Nos. 23-3624 & 23-3627

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al.,
Plaintiffs/Appellants,
v.
BUREAU OF LAND MANAGEMENT, et al.,
Defendants/Appellees,
and
CONOCOPHILLIPS ALASKA, INC., et al.,
Intervenor-Defendants/Appellees.

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs/Appellants,
v.
BUREAU OF LAND MANAGEMENT, et al.,
Defendants/Appellees,
and
CONOCOPHILLIPS ALASKA, INC., et al.,
Intervenor-Defendants/Appellees.

Appeals from the United States District Court for the District of Alaska
Nos. 3:23-cv-58 & 3:23-cv-61 (Hon. Sharon L. Gleason)

CONOCOPHILLIPS ALASKA, INC.'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendant-Appellee ConocoPhillips Alaska, Inc. is a wholly owned subsidiary of ConocoPhillips Company. ConocoPhillips Company is a wholly owned subsidiary of ConocoPhillips, which is a publicly traded corporation. ConocoPhillips has no parent corporation and, based on Schedule 13G filings with the Securities and Exchange Commission, no publicly held corporation owns 10 percent or more of its stock.

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LIST OF ABBREVIATIONS

Abbreviation	Definition
BiOp	Biological Opinion
BLM	Bureau of Land Management
CO_2e	Carbon Dioxide Equivalent
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FSEIS	Final Supplemental Environmental Impact Statement
FWS	U.S. Fish and Wildlife Service
GHG	Greenhouse Gas
IAP	Integrated Activity Plan
MDP	Master Development Plan
MT	Metric Tons
NEPA	National Environmental Policy Act
NPRPA	Naval Petroleum Reserves Production Act
NPR-A or Petroleum Reserve	National Petroleum Reserve in Alaska
ROD	Record of Decision
TLSA	Teshekpuk Lake Special Area
USGS	United States Geological Survey

I. INTRODUCTION

Willow is an oil and gas project located in the National Petroleum Reserve in Alaska ("Petroleum Reserve" or "NPR-A")—a 23.5-million-acre tract of land set aside by Congress in 1923 "to be a petroleum reserve to help meet the Nation's need for oil and gas." 1-CBD_ER-23. In 1980, Congress amended the Naval Petroleum Reserves Production Act ("NPRPA") and "directed the Secretary to carry out an 'expeditious program of competitive leasing of oil and gas' on the Reserve." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006) (citing 42 U.S.C. § 6508).

Since 1980, development in the Petroleum Reserve "has come slowly," with much deliberation, study, and analysis. *See id*. The Bureau of Land Management ("BLM") prepared a series of comprehensive integrated activity plans ("IAPs"), paired with environmental impact statements ("EISs"), to inform and determine "the appropriate management . . . in the nearly 23-million-acre Petroleum Reserve" and "what lands should be made available for oil and gas leasing and with what protections for surface resources and uses." *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1094 (9th Cir. 2020) (internal quotation marks and citation omitted). The most recent IAP, approved by the Biden administration in 2022, closes 11 million acres of the Petroleum Reserve to oil and gas development "in order to protect and conserve important surface resources and uses in these

areas," 1-CBD_ER-42, and imposes hundreds of restrictions and stipulations in the areas open to development. 3-SER-633-706.

Consistent with this deliberative approach, only two projects located on Petroleum Reserve leases (Greater Mooses Tooth 1 and 2) have been approved and achieved oil production since 1980. Willow will be the third project. All three projects are located in areas open to oil and gas leasing and development under the IAP and subject to hundreds of stipulations and protections.

Willow's approved design is the culmination of more than five years of planning and engagement with federal, state, municipal, and tribal authorities. In March 2023, BLM approved Willow in a record of decision ("ROD") supported by a Final Supplemental EIS ("FSEIS") under the National Environmental Policy Act ("NEPA"). The ROD authorizes a scaled-back version of Willow, reducing the already modest surface footprint of ConocoPhillips' proposal from five to just three drill pads and imposing stringent environmental protections. The total footprint of the Willow project, including the gravel mine, gravel roads, drill pads, and related infrastructure, is about 384 acres. 3-SER-713. Willow construction began in April 2023, and has been ongoing since then.

The analytical rigor of the permitting process and the public benefits of the project are undeniable. The process involved thousands of pages of environmental analyses, over a hundred public meetings, and tens of thousands of public

comments. The project has been reduced and modified in response to local input, including the elimination of drill sites and the addition of features to improve subsistence access, such as road pullouts, tundra access ramps, and boat ramps. The project is subject to over 250 impact minimization measures and it permanently preserves over 800 acres of pristine North Slope wetlands. *See* 4-SER-1088. Over its lifetime, Willow will generate thousands of jobs and billions of public dollars, including tax revenues that will fund schools, emergency response, health clinics, water facilities, roads, waste facilities, and power facilities in all eight North Slope Borough villages.

Nevertheless, Plaintiffs-Appellants (individually "CBD" and "SILA," and collectively "Plaintiffs") seek to stop Willow entirely because they "don't see *any* acceptable version of the project" and hope "Willow dies a death by a thousand cuts."[1] Plaintiffs succeeded in forcing a remand in 2020 after the district court found "discrete deficiencies" in BLM's 2020 EIS and in the 2020 biological opinion issued by the U.S. Fish and Wildlife Service ("FWS") pursuant to the Endangered Species Act ("ESA"). 1-CBD_ER-10. But despite the agencies addressing those deficiencies over the course of two more years of comprehensive agency review and public comment, Plaintiffs sued again, challenging the new

[1] 2-SER-492 (emphasis added).

FSEIS and biological opinion ("BiOp"). Their lawsuits repeat their old claims and add new claims that could have been, but were not, raised in the prior litigation.

The district court reviewed all those claims and methodically rejected them in a 109-page decision. The district court got it right, and this Court should affirm.

II. JURISDICTIONAL STATEMENT

ConocoPhillips incorporates by reference the jurisdictional statement of the Federal Defendants.

III. STATEMENT OF THE ISSUES

ConocoPhillips incorporates by reference the statement of the issues of the Federal Defendants. ConocoPhillips also states this additional issue: Whether CBD has Article III standing to bring its ESA claim.

IV. STATEMENT OF THE CASE

A. The Petroleum Reserve and the NPRPA.

The Petroleum Reserve, which is "roughly the size of Indiana," is "home to numerous Native Alaskan communities that practice a subsistence way of life, relying on the biological resources of the Reserve." *N. Alaska Env't Ctr.*, 983 F.3d at 1081. The Petroleum Reserve "is also a significant source of oil and gas." *Id.* "As of 2017, the U.S. Geological Survey (USGS) estimated that technically recoverable petroleum resources underlying the Reserve include 8.7 billion barrels of oil and 25 trillion cubic feet of natural gas." *Id.*

President Harding established the Naval Petroleum Reserve on Alaska's North Slope in 1923 "for oil and gas only." Exec. Order No. 3797-A (Feb. 27, 1923); *Kempthorne*, 457 F.3d at 973. "It was fifty years later, in 1976, that the [NPRPA] transferred authority over the Reserve to the Secretary" and renamed it the NPR-A. *Kempthorne*, 457 F.3d at 973. The 1976 legislation prohibited development and production, but authorized a continued federal exploration program. Pub. L. No. 94-258, 90 Stat. 303 (1976).

In 1980, Congress amended the NPRPA, phased out the federal exploration program, and authorized privately funded exploration, development, and production in the NPR-A. *See* Pub. L. No. 96-514, 94 Stat. 2957 (1980). As one member of the Senate explained at the time, "we can no longer delay efforts which would increase the domestic supply of oil and lessen our reliance on imports." 126 Cong. Rec. S29489 (1980) (statement of Sen. Stevens). To underscore the urgency of the legislation, Congress instructed the Secretary of the Interior to carry out "an expeditious program" of oil and gas leasing in the NPR-A. 42 U.S.C. § 6506a(a).

The resulting legislation is unique amongst BLM's land management statutes. The Petroleum Reserve is exempt from the typical "multiple use and sustained yield" principles of planning applicable to other BLM lands. *Id.* § 6506a(c). The Petroleum Reserve is also exempt from wilderness designation. *Id.*

What the NPRPA makes paramount is the national interest in expeditious oil and gas production, while taking into account "the subsistence interests of Native American tribes in the area and the need to protect the environment." *Kempthorne*, 457 F.3d at 973-74; 42 U.S.C. § 6506a(a); 126 Cong. Rec. S29489. The NPRPA "directs BLM to lease Reserve land to private entities for oil and gas development, while taking such measures as BLM deems necessary or appropriate to mitigate adverse environmental impacts." *N. Alaska Env't Ctr.*, 983 F.3d at 1081; 42 U.S.C. § 6506a(b) ("[a]ctivities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions *as the Secretary deems necessary or appropriate* to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the" NPR-A (emphasis added)). But once the government issues a lease in the Petroleum Reserve, it has made an "irretrievable commitment of resources" and no longer has "an absolute right to prohibit surface-disturbing activities." *N. Alaska Env't Ctr.*, 983 F.3d at 1086; *Kempthorne*, 457 F.3d at 976.

Additionally, the NPRPA authorizes BLM to designate areas warranting special protection (called Special Areas), and provides that "exploration" activities in those areas "shall be conducted in a manner which will assure the maximum protection of such surface values *to the extent consistent with* the requirements of this Act for the exploration of the reserve." 42 U.S.C. § 6504(a) (emphasis added).

The phrase "maximum protection" was included in the NPRPA in 1976, and the House Conference Report states that "'maximum protection of such surface values' is *not a prohibition* of exploration-related activities within such areas" but instead is intended to ensure "that such exploration operations *will be conducted* in a manner which will *minimize the adverse impact* on the environment." H. Conf. Rep. No. 94-942, at 21 (1976) (emphases added). When BLM implemented that statutory provision in 1977, it confirmed that "[m]aximum protection of designated special areas does not imply a prohibition of exploration or other activities," 42 Fed. Reg. 28,723 (June 3, 1977), but instead refers to appropriate mitigation measures such as "(1) [r]escheduling activities and use of alternative routes, (2) types of vehicles and loadings, (3) limiting types of aircraft in combination with minimum flight altitudes and distances from identified places, and (4) special fuel handling procedures," 43 C.F.R. § 2361.1(c).

Recognizing that oil and gas development could impact local communities, Congress instructed that 50% of "[a]ll receipts from sales, rentals, bonuses, and royalties on leases issued" in the Petroleum Reserve be given to the State of Alaska, and that, in allocating those funds, "the State shall give priority to use by subdivisions of the State most directly or severely impacted by development of oil and gas leased under this Act." 42 U.S.C. § 6506a(l). In accordance with this provision, the State created the NPR-A Impact Mitigation Program, which, since

its inception, has provided $143 million to the North Slope Borough and $22 million to Nuiqsut (a community of about 500 people located within the NPR-A). Those funds have been used to provide government and social services, boost education, and build needed infrastructure for communities in and around the Petroleum Reserve. 1-SER-37.

B. Integrated Activity Plans in the NPR-A.

BLM initially developed management plans for portions of the Petroleum Reserve. *Kempthorne*, 457 F.3d at 974. Those plans were challenged under NEPA by some of the Plaintiffs in this case, and this Court affirmed BLM's NEPA analysis, including its range of alternatives and use of hypothetical development scenarios. *Id*. at 976.

In 2013, BLM adopted a single comprehensive IAP that closed approximately 11 million acres (48%) of the Petroleum Reserve to leasing and made about 2.5 million acres (11%) available for leasing but subject to "No Surface Occupancy" stipulations forbidding surface construction (with some exceptions). 9-SER-2296. The closed portions "include areas critical to sensitive bird populations and the Teshekpuk Lake and Western Arctic Caribou Herds." 9-SER-2502. The remaining 9.3 million acres (41%) of the Petroleum Reserve were made available for leasing and new oil and gas infrastructure, subject to terms and conditions designed to protect surface resources. 9-SER-2296.

Many environmental groups, including some of the Plaintiffs here, praised the 2013 IAP. The Northern Alaska Environmental Center said the IAP "provides effective and reliable conservation measures to protect fish, wildlife and their habitats to ensure balanced management of the NPR-A, consistent with federal law." 10-SER-2762. Similarly, 12,600 members of the Alaska Wilderness League wrote to BLM that this was "the most responsible and balanced management plan for the Reserve." 10-SER-2759. Earthjustice said the IAP was "a positive step toward balanced management" that "allows for future oil and gas development." 10-SER-2760.

In 2022, the Biden administration issued a new IAP affirming the 2013 land allocations, finding that they "strike[] a balance" among development, the "importance of surface resources," and the need to mitigate impacts on subsistence uses. 9-SER-2499, 2514. The 2022 IAP is also supported by a comprehensive EIS (the "2020 IAP EIS") that, like the predecessor IAP EISs (approved in *Kempthorne*), evaluates the environmental effects of potential future development in the NPR-A based on hypothetical development scenarios. 10-SER-2686-87. The 2022 IAP includes dozens of required operating procedures and other measures designed to reduce and minimize the impact to surface resources. 3-SER-639.

C. The Willow Project.

Willow is located in an area specifically designated for oil and gas leasing and surface development under both the 2013 and 2022 IAPs. 9-SER-2296. The project's purpose is to tap into a discovered oil reservoir underneath Petroleum Reserve land that is leased to ConocoPhillips and organized as a unit called the Bear Tooth Unit. *Id.* ConocoPhillips began acquiring those leases in 1999. A full project history appears in 9-SER-2296-304 and a graphical representation appears in 8-SER-2253.

The Willow project was designed, from its outset, to minimize its environmental footprint and impact on subsistence hunting activities. 9-SER-2296-314. Using extended-reach underground horizontal drilling, the project will be able to access most of the oil underlying the 195,709-acre unit of leased lands using only three 15-acre drill pads. 9-SER-2302; 8-SER-2254. The locations of the drill pads and related infrastructure were carefully selected to balance access to the underlying oil resource while avoiding, as much as possible, sensitive and significant environmental areas. *See* 5-SER-1253; 6-SER-1673-83.

The public benefits of Willow are significant. Willow will reduce dependence on foreign oil, as contemplated by the NPRPA.[2] Willow will provide

[2] The FSEIS confirms that Americans will consume roughly the same amount of oil regardless of Willow and, if Willow is not built, over 50% of the oil

between $2.27 to $3.56 billion to the NPR-A Impact Mitigation Program that will benefit local communities. 2-SER-305. Willow will provide production tax revenues to the State of between $1.258 and $5.21 billion and *ad valorem* tax revenue to the North Slope Borough of about $1.25 billion. *Id.*; 6-SER-1530. And Willow will create (and has already created) thousands of new jobs in an area where jobs are scarce and unemployment exceeds 13%. *See* 2-SER-305; 6-SER-1530-31. All these benefits come from a project with a surface footprint of only 384 acres in a 23.5-million-acre tract of land "set aside by Congress to be a petroleum reserve to help meet the Nation's need for oil and gas." 1-CBD_ER-23.

Willow has overwhelming support from state, local, and tribal governments in Alaska, including every member of the Alaska State Legislature as well as Nuiqsut, the community closest to the Willow project. *See* 3-SER-588-92 (Alaska House and Senate Joint Resolution detailing local, tribal, state, and federal support and unanimously urging approval of Willow); CBD Dkt. 86.2[3] at 5-15 (City of Nuiqsut Resolution No. 23-13 (December 18, 2023) (committing to "work closely" with ConocoPhillips and BLM on implementation "for the benefit of the community of Nuiqsut")); *id.* at 17-18 (Native Village of Nuiqsut Resolution 2023-

(. . . continued)
that could come from Willow will instead come from foreign sources. 3-SER-799-800 (Table 3.2.3).

[3] This brief cites to the docket in Case No. 23-3624.

25 (December 19, 2023)); *see also* 1-SER-43-44 (NSB unanimous approval of rezone for Willow).

D. Willow Approval and Litigation History.

The procedural history of this case is lengthy and complex as it involves a prior remand to the agency, *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739 (D. Alaska 2021) ("*SILA*"), a supplemental EIS, and subsequent decisions after remand by the district court denying Plaintiffs' motions for preliminary injunctions (2-SER-429-72), ruling in the favor of the government on the merits (1-CBD_ER-5-109), and multiple denials of Plaintiffs' motions for an injunction pending appeal (1-SER-3-29; CBD Dkt. 37). To avoid duplication, ConocoPhillips adopts Federal Defendants' discussion of Willow's approval and litigation history.

E. Status of Willow Construction.[4]

Construction on Alaska's North Slope is challenging. To protect the permafrost-underlain tundra, most infrastructure is built in the winter, when the ground is frozen, using temporary ice roads and ice pads and mobile camps. The ice road season typically ends (weather dependent) around the end of April or the first week of May.

[4] Descriptions of Willow construction, including the current status, are provided in 2-SER-293-300, 307-20, 376-84, 520-31, and the Declaration of James I. Brodie, filed with this Court on January 8, 2024. CBD Dkt. 86.3.

ConocoPhillips began Willow construction with ice road building activities immediately following issuance of the ROD in March 2023, and started mine excavation and road building activities on April 3, 2023, after the district court denied Plaintiffs' request for a preliminary injunction. Between April 3 and May 3, 2023, when the ice road season ended, ConocoPhillips opened a new gravel mine, and used that gravel to extend the existing road westward toward Willow about two miles. ConocoPhillips also began building a subsistence boat ramp for use by local residents. Offsite fabrication of Willow materials, such as modules, pipes, and culverts, continued over the summer as did pre-construction summer road and pipeline work in accessible areas in the Kuparuk River Unit.

In late-October 2023, ice road building activities for this winter's construction activities recommenced. On December 20, 2023, with new ice roads in place, ConocoPhillips resumed surface-disturbing construction. Hundreds of workers have been hired and mobilized, and are now working in the field as the winter construction workforce ramps up to approximately 1,800 North Slope workers. ConocoPhillips continues to expend resources daily to ensure timely and safe construction of the project.

V. SUMMARY OF ARGUMENT

BLM evaluated a reasonable range of alternatives for development of the Bear Tooth Unit as required by NEPA. The FSEIS includes a no-action alternative

and four development alternatives that evaluate a range of different pad, pipeline, and road configurations. The alternatives include ConocoPhillips' proposed plan (Alternative B) as well as BLM's compromise alternative (Alternative E) that reduces the scope of Willow and adds more protections for surface resources. This range of alternatives complies with NEPA and this Court's case law.

BLM appropriately declined to consider, in detail, Plaintiffs' proposal that would have eliminated all infrastructure in the Teshekpuk Lake Special Area ("TLSA"). BLM determined that this no-TLSA alternative failed to serve the purpose of a master development plan, was a false comparison with other development alternatives, and would segment the NEPA analysis. Moreover, Plaintiffs fail to demonstrate, as required by this Court's precedent, that an additional mid-range alternative between BLM's compromise alternative and the no-action alternative was necessary to foster informed decision-making under NEPA.

BLM also fully considered the potential growth inducing impacts of Willow, as required by NEPA. The FSEIS expressly addressed the potential for Willow to induce growth and included an estimate of the downstream GHG emissions associated with that potential growth by incorporating emissions from the future growth scenarios in the 2020 IAP EIS. These growth scenarios expressly include potential growth facilitated by Willow. Nothing more was required.

BLM complied with its obligations under the NPRPA. BLM may impose restrictions that it "deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources" in the Petroleum Reserve, 42 U.S.C. § 6506a(b), and has an obligation to "assure the maximum protection of such surface values" in designated special areas, but only "to the extent consistent with the requirements of this Act," *id*. § 6504(a). BLM's ROD does precisely that, approving a pared down version of Alternative E that "strikes a balance" by "allowing for development to occur in the NPR-A consistent with the terms of existing leases while at the same time requiring the implementation of robust protections for surface resources." 3-SER-613.

CBD lacks standing to challenge Federal Defendants' ESA decisions regarding the potential impact of downstream GHGs on listed species. There is no scientific way to connect the dots between emissions from specific projects and potential impacts to the environment at any specific location, and thus no way to establish the causation or redressability required by Article III under this Court's precedent. *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013). But even if the Court reaches the issue, CBD's ESA claim is meritless.

The record demonstrates that the federal agencies considered the possibility that downstream emissions from Willow could contribute to climate change, but determined that the potential future effects of those emissions on polar bears and

ice seals are too remote and uncertain to qualify as "effects of the action" under the ESA. *See* 50 C.F.R. § 402.02. This determination is consistent with a long and unbroken chain of agency guidance and decisions affirming that GHG emissions are generally not considered "effects of the action" on species or their habitat in an ESA section 7 consultation.

The decision below should be affirmed.

VI. ARGUMENT

A. The FSEIS Alternatives Analysis Satisfies NEPA.

NEPA requires agencies to analyze a "reasonable range of alternatives" to a proposed action. *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 980 (9th Cir. 2022) (citing 42 U.S.C. § 4332(E)). As addressed below, BLM considered a reasonable range and Plaintiffs' contrary arguments lack merit.

1. BLM Considered a Reasonable Range of Alternatives.

An EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones," and "alternatives eliminated from detailed study need only be briefly discussed." *Id*. at 981 (internal quotation marks and citation omitted); 40 C.F.R. § 1502.14(a). "NEPA does not require BLM to explicitly consider every possible alternative[.]" *Kempthorne*, 457 F.3d at 978. "'Without such criteria, an agency could generate countless alternatives.'" *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998) (citation omitted).

This Court's decision in *Audubon*, 40 F.4th 967, establishes the analytical framework for judicial review of the adequacy of an EIS's range of alternatives. Courts apply a "rule of reason" standard, which is "essentially the same as an abuse of discretion analysis." *Id*. at 980 (cleaned up). The "range of alternatives" to be considered by an agency "is based on the purpose and need" of the proposed agency action. *Id.* at 981. Accordingly, courts "'begin[] by determining whether or not the Purpose and Need Statement was reasonable.'" *Id*. (citation omitted). "The next question is whether [the agency] considered reasonable alternatives given the . . . Plan's purposes and needs." *Id*. at 982. Ultimately, the "'touchstone . . . is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.'" *Id*. (citation omitted).

The FSEIS meets all these requirements, as the district court correctly concluded in a 22-page analysis. 1-CBD_ER-15-36. Here, ConocoPhillips proposed a master development plan to develop the oil reservoir under the Bear Tooth Unit. 3-SER-758. A "unit" is a collection of leases aggregated together under the requirements of the NPRPA for the purpose of collective development. 42 U.S.C. § 6506a(j)(1); 9-SER-2572. The unit is governed by a "unit agreement" between the lessee and BLM, the purposes of which are to facilitate coordinated development, "minimize the impact to surface resources of the leases," and "facilitate consolidation of facilities." 42 U.S.C. § 6506a(j)(1). As the unit

operator, ConocoPhillips has "continuing development obligations" and is required to submit a "plan" that "must describe the activities to fully develop the oil and gas field." 43 C.F.R. § 3137.71(b)(1). ConocoPhillips submitted that plan—the Willow Master Development Plan ("MDP")—to BLM, and the purpose of the FSEIS was to evaluate the environmental consequences of that plan. 3-SER-758.

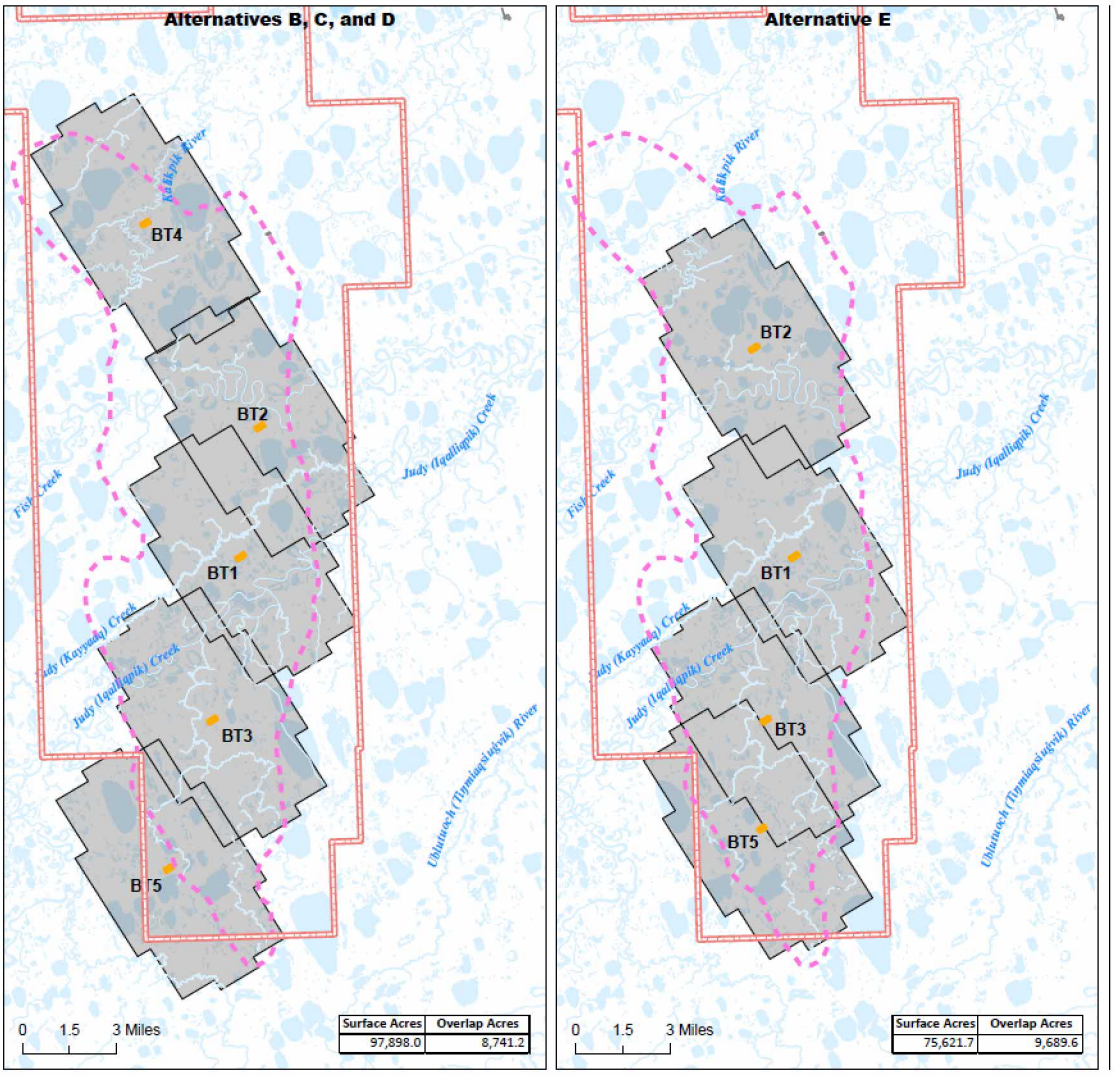
BLM's statement of purpose and need appropriately reflects this context and the NPRPA statutory framework:

> 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 in the Willow reservoir located in the [Bear Tooth Unit], while providing maximum protection to significant surface resources within the NPR-A, consistent with BLM's statutory directives. The need for federal action (i.e., issuance of authorizations) is established by BLM's responsibilities under various federal statutes, including the NPRPA (as amended)…. Under the NPRPA, BLM is authorized to conduct oil and gas leasing and development in the NPR-A…. BLM is required to respond to the Proponent's requests for an MDP and related authorizations to develop and produce petroleum in the NPR-A.

3-SER-758-59. As the district court observed, "[n]one of the parties dispute the reasonableness of the purpose and need statement, and … the statement is reasonable given the NPRPA's directives and BLM's responsibilities pursuant to federal law." 1-CBD_ER-20; *see Audubon*, 40 F.4th at 981.

As to the "next question," *Audubon*, 40 F.4th at 982, BLM considered a range of alternatives in light of the (uncontested) statement of purpose and need and its statutory obligations. The FSEIS considered five alternatives in depth: (A) a no-action alternative; (B) ConocoPhillips's proposed MDP with five road-connected drill pads (BT1-BT5); (C) an alternative with no infield roads connecting the drill pads; (D) an alternative with co-location of certain facilities and no road connections to existing facilities in other units; and (E) an alternative with less infrastructure altogether, which would eliminate drill pad BT4 in the TLSA, adjust the location of drill pad BT2 to partially compensate for eliminating BT4, and defer approval of BT5.

The range of feasible configurations and alternatives for the Willow MDP is constrained by many technical, geological, and physical limitations, such as the location and depth of the reservoir within the Bear Tooth Unit and the limits of horizontal underground drilling to reach oil from drill pad locations. These limitations are graphically depicted below in Figure D.4.10 from the FSEIS. The red double line depicts the boundary of the Bear Tooth Unit (and leases held by ConocoPhillips); the dotted magenta line reflects the extent of the oil reservoir under the unit; and the large grey polygons reflect the maximum possible underground reach of horizontal drilling from the much smaller (orange) drill pads.



5-SER-1335; 8-SER-2282-83. Overlaying these drilling-reach limits are many more limitations associated with the desire to avoid environmentally sensitive areas (*e.g.*, rivers, streams, and bird habitat) and buffers associated with those areas—all of which are subject to protections under the 2022 IAP and lease stipulations. *See* 5-SER-1253 (graphic depiction of buffers); 9-SER-2570-71; 3-SER-639-59.

On BLM lands in the Lower 48, a typical development project of this size would have many more drill pad locations spread across the reservoir. *See* 8-SER-2273-79. But in the Arctic, where minimizing the footprint of the project on surface resources is at a premium, Willow is designed to optimize oil recovery while minimizing the surface disturbance. 9-SER-2296-314.

ConocoPhillips' proposed five-pad Alternative B would capture about 91% of the oil within the Bear Tooth Unit. 10-SER-2595. BLM's four-pad Alternative E allows for less oil recovery. 10-SER-2596. By contrast, a development plan "intended to maximize resource recovery" for the Bear Tooth Unit would have required "7 drill sites" including "4 total pads within the TLSA." 10-SER-2595-96.

Under these circumstances, and within these numerous constraints, BLM developed and evaluated alternatives to ConocoPhillips' proposed MDP. BLM explained:

> The purpose of a master development plan is to evaluate the full development of an oil prospect to disclose all impacts related to the proposed project and prevent segmentation of the National Environmental Policy Act analysis.

5-SER-1196. BLM further explained that the term "fully develop" means "that a lessee may not strand such a large quantity of oil and gas that, standing alone, is economic to develop (i.e., that would warrant construction of an additional drill pad)." 5-SER-1193; 9-SER-2536 ("Full development . . . does not mean an

applicant must recover 100% of a resource, but an applicant cannot strand an economically viable amount of recoverable resource.").

BLM's explanation is both reasonable and faithful to applicable law. A "master development plan" for an oil and gas field must include all of the development that is planned to "fully develop" the field. 43 C.F.R. § 3137.71(b)(1). Again, BLM explained:

> [T]o the extent that an alternative concept strands an economically viable quantity of oil, the BLM would expect to receive a future permit application to develop it. Such an alternative concept therefore does not disclose and analyze the impacts of full field development and is a false comparison to other action alternatives.

5-SER-1194 (citing 43 C.F.R. § 3137.71(b)(1)). Consistent with that limitation, all of the action alternatives in the FSEIS (B-E) represented full development of the Bear Tooth Unit, meaning they do "not strand such a large quantity of oil and gas that, standing alone, is economic to develop (i.e., that would warrant construction of an additional drill pad)." 5-SER-1193. Full development does not mean recovery of "all possible oil." None of the alternatives evaluated in the FSEIS would recover all possible oil.

BLM's delineation of the five alternatives for full analysis is detailed in a 250-page "Alternatives Development" appendix (Appendix D.1) to the FSEIS. There, BLM explains how it developed the alternatives, the reasons it screened out other concepts and proposed alternatives from detailed consideration, and why it

carried particular elements forward for detailed consideration. 5-SER-1209-449; 6-SER-1452-76. BLM's discussion of alternatives, its selection of four alternative MDP configurations (in addition to the no-action alternative), and its explanation for why other alternatives were not carried forward for detailed analysis satisfies its obligation to consider a reasonable range of alternatives.

Ultimately, the alternatives-development process took years and was fully informed by public comment, which, in turn, lead to refinement of the alternatives, precisely as contemplated by NEPA. BLM's final range of alternatives "'foster[ed] informed decision-making and informed public participation.'" *Audubon*, 40 F.4th at 982 (citation omitted). Nothing more is required by NEPA.

2. BLM Correctly Addressed the No-TLSA Alternative Proposed by Plaintiffs.

Plaintiffs' core argument is that BLM should have given detailed consideration to an additional mid-range alternative that would have *partially* developed the Bear Tooth Unit. Specifically, Plaintiffs asked BLM to consider an alternative that prohibited all infrastructure in the TLSA. This proposed alternative would have made *two-thirds* of the Bear Tooth Unit surface area off-limits to development and allowed for development of only 71% of the pool underlying the Bear Tooth Unit, stranding about 200 million barrels of oil on leased lands that would otherwise be developed by drill pad BT2 or BT4. 9-SER-2572; 10-SER-2596.

But Plaintiffs concede, as they must, that BLM *did* consider this alternative and decided, as explained in the Alternatives Appendix, that it would not carry forward that alternative for detailed consideration. 5-SER-1256 (discussing Alternative Component 44, "No infrastructure within TLSA," including potential environmental benefits); 5-SER-1261 (alternatives eliminated from further analysis, Component 44). Specifically, BLM explained:

> This alternative concept would not meet the Project's purpose and need and would strand an economically viable quantity of recoverable oil. This alternative concept would strand all of the oil that would be accessed by drill site BT4 and some of the oil that would be accessed from drill site BT2. BLM determined that there is an economically viable quantity of recoverable oil in this area based on its review of the available geologic data and because there is enough resource accessible from BT4 that CPAI has proposed constructing a gravel road and drill pad to access it.

5-SER-1261; 8-SER-2282-83 (BLM evaluation of drilling reach). This explanation is all that NEPA requires. *Audubon,* 40 F.4th at 981 ("alternatives eliminated from detailed study need only be briefly discussed"); 40 C.F.R. § 1502.14(a) (same).[5]

[5] CBD cites *Environmental Defense Center v. Bureau of Ocean Energy Management*, but there, the "agencies gave no explanation for why the alternatives proposed did not lend themselves to meaningful analysis." 36 F.4th 850, 877 (9th Cir. 2022). Here, by contrast, BLM explained why Plaintiffs' no-TLSA development proposal was a "false comparison to other action alternatives." 5-SER-1194. Likewise, the decision in *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1052 (9th Cir. 2013), is distinguishable as it did not involve (as here) a

Moreover, although BLM declined to carry forward Plaintiffs' no-TLSA alternative for detailed consideration, it acknowledged and acted upon Plaintiffs' concerns about impacts in the TLSA. Specifically, BLM developed (and ultimately adopted) Alternative E, which is designed to reduce impacts in the TLSA and address other environmental concerns. 3-SER-809-11; 3-SER-603-04. BLM even incorporated many of the project components recommended by Plaintiffs—fewer well sites, less access to oil, fewer greenhouse gas emissions, 40% less infrastructure in the TLSA, less impact on subsistence resources, and fewer gravel roads—into the new Alternative E. 5-SER-1394-96; *see also* 8-SER-2254 (side-by-side comparison).

BLM's approach to the alternatives aligns with *Kempthorne*. 457 F.3d 969. There, this Court rejected a similar alternatives challenge (by some of the Plaintiffs here) to BLM's EIS for an earlier version of the IAP for the Petroleum Reserve. *Id.* at 978-79. The plaintiffs argued that BLM's range of alternatives was inadequate because it did not include their preferred "Audubon Alternative," which offered more protection for wildlife than the five alternatives considered. *Id.* at 978. The Court rejected that argument because BLM sufficiently explained why the

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(. . . continued)
compromise alternative (Alternative E) that reduced the development footprint in order to reduce impacts.

"Audubon Alternative as a whole was inconsistent with the [IAP] project and statutory mandates" and agreed to "incorporate several recommendations" into the final alternative it selected. *Id*. at 978-79. That is precisely what BLM did here with Alternative E.

3. Plaintiffs' Arguments Are Inconsistent with the Record and Misconstrue BLM's NEPA and NPRPA Obligations.

Plaintiffs levy a series of objections to BLM's rationale in support of its range of alternatives and the reasons it provided for rejecting Plaintiffs' no-TLSA alternative for detailed consideration in the FSEIS. None of these arguments have merit.

Plaintiffs argue that BLM believed it "must allow full development" of the Bear Tooth Unit. CBD Br. at 18; SILA Br. at 24 (claiming BLM believed it was "required to authorize full-field development"). This is false. In response to a similar allegation made by Plaintiffs during the NEPA process, BLM explained "[t]he Supplemental EIS does not state that BLM's legal authority to condition or reject the Willow Project is constrained, or that BLM cannot select Alternative A (No Action)." 5-SER-1198. In fact, BLM was very clear with Plaintiffs about this from the beginning of the NEPA process. On November 3, 2021, in a private meeting Plaintiffs and their lawyers had with agency officials shortly after the district court's last remand, BLM told Plaintiffs that "[t]he EIS will analyze all of the drill sites in any new alternative (i.e., fully develop), *though the ROD may or*

may not include (i.e., approve and permit) all of them." 9-SER-2577 (emphasis added). Plaintiffs themselves admit that BLM's final decision did *not* authorize all of the evaluated drill sites. *See* CBD Br. at 25; SILA Br. at 32.

In the FSEIS, BLM explained that "the purpose of a master development plan is *to evaluate* the full development of an oil prospect *to disclose all impacts* related to the proposed project and *prevent segmentation* of the National Environmental Policy Act analysis." 5-SER-1196 (emphases added). BLM further explained that Plaintiffs' no-TLSA alternative does not meet this purpose because it would not evaluate "full development," "disclose all impacts," or "prevent segmentation," and would therefore provide a "false comparison to other action alternatives" 5-SER-1194, 1196 (citing 43 C.F.R. § 3137.71(b)(1)); *see* 9-SER-2572-73 ("BLM does not want an alternative that would piecemeal development."). In so concluding, BLM remained faithful to NEPA's core purpose—to "foster[] informed decision-making and informed public participation." *Audubon,* 40 F.4th at 982 (citation omitted).

Plaintiffs' proposed alternative, if adopted, would likely result in a future application to build another drill pad in the northern area of the Bear Tooth Unit to recover the oil that would otherwise be stranded on leased lands. BLM appropriately explained that such an alternative would frustrate (and violate) NEPA because it would segment BLM's analysis of the MDP for the Bear Tooth

Unit. 5-SER-1196. Plaintiffs themselves argued, in public comments on the draft EIS, that NEPA prohibited BLM from segmenting its analysis. 9-SER-2525. ("BLM should be clear about the true scope of Willow and should not allow Conoco to piecemeal its proposal."). BLM did not abuse its discretion in choosing to conduct a detailed analysis of alternatives that provide for "full development" of the Bear Tooth Unit and declining to segment its NEPA analysis. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 897 (9th Cir. 2002) (NEPA does not permit "piecemeal" analysis).[6]

BLM's rejection of Plaintiffs' alternative is all the more sensible because Plaintiffs failed to demonstrate (as is their burden) that their proposed alternative is not just another "'mid-range' alternative[] between action and no action." *Earth Island Inst. v. U.S. Forest Serv.,* 87 F.4th 1054, 1065 (9th Cir. 2023). The FSEIS considers ConocoPhillips' five-pad proposal (Alternative B), two alternatives with similar oil recovery but dramatically different surface impacts (Alternatives C and D), a mid-range alternative with less oil recovery from only four pads

[6] Plaintiffs claim BLM's decision to eliminate their no-TLSA alternative from detailed evaluation is "unsupported by Willow's purpose and need statement." CBD Br. at 24; *see* SILA Br. at 28. But BLM's purpose and need statement (set forth on page 18 above) clearly states that BLM is evaluating a proposal for *a master development plan for the Bear Tooth Unit*. A partial development proposal is a "false comparison" to a master development plan for the entire unit.

(Alternative E), and a zero-pad (no-action) alternative (Alternative A). This range of alternatives gave BLM an informed basis for ultimately approving a three-pad project. 3-SER-610-14. Plaintiffs' proposed alternative just falls in the mid-range of alternatives between Alternative B and the no-action alternative, and Plaintiffs do "not explain why another alternative was necessary to foster informed decisionmaking and public participation." *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004-05 (9th Cir. 2013).

4. Plaintiffs Ignore BLM's Reasoned Explanation in the Record.

Plaintiffs largely ignore the NEPA-based reasons BLM gave for deciding not to carry forward Plaintiffs' no-TLSA alternative for detailed analysis, instead offering mistaken arguments that BLM misapprehended its authority under the NPRPA. CBD Br. at 21-22; SILA Br. at 25-26. In Plaintiffs' view, the NPRPA authorized—if not required—BLM to close areas of the Bear Tooth Unit to development, and, therefore, BLM should have carried forward for detailed analysis an alternative that permanently prohibited development in the TLSA portion of the Bear Tooth Unit. Plaintiffs' view misunderstands the NPRPA and BLM's administration of the Petroleum Reserve. *See* 1-CBD_ER-23-28 (district court's comprehensive explanation of Plaintiffs' mistaken view).

At the IAP stage, BLM determined which specific areas of the Petroleum Reserve are open for leasing and development, and under what conditions. Under

the IAP, 86% of the TLSA (3.13 million acres) is *closed* to oil and gas leasing and another 3% is available to leasing, but without any surface occupancy rights. 9-SER-2299. The remaining 11% of the TLSA is open to leasing and surface development, subject to additional special protections. 9-SER-2296. All of the leases in the Bear Tooth Unit, including those in the TLSA, are in areas open to leasing and surface development. 9-SER-2315. The decision to open this portion of the TLSA to oil development was therefore made in the 2013 IAP—which Plaintiffs supported as "balanced"—and affirmed in the 2022 IAP. 10-SER-2762; 10-SER-2759.

BLM further committed the Bear Tooth Unit to development when it issued leases for these lands over the course of nearly two decades. 9-SER-2320. Petroleum Reserve leases come with rights to develop the underlying resource, subject to reasonable mitigation measures to minimize impacts to surface resources. 9-SER-2296-97. With the exception of a few leases from 2017, Plaintiffs did not challenge BLM's leases for the Bear Tooth Unit, and the challenge to those few 2017 leases was rejected by this Court. *N. Alaska Env't Ctr.*, 983 F.3d at 1081.

Given this context, the decision before BLM in the present case was not whether all of the Bear Tooth Unit should be open to development, which was long ago decided, or whether the lands should have been leased for development, which

already occurred. Rather, BLM was required here to determine reasonable alternative configurations for development of the Bear Tooth Unit that best adhere to BLM's obligation to protect the surface resources of the Petroleum Reserve, and to give maximum protection to special areas "to the extent consistent with the requirements of this Act." 42 U.S.C. § 6504(a). BLM did so by considering a range of alternatives that contain varying levels of reduced impacts in the TLSA.

Plaintiffs assert that BLM did not perform a detailed analysis of their no-TLSA alternative, but the NPRPA mandated no such alternative. To the contrary, under the NPRPA and the IAP, "infrastructure is allowed, and indeed anticipated, within the TLSA." *SILA*, 555 F. Supp. 3d at 769; 42 Fed. Reg. 28,723; 9-SER-2296. And while Plaintiffs selectively cite 42 U.S.C. § 6504(a) as requiring "maximum protection," they conveniently omit the language clarifying that such protections apply only "to the extent consistent with the requirements of this Act."

Continuing to ignore BLM's actual reasons for rejecting their no-TLSA alternative, Plaintiffs also argue that BLM unlawfully assumed that ConocoPhillips has the right to recover "all possible oil." CBD Br. at 20-21; SILA Br. at 24. This is factually wrong. As BLM explained:

> In accordance with the District Court's decision, the [FSEIS] does not assume that ConocoPhillips has the right to extract all possible oil and gas from its leases. BLM does not require 100% resource extraction and may condition Project approval to protect surface resources

> even if doing so reduces the amount of oil and gas that can be profitably produced.

5-SER-1193. Indeed, Alternative B, as depicted in the figure at page 20 above, does not involve recovery of "all possible oil," and Alternative E involves recovery of even less oil. 3-SER-810. However, as BLM explained, Alternatives B and E both fully develop the reservoir (unlike Plaintiffs' no-TLSA alternative), while also providing appropriate protections to the surface resources in the Petroleum Reserve as required by the NPRPA.[7]

Likewise, Plaintiffs argue that BLM believed it had to "maximize Willow's oil recovery." CBD Br. at 21. But a "maximize resource recovery" plan would require seven drill pads, including four in the TLSA, and BLM screened out that option early in the process. 10-SER-2595. ConocoPhillips' actual proposal (Alternative B) only contemplated about 91% oil recovery, and BLM's compromise alternative (Alternative E) contemplated even less. 10-SER-2595-96. These action alternatives do not "maximize" oil recovery—they evaluate full-field development in the context of the NPRPA and its balance between development and protection of surface resources. This is entirely appropriate under NEPA.

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[7] Alternative E contemplated "the full development of the Willow reservoir with up to four drill site pads" but deferred approval of the BT5 to the future. 3-SER-785. "In order to provide an equivalent comparison of the full impacts of each alternative," BLM assumed all four pads would be approved and that construction on BT5 would begin at the earliest possible date. *Id*.

Morongo Band, 161 F.3d at 575 ("[a]n agency . . . is 'entitled to identify *some* parameters and criteria—related to Plan standards—for generating alternatives to which it would devote serious consideration.'" (citation omitted)).

Finally, Plaintiffs argue for the first time on appeal that BLM's decision, in the ROD, to disapprove drill pad BT5 (the southern-most drill pad) "demonstrates" that BLM's range of alternatives is unlawful. CBD Br. at 25-27; SILA Br. at 30-33. But this argument just conflates BLM's mitigation authority under the NPRPA with the range of alternatives that must be considered for an MDP for NEPA purposes. Indeed, BLM has the discretion to impose "such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska." 42 U.S.C. § 6506a(b). And BLM "can condition permits for drilling on implementation of environmentally protective measures, and we assume it can deny a specific application altogether if a particularly sensitive area is sought to be developed and mitigation measures are not available." *Kempthorne*, 457 F.3d at 976.

Here, BLM determined that mitigation measures *are* available—a finding Plaintiffs have not challenged. Following completion of the FSEIS, BLM used its NPRPA mitigation authority to approve a three-pad version of Alternative E that eliminated BT5. 3-SER-603-04. As the ROD explains, BLM exercised its authority

to approve something less than full development of the Bear Tooth Unit: "Although Alternative E in the Supplemental EIS evaluates the full development of the Willow reservoir with four satellite drill pads (BT1, BT2, BT3 and BT5), BT5 is disapproved in this ROD, as is BT4 (analyzed under Alternatives B, C and D)." 3-SER-613.[8]

In other words, after evaluating—under NEPA—the impacts of full-field development MDP alternatives, BLM had the information it needed to authorize—under the NPRPA—a mitigated version of the project that "strikes a balance" by "allowing for development to occur in the NPR-A consistent with the terms of existing leases while at the same time requiring the implementation of robust protections for surface resources." 3-SER-613. This is fully informed decision-making.[9]

B. BLM Lawfully Evaluated Growth Inducing Impacts.

Plaintiffs argued below that BLM failed to consider "growth inducing" impacts of Willow. 1-CBD_ER-37. Plaintiffs focused on a potential future development in the Petroleum Reserve, "West Willow," which is a "technical oil

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[8] ConocoPhillips subsequently relinquished 68,085.50 acres of leases underlying portions of BT4 and BT5. 1-CBD_ER-11.

[9] ConocoPhillips adopts and incorporates by reference the arguments of Kuukpik and the North Slope Borough in response to SILA's Alaska National Interest Lands Conservation Act arguments.

and gas discovery into which two exploration wells have been drilled," and for which "[d]evelopment is not currently planned." 9-SER-2289. Plaintiffs argued that BLM did not analyze the potential downstream greenhouse gas ("GHG") emissions of West Willow or other yet-to-be-conceived-of projects.[10] *Id*.

The district court determined that these claims were "unfounded" because the FSEIS did, in fact, estimate and discuss the downstream emissions associated with foreseeable future growth in the Petroleum Reserve, "include[ing] estimates for the downstream GHG emissions from developments like West Willow." 1-CBD_ER-40-41, 43. SILA has abandoned this claim on appeal, but CBD persists, pushing a hyper-technical argument that these impacts should appear in the FSEIS under the heading of "indirect" effects instead of the heading "cumulative" effects. CBD Br. 27-33. CBD's effort to "impermissibly elevate form over substance" has no support in NEPA. *Ctr. for Env't L. & Pol'y v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1009 (9th Cir. 2011).

1. The FSEIS Squarely Addresses Growth Inducing Impacts, Including West Willow.

Courts review the adequacy of an EIS's analysis of effects using the same "rule of reason" and "abuse of discretion analysis" discussed above. *Audubon*, 40

[10] West Willow is not part of Willow, and there is "no certainty as to whether, how, or when this discovery could be developed." 1-CBD_ER-39; 3-SER-758-59 (describing Willow project).

F.4th at 980 (internal quotation marks and citation omitted). "In performing this review," courts do not "'fly-speck'" an agency's analysis or "'hold it insufficient on the basis of inconsequential, technical deficiencies.'" *Id.* at 984 (citation omitted). Ultimately, a court "'must defer to an agency's decision that is "fully informed and well-considered."'" *Id*. (quoting *Kempthorne*, 457 F.3d at 975).

The FSEIS addresses the growth inducing impacts of Willow in a section aptly titled "Growth Inducing Impacts" (Section 3.20.3). *See* 4-SER-1157; *see also* 5-SER-1163. That section expressly identifies "West Willow" as a "Reasonably Foreseeable Future Action" and discusses the potential for Willow to facilitate future development projects, including "West Willow." 4-SER-1157.

The FSEIS then analyzes the cumulative effects of Willow's downstream emissions in the context of *all* such emissions from present and future development in the Petroleum Reserve and across the North Slope, including "the cumulative annual average of gross GHG emissions from the Project, the Coastal Plain, NPR-A, and other North Slope emissions." 5-SER-1163. This scope of analysis is reasonable and consistent with controlling precedent. *Cascadia Wildlands v. Bureau of Indian Affs.*, 801 F.3d 1105, 1112 (9th Cir. 2015) ("40 C.F.R. § 1508.7 does not explicitly require individual discussion of the impacts of reasonably

foreseeable projects, and, absent such a requirement, it is not for the court to tell the agency how specifically to present such evidence").[11]

BLM's analysis includes emissions from future growth in the Petroleum Reserve. Drawing on technical models from the 2020 IAP EIS, BLM includes in the FSEIS the projected indirect (or "downstream") emissions that may result from consuming fuel produced under future development scenarios in the Petroleum Reserve. 10-SER-2691. BLM's low- and medium-growth forecasts in the 2020 IAP EIS contemplated that potential future satellite projects (like West Willow) would "connect to existing or planned infrastructure in the Willow development," with the high-growth forecast going much further in anticipating new central processing facilities. 10-SER-2686-87. Moreover, the FSEIS conservatively uses the future downstream emissions from the high-growth scenario in the 2020 IAP EIS, thereby fully capturing the potential growth induced by Willow (and much more). 5-SER-1163; 10-SER-2691; 1-CBD_ER-44, n.175.

BLM performed this analysis along with the expanded analysis of GHG emissions to address the district court's 2021 remand order and this Court's decision in *Center for Biological Diversity v. Bernhardt,* 982 F.3d 723, 737 (9th Cir. 2020). The expanded analysis included detailed numerical estimates of

[11] 40 C.F.R. § 1508.7 has been recodified at 40 C.F.R. § 1508.1(g)(3).

Willow's direct and indirect GHG emissions (3-SER-793-95; 3-SER-803-04), the impact of foreign emissions (3-SER-803-05), the social cost of GHG emissions (3-SER-805-07), cumulative impacts to climate change based on cumulative and annual CO_2e calculations (5-SER-1163), and an appendix including the models and calculations themselves (6-SER-1477-518).

BLM therefore fully addressed growth inducing impacts and GHG emissions, and CBD's claim that BLM failed to evaluate such impacts directly contradicts the record. Indeed, CBD (perplexingly) relies on the "Growth Inducing Impacts" section *of the FSEIS itself* as evidence of the impacts that BLM allegedly failed to consider. CBD Br. at 30. CBD's argument is baseless.

2. CBD's "Indirect Effects" Argument Is Erroneous.

CBD next complains that the downstream GHG analysis of growth inducing impacts should have been placed in the FSEIS's indirect effects section, not the cumulative effects section. CBD Br. at 28. This argument is a whipsaw, as SILA argued in 2021 that the discussion of West Willow (sometimes referred to as "Greater Willow") "should have been included in the cumulative impacts section, not elsewhere in the EIS." *SILA*, 555 F. Supp. 3d at 781. The argument also just makes a distinction without a difference.

Cumulative effects aggregate the action's effects (direct and indirect) with those of other actions. 40 C.F.R. § 1508.1(g). An agency's NEPA analysis need

only "'provide[] full and fair discussion of significant environmental impacts and inform[] decisionmakers and the public of the reasonable alternatives.'" *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (ellipsis omitted) (quoting 50 C.F.R. § 1502.1). As discussed above, BLM met that standard by disclosing the potential for Willow to induce growth and estimating the downstream emissions of that future growth in the cumulative impacts section of the EIS. Nothing more was required. *Ctr. for Env't L. & Pol'y*, 655 F.3d at 1009 ("it would impermissibly elevate form over substance to hold that Reclamation must replicate its entire analysis under the heading of cumulative effects").

Next, CBD complains that BLM should not have relied on the future growth estimates in the 2020 IAP EIS because it "hides the effects induced by Willow itself." CBD Br. at 32. But the 2020 IAP EIS evaluated a "development scenario" whereby "future development . . . would connect to existing or planned infrastructure in the Willow development." 10-SER-2686-87. These scenarios include "satellite developments using . . . Willow," which is precisely what West Willow (if ever built) would be. 10-SER-2709. These numbers also include downstream effects and market effects. 10-SER-2732. BLM was not required to reinvent the wheel, and both the Ninth Circuit and the NEPA regulations confirm BLM's approach is reasonable. *See W. Watersheds Project v. Abbey*, 719 F.3d

1035, 1048-49 (9th Cir. 2013); *Kempthorne*, 457 F.3d at 974; 40 C.F.R. § 1501.11(b) (tiering); *id.* § 1501.12 (incorporation by reference); *see also Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 866 (9th Cir. 2004) ("Preparing an EIS 'necessarily calls for judgment, and that judgment is the agency's.'" (citation omitted)).

CBD seizes upon a statement that ConocoPhillips has "3 billion" barrels of "prospects and leads" in the Petroleum Reserve to suggest that BLM should have conducted a downstream GHG analysis on all of that speculative future development. But indirect effects are limited to those that are "'reasonably foreseeable.'" *Ctr. for Env't L. & Pol'y*, 655 F.3d at 1011 (citation omitted). "Prospects and leads" are not reasonably foreseeable and are dependent on enumerable future actions, including the results of future exploration activities that may confirm or disprove the prospects, a decision to develop (if the resources are proven), and BLM approval of a proposed development. 9-SER-2289-90. This type of attenuated causal chain—dependent on future events including future agency approval and "NEPA review"—is not an induced "indirect effect[]" of a project, even where the approved project "will make it easier" for future projects to occur. *Ctr. for Env't L. & Pol'y*, 655 F.3d 1011-12. Moreover, even if "prospects and leads" were "reasonably foreseeable effects" (they are not), the FSEIS's effects analysis nonetheless incorporated and considered the "high development" scenario

from the 2020 IAP EIS, which included total production of "2.6 billion barrels of oil." 1-CBD_ER-44 n.175; 5-SER-1161, 1163; 10-SER-2707.

Finally, CBD cites to airport and highway cases (*e.g.*, *City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975), and *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011)), but those involved growth that a project would induce *without* future federal action, approval, or NEPA review, such as growth in air traffic from a new runway or auto traffic from a new highway interchange. Here, no future "growth" in the Petroleum Reserve can occur without exploration, a proposal, NEPA review, and BLM approval. *See Ctr. for Env't L. & Pol'y*, 655 F.3d at 1012 (new water infrastructure providing increased capacity was not a growth inducing effect when "[t]he use of the expanded capacity remains both firmly in the control of Reclamation and is subject to review in a future EA or EIS"); *see also* 1-CBD_ER-45-46 (district court order distinguishing CBD's cases on other grounds).

Ultimately, BLM cannot know what future development of the Petroleum Reserve will entail (induced by Willow or otherwise), particularly given that development has consistently come far more slowly than anticipated by Congress or BLM. *Kempthorne*, 457 F.3d at 973. BLM's analysis was transparent and reasonable, and NEPA requires nothing more. *See id.* at 976 (affirming BLM

decision to use hypothetical development scenario to project future growth in NPRPA).

C. BLM's Decision Complies with the NPRPA.

CBD argues that BLM violated the NPRPA because it did not use its discretionary authority under the NPRPA to "limit Willow's climate harms." CBD Br. at 33. This argument is baseless.

Congress enacted the NPRPA to "expeditiously advance private oil and gas development on the NPR-A." *ConocoPhillips Alaska, Inc. v. Alaska Oil & Gas Conservation Comm'n*, 660 F. Supp. 3d 822, 840 (D. Alaska 2023). And it amended the law "to increase domestic oil supply as expeditiously as possible." *Id.* at 834. But Congress balanced oil production with protection of "surface resources" in the NPR-A, giving BLM discretion to "mitigate . . . adverse effects" as it "deems necessary." 42 U.S.C. § 6506a(b); *see also id.* § 6504(a) (directing federal oil exploration be conducted to "assure the maximum protection of such surface values" in special areas, but only "to the extent consistent with the requirements of this Act"). The NPRPA says nothing about downstream emissions.

BLM followed the NPRPA's instruction, mandating numerous mitigation measures and additional protections from the unchallenged 2013 and 2022 IAP RODs. 3-SER-639, 659-69. Those are the same mitigation measures that BLM found, in 2022, "strike[] a balance" between development and the "importance of

surface resources." *See also* 9-SER-2499, 2514 (IAP protections). Neither CBD nor SILA challenges any of those measures (or the 2022 IAP).

Instead, CBD turns the NPRPA upside down, arguing that BLM was *required* to reduce oil production to mitigate potential future climate change impacts to "surface resources." There is no plausible way to graft CBD's "keep it in the ground" policy[12] onto the Naval ***Petroleum Reserves Production*** Act. The purpose of the NPRPA is to provide for the increased production of oil—not to ameliorate the long-term consequences of global climate change by imposing conditions to restrict the production of oil. The statutory reference to "surface resources" plainly refers to on-the-ground development activities, and mitigation measures for those activities were imposed here. 42 U.S.C. § 6506a(b).

CBD also misconstrues the facts. It asserts that Willow will "result in more than 239 million metric tons of direct and indirect greenhouse gas emissions over its lifetime," CBD Br. at 5, but the figures it cites are *gross* emissions, not *net* emissions that account for market substitution. 6-CBD_ER-1170. The FSEIS projects Willow's total direct and net indirect (downstream) emissions at

[12] *See* Ctr. for Biological Diversity, https://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground/ (last visited Jan. 11, 2024).

approximately 4.3 million MT per year.[13] EPA has determined that an emission source more than *three times that size*, operating for a period of *50 years,* has no measurable impact on the environment. 2-SER-337-45 (EPA letter explaining that effects from such emissions "would be too small to physically measure or detect"); *see also* 7-SER-1949-55. BLM's substantive authority under the NPRPA is to "provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the" NPR-A, 42 U.S.C. § 6506a(b), not to address speculative impacts that are too small to physically measure or detect.

Finally, CBD cherry picks the FSEIS and ROD to claim that "BLM itself linked Willow's emissions to climate harms to the Reserve's resources." CBD Br. at 34. Not true. CBD's selected citations generally discuss the impacts of GHGs and climate change. *Id*. But they provide no "link" between specific Willow emissions and "significant[] adverse effects on the surface resources of the" NPR-A, 42 U.S.C. § 6506a(b). Nor could the FSEIS do so. As this Court has explained, "'[i]t is currently beyond the scope of existing science to identify a

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[13] The FSEIS estimates *total emissions*, including, direct, indirect net, domestic, and indirect foreign emissions for Alternative E at 129.669 million MT over the 30-year life of the project (about 4.3 million MT per year). 3-SER-804 (Table 3.2.8); 6-SER-1497-99. Congressional *amici* in support of CBD compare Willow emissions to the "annual emissions of over 60 coal-fired power plants," CBD Dkt. 65.2 at 6, but this just repeats a myth that has been debunked in the record. 9-SER-2337.

specific source of CO2 emissions and designate it as the cause of specific climate impacts at an exact location.'" *Bellon*, 732 F.3d at 1143 (quoting Letter from Director, U.S. Geological Survey, to Director, U.S. Fish & Wildlife Service, The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts (May 14, 2008)); *see infra* section VI.D.1.

For these reasons, and those discussed by Federal Defendants and the other Intervenors, whose arguments ConocoPhillips adopts by reference, CBD's NPRPA arguments are without merit.

D. The Agencies' ESA Determinations Are Lawful.

FWS's BiOp for Willow concluded that the project was not "likely to jeopardize the continued existence" of polar bears. 6-SER-1710. Far from it, the BiOp concludes that FWS does "not anticipate the proposed action would result in *any* incidental take of polar bears" over the entire 30-year life of Willow. 6-SER-1712 (emphasis added). Plaintiffs challenged that conclusion before the district court, but abandon those claims on appeal.

Instead, CBD alone presses the novel claim that because Willow could contribute to global GHG emissions, the Federal Defendants were required to evaluate potential effects to polar bears and ice seals from those emissions in a

biological opinion. CBD Br. at 45.[14] But as the district court explained, the record here amply demonstrates that the federal agencies *did* consider the possibility for GHG emissions from Willow to impact polar bears and ice seals, applied the correct legal standard (whether future climate change "effects" are "caused by the proposed action" and "reasonably certain to occur"), and "provided a reasoned basis for concluding that" this standard was not met. 1-CBD_ER-102-03 (quoting 50 C.F.R. § 402.02).

Tellingly, CBD does not identify a single example where an agency has conducted the type of ESA consultation it demands, and, indeed, CBD itself did not even assert this claim in the prior Willow litigation. That is unsurprising because, as outlined below, the EPA, the U.S. Geological Survey ("USGS"), FWS, and the Secretary of Interior (among others) have all concluded that there is no way to connect emissions from a specific project with specific impacts to animals at specific locations. Without such a connection, the possible impacts associated with GHG emissions do not meet the regulatory definition for "effects of the action," which must be "caused by the proposed action" and "reasonably certain to occur." 50 C.F.R. § 402.02.

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[14] SILA made a similar claim below but did not raise it on appeal and has therefore forfeited it. *Miller v. Fairchild Indus., Inc.,* 797 F.2d 727, 738 (9th Cir. 1986).

CBD also gives no reason why Willow should be the first project in the history of the ESA to require treatment of indirect GHG emissions as "effects of the action" on listed species. And there is no such reason. As indicated above, the FSEIS projects Willow's total direct and indirect (downstream and foreign) emissions at an average of 4.32 million MT per year. 3-SER-810. For context, in 2019 alone, GHG global emissions were 59,100 million MT. 3-SER-794; 5-SER-1164.

The briefs of Federal Defendants and the North Slope Borough demonstrate the lawfulness of the agencies' approach. Without repeating those arguments, ConocoPhillips addresses three points below. *First*, the scope of the Willow consultation is consistent with a long and unbroken chain of agency guidance and actions, and is supported by Ninth Circuit case law. *Second*, CBD fails to establish standing to pursue its claims. *Third*, CBD's argument would result in the unprecedented circumstance in which the "effects of the action" for *any* federal action with GHG emissions would extend to every ESA-listed species on Earth, making consultation on such actions a practical impossibility.

1. Plaintiffs' Arguments Conflict with Longstanding Agency Practice.

In 2008, FWS listed the polar bear as a "threatened species" because "polar bear habitat—principally sea ice—is declining throughout the species' range" and "this decline is expected to continue for the foreseeable future[.]" 2-SER-331.

FWS explained that most of the observed increase in globally averaged temperatures is "*very likely* due to the observed increase in anthropogenic GHG concentrations" and that the Arctic is likely to be "ice-free" in the summer sometime in the 21st century. 2-SER-332, 334.

In the polar bear listing rule, FWS addressed the "Regulatory Implications for Consultations under Section 7 of the Act" for projects that emit GHGs (like a power plant) and for "oil and gas development activities conducted on Alaska's North Slope." 2-SER-335-36. FWS explained that Section 7 is limited to effects that are "reasonably certain to occur" and would not occur "but for" the action under consultation. 2-SER-333. Relying on *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229 (9th Cir. 2001), FWS explained that in order to attribute effects to an action, it "must 'connect the dots' between its evaluation of effects of the action and its assessment of take" and that "[t]he best scientific information available to us today . . . has not established a causal connection between specific sources and locations of emissions to specific impacts posed to polar bears or their habitat." 2-SER-335. FWS explained that, for Alaska North Slope activities, consultation may be required for localized operational and construction impacts but not for any downstream GHG impacts because "there is no traceable nexus between the ultimate consumption of the petroleum product and any particular effect to a polar bear or its habitat" and, therefore, "the emissions

effects resulting from the consumption of petroleum derived from North Slope or Chukchi Sea oil fields *would not constitute an 'indirect effect' of any federal agency action to approve the development of that field.*" 2-SER-336 (emphasis added).

EPA reached the same conclusion by modelling the emissions from a hypothetical power plant that would emit over 14 million MT of CO_2 per year for 50 years. *See* 2-SER-337-45; 7-SER-1954-55 (discussing EPA letter). EPA showed that *after 50 years* of operation, there could be an approximate 0.01% change in global CO_2 concentrations, which could potentially correspond to a change in global temperature between 0.00022 and 0.00035 degrees Celsius. EPA explained that these changes (if they occurred) "would be too small to physically measure or detect" in the habitat of listed species. 7-SER-1955. Accordingly, "EPA has determined that the risk of harm to any listed species, including . . . polar bears, or to the habitat of such species based on the anticipated emissions of the model facility as described above, or any facility with lower emissions, is too uncertain and remote to trigger ESA section 7(a)(2) obligations." 2-SER-334. USGS also

performed an analysis that reached this same conclusion. *See Bellon*, 732 F.3d at 1143 (discussing USGS analysis and conclusions).[15]

The Department of Interior evaluated the issue and agreed with the positions of FWS, EPA, and USGS. 7-SER-1949-55 (the "Bernhardt Memorandum"). Based on a careful review of the statute, regulations, and guidance, the Department concluded that "any observed climate change effect on a member of a particular species or its critical habitat cannot be attributed to the emissions from any particular source" and cannot be "reasonably certain to occur." 7-SER-1954.

In subsequent years, federal agencies have uniformly followed this approach. 8-SER-2280-81 ("the memo is still in effect"). For example, EPA relied on its own prior analysis, the Bernhardt Memorandum, and the polar bear listing decision to conclude that Section 7(a)(2) does not require an evaluation of GHG emissions associated with vehicle fuel standards (2012) or the Clean Power Plan (2015), explaining that "'any potential for a specific impact on listed species in their habitats associated with these very small changes in average global temperature and ocean pH is too remote to trigger the threshold for ESA section 7(a)(2).'" 2-SER-348. Likewise, in 2022, FWS confirmed that "based on the best

[15] The district court concluded that the EPA letter and USGS memorandum were "relied" upon by Federal Defendants, and thus considered part of the administrative record. 1-CBD_ER-60-61.

scientific data available we are unable to draw a causal link between the effects of specific GHG emissions and take of the emperor penguin[.]" 2-SER-352.

This Court has also recognized these limits on causation. In *Bellon*, the Court evaluated a Clean Air Act challenge by environmental groups alleging that Washington State failed to regulate GHG emissions from five refineries with 5 million MT per year of collective emissions. 732 F.3d at 1138. The plaintiffs asserted injury based on aesthetic and recreational harms from melting glaciers and other effects of climate change. The court held they lacked standing because the alleged injuries were not "fairly traceable" to Washington's failure to regulate GHG emissions from the refineries, explaining:

> [T]here is a natural disjunction between Plaintiffs' localized injuries and the greenhouse effect. Greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime. . . . [T]here is limited scientific capability in assessing, detecting, or measuring the relationship between a certain GHG emission source and localized climate impacts in a given region. As the U.S. Geological Survey observed, "[i]t is currently beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of specific climate impacts at an exact location." Ltr. From Director, U.S. Geological Survey to Director, U.S. Fish & Wildlife Service, *The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts* (May 14, 2008).

Id. at 1143. The Court found there was no way to connect the causal chain, especially because the refineries' annual emissions (5 million MT per year) were a

tiny fraction of global emissions. The Court explained that any impacts are "scientifically indiscernible, given the emission levels, the dispersal of GHGs world-wide, and the absence of any meaningful nexus between Washington refinery emissions and global GHG concentrations now or as projected in the future." *Id.* at 1143-44 (internal quotation marks and citation omitted).

2. CBD Lacks Standing to Assert Its ESA GHG Claim.

For Article III standing, a plaintiff must satisfy three "irreducible constitutional minimum" requirements: (1) he or she suffered an injury-in-fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). "[T]he 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.'" *Bellon*, 732 F.3d at 1146 (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). However, they are distinct in that traceability "examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief." *Id.* "Redress need not be guaranteed, but it must be more than 'merely speculative.'" *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (citation omitted).

A plaintiff bears the burden to prove standing at summary judgment (*Lujan*, 504 U.S. at 561) and must demonstrate standing for *each claim* asserted (*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).[16] Standing is substantially more difficult to prove when the plaintiff's injury "'arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*[.]'" *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1013 (9th Cir. 2021) (citation omitted), *cert. denied*, 142 S. Ct. 713 (2021). "In that case, the plaintiffs must 'adduce facts showing that [the choices of independent actors not before the courts] have been or will be made in such manner as to produce causation and permit redressability of injury.'" *Id.* (citation omitted; alteration in original). Moreover, "a plaintiff [asserting a procedural harm] raising only a generally available grievance about government . . . and seeking relief that no more directly and tangibly benefits him than it does the public at large[,] does

[16] The district court did not address standing related to CBD'S GHG emissions claim because it found CBD had standing to challenge FWS's conclusions in the BiOp that no "incidental take" would result to polar bears from on-the-ground construction and operation of Willow. 1-CBD_ER-75-76. But standing is not "commutative," *Cuno*, 547 U.S. at 335, and even if it were, CBD has now forfeited its ESA "take" claim by not appealing it. A party may not maintain standing based on a claim that is no longer part of the case. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). CBD's only ESA claim on appeal is CBD's GHG claim. CBD must, but fails to, establish standing for that claim.

not state an Article III case or controversy." *Id*. at 1014 (citation omitted; alterations in original).

CBD's brief contains a single, conclusory paragraph addressing standing. CBD Br. at 16-17. CBD's standing declarations make generic (and equivocal) assertions that Willow will contribute to climate change, climate change is harming polar bears, and Willow will therefore harm Plaintiffs' members' recreational or aesthetic interests in viewing polar bears in the future.[17] This is precisely the alleged causal chain that *Bellon* found too attenuated to support standing. *Bellon*, 732 F.3d at 1143. CBD provides no evidence to connect Willow emissions to specific impacts at specific locations in the Arctic, let alone to animals inhabiting those locations. *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 84 (D.D.C. 2012) ("The fundamental problem with this theory of standing lies in the disconnect between Plaintiffs' recreational, aesthetic, and economic interests, which are uniformly local, and the diffuse and unpredictable effects of GHG emissions."), *aff'd sub nom. WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013). CBD thus cannot demonstrate causation or redressability.

[17] *See, e.g.*, 3-CBD_ER-391-92 (CBD District Court Dkt. 115-4 ¶ 59 (Amstrup)) ("I am injured by the greenhouse gas emissions that result from the extraction and production of fossil fuels on public lands, and in particular, I am injured by the approval of the Willow Project which will result in substantial global emissions of greenhouse gases[.]").

CBD's burden is particularly difficult to meet here, given that most of the Willow emissions estimates in the FSEIS are indirect, and any allegation of injury must rely on an attenuated downstream causal chain. The FSEIS estimates Willow emissions in three categories. The first category is the ***direct*** emissions from constructing and operating Willow. For Alternative E, the direct emissions are 773 thousand MT of CO_2e per year (or 23.19 million MT over 30 years). 3-SER-803. The second category is ***indirect*** emissions, which are an estimate of future emissions that occur when third parties use fuel made from Willow oil (*e.g.*, by flying planes and driving vehicles). These estimates are based on many assumptions about future third-party behavior and future market forces, such as market substitution and no future government policies or voluntary programs to offset those future emissions. 6-SER-1497, 1522-25. For Alternative E, the FSEIS estimates those indirect emissions at 1.54 million MT per year (or 46.2 million MT over 30 years). 3-SER-803. The third category is the ***indirect foreign*** emissions, which are estimates based on assumptions of how Willow will impact the global price of oil for the next 30 years and how those changes will, in turn, affect consumer choices and demand. 3-SER-802-03, 810-11. For Alternative E, the FSEIS estimates those indirect foreign emissions at 2.01 million MT per year (or 60.273 million MT over 30 years). 3-SER-803, 810. Thus, the total direct and indirect emissions estimated in the FSEIS is 4.32 million MT per year. 3-SER-810.

Bellon involved sources with *5 million* MT per year of *direct* emissions. Willow direct emissions are estimated at 773 *thousand* MT per year. Even the total Willow estimated emissions (4.32 million MT per year) are still below the direct emissions in *Bellon*. Indirect emissions are far more attenuated than direct emissions because they are remote in time and location and the product of future independent consumer choices, market forces, and policy decisions or regulation (or lack thereof). Plaintiffs fail to "'adduce facts showing that those choices have been or will be made.'" *WildEarth Guardians v. U.S. Forest Serv.*, 70 F.4th 1212, 1217 (9th Cir. 2023) (citation omitted).

CBD may try to distinguish *Bellon* by relying on the 2016 paper by Notz and Stroeve ("Notz") that CBD cites in its opening brief for the proposition that there is a generally observed linear relationship between increased GHG emissions and decreased summer sea ice. CBD Br. at 45. Any such correlation does not fill the evidentiary gap. That is because the paper does not demonstrate a new "scientific capability in assessing, detecting, or measuring the relationship *between a certain GHG emission source and localized climate impacts in a given region*." *Bellon*, 732 F.3d at 1143 (emphasis added); *see* 2-SER-391-92 (Declaration of Dr. Anne Smith ("Smith Decl.") ¶ 9) ("There is no aspect of the Notz relationship that provides a basis for making location-specific estimates of sea-ice, and the paper does not provide any information to project how any sea-ice losses might translate

into polar bear or ice seal population impacts."); 2-ER-396, 407-08 (*id.* ¶¶ 16, 30-32); *see also* 1-CBD_ER-60-61 (district court accepting the unrebutted Smith Declaration for standing purposes).

Indeed, the limits of the Notz equation are demonstrated with simple arithmetic. If each ton of direct emissions from Willow resulted in the direct loss of 3 square meters of sea ice (as claimed by Notz), the sum per year is only 2.3 square kilometers of summer sea ice.[18] If the more speculative indirect emissions are included (4.32 million tons per year), the total is still only 12.9 square kilometers per year.[19] The Arctic ice sheet at its maximal area in 2022 was 12.898 *million* square kilometers (larger than the entire United States) and the minimal summer area (September average) in 2022 was 3.474 *million* square kilometers. 2-SER-393-94 (Smith Decl. ¶ 11). Annual variations in minimal sea ice extent can exceed a million square kilometers. For example, in 2022, there were 1.1 million *more* square kilometers of summer sea ice extent than in 2012. *Id.* Sea ice changes *less than 1,000 square kilometers cannot be reliably measured*, and a change of 2.3 square kilometers (or 12.9 square kilometers if indirect emissions are included) of sea ice is thus not even perceptible or scientifically measurable in the context of a

[18] 773,000 (MT GHG) x 3 (square meters) = 2,319,000 (square meters) / 1,000,000 (square meters per square kilometer) = 2.3 square kilometers.

[19] 4,320,000 (MT GHG) x 3 (square meters) = 12,960,000 (square meters) / 1,000,000 (square meters per square kilometer) = 12.96 square kilometers.

sea ice sheet that is regularly fluctuating in size by orders of magnitude more. 2-SER-392-95 (*Id.* ¶¶ 10 & n.1, 12); 2-SER-405 (*id.* ¶ 27) ("[T]he environmental impact of the additional Willow project-related emissions is, in any practical sense of the term, nil."). Notz provides no mechanism to show where on the expansive Arctic ice sheet this (imperceptible) change will occur, how that change in that location will impact polar bears in a perceptible way, or how that change (many years from now) will perceptibly impact CBD's members' recreational or aesthetic interests in polar bears. 2-SER-391-92, 396, 408 (*Id.* ¶¶ 9, 16, 32).

CBD also cannot avoid dismissal by arguing it has asserted a "procedural" injury. *Bellon* rejected this argument because those plaintiffs failed to show the "'meaningful contribution' to global GHG levels" necessary to establish a causal nexus. *Bellon*, 732 F.3d at 1144-46 (citation omitted). And this Court recently confirmed that "the causation and redressability requirements are 'relaxed' for procedural claims *only* in the sense that a plaintiff 'need not establish the likelihood that the agency would render a different decision after going through the proper procedural steps.'" *WildEarth Guardians*, 70 F.4th at 1216 (emphasis added; citation omitted).

A plaintiff still must show "'a likelihood that the challenged action, if ultimately taken, would threaten a plaintiff's interests,'" and the procedural injury standard has no bearing when, as here, the alleged injury is caused by "'third

parties not before the court.'" *Id.* at 1217 (citation omitted) (quoting *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1161 (9th Cir. 2017)). In other words, the "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Thus, "a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996).

Here, CBD's alleged climate change injuries result from potential third-party actions—future downstream emissions, future policies, and the actions of countless actors and market forces—which may or may not come to pass. Thus, the "procedural" standing test does not apply. *WildEarth Guardians*, 70 F.4th at 1216. Moreover, CBD cannot show that any procedural breach of the ESA with respect to Willow will cause future global climate change, let alone cause the "essential injury" to CBD's member recreational or professional interest in ESA-listed species. *Fla. Audubon Soc'y*, 94 F.3d at 664-65; 2-SER-405 (Smith Decl. ¶ 27).

For similar reasons, CBD fails to demonstrate redressability. Whether CBD's members suffer global climate change impacts in the future that affect their interests in Arctic species is a function of many factors, including total global

GHG emissions (past, present, and future) and global policy choices. 2-SER-391-92 (Smith Decl. ¶ 9) ("The Notz relationship indicates that any projection of future Arctic sea-ice area depends on the future global emission path the world will follow and is not accelerated in any meaningful way by Willow's emissions."); 2-SER-396, 408-09 (*Id.* ¶¶ 17, 33).

As this Court explained, while "[t]here is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change," "any effective plan would necessarily require a host of complex policy decisions entrusted . . . to the wisdom and discretion of the executive and legislative branches." *Juliana*, 947 F.3d at 1171 (climate injuries not redressable). Additionally, "[t]here is little reason to think Congress assigned" to FWS the duty to develop and implement a plan to address GHG emissions. *West Virginia v. EPA*, 142 S. Ct. 2587, 2612 (2022).

At bottom, CBD has asserted, at most, a "'generally available grievance'" related to the future of sea ice and Arctic species that "'does not state an Article III case or controversy.'" *Mayorkas*, 5 F.4th at 1014 (citation omitted). CBD lacks Article III standing with respect to its ESA GHG claim.

3. CBD's Claim Would Expand the "Effects of the Action" for GHG-Emitting Actions to the Entire Earth.

CBD is attempting to force agencies (for the first time in ESA history) to treat a project's GHG emissions, standing alone, as "effects of the action." But to

be an "effect[] of the action," the effect must be a "consequence[] *to listed species or critical habitat* that [is] *caused by* the proposed action" and that is "reasonably certain to occur." 50 C.F.R. § 402.02 (emphases added). Here, BLM is the agency charged by law to determine the "effects of the action" and it explained why Willow's GHG emissions are not an "effect of the action," concluding:

> The Service has consistently held this position since at least 2008, when it listed polar bears as threatened. Although climate science has advanced since then, the level of reliability and granularity provided by existing models is still insufficient to identify project-specific effects to listed species or designated critical habitat.

7-SER-1919; *see* 7-SER-1957.[20] FWS and NMFS both agreed. CBD disagrees with these expert determinations because CBD believes the "effects of the action" for any action that has GHG emissions must extend everywhere GHGs go: to the entire Earth.

The "effects of the action" establish the geographic limits on consultation (called the "action area") and also the species to be evaluated. 50 C.F.R. §§ 402.02(d) ("Action area means all areas to be affected directly or indirectly by the

[20] CBD suggests BLM made a "no effect" determination, citing *Growth Energy v. EPA*, 5 F.4th 1, 31 (D.C. Cir. 2021); CBD Br. at 52. The district court saw through this. 1-CBD_ER-100-105. BLM made a "may affect" determination and appropriately limited the "effects of the action" to those that are "reasonably certain to occur." 1-CBD_ER-101-02. Regardless, CBD failed to allege a "no effect" claim against BLM in its complaint and its 60-day notice, barring any such claim. *See Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998); 16 U.S.C. § 1540(g)(2).

Federal action and not merely the immediate area involved in the action."), 402.14(c)(1)(ii), (iii) (action area sets scope of consultation and species evaluated). Because GHGs, "once emitted from a given source, become well mixed in the global atmosphere,"[21] CBD's argument necessarily requires the "action area" for any action with direct or indirect GHG emissions (which is almost all actions) to be the entire Earth, in which case, for each consultation, the "may effect" test would have to be applied to all 1,300 or so listed species throughout the world.[22] *See* CBD Br. at 53. That is obviously impractical (and of little or no value), and would make consultation on such actions a practical impossibility. In any event, the ESA does not require consultation on remote and speculative impacts. *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (Navy not required to consult on remote possibility of missile explosion); 50 C.F.R. § 402.02 (effects must be "caused by" the action and "reasonably certain to occur").

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[21] 7-SER-1953; *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011).

[22] CBD agrees, claiming "Willow … may affect hundreds of threatened and endangered species and their critical habitats [worldwide] due to the resulting increase in carbon emissions" and "BLM must therefore consult [on those species] under the ESA prior to permitting" Willow. 7-SER-1989; *see also* CBD Br. at 53 (arguing for expanded "action area").

CBD nonetheless argues that "there is a direct link between increased greenhouse gas emissions and increased ice-free days, rendering the effects to [polar bears and ice seals] from Willow's emissions reasonably foreseeable." CBD Br. at 46. But this directly contradicts findings by federal agencies over the past 15 years, as described above, that emissions from a specific source cannot be scientifically linked to specific impacts in a specific location. It also contradicts the extensive record in this case. As the district court explained, "Plaintiffs have not shown any available scientific evidence that links Willow's projected GHG emissions to a reasonably certain decrease in sea ice impacting polar bears in the Action Area." 1-CBD_ER-111. CBD points to Notz, but BLM concluded that Notz "does not connect the impacts from GHG emissions for a specific, individual activity, such as Willow, to a specific area for analysis which could affect the health of a discrete listed species, such as polar bears or ice seals." 7-SER-1957; *see also* 7-SER-1919-55.[23]

[23] CBD also cites a "letter," which it erroneously calls a "study" (4-ER-799-805 (Molnar et al. (2020)), but that letter says nothing about GHG emissions levels worldwide, let alone provide a "link" from project-specific emissions to Arctic species impacts. Before the district court, CBD cited a declaration filed in another lawsuit challenging an EPA rule known as "SAFE II," arguing there that "polar bears in Alaska face an additional ice-free day . . . for each 9.0 billion metric tons of CO_2 emitted from fossil fuel combustion and industrial processes." 10-SER-2600. CBD has apparently abandoned that line of argument, perhaps because if 9.0 billion MT of CO_2 supposedly equals *one* additional ice-free day, then 6.25 million tons creates an ice-free minute, and, by that calculation, the combined 30 years of

In sum, the agencies complied with their obligation to consider the "effects of the action" by thoroughly considering the entire record and correctly applying well-established ESA standards. CBD's claim should be dismissed because CBD lacks standing and because its claim is meritless.

E. Vacatur Is Unwarranted.

If the Court finds any error, the Court should remand the case to the district court to determine the appropriate remedy. *See, e.g.*, *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022) (remanding to district court to determine remedy). The appropriate remedy necessarily hinges on the type of legal error found by the Court, which is presently unknown, as well as equitable factors that will be clearer and more informed after this Court's decision. Willow has been under construction since April 2023, the current winter construction season is fully underway, hundreds of workers have been hired with more workers coming on board each day, and ConocoPhillips is expending substantial resources daily to ensure the construction is safely and timely executed. Such an immense mobilization of

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(. . . continued)
Willow emissions—assuming all the speculative indirect and foreign emissions actually occur (129.7 million MT)—would mean there *could* be 20 minutes more ice-free time *in 2055* (9,000,000,000 MT divided by 24 hours and divided by 60 minutes = 6.25 million MT). This "consequence is so remote in time from the action under consultation that it is not reasonably certain to occur." 50 C.F.R. § 402.17(b)(1).

equipment, people, and resources—in one of the harshest climates on Earth—cannot be stopped on a dime.

Given the enormous import of the Willow project to the United States, ConocoPhillips, Alaska Native communities, and the State of Alaska—as expressed in opposition to the motions for injunctions pending appeal—any remedy should be addressed in a fully informed manner through supplemental briefing before the district court, which has presided over Willow litigation for over three years, including numerous injunction proceedings. Alternatively, if the Court is not inclined to remand the case, ConocoPhillips respectfully requests that the Court reserve decision on remedy until after supplemental briefing before this Court.

A court "is not required to set aside every unlawful agency action." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). "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.'" *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (citation omitted).

Courts often decline to vacate when "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993); *see Nat'l*

Fam. Farm Coal. v. EPA, 966 F.3d 893, 929 (9th Cir. 2020) (remanding without vacatur where agency would "likely be able to offer better reasoning and adopt the same rule on remand" (internal quotation marks and citation omitted)). Here, Plaintiffs have "given [the Court] no reason to believe that the agency would be unable to cure [any] deficienc[y] on remand." *Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n*, 80 F.4th 956, 997 (9th Cir. 2023).

This Court has also made clear that, when considering whether vacatur is warranted, courts should weigh economic and other practical concerns. *Id.* at 994. Here, the consequences of vacatur would be devastating. Those consequences are documented in the existing record—specifically, in the briefing and numerous declarations submitted by ConocoPhillips, Kuukpik, the North Slope Borough, Arctic Slope Regional Corporation, and the State of Alaska in response to the motions for injunction pending appeal filed in this Court in December 2023.[24] ConocoPhillips also directs the Court to the recent declarations submitted on January 8, 2023, which (i) describe the status of the construction as of that date and (ii) provide resolutions executed in December 2023 by the City of Nuiqsut and the Native Village of Nuiqsut formally documenting their support for the Willow project. Plaintiffs have offered no testimony or other evidence rebutting that

[24] *See* Dkts. 21-22, 24, 26, 28; *see also* 2-SER-376, 384-87.

factual record, and vacatur is unwarranted because it would have indisputably disruptive consequences.

VII. CONCLUSION

The district court's decision should be affirmed.

DATED: January 12, 2024.

STOEL RIVES LLP

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

TABLE OF CONTENTS TO ADDENDUM

Federal Statutes

Federal Regulations

16 U.S.C. § 1540. Penalties and enforcement

. . .

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2) **(A)** No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United

States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3) **(A)** Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

. . .

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

> **(A)** utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> **(B)** identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> **(C)** consistent with the provisions of this chapter and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> > **(i)** reasonably foreseeable environmental effects of the proposed agency action;
> > **(ii)** any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
> > **(iii)** a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
> > **(iv)** the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

Prior to making any detailed statement, the head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document;

(E) make use of reliable data and resources in carrying out this chapter;

(F) consistent with the provisions of this chapter, study, develop, and describe technically and economically feasible alternatives;

(G) any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

> The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(H) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(I) consistent with the provisions of this chapter, recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(J) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(K) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(L) assist the Council on Environmental Quality established by subchapter II of this chapter.

42 U.S.C. § 6504. Administration of Reserve

(a) Conduct of exploration within designated areas to protect surface values

Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.

(b) Continuation of ongoing petroleum exploration program by Secretary of Navy prior to date of transfer of jurisdiction; duties of Secretary of Navy prior to transfer date

The Secretary of the Navy shall continue the ongoing petroleum exploration program within the reserve until the date of the transfer of jurisdiction specified in section 6503(a) of this title. Prior to the date of such transfer of jurisdiction the Secretary of the Navy shall—

(1) cooperate fully with the Secretary of the Interior providing him access to such facilities and such information as he may request to facilitate the transfer of jurisdiction;

(2) provide to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives copies of any reports, plans, or contracts pertaining to the reserve that are required to be submitted to the Committees on Armed Services of the Senate and the House of Representatives; and

(3) cooperate and consult with the Secretary of the Interior before executing any new contract or amendment to any existing contract pertaining to the reserve and allow him a reasonable opportunity to comment on such contract or amendment, as the case may be.

(c) Commencement of petroleum exploration by Secretary of the Interior as of date of transfer of jurisdiction; powers and duties of Secretary of the Interior in conduct of exploration

The Secretary of the Interior shall commence further petroleum exploration of the reserve as of the date of transfer of jurisdiction specified in section 6503(a) of this title. In conducting this exploration effort, the Secretary of the Interior—

(1) is authorized to enter into contracts for the exploration of the reserve, except that no such contract may be entered into until at least thirty days after the Secretary of the Interior has provided the Attorney General with a copy of the proposed contract and such other information as may be appropriate to determine legal sufficiency and possible violations under, or inconsistencies with, the antitrust laws. If, within such thirty day period, the Attorney General advises the Secretary of the Interior that any such contract would unduly restrict competition or be inconsistent with the antitrust laws, then the Secretary of the Interior may not execute that contract;
(2) shall submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives any new plans or substantial amendments to ongoing plans for the exploration of the reserve. All such plans or amendments submitted to such committees pursuant to this section shall contain a report by the Attorney General of the United States with respect to the anticipated effects of such plans or amendments on competition. Such plans or amendments shall not be implemented until sixty days after they have been submitted to such committees; and
(3) shall report annually to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives on the progress of, and future plans for, exploration of the reserve.

42 U.S.C. § 6506a. Competitive leasing of oil and gas

(a) In general
The Secretary shall conduct an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act.

(b) Mitigation of adverse effects
Activities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska.

(c) Land use planning; BLM wilderness study
The provisions of section 1712 and section 1782 of title 43 shall not be applicable to the Reserve.

(d) First lease sale
The; first lease sale shall be conducted within twenty months of December 12, 1980: Provided, That the first lease sale shall be conducted only after publication of a final environmental impact statement if such is deemed necessary under the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(e) Withdrawals
The withdrawals established by section 6502 of this title are rescinded for the purposes of the oil and gas leasing program authorized under this section.

(f) Bidding systems
Bidding systems used in lease sales shall be based on bidding systems included in section 205(a)(1)(A) through (H) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 629).

(g) Geological structures
Lease tracts may encompass identified geological structures.

(h) Size of lease tracts

The size of lease tracts may be up to sixty thousand acres, as determined by the Secretary.

(i) Terms

(1) In general

Each lease shall be issued for an initial period of not more than 10 years, and shall be extended for so long thereafter as oil or gas is produced from the lease in paying quantities, oil or gas is capable of being produced in paying quantities, or drilling or reworking operations, as approved by the Secretary, are conducted on the leased land.

(2) Renewal of leases with discoveries

At the end of the primary term of a lease the Secretary shall renew for an additional 10-year term a lease that does not meet the requirements of paragraph (1) if the lessee submits to the Secretary an application for renewal not later than 60 days before the expiration of the primary lease and the lessee certifies, and the Secretary agrees, that hydrocarbon resources were discovered on one or more wells drilled on the leased land in such quantities that a prudent operator would hold the lease for potential future development.

(3) Renewal of leases without discoveries

At the end of the primary term of a lease the Secretary shall renew for an additional 10-year term a lease that does not meet the requirements of paragraph (1) if the lessee submits to the Secretary an application for renewal not later than 60 days before the expiration of the primary lease and pays the Secretary a renewal fee of $100 per acre of leased land, and—

(A) the lessee provides evidence, and the Secretary agrees that, the lessee has diligently pursued exploration that warrants continuation with the intent of continued exploration or future potential development of the leased land; or

(B) all or part of the lease—

(i) is part of a unit agreement covering a lease described in subparagraph (A); and

(ii) has not been previously contracted out of the unit.

(4) Applicability

This subsection applies to a lease that is in effect on or after August 8, 2005.

(5) Expiration for failure to produce

Notwithstanding any other provision of this Act, if no oil or gas is produced from a lease within 30 years after the date of the issuance of the lease the lease shall expire.

(6) Termination

No lease issued under this section covering lands capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same due to circumstances beyond the control of the lessee.

(j) Unit agreements

(1) In general

For the purpose of conservation of the natural resources of all or part of any oil or gas pool, field, reservoir, or like area, lessees (including representatives) of the pool, field, reservoir, or like area may unite with each other, or jointly or separately with others, in collectively adopting and operating under a unit agreement for all or part of the pool, field, reservoir, or like area (whether or not any other part of the oil or gas pool, field, reservoir, or like area is already subject to any cooperative or unit plan of development or operation), if the Secretary determines the action to be necessary or advisable in the public interest. In determining the public interest, the Secretary should consider, among other things, the extent to which the unit agreement will minimize the impact to surface resources of the leases and will facilitate consolidation of facilities.

(2) Consultation

In making a determination under paragraph (1), the Secretary shall consult with and provide opportunities for participation by the State of Alaska or a Regional Corporation (as defined in section 1602 of Title 43) with respect to the creation or expansion of units that include acreage in which the State of Alaska or the Regional Corporation has an interest in the mineral estate.

(3) Production allocation methodology

(A) The Secretary may use a production allocation methodology for each participating area within a unit that includes solely Federal land in the Reserve.

(B) The Secretary shall use a production allocation methodology for each participating area within a unit that includes Federal land in the Reserve and non-Federal land based on the characteristics of each specific oil or gas pool, field, reservoir, or like area to take into account reservoir

heterogeneity and area variation in reservoir producibility across diverse leasehold interests. The implementation of the foregoing production allocation methodology shall be controlled by agreement among the affected lessors and lessees.

(4) Benefit of operations

Drilling, production, and well reworking operations performed in accordance with a unit agreement shall be deemed to be performed for the benefit of all leases that are subject in whole or in part to such unit agreement.

(5) Pooling

If separate tracts cannot be independently developed and operated in conformity with an established well spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the drilling or spacing unit when determined by the Secretary of the Interior (in consultation with the owners of the other land) to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed to the agreement.

(k) Exploration incentives

(1) In general

(A) Waiver, suspension, or reduction

To encourage the greatest ultimate recovery of oil or gas or in the interest of conservation, the Secretary may waive, suspend, or reduce the rental fees or minimum royalty, or reduce the royalty on an entire leasehold (including on any lease operated pursuant to a unit agreement), whenever (after consultation with the State of Alaska and the North Slope Borough of Alaska and the concurrence of any Regional Corporation for leases that include land that was made available for acquisition by the Regional Corporation under the provisions of section 1431(o) of the Alaska National Interest Lands Conservation Act) in the judgment of the Secretary it is necessary to do so to promote development, or whenever in the judgment of the Secretary the leases cannot be successfully operated under the terms provided therein.

(B) Applicability

This paragraph applies to a lease that is in effect on or after August 8, 2005.

(2) Suspension of operations and production

The Secretary may direct or assent to the suspension of operations and production on any lease or unit.

(3) Suspension of payments

If the Secretary, in the interest of conservation, shall direct or assent to the suspension of operations and production on any lease or unit, any payment of acreage rental or minimum royalty prescribed by such lease or unit likewise shall be suspended during the period of suspension of operations and production, and the term of such lease shall be extended by adding any such suspension period to the lease.

(l) Receipts

All receipts from sales, rentals, bonuses, and royalties on leases issued pursuant to this section shall be paid into the Treasury of the United States: Provided, That 50 percent thereof shall be paid by the Secretary of the Treasury semiannually, as soon thereafter as practicable after March 30 and September 30 each year, to the State of Alaska for: (1) planning; (2) construction, maintenance, and operation of essential public facilities; and (3) other necessary provisions of public service: Provided further, That in the allocation of such funds, the State shall give priority to use by subdivisions of the State most directly or severely impacted by development of oil and gas leased under this Act.

(m) Explorations

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the National Petroleum Reserve in Alaska which do not interfere with operations under any contract maintained or granted previously. Any information acquired in such explorations shall be subject to the conditions of 43 U.S.C. 1352(a)(1)(A).

(n) Environmental impact statements

(1) Judicial review

Any action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) 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.

(2) Initial lease sales

The detailed environmental studies and assessments that have been conducted on the exploration program and the comprehensive land-use studies carried out in response to sections 6505(b) and (c) of this title shall be deemed to have fulfilled the requirements of section 102(2)(c)3 of the National Environmental Policy Act (Public Law 91-190), with regard to the first two oil and gas lease sales in the National Petroleum Reserve-Alaska: Provided, That not more than a total of 2,000,000 acres may be leased in these two sales: Provided further, That any exploration or production undertaken pursuant to this section shall be in accordance with section 6504(a) of this title.

(o) Regulations

As soon as practicable after August 8, 2005, the Secretary shall issue regulations to implement this section.

(p) Waiver of administration for conveyed lands

(1) In general

Notwithstanding section 1613(g) of Title 43—

(A) the Secretary of the Interior shall waive administration of any oil and gas lease to the extent that the lease covers any land in the Reserve in which all of the subsurface estate is conveyed to the Arctic Slope Regional Corporation (referred to in this subsection as the "Corporation");

(B) **(i)** in a case in which a conveyance of a subsurface estate described in subparagraph (A) does not include all of the land covered by the oil and gas lease, the person that owns the subsurface estate in any particular portion of the land covered by the lease shall be entitled to all of the revenues reserved under the lease as to that portion, including, without limitation, all the royalty payable with respect to oil or gas produced from or allocated to that portion;

(ii) in a case described in clause (i), the Secretary of the Interior shall—

(I) segregate the lease into 2 leases, 1 of which shall cover only the subsurface estate conveyed to the Corporation; and

(II) waive administration of the lease that covers the subsurface estate conveyed to the Corporation; and

(iii) the segregation of the lease described in clause (ii)(I) has no effect on the obligations of the lessee under either of the resulting leases, including obligations relating to operations, production, or other circumstances (other than payment of rentals or royalties); and

(C) nothing in this subsection limits the authority of the Secretary of the Interior to manage the federally-owned surface estate within the Reserve.

40 C.F.R. § 1501.11. Tiering

(a) Agencies should tier their environmental impact statements and environmental assessments when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review. Tiering may also be appropriate for different stages of actions.

(b) When an agency has prepared an environmental impact statement or environmental assessment for a program or policy and then prepares a subsequent statement or assessment on an action included within the entire program or policy (such as a project- or site-specific action), the tiered document needs only to summarize and incorporate by reference the issues discussed in the broader document. The tiered document shall concentrate on the issues specific to the subsequent action. The tiered document shall state where the earlier document is available.

(c) Tiering is appropriate when the sequence from an environmental impact statement or environmental assessment is:

(1) From a programmatic, plan, or policy environmental impact statement or environmental assessment to a program, plan, or policy statement or assessment of lesser or narrower scope or to a site-specific statement or assessment.

(2) From an environmental impact statement or environmental assessment on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or assessment at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues that are ripe for decision and exclude from consideration issues already decided or not yet ripe.

40 C.F.R. § 1501.12. Incorporation by reference

Agencies shall incorporate material, such as planning studies, analyses, or other relevant information, into environmental documents by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. Agencies shall cite the incorporated material in the document and briefly describe its content. Agencies may not incorporate material by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Agencies shall not incorporate by reference material based on proprietary data that is not available for review and comment.

40 C.F.R. § 1502.14. Alternatives including the proposed action

The alternatives section should present the environmental impacts of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In this section, agencies shall:

> (a) Evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination.
>
> (b) Discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.
>
> (c) Include the no action alternative.
>
> (d) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
>
> (e) Include appropriate mitigation measures not already included in the proposed action or alternatives.
>
> (f) Limit their consideration to a reasonable number of alternatives.

40 C.F.R. §1508.1. Definitions

. . .

(g) ***Effects or impacts*** means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:

(1) Direct effects, which are caused by the action and occur at the same time and place.

(2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

(3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non–Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

(4) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.

. . .

43 C.F.R. § 2361.1. Protection of the environment

(a) The authorized officer shall take such action, including monitoring, as he deems necessary to mitigate or avoid unnecessary surface damage and to minimize ecological disturbance throughout the reserve to the extent consistent with the requirements of the Act for the exploration of the reserve.

(b) The Cooperative Procedures of January 18, 1977, for National Petroleum Reserve in Alaska between the Bureau of Land Management (BLM) and the U.S. Geological Survey (GS)(42 FR 4542, January 25, 1977) provides the procedures for the mutual cooperation and interface of authority and responsibility between GS and BLM concerning petroleum exploration activities (i.e., geophysical and drilling operations), the protection of the environment during such activities in the Reserve, and other related activities.

(c) Maximum protection measures shall be taken on all actions within the Utikok River Uplands, Colville River, and Teshekpuk Lake special areas, and any other special areas identified by the Secretary as having significant subsistence, recreational, fish and wildlife, or historical or scenic value. The boundaries of these areas and any other special areas identified by the Secretary shall be identified on maps and be available for public inspection in the Fairbanks District Office. In addition, the legal description of the three special areas designated herein and any new areas identified hereafter will be published in the Federal Register and appropriate local newspapers. Maximum protection may include, but is not limited to, requirements for:

> **(1)** Rescheduling activities and use of alternative routes, **(2)** types of vehicles and loadings, **(3)** limiting types of aircraft in combination with minimum flight altitudes and distances from identified places, and **(4)** special fuel handling procedures.

(d) Recommendations for additional special areas may be submitted at any time to the authorized officer. Each recommendation shall contain a description of the values which make the area special, the size and location of the area on appropriate USGS quadrangle maps, and any other pertinent information. The authorized officer shall seek comments on the recommendation(s) from interested public agencies, groups, and persons. These comments shall be submitted along with his recommendation to the

Secretary. Pursuant to section 104(b) of the Act, the Secretary may designate that area(s) which he determines to have special values requiring maximum protection. Any such designated area shall be identified in accordance with the provision of § 2361.1(c) of this subpart.

(e) **(1)** To the extent consistent with the requirements of the Act and after consultation with appropriate Federal, State, and local agencies and Native organizations, the authorized officer may limit, restrict, or prohibit use of and access to lands within the Reserve, including special areas. On proper notice as determined by the authorized officer, such actions may be taken to protect fish and wildlife breeding, nesting, spawning, lambing of calving activity, major migrations of fish and wildlife, and other environmental, scenic, or historic values.

(2) The consultation requirement in § 2361.1(e)(1) of this subpart is not required when the authorized officer determines that emergency measures are required.

(f) No site, structure, object, or other values of historical archaeological, cultural, or paleontological character, including but not limited to historic and prehistoric remains, fossils, and artifacts, shall be injured, altered, destroyed, or collected without a current Federal Antiquities permit.

43 C.F.R. § 3137.71. What must I do to meet continuing development obligations?

(a) Once you meet initial development obligations, you must perform additional development. Work you did before meeting initial development obligations is not continuing development. Continuing development includes the following operations—

(1) Drilling, testing, or completing additional wells to the primary target or other unit formations;

(2) Drilling or completing additional wells that establish production of oil and gas;

(3) Recompleting wells or other operations that establish new unit production; or

(4) Drilling existing wells to a deeper target.

(b) No later than 90 calendar days after meeting initial development obligations, submit to BLM a plan that describes how you will meet continuing development obligations. You must submit to BLM updated continuing obligation plans as soon as you determine that, for whatever reason, the plan needs amending.

(1) If you have drilled a well that meets the productivity criteria, your plan must describe the activities to fully develop the oil and gas field.

(2) If you fulfilled your initial development obligations, but did not establish a well that meets the productivity criteria, your plan must describe the further actual or constructive drilling operations you will conduct.

50 C.F.R. § 402.02. Definitions

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Action 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.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

Director refers to the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action 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. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency

activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time and any take of a

listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Programmatic consultation is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as:

(1) Multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas; and

(2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.

Proposed critical habitat means habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

50 C.F.R. § 402.14. Formal consultation

. . .

(c) Initiation of formal consultation.

(1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

(i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (i.e., the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. The provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

. . .

50 C.F.R. § 402.17. Other provisions

(a) Activities that are reasonably certain to occur. A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;
(2) Existing plans for the activity; and
(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) Consequences caused by the proposed action. To be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or
(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or
(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

(c) Required consideration. The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.