.[297] Secondary impacts, including those related to water impoundment and dust, are discussed in detail in the FEIS and in the appendices.[298] Additionally, the aquatic site assessment analyzes secondary effects from potential fugitive dust and water impoundment, including how many acres would be indirectly impacted for purposes of determining the appropriate compensatory mitigation.[299] In its ROD, the Corps concurred that "[s]ite specific data regarding these [secondary] impacts are quantified as acres of wetlands by [National Wetlands Inventory] type in Appendix E.9. The FEIS clearly considers the impacts in question and this analysis is sufficient to inform the Corps' permit decision.[300]

Fourth, SILA argues that the Corps neglected to address a supposed "64% chance Willow's culverts would not function properly during their lifetime."[301] SILA supports this claim by taking out of context a figure in the FEIS's Water Resources appendix that

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[296] Corps_AR000169.

[297] SILA Br. at 27-28.

[298] *See, e.g.,* BLM_AR182503-504, 185900-905; 185556.

[299] *See* Corps_AR000466-468.

[300] Corps_AR000175.

[301] SILA Br. at 28. SILA did not raise this claim during the comment period and therefore waived it. *See Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007).

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shows the chance of a 50-year flood event exceeding the hydraulic design of a culvert that is left in place for 50 years.[302] SILA ignores the comprehensive discussion of culvert design in the FEIS[303] as well as the ROD's required mitigation measures to ensure that Project culverts "perform satisfactorily for all flood events *up to and including the 50-year event*."[304] It also ignores the other design features and mitigation measures that will maintain natural surface drainage to prevent or minimize water impoundment, including the identification of locations requiring cross-drainage culverts during spring break-up prior to construction, annual surveillance of culverts to confirm proper functioning, and as-needed installation of additional culverts.[305]

Finally, SILA contends that the Corps arbitrarily limited its analysis of secondary effects to areas within 100 meters of gravel fill, asserting that this distance is "inconsistent with" the Corps' use of a 500-foot buffer for anadromous waterways.[306] SILA's argument conflates two distinct analytical standards and misunderstands the Corps' process for evaluating compensatory mitigation. The 100-meter (328-foot) radius is routinely used to define the area of indirect impacts around a project's gravel

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[302] BLM_AR185535.

[303] BLM_AR182400 ("Culvert size, design, and layout would be determined based on site-specific conditions to pass the 50-year flood event with a headwater elevation not exceeding the top of the culvert.").

[304] BLM_AR186081 (emphasis added).

[305] *See* BLM_AR186083, 182400; Corps_AR004979.

[306] SILA Br. at 28. SILA also failed to raise this claim in its comments and therefore waived it. *See supra* note 301.

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components and is based on peer-reviewed studies of dust distribution on the Dalton Highway.[307] EISs for several recent North Slope projects, including those for GMT-1, GMT-2, and the Nanushuk Project, have consistently used this same 100-meter buffer to evaluate indirect impacts, including those from fugitive dust.[308]

The 500-foot stream buffer, on the other hand, is used by the Corps to delineate areas within specific fish-bearing waters that may be impacted by gravel fill and may require compensatory mitigation. This figure comes from the Corps' Alaska District Compensatory Mitigation Thought Process guidance document, which identifies six instances where compensatory mitigation may be required, including scenarios where fill is "placed in *fish bearing waters* and jurisdictional wetlands *within 500 feet of such waters* when impacts are determined to be more than minimal."[309] The 100-meter and 500-foot radii are two different tools that serve different analytical purposes. There is no inconsistency in the Corps' evaluation of secondary effects and SILA fails to identify any

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[307] BLM_AR277003-04, 182503.

[308] *See* BLM_AR273698 (GMT-2 Final EIS noting "[f]or this analysis, as for the GMT1 analysis before it (BLM 2014), the area of indirect impact was determined by applying a 328-foot-wide buffer to the perimeter of gravel filled areas and calculating the area of each vegetation and wetland type within the impact zone using GIS."); BLM_AR277003 (same for Nanushuk Final EIS).

[309] *See also* U.S. Army Corps of Eng'rs, Alaska District Compensatory Mitigation Thought Process (Sept. 18, 2018) at 5, https://www.poa.usace.army.mil/Portals/34/docs/regulatory/2018MitigationThoughtProcess.pdf (emphasis added); Corps_AR000335 ("In the Alaska District, implementation of regulations governing compensatory mitigation is guided by…the Alaska District Compensatory Mitigation Thought Process.") (quotations and citation omitted).

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authority requiring the agencies to consider secondary effects beyond a 100-meter radius. Indeed, such a requirement would make little sense as "[r]oad dust has the greatest effect within 35 feet of a road" and "[r]oughly 95% of dust settles within 328 feet (100 m) from a road surface."[310]

In short, the record demonstrates that the Corps had a sufficient basis to reasonably conclude that the Willow Project would not result in significant degradation.[311] Accordingly, SILA's significant degradation claim should be denied.

2. The Corps Appropriately Minimized and Mitigated the Impacts of the Willow Project.

With respect to the required mitigation for the Willow Project, SILA first nitpicks the steps the Corps required ConocoPhillips to take to maintain natural drainage and preserve floodplain connectivity.[312] But SILA disregards the extensive discussion of culvert design in the both the permit application and FEIS as well as the comprehensive suite of mitigation measures adopted in BLM's ROD[313] and the Corps' ROD (and Special Conditions on the permit)[314] to maintain natural surface drainage. In a similar vein, SILA

[310] BLM_AR182503 (citations omitted).

[311] *Bering Strait Citizens*, 524 F.3d at 949 ("Because the Corps thoroughly and rationally considered the relevant factors… it cannot be said that its determination was arbitrary and capricious, or that its conclusion was contrary to law.").

[312] SILA Br. at 29-30.

[313] *See* BLM_AR182400, 186081-83; Corps_AR004979.

[314] Corps_AR000189-197.

alleges that the Corps' requirements for mitigation of fugitive dust are "vague."[315] But the FEIS contains a standalone "Dust Control Plan" appendix detailing the various mitigation measures that will address fugitive dust.[316] Additionally, both BLM's and the Corps' respective RODs contain additional dust control requirements and best management practices that will curtail impacts from fugitive dust.[317] The Corps rationally determined that ConocoPhillips "has avoided and minimized impacts to the waters of the U.S., including wetlands to the maximum extent practicable."[318] This reasoned conclusion is entitled to deference.[319]

Next, SILA faults the amount of compensatory mitigation approved for the Willow Project. But these criticisms also contradict the record and ignore applicable law.[320]

"The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by

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[315] SILA Br. at 30.

[316] BLM_AR185900-05.

[317] *See* Corps_AR000210; BLM_AR186080; Corps_AR000196.

[318] Corps_AR000183.

[319] *See Gaule v. Meade*, 402 F. Supp. 2d 1078, 1087 (D. Alaska 2005) (determining with respect to the effectiveness of mitigation measures, "[t]he Court is not here to substitute its judgment for that of the agency").

[320] SILA repeats its meritless argument that no assessment of impacts to wetland functions took place. SILA Br. at 30; *see supra* Section IV.D.1.

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[Department of the Army] permits."[321] This is "based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity."[322] Compensatory mitigation may be sited on public or private lands and may be carried out via restoration, enhancement, establishment, and preservation.[323] The Corps' regulations provide that "[a]ll compensatory mitigation will be for *significant resource losses* which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment."[324] Compensatory mitigation is not mandated and may be required in the Corps' discretion.[325]

ConocoPhillips prioritized mitigating impacts to aquatic resources that support subsistence resources for the community of Nuiqsut.[326] The approved CMP for the Willow Project includes subsistence trail tundra rehabilitation projects for the communities of Nuiqsut and Anaktuvuk Pass, which will place geogrid material over approximately 10 miles of existing rutted all-terrain vehicle trails to protect vegetation, soils, hydrology, wetland function, and aesthetics near these communities.[327] These

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[321] 33 C.F.R. § 332.3(a)(1); *see also* 40 C.F.R. § 230.93(a)(1) (same).

[322] 33 C.F.R. § 332.3(a)(1).

[323] *Id.* § 332.3(a)(2)-(3).

[324] *Id.* § 320.4(r)(2) (emphasis added).

[325] *See id.*; *see also* 33 C.F.R. § 332.1(c)(3) (compensatory mitigation "may be required"); *Cook Inletkeeper v. U.S. Army Corps of Eng'rs*, 541 F. App'x 787 (9th Cir. 2013).

[326] Corps_AR000335.

[327] Corps_AR000337-338, 000357-358, 000375-378.

rehabilitation projects will enhance 209.1 acres of wetlands.[328] ConocoPhillips will also complete a culvert repair project in Nuiqsut that will enhance 12 acres of waters and wetlands abutting the Nigliq Channel of the Colville River by replacing four culvert batteries near the center of the community. The CMP also provides for the preservation of 800 acres of high-functioning wetlands that would otherwise be subject to future development at Cape Halkett.[329] The Corps determined that ConocoPhillips' "mitigation plan would provide appropriate and sufficient compensatory mitigation required to offset unavoidable losses to aquatic resources authorized by the [Section 404] permit."[330] The Corps approved the 287-page CMP and incorporated it into the 404 Permit for the project.[331]

SILA erroneously complains that the CMP mitigates "only a fraction of Willow's direct and secondary impacts" and is insufficiently explained by the Corps.[332] Both the CMP and the Corps' ROD explain in technical detail how the agency used the watershed approach—pursuant to 33 C.F.R. Section 332.2(c)—to evaluate which project elements would result in *significant impacts* requiring compensatory mitigation.[333] Consistent with applicable regulations and the Corps' Alaska District Thought Process guidance

[328] Corps_AR000336.

[329] Corps_AR004012-014.

[330] Corps_AR000188.

[331] Corps_AR000008.

[332] SILA Br. at 31.

[333] *See* Corps_AR000183-188, 000326-612 (CMP).

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document, the Corps determined that compensatory mitigation is required for significant unavoidable direct and indirect impacts for 29.4 acres occurring within 500 feet of anadromous fish-bearing waters, and for an additional 208.5 acres of direct and indirect impacts occurring within the Teshekpuk Lake and Colville River Special Areas.[334] Neither the Corps' regulations nor Ninth Circuit precedent require that mitigation *completely* compensate for *all* adverse environmental impacts.[335] The Corps explained the technical methodology it used to determine the appropriate compensatory mitigation for the Willow Project, and that determination is entitled to deference.[336]

SILA also criticizes the preservation component of the CMP, which will permanently protect 805 acres of high-functioning wetlands at Cape Halkett that would otherwise be susceptible to future development.[337] Cape Halkett's pristine coastline abuts the Beaufort Sea and is immediately adjacent to the Teshekpuk Lake Special Area.[338]

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[334] Corps_AR000183-188, 000348-350.

[335] *See* 33 C.F.R. § 320.4(r)(2) (compensatory mitigation may be required for *significant resource losses* that are specifically identifiable and reasonably likely to occur); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) ("Even if the mitigation measures in the present case would not completely compensate for all adverse environmental impacts, this shortcoming would not be detrimental. In this circuit, so long as significant measures are undertaken to 'mitigate the project's effects,' they need not *completely compensate* for adverse environmental impacts.") (citation omitted).

[336] *See Cook Inletkeeper v. U.S. Army Corps of Eng'rs*, No. 3:12-CV-0205-RRB, 2013 WL 12155342, at *1 (D. Alaska Feb. 11, 2013), *aff'd sub nom.*, 541 F. App'x 787 (9th Cir. 2013) ("Certainly this Court must extend deference to the Corps' technical expertise regarding [issuance of a 404 permit]").

[337] Corps_AR000601.

[338] Corps_AR000356.

SILA claims that the CMP does not identify the area to be preserved or the threat of development with sufficient specificity, and contends there is insufficient information "regarding what activities would be permitted to occur at the sites, and what legal instrument would be used to ensure protection of whichever site is chosen."[339]

As SILA should know from the prior filings in this case, ConocoPhillips already prepared and executed a deed restriction in consultation with the Corps and Arctic Slope Regional Corporation permanently preserving 805 acres of high-value wetlands and waterbodies at Cape Halkett for wildlife conservation and environmental protection.[340] The precise location of the Preservation Area falls within the larger parcel, and watershed, identified in the CMP.[341] Prior to its designation for preservation, the Cape Halkett parcel was not subject to restrictions on development and provided an attractive location for placing surface infrastructure to support offshore development in tidelands subject to oil and gas leasing by the State of Alaska to the east, or for directional drilling on adjacent lands that are available for subsurface fluid mineral leasing under BLM's

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[339] SILA Br. at 33.

[340] *See* Declaration of Jason Lyons ("Lyons Decl."), Dkt. 16-3, *Sovereign Iñupiat for a Living Arctic v. BLM*, Case No. 21-35085 (9th Cir. Feb. 20, 2021). The Court may take judicial notice of court filings and other matters of public record from this litigation. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

[341] Lyons Decl. at 13 (Exhibit 2 Map); Corps_AR000601 ("The 800-acre preservation parcel at Cape Halkett is located within the Umiat Meridian of the [USGS] Quadrangle maps of Harrison Bay D-4…"); Corps_AR000417-418.

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2020 Integrated Activity Plan to the west.[342] The suitability of Cape Halkett for preservation is confirmed by the fact that lands at Cape Halkett have previously been approved by the Corps for preservation credits for other projects.[343] And consistent with the CMP, the restrictive covenant prohibits surface-disturbing activities such as dredging, excavation, discharge of fill materials, drilling, surface mining, permanent structures, and ice roads, while allowing for local recreational and subsistence activities such as hunting, fishing, trapping, egg gathering, berry-picking and vegetation collection.[344] In sum, the Court should deny SILA's CWA claims.

E. Vacatur Is Not the Appropriate Remedy.

Plaintiffs request—with little supporting argument—that the Court vacate the challenged agency decisions. As an initial matter, if this Court finds any merit in Plaintiffs' claims, ConocoPhillips respectfully requests the opportunity to address the appropriate remedy through supplemental briefing and argument. Should a remedy be necessary in this case, it will inevitably hinge on the type of legal error found by the Court and the consequences that would flow from vacating the particular agency decision

[342] Corps_AR000356 ("The large Smith Bay discovery is nearby, to the northeast, and has generated significant industry interest in oil and gas exploration and development in this area…. Shell filed an application with the State … to form the West Harrison Bay unit consisting of 18 leases in West Harrison Bay, which is only about five miles from Cape Halkett preservation lands.").

[343] *Id*. ("Lands at Cape Halkett were approved for preservation credit for recent oil and gas related projects (GMT1 and AES Deadhorse Pad).").

[344] *See* Corps_AR000342-343; Lyons Decl. at 8-9.

found to be in error. These issues can only be addressed in an informed way, through additional briefing, after the Court has issued a summary judgment order.

Although an agency action that is held to be unlawful can be set aside under the APA,[345] vacatur is "a species of equitable relief," and "courts are not mechanically obligated to vacate agency decisions that they find invalid."[346] "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"[347] The Ninth Circuit has made clear that in considering whether vacatur is appropriate, courts should consider economic and other practical concerns.[348]

As a general matter, vacatur of any of the challenged agency decisions is not warranted here because it would have highly disruptive consequences, including but not limited to consequences affecting ConocoPhillips' ability to develop the leases in which

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[345] 5 U.S.C. § 706(2)(A).

[346] *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1017 (E.D. Cal. 2013); *see also Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("Although the district court has power to do so, *it is not required to set aside every unlawful agency action*." (emphasis added)); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures.").

[347] *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

[348] *Id.* at 994 ("[I]f saving a snail warrants judicial restraint, so does saving the power supply." (citation omitted)).

it has made a substantial investment.[349] This investment would be severely impaired or lost altogether if agency decisions are vacated and ConocoPhillips is required to start permitting processes over again substantially or entirely from ground zero.

V. CONCLUSION

The Willow Project has undergone rigorous permitting review, involving numerous local, state, and federal agencies, and is strongly supported by stakeholders. As explained above, Plaintiffs' attempts to poke holes in the agencies' careful and comprehensive analyses are time-barred (NEPA), inconsistent with the administrative record, and substantively meritless. ConocoPhillips respectfully requests that the Court deny Plaintiffs' motion for summary judgment and grant Defendants' and Intervenor-Defendants' cross-motions for summary judgment.

DATED: May 26, 2021.

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[349] ConocoPhillips has invested approximately $500 million in lease acquisition, exploration and appraisal drilling, conceptual engineering, permitting, and other expenditures to find the Willow discovery, plan the development, and secure BLM's approval. *See* Case No. 3:20-cv-00290-SLG, Dkt. 28-3 (Declaration of Connor Dunn ¶¶ 23-25) and Dkt. 28-4 (Declaration of James Brodie ¶ 19).

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 18,957 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the 19,000-word limit applicable to ConocoPhillips that has been granted by the Court.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court of Alaska by using the CM/ECF system. Participants in this Case No. 3:20-cv-00290-SLG and 3:20-cv-00308-SLG who are registered CM/ECF users will be served by the CM/ECF system.

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