IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SHELL GULF OF MEXICO, INC, *et al.*, Plaintiffs, vs. CENTER FOR BIOLOGICAL DIVERSITY, INC., *et al.*, Defendants.	Case No. 3:12-CV-00048-RRB
ALASKA WILDERNESS LEAGUE, *et al.*, Plaintiffs, vs. UNITED STATES DEPARTMENT OF THE INTERIOR., *et al.*, Defendants.	Case No. 1:12-CV-00010-RRB Order Denying Motion For Summary Judgment and Granting Cross-Motions For Summary Judgment

I. INTRODUCTION

The matter before the Court involves two lawsuits: *Shell Gulf of Mexico, Inc. v. Ctr. for Biological Diversity*, No. 3:12-cv-00048-RRB (D. Alaska filed Feb. 29, 2012), and *Alaska Wilderness League v. Dep't of the Interior*, No. 1:12-cv-00010-RRB (D. Alaska filed July 10, 2012). *Shell Gulf of Mexico* is a declaratory judgment action, and *Alaska Wilderness League* is an action

under the Administrative Procedure Act ("APA"). The single point of dispute in both cases is the propriety of two oil spill response plans (referred to hereafter as "OSRP") that were approved by the Department of Interior's Bureau of Safety and Environmental Enforcement ("BSEE"). The plans in question were submitted by Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. (collectively, "Shell") and related to activities to take place in the Chukchi and Beaufort Seas. The parties in both cases ask the Court to ensure that the approvals comport with the standards of the APA. Because the lead case in this action is *Shell Gulf of Mexico*, all docket numbers will refer to that case; yet the Court's findings will apply to both cases. The Court will treat the two suits as a single case and rule on the validity of the BSEE approvals.

There are three groups of parties in these two consolidated cases: (1) Shell – plaintiffs in the *Shell Gulf of Mexico* case and defendant-intervenors in the *Alaska Wilderness League* case; (2) Center For Biological Diversity, Inc.; Redoil, Inc.; Alaska Wilderness League; Natural Resources Defense Council, Inc.; Pacific Environment and Resources Center; Sierra Club; Ocean Conservancy, Inc.; Oceana, Inc.; Greenpeace, Inc.; National Audubon Society, Inc.; Defenders of Wildlife; Northern Alaska Environmental Center; and The Wilderness Society (collectively, the "Organizations") – who are defendants in the *Shell Gulf of Mexico* case and plaintiffs in the *Alaska Wilderness League* case;[1] and (3) the Department of the Interior; Sally Jewell, Secretary of the Interior; the BSEE; James Watson, Director of the BSEE; and Mark Fesmire, Regional Director of the BSEE, Alaska Region (collectively, the "Government") – who are defendants in the *Alaska Wilderness League* case.

[1] Defenders of Wildlife, Northern Alaska Environmental Center, and The Wilderness Society are defendants in the *Shell Gulf of Mexico* case, but *not* plaintiffs in the *Alaska Wilderness League* case.

At Docket Number 134, the Organizations request that the Court grant summary judgment on their behalf. The Organizations challenge the decision of the BSEE approving Shell's two OSRPs.[2] The OSRPs were prepared pursuant to the Oil Pollution Act's amendments to the Federal Water Pollution Control Act (the Clean Water Act, "CWA").[3] These various statutes require owners and operators of offshore facilities to prepare and submit for approval an OSRP for the prevention, containment, and cleanup of oil spills from their facilities.[4] The Organizations contend that Shell's OSRPs were inadequate and that the BSEE's approvals were arbitrary, capricious, or contrary to law.[5]

At Docket Number 137, the Government opposes and files a cross-motion for summary judgment. The Government argues that the Organizations' claims are based on a misreading of the laws, a misreading of Shell's OSRPs, and a misreading of the studies on which the OSRPs are based.[6] The Government asserts that the BSEE's approval of the two response plans is not arbitrary, capricious, or contrary to law.[7]

At Docket Number 138, Shell likewise opposes the Organizations' Summary Judgment Motion and files a cross-motion for summary judgment. Shell seeks a declaration from the Court that the BSEE complied with the APA when it approved the OSRPs and determined that the OSRPs

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[2]Docket No. 134 at 10.

[3]*Id.*

[4]*Id.*

[5]*See id.* at 10-11.

[6]Docket No. 137 at 14.

[7]*Id.*

complied with the requirements of the CWA, the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA").[8] Shell asserts that its OSRPs "not only meet the regulatory requirements, they far exceed them . . . ."[9]

Inasmuch as the Court has determined that the BSEE approvals of Shell's Beaufort Sea and Chukchi Sea OSRPs fulfilled the applicable CWA, NEPA, and ESA requirements, the approvals do not violate the APA.[10]

II. STANDARD OF REVIEW

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. A court may grant summary judgment if the motion and supporting materials show that the movant is so entitled.[11]

B. Administrative Procedure Act

Under the APA, "final agency action for which there is no other adequate remedy in a court is subject to judicial review."[12] "[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the

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[8]Docket No. 138 at 15.

[9]*Id.* at 14.

[10]The Court adopts the relevant factual portions of Docket Number 88 at 3-5 as the background of the case.

[11]Fed. R. Civ. P. 56(e)(2), (3).

[12]5 U.S.C. § 704 (1966).

terms of an agency action."[13] After a court has finished reviewing the action, the "court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law . . . ."[14]

Judicial review of agency action is limited to those actions required by law.[15] A court cannot review agency action that Congress has left to agency discretion.[16] Once a court is "satisfied that an agency's exercise of discretion is truly informed," a court "'must defer to th[at] informed discretion.'"[17] Yet, "an agency must cogently explain why it has exercised its discretion in a given manner . . . ."[18] Additionally, even if agency decision making is discretionary, the required procedures of such decision making may not be.[19]

"Summary judgment is an appropriate mechanism for" resolving disputes over agency action.[20] "[T]he function of the district court is to determine whether or not as a matter of law the

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[13] 5 U.S.C. § 706 (1966).

[14] 5 U.S.C. § 706(2)(A), (C), (D).

[15] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64-65 (2004).

[16] *Id*.

[17] *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331-32 (9th Cir. 1992) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)).

[18] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983).

[19] *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

[20] *City & Cnty. of S. F. v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985)).

evidence in the administrative record permitted the agency to make the decision it did."[21] However, the agency is the fact finder, not the district court.[22]

When reviewing "under the arbitrary and capricious standard[,]" a court is deferential to the agency involved.[23] The agency's action is to be "presum[ed] . . . valid."[24] A court should

> not vacate an agency's decision unless it 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'[25]

If an agency has not committed one of the these errors, and "'a reasonable basis exists for its decision[,]'" the action should be affirmed.[26] But in considering whether there is a reasonable basis for the action, a "reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[27] A court's

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[21]*Id.* (quoting *Occidental Eng'g Co.*, 753 F.2d at 769).

[22]*Occidental Eng'g Co.*, 753 F.2d at 769.

[23]*Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

[24]*Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011) (quoting *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)).

[25]*Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43).

[26]*Cal. Wilderness Coal.*, 631 F.3d at 1084 (quoting *Nw. Ecosystem Alliance*, 475 F.3d at 1140).

[27]*Marsh*, 490 U.S. at 377-78 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

consideration of agency action must be "'thorough, probing, [and] in-depth . . . .'"[28] A reviewing court "'must not rubber-stamp . . . administrative decisions that [a court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'"[29] An agency must have taken "a 'hard look' at the potential . . . impacts at issue."[30] Moreover, if the agency does not satisfactorily explain its decision, a court should not attempt itself to make up for any deficiencies: A court may not supply a reasoned basis for the agency's action that the agency itself has not given.[31] In other words, an "agency must set forth clearly the grounds on which it acted."[32] Additionally, "an agency must account for evidence in the record that may dispute the agency's findings."[33]

A court must inquire whether "the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[34] "This inquiry must 'be searching and careful,' but 'the ultimate standard of

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[28]*Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 840-41 (9th Cir. 2003) (quoting *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1098 (D.C. Cir.1996)).

[29]*Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005) (quoting *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001)).

[30]*Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1126 (9th Cir. 2012) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999)).

[31]*Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 42-43.

[32]*Atchison T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973).

[33]*Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1035 (9th Cir. 2007) *(*citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)).

[34]*Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

review is a narrow one.'"[35] "[A] court is not to substitute its judgment for that of the agency."[36] "The APA does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions . . . ."[37] Rather, a court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[38] A court "is not to second guess the agency's action[, but] . . . must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'"[39] The agency's action "'need only be a reasonable, not the best or most reasonable, decision.'"[40]

Deference to an agency's factual conclusions is important when the subject matter involves an agency's experts' complex scientific and technical opinions: "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."[41]

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[35]*Marsh,* 490 U.S. at 377-78 (quoting *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 416).

[36]*Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 42-43.

[37]*River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978)).

[38]*Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43).

[39]*Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1036 (9th Cir. 2010) (quoting *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009)).

[40]*River Runners for Wilderness*, 593 F.3d at 1070 (quoting *Nat'l Wildlife Fed. v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989)).

[41]*Marsh*, 490 U.S. at 377-78.

However, "[t]he deference accorded an agency's scientific or technical expertise is not unlimited."[42] "The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned."[43] A court "defer[s] to agency expertise on methodology issues, 'unless the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision.'"[44]

"Unlike substantive challenges [under the arbitrary and capricious standard, a court's] review of an agency's procedural compliance is exacting, yet limited."[45] A court is limited to ensuring that statutorily prescribed procedures have been followed.[46] Indeed, "'regulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum found in that Act.'"

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[42]*Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (citing *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 679 (D. D.C. 1997)).

[43]*Id.* (citing *Defenders of Wildlife*, 958 F.Supp. at 679).

[44]*Id.* (quoting *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993)).

[45]*Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1075-76 (9th Cir. 2006) (quoting *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045, 1048-49 (D.C. Cir. 1979)).

[46]*Id. (*quoting *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002)).

III. DISCUSSION

A. The Clean Water Act

1. BSEE approval process was not flawed.

The Organizations argue that the BSEE's approach in approving the OSRPs was contrary to congressional intent.[47] Specifically, the Organizations assert that "Congress did not dictate the parts of an oil spill response plan and then direct the agency to approve the plan so long as it included those parts."[48] According to the Organizations, the CWA requires the "BSEE to exercise independent judgment to ensure a company is prepared, to the maximum extent practicable, to clean up an oil spill and prevent, minimize, and mitigate damage to the environment."[49] Such a broad grant of approval power, argues the Organizations, does not prescribe or limit the considerations the BSEE could evaluate in deciding whether an OSRP satisfies the statutory mandate.[50] Thus, the Organizations contend that the BSEE was not automatically required to approve the OSRPs once it determined that the OSRPs met all of the requirements outlined in the implementing regulations found at 30 C.F.R. pt. 254.[51]

The crux of the Organizations' argument is that the BSEE should not have relied solely on the implementing regulations to determine whether or not 33 U.S.C. § 1321(j) was met. The

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[47]Docket No. 141 at 12.

[48]*Id.*

[49]*Id.*

[50]*Id.*

[51]*Id.* The Organizations do not attack the validity of the BSEE's regulations, simply the regulations' use in the approval process.

Organizations argue that the BSEE should have looked *beyond* the implementing regulations in determining that Shell could respond, to the maximum extent practicable, to a worst case discharge ("WCD"), and a substantial threat of such a discharge, of oil or a hazardous substance. In short, the Organizations claim that the regulations did not automatically fulfill the OSRP statutory requirements outlined in § 1321(j). The Court disagrees.

Under the CWA, the President *shall* issue *regulations* which require an owner or operator of an offshore oil facility "to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance."[52] Such plan shall identify, and ensure the availability of, private personnel and equipment necessary to remove, to the maximum extent practicable, a worst case discharge and to mitigate or prevent a substantial threat of such a discharge.[53] After reviewing a response plan, the President *shall* approve any plan that meets the requirements of § 1321(j).[54] The President's review and approval authority under § 1321(j)(5) was delegated to the Secretary of the Interior through Executive Order Number 12777.[55] Based on such delegation, the BSEE promulgated regulations implementing the CWA's requirements in § 1321(j).

Here, the Court finds no fault with the BSEE's approval procedure. It is clear that once the BSEE found that the OSRPs fulfilled the regulatory requirements of 30 C.F.R. pt. 254, the BSEE

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[52]33 U.S.C. § 1321(j)(5)(A)(i)(2012).

[53]§ 1321(j)(5)(D)(iii).

[54]§ 1321(j)(5)(E)(iii).

[55]56 Fed. Reg. 54,757, 54,761-62 (Oct. 18, 1991).

determined that the OSRPs met the requirements of § 1321(j).[56] Having decided that the plans complied with § 1321(j), the BSEE had no discretion in choosing to approve the plans or not; the OSRPs had to be approved according to § 1321(j)(5)(E)(iii).[57] Congress's admonition in § 1321(j)(5)(A)(i) not only gave the BSEE a general standard to follow, but it required the BSEE to establish regulations to use when deciding whether or not such general standard was met. Deciding whether or not the OSRPs met the regulations was entirely within the purview of the BSEE, but once the plans were shown to be compliant, approval was required.

Moreover, the Court is constrained to defer to the reasoned factual conclusions established by the complex scientific and technical opinions of the BSEE's experts concerning the BSEE approval methodology.[58] The Court must also defer to the BSEE's "permissible construction of" § 1321(j), including the BSEE's definition of the ambiguous term "maximum extent practicable."[59] It is apparent that the BSEE interprets its regulations to be conterminous with the CWA, and it is the Court's opinion that, regarding OSRPs, the CWA does not require more than that which the BSEE regulations demand. Additionally, by using a checklist to ensure compliance with the BSEE regulations, the BSEE enhanced its thoroughness and confirmed that the OSRPs observed each

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[56]Docket No. 138-8 (BSEE final regulatory checklist for Chukchi OSRP showing compliance with 30 C.F.R. pt. 254); Docket No. 138-9 (BSEE final regulatory checklist for Beaufort OSRP showing compliance with 30 C.F.R. pt. 254).

[57]Docket No. 134-38 (BSEE approval of Chukchi OSRP); Docket No. 134-36 (BSEE approval of Beaufort OSRP).

[58]*Marsh*, 490 U.S. at 377-78.

[59]*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). BSEE definition of "maximum extent practicable" found at 30 C.F.R. § 254.6.

applicable CWA condition. Therefore, the Court finds that the BSEE OSRP approval process was not contrary to congressional intent and did not violate the APA.

2. BSEE approvals not based on erroneous planning assumption.

The Organizations contend that the BSEE approvals were premised on the unsupported planning assumption that Shell would recover "95 percent of the worst case discharge with the offshore recovery efforts."[60] Such an assumption is untenable, according to the Organizations, and the "BSEE acted arbitrarily when it failed to consider the adequacy of Shell's nearshore and shoreline resources if Shell's planning assumptions were wrong."[61] However, the Organizations misread and misunderstood Shell's "95 percent" language.

When reviewing whether an OSRP properly prepares for a WCD, the BSEE calculates the size of an oil spill that the OSRP must address, looking at two factors: volume of discharge from the facility and areas affected by the discharge.[62] The volume of discharge is that of a WCD, defined by § 1321(a)(24) and calculated under 30 C.F.R. § 254.26(a) and § 254.47(b). The areas affected by the discharge are determined by looking at the "maximum distance from the facility that oil could move in a time period that it reasonably could be expected to persist in the environment."[63] Consequently, when reviewing the ability of an OSRP to deal with a WCD, the specific recovery rate

[60]Docket No. 134 at 32.

[61]*Id.*

[62]Docket No. 137 at 27.

[63]30 C.F.R. § 254.26(b) (2011).

at different locations, offshore, nearshore, and shoreline, does not come into the equation. The BSEE instead looks at winds, currents, and other natural factors.[64]

In addition to being prepared for the size of a possible WCD, an OSRP must demonstrate sufficient response capacity. Under § 254.26(d)(1), Shell must "calculate the effective daily recovery capacity of the response equipment identified in [its] response plan that [it] would use to contain and recover [a] worst case discharge."[65] For example, in its Chukchi OSRP, Shell's effective daily recovery capacity ("EDRC") is listed as 80,400 barrels a day while a WCD for the Chukchi is estimated at merely 25,000 barrels.[66] Similarly, Shell's Beaufort EDRC is 80,400 barrels, and a Beaufort WCD is 16,000 barrels.[67] In both calculations, Shell's EDRC exceeds the daily WCD estimate. Therefore, because the OSRPs address the size of a possible WCD, and because of Shell's EDRC for each sea, the BSEE found that Shell had adequately shown its ability to respond, to the maximum extent practicable, to a WCD lasting at least thirty days.[68]

Despite the BSEE's determination, however, the Organizations point to language in both OSRPs where Shell states that its planning assumption underlying the calculation for "potential shoreline response assets" under the WCD scenario is based on only 5 percent of the 25,000 barrels-a-day discharge escaping both the offshore and nearshore recovery efforts and eventually reaching

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[64]Administrative Record ("AR") Beaufort Sea ("B") -36 at C-2 to -5; Chukchi Sea ("C") -41 at C-2 to -3.

[65]30 CFR § 254.44 (2011).

[66]Docket No. 134-5 at 73 (Chukchi WCD), 80 (Chukchi EDRC).

[67]Docket No. 138-49 at 5 (Beaufort WCD), 12-13 (Beaufort EDRC).

[68]§ 254.26(d)(1). Docket No. 138-8 at 24 (Chukchi); Docket No. 138-9 at 8 (Beaufort).

the shoreline.[69] This 95 percent expected mechanical recovery rate, argues the Organizations, is an extreme overestimation of Shell's actual potential WCD recovery rate.[70]

Although it could be argued that, for planning purposes, Shell included in its OSRPs a hypothetical percentage for oil reaching nearshore and shoreline that does not comport with evidence of other actual and calculated percentages of offshore-captured oil, the BSEE did not rely on the 95 percent assumption as a factor in any part of the OSRP approval process.[71] In approving the OSRPs, the BSEE did not have to *separately* consider offshore, nearshore, and shoreline recovery capacity, but had to ensure that in the *aggregate,* Shell had sufficient response equipment and resources to contain and recover a WCD.[72] Compliance with § 254.26(d)(1) did not depend upon an estimate of the volume of oil that would reach any particular area.[73] For example, the BSEE regulations require a description of only the methods and procedures to be used to protect beaches and shoreline

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[69]AR C-41 at C-11; AR B-36 at C-12.

[70]*See, e.g.*, Docket No. 134-35 at 6-10 (the Bureau of Ocean Energy Management, Regulation and Enforcement (predecessor to BSEE) rate equals 5 to 30 percent without broken ice, 10 to 20 percent, or 1 to 20 percent with ice; International Tanker Owners Pollution Federation rate equals 5 to 30 percent; National Oceanic and Atmospheric Administration ("NOAA") rate equals 20 percent; Exxon Valdez Spill recovery rate equaled 8 percent; Deepwater Horizon Spill recovery rated equaled 3 percent); Docket No. 134-43 at 10-11 (Mayor, North Slope Borough rate equals 20 percent; Pew Environmental Group rate equals 20 percent).

[71]AR B-36 at C-11 (Beaufort WCD Scenario); AR C-41 at C-11 (Chukchi WCD Scenario).

[72]Docket No. 151 at 4-5, 10.

[73]Docket No. 137 at 29.

resources, not an estimate of the volume of oil that could escape primary response and move towards the shore.[74]

Yet, the BSEE did not simply ignore the 95 percent issue raised by the Organizations. The BSEE dutifully considered it and found that Shell was *not* stating that it would *recover* 95 percent of a WCD:

> NOAA expressed concern that it believed Shell was claiming it would mechanically recover 95% of oil spilled in any incident, which is many times more than the best performance currently achievable. *However, this was a misreading of the plan, which is not a performance standard. Shell is claiming to have the capacity to store up to 95% of the WCD volume, not that it would be able to actually collect that much.*[75]

Thus, Shell made a capacity calculation for planning purposes, not an estimate of an actual recovery rate. Shell used the 95 percent figure out of an abundance of caution despite the spill trajectories showing that it was highly unlikely that oil would migrate toward shore.[76] Moreover, Shell included the 95 percent language in the OSRPs in order to fulfill a State-of-Alaska requirement, not a BSEE regulation.[77]

Therefore, because the BSEE did not rely on Shell's 95 percent assumption in approving the OSRPs, but instead relied on other factors to find the OSRPs in compliance with 30 C.F.R. pt. 254,

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[74]Docket No. 138 at 37 (citing 30 C.F.R. § 254.23(g)(4), (7) (2011)).

[75]AR C-143 at 3 (emphasis added); *see, e.g.*, AR C-168 at 1 (the BSEE understands the planning versus performance issue and that there is no actual 95 percent recovery rate espoused by the OSRP); AR B-172 at 16 (Shell plans only to have the capacity to collect and manage that much oil).

[76]AR C-41 at 2-49 to -50 (10 percent escaping offshore response); AR B-36 at C-2 (probability of shore impact at .5 percent to 3 percent).

[77]AR B-172 at 6 (90 percent is a standard established by 18 A.A.C. 75.445(d)(4) (2013)).

and because this Court owes a degree of deference to BSEE's technical determinations and interpretations, the Court finds that, despite the 95 percent language, the BSEE did not act arbitrarily or contrary to the APA when it approved Shell's OSRPs.

3. OSRP trajectory analyses are sufficient.

The Organizations claim that the BSEE acted arbitrarily when it approved the OSRPs without more trajectory information.[78] Specifically, the Organizations assert that the OSRPs "failed to describe the conditions Shell used to develop its trajectories, making it impossible for BSEE to determine whether the trajectories are 'appropriate' for a worst case spill in adverse weather or that they reflect the 'maximum distance' oil is expected to travel."[79] However, Shell's trajectory analyses include sufficient information to show the maximum distance that oil is expected to travel.

Under § 254.26(b), "[a]n appropriate trajectory . . . must identify onshore and offshore areas that a discharge potentially could affect. The trajectory analysis chosen must reflect the maximum distance from the facility that oil could move in a time period that it reasonably could be expected to persist in the environment." The Organizations claim that the trajectory analysis for both OSRPs used the warmer month of August and favorable weather conditions to determine the maximum distance trajectory for the WCD instead of considering adverse conditions in the colder month of October, when drilling would actually take place.[80] However, despite the Organizations' contentions, the focal point of the trajectory analysis is the maximum-distance requirement. Thus,

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[78]Docket No. 134 at 39.

[79]*Id.* at 36-37.

[80]Docket No. 134 at 37.

regardless of weather conditions or time of year, the OSRPs' trajectory analyses pass regulatory muster if they represent the maximum distance that oil could travel in a WCD.

The OSRPs' trajectory analyses were based on and referenced the Beaufort Sea and Chukchi Sea Environmental Impact Statements ("EIS") prepared by the Bureau of Ocean Energy Management ("BOEM").[81] These EISs considered many "weather conditions that could impact the disposition of sea-surface oil . . . ."[82] Each EIS used trajectory analyses for 2,700 individual spills, 675 trajectories in the arctic summer and 2,025 in the arctic winter.[83] These analyses showed that oil moved farther in August than in colder months, such as October, in any weather condition.[84] Furthermore, the EISs' Very-Large-Oil-Spill analysis does not differ, in any practical sense, from the WCD analysis. Based on BOEM research, therefore, a trajectory analysis calculated on a hypothetical spill in August would represent the maximum distance that oil could travel in a WCD under § 254.26(b). Thus, employing trajectories consistent with those found in the BOEM Beaufort and Chukchi EISs, even if the trajectories were mapped out in August in favorable weather conditions, would satisfy BSEE's appropriate-trajectory requirement.[85]

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[81]AR B-36 at C-3 to -4; AR C-41 at C-2.

[82]AR C-13 at E116-17.

[83]AR B-2 at A.1-7; AR C-5 at A.1-13.

[84]AR B-2 at A.1-4; C-5 at A.1-4 to -5.

[85]AR C-252. Both OSRPs state that they are using BOEM trajectory analyses. Docket No. 134-5 at 2 (Chukchi); Docket No. 138-49 at 5 (Beaufort). The BSEE understood and concurred with Shell's references to the trajectory analyses prepared by the BOEM. Docket No. 138-48 at 8; Docket No. 138-52 at 8.

Moreover, any concern over the role of adverse weather conditions in determining the correct oil spill trajectories has been addressed and resolved by the BSEE.[86] Additionally, with Shell using and referencing BOEM EISs, the BSEE had the opportunity, because the BOEM is its sister agency, to review the conditions used in Shell's trajectory analysis. Consequently, whether BOEM EIS trajectory analysis satisfies the BSEE regulations and in turn, the CWA, is up to the BSEE's expertise, which deserves the Court's deference.[87] Indeed, the BSEE found that Shell's trajectory analyses fulfilled the regulatory requirement.[88] Therefore, the BSEE did not act arbitrarily or contrary to the APA when it approved Shell's OSRP trajectory analyses.

4. OSRP trajectories account for overwintering.

The Organizations raise two issues dealing with the overwintering of oil in a potential WCD. First, they argue that Shell's maximum distance trajectories fail to account for the possibility of oil moving while it is frozen in arctic ice, i.e., overwintering.[89] Second, the Organizations contend that Shell does not explain in its OSRPS how it plans on protecting the areas and resources that could be affected by such overwintering.[90] The Organizations complaints are unfounded.

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[86]Docket No. 138-55 at 2-3; Docket No. 138-48 at 8; Docket No. 138-52 at 8; Docket No. 138-58 at 5-7.

[87]*Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 786 (9th Cir. 2001) (agency can use analyses performed under one statute to satisfy requirements of another statute if agency made a *reasoned judgment* that the data was relevant and yielded a useful analysis of the extent to which spilled oil would spread under the least favorable conditions).

[88]Docket No. 138-8 at 23 (Chukchi); Docket No. 138-9 at 8 (Beaufort).

[89]Docket No. 134 at 39.

[90]*Id.*

First, BSEE regulations state that OSRP trajectories analyses must represent the maximum distance that oil could travel in a WCD.[91] Determining the conditions under which the maximum distance is achieved is less important than ensuring that the trajectories cover the maximum distance. Despite their focus on the maximum distance traveled, the EISs used by Shell in its trajectory analysis also considered the effects of overwintering oil.[92] The EISs showed that "[o]il spreads less in cooler water, and less still in broken ice, and oil spreading rates decrease as concentrations of ice increase."[93] "[W]inter spills contacted nearshore and coastal resources less often and to a lesser extent than summer spills due to the landfast ice in place from December to April."[94] Thus, using trajectories that *did not* use overwintering oil resulted in oil traveling farther in a WCD scenario than if overwintering oil had been relied on in calculating the maximum distance. Furthermore, the OSRPs take special notice of the effect that overwintering oil would have on WCD clean-up efforts. The plans provide for tracking ice-trapped oil[95] and general ice forecasting.[96] Thus, not only do the OSRP trajectory analyses account for overwintering oil, but the OSRPs generally include overwintering oil in the planning for WCD cleanup. Additionally, the BSEE determined that the trajectories met the maximum-distance requirement because the BSEE requested that the BOEM

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[91] § 254.26(b).

[92] AR B-2 at A-1-11 to -12; AR C-12 at 239, B-9 to -10, B-14 to -15.

[93] Docket No. 137 at 31 (citing AR B-2 at A-1-3; AR C-5 at A-1-3).

[94] *Id.* (citing AR B-2 at A-1-11; AR C-5 at A-1-13).

[95] Docket No. 134-5 at 85; Docket No. 138-49 at 17.

[96] Docket No. 138-58 at 5.

review such trajectory analyses, and the BOEM determined that "the trajectory graphic and the time to shoreline contact that Shell has represented are within the bounds of BOEM's conditional statistical trajectory analysis."[97]

Second, the OSRPs include detailed explanations of response plans for protecting areas affected by overwintering oil.[98] These responses include wildlife protection strategies.[99] Shell designated priority exclusion areas based on their trajectory analyses.[100] The trajectories were also used to identify sensitive areas.[101] Therefore, because the OSRP trajectory analyses accounts for overwintering oil and provides for protecting areas and resources affected by overwintering oil, the BSEE did not act contrary to the APA in finding that the OSRPs met the regulatory and statutory conditions for approval.

5. Arctic Containment System was properly described in the OSRPs.

The Organizations complain that a description of Shell's Arctic Containment System ("ACS") was either not included in the OSRPs when it should have been, or the description "failed to comply with regulatory requirements."[102] The Court disagrees.

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[97]AR C-252.

[98]AR B-36 at C-13 to -15, H-17 to -18; AR C-41 at C-12 to -14.

[99]AR B-36 at I-1 to -47; AR C-41 at I-1 to -47.

[100]Docket No. 134-5 at 76, 92-93; Docket No. 138-49 at 9-10, 24-25.

[101]Docket No. 134-5 at 76-77.

[102]Docket No. 134 at 41.

Under § 254.26(d)(1), an OSRP must describe the response equipment that will contain and recover a WCD. However, the ACS does not fall under the category of "response equipment." The ACS is designed to cap the oil wells themselves and, if necessary, for subsea containment and capture of oil at the wellhead.[103] "The ACS equipment includes a capping stack, subsea containment devices, and barge with an oil-water separator."[104] "If a blowout preventer should fail, the capping stack is attached directly to the failed blowout preventer to either stop oil flows or divert flows to a surface barge."[105] "Should capping fail to completely stop oil leaking from the well, one or more subsea devices would be deployed to capture leaks and direct oil to a surface barge, where oil would be separated from water."[106] As described, the ACS is a form of first response to an oil spill. It would not be deployed to contain and recover a WCD. Instead, the ACS's role is "to cap and divert oil so that it does not escape to the environment in the first place."[107] In other words, the ACS is designed to stop rather than recover an oil leak well before a spill reaches the thirty-day mark.

Not only is the ACS not designed to function as a response asset, neither Shell nor the BSEE considers the ACS to be a WCD response asset.[108] The ACS's only inclusion in the OSRPs appears in the Alaska compliance index (Appendix C of the Emergency-Response-Action-Plan ("ERAP")

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[103]AR B-36 at N-10; AR C-41 at N-13.

[104]Docket No. 137 at 34 (citing AR B-36 at N-10; AR C-41 at N-13).

[105]*Id.* (citing AR B-36 at A-25, N-10; AR C-41 at A-24, N-13).

[106]*Id.* (citing AR B-36 at A-25, N-10; AR C-41 at A-24, N-13).

[107]Docket No. 153 at 21 (citing Docket No. 138-62 at 3; Docket No. 134-9 at 36).

[108]*Id.* at 19.

portion of the OSRPs) to show conformity with Alaska regulations.[109] Such limited inclusion in the OSRPs was intentional on the part of Shell. Shell does not need the ACS to respond to a WCD; Shell has adequate containment and response capacity without the ACS being deployed.[110] Furthermore, the ACS is described in great detail in the *ERAP* part of the OSRPs, *not* in the *WCD* section.[111] Thus, § 254.26(g) (ERAP) applies, not § 254.26(d) (WCD). Importantly, the BSEE was not in the dark about the ACS. The BSEE and Shell were in almost daily communication about the ACS, and the BSEE had the technical details of the ACS.[112]

Although the Organizations' complaint involves the *description* of Shell's response equipment, the focus is more appropriately placed on the equipment's *ability to respond to a WCD to the maximum extent practicable*, and the OSRPs show that Shell is able to so respond without the ACS. The ACS offers an *additional* level of protection against the occurrence of an oil spill, above and beyond what is required by the BSEE regulations. If the ACS is deployed, ideally, there will not be a WCD, and no response equipment will be required.

Therefore, because the ACS is not a WCD response asset, Shell did not have to include an ACS description in the WCD portion of the OSRPs. Additionally, this Court owes a degree of deference to BSEE's technical determinations and interpretations concerning the type of response

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[109]*Id.* (citing Docket No. 138-62 at 3-4; Docket No. 134-9 at 36-37); Docket No. 141 at 23.

[110]*Id.* (citing Docket No. 138-62 at 3-4; Docket No. 134-9 at 36-37).

[111]Docket Nos. 138-62 and 134-9. Organizations appear to agree to ACS's limited role in oil spill containment. Docket No. 141 at 22-24.

[112]Docket No. 138-50 at 3, 57.

equipment that did or did not need to be described in the OSRPs. Thus, the BSEE did not act arbitrarily in approving the OSRPs despite the absence of an ACS description.

B. The National Environmental Policy Act ("NEPA")

The Organizations opine that the "BSEE approved the Spill Plans without first conducting an environmental review as required under NEPA."[113] As a result, according to the Organizations, the "BSEE's decision to approve Shell's Spill Plans is in violation of NEPA and must be remanded to the BSEE."[114] But an environmental review was not required.

An "'agency bears the primary responsibility to ensure that it complies with NEPA.'"[115] "Because NEPA is essentially a procedural statute, an agency's actions under NEPA are generally reviewed to determine if the agency observed the appropriate procedural requirements."[116] The *reasonableness standard* "applies to threshold agency decisions that certain activities are not subject to NEPA's procedures."[117] Yet, the *APA review* applies to "[a]n agency's decision not to prepare

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[113]Docket No. 134 at 43.

[114]*Id.*

[115]*Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1096-98 (9th Cir. 2011) (quoting *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006)).

[116]*Envtl. Coal. of Ojai v. Brown*, 72 F.3d 1411, 1414 (9th Cir. 1995) (citing *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 399 (9th Cir. 1988)).

[117] *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011-12 (9th Cir. 2009) (citing *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 667 (9th Cir. 1998)).

an EIS" under the NEPA.[118] "The Supreme Court has noted, however, that 'the difference between the arbitrary and capricious and reasonableness standards is not of great pragmatic consequence.'"[119]

"Under NEPA, an agency is required to provide an EIS only if it will be undertaking a 'major Federal actio[n],' which 'significantly affect[s] the quality of the human environment.'"[120] "'[M]ajor Federal action' is defined to 'includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility.'"[121] "[A]gency action may constitute a 'major Federal action' even though the program does not direct any immediate ground-breaking activity."[122] "'[Actions include] [a]pproval of specific projects, such as construction of management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.'"[123] "[T]he key to determining whether there was major federal action was the extent of the federal involvement . . . [T]here is not always a clear line between the cases in which that involvement constitutes major federal action and those in which it does not."[124] Yet, "[i]t *is* clear . . . that if a federal permit is a prerequisite for a

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[118]*Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (quoting 5 U.S.C. § 706(2)(A)).

[119]*Cal. ex rel. Lockyer*, 575 F.3d at 1011-12 (quoting *Marsh*, 490 U.S. 360, 377 n. 23).

[120]*Dep't of Transp.*, 541 U.S. at 763-64 (quoting 42 U.S.C. § 4332(2)(C) (1975)).

[121]*Id.* (quoting 40 C.F.R. § 1508.18 (2003)).

[122]*Cal. Wilderness Coal.*, 631 F.3d at 1098.

[123]*Ramsey v. Kantor*, 96 F.3d 434, 443-44 (9th Cir. 1996) (quoting 40 C.F.R. § 1508.18 (1996)).

[124]*Id.* (citing *Almond Hill Sch. v. U.S. Dep't of Agric.*, 768 F.2d 1030, 1039 (9th Cir. 1985)).

project with adverse impact on the environment, issuance of that permit does constitute major federal action and the federal agency involved must conduct an EA [environmental assessment] and possibly an EIS before granting it."[125] In sum, "major federal action . . . includes activities 'entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies.'"[126]

"'Effects' is defined to 'include: (a) Direct effects, which are caused by the action and occur at the same time and place,' and '(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.'"[127] "Whether an action may 'significantly affect' the environment requires consideration of 'context' and 'intensity.'"[128] "'Context . . . delimits the scope of the agency's action, including the interests affected.'"[129]

> Intensity refers to the 'severity of impact,' which includes both beneficial and adverse impacts, '[t]he degree to which the proposed action affects public health or safety,' '[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,' '[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,' and '[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.'[130]

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

[126] *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) (quoting § 1508.18(a)).

[127] *Dep't of Transp.*, 541 U.S. at 763-64 (quoting 40 C.F.R. § 1508.8 (2003)).

[128] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185-86 (9th Cir. 2008) (quoting 40 C.F.R. § 1508.27 (2007)).

[129] *Id.* (quoting also *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001)).

[130] *Id.* (quoting § 1508.27(b)(2), (4), (5), (7)).

"An agency undertaking a major federal action *may* first prepare an environmental assessment . . . to determine whether an EIS is necessary."[131] "EAs should be conducted 'to provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact [FONSI].'"[132] "'[B]ecause the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process.'"[133] "'[I]f the proposed action does not categorically require the preparation of an EIS, the agency must prepare an EA to determine whether the action will have a significant effect on the environment.'"[134] "If after conducting an EA the agency determines that the proposed action will not result in a significant impact, the agency must issue a finding of no significant impact . . . in lieu of an EIS."[135] However, "[t]he regulations provide that 'neither an environmental assessment nor an environmental impact statement is required' for 'actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency.'"[136]

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[131]*Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1012-13 (9th Cir. 2012) (emphasis added) (citing 40 C.F.R. § 1508.9 (2012)).

[132]*Cal. Wilderness Coal.*, 631 F.3d at 1096-98 (quoting § 1508.9(a)(1)).

[133]*Id.* (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000)).

[134]*Id.* (quoting *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002)).

[135]*Grand Canyon Trust*, 691 F.3d at 1012-13 (citing §§ 1508.9, 1508.13).

[136]*Sw. Ctr. for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1448 (9th Cir. 1996) (quoting § 1508.4).

Moreover, "NEPA does not require the government to do the impractical."[137] "[I]nherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision making process."[138] "Where the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason . . . would require an agency to prepare an EIS."[139] For example, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[140] "[A]n 'EIS is not necessary where a proposed federal action would not change the status quo.'"[141] However, "'[w]hen an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision.'"[142] "'[A]n agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.'"[143]

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[137] *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 9th Cir. 1996) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976)).

[138] *Dep't of Transp.*, 541 U.S. at 767-68 (quoting *Marsh*, 490 U.S. at 373–374).

[139] *Id.* (quoting *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 325 (1975)).

[140] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

[141] *Cal. Wilderness Coal.*, 631 F.3d at 1100 n. 28 (quoting *Northcoast Envtl. Ctr.*, 136 F.3d at 668).

[142] *Id.* at 1096-98 (quoting *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999)).

[143] *Id.* (quoting *Alaska Ctr. for Env't*, 189 F.3d at 859).

Moreover, if a party "'raises substantial questions whether a project may have a significant effect, an EIS must be prepared,' . . . '[t]his is a low standard.'"[144]

Here, under the laws as set forth above, the BSEE's approvals *do not* constitute a major federal action that significantly affects the quality of the human environment. First, the BSEE did not approve a project or activity. There was no federal approval for any *action*; the approvals were merely affirming that the OSRPs met regulatory requirements. The approvals constituted just one small part of a larger exploration plan ("EP") for which an EA and a FONSI had already been created.[145] Second, although its arguable whether the OSRPs have an indirect affect on the human environment, it is not clear that the approvals would cause such effects, and the use of the OSRPs is not reasonably foreseeable. Ideally, there will not ever be an oil spill for which the OSRPs would have to be used. Moreover, the BSEE is merely *approving* the OSRPs. When and if the OSRPs are put into action, the United States Coast Guard ("USCG") and the Environmental Protection Agency ("EPA") will direct the OSRPs' actual use.[146] Therefore, the BSEE was not required to perform an additional environmental review under the NEPA prior to approving the OSRPs.[147]

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[144]*Id.* (quoting *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549 (9th Cir. 2006)).

[145]AR B-212 at 3; AR C-269 at 3; *see* 40 CFR § 1501.4(e) (2012) (FONSI preparation). "The Regional Supervisor will evaluate the environmental impacts of the activities described in your proposed EP and prepare environmental documentation under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.) and the implementing regulations (40 CFR parts 1500 through 1508)." 30 CFR § 550.232(c) (2011).

[146]40 CFR § 300.120(a), (b), (e) (2012).

[147]§ 1501.4(a)(2).

However, assuming, *arguendo*, that the BSEE's approvals did require a separate NEPA environmental review, prior NEPA reviews satisfied the applicable requirements. The record shows that the BSEE "reviewed all the prior NEPA analyses and made determinations that, as to both the Beaufort and Chukchi OSRPs, the prior analyses were adequate."[148] In other words, the BSEE determined that no new potential information existed above and beyond what was already contained in the previous NEPA reviews. Such a determination of NEPA adquacy ("DNA") by the BSEE is permitted under 43 C.F.R. § 46.120(b), (c), and a DNA can be used in the first instance to determine that a NEPA review is not warranted due to no change in the status quo.[149] Regulations also allow OSRPs to reference information contained in other readily accessible documents, including BSEE or BOEM environmental documents.[150] The OSRPs merely identify spill response resources discussed in prior NEPA analyses; the OSRPS are not separate actions requiring their own NEPA analyses.

Furthermore, under the NEPA's rule of reason, it is up to the BSEE to determine whether additional NEPA review would serve any purpose. The BSEE found that no such purpose existed.[151] No purpose existed in part due to the BSEE's lack of authority to take any action on any supplemental NEPA information. Regardless of anything that an additional NEPA review could

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[148]Docket No. 151 at 24 (citing AR B-212; AR C-269).

[149]*See* 43 C.F.R. § 46.120(a) (2008) ("When available, the Responsible Official should use existing NEPA analyses for assessing the impacts of a *proposed* action . . . .").

[150]30 C.F.R. § 254.4 (2011).

[151]AR B-212 at 3; AR C-269 at 3.

possibly show, the BSEE had no discretion to force Shell to consider any alternatives to the OSRPs, and the BSEE could not consider or incorporate any additional public comment generated by another NEPA review. Once the OSRPs were found to be in accord with 30 C.F.R. pt. 254, the BSEE had no ability to reserve approval for the OSRPs until they met NEPA requirements. Additionally, the Court must give deference to the BSEE's longstanding interpretation that NEPA does not apply to OSRP approval.[152] Therefore, the Court finds that the BSEE approvals of the OSRPs did not require NEPA environmental review.

C. The Endangered Species Act

The Organizations claim that because the BSEE failed to engage in ESA Section 7 consultation, ensuring that its approvals of the OSRPs would not jeopardize listed species or their critical habitat, the BSEE acted in violation of the ESA.[153] The Court finds that no consultation was necessary.

A court's "review of an agency's compliance with the ESA is governed by the Administrative Procedure Act . . . ."[154] The Ninth Circuit's ESA-agency-action "inquiry is two-fold. First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity.

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[152]"An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations." 40 C.F.R. § 1506.3 (2012).

[153]Docket No. 134 at 47.

[154]*Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011) (citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901 (9th Cir. 2002)).

Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species."[155] Under the ESA:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .[156]

Under 50 C.F.R. § 402.14(a):

> Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required . . . The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation.

"'[M]ay affect' is a 'relatively low' threshold for triggering consultation."[157] "'Any possible effect, whether beneficial, benign, adverse or of an undetermined character,' triggers the requirement."[158]

> [Agency a]ction means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.[159]

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[155] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020-21 (9th Cir. 2012).

[156] 16 U.S.C. § 1536(a)(2), (3) (1988).

[157] *Id.* at 1026-27 (quoting *Cal. ex rel. Lockyer*, 575 F.3d at 1018).

[158] *Id.* (quoting *Cal. ex rel. Lockyer*, 575 F.3d at 1018).

[159] *Id.* at 1020-21.

"There is 'little doubt' that Congress intended agency action to have a broad definition in the ESA . . . ."[160] "[A] federal agency action need not be "major" to trigger the duty to consult. It need only be an "agency action."[161] "An agency may avoid the consultation requirement only if it determines that its action will have 'no effect' on a listed species or critical habitat."[162]

An agency's consultation requirement under the ESA applies "to all actions in which there is discretionary Federal involvement or control."[163] Yet the Supreme Court has said that "not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion."[164] There is no duty to consult for actions "that an agency is required by statute to undertake once certain specified triggering events have occurred."[165] "However, to avoid the consultation obligation, an agency's competing statutory mandate must require that it perform specific nondiscretionary acts rather than achieve broad goals."[166]

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[160] *Id.* (quoting *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054–55 (9th Cir. 1994)).

[161] *Id.* at 1024.

[162] *Id.* at 1026-27 (quoting *Sw. Ctr. for Biological Diversity*, 100 F.3d at1447–48).

[163] 50 CFR § 402.03 (2009).

[164] *Nat'l Ass'n of Home Builders*, 551 U.S. at 668.

[165] *Nat'l Ass'n of Home Builders*, 551 U.S. at 669.

[166] *Karuk Tribe of Cal.*, 681 F.3d at 1024-25 (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928–29 (9th Cir. 2008)).

"To trigger the ESA consultation requirement, the discretionary control retained by the federal agency also must have the capacity to inure to the benefit of a protected species."[167] "If an agency cannot influence a private activity to benefit a listed species, there is no duty to consult because 'consultation would be a meaningless exercise.'"[168] "The relevant question is whether the agency could influence a private activity to benefit a listed species, not whether it must do so."[169]

Here, the BSEE's approvals did not require ESA Section 7 consultation. First, the approvals do not constitute the type of agency action that triggers consultation. The approvals were not authorizing an activity, project, or program. The approvals were merely stating that the OSRPs met regulatory and statutory requirements, ensuring that Shell could respond to a WCD. The approvals will not lead to any oil-spill-response activities, the activities that the Organizations allege require ESA consultation due to their effect on listed species or critical habitat,[170] because the BSEE does not have the authority to authorize any oil spill cleanup response. That authority lies with the USCG and the EPA, as federal onsite coordinators, under National Contingency Plan requirements.[171] Thus, the BSEE's action will not affect listed species or critical habitat.

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[167] *Id.* (citing *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974-75 (9th Cir. 2003)).

[168] *Id.* (quoting *Sierra Club v. Babbitt, Seneca*, 65 F.3d 1502, 1508-09 (9th Cir. 1995)).

[169] *Id.* (citing *Turtle Island Restoration Network*, 340 F.3d at 977).

[170] Docket No. 134 at 47.

[171] § 300.120(a), (b), (e).

Second, the BSEE did not have discretion to approve the OSRPs once it determined that they met the requirements outlined in 30 C.F.R. pt. 254. The mandates of § 1321(j) are defined by the BSEE's implementing regulations and leave no room for BSEE discretion to disapprove OSRPs that fulfill the requirements, regardless of the OSRPs' effect on the environment. Although the BSEE exercised some discretion in deciding whether the OSRPs fulfilled the BSEE regulatory requirements, once the BSEE decided that the OSRPs did meet such requirements, the BSEE "did not have discretion, under the CWA, to deny the" approvals.[172] Thus, OSRP approval is not discretionary, and ESA consultation only applies to *discretionary* agency action. Third, because of the lack of discretion, the BSEE had no ability to influence Shell and its OSRPs for the benefit of any listed species or critical habitat. Thus, ESA consultation would be a "'meaningless exercise.'"[173]

Additionally, assuming, *arguendo*, that ESA consultation did apply, prior ESA consultations cover the OSRPs. The OSRP approvals are later actions subsumed within a larger body of actions considered in prior ESA consultations, and the wildlife agencies recognize the continuity of that coverage.[174] For example, "the previous consultations evaluated spill response activities as part of their programmatic analysis of oil and gas leasing and development, thus providing BSEE with any substantive analysis necessary to 'influence' its actions for the benefit of listed species within the

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[172]*Grand Canyon Trust*, 691 F.3d at 1017-18 (citing *Nat'l Ass'n of Home Builders*, 551 U.S. at 671-72).

[173]*Karuk Tribe of Cal.*, 681 F.3d at 1024-25 (quoting *Sierra Club*, 65 F.3d at 1508-09).

[174]AR B-17 at 9. Wildlife agencies refer to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service.

extent of its discretion."[175] The BSEE specifically looked at whether the ESA applied and determined that it did not. The BSEE then reevaluated its no-consultation position and again found consultation unnecessary.[176] Therefore, the Court finds that the BSEE approvals of the OSRPs did not require ESA Section 7 consultation.

In sum, the Court finds that the BSEE's approvals of the OSRPs did not run afoul of the CWA, NEPA, or ESA.

IV. CONCLUSION

Because the Court has determined that the BSEE's approvals of Shell's Beaufort Sea and Chukchi Sea OSRPs did not violate the CWA, NEPA, or ESA, the Organizations' Motion For Summary Judgement at **Docket Number 134** is hereby **DENIED**, and the Government's and Shell's Cross-Motions For Summary Judgment, at **Docket Numbers 137** and **138**, respectively, are hereby **GRANTED**. The BSEE approvals of Shell's OSRPs shall stand.

ORDERED this 5th day of August, 2013.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

[175]Docket No. 153 at 29.

[176]Docket No. 138-65.