ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1431

CENTER FOR SUSTAINABLE ECONOMY,
Petitioner,

v.

SALLY JEWELL, Secretary of the Interior, and
BUREAU OF OCEAN ENERGY MANAGEMENT,
Respondents,

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Intervenors.

Petition for Review of Final Administrative Action
of the Department of the Interior, Bureau of Ocean Energy Management

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OPENING BRIEF FOR PETITIONER

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR SUSTAINABLE ECONOMY, Petitioner, v. SALLY JEWELL, Secretary of the Interior, and BUREAU OF OCEAN ENERGY MANAGEMENT, Respondents, AMERICAN PETROLEUM INSTITUTE, *et al.*, Intervenors.	Case No: 12-1431

PETITIONER'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Petitioner Center for Sustainable Economy ("CSE") submits this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors, and Amici

Other than Petitioner CSE, the parties to this case are Respondents Sally Jewell, who is currently Secretary of the United States Department of the Interior,[1] and the Bureau of Ocean Energy Management, an agency of the United States

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Sally Jewell is substituted for Ken Salazar, previous Secretary of the Interior, who was originally named as Respondent in the Petition for Review.

Department of the Interior (hereafter referred to collectively as "Interior"). American Petroleum Institute, Independent Petroleum Association of America, U.S. Oil & Gas Association, and International Association of Drilling Contractors have intervened on behalf of Respondents. There are no amici.

(B) Rulings Under Review

CSE challenges the "Final Outer Continental Shelf Oil & Gas Leasing Program: 2012-2017," proposed on June 28, 2012 and approved by Interior on August 27, 2012, JA___, and Interior's "Final Programmatic Environmental Impact Statement" prepared in connection with the Program, JA___. Neither document was published in the *Federal Register*.

(C) Related Cases

There are no related cases.

Dated: October 23, 2013

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PETITIONER'S RULE 26.1 DISCLOSURE STATEMENT

CSE is a not-for-profit organization working to speed the transition to a more sustainable economy. CSE has no parent corporation, and there are no publicly-held corporations that have more than a 10% ownership interest in CSE.

Dated: October 23, 2013

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

BOEM:	Bureau of Ocean Energy Management
CSE:	Center for Sustainable Economy
EAM:	Economic Analysis Methodology
EIA:	Energy Information Agency
EIS:	Environmental Impact Statement
JA:	Joint Appendix
LNG:	Liquefied Natural Gas
NEPA:	National Environmental Policy Act
OCS:	Outer Continental Shelf
OCSLA:	Outer Continental Shelf Lands Act
OECM:	Offshore Environmental Cost Model
OED:	Oxford English Dictionary
PEIS:	Programmatic Environmental Impact Statement

JURISDICTIONAL STATEMENT

Pursuant to 43 U.S.C. § 1349(c), this Court has original subject-matter jurisdiction over a Petition for Review of a Five-Year Oil and Gas Leasing Program ("Program") authorized by Respondent Secretary of the Interior ("Interior") pursuant to the requirements of Section 18 of the Outer Continental Shelf Lands Act ("OCSLA"), *id.* § 1344, if the petitioner participated in relevant agency proceedings, is aggrieved by the Program's adoption, files its petition within sixty days of the Program's adoption, and transmits a copy of the petition to Interior and the Attorney General. Petitioner Center for Sustainable Economy ("CSE") participated in relevant administrative proceedings, is aggrieved by the Program as set out below, filed a timely Petition for Review on October 26, 2012, following Interior's adoption of the Program on August 27, 2012, and transmitted the petition to Interior and the Attorney General. All jurisdictional requirements have been met in this case.

STATEMENT OF THE CASE

In 1978, Congress amended OCSLA, 43 U.S.C. §§ 1301–1356a, to ensure that Interior exercises its discretion "to provide for rational management of the oil and gas resources of the outer continental shelf" by accounting for "national energy requirements, affected states' needs, environmental protection, alternate uses of the coastal waters and lands, and economic reality." H.R. Rep. No. 95-590,

at 46 (1977). The core innovation of the 1978 OCSLA amendments is Section 18, 43 U.S.C. § 1344, which requires Interior to prepare and periodically revise a Program "indicating, as precisely as possible, the size, timing, and location of leasing activity" on the outer continental shelf ("OCS") over the pertinent five-year period. *Id.* § 1344(a)(1). As further detailed below, Congress has directed Interior to base the Program on a prescribed economic analysis, on a balancing of the values of the OCS's mineral and non-mineral resources, and on assurances that OCS lessees will exercise "due diligence" in bringing their leases to production.

In this case, CSE demonstrates that the 2012-2017 Program approved by Interior fails to comply with the specific direction provided by Congress in Section 18. Specifically, CSE shows that the economic analysis prepared by Interior in connection with the Program violates express congressional requirements in various critical respects, reflects an irrational interpretation of Section 18, and fails to acknowledge industry's continuing practice of "stockpiling" OCS leases without producing the mineral resources found thereon. CSE also shows that the Final Programmatic Environmental Impact Statement ("PEIS") prepared to accompany the Program violates the procedural requirements of the National Environmental Policy Act ("NEPA"). 42 U.S.C. §§ 4321–4370h. For these reasons, the Program must be remanded for re-analysis in a manner consistent with statutory requirements.

STATUTES AND REGULATIONS

Pertinent sections of statutes and regulations appear in an addendum to this brief.

STATEMENT OF ISSUES PRESENTED

1. Whether Interior violated OCSLA by:
    a. basing its inter-area analysis on the irrational assumption that the environmental costs of deferring leasing will be borne by the nation's various OCS areas in proportion to the amount of mineral production expected from each;
    b. deferring analysis of the environmental costs of expected onshore and coastal infrastructure development until a later stage in the OCSLA process;
    c. basing its calculation of net economic value on the erroneous assumption that lessees will produce energy from all OCS leases;
    d. failing to analyze the quantity of OCS energy production consumed by the American public separately from the quantity consumed internationally;
    e. irrationally assuming that deferral of additional leasing will require a one-to-one substitution and an increase in environmental and social costs; and

f. irrationally failing to consider at the programmatic stage the informational value of delay associated with uncertain environmental and social costs.

2. Whether Interior violated NEPA by:

   a. failing to assign any value whatsoever to economic benefits provided by non-mineral resources of the OCS; and

   b. failing to provide the public with a meaningful opportunity to comment on the Final PEIS and economic analysis supporting the Program.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

In the mid-1970s, Congress perceived a need to accelerate exploration and development of OCS energy resources. In particular, the 1973 oil embargo and a shortfall in domestic onshore energy production created fear of increasing dependence on foreign energy sources. Congress determined to address that fear by stimulating additional development of OCS energy resources. H.R. Rep. No. 95-590, at 53, 89 (1977).

However, Congress concurrently believed that past energy development on the OCS had proceeded haphazardly, because the pre-amendment version of OCSLA was "an all too general piece of legislation"—"essentially a carte blanche

delegation of authority to the Secretary" that enabled administration of the leasing program as "a closed process involving [Interior] and the oil industry." *Id.*at 54, 57. The 1969 oil spill in the Santa Barbara channel (the largest oil spill in American history at the time) focused Congress's attention on the significant risks that energy development poses to the OCS's non-mineral resources and the adjacent coastal zone. *Id.* at 89. Additionally, the oil industry's lack of diligence developing previously leased OCS areas undercut the government's expectations regarding energy production from OCS leases. *Id.* at 108, 112.

In 1974, President Nixon announced a proposal to lease 10,000,000 OCS acres in one year, an amount almost equal to the total acreage leased on the OCS over the prior two decades. This proposal "crystallized growing concern on the part of many in Congress . . . about the open-ended authority granted" by the statute at that time, and about the dearth of congressional guidance on the development of OCS energy resources. *Id.* at 100. As the congressional discussion over necessary amendments to OCSLA unfolded in the years following President Nixon's proposal, "[b]oth trains of thought—environmental protection and the acceleration of OCS oil and gas development—competed for primary ranking in the list of national priorities." *Id.* at 89.

After years of deliberating on how to guide and constrain development of OCS energy resources, Congress amended OCSLA in 1978. As amended, OCSLA

reconciles the various considerations competing for Congress's attention and endeavors to fashion a rational process for the orderly development of OCS energy resources that will implement Congress's expressed policy:

> [T]he [OCS] is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.

43 U.S.C. § 1332(3); *see also Natural Resources Defense Council, Inc. v. Hodel* ("*Hodel*"), 865 F.2d 288, 291 (D.C. Cir. 1988) ("Congress amended the statute in 1978 to promote the rational development of OCS resources.").

The OCS management scheme created by Congress with the 1978 Amendments is "pyramidic" in structure. The first stage is the Program, followed by the increasingly specific subsequent stages of lease sales, exploration, and development and production. *California ex rel. Brown v. Watt* ("*Watt I*"), 668 F.2d 1290, 1297 (D.C. Cir. 1981). At each step in the prescribed process, OCSLA obligates Interior to account for all relevant policy considerations and the views of interested parties, including the public. *Id*. The key decisions as to the size, timing, and location of OCS leasing on a national level—as well as the key economic analyses and justifications—are made in the Program, which sets out a lease sale schedule that "will best meet national energy needs for the five-year period

following its approval," while more localized decisions are made at subsequent stages of the OCSLA process. *Id.*; *see also* 43 U.S.C. § 1344(a)(1).

OCSLA prescribes eight factors that Interior must consider in developing a Program, including the relative "environmental risks among the various [OCS] regions," the "relative needs" of regional energy markets, the "relative environmental sensitivity and marine productivity of different [OCS] areas," and the "relevant environmental and predictive information for different [OCS] areas." *Id.* §§ 1344(a)(2)(B), (C), (G) & (H). Once Interior gives due consideration to each factor, it develops the Program, which consists of a five-year leasing schedule that strikes "a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impacts on the coastal zone." *Id.* § 1344(a)(3).

"[C]ompliance with the mandates of Section 18 . . . is extremely important to the expeditious but orderly exploitation of OCS resources," and a Program developed through the Section 18 process "achieves important practical and legal significance." *Watt I*, 668 F.2d at 1299. Essentially, Section 18 provides the structure by which Interior determines the total extent of OCS leasing over the five-year period of the Program, the allocation of that leasing between various OCS regions, and the timing of that leasing. 43 U.S.C. § 1344(a). If, at the conclusion of the Section 18 process, a particular OCS area is not included in the

Program, then no leases may be issued in that area during the relevant time period. *Watt I*, 668 F.2d at 129 (citing 43 U.S.C. § 1344(d)(3)). Furthermore, all leases issued during the relevant time period must be consistent with the Program's provisions. *Id.*

Regarding Congress's concern about idle and undeveloped leases, Section 18 contains a provision intended to ensure that industry does not stockpile OCS leases with speculative intent. That provision allows Interior to specify the financial and staffing resources "necessary to assure due diligence in the exploration and development of the lease area." 43 U.S.C. § 1344(b)(4); *see also id.* § 1337(b)(4) ("An oil and gas lease issued pursuant to this section shall [be] . . . conditioned upon due diligence requirements."); *Amber Resources, Co. v. United States*, 538 F.3d 1358, 1379-80 (Fed. Cir. 2008) (noting that OCSLA requires lessees to develop OCS leases with "due diligence").

OCSLA's Section 18 works in tandem with and complements the important procedural requirements of NEPA, which also apply to the development and adoption of the Program. *Hodel*, 865 F.2d at 296 ("OCSLA explicitly provides that nothing in the Act diminishes the requirements of NEPA."). Pursuant to NEPA requirements, Interior prepares an EIS in conjunction with the Program. The purpose of the EIS—and, in particular, NEPA's requirement that an EIS discuss alternatives to a proposed action, 42 U.S.C. § 4332(2)(C)(iii), 40 C.F.R.

§ 1502.14(a)—is "to inform Congress, other agencies, and the general public about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action." *Hodel*, 865 F.2d at 296. Furthermore, the EIS preparation process provides interested parties "an opportunity to participate meaningfully in decision-making at the administrative and legislative levels." *Id.* at 296 n.5 (quotation omitted).

II. DEVELOPMENT OF THE 2012-2017 PROGRAM

On November 10, 2011, Interior issued a Draft Program, JA___, and an accompanying Draft PEIS, JA___, together with a Draft Economic Analysis Methodology ("EAM"), JA___, for public review and comment. CSE submitted comments to Interior discussing the various infirmities of the Draft Program, Draft PEIS, and Draft EAM. CSE Comments on the Program (February 2012), JA___. For example, CSE explained that the draft documents presented "a biased characterization and analysis of the no action alternative that . . . significantly understates [the no-action alternative's] economic and social value," that the Draft PEIS failed to incorporate Interior's cost-benefit analysis, and that the Draft PEIS failed to discuss the informational value of delay, which is also called "option value." *Id.* 1, 11; JA___, ___.

On June 28, 2012, after the comment period on the draft documents closed, Interior submitted a Proposed Final Program to the President and Congress,

initiating the sixty-day review period required by OCSLA. Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012-2017 ("Program"), JA___. On July 6, 2012, Interior released the Final PEIS supporting the Proposed Final Program, JA___, together with the Final EAM, JA___. Both the Final PEIS and Final EAM diverged in very significant respects from their draft iterations.

Interior approved the Proposed Final Program as the Final 2012-2017 Program on August 27, 2012. Approval and Record of Decision, JA___. As approved, the Program scheduled fifteen potential offshore oil and gas lease sales in six OCS planning areas: twelve sales in three planning areas in the Gulf of Mexico, and three sales in three planning areas in Alaska. Program 3, JA___.

SUMMARY OF THE ARGUMENT

By enacting Section 18, Congress intended to prescribe a transparent, objective process for the rational development of OCS resources. The Section 18 process requires Interior to analyze a number of prescribed factors concerning the relative suitability of various OCS areas for energy development over a five-year period, and to use that analysis to develop a Program that strikes a balance between environmental concerns and national energy needs. In this case, Interior failed to perform the analysis required by Section 18. Since Interior's analysis was erroneous and incomplete in various respects, the ultimate "balancing" underlying the Program is irrational.

Additionally, Interior violated NEPA by preparing a biased analysis of the no-action alternative in the Program's Final PEIS and by denying CSE an opportunity to provide meaningful comments on the cost-benefit analysis incorporated into the Final PEIS and on the Program's Final EAM.

This Court should therefore invalidate the 2012–2017 Program and remand to the Secretary.

RIPENESS

CSE's various OCSLA and NEPA challenges to the Program are all ripe for review. The ripeness requirement is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). To determine ripeness, courts consider: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Alcoa Power Generating Inc. v. Federal Energy Regulatory Commission*, 643 F.3d 963, 967 (D.C. Cir. 2011) (quotations and citations omitted).

Regarding the first factor, this Court looks to "whether the issue presented is purely legal, whether consideration of the issue would benefit from a more

concrete setting, and whether the agency's action is sufficiently final." *Id.* The "basic rationale" behind this factor is to allow agency proceedings to run their course "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* As this Court recognized in *Center for Biological Diversity v. U.S. Dept. of the Interior* ("*CBD*"), 563 F.3d 466, 481 (D.C. Cir. 2009), the pivotal inquiry for this factor is whether agency decision-making has reached a "critical stage" that affects the challenging party's legal interests.

In *Hodel*, this Court addressed the ripeness of OCSLA challenges to Interior's adoption of a Program. Specifically, this Court considered—and rejected—the argument that Program challenges are not ripe because they are not "final" until "subsequent stages of the OCSLA process." 865 F.2d at 303. In so holding, the Court determined that the peculiar nature of a Program—which constitutes the final word on "the nation-wide allocation of OCS activities"—requires adjudicating programmatic OCSLA challenges at the first stage of decision-making under OCSLA's unique "pyramidic" structure:

> Arbitrary or capricious decisions either to include or exclude nominated areas . . . may materially affect the program-stage inter-area analysis. These decisions must be subject to program-stage review to ensure meaningful review of the program.

Id. This Court's decision in *Hodel* with respect to ripeness is compelled by its finding from *Watt I* that a Program's adoption has "important practical and legal

significance" and that the "analysis [required by Section 18 in support of a Program] is one that the Secretary logically must undertake when he is considering the various regions at the one and the same time; namely, the program stage." *Watt I*, 668 F.2d at 1299, 1306; *see also id.* at 1314 (Interior must consider and weigh relevant factors at the Program stage; "otherwise, the requirement that Interior select the timing of leasing 'among the regions' is rendered meaningless").

While OCSLA challenges to Programs are ripe by nature, this Court has been more discerning when it evaluates NEPA challenges to the EIS prepared in conjunction Programs. In *Hodel* this Court found that the petitioner's particular NEPA challenge to a Program was ripe, 865 F.2d at 303, whereas in *CBD* this Court found that the petitioner's particular NEPA challenges to a Program were not ripe, 563 F.3d at 271-72. A review of the two cases illuminates where this Court draws the line between ripe and unripe NEPA challenges to Programs: a NEPA claim is ripe when the alleged analytical flaw giving rise to the procedural injury occurs in connection with Interior's inter-area analysis and the related nationwide allocation and timing of OCS leasing activities, whereas a NEPA claim is unripe when the alleged analytical error pertains to specific and tangible environmental harms that might result from subsequent OCS exploration and development activities. The alleged analytical error at issue in *Hodel*—Interior's failure to consider the "synergistic" impact of simultaneous OCS development in

multiple adjacent planning areas—could be cured only by remanding the Program for Interior to reconsider canceling or deferring additional OCS leases in one or more planning areas. 865 F.2d at 297-98. On the other hand, the more specific analytical errors argued in *CBD*—Interior's failure to fully evaluate the climate change impacts of additional OCS production and to acquire adequate baseline data in advance of OCS development—raised issues more appropriately addressed at subsequent phases of the OCSLA process.

As evident from the argument below, CSE's NEPA claims are more similar to those at issue in *Hodel* than to those in *CBD*. Specifically, CSE demonstrates that the flaws in the NEPA process associated with the challenged Program caused an injury to CSE's and its members' interest in a rational economic analysis underlying the inter-area balancing and final allocation decision. Since the economic analysis performed in conjunction with the PEIS is legally inadequate and will not be revised at subsequent OCSLA stages, it must be remanded. Re-analysis consistent with the requirements of NEPA may lead Interior to determine that less leasing—either nationwide or in one or more planning areas—will better effectuate congressional intent concerning OCS development as set forth in Section 18. Therefore, CSE's NEPA claims are ripe for review.

As for the "hardship factor," it is plainly evident that significant hardship would result from this Court's decision to defer adjudication of CSE's OCSLA and

NEPA claims until later. As this Court has previously held, "meaningful" review of inter-area and nationwide allocation decisions can only occur at the Program stage, when Interior has the opportunity to correct errors by reconfiguring the national OCS leasing program for the pertinent five-year period. Such corrections simply cannot be made at subsequent stages of the OCSLA process: "[w]hen a decision is being made on a particular lease sale, or a particular exploration, development or production plan, the focus of the inquiry is on the propriety of that particular lease sale or plan," and *not* on the inter-area comparisons and nationwide decisions made in the Program. *Watt I*, 668 F.2d at 1306.

STANDING

CSE has representational standing to protect the interests of its members, who fish, work, and recreate in the coastal and marine ecosystems of Alaska and the Gulf of Mexico. The Program and the associated PEIS imminently threaten cognizable interests in their continued use and enjoyment of those resources, and remanding the Program will redress these harms.

Additionally, CSE has organizational standing. One of CSE's key activities is counseling stakeholders on their responses to the economic and environmental analyses used to justify government decisions. The illegal, irrational, and incomplete analyses drafted to support the Program have undermined CSE's ability to carry out this core function.

I. CSE HAS REPRESENTATIONAL STANDING

CSE is a non-profit, membership organization that promotes sustainability through analysis, consultation, and advocacy. Talberth 3d Decl. ¶¶ 2-3. CSE's members include individuals, businesses, and organizations that share CSE's mission and work to promote CSE's objectives. *Id.* ¶¶ 4-5. Organizations have standing when (1) their members have standing in their own right; (2) the interests at stake are germane to organizational purposes; and (3) neither the suit's claims nor relief requires individual members' participation. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010). CSE satisfies all three criteria.

A. CSE's Members Have Standing

CSE's members satisfy the constitutional requirements for standing in their own right, by suffering "concrete and particularized injury that is caused by, or fairly traceable to, the act challenged in the litigation and redressable by the court." *CBD*, 563 F.3d at 477. Their injuries are "personal" and "actual or imminent," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992), with a "substantial (if unquantifiable) probability" of occurring. *Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010).

"[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *CBD*, 563

F.3d at 479 (quoting *Defenders of Wildlife*, 504 U.S. at 562-63). Similarly, interests in scenic areas, recreation, and "environmental well-being"—just "like economic well-being"—are cognizable. *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). The House Report accompanying OCSLA's 1978 Amendments specifically states that individuals with a "definable aesthetic or environmental interest" have standing to challenge Programs. H.R. Rep. No. 95-590, at 161.

"Where plaintiffs allege injury resulting from violation of a *procedural* right afforded to them by statute and designed to protect their threatened concrete interest, the courts relax—while not wholly eliminating—the issues of imminence and redressability." *City of Dania Beach v. Fed. Aviation Admin.*, 485 F.3d 1181, 1187 n.1 (D.C. Cir. 2007) (internal quotation omitted). If the government violated prescribed procedures and the "procedural requirement was designed to protect some threatened concrete interest" of the petitioner, the injury and causation prongs of standing analysis are satisfied. *Id.* at 1185 (internal quotation omitted). Remand to correct the procedural violation redresses the injury, regardless of whether petitioner proves that completing the procedure would alter the substantive outcome. *Id.* at 1186.

1. CSE's Members Will Continue to Suffer Concrete and Particularized Injuries Traceable to the Program and PEIS

Diane Wilson is an active CSE member who lives in Seadrift, Texas. Wilson 2d Decl. ¶¶ 1-2. Wilson is a commercial shrimper who relies on the health of the

Gulf of Mexico's interconnected marine and coastal ecosystems for her livelihood and her family's chief food source. *Id.* ¶¶ 3, 19. She also makes significant recreational use of Gulf waters and coastlines, particularly the Matagorda/San Antonio Bay ecosystem where she has explored, camped, fished, and enjoyed wildlife observation for her entire life. *Id.* ¶¶ 4-8. Wilson plans to continue using the Gulf's marine and coastal ecosystems for commercial and recreational purposes as long as she is able, and definitely during the years covered by the Program. *Id.* ¶¶ 3-4, 8. Specifically, she will continue using the waters of the Western and Central Gulf for her shrimping operations every shrimping season during the years covered by the Program. *Id.* ¶ 16. She will also visit and enjoy the Matagorda Bay ecosystem at least twice weekly during the period covered by the Program, and she has specific plans to lead groups of women in recreational and educational activities in this area. *Id.* ¶¶ 22, 24.

Wilson's personal and concrete commercial and recreational interests in the Gulf's remaining intact ecosystems have been injured by pollution and other disturbances associated with offshore energy development and onshore support infrastructure, *id.* ¶¶ 15-27, and they will be further injured by the increased drilling authorized by the Program, *id.* ¶¶ 14-17, 28-29. As a shrimper and outdoor enthusiast, Wilson avers that further deterioration to the health of the interconnected Gulf ecosystems "will destroy our way of life." *Id.* ¶ 3. As

Interior's own environmental impact statement acknowledges, the Gulf ecosystems will suffer certain imminent injuries under the Program, Final PEIS at 4-178, JA___, including "adverse effects on water and sediment quality;" air pollution increases; noise increases from surveys, construction, and traffic; disturbances of terrestrial and marine mammals; habitat alterations; adverse effects on marine and coastal birds; "adverse impact on fish nursery areas;" adverse effects to commercial and recreational fisheries; and spills and floating debris affecting recreation areas, *id.* at 5-1 to 5-2, JA___-___.

Bob Shavelson is an active CSE member who lives in Homer, Alaska. Shavelson 2d Decl. ¶¶ 1-2. Shavelson is employed by Cook Inletkeeper, and in his professional capacity he strives to protect the waters, fisheries, and communities in south-central Alaska. *Id.* ¶ 3. He also makes significant recreational use of Cook Inlet and other Alaskan waters, and participates in personal use fisheries, such as salmon. *Id.* ¶¶ 4, 5. Alaska's waters and ecosystems are interconnected, with species like salmon ranging from Alaska's southern coast—including Cook Inlet—as far north as the Beaufort and Chukchi Seas. *See* Final PEIS at 3-152 to 3-155, JA___-___. Shavelson has plans to continue using Alaska's coastal and marine environments for the foreseeable future, and certainly during the years covered by the Program. Specifically, during winter months he will enjoy beaches with his family, surf in Cook Inlet, and gather personal use products. Shavelson 2d Decl.

¶ 5. During summer months, he will also boat and fish with his family, and enjoy tide-pooling. *Id.*

Shavelson's professional and personal interests are injured by offshore oil development, and those injuries will increase with additional drilling on leases sold pursuant to the Program. *Id.* ¶¶ 7-13. Specifically, Shavelson states that the pollutants, noise, and physical infrastructure associated with offshore oil extraction and onshore support operations in Cook Inlet have injured his quality of life and his family's enjoyment of Alaska's coastal and marine environments, and that these effects will increase under the Program. *Id.* ¶¶ 7-13. Shavelson avers that the Program "add[s] new [lease] tracts in sensitive fisheries and habitats, and will lead to expansion of the onshore oil and gas infrastructure that degrades my quality of life." *Id.* ¶ 7. Interior acknowledges a litany of imminent injuries to the Alaskan ecosystems stemming from the Program, Final PEIS at 5-1, JA___, including water quality impacts, *id.* at 4-186, JA___. Notably, the highly migratory salmon that Shavelson fishes to feed his family also bio-accumulate pollutants and so are particularly susceptible to the water quality impacts that the Program will cause in Alaska's ecosystems. *See id.* at 3-42, JA___.

2. Interior's Irrational Program and PEIS Will Cause the Members' Injuries, and Remand Would Redress Them

In *CBD*, this Court held that "an irrationally based Leasing Program could cause a substantial increase in the risk to [petitioners'] enjoyment of the animals

affected by the offshore drilling," thus satisfying the constitutional requirement of causation. 563 F.3d at 479, 483. Likewise here: Interior's illegal NEPA process and adoption of an illegal Program greatly heightens the risk of harm to Wilson and Shavelson's cognizable interests including, but not limited to, their interests in animals that are adversely affected by the OCS energy development contemplated by the Program.

As to redressability, this Court's previous standing decisions in OCSLA challenges establish that remanding the Program will redress CSE members' injuries. *Id.* at 479, 483-84 ("[O]ur setting aside and remanding of the Leasing Program would redress [petitioners'] harm.").

Regarding the NEPA claims, causation is satisfied since the government violated procedural requirements that were designed to protect the members' concrete interests, and remand to correct the procedural violation will redress the members' injuries, regardless of whether the correction would alter the substantive outcome. *City of Dania Beach*, 485 F.3d at 1187 n.1.

B. Wilson and Shavelson's Interests Are Germane to CSE's Purpose

CSE's primary mission is promoting the transition to a sustainable, renewable energy-based economy through reasoned decision-making. Talberth 3d Decl. ¶¶ 3, 6. CSE's mission and activities further Wilson and Shavelson's interests in the continued, sustainable use and enjoyment of marine and coastal

ecosystems for commercial, recreational, and aesthetic purposes. *E.g.*, Shavelson 2d Decl. ¶ 2. As such, the members' interests are germane to CSE's purposes. *See Humane Soc. of the United States v. Hodel*, 840 F.2d 45, 58-59 (D.C. Cir. 1988).

C. Neither the Claims Nor the Relief Requested Requires the Participation of Individual CSE Members

Neither the OCSLA and NEPA claims nor the relief requested require individualized proof, and they are, thus, properly resolved in a group context. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977).

II. CSE HAS ORGANIZATIONAL STANDING

Organizations can demonstrate standing on their own behalf by satisfying the constitutional criteria, including "concrete and demonstrable injury to the organization's activities." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Cognizable injuries include "imped[ing]" an organization's "counseling, referral, advocacy, and educational services," *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006), "elimination of the opportunity to see and use an EIS," *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 712 (D.C. Cir. 1988), and "injury to an organization's ability to disseminate information . . . [that] is essential to the injured organization's activities," *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990). In particular, "NEPA creates a right to information on the environmental effects of government actions; any infringement of that right

constitutes a constitutionally cognizable injury, without further inquiry into causation or redressability." *Id.* at 123.

CSE's primary mission is to speed the transition to a sustainable economy, by ensuring public policies are grounded in science and economics. In pursuit of its mission, CSE routinely provides counseling services to help stakeholders review and respond to the economic and environmental analyses used to justify government decisions. Talberth 3d Decl. ¶¶ 3, 6, 9. Interior's failure to incorporate a sufficient cost-benefit analysis of the Program into the PEIS at the appropriate and required time undermined CSE's ability "to engage, consult, and counsel" its members and partners as to how to participate meaningfully in the planning and decision-making process. *Id.* ¶¶ 9-14. CSE spends considerable resources developing its expertise and reputation for critiquing economic analyses in the NEPA process; non-disclosure of key economic and environmental information undermines CSE's activities and mission. *Id.* ¶¶ 9, 14.

Moreover, the irrational economic analysis underlying Interior's Program will impair CSE's ability to assist and counsel stakeholders during subsequent OCSLA stages, because the programmatic economic analysis, inter-area analysis, and nationwide-allocation decisions will not be revisited. *Id.* ¶ 15.

ARGUMENT

I. THE 2012-2017 PROGRAM VIOLATES OCSLA

A. Standard of Review

This Court uses a three-part, hybrid standard of review in adjudicating challenges to Programs: (1) factual findings are reviewed under the substantial evidence test, (2) policy judgments must be "based upon rational consideration of identified, relevant factors," and (3) issues concerning Interior's interpretation of the statute are reviewed under the familiar *Chevron* two-step analysis. *Hodel*, 865 F.2d at 300 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

Policy judgments underlying a Program are reviewed by this Court to determine "whether 'the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Watt I*, 668 F.2d at 270 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). This Court's application of this standard requires "searching scrutiny" of policy judgments "to ensure that they are neither arbitrary nor irrational," *Watt I*, 668 F.2d at 1301-02, and has led to the remand of two previous Programs as a result of Interior's irrational failure to consider all relevant factors in conducting the required Section 18 analysis. *See id.* at 1307-08; *CBD*, 563 F.3d at 488.

Concerning Interior's factual assumptions, they must bear a "'rational relationship' to the real world." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053 (D.C. Cir. 2001); *see also Sierra Club v. Costle*, 657 F.2d 298, 332 (D.C. Cir. 1981) ("underlying assumptions [must] reflect reality"). As in this case, where CSE shows that there are "stark disparities between [Interior's] projections and real world observations," Interior must fully explain the factual basis for its projections and assumptions by pointing to evidence in the record. *Appalachian Power*, 249 F.3d at 1054-55. Interior does not enjoy deference when "reality is turned upside down" by its assumptions. *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 754 (D.C. Cir. 2000).

B. Interior's Inter-Area Analysis Is Fatally Flawed by Irrational Assumptions about Which OCS Areas Will Bear the Environmental Costs of Deferred Leasing

Section 18 requires Interior to consider the relative "developmental benefits and environmental risks among the various [OCS] regions," as well as their "relative environmental sensitivity." 43 U.S.C. §§ 1344(a)(2)(B), (G). Instead of complying with this statutory requirement, Interior based its inter-area analysis on an irrational assumption regarding the allocation of the environmental costs that purportedly arise from deferral of additional leasing in one or more OCS areas. Interior first asserts that deferring additional leasing will result in environmental costs by increasing onshore energy production and by increasing the risk of

import-related tanker spills. Interior then makes the irrational assumption that these costs should be allocated to OCS areas "in proportion to the amount of production expected from each area in the E&D [exploration and development] scenarios." Program 125-27, JA___-___. This assumption bears no relationship to reality, and Interior admits as much in the Program itself.

According to the Program, a significant portion of environmental costs associated with deferring additional leases (specifically, costs associated with import-related tanker spills) would actually be borne by OCS areas that are not scheduled for any production at all under the Program. *Id.* 70, JA___ ("Energy substitutions for the foregone hydrocarbon production . . . could increase tanker import spill risk . . . in OCS areas along the Pacific . . . and Atlantic coasts that contain tanker ports and terminals."). Relatedly, Interior admits that "[i]n practice, the resulting costs [of leasing deferral] would actually be felt in areas that would receive the increased imports and host the extra domestic natural gas production." *Id.* 126, JA___. Interior plainly acknowledges that environmental costs arising from leasing deferral would not actually be borne by the six producing areas in proportion to the expected amount of production from each, but rather by OCS areas that actually experience increased tanker traffic and increased onshore production. Thus, the Program's inter-area analysis is based on a plainly erroneous premise.

The implications of Interior's irrational assumption are especially egregious for Alaska's three planning areas, where oil imports and onshore production are miniscule compared to non-Alaskan OCS areas. For example, while Interior admits that "impacts listed for the Chukchi Sea would not *actually* occur in the Chukchi Sea, but rather along the contiguous U.S. coasts and onshore places of oil, gas, or coal production," Interior nonetheless apportions costs in the range of $0.24-$1.03 billion to the Chukchi Sea planning area associated with deferral. Final EAM 20, JA___ (emphasis added). If no such costs will *actually* accrue in that planning area, then the environmental and social costs of deferral would be zero in that planning area, and the net benefits of deferral in that planning area would be correspondingly higher, as environmental costs are re-apportioned to the OCS areas where they actually occur. Interior's erroneous assumption thereby distorts the Section 18 inter-area analysis.

In *Watt I*, this Court addressed a similar abdication of Interior's Section 18 duty to conduct a rational inter-area analysis. There, in purporting to consider the same inter-area factors required by Section 18, Interior indulged in the unsubstantiated assumption that "the risk of an environmentally damaging incident is largely equal nationwide." 668 F.2d at 1307. This Court found that reliance on this unsupported assumption flawed the Program because it prevented assessment of the *actual* relative risk of environmental injuries among various OCS areas. *Id.*

at 1307-08. Likewise in this case, Interior's assessment of relative risks, benefits, and sensitivities relies on a fallacious assumption that blurs relevant distinctions concerning relative environmental costs that would *actually* be borne by various OCS areas. Such irrational reliance on an admittedly erroneous assumption vitiates Interior's Section 18(a)(2) analysis and the resulting Section 18(a)(3) balancing. *Id.* at 1318-19 ("failure to consider and factor in all aspects of Section 18(a)(2) . . . precluded [Interior] from meeting the requirement of Section 18(a)(3)"); *see also CBD*, 563 F.3d at 487-489 (remanding the Program because Interior relied on the irrational assumption that an index of coastal impacts could serve as a proxy for the required analysis of marine impacts).

Interior cannot excuse its use of fallacious assumptions as an administrative convenience. While acknowledging that lease deferrals would actually lead to costs along the mid-Atlantic coast from increased tanker traffic, Interior states that "it would be impossible" to report these costs "in a simple table." Program 125 n. 71, JA___. Regardless of the difficulty of preparing a table setting out the *actual* inter-area data, Interior does not have "carte blanche to wholly disregard a statutory requirement out of convenience." *CBD*, 563 F.3d at 279. Because the Program is not based on relative assessments of actual benefits, risks, and environmental sensitivities associated with varying levels of additional leasing in different OCS areas, it does not comply with Section 18's requirements and must be remanded.

C. In Its Economic Analysis, Interior Illegally Deferred Assessment of the Environmental Costs of Coastal and Onshore Infrastructure Development

Section 18(a)(3) requires Interior to "obtain a proper balance between the potential for environmental damage, the potential for discovery of oil and gas, *and the potential for adverse impact on the coastal zone*." 43 U.S.C. § 1344(a)(3) (emphasis added); *see also id.* § 1344(a)(1) (Interior must consider potential impacts on "marine, coastal, and human environments"). While Interior has discretion in the amount of weight it gives each factor in the Section 18(a)(3) balance, it does not have discretion to ignore one factor and assume it will be addressed during subsequent OCSLA stages. *Watt I*, 668 F.2d at 1317 ("The obligation [at the Program stage] . . . is to look at all factors and then balance the results."). In this case, Interior's decision not to weigh potential coastal and onshore impacts violates Section 18.

Interior acknowledges its decision to defer consideration of coastal impacts until subsequent OCSLA stages, stating: "An assumption also is made that adverse ecological effects related to onshore construction and development-related projects are addressed through permitting-related mitigation efforts and thus do not merit assessment as externalities." Revised Offshore Environmental Cost Model ("OECM") 95, JA___. Thus, Interior deferred consideration of a required factor—"potential for adverse impact on the coastal zone"—by claiming that permit-related

mitigation efforts can substitute for the required consideration. This approach is illegal and irrational.

The PEIS for the Program belies Interior's suggestion that coastal and onshore impacts can be mitigated to zero through "permit-related mitigation." It references a broad range of such impacts and makes no claim whatsoever that they can be mitigated to zero. Final PEIS 4-5, 4-31, 4-241, 4-243, 4-245, 4-355, 4-364, 4-375, 4-451, 4-484, 4-503, JA___,___,___,___,___,___,___,___,___,___,___,___ (discussing impacts to wildlife, coastal and estuarine habitats, recreational areas, wetlands, seagrass communities, flood risk, and land-use).

Clearly, Interior knows that oil and gas infrastructure causes significant impacts to coastal and onshore environments. For example, concerning wetland impacts, Interior found "that canal dredging and the concomitant levee construction due to offshore oil and gas activity accounts for 8-17 percent of total wetland loss in Coastal Louisiana" and that "[t]he placement of onshore facilities supporting offshore oil and gas activities and access roads in wetland areas causes additional losses." Interior, *The Impact of Federal Programs on Wetlands: Volume II*, ch. 8 (1994), JA___*.[2] In light of the magnitude of these impacts, Interior routinely uses economic models to quantify the environmental costs of coastal and onshore impacts. Interior used these models to calculate environmental costs in the

[2] Citations to the JA marked with an asterisk will be the subject of a stipulation or motion to supplement the record.

development of previous Programs. *Hodel*, 865 F.2d at 311 (deferring to Interior's decision to value wetlands lost to OCS-related infrastructure development at $20,898/acre), but did not do so in connection with the 2012-2017 Program.

Clearly, the impacts to coastal and onshore environments associated with infrastructure development—both their magnitude and their cost—are "not inherently insusceptible of quantitative analysis" and, therefore, must be weighed in the balance during development of the Program. *Watt I*, 668 F.2d at 1319. Interior failed to consider a required factors in its Section 18(a)(3) balancing, and so the Program must be remanded.

D. An Irrational—and Demonstrably Incorrect—Assumption Regarding the Amount of Energy That Will Be Produced from Additional OCS Leases Distorts the Program

Interior's failure to account for the significant number of OCS leases that remain undeveloped by lessees critically flaws the economic analysis underpinning the Program and undermines Interior's assessment of the benefits of additional leasing. *Cf. Watt I*, 668 F.2d at 1317 (noting Interior's interpretation of Section 18, that OCS leasing should occur in an area "[i]f the anticipated benefits outweigh the anticipated costs"); *California ex rel. Brown v. Watt* ("*Watt II*"), 712 F.2d 584, 601 (D.C. Cir. 1983) (explaining that analysis of benefits of leasing begins by assessing net economic value of expected hydrocarbon production).

The Program's economic analysis "begins with the calculation of the gross revenue from the production of OCS oil and natural gas [in each planning area] anticipated as a result of the [Program]." Program 118, JA___. However, Interior's economic analysis fails to account for the fact that industry "stockpiles" most OCS lease tracts without bringing them to production, thereby undermining Interior's production estimates. Interior clearly knows the extent of lease stockpiling, having published a report highlighting that "[a]s of May 2012, nearly 72 percent of the area on the [OCS] that companies have leased for oil and gas development—totaling 26 million acres—are not producing or not subject to pending or approved exploration or development plans." Interior, *Oil and Gas Lease Utilization—Onshore and Offshore* 3 (2012), JA___*; *see also* R. No. 3336 at App.A-6 (comments from Oceana, Feb. 2012), JA___ (citing 2011 version of same report). Nonetheless, Interior turned a blind eye to this circumstance and conducted an economic analysis premised on the irrational assumption that all OCS leases will be developed.

The "due diligence" provision of the 1978 OCSLA Amendments was specifically intended to address and prohibit industry's practice of stockpiling undeveloped OCS leases. Interior appears to have disavowed Congress's express due diligence requirements, *Amber Resources, Co. v. United States*, 73 Fed. Cl. 738, 753-54 (Fed. Cl. 2006) (detailing Interior's position that OCS leases can be

"left idle"), and the Program and accompanying economic analyses are distorted by Interior's failure to account for the widespread practice of stockpiling leases.

As an example of the impact of Interior's irrational assumption, the previous 2007–2012 Program assumed that additional leasing authorized during that five-year period in Alaska's Chukchi Sea would result in net economic value of $3.79 billion. 2007-2012 Oil and Gas Leasing Program 84, JA___. This figure represents the discounted stream of "anticipated production by year over the life of program." Economic Analysis for the 2007-2012 Program 10, JA___*. Yet, as of June 2012, there were 487 leases granted in this planning area but no production at all. BOEM, *2012 Combined Leasing Status Report* 7 (2013), JA___*. All 487 leases were classified by Interior as non-producing, rendering Interior's estimate of the net economic value associated with the 2007 Program in the Chukchi Sea irrational, at best. This same failure is now repeated in the 2012-2017 Program, despite Interior's knowledge that Chuckchi Sea leasing has produced no benefits at all. Further exacerbating the irrationality, Interior assumes that development of additional leases is facilitated by infrastructure installed in connection with development of previously issued leases. For example, Interior's production estimate for additional leases in the Chukchi Sea planning area is "conditional on the assumption that initial development occurs on current leases and future OCS projects are produced through this infrastructure." Final EAM 35, JA___.

However, since no previous leases have been developed in the Chukchi Sea, Interior's benefits analysis—and, specifically, its analysis of expected production from additional leases—is inconsistent with real world conditions.

For the above reasons, the Program should be remanded so that Interior may correct its irrational assumptions regarding future production from additional leases and account for the significant amount of lease "stockpiling" in the calculation of net economic value.

E. Interior's Failure to Separately Analyze the Quantity of OCS Energy Production Consumed by the American Public and the Quantity Consumed Internationally Undermines Congressional Intent

Even under *Chevron*'s deferential standard of review, "a reviewing court must intervene to enforce the policy decisions made by Congress" when "the agency does not reasonably accommodate the policies of a statute or reaches a decision that is 'not one that Congress would have sanctioned.'" *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1326 (D.C. Cir. 1988) (citations omitted). In this case, Interior failed to give effect to Congress's clear intent that OCS minerals—"a vital national resource reserve"—should be developed to meet "national needs." 43 U.S.C. § 1332(3); *see also id.* § 1802(2)(A) (the policy underlying OCSLA is "to meet the Nation's energy needs"). The economic analysis underlying the Program fails to distinguish between the quantity of OCS

energy production consumed by the American public and the quantity consumed internationally. Interior's failure to make this distinction distorts the Program.

Section 18 directs Interior to develop a five-year program of lease sales "indicating, as precisely as possible, the size, timing, and location of leasing activity which [s]he determines will *best meet national energy needs*." *Id.* § 1344(a)(1) (emphasis added). This schedule must be based on consideration of "the relative needs of *regional and national energy markets*." *Id.* § 1344(a)(2)(C) (emphasis added); *see also* H.R. Rep. No. 95-590, at 115 (development of federal mineral resources on the OCS must "reconcil[e] the nation['s] energy needs with the fullest possible protection of the environment"); *id.* at 289 n.65 (OCS mineral resources must be developed "to help meet America's energy needs"). This statutory mandate cannot be fulfilled without determining which portion of the mineral resources produced on the OCS contributes to national energy needs and, conversely, which portion of contributes to international energy needs.

Interior failed to distinguish between domestic and foreign consumption of OCS products in any rational manner.[3] Instead, Interior's Program analysis rests squarely on the unsupported assumptions that all OCS-derived finished petroleum and natural gas products will be consumed domestically, and that there will be no

[3] While Interior discussed the effects of OCS production on global prices and foreign consumer benefit associated with reduced prices, the more important issue of foreign consumption of exported OCS energy products was entirely ignored.

exports of OCS unprocessed oil and gas. These assumptions are evident in the Program's statement that all OCS energy production foregone by a decision to defer leasing will be replaced on a one-to-one basis as domestic markets switch to substitute sources of energy from imports and onshore production in the United States. Program 121, JA___. These assumptions are at odds with reality, and taken together they heavily skew the Program in favor of additional leasing.

In early 2012, the U.S. Energy Information Agency ("EIA") announced that the United States had become a net exporter of finished energy products (for the first time since World War II). *See* R. No. 3685 at 2 (draft document entitled "Direct and Embodied Trade in Oil and Gas," Mar. 28, 2012), JA___ ("[R]ecently US exports of some refined oil products like gasoline have exceeded imports."). While OCSLA contains restrictions on the direct export of unprocessed oil and gas produced from the OCS, there are no limits on the export of finished energy products. 43 U.S.C. § 1354. Accordingly, a reasonable assumption is that some portion of U.S. energy exports is derived from OCS hydrocarbon resources.

The EIA estimates U.S. exports of finished petroleum and natural gas products were over 1.1 billion barrels in 2012. EIA, *Petroleum Supply Monthly—December 2012* at 8 (2013), JA___*. By comparison, expected annual OCS production over the forty-year life of the challenged Program ranges from 0.15-0.35 billion barrels annually, so it is entirely possible that 100% of finished

products derived from OCS resources produced from leases authorized under the challenged Program could be exported.[4] In other words, it is possible that *none* of the incremental energy production derived from leases authorized by the Program will contribute to national energy needs given the new export stance of U.S. energy markets. Interior's economic analysis simply failed to consider the likelihood that a significant portion of the energy produced on additional OCS leases will be exported.

This error becomes even more egregious since the federal government is now accelerating crude oil and gas exports from the OCS. OCSLA disfavors exports, imposing a cumbersome process for approval that has held the amount of crude oil and gas exports to a minimum in the past. 43 U.S.C. § 1354. Recent years, however, have seen an explosive growth in the export of U.S. petroleum resources. *Compare* EIA, *Petroleum Supply Monthly—February 2008* at 95 (2008), JA___* (showing about 500 million barrels exported in 2007) *with* EIA, *Petroleum Supply Monthly—December 2011* at 91 (2012), JA___* (showing over 1 billion barrels exported in 2011). Federal agencies are actively promoting this trend. *See, e.g.*, U.S. Dept. of Energy, Office of Fossil Energy, Lake Charles Exports, LLC—FE Dkt. No. 11-59-LNG, 8/7/13 Order 3324 Conditionally Granting Long-Term Multi-Contract Authorization to Export LNG by Vessel from

[4] Calculated by dividing the total production estimate range of 6-14 billion barrels of oil equivalent by 40 years.

the Lake Charles Terminal to Non-Free Trade Agreement Nations, JA___* (granting certain liquefied natural gas export privileges and stating that anticipated sources of exported gas "will include . . . the offshore Gulf producing regions").

Congress intended the economic analysis prescribed by Section 18 to assure that OCS energy resources are used to secure America's energy future. Given the radically different landscape of domestic energy production, Interior's development of OCS resources has a very different relationship to "national energy needs"—the touchstone of the 1978 amendments—than in the past. Nonetheless, at no point has Congress seen fit to loosen the requirements of Section 18, and therefore OCSLA requires Interior to distinguish between domestic and foreign consumption of OCS products to assist Interior in determining how best OCS energy resources can be used to promote America's energy needs.

F. Interior Irrationally Assumed that Deferral of Additional Leasing Will Require a One-to-One Substitution and an Increase in Environmental and Social Costs.

In deciding against deferral of additional OCS leasing, Interior irrationally assumes that deferral of additional offshore production would require offsets from increases in energy imports and production of alternative domestic sources on a "one-to-one" basis—together with associated environmental costs. Program 121, JA___; Final PEIS 4-496, JA___; Final EAM 11, JA___. However, this assumption fails to account for the fact, discussed above, that foreign entities will

consume some energy production from leases under the Program. If Interior's analysis had reflected the fact that the United States is increasingly an exporter of refined energy products and some unprocessed OCS oil and gas, the reported environmental costs of the leasing deferral option may have been significantly different than predicted.

In *Hodel*, the petitioner challenged the same "backing-out" assumption—that is, the argument that all OCS production foregone by lease deferral necessitates a substitute in imports or onshore production—and argued that it was "totally unfounded" and led to a misleading representation of the extent of environmental costs associated with deferred OCS leasing. 865 F.2d at 309. This Court ruled against the petitioner, and agreed with Interior's claim that "[t]he specific assumption that OCS oil will replace imported oil barrel for barrel is quite reasonable." *Id.* However, this Court's holding was subject to a significant caveat: "The Secretary's 'backing-out' assumption is a rough approximation that would prove wrong . . . to the extent that some of the OCS production is exported." *Id.*

As discussed above, the record clearly shows that a significant and increasing portion of finished and unprocessed OCS energy resources is exported for foreign consumption. This increment of foregone production would not have to be "backed out" and may, therefore, not lead to the estimated increase in

environmental costs.[5] In short, this Court's holding in *Hodel* was prescient as it foresaw precisely the current circumstances: Interior's assumption of a one-to-one "back out" is irrational, as a portion of OCS energy production is now exported. Indeed, as exports increasingly become an important part of the domestic energy market, Interior's underlying assumption becomes more and more irrational. If Interior had acknowledged reality and accounted for OCS energy exports in the economic analysis for the Program, then the reported environmental costs attributable to the deferred leasing options could be significantly different.

G. Interior's Failure to Consider the Informational Value of Delay Associated with Uncertain Environmental and Social Costs at the Programmatic Stage Violated OCSLA and Was Arbitrary and Irrational

To fulfill its obligations under OCSLA to select the timing and location of OCS leases, Interior must consider relevant "economic, social, and environmental values" when adopting a Program; it must use established methodologies to carry out its analysis; and it must balance the costs and benefits of its choices in a rational, non-arbitrary fashion. In conducting this inquiry, Interior faces many uncertainties: Will fluctuating oil prices make future lease sales more profitable than current ones? Will technological advancements lead to cheaper production costs or the ability to drill more safely? Will future scientific discoveries reveal

[5] If international consumers substitute the foregone U.S. exports with other international energy sources, different environmental costs could result in those countries.

that oil spills are more environmentally catastrophic than presently estimated? When confronting these uncertainties, Interior had at its disposal well-established economic methodologies for valuing the costs and benefits of waiting for more information before extracting natural resources.

Indeed, Interior attempted to consider how waiting for information about prices could generate private benefits for the oil industry, thereby recognizing the importance and measurability of the informational value of delay. But the agency arbitrarily failed to value relevant public benefits of delay. In particular, before deciding the timing of leases, Interior failed to assess—as required by OCSLA—the relative uncertainties about environmental and social costs facing different OCS areas. There is no statutory basis to distinguish between price uncertainty and environmental and social uncertainties. Interior therefore misinterpreted its statutory obligations, irrationally made policy judgments that ignore statutory factors, failed to use established methodologies to aid its analysis, and arbitrarily biased its decisions.

1. The Informational Value of Delay Is a Relevant Factor in Rational Economic Analysis, Too Important to Ignore

The informational value of delay derives from the ability to delay decisions until later when more information is available. Just as financial investors may purchase options to wait for more information on stock prices before deciding whether to buy or sell shares, and oil companies lease drilling rights to take

advantage of the option to wait for more information before deciding whether to drill, there is value for the public in waiting for more information on environmental risks and technological development before the government leases drilling rights.

The informational value of delay is widely recognized in both economic theory and in the practices of the petroleum industry. In financial economics, the informational value of delay is known as "options value" or "real options." R. No. 3469, Michael A. Livermore, *Patience is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil* 12 n.55 (Policy Integrity Discussion Paper No. 2012/1, 2012) [hereinafter "Livermore"], JA___ (citing, *e.g.*, Avinash K. Dixit, *Entry and Exit Decisions under Uncertainty*, 97 J. Pol. Econ. 620 (1989)). Practical guides to real options value are widely available. *See id.* at 13 n.56, JA___ (citing, *e.g.*, Prasad Kodukula & Chandra Papudesu, *Project Valuation Using Real Options: A Practitioner's Guide* (2006)).

The framework has also long been applied to natural resource extraction and land use decisions—and to offshore drilling in particular. *See generally id.*, JA___ (citing, *e.g.*, James L. Paddock *et. al.*, *Option Valuation of Claims on Real Assets: The Case of Offshore Petroleum Leases*, 103 Q. J. Econ. 479 (1988); Anthony C. Fisher, *Investment under Uncertainty and Option Value in Environmental Economics*, 22 Resource & Energy Econ. 197 (2000)). The petroleum industry routinely accounts for the informational value of delay with respect to its private

costs and benefits, as associated with uncertainty over future oil prices and production costs. *See generally* citations in *id.* at 13 n.60, JA___; R. No. 3578, (Interior's e-mail correspondence entitled "32FW_Another Consideration for Option Value"), JA___ (calculating billions of dollars in price-related options value accruing to lessees from a prior sale, and noting industry will delay decisions when facing uncertain price increases). More evidence comes from oil companies' decisions not to drill on their offshore leases. *See supra* Argument part I.E. Such behavior is only rational if the companies weigh the real options value of waiting for information. Michael Rothkopf *et. al.*, Rutgers Center for Operations Research, Research Report 22-2006, *Optimal Management of Oil Lease Inventory: Option Value and New Information* (Sept. 2006) (cited in Livermore at 42 n.234, JA___).

Widespread use of real options theory by the petroleum industry is unsurprising, because failing to account for the informational value of delay "is not just wrong; it is often very wrong" and can lead to "serious errors in valuation," Avinash K. Dixit & Robert S. Pindyck, *Investment Under Uncertainty* 136, 396 (1994) (cited in Livermore at 11 n.50, JA___). A company that failed to account for real options value would risk receiving suboptimal returns on investment compared with more sophisticated competitors. Unfortunately, Interior's failure to account for the informational value of delay with respect to environmental and social uncertainties exposes the American public to suboptimal levels of

environmental risk and to suboptimal returns on sale of its valuable, nonrenewable offshore resources.

In short, the informational value of delay is well established in the economic literature, in methodologies designed for studying natural resource extraction, and in the practices of the petroleum industry. The framework is accessible enough that Interior could have utilized it, and it is significant enough that Interior should have utilized it. The decision to ignore longstanding economic theory and to depart from standard industry practice is irrational.

2. Uncertainty About Environmental and Social Costs Creates Informational Value of Delay

Considerable uncertainty about the magnitude of environmental and social costs for OCS leases—especially for deep-water and Arctic drilling—creates informational value associated with delay. Since relative uncertainties vary greatly between OCS regions, the informational value of delay will also vary by region. Relative comparisons between OCS regions must be made at the programmatic stage and cannot be made at later individual leasing stages.

Uncertainties about environmental and social costs fall into several categories. First, there is significant uncertainty about environmental, economic, and social sensitivity to threats associated with drilling. New information on the toxicity of petroleum releases, the interconnectedness of affected ecosystems, and the presence of endangered species will become available as more research is

conducted. *See* Final PEIS at 3-177, JA___ (noting the need for research on the ecosystem impacts of the *Deepwater Horizon* spill). Some OCS regions, such as Arctic and deep-water areas, face unique and different degrees of uncertainty about their environmental conditions and sensitivities. *See, e.g.*, *id.* at 1-8, JA___ (noting special "uncertainty . . . surrounding global climate change impacts in the Arctic"); *id.* at 4-103, JA___ ("[Gulf of Mexico] Loop Current impose[s] uncertainties" related to "drilling operations" and "oil release"); *id.* at 4-681, JA___ (uncertainty about future Gulf of Mexico hypoxic zones). Similarly, the effects of spills on coastal land values are uncertain and variable. *See id.* at 3-326, JA___ (noting "uncertainty" concerning spill effects on "coastal housing markets").

Second, there is significant uncertainty about the magnitude of the risks of catastrophic spills. Again, some areas—like deep-water zones (including the site of the 2010 *Deepwater Horizon* oil spill) and the Arctic (where companies have relatively less experience drilling)—present special degrees of risk and uncertainty. *See id.* at 4-79, JA___ (noting "uncertainties associated with different regional factors" for "risk of spill occurrence and consequences").

Third, there is significant uncertainty in the development rate of both spill-prevention and spill-remediation technologies. Spill prevention and remediation technologies have improved significantly over the last decade. *E.g.*, Livermore at 21 n.91, JA___ (citing U.S. Coast Guard Research and Development Center,

Report No. CG-D-07-03, *U.S. Coast Guard Oil Spill Response Research & Development Program: A Decade of Achievement* 9–12 (2003)). The degree of future technological improvement is uncertain, and different OCS regions face relatively different levels of exposure to technological uncertainty. *See* Final PEIS at xlviii, JA___ ("In the Alaska Beaufort Sea and Chukchi Sea Planning Areas, winter conditions (e.g., complete ice cover and extremely cold conditions) could substantially complicate spill response, given current spill control and remediation technologies.").

Finally, there is uncertainty about alternative uses of the OCS, in particular the potential for renewable energy projects. Such alternative, future uses could be incompatible with present oil and gas leasing plans. *See* Final PEIS at 4-62, JA___ ("OCS oil and gas leasing and development activities could interfere with future OCS wind energy renewable energy projects."). Different OCS regions have different potentials for the future development of renewable energy projects. *See* National Renewable Energy Laboratory, *Large-Scale Offshore Wind Power in the United States* 58 (2010) (cited by BOEM, *Energy Alternatives and the Environment* 38 (2012), JA___) (noting offshore wind opportunities in the Gulf of Mexico).

3. To Properly Balance the Timing of Leases, and to Fully Consider OCSLA's Economic, Social, and Environmental Factors, Interior Must Measure the Informational Value of Delay

OCSLA repeatedly emphasizes the need for Interior to balance certain factors in deciding the "timing" of leases. 43 U.S.C. §§ 1344(a), (a)(2), (a)(3). Timing decisions logically must evaluate the advantages and disadvantages of delay—including the full value of waiting for more information on key uncertainties. Leasing plans must broadly "consider[ ] economic, social, and environmental values," *id.* § 1344(a)(2), and timing decisions must be based on consideration of specific factors including the environmental risks and sensitivities of various OCS regions, *id.* §§ 1344(a)(2)(B) & (G). Ignoring or narrowly interpreting these factors is "contrary to the plain meaning of the statute." *Watt I*, 668 F.2d at 1308. The informational value of delay—long part of best economic practices for resource extraction decisions, *supra* Argument part I.G.1—clearly counts among the relevant "economic, social, and environmental values" required by OCSLA.

Moreover, Interior must base the "timing" of leases on "relevant environmental and *predictive information*." 43 U.S.C. § 1344(a)(2)(H) (emphasis added). "Predictive" means forecasting future, uncertain circumstances. *See* Oxford English Dictionary ["OED"] Online (Sept. 2013). Another factor Interior must consider in its timing decisions is "other anticipated uses of the [OCS]

resources and space." 43 U.S.C. § 1344(a)(2)(D). "Anticipate" refers to uncertain expectations. *See* OED Online (Dec. 2010). Ultimately, Programs must "select the timing" to "balance between the *potential* for environmental damage, the *potential* for the discovery of oil and gas, and the *potential* for adverse impact on the coastal zone." 43 U.S.C. § 1344(a)(3) (emphasis added). "Potential" also implies uncertain, future developments. *See* OED Online (June 2013). Notably, this Court has held that "properly consider[ing] the economic effect of delaying lease sales" is a factor in striking the required balance on timing. *Watt I*, 668 F.2d at 1320. Failing to account for the informational value of delay, thus, interferes with Congress's clear intent for Interior to consider uncertainties and predictions on environmental and social costs and benefits in its timing selections. *Cf. id.* at 1303 (noting interpretations that do "not effectuate the intent of Congress must fall").

4. OCSLA Requires Rational Analysis, Including the Use of Established Methodologies to Make Predictive Determinations

To make its timing decisions, Interior is generally "free to choose any methodology so long as it is not irrational," where rationality turns on proper consideration of relevant factors. *CBD*, 563 F.3d at 488. Specifically reviewing Interior's methodology to "properly consider[ ] the economic effect of delaying lease sales," this court did not hesitate to remand a leasing program for reconsideration where the analysis was "irrational," "troubling," and inadequately explained. *Watt I*, 668 F.2d at 1320-21.

When reviewing the rationality of methodological selections, this Court has looked to whether the methodology has been "performed extensively in the past." *Watt II*, 712 F.2d at 600. The economic theory, practical guides, and methodologies necessary to measure the informational value of delay in the timing of oil leases have existed for decades. *Supra* Argument part I.G.1. Additionally, Interior was fully informed of the applicability of the informational value of delay to its decision, having received comments, petitions, and scholarly articles on point. *E.g.*, R. No. 3584 (Interior's e-mail correspondence entitled "47FW_Fair Market Value in 5-Year.pdf"), JA___ (establishing that Interior was well aware of "the sophisticated option value methods" available). Though estimating the informational value of delay will require the exercise of expertise, Interior cannot plausibly argue that the decision of whether to account for this value is at the "frontiers of scientific knowledge," *Watt II*, 712 F.2d at 600. Measuring the informational value of delay may pose technical challenges, but Interior does not have "carte blanche to wholly disregard a statutory requirement out of convenience." *CBD*, 563 F.3d at 488.

5. OCSLA Requires Interior to Make Relative Comparisons—Including Between the Relative Values of Delay in Different OCS Areas—at the Programmatic Stage

Not only does OCSLA require Interior to consider broad "economic, social, and environmental values" at the programmatic stage, but certain relevant factors

can *only* be effectively considered at the programmatic stage. Specifically, as discussed above, OCSLA requires Interior to consider the relative "environmental risks among the various [OCS] regions," the "other anticipated uses" of various OCS locations, the "relative environmental sensitivity and marine productivity of different [OCS] areas," and the "relevant environmental and predictive information for different [OCS] areas." 43 U.S.C. §§ 1344(a)(2)(B), (D), (G) & (H).

Different OCS areas, especially deep-water and Arctic regions, face different types and levels of uncertainty about their environmental risks, their environmental sensitivities, and the rate of development of relevant technologies both for renewable energy options and for spill prevention and mitigation. *Supra* Argument part I.G.2. Accordingly, the relative informational value of delaying lease sales in different OCS regions will vary. Such relative, regional considerations must "be taken into account at the programmatic stage; otherwise, the requirement that Interior select the timing of leasing 'among the regions' is rendered meaningless." *Watt I*, 668 F.2d at 1314; *see also CBD*, 563 F.3d at 488 (remanding a Program for "failure to properly consider the environmental sensitivity of different areas of the OCS").

Even if Interior cannot develop perfectly exact measures for the relative informational value of delay in different OCS areas during the programmatic stage, OCSLA does not permit Interior to postpone its consideration of a statutory factor.

The fact that certain required analyses may be "predictive or speculative" at the programmatic stage "does not mean . . . that consideration of any particular factor may be deferred until some later date." *Watt I*, 668 F.2d at 1307. Rather, even for speculative considerations, Interior must engage in a "good faith" effort. *Id.* at 1313. The agency may not, as it has with the informational value of waiting for more data on uncertain environmental and social costs, simply decide to ignore an important aspect of the decision.

6. By Failing to Account for the Environmental and Social Informational Value of Delay, Interior Irrationally Ignored Statutory Factors and Arbitrarily Biased Its Decisions on Lease Timing

Interior attempts to consider the informational value of delay with respect to oil price uncertainty, thereby acknowledging the significance and measurability of the concept. This move was made in part to respond to comments from the Institute for Policy Integrity. R. No. 3584, (Interior e-mail correspondence entitled "47FW_Fair Market Value in 5-Year"), JA___ (explaining that "hurdle price analysis" was added "in response to" comments from "Institute for Policy Integrity"). In particular, Interior recognized that real options value is an important component of economic value that the petroleum industry considers when bidding on leases, *see* Program at 86, and the Program models industry behavior to "account for the operator's options to explore or wait and/or develop a discovery or wait." *Id.* at 89 (a "'real options' model"). Interior attempts to factor uncertainty

about future oil prices into its decision on lease timing, and the agency assumes that companies' bids on lease sales will partially reflect private options value. *Id.*

Yet Interior did not consider the informational value of delay with respect to *social and environmental* uncertainties. There is no rational distinction between these categories of uncertainty and price uncertainty. OCSLA and standards of administrative law prohibit Interior from analyzing the option to delay lease sales with an "irrational" methodology. *Watt I*, 668 F.2d at 1320. Interior's attention to private options value while ignoring important categories of the informational value of delay for the public was arbitrary, and so violated OCSLA.

This is not a case of Interior determining that no future discoveries would bear on important environmental and technological uncertainties, and so deciding the informational value of delay was zero. No such finding was made. Rather, Interior was apprised of the economic methodologies to value that information but chose, without explanation, not to use them.

Moreover, this is not a case of Interior determining that the "market [i]s capable of anticipating technological development . . . and that, accordingly, the market would delay investments whenever greater profits could be achieved." *Watt II*, 712 F.2d at 602. Private market actors do not have adequate incentives to consider external costs and benefits experienced by the general public. *See* Final EAM at 4, JA___ (calculating a "net social value" since "external costs occur

because producers and consumers do not bear all the costs generated by the program"). Though the petroleum industry does weigh the benefits of delaying drilling to gain information about future oil prices and production costs, it will not consider the benefits of delay with respect to environmental or social uncertainties. The environmental and social value of waiting for more information can only be addressed by the Program or else not at all, yet Interior still chose to ignore this significant and statutorily required economic factor.

II. THE 2012-2017 PROGRAM VIOLATES NEPA

A. Standard of Review

The key purpose of an EIS is "to inform Congress, other agencies, and the general public about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action." *Hodel*, 865 F.2d at 296. In reviewing an EIS for adequacy, this Court's role is to "ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision." *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 371 (D.C. Cir. 1981) (internal quotation marks omitted). An EIS is inadequate when it passes from the "tolerably terse" to the "intolerably mute." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75-76 (D.C. Cir. 2011). In *Hodel* this Court found that the EIS for a previous Program

was inadequate and required remand because "it ma[de] only conclusory remarks, statements that do not equip a decisionmaker to make an informed decision about alternative courses of action or a court to review Interior's reasoning." 865 F.2d at 298.

B. Interior's Failure to Account for the Benefits of Non-Mineral Resources Distorts the Cost-Benefit Analysis, and Skews the Decision Against Selection of the No-Action Alternative

NEPA requires that an EIS consider all reasonable alternatives to a proposed federal action. 42 U.S.C. § 4332(2)(E). A discussion that "sharply defin[es] the issues and provid[es] a clear basis for choice" amongst various alternatives "is the heart of the [EIS]." 40 C.F.R. § 1502.14. One alternative that agencies must always consider in every EIS is the "no-action" alternative. *Id.* § 1502.14(d).

In this case, the cost-benefit analysis of the no-action alternative in the Final PEIS is so biased and incomplete that it precludes informed assessment of that alternative. While Interior considered various costs of the no-action alternative in the form of damage to non-mineral resources, any discussion or quantification of non-mineral resource benefits is entirely missing. As CSE discussed in its comments, a diverse menu of non-mineral benefits should be included in the cost-benefit analysis. First, all non-mineral uses and values can be expected to continue and grow in the absence of resource conflicts associated with new OCS leasing. Second, production on existing leases could be expected to occur, and possibly

increase, especially in light of Interior's "due diligence" incentive programs to stimulate production from undeveloped leases.[6] Third, federal, state, and local governments would save money by avoiding the costs of administering and monitoring new leasing operations.

The one-sided nature of the analysis of non-mineral benefits is clear. This Court has held that the economic value of OCS non-mineral resources is not "inherently insusceptible of quantitative analysis." *Watt I*, 668 F.2d at 1319; *id.* at 1320 (Interior is obligated to "evaluate the quantifiable impact of an oil spill upon fishing, tourism and other OCS-related enterprises"). Indeed, in this case Interior undertook the task of quantifying the value of various non-mineral resources. For example, Interior determined that the monetary value of a recreational saltwater fishing trip in 2001 ranged from $11.00-$57.00/day and that the value of a recreation beach visitation day in 2001 ranged from $4.00-$19.00/person-day. OECM 11-12, JA___-___. Interior utilized these calculated values in its assessment of the quantum of environmental costs—i.e., losses of value associated with damage to those non-mineral resources—that are associated with various leasing alternatives.

[6] Indeed, Interior acknowledges that under no-action, "[e]xploration, development, and production activities would continue in lease blocks previously leased." Final PEIS xlii, JA___. In addition, Interior is currently evaluating policy options to provide companies with additional incentives for the more rapid development of oil and gas production from existing and future leases.

But Interior did not symmetrically consider the economic benefits of non-mineral resources that will flow to the American public in the absence of additional OCS leasing, including the potential growth in the value of these same non-mineral resources. This same failure extends to other benefits of the no-action alternative, such as the informational benefits of delay and the increased production of oil and gas from existing leases. To excuse its failure, Interior may argue that it acted consistently and also assigned no value to non-mineral benefits for action alternatives. This is correct, but misses the mark and does not "explain away" the NEPA violation, as Interior's truncated analysis eviscerates the informational purposes of the Final PEIS. As it stands now, the Final PEIS is "intolerably mute" on the subject of no-action alternative benefits.

In essence, Interior used an accounting "trick" to stack the deck against selection of the no-action alternative: the cost-benefit analysis fails to include anything on the benefits side of the ledger for non-mineral resources while at the same time accounting for harms to non-mineral resources on the cost side. Final PEIS 2-25, JA___; Program 136, JA___. Such a truncated and biased approach produces a "cost-benefit analysis [that is] reduced to a sham" because it "will always be tipped in favor" of selection of an action alternative. *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983).

Numerous decisions hold that cost-benefit analyses cannot be based on non-reciprocal consideration of costs and benefits or inconsistently use economic metrics. *See, e.g.*, *Sierra Club v. VanAntwerp*, 661 F.3d 1147, 1151 (D.C. Cir. 2011) (holding that metrics must be consistently used in cost-benefit analyses); *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 811 (9th Cir. 2005) (holding that "[i]naccurate economic information may defeat the purpose of an EIS" by impairing the consideration of alternatives). In this case, Interior's biased reporting of economic values misleads decision-makers and the public as to economic benefits of the no-action alternative. This error flaws the Final PEIS and requires a remand for a complete, unbiased, and objective analysis.

C. Interior's NEPA Process Prevented CSE from Providing Meaningful Comments on the Final PEIS and Final EAM

NEPA requires an agency to make an EIS and supporting materials available for public comment prior to the final decision, as "[p]ublication of an EIS, both in draft and final form, . . . provides a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's implementing regulations codify this requirement:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. *Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.*

40 C.F.R. § 1500.1(b) (emphasis added). Making the EIS and supporting materials available after issuance of a final decision thwarts NEPA's important informational purposes and prevents the public from making meaningful comments on proposed actions. A NEPA process that does not ensure an opportunity for meaningful public comment fails to comply with the applicable "hard look" standard. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 228-29 (D.D.C. 2003). When "actual prejudice" results from issuance of a deficient Draft EIS—"where, for example, omissions leave the agency without public comment on a material environmental aspect of a project"—then a "beefed-up" Final PEIS does not cure the problem. *National Committee for the New River v. Fed. Energy Regulatory Comm'n*, 373 F.3d 1323, 1329 (D.C. Cir. 2004).

Here, CSE was denied an opportunity to comment on Interior's cost-benefit analysis since it did not appear in the Draft PEIS and was not released before the final Program decision. Likewise, CSE was denied the opportunity to comment on Interior's Final EAM—a key supporting document—since only a very rough and extremely abbreviated Draft EAM was made available for public comment. The Final EAM contained a wealth of new assumptions and conclusions that CSE had no opportunity to review or critique.

NEPA regulations contain explicit guidance governing the development and use of cost-benefit analyses that are incorporated into an EIS, and state that a cost-

benefit analysis must be incorporated by reference or appended to the EIS when it is relevant to the choice of alternatives. 40 C.F.R. § 1502.23. In this case, the cost-benefit analysis supporting the Program was conducted outside of the NEPA process and never subjected to expert review or public comment. Interior's belated incorporation of the cost-benefit analysis into the Final PEIS—which was issued concurrently with the final Program decision—precluded all expert review and public comment on the analysis, eviscerated NEPA's important public participation purposes, and did not cure the legal defects in the NEPA process.[7]

Other inadequacies in the NEPA process also deprived CSE of a "springboard" for meaningful critique of Interior's conclusions and omissions. For example, with respect to "catastrophic" oil spills the Final PEIS states that "[l]imited historical data makes it difficult to provide reliable estimates of the environmental and social costs likely to result from a discharge of a given amount, not to mention even the probability that such an event might occur." Final PEIS 2-26 to 2-27, JA___-___. Had CSE been given the opportunity to comment on this explanation, it would have provided expert commentary regarding the widespread use of expected value analysis as one way that this important factor could have been addressed. CSE would also have objected to the Final PEIS's biased presentation of the net benefits analysis—which, as discussed above, entirely fails

[7] The Final PEIS contains a discussion of Interior's cost-benefit analysis at pages 2-19 to 2-28, JA___-___.

to assign any monetary value to non-mineral resources in their natural and unaltered state—and recommended various ways in which Interior could have cured this flaw.

Additionally, if given an opportunity CSE would have commented on Interior's final selection of a 3% discount rate in the Final EAM, as that decision doubled the economic benefits associated with the various leasing alternatives as originally presented in its incomplete draft economic methodology document. That draft, which was released for public comment, estimated the benefits of additional leasing in the Gulf of Mexico to be $141 billion. Draft EAM 22, JA___. However, the final economic analysis—which utilized a far lower discount rate that was not subject to public comment—increased those benefits to nearly $345 billion. Final EAM 28, JA___.

The procedural flaws noted above violated NEPA requirements, and created "actual prejudice" as this Court contemplated in its *New River* decision. The resulting prejudice was not cured in any manner whatsoever in the Final PEIS. Accordingly, the Program must be remanded to Interior with instructions to provide for meaningful public comment on the EIS and supporting analytical documents.

CONCLUSION AND RELIEF REQUESTED

For the reasons described above, CSE requests that this Court remand to Interior its 2012-2017 Outer Continental Shelf Oil and Gas Leasing Program with instructions that it reconsider the Program decision in light of the requirements of OCSLA and NEPA. In OCSLA Section 18, Congress specified the substantive objective that Interior must achieve when it adopts a Program: a five-year OCS leasing schedule that strikes "a proper balance between the potential for environmental damage, the potential for discovery of oil and gas, and the potential for adverse impact to the coastal zone." 43 U.S.C. § 1344(a)(3). Also in Section 18, Congress designed a decision-making process to ensure Interior duly accounts for all relevant economic and environmental considerations, including the unique risks and resources in the nation's various OCS areas. *Id.* § 1344(a)(2). Here, Interior violated the Section 18(a)(2) process, and this violation made it impossible for Interior to strike the proper substantive 18(a)(3) balance.

Interior's departure from its statutory duties can, and should, be corrected upon remand. In a case like this, remand to Interior for reconsideration in light of statutory requirements can lead to a change in the total amount of OCS leasing that takes place in 2012-2017, and a shift in the apportionment of the planned leasing amongst the various OCS areas in the United States. *CBD*, 563 F.3d at 280. The Program stage of the OCSLA process is the only—and last—opportunity that

Interior has to compare between regions and make nationwide leasing decisions. Faithful compliance with the decision-making and balancing processes that Congress directed is, therefore, extremely important to the rational management of the nation's OCS resource reserve.

CSE respectfully urges the Court to direct Interior to comply with these procedural and substantive obligations upon remand. Specifically, CSE requests that Interior be directed to base its Program decision on rational assumptions; to give consideration to all relevant factors prescribed by Congress, including the value of non-mineral resources; to consider the informational value of delay; and to provide a meaningful opportunity for public comment before the Program decisions are made.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Opening Brief of Petitioner contains 13,822 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

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