Duane A. Siler
Sarah C. Bordelon
Crowell & Moring LLP
1001 Pennsylvania Ave. N.W.
Washington, D.C. 20004
Telephone: 202-624-2500
Facsimile: 202-628-5116
dsiler@crowell.com

Attorneys for Shell Offshore, Inc. and Shell Gulf of Mexico, Inc.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Shell Gulf of Mexico Inc. Frontier Discoverer Drilling Unit OCS Permit No. R10OCS/PSD-AK-09-01 and Shell Offshore Inc. Frontier Discoverer Drilling Unit OCS Permit No. R10OCS/PSD-AK-09-02	OCS Appeal Nos. OCS 10-01 through 10-04

SHELL GULF OF MEXICO INC.'S AND SHELL OFFSHORE INC.'S NOTICE OF RELATED DECISION AND REQUEST FOR STATUS CONFERENCE

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell") hereby notify the Environmental Appeals Board that, in a pleading filed in the U.S. District Court for the District of Alaska on November 5, 2010, the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE") stated that it is now processing Shell Offshore Inc.'s Application for Permit to Drill ("APD") in Camden Bay (in the Beaufort Sea) in 2011 under Shell Offshore Inc.'s approved Exploration Plan utilizing the *Frontier Discoverer*. Shell Offshore Inc. submitted this APD for 2011 to BOEMRE on October 5, 2010. A copy of Shell's submission is Attachment A hereto.[1]

This new information appears in the Federal Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed by Department of Justice counsel on November 5, 2010, in *State of Alaska v. Salazar, et al.*, Case No. 3:10-cv-00205 (D. Ak.). *See* Attachment B hereto. In arguing that the State of Alaska has suffered no injury from alleged inaction by the Department of Interior in regard to exploration drilling on the Alaska Outer Continental Shelf ("OCS"), the Federal Defendants note Shell's October 5, 2010, submission and represent that: "The agency is processing this APD and Shell's revised EP in the regular course of business and in compliance with all applicable regulations." Federal Defendants' Opposition at 11.[2]

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[1] At the hearing on these Petitions on Oct. 7, 2010, counsel for Shell advised the Board of Shell's submission to BOEMRE two days previously. Shell's October 5, 2010 submission package included updates to Shell's approved Exploration Plan and additional information required by BOEMRE of all OCS operators on potential worst-case discharge in the event of an oil spill. In the cover letter Shell noted that "Shell must have timely review of the APD to ensure that Shell will be able to properly prepare for a safe and successful 2011 drilling season" and requested that BOEMRE complete its review by December 1, 2010.

[2] Shell has moved for leave to participate in the Alaska litigation, in which the State of Alaska seeks to compel BOEMRE to process permits for drilling in the Arctic OCS. On November 8, 2010, Shell filed in the Alaska litigation a Proposed Amicus Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment. In that pleading, Shell noted that on May 27, 2010, Secretary of the Interior Salazar issued a press release stating that BOEMRE would postpone consideration of any APDs

(continued...)

BOEMRE's indication that it is processing an APD that would enable Shell to drill in the Beaufort Sea in 2011 underscores the importance of Shell's prior requests for timely resolution of these Petitions. As Shell has shared with the Board on several occasions, a determination of the merits of these Petitions this Fall is critical for Shell to know whether to make the required significant financial commitments for exploration drilling in 2011. EPA has endorsed resolution of the Petitions,[3] and has noted that "the timing and substance of any future work by the Agency on these permits (if necessary) will be influenced by any decision the Board may issue, as well as the overall situation regarding OCS drilling and the availability of Agency resources." *Id.* at 4.

In light of the fact that BOEMRE is currently evaluating Shell's APD for drilling in 2011, Shell respectfully requests that the Board convene a status conference as soon as practicable for the purpose of hearing from the Parties on what would be an appropriate timetable for determination of these Petitions, including those issues on which Petitioners seek review but on which the Board did not request the Parties' views at oral argument. Shell recognizes that the Board has many demands on its time and resources and respectfully suggests that input from the Parties on the implications of earlier versus later resolution may assist the Board in prioritizing its consideration of these Petitions.

(continued)

submitted for Arctic oil and gas exploration operations during the 2010 open-water season; that as a result Shell was forced to cancel the 2010 drilling season less than 40 days before it was scheduled to begin, at great cost to Shell; and that throughout the Summer of 2010 Shell unsuccessfully sought clarification about the scope of the Arctic moratorium/deferral.

[3] In its July 28, 2010, motion to reschedule oral argument, Region 10 noted its position that "after hearing argument on the three issues identified in Board's Order, the Board should issue its decision on those issues instead of holding them in abeyance or remanding them pursuant to the motions previously filed by Region 10 and Petitioners." Region 10's Unopposed Motion to Reschedule Oral Argument at 3.

Respectfully submitted,

Duane A. Siler
Sarah C. Bordelon
Crowell & Moring LLP
1001 Pennsylvania Ave. NW
Washington DC 20004
Telephone: 202-624-2500
Facsimile: 202-628-5116

Attorneys for Shell Offshore Inc. and Shell Gulf of Mexico Inc.

DATED: November 12, 2010

CERTIFICATE OF SERVICE

I herby certify that I have caused a copy of the Notice of Related Decision and Request for Status Conference to be served by electronic mail upon:

Kristi M. Smith
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2344A)
Washington, DC 20460
Tel: (202) 564-3064
Fax: (202) 202-501-0644
smith.kristi@epa.gov

Julie Vergeront
Juliane R.B. Matthews
Office of Regional Counsel
U.S. EPA, Region 10, Suite 900
1200 Sixth Ave., SO-158
Seattle, WA 98101
Tel: (206) 553-1169
Fax: (206) 553-0163
vergeront.julie@epa.gov
matthews.juliane@epa.gov

Vera P. Pardee
Kevin P. Bundy
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104
Tel: (415) 436-9682 ext. 317 (VP)
Tel: (415) 436-9682 ext. 313 (KB)
Fax: (415) 436-9683
vpardee@biologicaldiversity.org
kbundy@biologicaldiversity.org

Brendan R. Cummings
Center for Biological Diversity
P.O. Box 549
Joshua Tree, CA 92252
Tel: (760) 366-2232
Fax: (760) 366-2669
bcummings@biologicaldiversity.org

David R. Hobstetter
Erik Grafe
EarthJustice
441 W 5th Avenue, Suite 301
Anchorage, AK 99501
Tel: (907) 277-2500
Fax: (907) 277-1390
dhobstetter@earthjustice.org
egrafe@earthjustice.org

Eric P. Jorgensen
EarthJustice
325 Fourth Street
Juneau, AK 99801
Tel: (907) 586-2751
Fax: (907) 463-5891
ejorgensen@earthjustice.org

Tanya Sanerib
Christopher Winter
Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205
Tel: (503) 525-2722
Fax: (503) 296-5454
tanya@crag.org
chris@crag.org

Duane A. Siler
CROWELL & MORNING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004-2595
Telephone: (202) 624-2500
Facsimile: (2025) 628-5116
dsiler@crowell.com

DATED: November 12, 2010

ATTACHMENT A

Shell Exploration & Production submission to Bureau of Ocean Energy Management, Regulation and Enforcement (October 5, 2010).

Shell Exploration & Production

October 5, 2010

U.S. Department of the Interior
Bureau of Ocean Energy Management,
Regulation, and Enforcement
Attn: Jeff Walker
Regional Supervisor/Field Operations
3801 Centerpoint Drive, Suite 500
Anchorage, AK 99503-5820

Shell
3601 C Street, Suite 1000
Anchorage, AK 99503
Tel. (907) 646-7112
Email susan.childs@shell.com
Internet http://www.shell.com/

Dear Mr. Walker:

Please find enclosed three items related to Shell Offshore Inc.'s ("Shell") Alaska Beaufort Sea exploration program: (1) an Application for Permit to Drill ("APD") under Shell's approved Outer Continental Shelf Lease Exploration Plan for Camden Bay, Alaska ("Camden Bay EP"); (2) Shell's responses required by Notice To Lessees 2010-N06 ("NTL 2010-N06"); and (3) a summary of the minor updates to the Camden Bay EP required for a 2011 exploration season. Shell expects the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE") to keep confidential the APD and responses to NTL 2010-N06. However, Shell authorizes BOEMRE to make public the executive summary provided with the NTL responses.

As you know, the Minerals Management Service (now BOEMRE) approved the Camden Bay EP on October 16, 2009, and that approval was upheld on judicial review. In May of this year, Shell was making final preparations to conduct exploration under the Camden Bay EP when your agency notified Shell that, in light of the Macondo incident in the Gulf of Mexico, it would not process Shell's APDs for a 2010 exploration program. Up to that point, Shell had been actively engaged with BOEMRE discussing final technical details regarding APDs that Shell planned to submit for the 2010 exploration season.

Shell must have timely review of the APD to ensure that Shell will be able to properly prepare for a safe and successful 2011 drilling season. Shell requests that BOEMRE commit to a review process that will render a decision on this APD by December 1, 2010, at the latest. Such a process should include a schedule for technical review of the APD and NTL responses and continued engagements between Shell and BOEMRE. Shell believes that the Alaska Regional Office of BOEMRE should play a significant role in the review process. The Alaska office is extremely familiar with this project, having completed a comprehensive Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) prior to approving the Camden Bay EP. Shell further requests that BOEMRE coordinate, as the lead agency, with other agencies to ensure that all required consultations are completed and documented in a timely manner.

As you know, neither statutes nor regulations require the agency to complete a public review process prior to approving an APD; however, if the agency nevertheless determines it will undertake some public process, such process should be clearly defined, with firm limits on scope and time. To streamline any public process, Shell requests that BOEMRE work cooperatively with Shell during the review and address any material issues identified by the agency.

A limited and clearly defined review process is appropriate in this case. The agency's review is limited to the APD and NTL response, which are entirely consistent with the Camden Bay EP that was approved by the agency and upheld on judicial review. The Camden Bay EP was extensively studied by both Shell and the agency prior to its approval to ensure that impacts were fully identified and appropriately mitigated. Extensive scientific and project-specific reservoir data back up both the Camden Bay EP and Environmental Impact Analysis submitted by Shell, and the EA and FONSI issued by the agency. BOEMRE therefore has ample information to complete its timely review and approval of the APD. Finally, the minor plan updates Shell is submitting today, which are reflected in the APD and summarized in the attached, are ministerial in nature and do not warrant any additional review.

Finally, Shell's responses to NTL 2010-N06 fully and completely respond to the agency's requests in NTL 2010-N06. The information in the responses is consistent with information provided in the Camden Bay EP and Environmental Impact Analysis and does not constitute supplementation or new information. Thus, no further agency review of the information in Shell's responses is required. While these responses may further inform BOEMRE's review of the APD, they should not become part of the APD review process. If BOEMRE nevertheless intends to conduct any additional analysis on Shell's responses to NTL 2010-N06, Shell requests that BOEMRE immediately notify Shell of that decision and provide Shell with a description of the process and goals of such review, including a schedule for the review with date certain for completion.

Shell looks forward to working with BOEMRE to resume its suspended operations and to ensure a safe and productive drilling season in 2011.

Please contact me at (907) 646-7112 or e-mail: susan.childs@shell.com for further information.

Sincerely,

Susan Childs

Susan Childs

Alaska Venture Support Integrator Manager

[SIVULLIQ N APD APPLICATION]
Camden Bay EP Update Summary

1.1 Continue Shell's Suspended Exploration Program in 2011

Shell's Approved Camden Bay Exploration Plan (Approved EP) provided a description of the exploration drilling program planned for its leases in the Beaufort Sea offshore of Camden Bay, and a detailed schedule for conducting the exploration drilling program during the 2010 drilling season. Shell now plans to conduct the suspended Camden Bay exploration drilling program during the 2011 drilling season.

The schedule will be the same as that described in Section 1.0 of the Approved EP; however, as a result of the agency's suspension of Shell's 2010 exploration program following the *Deepwater Horizon* incident, the exploration program will now take place during the 2011 drilling season. The drillship *Discoverer* and its ice management and support vessels will mobilize and depart from Dutch Harbor/Unalaska on or around June 20, 2011. The *Discoverer* and its support vessels will transit through the Bering Strait into the Chukchi Sea on or after July 1, 2011, arriving on location near Camden Bay on or about July 10, 2011.

Exploration drilling activities will begin on or about July 10, 2011 and run through October 31, 2011. Shell will suspend all operations from August 25 to the end of the Nuiqsut (Cross Island) and Kaktovik subsistence bowhead whale hunts. The *Discoverer* and its support vessels will leave the Camden Bay project area during that time period as indicated in the Approved EP, and return to resume activities at the conclusion of the Nuiqsut (Cross Island) and Kaktovik subsistence bowhead whale hunts.

Exploration drilling activities will cease on or before October 31, 2011, depending on ice and weather. At the end of the drilling season, the *Discoverer*, and associated support vessels will transit west into and through the Chukchi Sea.

1.2 The Impact Assessment in Shell's Camden Bay EIA Remains the Same for a 2011 Season

The potential environmental impacts associated with the exploration drilling program described in Shell's Approved EP are discussed in detail in Sections 4.1 and 4.2 of the Environmental Impact Analysis (EIA), which was provided as Appendix H of the Approved EP. Conducting the exploration drilling program on the same schedule, but in 2011 rather than 2010, does not alter the potential environmental effects analyzed in the EIA.

The schedule for the 2011 exploration season is also the same as that described and analyzed in the Bureau of Ocean Energy Management, Regulation, and Enforcement's (BOEMRE's) own Environmental Assessment (EA) of Shell's Camden Bay exploration drilling program. The schedule for the 2011 exploration season contains the same mitigation measures (including the suspension of exploration drilling during Nuiqsut and Kaktovik bowhead hunts) that were part of the Approved EP. The maximum length of the drilling season in 2011 is the same as that in the Approved EP. The expected total number of drilling days for a well is the same as under the Approved EP. BOEMRE concluded in its EA approving Shell's Camden Bay EP that, with the mitigation measures incorporated by Shell, the Camden Bay exploration drilling program would have only negligible effect on subsistence. BOEMRE's Finding of No Significant Impact (FONSI) similarly states that the Camden Bay exploration drilling program as scheduled would have negligible effect on Nuiqsut and Kaktovik subsistence activities. Because Shell's EIA, as well as BOEMRE's EA and FONSI, concluded that the exploration drilling program under the

schedule in the Approved EP would result in only negligible or minor effects, and because the schedule for operations for 2011 is the same as that in the Approved EP, the analysis in Shell's EIA and BOEMRE's EA, as well as the conclusion in BOEMRE's FONSI that the exploration drilling program on this schedule would have no significant adverse impact on biological resources, subsistence, water quality, or air quality, are still valid, and no further environmental analysis is warranted.

Shell continues to conduct environmental and geophysical studies in the area of the Sivulliq Prospect. No data or information has been collected since approval of Shell's EP that would alter the impact analysis provided in Shell's EIA or BOEMRE's EA. Furthermore, BOEMRE stated in its FONSI for Shell's Approved EP that no unavailable information relevant to potential significant effects or essential to a reasoned decision regarding the proposed activities was identified during its NEPA review.

The oil spill in the Gulf of Mexico associated with the Macondo well, which occurred since Shell's EP for Camden Bay was approved, also does not change the environmental analysis presented in either Shell's EIA or BOEMRE's EA. As discussed in Appendix A (Analysis of Accidental Oil Spills) of BOEMRE's NEPA EA, no large or very large crude or diesel oil spills were estimated or analyzed in the EIA or EA as a result of a review of historical spill and modeling data, and the low likelihood of occurrence. BOEMRE concluded in this analysis that a large oil spill in the Beaufort Sea is too remote and speculative to warrant analysis. However, as also indicated in Section 1.1.3 of Appendix A of the EA, the potential impacts of a very large spill resulting from a well control incident have been analyzed by BOEMRE in their Environmental Impact Statement (OCS EIS/EA MMS 2003-001 at IV-228 to IV-247) and this analysis was incorporated by reference in BOEMRE's EA for Shell's exploration drilling program. The occurrence of the Macondo oil spill does not appreciably alter the overall frequency of oil spill blowouts and has no bearing on the environmental analysis of Shell's Approved EP or EP update.

BOEMRE concluded in its FONSI for Shell's Approved EP that the Camden Bay exploration drilling program would: 1) result in no biologically significant mortalities to fish, birds, or mammals, and that effects on most species would be negligible or at most minor; 2) have negligible effects on the economy and no adverse effects on community health for Nuiqsut and Kaktovik; 3) result in only short term and negligible to minor effects on air quality; and 4) result in only temporary and minor water quality impacts due to program discharges. Nothing in this update to the EP (conducting the program in 2011 vs. 2010) would alter these conclusions.

2.1 Adoption of Zero Discharge Practices for the 2011 Camden Bay Exploration Program

Under Shell's approved Approved EP, a number of waste streams from the drillship would be discharged to the waters of the Beaufort Sea as authorized under a National Pollutant Discharge Elimination System (NPDES) permit from the U.S. Environmental Protection Agency (EPA). Shell now plans to adopt some zero discharge practices by holding some of these waste streams on the drillship or support vessels and subsequently hauling them out of the Arctic Ocean for disposal in accordance with all applicable laws and regulations as described below in Sections 4.1.1 and 4.1.2 of this document. For Shell's 2011 Camden Bay exploration season, and as used herein, "zero discharge" refers to the practice of not discharging water based drilling fluids, drill cuttings with adhered drilling fluids, sanitary waste, gray water, bilge water, and ballast water to the ocean. **[Other waste streams, including cuttings from well intervals in which only seawater and viscous sweeps are used, will be discharged as authorized under the NPDES General Permit AKG-28-0000.]**

2.1.1 Adoption of Zero Discharge of Drilling Mud and Cuttings with Adhered Drilling Mud

In Shell's Approved EP, used water based drilling mud (WBM), and drill cuttings with adhered drilling mud would be discharged to ocean waters. Shell now plans to temporarily store any spent WBM and drill cuttings with adhered WBM on the drillship and a barge, and then transport them out of the Arctic Ocean for disposal in accordance with all applicable laws and regulations. The estimated volume of drill cuttings and used drilling mud expected to be generated under this update to the EP, and the disposal strategy for each type, are provided below in Table 2-1 and Table 2-2.

Shell previously received authorization from the EPA to discharge drilling wastes in Flaxman Island Block 6658 under the NPDES Arctic General Permit AKG-28-0000. Shell will provide EPA with updated information on the drilling mud and disposal methods now planned for the Sivulliq N drill site.

TABLE 2-1 ESTIMATED VOLUME OF DRILL CUTTINGS GENERATED AT EACH WELL

Well Interval	Drilling Fluids	Cuttings Volume
MLC and 36-inch + 26-inch hole intervals	Seawater & viscous sweeps	4,031 bbl
Top of the 12.25-inch hole to total depth	WBM	712 bbl

TABLE 2-2 DRILLING WASTES GENERATED AT EACH WELL AND DISPOSAL METHOD

Well Interval	Drilling Fluid Type	Cuttings	Drilling Fluids	Total Waste	Disposal
MLC and 36+26-inch hole intervals	Seawater & viscous sweeps	4,031 bbl	0	4,031 bbl	Discharged to Beaufort Sea
Top of 12.25-inch hole to total depth	WBM	712 bbl	2,212 bbl	2,924 bbl	Shipped out of Alaska for disposal

2.1.2 Adoption of Zero Discharge of Gray Water, Sanitary Water, Ballast Water, and Bilge Water

In Shell's Approved EP, gray water (laundry, lavatory, galley wastes), treated sanitary wastes (toilet wastes treated in marine sanitation device), bilge water, and ballast water, were to be discharged to ocean waters. Shell now proposes to store these wastes on the drillship or support vessels and subsequently transport them out of the Arctic Ocean and dispose of them in accordance with all applicable laws and regulations.

Shell previously received authorization from the EPA to discharge these waste streams in Flaxman Island Block 6658 under the NPDES Arctic General Permit AKG-28-0000 (Authorization AKG-28-0005). Shell will provide EPA with updated information on the planned discharges at the Sivulliq N drill site. An updated table indicating the volumes of wastes that will be generated by the drillship, and the volumes and rates at which waste will be discharged to the ocean, is provided below in Table 2-3. Only the waste streams for drill cuttings, drilling fluids, gray water, sanitary water, bilge water, and ballast water have

changed. The method of disposal, generated volumes, and discharge rates remain the same for all other types of wastes.

TABLE 2-3 PROJECTED GENERATED WASTES AND OCEAN DISCHARGES FROM A DRILL SITE

Type of Waste	Composition	Projected Generated Amount / Discharge Rate	Treatment / storage/ disposed
Drill cuttings from MLC & 36&26-in holes	Cuttings only; no drilling mud used – only seawater & viscous sweep	4,031 bbl/well / 697 bbl/day discharge	Discharged / deposited on the seafloor - NPDES Discharge 013
Spent WBM drilling fluids & Cutings with adhered WBM	1,500 bbl spent WBM + 712 bbl cuttings with 712 bbl adhered WBM	2,924 bbl/ well / no discharge	Not discharged; will be hauled out of the Arctic Ocean and disposed of in accordance with all applicable laws and regulations
Sanitary wastewater	Treated human body waste from toilets	1,020 bbl/well / no discharge	Not discharged; will be treated in MSD, stored on drillship and/or support vessels then hauled out of the Arctic Ocean and disposed of in accordance with all applicable laws and regulations (volume based on 140 crew at rate of 9 gal/person/day)
Domestic wastewaster	Gray water (laundry, galley, lavatory)	11,333 bbl/well / no discharge	Not discharged; food wastes incinerated onboard; other wastes stored on drillship and/or support vessels and hauled out of the Arctic Ocean and disposed of in accordance with all applicable laws and regulations (volume based on 140 people at 100 gal/person/day)
Excess cement slurry	Cement slurry	50 bbl/well / 1 bbl/min (2 times)	Discharged to ocean waters while cementing 30-inch and 20-inch casing - NPDES Discharge 012 – 45 bbl at seafloor, 5 bbl in equipment washwater
Desalination unit waste (brine water)	Rejected water from watermaker unit	4,250 bbl/well / 125 bbl/day discharge	Discharged to ocean waters through disposal caisson - NPDES Discharge 005
Deck drainage	Uncontaminated fresh or seawater	170 bbl/well / 5 bbl/day discharge (rain dependant)	Drains to oily water separator. Uncontaminated water discharged to ocean waters via disposal caisson - NPDES Discharge 002. Oily water stored onboard in waste oil tank then transferred by boat to approved treatment/disposal site
Trash and debris	Refuge generated during installation and production	300 bbl/month / no discharge	Not discharged to ocean waters; trash & debris segregated & incinerated or disposed of at approved disposal facility
Non-contact cooling water	Uncontaminated seawater	1,530,000 bbl/well / 45,000 bbl/day discharge	Discharged overboard to ocean waters at several sites - NPDES Discharge 009
Fire control system test water	Treated seawater	0 bbl/well	No routine system testing anticipated. No discharge of firewater unless needed for fire
Uncontaminated ballast	Uncontaminated seawater	170 bbl/well /	Not discharged: stored on drillship

TABLE 2-3 PROJECTED GENERATED WASTES AND OCEAN DISCHARGES FROM A DRILL SITE

water		no discharge	and/or support vessels and hauled out of the Arctic Ocean and disposed of in accordance with all applicable laws and regulations (volume based on 5 bbl/day)
Used oil	Lube oil	50 bbl/well / no discharge	Not discharged to ocean waters; stored onboard in waste oil tank. Transferred to lube cubes for transport by boat. Transfer to an approved treatment/disposal site.
Hazardous waste	Chemical products and general hazardous waste	10 bbl/well / no discharge	Not discharged to ocean waters; stored onboard in an approved container; transferred by boat to an approved treatment/disposal site
Bilge water	Oily water	429 bbl/well / no discharge	Not discharged; treated in oil/water separator; uncontaminated waters and oily waters stored separately on drillship and hauled out of the Arctic Ocean and disposed of in accordance with all applicable laws and regulations (volume based on 13 bbl/day)
Blowout preventer fluid	Water, glycol,	42 bbl/well / < 6 BOP tests at 7 bbl/test (ave.) discharge	Discharged at the seafloor(ocean waters) at the BOP - NPDES Discharge 006

2.2 The Impact Assessment in Shell's Camden Bay EIA Remains the Same with the Adoption of Zero Discharge Practices

2.2.1 No Effect on Shell's Approved 2010 EIA due to Adoption of Zero Discharge of Drilling Mud and Drill Cuttings with Adhered Drilling Mud

The potential environmental impacts associated with the exploration drilling program described in Shell's Approved EP are discussed in detail in Sections 4.1 and 4.2 of the EIA, which was provided as Appendix H of the Approved EP. The discharge of these drilling wastes was expected to result in no impact on sea ice, birds, terrestrial mammals, cultural resources, and subsistence, negligible impacts on lower trophic organisms, marine mammals, and threatened and endangered whales, and minor and temporary impacts on water and sediment quality.

The primary effects of the discharges would be on water quality, sediment quality and benthic invertebrates. The discharge of drill cuttings and WBM would temporarily increase turbidity in the water column near the discharge location. The deposition of discharged drill cuttings on the seafloor would smother some benthic organisms and change sediment consistency with additional indirect effects on the benthos. The deposition of discharged WBM would slightly elevate the concentrations of some metals in the seafloor sediments. All such effects would be limited to a very small area of the Beaufort Sea seafloor.

With the planned update of waste management practices, the volume of cuttings to be discharged from a well will be reduced by 15 percent from 4,743 bbl to 4,031 bbl (no cuttings with adhered drilling mud will be discharged). Thus discharged cuttings will still have a minor impact on benthic species but the

impact will be reduced and only cuttings from the near seafloor sediments will be discharged while constructing the mudline cellar (MLC) and drilling the short 36-inch and 26-inch hole sections of the well. The volume of water based drilling mud to be discharged will be reduced 100 percent from 2,212 bbl to zero (Table 2-4). The combination of these represents a 42 percent reduction in total drilling waste to be discharged.

TABLE 2-4 ESTIMATED VOLUME OF DRILL CUTTINGS AND DRILLING MUD TO BE DISCHARGED TO THE BEAUFORT SEA WITH EACH WELL UNDER THE APPROVED EP AND THE EP UPDATE

Well Interval	Discharged to Sea in Approved EP			Discharged to Sea in EP Update		
	Fluid System	Cuttings	Fluids	Fluid System	Cuttings	Fluids
MLC & 36/26-inch holes	seawater	4,031 bbl	--	seawater	4,031 bbl	--
12.25 in hole to TD	WBM	712 bbl	2,212 bbl	WBM	--	--
Total Discharge	--	4,743 bbl	2,212 bbl	--	4,031 bbl	--

Potential water quality impacts are discussed in Sections 4.1.7 and 4.1.8 of Shell's Camden Bay EIA. By adopting zero discharge of drilling mud and cuttings with adhered mud for the 2011 Camden Bay exploration program, the potential impacts to water quality will be similar to those described in the EIA but reduced as they will be restricted to the drilling of the MLC and the 36-inch and 26-inch diameter holes. With the 100 percent reduction in discharge of WBM and drill cuttings with adhered mud from the 12.25-inch hole (9.625-inch casing) and lower well intervals, the potential increases in total suspended solids (TSS) that could occur from drilling waste discharge will be greatly reduced. The expected increases (based on Shell's modeling effort) in TSS or turbidity associated with WBM and WBM cuttings discharges, as presented in Section 4.1.7 (Table 4.1.7.2) and Section 4.1.8 (Figures 4.1-1 and 4.1-2) of the EIA, will not take place in 2011 as the discharges considered in this modeling effort will not occur. Some local increases in TSS in the water column will still occur as the drill cuttings from the mudline cellar (MLC), drive pipe (36-inch hole / 30-inch casing), and 26-inch hole (20-inch casing) intervals will be discharged as there is no practicable means of catching and storing these cuttings. However, overall any water quality impacts would be reduced because:

- The total volume (6,995 bbls) of drilling wastes to be discharged from a well would be reduced (by 42% to 4,031 bbl);
- Because no drilling mud or cuttings with adhered mud will be discharged. Drilling mud contain fine particles such as clays and silts, which are the greatest contributors to TSS in the water column; and
- Because all the drilling wastes that would be discharged (from the MLC and 26-inch and 36-inch hole intervals) will be discharged at the seafloor rather than from the disposal caisson near the hull of the drillship. With discharge occurring at the seafloor, less of the material becomes suspended in the water column (reducing TSS and turbidity) and the discharged material settles to the seafloor rapidly, reducing the area of water column that will be affected.

Potential sediment quality impacts are discussed in Section 4.1.8 of Shell's EIA. Much of the discussion of potential impacts to sediments was based on the results of modeling of the discharge conducted by Shell. The model predicted that discharge of the drill cuttings and drilling mud would likely result in the deposition of these materials on the seafloor out to a distance of about 1,000 ft (300 m) from the discharge location. The materials would settle to a depth of about (1.0-1.3 cm) over an area of about (6.0 m^2), and

to a depth of about (0.1-1.0 cm) over a seafloor area of about (62 m^2) as indicated in Table 4.1.8-2 and Figures 4.1-6 and 4.1-7 of Shell's EIA. These potential environmental impacts to the seafloor sediments will not occur in 2011 in Camden Bay as the drill cuttings with adhered drilling mud and used drilling mud will not be discharged. The modeling also indicated that the drilling waste discharges would result in slightly elevated concentrations of metals (Table 4.1.8-3 in the EIA) in the seafloor sediments over this area of deposition because of the higher concentrations of some metals found in drilling mud. These elevations in metal concentrations in the surficial sediments will not occur in 2011 in Camden Bay as no drilling mud and no drill cuttings with adhered drilling mud will be discharged.

Potential impacts to lower trophic organisms from the discharge of drilling wastes that would occur under the Approved EP were discussed in detail in Section 4.1.9 of Shell's Camden Bay EIA. The identified potential impacts to lower trophic organisms will be further minimized by adoption of zero discharge of drilling mud and drill cuttings with adhered drilling mud for the 2011 Camden Bay exploration drilling program. As discussed above regarding water quality, increases in TSS concentrations in the water column that might result from the discharge of drill cuttings and drilling mud under the Approved EP will be reduced with the adoption of these zero discharge practices. Any reduction in TSS would minimize effects the discharge might have on phytoplankton or zooplankton, as effects on plankton are largely limited to such things as abrasion by suspended sediments. As discussed above regarding effects on seafloor sediments, the reduced volume of cuttings (15% reduction) and drilling muds (100% reduction) that will be discharged during the 2011 Camden Bay exploration drilling program will result in a smaller volume of materials that becomes redeposited on the seafloor. The drill cuttings that will be discharged (from MLC and 36/26-inch holes) will be discharged at the seafloor rather than from the disposal caisson near the hull of the drillship, causing discharged materials to settle out of the water column more quickly, and further reducing the area of seafloor that would be affected. The primary effects such discharges have on benthic organisms are: a) smothering due to redeposition of materials, which may result in mortality or morbidity of benthos; and b) alteration of the consistency of the seafloor sediments by the addition of materials such as drilling muds or cuttings from deep horizons that differ from the surficial seafloor sediments, and can therefore alter benthic communities residing in or on the sediments. The lack of drilling mud discharges will also eliminate the predicted increased levels of metals in the seafloor sediments that might have impacted benthic organisms.

Potential impacts from the discharge of drilling wastes to fish are described in Section 4.1.12 of Shell's Camden Bay EIA, potential impacts to birds are described in Section 4.1.11, potential impacts to marine mammals are described in Section 4.1.10 of the EIA, and potential impacts to threatened and endangered species are described in Section 4.1.14. No or negligible effects to these resources were expected under the Approved EP. By adopting zero discharge of drilling mud and drill cuttings with adhered drilling mud during the 2011 Camden Bay program, the potential impacts to these resources would be similar to those described in the EIA but will be minimized because of the reduction in the volume of discharged cuttings and drilling mud.

Potential environmental impacts associated with the discharge of drilling wastes from exploration wells at the Sivulliq N drill site as detailed in Shell's Approved EP, were also described and evaluated in BOEMRE's EA of Shell's exploration drilling program. In its EA, BOEMRE concluded that any effects from the discharges of drill cuttings or drilling mud on invertebrates, fish, birds, and mammals would be negligible and any effects on water quality from discharges would be temporary and minor. In its (FONSI for Shell's Approved EP, BOEMRE concluded that the discharges would not result in any biologically significant mortalities of fish, birds, or mammals, and that Shell's exploration drilling program would not result in any significant adverse impacts. The volume of discharges will be reduced during the 2011 Camden Bay program because the drilling fluids and cuttings from the lower well intervals will be temporarily stored on vessels and then hauled out of the region for disposal. Therefore,

the impacts to water quality will be reduced in duration and quantity (discharge volume, TSS, etc.). Because the analysis in both BOEMRE's EA and Shell's EIA evaluated drilling waste discharges and concluded the effects would be negligible to minor, and because the effects during the 2011 Camden Bay program will be less as the volume of drilling wastes to be discharged will be reduced, the analysis presented in Shell's EIA and BOEMRE's EA, as well as the conclusion in the FONSI that Camden Bay exploration drilling program would have no significant adverse impact, are still valid and no further analysis is warranted.

2.2.2 No Effect on Shell's Approved 2010 EIA due to Adoption of Zero Discharge of Gray Water, Sanitary Water, Bilge Water and Ballast Water

The potential environmental impacts associated with the exploration drilling program described in Shell's Approved EP are discussed in detail in Sections 4.1 and 4.2 of Shell's Camden Bay EIA, which was provided as Appendix H of the Approved EP. These permitted discharge were expected to result in no or negligible effects on sea ice, sediment quality, lower trophic organisms, birds, marine and terrestrial mammals, cultural resources, and subsistence, and minor and temporary impacts on water quality. The discharged wastes could result in minor and localized effects on water quality parameters including temperature, salinity, pH, turbidity, and biochemical oxygen demand (BOD).

With the adoption of zero discharge of gray water, sanitary water, bilge water, and ballast water, and implementation of Shell's waste management plans, the potential environmental impacts associated with these permitted discharges as detailed in Shell's Camden Bay EIA, will not occur.

The effects of permitted discharges were also described and evaluated in BOEMRE's EA. In its EA, BOEMRE concluded that any effects from these permitted discharges on invertebrates, fish, birds, or mammals would be negligible and any effects on water quality from discharges would be localized, temporary, and minor. In its FONSI, BOEMRE concluded that the discharges would not result in any significant adverse effects. Because the analysis in both BOEMRE's EA and Shell's EIA evaluated the permitted discharges and concluded the effects would be negligible to minor, and because the effects of permitted discharges during the 2011 Camden Bay program will be less as the volume of permitted discharges will be reduced, the analysis presented in Shell's EIA and BOEMRE's EA, as well as the conclusion in the FONSI that Camden Bay exploration drilling program would have no significant adverse impact, are still valid and no further analysis is warranted.

3.1 Tug and Barge to Support Zero Discharge

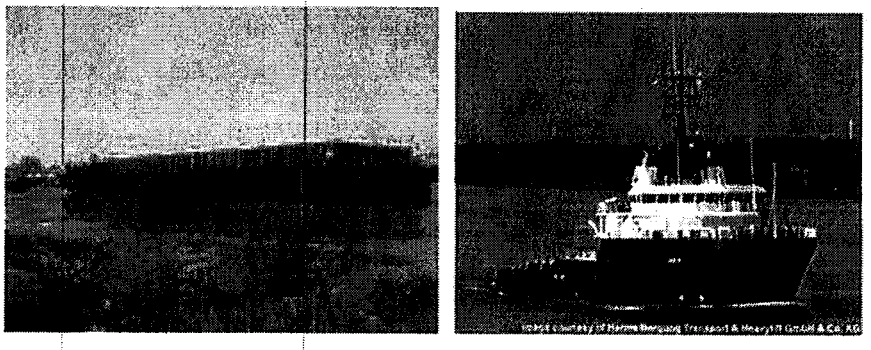
Section 13 of Shell's approved Exploration Plan for the Beaufort Sea (Approved EP) described the vessels and aircraft that would support the drillship *Discoverer* and the exploration drilling program in general. The vessels included an ice management vessel, an anchor handler, and a West Dock supply vessel for drillship support, an oil spill response barge (OSRB), an oil storage tanker (OST), and a berthing vessel. Shell now plans to add a barge and a tug for assistance in the storage and transport of materials for disposal. The vessels have not been chartered at this time. Specifications for sample vessels that might be contracted are provided below in Table 3-1. Photographs of the sample vessels are also provided below. If the specific vessels listed in Table 3-1 are not available or selected, vessels of similar size and/or rating will be used.

TABLE 3-1 SPECIFICATIONS OF A BARGE AND TUG TO SUPPORT ZERO DISCHARGE

Specification	Barge[1]	Tug[1]
Length	300 ft 91.4 m	210 ft 65 m
Width	100 ft 30.48 m	60 ft 18.5 m
Draft	18 ft 5.5 m	22 ft 6.8 m
Accommodations	--	27 berths
Maximum Speed	-- --	12 knots 9 km/hr
Fuel Storage	--	2,096 bbl 250 m^3

[1] or similar vessel

Barge **Tug**



The primary purpose of the barge will be to provide temporary storage for the drill cuttings from the well intervals in which WBM is used, and for other wastes as needed. These wastes will be subsequently transported out of the Arctic Ocean and disposed of in accordance with all applicable laws and regulations. The tug and the barge would enter the prospect area at about the same time as the drillship, and exit the Beaufort Sea at the end of the drilling season (October 31, 2011). Once the barge is moored the tug will move off and be stationed at a distance of ≥ 25 mi (40 km) from the drillship and cuttings barge. The tug and barge will transit out of the area with the drillship and other support vessels before August 25, 2011, for the Nuiqsut (Cross Island) and Kaktovik subsistence bowhead whale hunts, returning with the drillship to the prospect at the conclusion of the hunts.

These vessels would be subject to all the restrictions, mitigation measures, and route requirements set forth in the Sections 12 and 13 of the Approved EP for other support vessels.

3.2 The Impact Assessment in Shell's Camden Bay EIA Remains the Same with the Addition of a Tug & Barge to Support Zero Discharge

The potential environmental impacts associated with the Camden Bay exploration drilling program described in Shell's Approved EP are discussed in detail in Sections 4.1 and 4.2 of the EIA, which was provided as Appendix H of the Approved EP. Analysis provided in the EIA indicated that the type and level of vessel traffic that would occur under the Approved EP would have no effect on ice, sediments, and cultural resource, and negligible effect on air quality and terrestrial wildlife. Any effects on lower trophic organisms from vessel traffic were expected to be localized and temporary, with no effect at the population level for the biological resources. Vessel traffic could result in some temporary and localized avoidance by fish, but no population level effects. Vessel traffic was expected to result in some flushing and temporary disturbance of marine birds foraging or resting on the sea surface, but any effects would be restricted to the immediate vicinity of the vessel and result in no population levels effects. The risk of avian collisions with vessels was determined to be low due to low bird densities and light vessel traffic. Vessel traffic levels associated with the Approved EP were also expected to result in some temporary disturbance of marine mammals such as beluga and walrus, but any such effects would be temporary and result in no population level effects. Similar impacts would be expected for threatened and endangered birds (Steller's and spectacled eiders) and marine mammals (polar bears, bowhead whales).

The addition of a tug and barge during the 2011 Camden Bay exploration drilling program to support zero discharge of certain waste streams will not appreciably alter the environmental impacts of the vessel traffic associated with the exploration drilling program as discussed in the EIA. The additional tug and barge would make relatively few trips (Table 3-2) and would therefore result in a very minor incremental increase in project vessel traffic. The potential impacts of this small incremental increase in the vessel traffic would be of the same type as that described in the above referenced subsections of Section 4.1 of the EIA.

TABLE 3-2 FUEL STORAGE CAPACITY AND TRIP FREQUENCY OF THE ADDITIONAL SUPPORT VESSEL

Vessel Type	Purpose	Maximum Fuel Tank Storage Capacity	Trip Frequency or Duration
Barge & Tug [1]	Cuttings storage and transport	2,096 bbl 250 m^2	One round trip between Dutch Harbor and the drill site located in the Beaufort Sea; one round trip with the drillship out of the area before the whale hunt and back when the hunt is over. Barge remains moored during drilling operations – tug stationed > 25 mi (40 km) away.

[1] or similar vessel

Potential environmental impacts of vessel traffic associated with Shell's exploration drilling program as detailed in Shell's Approved EP were also described and evaluated in the BOEMRE's EA of Shell's exploration drilling program. In its EA, BOEMRE concluded that given the mitigation measures put in place by Shell, any effects of vessel traffic on invertebrates, fish, and birds would be negligible, any effects on mammals would be negligible or minor, and effects on subsistence would be negligible. The mitigation measures relating to vessel traffic are specifically listed on page 44 in Section 3.2.2 in BOEMRE's EA, and these same measures will apply to the ocean going tug and barge used during the 2011 Camden Bay exploration drilling program.

The analysis of the effects of vessel traffic in the EA, in which BOEMRE concluded the effects of vessel traffic would be negligible to minor, was not based on a specific number of vessels. In Section 2.2 of the EA, BOEMRE states that the drillship would be supported by additional vessels, and in Section 2.3.3 they state that the drillship would be attended by a minimum of six vessels. For the 2011 Camden Bay program, only a single tug/barge would be added, and the expected level of vessel traffic would only be increased by one round trip into and out of the Beaufort Sea during ingress / egress of the drillship and one round trip out of and back into the Beaufort Sea with the drillship during the whale hunt. Because BOEMRE's EA analysis addressed the support vessels in general and not a specific number of vessels, because the effects of vessel traffic associated with the Approved EP were expected to be negligible to minor, and because the planned increase in vessel traffic is minimal, the analysis in Shell's EIA and BOEMRE's EA, as well as the conclusion in BOEMRE's FONSI that vessel traffic would have no significant adverse impact on biological resources, subsistence, water quality, or air quality, are still valid.

Shell Offshore Inc.

Sivulliq Location N

Camden Bay Exploration Plan, Beaufort Sea OCS Region, Alaska

Executive Summary

Attached is Shell Offshore Inc.'s ("Shell") response to the Bureau of Ocean Energy Management, Regulation and Enforcement's ("BOEMRE") Notice to Lessees 2010-06 ("NTL 2010-06"). The information provided in Shell's NTL 2010-06 response includes interpretations of well results and survey data that is highly confidential and commercially sensitive. Those well results and survey data were analyzed and presented using Shell proprietary information and processes. Shell therefore requests that BOEMRE maintain the attached NTL 2010-06 response as CONFIDENTIAL.

Shell provides the following Executive Summary of the NTL 2010-06 response and hereby authorizes BOEMRE to release the information in this summary if necessary.

The Sivulliq Prospect is located approximately 16 miles north of Point Thomson in Camden Bay, Beaufort Sea, Alaska in water depths that average 102 feet (ft) across the Prospect. The structural component of the target is defined by a low-relief, faulted anticline approximately 7 miles long by 4 miles wide, with the top of primary objectives near -4900 ft subsea (SS). The southwestern fault block contains two previously drilled wells, the OCS-Y-0849 No. 001 (Hammerhead #1) drilled in 1985 and the OCS-Y-0849 No. 002 (Hammerhead #2) drilled in 1986. The reservoir characteristics of the two Hammerhead wells correlate directly to primary objectives in the northeastern fault block that will be penetrated by the Sivulliq N exploration well during the 2011 exploration drilling program.

The well-understood depositional environment, comprehensive evaluation dataset and proximity to the proposed location make the Hammerhead wells excellent analogs for reservoir and fluid properties used to develop responses to NTL 2010-06.

Worst Case Discharge ("WCD") flowrates and volumes for the Sivulliq N exploration well were estimated using a combination of nodal analysis and numerical simulation techniques. The WCD scenario upon which the calculations in the NTL 2010-06 response is based assumes uncontrolled flow to the mud line with no drill pipe in the hole and no other borehole restrictions (i.e., complete BOP failure and no formation bridging).

The WCD modeling completed for the Sivulliq N exploration well indicates that the WCD numbers for the well are significantly below the numbers used to develop Shell's oil spill response (OSR) capabilities. The WCD calculations for the Sivulliq N well indicate that the largest single-day WCD flowrate is 860 bbls/day. Reservoir characteristics further indicate that the 860 bbl/day number for the first day of any well control incident will decline significantly in the days following such event. The lower WCD flowrates for the Sivulliq N well are primarily the result of lower reservoir pressure in a shallow sand

series, formation water production that would occur simultaneously with oil flows and high viscosity crude oil known to be in this structure.

WCD calculations have been completed for the final open-hole section only, as no hydrocarbon bearing sands are anticipated prior to setting the 9 ⅝-in. casing at 2700 ft TVD. All hydrocarbon bearing sands and some of the water bearing sands expected at the location have been included in the calculations.

In addition to the sands that were modeled, an additional 400 – 500 net feet of wet sand averaging 750 – 1000 millidarcies (mD) permeability are expected above the modeled interval, and an another 300 – 400 net feet of wet sand averaging approximately 400 mD are expected within the Oligocene interval. These wet sands will act to further reduce the hydrocarbon flowrate that would occur during an uncontrolled blowout, yet have not been included in the WCD calculation.

The reservoir inflow calculations were carried out using a radial model created with the Computer Modeling Group Ltd. (CMG) Imex numerical simulation software. The radial simulation model consists of multiple layers, with the depth and thickness of each layer corresponding to the expected depth and net sand thickness of the sands outlined in the Geology and Geophysical Section. The porosity and permeability values assigned to each of the sands are equivalent to the highest average values observed in the correlative sand in either the Hammerhead #1 or Hammerhead #2. The areal extent (radius) of each layer is such that the modeled net ac-ft of sand is approximately equal to the net ac-ft of sand expected within the northeastern fault block structural closure. The hydrocarbon contacts are set to ensure each sand contains the expected fluid type (oil or water) when the model is initialized. A set of tubing lift curves generated with Petroleum Experts Prosper nodal analysis software is used by the numerical simulation model to estimate the flowing bottom hole pressure (at the given mudline wellhead pressure of 50 psig) for any combination of liquid rate, gas liquid ratio, and water cut. Output from the radial simulation model is used to estimate the daily oil production rate expected during an uncontrolled blowout scenario, as well as the total volume of oil that would be produced during the 38 days required to complete a relief well in the unlikely event the *Discoverer* drillship is damaged and is unable to drill its own relief well.

Strategies for containment and/or surface clean-up of oil volumes that could be discharged in an open flow event are detailed in Shell's approved Oil Discharge Prevention and Contingency Plan ("ODPCP"). Shell's oil spill response ("OSR") capabilities, as detailed in its approved ODPCP, were developed using the State of Alaska WCD planning standard of 5,500 bbls/day. It is noted that the OSR vessels and equipment listed in Shell's ODPCP will accompany the drillship and are capable of responding to a spill event in one hour or less.

In addition to presenting WCD responses, Shell's NTL 2010-06 response provides information demonstrating that Shell's drilling plan for the Sivulliq N exploration well has been enhanced with both additional prevention and response equipment and procedures.

In Shell's approved Camden Bay Exploration Plan, numerous measures are detailed that provide a multi-tiered barrier policy to prevent a blowout or to reduce the likelihood of such an event occurring. These were outlined in the agency's environmental assessment (*Environmental Assessment Shell Offshore Inc. 2010 Outer Continental Shelf Lease Exploration Plan Camden Bay, Alaska – Beaufort Sea Leases OCS-Y-1805 and 1941, OCS EIS/EA MMS 2009-052, October 2009)*, which was prepared by the agency when reviewing Shell's Camden Bay EP, and include:

- Shell has engineered each of its exploration wells (hole sizing, mud program, casing design, casing cementing depth, wellhead equipment, etc.) specifically to minimize the risk of uncontrolled flows from the wellbore due to casing or other equipment failure.
- Shell requires its drilling supervisors, toolpushers, drillers, and assistant drillers to hold an International Association of Drilling Contractors (IADC) WellCap (or equivalent) certificate showing mastery of well-control procedures and principles, and its crews must participate in regular training and drills in kick control to minimize the risk of a well-control event that might lead to a spill.
- Shell will use state-of-the-art automatic kick-detection equipment, including pit-volume totalizers, a flow detector, and various gas detectors placed about the rig, to provide early warning of a potential well-control event.
- The blowout preventer Shell will install on the high-pressure wellhead housing on the 20-in. conductor casing on each exploration well includes redundant mechanical barriers to provide multiple means of closing in the well to prevent an oil flow to the surface.
- Shell will install multiple barriers, including manual and automated valves, on the drilling rig to prevent flows from coming up the drill string.

In addition to these measures that would apply to the Sivulliq N exploration well, Shell has added the following measures and procedures to further enhance its blowout mitigation measures. Several of these enhancements were discussed in Shell Oil Company President Marvin Odum's letter of May 14, 2010 to MMS Director Elizabeth Birnbaum. Others were discussed at meetings between Shell Alaska Venture vice-president Peter Slaiby, BOEMRE Director Michael Bromwich and Department of Interior Secretary Ken Salazar. These include:

- An increase in the frequency of subsea blowout preventer (BOP) hydrostatic tests from once each 14 days to once each 7 days,
- The installation of a second set of blind/shear rams in the BOP stack,
- Relocation of the BOP stack ROV hot stab from the bottom of the BOP to the top to improve its availability since the stack must be protected in a Mud Line Cellar (MLC) some 41 ft deep,
- A redundant remotely-operated vehicle (ROV) hot stab panel on a seafloor sled located a safe distance away from the well to provide a means to operate the BOP if the ROV hot stab panel on the BOP is inaccessible,

- Redundant ROV and diver capability on a support vessel along with launch and recovery systems for each,
- A specific relief well drilling plan for the well and a designated standby relief well drilling vessel capable of responding if the original drillship is incapable of drilling its own relief well,
- Prefabricated subsea collection system with surface separation capability to capture and dispose of oil from a flowing well before it reaches the surface

Other enhancements to Shell's program include a family of subsea intervention devices to attach to the wellhead for capping, multiple barriers such as casing strings, cement, a well-designed mud program that will provide constant overbalance and multiple BOPs available to shut-in a flowing well quickly.

In summary, Shell is well prepared to prevent any well control event at the Sivulliq N exploration well. In the highly unlikely event of a blowout Shell is also prepared to stop the flow quickly and to collect or clean-up any spilled oil from the environment using assets that are pre-staged in the Arctic.

ATTACHMENT B

Federal Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, *State of Alaska v. Salazar, et al.*, Case No. 3:10-cv-00205 (D. Ak.) (Nov. 5, 2010)

IGNACIA S. MORENO
Assistant Attorney General

TYLER WELTI
Trial Attorney, CA Bar No. 257993
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington D.C. 20044-0663
202-305-0481 (tel.); 202-305-0506 (fax)
Tyler.Welti@usdoj.gov

DEAN K. DUNSMORE
United States Department of Justice - ENRD
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
907-271-5452 (tel.); 907-271-5827 (fax)
Dean.Dunsmore@usdoj.gov

AYAKO SATO
United States Department of Justice - ENRD
P. O. Box 663
Washington, D.C. 20044-0663
202-305-0239 (tel.); 202-305-0506 (fax)
Ayako.Sato@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALAKSA

THE STATE OF ALASKA, *et al.*, Plaintiffs, v. KEN SALAZAR, *et al.*, Defendants.	Case No.3:10-CV-00205-RRB **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Federal defendants file this opposition to the State of Alaska and Governor Sean Parnell's ("the State's" or "Alaska's") motion for partial summary judgment and separately file a cross-motion for summary judgment incorporating this brief.

As discussed below, the Court lacks jurisdiction over the State's challenge to alleged agency actions/inactions related to exploratory oil and gas drilling in Alaska because the State failed to provide a sixty-day notice of their challenge as required by the Outer Continental Lands Act ("OCSLA"), 43 U.S.C. § 1349(2)(a). The State also lacks standing to challenge the Secretary of the Interior's ("the Secretary's") statements regarding an incomplete application for a permit to drill ("APD") submitted but subsequently withdrawn by a private lessee who is not party to this action. Even if the State demonstrated jurisdiction, its first claim fails because the State does not challenge a final agency action and notice to the State is not required by law in this case.[1] The only proposed exploratory drilling pending before the agency is an APD submitted by Shell on October 5, 2010. The agency is processing this APD in the regular course of business and in compliance with all applicable regulations.

[1] It is unclear what agency actions and inactions the State challenges. For example, the State seeks to compel defendants to vacate a "moratorium/deferral" on the one hand, but seeks to compel defendants to issue a final, appealable decision to impose a "moratorium/deferral" on the other. *Compare* dkt. no. 1-1 at ¶ 55 *with id.* at ¶ 69; *see also id.* at ¶¶ 1, 29, 37 (alleging that suspensions of Gulf of Mexico leases applied to Alaska but then admitting they did not). Similarly unclear is whether the State seeks to compel consultation regarding a specific decision to suspend operations or to compel consultation divorced from any proposed or final decision. *See id.* at ¶¶ 44–55. Due to these ambiguities, defendants do not cross-move as to the merits of the State's other claims at this time and reserve their right to make additional threshold defenses, including but not limited to mootness, ripeness, failure to challenge a final agency action, and failure to state a claim upon which relief can be granted. While review of the merits of the State's claims must be based on an administrative record, *see* Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, defendants respond to the merits of claim one now in accordance with the Court's Order directing defendants to respond by November 5. Dkt. no. 23.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Proposed Oil and Gas Drilling in the Alaska OCS during the 2010 Season

In 2010, only two Exploration Plans ("EPs") for the Alaska Outer Continental Shelf ("OCS") existed—both were Shell EPs, one addressed exploration in the Beaufort Sea and the other in the Chukchi Sea. Decl. Of Jeffrey Walker (Decl.) at ¶ 7.[2] The Camden Bay EP proposed drilling up to two exploratory wells in the Beaufort Sea during July through October of the 2010 drilling season. On October 16, 2009, BOEMRE approved the 2010 Camden Bay EP subject to twelve conditions, including Shell's need to obtain permits from other federal agencies and to obtain BOEMRE's approval of APDs. *Id.* Ex. D. Shell never submitted an APD under the Camden Bay EP. *Id.* at ¶ 8.

The Chukchi Sea EP proposed drilling up to three exploratory wells in the Chukchi Sea during the 2010 drilling season. *Id.* Ex. F. On December 7, 2009, BOEMRE approved the 2010 Chukchi Sea EP subject to fifteen conditions, including Shell's need to obtain permits from other federal agencies and to obtain BOEMRE's approval of APDs. *Id.* Ex G. On April 15, 2010, Shell submitted one APD under the Chukchi EP for "preliminary review." *Id.* at ¶ 8. While BOEMRE provided feedback on this preliminary APD at an April 28, 2010 meeting, and

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[2] Development of mineral resources on the OCS is conducted in several stages under the OCSLA and the first three stages relating to these two EPs have been the subject of litigation. First, the District Court for the District of Columbia had remanded the agency's broad five-year leasing plan to the agency and enjoined drilling activities until the agency completed the remanded actions. *See Center for Biological Diversity v. Dept. of the Interior*, 563 F.3d 466 (D.C. Cir. 2009). Second, the District Court for the District of Alaska remanded Lease Sale 193, which included the lease addressed by Shell's APD, and enjoined certain activities on that lease until the agency completed the remanded actions. *Native Village of Point Hope v. Salazar*, No. 08-00004-RRV, 2010 WL 2943120 (D. Alaska Aug. 2, 2010). Third, review of the agency's conditional approval of the Chukchi Exploration Plan was pending before the Ninth Circuit, which later upheld the approval on May 13, 2010. *Native Village of Point Hope v. Salazar*, 378 Fed. Appx. 747 (9th Cir. 2010).

requested additional information, Shell never submitted any additional information. Instead, Shell withdrew its preliminary APD in early June. *Id.* at ¶ 14.

On May 6, 2010, BOEMRE requested information from Shell regarding additional safety procedures related to exploratory drilling in the Chukchi and Beaufort Seas that Shell could undertake in light of the Deepwater Horizon oil spill. *Id.* at ¶ 11. On May 14, Shell responded to BOEMRE's May 6 letter, providing further information on the environmental and safety measures Shell planned to employ for operations in the Chukchi and Beaufort Seas. *Id.* at ¶ 12.

On May 27, 2010, the Secretary said in a news release that the Department of the Interior would "postpone consideration of Shell's proposal to drill up to five exploration wells in the Arctic this summer" in light of the then-ongoing Deepwater Horizon oil spill in the Gulf of Mexico. *Id.* at ¶ 13. Unlike in the Gulf of Mexico, the Secretary never subsequently issued a directive ordering BOEMRE to issue a suspension of any operations in Alaska.[3] In fact, it never had the occasion to suspend any proposed drilling because Shell voluntarily withdrew its single, incomplete APD submission and did not submit another APD until October 5, 2010. *Id.* at ¶ 15.

In two letters dated June 24, 2010, Shell requested that BOEMRE issue a directed suspension of operations to relieve Shell of its lease rental obligations for its leases in the Chukchi and Beaufort Seas. *Id.* Exs. I, J. This request remains under consideration. *Id.* at ¶ 15.

On July 21, 2010, the United States District Court for the District of Alaska found that the Interior Department's decision to conduct Lease Sale 193 violated the National

[3] In contrast, on May 28, 2010, the day after making these statements, the Secretary formally directed the Minerals Management Service (now renamed as BOEMRE) to issue a temporary six-month suspension of deepwater offshore drilling operations involving deepwater wells in the Gulf of Mexico and the Pacific Outer Continental Shelf, which BOEMRE immediately executed. On October 12, 2010, the Secretary issued a decision memorandum directing BOERME to terminate the July 12 suspensions. These directives did not apply to the Alaska OCS and challenges to them have been found to be moot. *ENSCO Offshore Co. v Salazar*, No 10-1941, Dkt. No. 129 (E.D. La. Nov. 3, 2010).

Environmental Policy Act. *Native Village of Point Hope v. Salazar*, No. 1:08-CV-00004-RRB, 2010 WL 2943120, at *7; *see also id.*, 2010 WL 3025163, at *2 (D. Alaska Aug. 2, 2010) (clarifying the previous order). In compliance with the Court's order, on September 13, 2010, BOEMRE issued a directed suspension of operations for activities in the Chukchi Sea associated with the Lease Sale 193. Decl. at ¶ 16. The suspension covers lease activities addressed by Shell's Chukchi EP and its April 15 preliminary APD. *Id.*

B. Proposed Oil and Gas Drilling in the Alaska OCS during the 2011 Season

Since Shell's withdrawal of its April 15 preliminary APD, BOEMRE has received one APD for the Alaska Outer Continental Shelf ("OCS"). *Id.* at ¶ 17. On October 5, 2010, Shell submitted an APD under the Camden Bay EP and what it described as "minor updates to the Camden Bay EP required for a 2011 exploration season." *Id.* The APD proposes drilling an exploratory well for the Beaufort Sea's Sivulliq prospect, approximately 16 miles offshore. *Id.*

BOEMRE is reviewing Shell's October 5 submissions in accordance with applicable regulations. Decl. at ¶ 20. On October 15, 2010, BOEMRE requested additional information regarding the "minor updates" to the Camden Bay EP. *Id.*[4] If the revision to the Camden Bay EP is approved, BOEMRE will consider the October 5 APD for approval. In fact, BOEMRE is currently reviewing the APD concurrently with the updated EP. *Id.*

Approvals by other federal agencies also are required. BOEMRE informed Shell that drilling may not commence until Shell obtains a Prevention of Significant Deterioration air quality permit, a National Pollutant Discharge Elimination System permit for water pollution

[4] BOEMRE is evaluating the updated EP as a revision to the Camden Bay EP. BOEMRE must determine if the revised EP is "likely to result in a significant change in the impacts previously identified and evaluated." 30 C.F.R. § 250.285(c). If it is, BOEMRE must review the revised EP for approval in accordance with 30 C.F.R. §§ 250.231–250.235. If it is not, BOEMRE may approve the revision pursuant to 30 CFR § 250.285.

from the Environmental Protection Agency, and, if applicable, authorization from the National Marine Fisheries Service under the Marine Mammal Protection Act. *Id.* at ¶ 25. As of this date, BOEMRE has not received confirmation that Shell has obtained these other approvals. *Id.*

On September 9, 2010, the State filed a "Petition for Writ of Mandamus and Petition for Review" challenging the Department's alleged imposition of "moratorium" on drilling in Alaska. Dkt. 1. On October 12, 2010, before Defendants had an opportunity to respond to the Petition, the State filed a motion for partial summary judgment on it first claim, requesting the Court to "issue a writ of mandamus to invalidate the moratorium/deferral and compel Defendants to provide Plaintiffs with notice and an opportunity to participate before imposing any future moratorium/deferral on OCS exploration and development in the Alaska region." Dkt. 6 at 18.

II. LEGAL BACKGROUND

A. The Outer Continental Lands Act

Oil and gas exploration on the OCS is governed by OCSLA. 43 U.S.C. § 1331 *et seq.* The OCS is generally defined as those lands within federal jurisdiction lying seaward of state jurisdiction. *Id.* at § 1331(a). OCSLA prescribes a multi-stage process for development of offshore mineral resources: (1) a 5-year lease plan; (2) lease sales; (3) exploration pursuant to exploration plans; and (4) development and production plans. *See id.* at §§ 1344, 1337(c), 1340(e)(2).[5]

A lessee's exploration or development activities, including drilling, require BOEMRE's prior approval. *Id.* at. §§ 1340(c)(1), 1351(a); 30 C.F.R. § 250.201. The regulations set forth a

[5] An oil and gas lease is issued for an initial term of five or ten years, and "as long [thereafter] as oil or gas is produced from the [lease] in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted" on the leases. 43 U.S.C. § 1337(b)(2); 30 C.F.R. § 256.37. A lease term may be extended in specified circumstances through a "suspension" of the lease. 30 C.F.R. § 256.73.

timeline for BOEMRE's consideration of EPs. Within fifteen days of receiving a submission for approval of an EP, BOEMRE determines whether the application is complete and thus "deemed submitted." *Id.* at §§ 250.231(a), 250.285. Within thirty days of deeming a plan submitted, and after completing environmental analysis, BOEMRE provides written notification of its decision. *Id.* at §§ 250.232, 250.233. There is no regulatory timeframe for approval of APDs.

OCSLA directs the Secretary to promulgate rules addressing "the suspension or temporary prohibition of any operation" where there is "a threat of serious, irreparable, or immediate harm" to human or aquatic life, property, "or to the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1); *see* 30 C.F.R. §§ 168–250.185. Through OCSLA, "Congress authorized the Secretary to suspend operations under existing leases whenever he determines that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas." *Gulf Oil Corp. v. Morton*, 493 F.2d 141, 144 (9th Cir. 1974). The regulations, in turn, authorize the agency to direct a suspension if it determines that "activities pose a threat of serious, irreparable, or immediate harm or damage" to human or animal life, "property, any mineral deposit, or the marine, coastal, or human environment," 30 C.F.R. § 250.172(b), or "[w]hen necessary for the installation of safety or environmental protection equipment." *Id.* at § 250.172(c).

Congress included a "declaration of policy" in OCLSA that states are "entitled to an opportunity to participate . . . in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf." 43 U.S.C. § 1332(4)(C). This broad policy is carried forward in several statutory provisions that direct the Secretary to consult with states in specific instances.

Section 18(f) directs the Secretary to establish procedures by regulation for periodic consultation with States that may be impacted by the adoption or significant revision of five-year leasing programs. *Id.* at § 1344(f). Section 19 authorizes the Secretary to enter into cooperative agreements with affected States for purposes that are consistent with OCSLA. *Id.* at § 1345. Section 19 also authorizes governors and executives of affected state or local governments to submit recommendations to the Secretary regarding proposed lease sales or proposed development and production plans. *Id.* Section 20(c) directs the Secretary to establish procedures by regulation for conducting environmental studies in full cooperation with affected States. *Id.* at § 1346(c). Section 5(a) directs the Secretary to cooperate with the relevant agencies of impacted States in undertaking certain enforcement actions. *Id.* at § 1334(a). Section 5(h) directs federal agencies to notify "affected States" on "any action which has a direct and significant effect on the [OCS] or its development." *Id.* at § 1334(h).[6] As defined by OCSLA, "[t]he term 'affected State' means, with respect to any program, plan, lease sale, or other activity, proposed, conducted, or approved" pursuant to the statute. *Id.* at § 1331(f).

III. ARGUMENT

A. Standard of Review

Defendants are entitled to summary judgment where "there is no genuine issue as to any material fact and . . . the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). A party opposing a summary judgment motion may not rest upon the allegations or denials in its pleadings, but must demonstrate the existence of facts that could support a finding in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

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[6] The legislative history of this provision indicates that Congress' intent was to provide for notification regarding actions taken by "other agencies." H.R. REP. NO. 95-590, at 130 (1977); see also S. CONF. REP. 95-1091 at 89 (adopting House amendment containing this subsection).

Judicial review of agency action and inaction under OCSLA is governed by the APA, which states that courts shall: (1) compel agency action that is unlawfully withheld or unreasonably delayed; and (2) set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(1), (2). The State's § 706(1) mandamus claims "can proceed only [if] plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original) ("*SUWA*"); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932–33 (9th Cir. 2010); *see also Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (analyzing a mandamus claim under APA § 706(1)). Similarly, "[m]andamus is an extraordinary remedy which is to be utilized only in the most urgent cases." *Strait v. Laird*, 445 F.2d 843 (9th Cir. 1971), *rev'd on other grounds*, 406 U.S. 341 (1972); *Aleut League v. Atomic Energy Comm'n*, 337 F. Supp. 534, 540 (D. Alaska 1971) ("Mandamus is an extraordinary remedial device that may issue only when the claim for relief is clear and certain, and the duty of the officer involved is ministerial, plainly defined, and preemptory.").

B. The Court Lacks Jurisdiction over this Action because the State fails to Show that it Provided the Secretary with Sixty-day Notice of Alleged Violations.

The United States and its officers cannot be sued except to the extent it has waived sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Any waiver is to be strictly construed in favor of the sovereign's immunity from suit. *Orff v. United States*, 545 U.S. 596, 601–02 (2005); *IRS v. Fed. Labor Relations Auth.*, 521 F.3d 1148, 1153 (9th Cir. 2008).

The State seeks review of alleged violations of OCSLA, 43 U.S.C. §§ 1331–1356a. Dkt. 1 ¶¶ 44–84. OCSLA provides a mechanism for obtaining relief for alleged violation of that act, but also imposes a limitation on the government's waiver of sovereign immunity. 43 U.S.C. § 1349(a). A plaintiff may not commence an action challenging the government's compliance

with OCSLA "prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any another appropriate Federal official." *Id.* at § 1349(a)(2). But such actions may be "brought . . . immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff." *Id.* at § 1349(a)(3).

The State has not shown that it provided the required notice or explained why any exceptions apply. The State's delay in bringing this action undermines any claim that alleged violations immediately affect its legal interests. Dkt. 1 at ¶¶ 30, 32. The State had ample time after the Secretary's May 27 press statements to provide notice to the Secretary of any alleged violations of OCSLA. Indeed, a central purpose of such administrative notice and exhaustion requirements is to allow agencies an opportunity to correct potential violations and clarify their statements/decisions, thereby potentially avoiding judicial review entirely. *C.f. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas*, 792 F.2d 782, 791 (9th Cir. 1986) (exhaustion requirement allows agencies to apply expertise, correct mistakes, and develop an adequate factual record); *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 412 (D.C. Cir. 1998) ("Administrative appeals permit agencies to correct mistakes . . . . Judicial review may thereby be entirely avoided.").

Having failed to meet this requirement, the Court is without jurisdiction. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 23 n.1, 26–27, 31 (1990) (holding that "compliance with [a similar] 60-day notice provision is a mandatory, not optional, condition precedent for suit" and noting that OCSLA contains similar notice requirements); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1125 (9th Cir. 1997) (finding that the court lacked jurisdiction over claims against two federal agencies because plaintiffs failed to give the requisite sixty day-notice

requirement pursuant to the Endangered Species Act); *Duke Energy Field Servs. Assets, L.L.C. v. FERC*, 150 F. Supp. 2d 150, 156 (D.C. Cir. 2001); *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1192 n.9, 1197 (D.C. Cir. 1995) (rejecting argument that § 1349(a) does not apply to "the review of administrative orders" and reviewing plaintiffs' claim under the APA) (citing *Trustees for Alaska v. Dep't of Interior*, 919 F.2d 119 (9th Cir.1990)).[7]

C. The State Lacks Standing.

The State's challenge to the Secretary's statements regarding proposed drilling operations conducted by private lessees and operators who are not party to this action also must be dismissed for lack of standing. The judicial power of the United States "is not an unconditional authority to determine the [legality] of legislative or executive acts." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982). Rather, "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Standing doctrine reflects this limitation on Article III jurisdiction. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332,

[7] The State also alleges jurisdiction pursuant to 28 U.S.C. §§ 1331, 3161, and 5 U.S.C. § 701–706. Petition at ¶ 8. Neither 28 U.S.C. § 1331 (federal question) nor § 1361 (mandamus) waives the United States' sovereign immunity. *Pitt River Home & Agric. Coop. Assoc. v. United States*, 30 F.3d 1088, 1098 n.5 (9th Cir. 1994); *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Smith v. Grimm*, 534 F.2d 1346, 1352 n.9 (9th Cir.), *cert. denied*, 429 U.S. 980 (1976). The APA, 5 U.S.C. §§ 701–706 provides applicable standards of judicial review and imposes additional limitations on the government's waiver of sovereign immunity—it expressly provides that it is not an alternative waiver. *Id.* at § 702 ("Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."); *see also Independence Mining Co.*, 105 F.3d at 507 & n.6 ("question[ing] the applicability of the traditional mandamus remedy under the [Mandamus and Venue Act] where there is an adequate remedy under the APA"); *Idaho Sporting Congress v. U.S. Forest Serv.*, 92 F.3d 922, 925 (9th Cir. 1996).

342 (2006). If standing requirements are not met with respect to any claim, that claim must be dismissed for lack of jurisdiction. *Id.*

States may seek to bring suit in three capacities: (1) proprietary suits in which the State sues much like a private party suffering a direct, tangible injury; (2) sovereignty suits requesting adjudication of boundary disputes or water rights; or (3) limited *parens patriae* suits in which States litigate to protect "quasi-sovereign" interests. *See Alfred L. Snapp & Son v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600 (1982).[8] Alaska lacks standing in any of these capacities.

1. The State Lacks Standing in any Capacity because it Fails to Show any Procedural or Substantive Injury Whatsoever.

The State cannot show injury in any of these capacities because there was *no* proposal to conduct drilling in the Alaska OCS pending before BOEMRE at the time the State filed its Petition or any other time this year before filing. As discussed above, Shell never submitted an APD under its 2010 Camden Bay EP. Decl. at ¶ 8. Shell never completed its April 15 APD submission under its 2010 Chukchi Sea EP. *Id.* Instead, Shell voluntarily withdrew this preliminary APD submission in early June. *Id.* at ¶ 14. Neither Shell nor any other Alaska OCS lessee submitted another APD until October 5, 2010, after the State filed this lawsuit. The agency is processing this APD and Shell's revised EP in the regular course of business and in compliance with all applicable regulations—the State has not claimed otherwise.

Because there was no proposal for drilling for the agency to approve, deny, defer, or delay when the State initiated its action, there necessarily was no procedural or substantive injury to the State. *Wilderness Soc'y v. Rey*, No. 06-35565, 2010 WL 3665713, at *5 (9th Cir. Sept. 22, 2010) (finding plaintiff lacked standing for failure to demonstrate a threatened concrete interest

[8] While the State has not stated in what capacity it brings suit, it suggests that it sues in a *parens patriae* capacity. Dkt. 1 at ¶ 2 ("The State brings this action in its capacity as trustee of the natural resources and environment of the State of Alaska and on behalf of Alaska residents.").

at the time the complaint was filed). Nor can the State show any injury now. Failing to demonstrate injury, the State lacks standing and its action must be dismissed.

Even if the State could demonstrate any procedural or substantive injury, as shown below, those injuries do not satisfy standing requirements.

2. The State Cannot Sue the United States in a Parens Patriae Capacity.

The State attempts to bring this action in a *parens patriae* "capacity as trustee of the natural resources and environment of the State of Alaska and on behalf of Alaska residents." Petition at ¶ 2; *see also* dkt. 18 at 3.[9] In some cases, a State may sue in a *parens patriae* capacity to protect its quasi-sovereign interests, such as the interest in the health and well-being of its citizenry or the interest in preventing discrimination against its citizenry. *Snapp*, 458 U.S. at 607. But "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n.16.[10] In *Snapp*, the Supreme Court reiterated: "While the State, under some circumstances, may sue . . . for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id.* (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)) (internal citations omitted). The D.C. Circuit further explained the federalism rationale underlying this exception:

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[9] To the extent the State attempts to establish standing based on alleged injury to the State's economy, job market, or environment, such "alleged injuries to the state's economy and the health, safety, and welfare of its people clearly implicate the *parens patriae* rather than the proprietary interest of the state. They involve no harm to the state beyond the individualized harms to her citizens, and thus if relief is to be granted it must be on the theory of the state as representative of those private interests." *Pennsylvania, by Shapp v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir.), *cert. denied,* 429 U.S. 977 (1976) (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257–59 (1972)); *Georgia v. Penn. R.R.*, 324 U.S. 439, 445–52 (1945)); *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044–45 (9th Cir. 1979), *cert. denied* 445 U.S. 961 (1980).

[10] An action against a federal employee in his or her official capacity is an action against the federal government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).

> The individual's dual citizenship in both state and nation, with separate rights and obligations arising from each, suggests that both units of government act as *parens patriae* within their separate spheres of activity. The general supremacy of federal law gives some reason to conclude that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens. In the terms used by the *parens patriae* cases, the state cannot have a quasi-sovereign interest because the matter falls within the sovereignty of the Federal Government.

Kleppe, 533 F.2d at 676–77; *see also Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990), *cert. denied sub nom. Nevada v. Jamison*, 500 U.S. 932 (1991) (dismissing challenge against a federal agency decision to grant a right-of-way because State failed to show it would suffer concrete and immediate injury and did not have standing as *parens patriae* to sue the federal government).

Accordingly, Alaska lacks *parens patriae* standing to sue federal defendants. While the Court may "recognize the considerable importance that the State of [Alaska] and its citizens place on the continued vitality of [offshore drilling] in the state's economy," to decide otherwise "would intrude on the sovereignty of the federal government and ignore important considerations of our federalist system." *Iowa ex rel. Miller v. Block,* 771 F.2d 347, 355 (8th Cir. 1985).

3. The State Lacks Proprietary Standing.

The State claims that the Secretary's statements may harm it procedurally and by reducing tax revenues, oil pipeline royalties, and opportunities to develop State-owned land. *See* dkt. 1 at ¶¶ 15, 16, 54. These alleged injuries do not meet proprietary standing requirements either. To establish standing to sue in a proprietary capacity, a plaintiff—public or private—bears the burden of showing: (1) an "injury in fact—an invasion of a judicially cognizable interest which is (a) concrete and particularized [rather than abstract or generalized] and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of . . . ; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S.

154, 167 (1997) (internal citations and quotation marks omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Additionally, the action must not be barred by a "second category of . . . prudential principles which underscore the limitations embodied in Article III." *Block,* 771 F.2d at 352–53. "One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975). "[T]he Supreme Court [also] has disapproved of considering 'abstract questions of wide public significance' amounting to 'generalized grievances.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (quoting *Valley Forge Christian Coll.*, 454 U.S. at 475).

a. Alleged procedural injury

The State claims that the Secretary caused it procedural harm by allegedly deferring APD decisions for 2010 without first notifying Alaska. *See* dkt. 1 at ¶¶ 43, 51–54. "But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009); *see also Lujan*, 504 U.S. at 573 n.8 (rejecting theory that "the Government's violation of a . . . procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)").

As explained below, the State cannot meet this requirement because its alleged separate injuries—potential reduction of tax revenues, pipeline revenues, and opportunities to develop state-owned property—are insufficient to establish standing. Accordingly, the State's alleged procedural interest is insufficient to demonstrate standing. *Summers*, 129 S. Ct. at 1151;

Wilderness Soc'y v. Griles, 824 F.2d 4, 19 (D.C. Cir. 1987) ("Since plaintiffs lack standing to challenge [the agency's] substantive actions, they indeed lack standing to challenge procedural defects in the process that produced those actions.").

b. Alleged loss of State revenue and development opportunity

The State also claims that the Secretary's statements may harm it by reducing tax revenues, oil pipeline revenues, and opportunities to develop State-owned land. *See* dkt. 1 at ¶¶ 15, 16, 54. As an initial matter, the State fails to demonstrate how the Secretary's statements impact any of these financial interests. The State is not entitled to revenue sharing under the OCSLA, 43 U.S.C. § 1337(g), because no Alaska OCS lease on which drilling has been proposed is within three nautical miles of Alaska. *C.f. Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160–61 (1981). The State has not shown that it receives revenue for oil produced on the federal OCS that is transported through the Alaska pipeline. In fact, it does not.

Regardless, these interests are too speculative and indirectly related to the Secretary's statements to demonstrate standing. Financial injury to State revenue generally "affords no basis for relief, because . . . the anticipated result is purely speculative, and, at most, only remote and indirect." *Florida v. Mellon*, 273 U.S. 12, 17–18 (1927) (citing *Minnesota v. N. Secs. Co.*, 194 U.S. 48, 70 (1904)) (emphasis added) (holding that Florida was not so directly injured by federal inheritance tax statute as to entitle it to maintain suit to enjoin the statute's enforcement); *see also Kleppe*, 533 F.2d at 672 (no standing for State seeking assistance from Small Business Administration in rebuilding hurricane-ravaged businesses in Pennsylvania); *Block*, 771 F.2d at 353 (no standing for State seeking an injunction compelling federal government to implement federal agricultural disaster relief programs).

Here, potential reduction of tax and oil pipeline revenue is "largely an incidental result of the challenged action"—the Secretary's statements regarding an incomplete application for a permit to drill an exploratory well on a lease owned and operated by Shell, not by Alaska. *Kleppe*, 533 F.2d at 672; *Block*, 771 F.2d at 353. Having failed to show a "fairly direct link between the state's status as a collector and recipient of revenues and the [alleged] legislative or administrative action being challenged," the State cannot establish standing on these bases. *Id.* (quoting *Kleppe*, 533 F.2d at 672).

Alleged reduced opportunity to develop State-owned land is even further removed from the challenged action and even more conjectural, and thus falls even shorter of demonstrating injury-in-fact or causation. *See Warth,* 422 U.S. at 507, 522 (holding that causation was lacking since plaintiffs' "unsubstantiated" injury depended on the action of third-party developers); *Rohnert Park v. Harris*, 601 F.2d 1040, 1045 (9th Cir. 1979) (finding asserted injury to plaintiff's interest as a landowner to be too "speculative" to establish standing because "[i]t is not clear from the record whether any of this land will be available for commercial use or whether its value will be affected by" the challenged action). The State has not explained how exploratory drilling of a proposed well sixteen miles offshore could "benefit development" of its property, how the State would benefit from such development, or why its property does not have other viable uses. "Plainly, there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any direct injury." *Mellon*, 273 U.S. at 18.[11]

[11] *See also Summers*, 129 S. Ct. at 1149; *Allen v. Wright*, 468 U.S. 737, 759 (1984) (holding that the "chain of causation between the challenged Government conduct and the asserted injury" was broken by third parties' actions); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) (dismissing complaint because "unadorned speculation will not suffice to invoke the federal judicial power"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973) (holding that "appellant [] failed to allege a sufficient nexus between her injury and the government action"). Similarly, the State fails to show their alleged injuries would likely be redressed by a favorable

Similarly, the State's alleged loss of tax revenue is insufficiently "particularized" to establish standing. An injury is sufficiently "particularized" for injury-in-fact purposes when it "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. By contrast, an alleged injury falls short of Article III's requirements when it takes the form of a "generalized grievance" that is "plainly undifferentiated" and "common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176–77 (1974). Alaska's alleged loss of tax revenue is such a "generalized grievance about the conduct of government," indistinguishable from the "unavoidable economic repercussions of virtually all federal policies," and thus insufficient to demonstrate standing. *Kleppe*, 533 F.2d at 672–73; *Block*, 771 F.2d at 353–54.[12]

Indeed, these limitations on proprietary standing apply with particular force in this case because Alaska is "not [itself] the object of the government action or inaction [it] challenges." *Lujan*, 504 U.S. at 562 (recognizing that in such situations "standing . . . is ordinarily 'substantially more difficult' to establish." (citation omitted)); *see also Warth*, 422 U.S. at 499. Importantly, this is not a situation in which the denial of standing to the State would insulate the Secretary's decision from judicial review entirely. A lessee whose operations are suspended or whose completed APD is pending before BOEMRE may seek to challenge the suspension or compel a decision regarding the APD, assuming the lessee alleges a legally-cognizable injury and the challenge remains live. By limiting judicial review to such litigants capable of asserting a concrete and particularized injury in fact, the federal courts thus "put the decision as to whether

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decision. *See Wy. ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992) (holding State lacked standing to challenge an agency's exchange of federally-owned coal for a conservation easement in national park because the State's alleged loss of coal revenue was "only speculation and surmise," "founder[ed] on too many contingencies," and thus was not redressable).

[12] Additionally, allowing the State to proceed with its suit based on a revenue interest that is subordinate to that of the United States would raise federalism concerns. *See Mellon,* 273 U.S. at 18 ("[T]he state's right of taxation [is] subordinate to that of the general government"); *Kleppe*, 533 F.2d at 672; *Block*, 771 F.2d at 354.

review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972); *see also Valley Forge Christian Coll.*, 454 U.S. at 473 ("The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'") (citation omitted).

Accordingly, the State fails to allege an "injury to state proprietary interests [adequate] to confer standing." *Kleppe*, 533 F.2d at 672–73; *see also Texas v. Mosbacher*, 783 F. Supp. 308, 314 (S.D. Tex. 1992) ("Although citizens . . . may suffer a direct injury because of this, the State . . . will not suffer in this same direct way. Absent an allegation of a direct loss, the State does not show injury-in-fact.").

In sum, the State lacks standing on any basis to bring this action and it must be dismissed.

D. The State's First Claim Fails.

The State's first claim seeks to set aside the Secretary's statements about proposed drilling during the 2010 drilling season and to compel defendants to notify the State regarding the statements. *See* Dkt. No. 1-1 at ¶¶ 46, 47, 53; Dkt. No. 6 at 9–13. As explained below, to the extent the first claim seeks to set aside the Secretary's statements as agency action that is "not in accordance with law," 5 U.S.C. § 706(2)(A), the claim fails because the Secretary's statements are not final agency action subject to review under the APA. *See* dkt. 6 at 1 (seeking to set aside the Secretary's "deferral"). To the extent the first claim seeks to compel consultation as action "unlawfully withheld," 5 U.S.C. § 706(1), the claim fails because notice is not required by OCSLA in this case and is not a discreet agency action that may be compelled in compliance with the APA. *See SUWA*, 542 U.S. at 64 (a § 706(1) claim "can proceed only [if] plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.").

that notice is generally required—the APA limits judicial review to final agency actions and forbids programmatic challenges seeking wholesale relief. *See* 5 U.S.C. § 704; *Lujan*, 497 U.S. at 892; *SUWA*, 542 U.S. at 62. As the Supreme Court explained in discussing "[t]he principal purpose of the APA limitations . . . and of the traditional limitations upon mandamus from which they were derived, . . . [i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates . . . it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *Id.* at 66–67.[13]

2. Notification / Consultation is not Required by Law in this Case.

The State's first claim also fails because notification is not required by law. The State's claim relies entirely on a strained reading of OCSLA Section 5(h). 43 U.S.C. § 1334(h). As explained below, its interpretation cannot be squared with OCSLA's plain language, statutory scheme, or BOEMRE's long-established interpretation, which is entitled to deference.

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[13] The State's cited authorities do not support the proposition that this Court can compel BOEMRE to consult with the State divorced from review of final agency action. *See* Dkt. No. 6 at 10–11. In *Lower Brule Sioux Tribe v. Deer*, unlike here, the court reviewed an agency's consultation in connection with final agency actions (Reduction in Force notices) and found that the APA did not apply because such actions were committed to agency discretion by law. 911 F. Supp. 395, 397–98, 402 (D.S.D. 1996). Moreover, the court acknowledged contrary Ninth Circuit precedent. *Id.* at 399–400. *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997) is inapposite because it was not a challenge to federal agency action. *Pennsylvania v. Nat'l Assoc. of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975), was subsequently overruled because it was an improper challenge to federal agency action. *Pennsylvania v. Porter*, 659 F.2d 306, 317 (1981). In *Marathon Oil Co. v. Lujan*, 937 F.2d 498 (10th Cir. 1991) and *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), the courts compelled agencies to complete final agency actions (issue final decisions regarding particular applications) by specified dates—they did not compel consultation or any other procedure divorced from a final agency action. To the contrary, here the State has not sought to compel BOEMRE to issue a decision regarding Shell's APD by a date certain. In the Ninth Circuit, such a § 706(1) mandamus claim challenging "agency action unlawfully withheld or unreasonably delayed" would be evaluated under "so called *TRAC* factors." *Independence Mining* Co, 105 F.3d at 507 (citing *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79–80 (D.C. Cir. 1984)).

1. The State Fails to Challenge Final Agency Action.

The State may not seek judicial review of the Secretary's alleged failure to comply with OCSLA's notification provisions in making public statements because the statements are not "final agency action" under the APA. Under Section 704 of the APA, only "final agency action" is judicially reviewable. 5 U.S.C. § 704. The APA defines "agency action" as "a rule, order, license, sanction, relief, or the equivalent or denial thereof . . . ." 5 U.S.C. § 551(13). To be "final," an action must mark "the consummation of the agency's decision making process" and be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Spear*, 520 U.S. at 177–78 (citation and notation omitted).

Here, the Secretary's statements did not mark "the consummation of the agency's decision making process" or determine rights or obligations, and thus were not final agency actions. *Id.*; *see also Loughlin v. United States*, 286 F. Supp. 2d 1, 29 (D.D.C. 2003) (press releases did not constitute "an official, irrevocable commitment" by the agency to undertake actions described in the press release). In contrast to the suspensions directed for the Gulf of Mexico the day after the Secretary's May 27 press statements, the Secretary never directed BOEMRE to suspend any operations in Alaska. In fact, BOEMRE never had occasion to suspend any proposed drilling because Shell voluntarily withdrew its single, incomplete APD submission and did not submit another APD until October 5, 2010.

In these circumstances, the State's claim is barred by the final agency action requirement. *Potash Ass'n of New Mexico v. U.S. Dep't of the Interior*, 367 Fed. Appx. 960 (10th Cir. 2010) (courts may "not review agency action if it 'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" (internal citations and notation omitted)). For the same reason, the State may not seek declaratory relief

When reviewing an agency's construction of a statute, courts must begin by giving effect to clearly-expressed congressional intent. *Chevron v. NRDC*, 467 U.S. 837, 842–43 (1984). In determining whether Congress spoke to a question, courts look to "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Robinson v. Shell*, 519 U.S. 337, 341 (1997). If the statute is silent or ambiguous with respect to an issue, courts defer to an agency's interpretation as long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Here, Congress' intent is clear—the duty to notify is triggered only by a circumscribed set of actions that have a direct and significant effect on the OCS. Section 5(h) provides:

> The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

43 U.S.C. § 1334(h). As an initial matter, this provision says *nothing* about consultation. The provision does not explicitly require notice to be provided before action is taken, but instead ties the duty to action that has been taken. Moreover, the provision applies to other departments, but does not clearly apply to the Secretary or Interior at all. It would be absurd for Congress to require the Secretary to notify himself of actions affecting the OCS, and absurd for Congress to authorize the Secretary, in whom the Department's authority is already vested, to "recommend" changes to his own actions. *See* 4 H.R. REP. No. 95-590, at 130–31 (1977) (suggesting Congress' intent was to provide a mechanism for coordination on actions taken by "other agencies"). Accordingly, notification and consultation are not the types of clear, unequivocal duties that may be compelled in a § 706(1) mandamus claim. *Wilbur v. United States*, 281 U.S.

206, 218–19 (1931) (mandamus is unavailable where "the duty is not . . . plainly prescribed but depends upon a statute . . . the construction or application of which is not free from doubt").

Regardless, the duty to notify only extends to "affected State[s]" and only with respect to "actions" that directly and significantly affect the OCS. *Id.* While the State claims that "an 'affected state' includes any state that will receive oil extracted from the OCS for processing, refining, or transshipment," *see* Dkt. No. 1-1 at ¶ 48, Congress defined the term more narrowly. "The term 'affected State' means, with respect to any program, plan, lease sale, or other activity, proposed, conducted, or approved pursuant to [OCSLA] . . . ." 43 U.S.C. § 1331(f).[14] Here, the Secretary's statements were not actions proposing, conducting, or approving "any program, plan, lease sale, or other activity . . . pursuant to [OCSLA]." *Id.* In fact, mere statements are not actions pursuant to OCSLA at all. Even if they were, public statements divorced from any decision record do not have a "direct and significant effect" on the OCS. *Id.* at § 1334(h).[15]

This conclusion is reinforced by OCSLA's statutory scheme. Sections 18 and 19 confine the Secretary's duty to consult to a limited set of actions. *See id.* at § 1344(c), (f) (duty limited to a "proposed leasing program"); *id.* at § 1345(a) (duty limited to certain information with respect to "a proposed lease sale or . . . a proposed development and production plan"); *see also* dkt. 6 at n. 3 (acknowledging that OCSLA's consultation provisions require coordination "as to potential lease sales and production and development plans" (citing S. Rep. No. 95-284, at 78 (1977) and

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[14] The House Report also clarifies that "[t]he term [affected State] is *not a general designation of all actions and decisions.* Rather, it is a specific description related to a particular provision, plan, lease or other activity." H.R. Rep. No. 95-590 at 125 (1977), reprinted in 1978 U.S.C.C.A.N 1450, 1531 (emphasis added).

[15] The State briefly suggests that 43 U.S.C. § 1332(4) also mandates consultation. Dkt. No. 1-1, ¶ 46; Dkt. No. 6 at 10. But this provision is similarly limited in application to "affected State[s]" and further restricted to state participation in "policy and planning decisions made by the Federal Government." 43 U.S.C. § 1332(4)(C). Moreover, Section 1332 is merely a "Congressional declaration of policy," not a source of binding requirements. *See id.*

H. Rep. No. 95-590, at 152 (1977)). Indeed, the specific requirements of Section 19, entitled "Coordination and consultation with affected State and local government," control the general provisions of Section 5(h). *Markair, Inc. v. Civil Aeronautics Bd.*, 744 F.2d 1383, 1386 (9th Cir. 1984) ("[S]pecific terms of a statute override the general terms."). Moreover, Sections 18 and 19 also limit the duty to consult to "affected State[s]." 43 U.S.C. § 1344(c). But while all three Sections are similarly limited, the State interprets Section 5(h) to require consultation with respect to a far more expansive set of actions than do Sections 18 and 19. Section 5(h) should not be interpreted so as to create an internal inconsistency. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); *see also Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

Even if the Court finds that Section 5(h) is ambiguous, the Court must defer to BOEMRE's interpretation as long as it is based on a reasonable construction of the statute. *Chevron*, 467 U.S. at 843–44; *id.* at 844 ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."). Pursuant to OCSLA's mandate that the Secretary establish procedures for consulting with State and local governments, the Secretary promulgated regulations that set forth when BOEMRE must provide notification and consultation. *See* 43 U.S.C. §§ 1331(f), 1345(c). None of these regulations require the Secretary to consult with States regarding public statements that were not consummated.[16] BOEMRE's longstanding interpretation is entitled to deference. *See Smiley v. Citibank*, 517 U.S. 735, 740 (1996) ("To be sure, agency interpretations that are of long standing

[16] *See* 30 C.F.R. § 250.1016 (requirement consultation regarding approval of a right-of-way application); *id.* at § 251.14(d)(2) (nominations for leasing areas with the OCS); *id.* at 252.4 (Summary Report of data and information regarding planning for onshore impacts of potential OCS oil and gas development and production); *id.* at § 256.16 (5-year leasing program); *id.* at § 256.19 (activities in or on the OCS, including fish and shellfish recovery and recreational activities); *id.* at § 256.25 (leasing areas near coastal States); *id.* at 256.26 (areas identified for environmental analysis and considered for leasing); *id.* at § 256.31 (proposed lease sale); *id.* at § 281.13(a) (OCS mineral leasing and formation of joint state/federal task force).

come before us with a certain credential of reasonableness, since it is rare that error would long persist."); *see also Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 841–42 (1986).

The State's contrary interpretation of Section 5(h) is unreasonable. Its reading is impractical because it would require notice to governors of affected states every time any federal agency made a public statement regarding OCS activities. *See Olympic v. United States*, 615 F. Supp. 990, 993 (D. Alaska 1985) ("Interpretations of a statute which lead to absurdity of result should be avoided.") (citation omitted). Moreover, as discussed, the State's reading leads to inconsistencies across OSCLA. Accordingly, the Secretary was not under a clear duty to notify so as to merit mandamus relief and its first claim fails.

3. The State's Claim is not Legally Cognizable under APA Section 706(1).

The State also may not compel consultation under APA § 706(1) because judicial review under the APA is limited to "final agency action," and only final agency action may be compelled under § 706(1). In *SUWA*, the Court defined the parameters of what constitutes an agency action that may be compelled under APA § 706(1) by reference to APA §§ 551(13) and 704. *See SUWA*, 542 U.S. at 62–63. Section 551(13) defines "agency action" to include a limited set of discreet actions, while Section 704 provides that a "preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. §§ 551(13), 704; *see SUWA*, 542 U.S. at 63.

Consultation is not a "circumscribed, discreet action" but instead is a procedural prerequisite to particular "final agency actions" taken pursuant to OCSLA, such as decisions to approve a "program, plan, lease sale, or other activity." 43 U.S.C. § 1331(f). Accordingly, consultation may not be reviewed independently from review of a final agency action—it is a

"preliminary, procedural, or intermediate agency action or ruling not directly reviewable [but only] subject to review on the review of the final agency action." 5 U.S.C. § 704.

IV. CONCLUSION

Having failed to demonstrate a waiver of sovereign immunity or standing, the Court is without jurisdiction and, therefore, summary judgment should be granted in favor of defendants. Even if the Court has jurisdiction, the State's first claim fails and, therefore, partial summary judgment on claim one should be granted in favor of defendants.

Respectfully submitted this 5th day of November, 2010.

IGNACIA S. MORENO
Assistant Attorney General

/s/ Tyler Welti
TYLER WELTI
Trial Attorney, California Bar No. 257993
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington D.C. 20044-0663
202-305-0481 (tel.); 202-305-0506 (fax)
Tyler.Welti@usdoj.gov

DEAN K. DUNSMORE
United States Department of Justice
Environment & Natural Resources Division
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
907-271-5452 (tel.); 907-271-5827 (fax)
Dean.Dunsmore@usdoj.gov

AYAKO SATO
United States Department of Justice - ENRD
P. O. Box 663
Washington, D.C. 20044-0663
202-305-0239 (tel.); 202-305-0506 (fax)
Ayako.Sato@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I caused the foregoing to be served upon counsel of record through the Court's electronic service system:

Rebecca Kruse
State of Alaska, Department of Law (Anch)
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
907-269-3036
Fax: 907-279-8644
Email: becky.kruse@alaska.gov

/s/ Tyler Welti
TYLER WELTI
Trial Attorney, CA Bar #257993
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington D.C. 20044-0663
202-305-0481(tel.); 202-305-0506 (fax)
tyler.welti@usdoj.gov

IGNACIA S. MORENO
Assistant Attorney General

TYLER WELTI
Trial Attorney
California Bar No. 257993
United States Department of Justice
Environment & Natural Resources
Division
Natural Resources Section
P.O. Box 663
Washington D.C. 20044-0663
202-305-0481(tel);202-305-0506(fax)
Tyler.Welti@usdoj.gov
DEAN K. DUNSMORE
United States Department of Justice
Environment & Natural Resources
Division
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
Telephone:(907) 271-5452
Facsimile:(907) 271-5827
Email: dean.dunsmore@usdoj.gov
AYAKO SATO
United States Department of Justice
Environment & Natural Resources
Division
P.O. Box 663
Washington D.C. 20044-0663
202-305-0239(tel);202-305-0506(fax)
Ayako.Sato@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

THE STATE OF ALASKA, et al.	)	
	)	CASE NO. 3:10-CV-00205-RRB
Plaintiffs,	)	
	)	
v.	)	DEFENDANTS' CROSS MOTION
	)	FOR SUMMARY JUDGMENT
KEN SALAZAR, et al.,	)	

Defendants.)
)
)

Federal Defendants Ken Salazar, Secretary of the Interior, United States Department of the Interior; Michael Bromwich, Director, Bureau of Ocean Energy Management, Regulation and Enforcement; and Bureau of Ocean Energy Management, Regulation and Enforcement, move the Court pursuant to Fed. R. Civ. P. 56(b), for a summary judgment dismissing this action in its entirety for lack of jurisdiction and failure to state a claim upon which relief can be granted.

In support of this motion Federal Defendants incorporate herein by reference Federal Defendants' Opposition to Plaintiffs'

Motion for Partial Summary Judgment (Docket Entry No. 25) and the exhibits thereto filed this date.

DATED this 5th day of November 2010.

IGNACIA S. MORENO
Assistant Attorney General

/s/ Tyler Welti
TYLER WELTI
Trial Attorney
California Bar No. 257993
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington D.C. 20044-0663
202-305-0481(tel);202-305-0506(fax)
Tyler.Welti@usdoj.gov

DEAN K. DUNSMORE
U.S. Department of Justice
Environment & Natural Resources Division
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
907-271-5452(tel);907-271-5827(fax)
Facsimile:(907) 271-5827
Email: dean.dunsmore@usdoj.gov
AYAKO SATO
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington D.C. 20044-0663
202-305-0239(tel);202-305-0506(fax)
Ayako.Sato@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010 a copy of the foregoing Federal Defendants' Cross Motion for Summary Judgment was served electronically to:

Rebecca Kruse

/s/ Tyler Welti
TYLER WELTI