# APPENDIX

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 19-55526

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA NON-PROFIT CORPORATION; SANTA BARBARA CHANNELKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT,
DEFENDANT-APPELLEE

AMERICAN PETROLEUM INSTITUTE,
INTERVENOR-DEFENDANT-APPELLANT

AND

RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY MANAGEMENT; DAVID FISH, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT;

JOAN BARMINSKI, PACIFIC REGION DIRECTOR,
BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR,
BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS

EXXON MOBIL CORPORATION; DCOR, LLC,
INTERVENOR-DEFENDANTS

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No. 19-55707

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA,
EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA
COASTAL COMMISSION; CENTER FOR BIOLOGICAL
DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE
OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN
ENERGY MANAGEMENT; KEVIN M. SLIGH, SR.,
DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; BUREAU OF SAFETY

AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR,
BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR,
BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS

AMERICAN PETROLEUM INSTITUTE; DCOR, LLC,
INTERVENOR-DEFENDANTS

AND

EXXON MOBIL CORPORATION,
INTERVENOR-DEFENDANT-APPELLANT

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No. 19-55708

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION,
PLAINTIFFS-APPELLANTS

AND

PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB
BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL
COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY;
WISHTOYO FOUNDATION,
PLAINTIFFS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE
OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN
ENERGY MANAGEMENT; KEVIN M. SLIGH, SR.,
DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; BUREAU OF SAFETY AND
ENVIRONMENTAL ENFORCEMENT; JOAN BARMINSKI,
PACIFIC REGION DIRECTOR, BUREAU OF OCEAN
ENERGY MANAGEMENT; MIKE MITCHELL,
ACTING PACIFIC REGION DIRECTOR, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLEES

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC,
INTERVENOR-DEFENDANT-APPELLEES

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No. 19-55718

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA,
EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA
COASTAL COMMISSION; CENTER FOR BIOLOGICAL

DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR,
OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN
ENERGY MANAGEMENT; KEVIN M. SLIGH, SR.,
DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR,
BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR,
BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION,
INTERVENOR-DEFENDANTS

AND

DCOR, LLC
INTERVENOR-DEFENDANTS-APPELLANT

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No. 19-55725

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA NON-PROFIT CORPORATION; SANTA BARBARA CHANNELKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT; RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY MANAGEMENT; DAVID FISH, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; JOAN BARMINSKI, PACIFIC REGION DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR; DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLANTS

AND

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC
INTERVENOR-DEFENDANTS

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No. 19-55727

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PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB
BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL
COMMISSION,
PLAINTIFFS-APPELLEES

v.

ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY;
WISHTOYO FOUNDATION,
PLAINTIFFS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE
OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN
ENERGY MANAGEMENT; KEVIN M. SLIGH, SR.,
DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR, BUREAU

OF OCEAN ENERGY MANAGEMENT; MIKE MITCHELL,
ACTING PACIFIC REGION DIRECTOR, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLEES

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC,
INTERVENOR-DEFENDANTS-APPELLEES

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No. 19-55728

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CENTER FOR BIOLOGICAL DIVERSITY;
WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

AND

ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA,
EX REL. ROB BONTA, ATTORNEY GENERAL;
CALIFORNIA COASTAL COMMISSION,
PLAINTIFFS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE
OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY

AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLEES

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC,
INTERVENOR-DEFENDANTS-APPELLEES

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Filed: June 3, 2022

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Before: WALLACE, GOULD, and BEA, Circuit Judges.

**OPINION**

GOULD, Circuit Judge.

State boundaries extend three miles from their coastlines. Although the land and water beyond that is subject to federal control, coastal states are entitled to participate in the federal government's decisions concerning this area, known as the Outer Continental Shelf. This appeal concerns the federal government's authorization of unconventional oil drilling methods on offshore platforms in

the Pacific Outer Continental Shelf. These unconventional oil drilling methods are known within the oil and gas industry as "well stimulation treatments" and encompass, among other techniques, what is known colloquially as fracking.[1] Well stimulation treatments prolong drilling operations by enabling oil companies to extract oil otherwise unreachable using conventional drilling methods. These stimulation treatments pose unknown risks, or so Plaintiffs contend, because their environmental impacts have not been fully studied.

Many of the questions that arise from this appeal are a result of its unique procedural posture. For offshore oil and development activities, agencies are supposed to conduct environmental review of proposed activities *before* approving permits authorizing private companies to conduct such activities. But here, environmental groups learned through Freedom of Information Act ("FOIA") requests that agencies within the U.S. Department of the Interior had authorized permits for offshore well stimulation treatments without first conducting the normally-required environmental review. The federal agencies, the Bureau of Ocean Energy Management ("BOEM") and the Bureau of Safety and Environmental Enforcement ("BSEE"), agreed to conduct an environmental review only after being sued by and reaching settlement agreements with the environmental groups involved in this litigation: the Environmental Defense Center ("EDC"), the Santa Barbara Channelkeeper, the Center for Biological Diversity ("CBD"), and the Wishtoyo Foundation. Pursu-

[1] The district court and the parties use "WST" to refer to well stimulation treatments. We decline to use that abbreviation in this opinion but do not alter quotes from the administrative record in which that abbreviation is used.

ant to the settlements, the agencies issued an Environmental Assessment ("EA") evaluating the use of offshore well simulation treatments and did not prepare a full Environmental Impact Statement ("EIS"). The agencies ultimately concluded that the use of these treatments would not pose a significant environmental impact and issued a Finding of No Significant Impact ("FONSI").

The environmental groups considered the agencies' environmental review to be inadequate and sued once again. In this litigation, they assert claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., and under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*., against BOEM, BSEE, and the responsible federal agency officials. The State of California and the California Coastal Commission (collectively, "California") also sued, alleging that the agencies violated NEPA and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq*., by not reviewing the use of well stimulation treatments for consistency with California's coastal management program. Exxon Mobil Corporation ("Exxon"), the American Petroleum Institute ("API"), and DCOR, LLC ("DCOR") intervened, and the cases were consolidated. So, the litigants before us include environmental group Plaintiffs, state Plaintiffs, federal agency Defendants, and intervening petroleum industry Defendants.[2]

The district court granted summary judgment to Defendants on the NEPA claims, and to Plaintiffs on the ESA and the CZMA claims. All parties timely appealed.

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[2] The panel thanks all parties and amici curiae for their extensive legal briefing, which has assisted the Court.

We have jurisdiction over this appeal under 28 U.S.C. § 1291, and we affirm in part and reverse in part. We address in turn the following issues: (1) whether the programmatic environmental review was final agency action under the Administrative Procedure Act ("APA"); (2) whether the claims are ripe for review now or when the agencies approve specific permit applications; (3) whether the agencies' EA and FONSI violated NEPA; (4) whether the agencies violated the ESA by not conducting required consultation with other relevant federal agencies; and (5) whether the agencies violated the CZMA by not conducting a consistency review with California's costal program. These issues are addressed in Sections II through V, *infra*.

The essential, and recurring, question raised by this case is whether an agency's conclusion in a programmatic environmental review that a proposed action would not have a significant environmental impact constitutes agency authorization of that proposed action, even if the agency will have to approve subsequent, individual permits before that action can occur. This question resurfaces throughout this opinion in different forms, as we must decide whether the agencies' programmatic environmental review constitutes "final agency action" under the APA, "agency action" under the ESA, and "Federal agency activity" under the CZMA. We answer the various iterations of this question in the affirmative.

We first conclude that we have jurisdiction to review the challenges to the agencies' EA and FONSI and that Plaintiffs' claims are ripe for review now. After reviewing the agencies' EA and FONSI, we hold that the agencies failed to take the hard look required by NEPA in issuing their EA and that they should have prepared an EIS for their proposed action. We reverse the district court's

grant of summary judgment to Defendants on the NEPA claims, and we grant summary judgment to Plaintiffs on these claims. We affirm the district court's grant of summary judgment to Plaintiffs on the ESA and the CZMA claims. And we hold that the district court did not abuse its discretion in fashioning injunctive relief.

## I. BACKGROUND

### A. Factual Background

Federal law provides that state boundaries extend three nautical miles from their coastlines. 43 U.S.C. § 1312. The submerged land and water beyond the state boundary, known as the Outer Continental Shelf, *id.* §§ 1331(a), 1332(1), is subject to federal control. This appeal centers on the use of well stimulation treatments in the Pacific Outer Continental Shelf.

#### 1. Offshore Drilling

Declaring that the oil and natural gas reserves beneath the Outer Continental Shelf are a "vital national resource," Congress enacted the Outer Continental Shelf Lands Act ("OCSLA") to govern the development of offshore oil and gas resources in this region, while recognizing the crucial need to balance resource development with the protection of the human, marine, and coastal environments. *Id.* § 1332(3). The OCSLA provides for the right of coastal states to participate in decisions concerning the Outer Continental Shelf "to the extent consistent with the national interest." *Id.* § 1332(4)(C).

Congress created four phases for offshore oil and gas production. First, the Department of the Interior creates a leasing program to meet national energy needs for a five-year period. *See id.* § 1344. Second, the Department of the Interior holds lease sales. *See id.* § 1337. Third, the

winning bidders obtain leases and submit exploration plans to the Department of the Interior, and these plans, if approved, authorize exploratory drilling. *See id.* § 1340. Fourth, if lessees discover commercially viable oil and gas deposits through their exploratory drilling, they then file development and production plans that would authorize them to construct a platform, install equipment, lay pipeline, and conduct other development activities. *See id.* § 1351. Before commercial drilling, lessees must submit an Application for Permit to Drill or an Application for Permit to Modify. The Department of the Interior can then approve the drilling operations, approve with modification, or deny the application. *See generally* 30 C.F.R. §§ 250.410-465; *id.* § 550.281. Lessees are required to revise an approved development and production plan if they make certain operational changes, like changing the type or volume of production or increasing the amount of emissions or waste, or if they propose to conduct activities that require approval of a license or permit that is not described in their approved plan. *Id.* § 550.283. *Id.* BOEM and BSEE, two agencies within the Department of the Interior, manage the oil and gas activities described in OSCLA.

There are 23 oil and gas platforms in the federal waters on the Pacific Outer Continental Shelf off the coast of California. Oil companies installed these platforms between 1967 and 1989 and continue to rely on development and production plans approved in that time period for their drilling activities.

**2. Well stimulation treatments**

Well stimulation treatments include oil extraction techniques that allow oil production to continue from wells with declining reservoirs. These practices prolong drilling operations, and expand total production, by enabling oil

companies to extract oil otherwise unreachable using conventional drilling methods. The well stimulation treatments at issue in this case primarily consist of hydraulic fracturing (commonly known as fracking), which involves injecting a mixture of water, sand, and chemicals into a well at an extremely high pressure to fracture the rock formation.[3]

Well stimulation treatments pose a variety of risks. Not all of the chemicals used in well stimulation treatments have been studied, but the known chemicals include carcinogens, mutagens, toxins, and endocrine disruptors. These chemicals can harm aquatic animals and other wildlife in the areas where well stimulation treatments are used. Well stimulation treatments also emit pollutants, including carcinogens and endocrine disruptors, into the air. And the high pressures used in these treatments can increase the risk of oil spills, especially because well stimulation treatments are often used on old wells. Enhanced well life and increased production thus come with a potential environmental price.

**B. Procedural History**

This appeal stems from prior litigation between the parties concerning the use of well stimulation treatments off the coast of California. In 2012, Plaintiff EDC began to suspect the use of well stimulation treatments on platforms in the Pacific Outer Continental Shelf. Through FOIA requests, EDC discovered that the relevant federal

[3] This case also involves the use of acid fracturing and matrix acidizing. Acid fracturing is similar to fracking but involves applying an acid solution at a high pressure to etch channels into the rock. Matrix acidizing involves injecting a mixture of acids to dissolve the rock, rather than fracture it. All three types of treatments make it easier for oil and gas to pass through the subterranean rock for extraction.

agencies had granted 51 permits authorizing oil companies to perform well stimulation treatments off the coast of California without any environmental review whatsoever.

### 1. Prior litigation, settlement, and environmental review

After the federal agencies refused to conduct an environmental review of these treatments, EDC and CBD brought separate lawsuits alleging that the agencies had violated NEPA. The lawsuits culminated in similar settlement agreements, in which the agencies agreed to conduct a programmatic EA pursuant to NEPA to study the environmental impacts of well stimulation treatments in the Pacific Outer Continental Shelf. The agencies also agreed to a temporary moratorium on permit approvals authorizing well stimulation treatments until they completed the stated environmental review.

Pursuant to the settlement agreements, the agencies issued a draft EA in February 2016 that examined the programmatic effects of allowing well stimulation treatments in the Pacific Outer Continental Shelf. There was a thirty-day public comment period, during which the agencies received thousands of comments from individuals, scientists, federal and state agencies, and elected officials. The agencies published a final programmatic EA and FONSI in May 2016.

The "Proposed Action" that the programmatic EA examined was "allow[ing] the use of selected well stimulation treatments on the 43 current active leases and 23 operating platforms" in the Pacific Outer Continental Shelf without restrictions. Under NEPA, agencies must evaluate the environmental impacts of alternatives to the proposed action, and it specifically mandates consideration of

a "no action" alternative. 42 U.S.C. § 4332; 40 C.F.R. § 1502.14. In the EA, the agencies considered four courses of action as options: (1) the proposed action of allowing the use of well stimulation treatments without restriction; (2) allowing well stimulation treatments with a minimum depth restriction; (3) allowing well stimulation treatments with a prohibition on the open water discharge of fluids; and (4) the required "no action" alternative of prohibiting well stimulation treatments. The environmental impacts of the first three alternatives were all based on a forecast of authorizing up to five well stimulation treatments per year.

Based on the analysis in the programmatic EA, the agencies determined that the proposed action of allowing well stimulation treatments without restriction "would not cause any significant impacts" and accordingly, the federal agencies issued a FONSI, which concluded the NEPA environmental review process. In doing so, the agencies did not consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service pursuant to the ESA before issuing their final EA and FONSI, nor did they review the proposed action in the EA for consistency with California's coastal management program pursuant to the CZMA.

**2. Consolidated lawsuits and district court orders**

The two groups of Plaintiffs (the environmental organizations and California) filed separate suits in 2016 challenging the agencies' programmatic EA and FONSI. All Plaintiffs alleged that the agencies violated NEPA, among other reasons, by failing to take a "hard look," *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002), at the environmental impacts of allowing well stimulation treatments in the Pacific Outer Continental Shelf. The environmental groups also alleged that the

agencies violated NEPA by not preparing an EIS. California additionally alleged that the agencies violated the CZMA by failing to conduct a consistency review to determine if allowing well stimulation treatments in federal waters offshore California is consistent with California's coastal zone management program. The environmental groups also alleged that the agencies violated the ESA by failing to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure the proposed action in the EA would not jeopardize endangered species or their habitats. The district court consolidated the lawsuits, and allowed Exxon, API, and DCOR to intervene as Defendants.

The agencies and API filed motions to dismiss, arguing that the district court lacked jurisdiction to hear the NEPA and CZMA claims because the EA and FONSI did not constitute reviewable "final agency action" under the APA, 5 U.S.C. § 551 *et seq.,* and arguing that the ESA claims were not ripe and were moot. The district court denied the motions, holding that the EA and FONSI were final agency action because they concluded the agencies' programmatic environmental review and lifted the moratorium on well stimulation treatments in the Pacific Outer Continental Shelf. As for the ESA claims, the district court held that they were ripe because the agencies made an affirmative and discretionary decision in the EA and FONSI about whether, and under what conditions, to allow well stimulation treatments in the region. The district court also held that the ESA claims were not moot because the consultation process under the ESA was not yet complete.

The parties made cross-motions for summary judgment, which the district court granted in part and denied in part. It granted summary judgment to Defendants on

the NEPA claims, concluding that the agencies reasonably decided to conduct an EA rather than an EIS and took a sufficiently hard look at the environmental impacts of allowing well stimulation treatments. The district court granted summary judgment to the environmental groups on the ESA consultation claim, holding that the agencies violated the ESA by not consulting with the expert wildlife agencies. But the district court also held that the ESA claim based upon the National Marine Fisheries Service consultation was moot because that consultation was complete. As to California's CZMA claim, the district court granted summary judgment to California because the agencies did not complete the requisite consistency review under § 1456(c)(1) of the CZMA. The court granted injunctive relief on the ESA and CZMA claims, enjoining the agencies from approving any permits for well stimulation treatments until they completed ESA consultation and CZMA consistency review. Subsequently, intervenor DCOR filed a motion for reconsideration, arguing that the court erred in issuing injunctive relief and requesting it to modify the judgment to allow the agencies to approve DCOR's two pending permit applications for well stimulation treatments in the Pacific Outer Continental Shelf. The district court denied the motion, holding that the injunction it issued was the appropriate remedy for the ESA and CZMA violations. This appeal followed.

## II. JURISDICTION

### A. Final Agency Action

As a preliminary matter, we must determine whether we have subject matter jurisdiction to hear Plaintiffs' NEPA and CZMA claims. Because neither NEPA nor the CZMA expressly provide for judicial review, judicial review of these claims is governed by the APA, which limits review to "final agency action." 5 U.S.C. § 704. We do not

defer to the agencies' interpretation of whether their actions constitute "final agency action" because Congress did not charge BOEM and BSEE with implementing the APA. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012).

Agency action is final and reviewable under the APA when two conditions are met. The action must "mark the consummation of the agency's decision-making process," and it must also determine "rights or obligations" or be one "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). The agencies contend that the programmatic EA and FONSI are not "final agency actions" because they will still have to approve permits from private entities wishing to use well stimulation treatments before the treatments will actually be used in the region. The agencies would have us wait until the agencies approve site-specific permits before Plaintiffs could challenge the agencies' actions under the APA. We disagree and hold that the programmatic EA and FONSI meet both prongs of *Bennett*'s test for final agency action.

**1. The EA and FONSI mark the consummation of the agency's decision-making process**

The EA and FONSI conclude the agencies' programmatic review under NEPA of allowing well stimulation treatments in the Pacific Outer Continental Shelf and reflect the agencies' understanding that CZMA review is not required for this action. In the programmatic EA, the agencies considered four alternatives ranging from not authorizing well stimulation treatments to authorizing well stimulation treatments without restriction, and, in the FONSI, the agencies found that "the Proposed Action"—authorizing well stimulation treatments without restriction—"would not cause any significant impacts."

There is nothing preliminary or tentative about these documents, even if the agencies included a disclaimer in the EA that it is "not itself a decision document."

To be sure, the use of well stimulation treatments will not occur in practice until an individual permit application has been approved. But as the district court explained, the agencies concede that no further programmatic environmental review of these treatments will be conducted. And it is "the effect of the action and not its label that must be considered." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006) (citations omitted). Here, the effect of the FONSI is that it provides the agencies' final word on the environmental impacts of the proposed action and concludes that the authorization of well stimulation treatments will not have a significant impact. This programmatic conclusion will not be revisited, so Plaintiffs here "are able to show . . . a completeness of action by the agency." *Kern*, 284 F.3d at 1070. Absent the proposed action approved in the EA, no permits could be sought.

We have repeatedly held that final NEPA documents are final agency actions. *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1318 (9th Cir. 1982); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 598 (9th Cir. 2010); *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2007); *Hall v. Norton*, 266 F.3d 969, 975, n.5 (9th Cir. 2001). We are bound by these decisions and see no reason to depart from that principle here. The NEPA review process concludes in one of two ways: (1) the agency determines through an EA that a proposed action will not have a significant impact on the environment and issues a FONSI, or (2) the agency determines that the action will have a significant impact and issues an EIS and record of decision. *See* 40 C.F.R. §§ 1505.2 (rec-

ord of decision), 1508.13 (FONSI). Final NEPA documents constitute "final agency action" under the APA, whether they take the form of an EIS and Record of Decision or an EA and FONSI, because they culminate the agencies' environmental review process.

We reject the agencies' claim that the EA and FONSI are merely their "first, preliminary steps toward making a decision about the use of well stimulation treatments in the federal waters off the California coast," particularly in the context of this litigation, where 51 permits authorizing well stimulation treatments were approved without environmental review. There is no argument or evidence that these 51 already-approved permits will be revisited, especially after the agencies approved unrestricted use of well stimulated treatments in the EA and FONSI. It would make no sense to have a full environmental impact evaluation on one permit or multiple individual permits without considering the total environmental impact of the full picture. Environmental law does not require a court to miss the forest for the trees. The agencies' programmatic approval is not insulated from judicial review.

The FONSI and programmatic EA satisfy the first prong of the *Bennett* test because they are the final step in the agencies' programmatic review under NEPA and reflect the agencies' determination that review under the CZMA is not warranted.

**2. The EA and FONSI determine rights and obligations and are actions from which legal consequences will flow**

The programmatic EA and ensuing FONSI also satisfy the second prong of the *Bennett* test for final agency actions. By finding that well stimulation treatments have

no significant environmental impact, the agencies have allowed the permitting process for these treatments to proceed. This return to the pre-settlement status quo and lifting of the moratorium on well stimulation treatments in the Pacific Outer Continental Shelf strongly affects the legal rights of oil companies, as demonstrated by Intervenors' involvement in this suit and DCOR's request for reconsideration of the judgment to allow the agencies to act on its pending applications. Also, the rights of Plaintiffs to further environmental review, and the obligation of the agencies to prepare a full EIS, are fully and finally determined by the FONSI and are not subject to any further administrative procedure. Legal consequences flow from the FONSI insofar as oil companies do not need to abide by any depth, discharge, or frequency limitations in their permit applications because the agencies have not imposed any such limitations on permit applications. In fact, the FONSI green lights the unrestricted use of well stimulation treatments, with no cautionary limitations.

The agencies urge us to look for a decision document outlining a binding plan that is separate from final NEPA documents for agency action to be "final," but they concede that their programmatic review of well stimulation treatments offshore California is complete. In fact, the agencies describe their "work left to do" as only reviewing and approving individual, site-specific permits. The conclusion of the programmatic environmental review of offshore well stimulation treatments determines rights, obligations, and legal consequences. The EA and FONSI meet the *Bennett* test for "final agency action," and we have subject matter jurisdiction over Plaintiffs' claims.

### B. Ripeness

The agencies also contest the ripeness of the NEPA and CZMA claims.[4] Their ripeness arguments echo their arguments contesting final agency action under the APA. Although they issued final NEPA documents, the agencies contend that Plaintiffs' claims are not ripe because the agencies have not yet issued a formal plan for well stimulation treatments or acted on site-specific permits. We review *de novo* questions of ripeness. *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1084 (9th Cir. 2003). We note at the outset that the agencies raise concerns of prudential ripeness, which are discretionary. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1140 (9th Cir. 2000). In any event, we conclude that the agencies' action satisfies the test for prudential ripeness as established in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

Evaluating ripeness in the agency context requires considering "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Id.* All three considerations support the conclusion that these claims are ripe for review.

First, delayed review would cause hardship to Plaintiffs because they are alleging only procedural violations in this case. Under NEPA, Plaintiffs challenge the agencies' decision not to issue an EIS; under the ESA, the

[4] Defendants challenge the ripeness of the ESA claim as well. Because NEPA and ESA have different language pertinent to ripeness, we address Defendants' challenge to ripeness on the ESA claim in our discussion of the ESA appeal *infra* Part IV.

agencies' failure to consult with wildlife experts; and under the CZMA, the agencies' failure to conduct a consistency review. Delaying review of these procedural injuries would cause hardship to Plaintiffs by denying them the fundamental safeguards provided by the three environmental statutes. The "asserted injury is that environmental consequences might be overlooked." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994). Delaying review would extend and compound the harms Plaintiffs allege. Programmatic environmental review "generally obviates the need" for subsequent review at the application level "unless new and significant environmental impacts arise." *Id*. at 1356. And any additional protective measures Plaintiffs could obtain by challenging the agency's conclusions later, at the time the agencies review specific applications, would only apply at the site-specific, not the programmatic, level. If the programmatic procedures offend the law, they should be reviewed now.

Second, reviewing Plaintiffs' claims at this point would not "inappropriately interfere with further administrative action." *Ohio Forestry*, 523 U.S. at 733. We have established that judicial review does not interfere with further administrative action when the agency's decision is at "an administrative resting place." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003). Here, the agencies' NEPA documents, and the decisions contained therein—not to issue an EIS, not to conduct a consistency review, and not to consult with the wildlife services—demonstrate that the agencies' decision making is at an administrative resting place. The agencies have concluded their programmatic review of well stimulation treatments offshore California and maintain that they have met their procedural obligations under the relevant environmental statutes. No further administrative action

will be required until oil companies submit permits for site-specific review. We hold that the final NEPA documents in this case constitute an administrative resting place for purposes of procedural injuries. *See Kern*, 284 F.3d at 1071.

Third, there is no need for "further factual development." *Ohio Forestry*, 523 U.S. at 733. For claims of procedural injury, we have held that the need for factual development ceases when the alleged procedural violation is complete. *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1084 (9th Cir. 2015).

Our ripeness analysis for claims brought pursuant to environmental statutes is affected by whether plaintiffs allege a procedural or substantive violation. This stems from *Ohio Forestry*, in which the Supreme Court distinguished between the ripeness of substantive and procedural claims brought under environmental statutes. 523 U.S. at 737. There, the plaintiff's substantive challenge under the National Forest Management Act to the agency's forest plans was unripe because the plans had not yet been implemented at the site-specific level. *Id.* at 739. Yet the Court specifically distinguished its holding from cases where procedural injuries are alleged, explaining that, by comparison, a person injured by "a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* at 737.

We have endorsed this distinction. *Cottonwood*, 789 F.3d at 1084; *Kern*, 284 F.3d at 1071; *Citizens for Better Forestry*, 341 F.3d at 977. In *Kern,* plaintiffs challenged an EA and an EIS for two proposed actions in an area along the Oregon coast. 284 F.3d at 1066. We concluded that both challenges were ripe and justiciable, differenti-

ating between the substantive claim at issue in *Ohio Forestry* and the procedural rights conferred by NEPA. *Id.* at 1071. Similarly, in *Citizens for Better Forestry*, we concluded that procedural claims challenging an agency's EA, FONSI, and failure to consult under the ESA were ripe, even though site-specific proposals had not been issued. 341 F.3d at 970-71. Site-specific action, we held, is "simply a factual coincidence, rather than a basis for legal distinction." *Id.* at 977. This is because the imminence or occurrence of site-specific action is irrelevant to the ripeness of procedural injuries, which are ripe and ready for review the moment they happen. Plaintiffs need not wait for the agencies to act on site-specific permits authorizing well stimulation treatments. Plaintiffs' procedural challenges under NEPA and the CZMA to the agencies' proposed action allowing the use of well stimulation treatments off the coast of California, as adopted in the final EA and FONSI, are immediately ripe for review.

## III. NEPA

After determining that we have subject matter jurisdiction over Plaintiffs' claims and that they are ripe for review, we assess first the merits of Plaintiffs' NEPA claims. The district court granted summary judgment to Defendants on these claims, which we review *de novo*, "applying the same standards that applied in the district court." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006) (citation omitted). Because judicial review of agency decisions under NEPA is governed by the APA, we must consider whether the agencies complied with NEPA's requirements under the APA's deferential arbitrary and capricious standard. *Id.* An agency's action is arbitrary and capricious "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or

offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1257 (9th Cir. 2017) (quoting *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013)); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-48, 55-57 (1983) (holding that agency action was arbitrary and capricious where the agency "did not even consider" a reasonable alternative that was made known to it and also "failed to articulate a basis" for its action).

NEPA is the statute that launched the environmental movement in the 1970s. Richard J. Lazarus, *The Making of Environmental Law*, 64-67 (2004). It is the "basic national charter for protection of the environment" and, coincidentally, was borne out of a catastrophic oil spill from drilling offshore California. 40 C.F.R. § 1500.1(a); NEPA is at its heart a procedural statute and requires federal agencies to take a "hard look" at the environmental consequences of their actions. *Kern*, 284 F.3d at 1066 (quotation omitted). NEPA requires agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). In this review, the agency must evaluate the environmental impact of its proposed action as well as "alternatives to the proposed action." *Id.* If an agency is unsure whether its proposed action will have significant environmental impacts, it may first prepare an EA. An EA is a "concise, public document" providing "sufficient evidence and analysis" for the agency to determine "whether to prepare an environmental impact statement." 40 C.F.R § 1508.9 (a)(1). Thus, an EA is intended to help an agency decide if an EIS is warranted; an EA is not meant to replace or

substitute for an EIS. *Anderson v. Evans*, 314 F.3d 1006, 1023 (9th Cir. 2002).

When reviewing an EA, we examine it "with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008).

Plaintiffs allege that the agencies violated NEPA in two ways. First, Plaintiffs allege that the agencies violated NEPA because the agencies' EA is inadequate and does not constitute a "hard look" of the environmental impacts of allowing well stimulation treatments offshore California. Specifically, Plaintiffs contend that in issuing the EA, the agencies relied on erroneous assumptions, used too narrow of a statement of need and purpose, and did not consider a reasonable range of alternatives. Second, the environmental groups additionally contend that the agencies violated NEPA by failing to prepare an EIS. The type of NEPA violation impacts the relief that should be granted, *i.e.*, whether to vacate the existing EA for preparation of a new one or whether to remand with orders to prepare a full EIS. We consider each alleged NEPA violation in turn.

**A.**

Plaintiffs first allege that the agencies' EA is inadequate and violates NEPA because the agencies relied upon erroneous assumptions instead of taking the requisite "hard look" at the potential environmental effects of

authorizing well stimulation treatments offshore California. NEPA requires agencies to take a "hard look" at the environmental effects of a proposed action before implementing it. To take the requisite hard look, an agency "may not rely on incorrect assumptions or data" in arriving at its conclusion of no significant impacts. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). But Plaintiffs contend that the agencies reached their conclusion of no significant impacts by relying on incorrect assumptions. We agree.

**1. The faulty assumption that well stimulation treatments would not occur frequently in this region**

The central assumption underlying the agencies' entire EA, and driving their conclusion of no significant impact, is that the use of well stimulation treatments in the Pacific Outer Continental Shelf would happen so infrequently that any adverse environmental effects would be insignificant. Based on the available data for past well stimulation treatment usage and the expected future industry needs, the agencies used what they considered to be a "reasonable forecast of up to five WSTs per year" for all three "action alternatives" evaluated in the EA. Plaintiffs challenge this assumption, and for good reason.

Plaintiffs point to record evidence attacking the historical data used by the agencies. The district court acknowledged the historical data relied upon by the agency "may not have been perfect" but found that it was not "so unreliable" as to be arbitrary and capricious for the agencies to have based their entire projections on it. We disagree. Plaintiffs raise legitimate doubts about the agencies' recordkeeping of well stimulation treatments and the reasonableness of relying on flawed recordkeeping to formulate an estimate for evaluating environmental impacts under NEPA.

The agencies do not know the actual number of well stimulation treatments that have occurred on the Pacific Outer Continental Shelf because data collection has been incomplete. At the time the EA and FONSI were published, no "formal data collection system [had] been set up" to track the use of offshore well stimulation treatments in federal waters. Critically, the agencies' contention in the EA that only six well stimulation treatments have been approved on the Pacific Outer Continental Shelf since 2000 is at odds with the numbers that are known. The impetus to this litigation was that the agencies had approved 51 permits without conducting environmental review. A 2016 email among BSEE officials regarding what numbers to use in the EA confirms this. In the email, one official admitted that the agency was "sued on 13" acidizing jobs but "a lot more routine acid jobs have taken place" and they "do not have [a] number between 1984-2011." This email also reveals that the agency had found more instances of fracking "that were not in the lawsuit." In another email, BSEE officials decided to "leave EA Table 4-1 as is in the absence of definitive information on additional WSTs" because "it appears that there is not enough information . . . to identify WSTs." A BSEE spokesperson acknowledged that the agency "cannot be sure just how often fracking has been allowed." EDC's analysis of information gathered from the FOIA requests determined that at least 15 instances of fracking alone occurred offshore California in federal waters.

Aside from questionable and inconclusive historical records, Plaintiffs also raise legitimate questions about the soundness of the agencies' estimates of future usage of well stimulation treatments in the Pacific Outer Continental Shelf given the age of the reservoirs in this region and their declining production, as noted by the EA. The agencies' response in the EA that the reservoirs offshore

California "are already highly fractured," which decreases the need for well stimulation treatments, conflicts with statements made by Intervenors that the wells in this region "lack any value or utility" without the approval of well stimulation treatments. It is also at odds with the agencies' analysis of the no action alternative in the EA, in which the agencies warn that wells in the Pacific Outer Continental Shelf may have to close if well stimulation treatments are not authorized.

The gaps and errors underlying the agencies' assumption about well stimulation treatment use would not be as critical if this assumption was not central to the agencies' finding of no significant impact. But the agencies repeatedly relied upon the purported infrequent use of these treatments as a basis for concluding no significant impacts would occur from offshore treatments with respect to accidents, induced seismicity, air quality, water quality, ecological resources, and fisheries. In response to the repeated reliance on low estimates of well stimulation treatments in the draft EA, the California Coastal Commission commented that the agencies should "examine several scenarios of future WST activity" in the final EA and "identify thresholds at which environmental effects become significant" to place the impacts (or lack thereof) in context and provide a guide for when additional analysis would be needed if the agencies' estimates prove to be inaccurate. Nevertheless, the agencies continued to rely on the infrequent use of well stimulation treatments as the driving force behind their finding of no significant impact in the final EA and FONSI. We agree with Plaintiffs that the agencies' excessive reliance on the asserted low usage of well stimulation treatments distorted the agencies' consideration of the significance and severity of potential impacts.

Because the EA's finding relied on the incorrect assumption that well stimulation treatments would be infrequent, we conclude that the agencies acted arbitrarily and capriciously by offering an analysis that ran "counter to the evidence before the agency," *Zinke*, 856 F.3d at 1257, and that they failed to take the requisite hard look by "rely[ing] on incorrect assumptions or data" in arriving at their conclusion. *Native Ecosystems Council*, 418 F.3d at 964.

**2. The assumption that an EPA permit would render impacts insignificant**

The agencies also acted arbitrarily and capriciously by assuming in the EA that compliance with a permit issued by the EPA under the Clean Water Act, the National Pollution Discharge Elimination System General Permit ("NPDES permit"), would render the impacts of well stimulation treatments insignificant.

We have previously held that agencies cannot "tier" their environmental review under NEPA to assessments of similar projects that do not "actually discuss the impacts of the project at issue." *South Fork Band Council of Western Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). Nor have we allowed federal agencies to rely on state permits to satisfy review under NEPA. *Id.*; *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004). The same concerns apply here, and we see several issues with the agencies relying on the NPDES permit to conclude that any impacts from offshore well stimulation treatments to the marine environment would be insignificant. The NPDES permit is issued by a different federal agency, and it does not specifically address "the impacts of the project at issue." *South Fork Band Council*, 588 F.3d at 726.

First, the NPDES permit was not created or intended to be used for the offshore well stimulation treatments at issue in this appeal. The EPA developed the NPDES permit in 2014 to broadly regulate discharges from a range of offshore oil and gas activities. However, the NPDES permit does not require monitoring for the most common well stimulation treatment fluids. In their comments on the draft EA, Plaintiffs highlighted the risks of relying upon the NPDES permit, explaining that the "NPDES General Permit contains no limitations on the discharge of specific WST chemicals."

Second, the imperfect fit of *what* the NPDES permit requires operators to monitor is compounded by an imperfect fit on *when* the NPDES permit requires monitoring. The whole effluent toxicity ("WET") testing required by the permit is inadequate to measure the impacts of well stimulation treatments because WET testing is not conducted in conjunction with the use of well stimulation permit broadly encompassing discharges from all offshore oil and gas activities, WET testing is required only on a quarterly basis, which diminishes to annual testing after four consecutive "passing" tests. The agencies acknowledged in the EA that fluids from well stimulation treatments may not actually be present in samples from WET testing because of this timing problem. Internal emails among Department of Interior officials reveal that the monitoring reports associated with the NPDES permit do not contain enough information to identify well stimulation treatments. In the final EA, the agencies minimize the concern over the inadequacy of testing under the NPDES permit by stating that the permit also requires visual monitoring and oil and grease sampling in addition to WET testing. But the agencies do not explain how visual monitoring or oil and grease sampling would account for the permit's lack of toxicity testing for the constituents

specifically discharged from well stimulation treatments. The missing data and unknown impacts that Plaintiffs raise concern the toxicity of the chemicals, not the potential for oil spills, and toxicity cannot be accessed visually. Annual testing that is not conducted in conjunction with the occurrence of well stimulation treatments, and does not test the specific constituents used in the well stimulation treatments, is inadequate to assess the impacts of those treatments.

Third, the EPA—not BOEM or BSEE—oversees the NPDES permit. The district court dismissed Plaintiffs' concerns about the adequacy of testing under the NPDES permit as a mere "wish that EPA would test more frequently." This reasoning only highlights the problem of BOEM and BSEE relying on a general permit issued by the EPA to evaluate the impacts from specific well stimulation treatments. Though the NPDES permit, in theory, could be modified to test the most common fluids used in offshore well stimulation treatments, or be modified to require testing in conjunction with the use of these treatments, the agencies responsible for conducting the NEPA review do not control the permit upon which they rely.

Like the assumption concerning the infrequent use of well stimulation treatments, the agencies repeatedly relied on the NPDES permit to conclude that the proposed action would not significantly affect the environment. The agencies relied on the NPDES permit and its testing to find that impacts of the proposed action would be minimal on marine and coastal fish, marine birds, sea turtles, and fisheries. The agencies acted arbitrarily and capriciously by relying, in significant part, on these two flawed assumptions throughout the EA, *see Native Ecosystems Council*, 418 F.3d at 964. As a result, the EA is inade-

quate, and the agencies violated NEPA by failing to take the requisite hard look.

**B.**

Plaintiffs also contend that the EA violates NEPA because the agencies failed to consider a reasonable range of alternatives and relied upon too narrow a statement of "purpose and need" in the EA. NEPA requires agencies to consider alternatives to their proposed action, 42 U.S.C. § 4332(C)(iii), regardless whether an agency issues an EA or EIS. As we held in *Western Watersheds Project v. Abbey*:

> NEPA's requirement that agencies "study, develop, and describe appropriate alternatives . . . applies whether an agency is preparing an [EIS] or an [EA]." Although an agency must still "give full and meaningful consideration to all reasonable alternatives" in an environmental assessment, the agency's obligation to discuss alternatives is less than in an EIS. "The existence of a viable but unexamined alternative renders an [EA] inadequate."

719 F.3d 1035, 1050 (9th Cir. 2013) (alteration in original) (citations omitted). In considering which alternatives to analyze, agencies must provide a "detailed statement" regarding why they were eliminated or not considered. 40 C.F.R. §§ 1502.14(a); 1508.9(b)

**1. Purpose and need statement**

Whether the range of alternatives considered is reasonable is to some degree circumscribed by the scope of the statement of "purpose and need," so we begin our analysis there. *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Agencies enjoy a good deal of discretion in framing the "purpose and need"

of an EA or EIS, *id*. at 866, but the statement cannot "unreasonably narrow[] the agency's consideration of alternatives so that the outcome is preordained." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084-85 (9th Cir. 2013).

Here, the EA explains the "purpose of the proposed action (use of certain WSTs, such as hydraulic fracturing) is to enhance the recovery of petroleum and gas from new and existing wells on the [Pacific Outer Continental Shelf], beyond that which could be recovered with conventional methods." And the need is "the efficient recovery of oil and gas reserves" from the Pacific Outer Continental Shelf. California contends that by defining the purpose of the EA in terms of the proposed action, the agencies predetermined the outcome. California stresses the EPA's comments on the draft EA, in which the EPA recommended that BOEM and BSEE revise the EA's "purpose and need" statement because "[s]uch a narrow and prescriptive statement identifies a solution, rather than the underlying need."

While the "purpose and need" statement is narrow, it does not necessarily fail under our deferential standard of review. The district court found that the "purpose and need" statement was "largely a product of the settlement agreements." The settlement agreements required the agencies to evaluate the environmental effects of continuing to approve well stimulation treatments, which explains why they framed the "purpose and need" statement in this way. The focus of the EA was naturally affected by the settlement agreements. In light of the discretion we must afford the agencies, we do not agree with Plaintiffs that the EA's statement of "purpose and need" unduly constrained the agencies' consideration of alternatives regarding the use of well stimulation treatments.

**2. Reasonable range of alternatives**

That the statement of "purpose and need" did not violate NEPA's procedural commands does not necessarily mean that the agencies considered a reasonable range of alternatives, which is the question to which we next turn. Agencies do not have to consider infinite, unfeasible, or impractical alternatives, but they must consider reasonable ones. *Westlands Water*, 376 F.3d at 868. The existence of a "viable but unexamined alternative" renders the environmental review conducted under NEPA inadequate. *Id.* (citation omitted).

Here, the proposed action that the agencies examined in the EA was allowing the use of well stimulation treatments on the Pacific Outer Continental Shelf without restriction. The agencies also examined three alternatives: (1) authorizing well stimulation treatments at depths more than 2,000 feet below the seafloor surface; (2) authorizing well stimulation treatments but prohibiting the open water discharge of waste fluids, and (3) prohibiting the use of well stimulation treatments altogether (the "no action" alternative that NEPA requires agencies to consider). In the EA, the agencies acknowledged that the three "action alternatives" they considered were similar because they all "include the use of the same four types of WST" so the "nature and magnitude" of any impacts will be similar. Plaintiffs argue that the lack of any meaningful difference among the alternatives did not allow the informed decision making that NEPA requires.

California and other commenters had suggested specific alternatives for the agencies to consider in the final EA, such as prohibiting well stimulation treatments in specific locations or at particular times of year, requiring the disclosure of well stimulation treatment constituents

and additives, requiring notice to be given to state agencies and the public before well stimulation treatments are conducted, requiring testing of well stimulation fluids, or limiting the number of well stimulation treatments in a given year. Responding to these proposed alternatives in the Final EA, as they were required to do, the agencies summarily dismissed them. The agencies concluded in the appendix: "There were no commenters who proposed that the [programmatic EA] include a wider range of alternatives that also suggested an additional alternative for review that would lend itself to meaningful analysis." The agencies gave no explanation for why the alternatives proposed did not lend themselves to meaningful analysis. In the body of the EA, the agencies discussed in more detail a few alternatives that they had considered but eliminated, but these alternatives involved imposing stipulations on fluid volume, constituents, and pressure. The eliminated alternatives relate in substance to only one of the alternatives that Plaintiffs and other commenters suggested the agencies consider.

We conclude that the agencies did not meet their obligation under NEPA to "give full and meaningful consideration to all reasonable alternatives." *Western Watersheds*, 719 F.3d at 1050 (citation omitted). We first address the proposal to limit the number of treatments per year. The agencies contend that there was no need to consider such an alternative because they "already had one alternative that allowed zero treatments and another alternative that allowed up to five," so an alternative that allowed "some number in between" would have been unnecessary. The agencies principally rely on *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004 (9th Cir. 2013), a case in which we determined that an agency did not need to consider a "middle ground" alternative between zero and six airstrips for a proposed action.

The district court found this argument persuasive, but the district court and the Defendants both mistakenly assumed that the proposed action in the EA was limited to five well stimulation treatments per year. In granting summary judgment to Defendants on the NEPA claims, the district court erroneously concluded that the EA "examined a proposal for allowing up to five WST approvals per year" so "there was no need for the agencies to consider imposing different limits on the number of WSTs" allowed per year. This relies upon a misreading of the EA.

Nowhere in the text of "Alternative 1: Proposed Action—Allow Use of WSTs" is there any limit on the number of well stimulation treatments imposed. The agencies argue that they use "a reasonable forecast of . . . up to five WST applications per year" to calculate potential impacts. In discussing the other "action alternatives" in the EA, the agencies note that these alternatives too are premised on—but not limited to—five well stimulation treatments per year "to analyze the potential impacts."

The proposed action does not have a five treatments-per-year limit (nor do any of the actions, for that matter). Rather, the agencies used a five-per-year estimate to calculate environmental impacts. Commenters flagged that the EA does not actually limit the use of well stimulation treatments to five per year and that the agencies should revise their analysis in the final EA to account for the possibility that more well stimulation treatments will be used than they estimate. It was highly arbitrary for the agencies repeatedly to premise their finding of no significant impact on a limit of five well stimulation treatments per year, without in fact considering an alternative that imposed such a five-treatment limit.

The agencies have asserted in their briefing what they contend are persuasive reasons as to why the other alternatives proposed by commenters were not considered by the agencies. They contend that agencies can already access a website that gives them notice of well stimulation treatments. They also contend that they could not require the disclosure of fluid constituents because some of the chemicals are proprietary to the oil companies. These reasons fail because they are post-hoc rationalizations not contained in the Final EA. As such, we may not consider them, given the well-established principle that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself" rather than "appellate counsel's *post hoc* rationalizations." *Or. Nat'l Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1120 (9th Cir. 2010) (citations omitted); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

NEPA requires agencies to "give full and meaningful consideration" to all viable alternatives "in [the] environmental assessment"—not in appellate briefing after the fact. *Western Watersheds*, 719 F.3d at 1050 (citation omitted). We hold that the agencies violated NEPA by failing to consider a reasonable range of alternatives in the EA.

In summary, the agencies' EA is inadequate both because the agencies failed to take the requisite "hard look" by relying on incorrect assumptions and also because the agencies did not consider a reasonable range of alternatives in the EA.

**C.**

The environmental groups also challenge the agencies' decision not to prepare an EIS as a separate violation of NEPA. An EIS must be prepared if there are "substantial

questions" regarding whether the agency's proposed action may have significant impacts. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th Cir. 2005). In challenging an agency decision not to prepare an EIS, plaintiffs need not prove that significant environmental effects *will* occur; they need only raise a "substantial question" that they might. *Id.* This presents a "low standard" that is permissive for environmental challenge. *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (citation omitted). When challenged actions are novel, there is more need for an EIS. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 177 (2010) (Stevens, J., dissenting) (noting that an EIS is especially important where the environmental threat is novel). If the agency does not prepare an EIS, it must submit a "convincing statement of reasons" to explain why the proposed action's environmental impacts will not be significant. *Ocean Advocates*, 402 F.3d at 864 (citation omitted). Conclusory assertions about insignificant impacts will not suffice. *Id.* Here, the environmental impacts of extensive offshore fracking are largely unexplored, making it *terra incognita* for NEPA review. For this reason, among others, the important issues here warranted a full NEPA analysis in an EIS. We hold that the agencies acted arbitrarily and capriciously by not preparing an EIS, and by limiting their assessment to an EA that did not fully evaluate the environmental impacts of fracking.

The NEPA regulations in effect at the time the agencies issued the EA set forth criteria for the agencies to consider when determining whether an action will significantly affect the environment and consequently requires

a full EIS. 40 C.F.R. § 1508.27.[5] These regulations required an agency to consider "both context and intensity." *Id*. Context refers to the setting and circumstances of the proposed action, including "society as a whole (human, national), the affected region, the affected interests, and the locality." *Id*. § 1508.27(a). Intensity "refers to the severity of impact" and requires analysis of ten specific factors. *Id*. § 1508.27(b). Meeting just one of these "significance factors" may be sufficient for us to require an agency to prepare an EIS, *Ocean Advocates*, 402 F.3d at 865, but here we find multiple factors met.

### 1. Offshore well stimulation treatments may adversely affect endangered or threatened species

One significance factor is whether the action "may adversely affect an endangered or threatened species." 40 C.F.R. § 1508.27(b)(9). After the agencies issued the EA and FONSI and were sued because of the lack of consultation under the ESA, the agencies belatedly commenced consultations with the requisite wildlife agencies. In doing so, the agencies advised that they concluded that the western snowy plover, the California least tern, and the southern sea otter all were likely to be adversely affected by oil spills. This finding of adverse effects, especially *after* the EA was published, is *prima facie* evidence that an EIS should have been prepared. And in responding to the agencies' request for formal consultation, the Fish and Wildlife Service demanded additional information in order to address potential effects to other endangered species. This significance factor is readily met.

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[5] The NEPA regulations have been revised, 85 Fed. Reg. 43,304 (July 16, 2020), but we look to the regulations in place at the time of the challenged decision. *See, e.g.*, *California v. Norton*, 311 F.3d 1162, 1167 n.2 (9th Cir. 2002).

**2. Well stimulation treatments in the Pacific Outer Continental Shelf would affect unique geographic areas**

Another significance factor weighing in favor of an EIS is that the authorization of well stimulation treatments in this region affects unique geographic areas. 40 C.F.R. § 1508.27(b)(3). The regulations require agencies to consider the existence of "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources." *Id.* The Santa Barbara Channel, where most of the offshore drilling on the Pacific Outer Continental Shelf takes place, is a unique area with proximity to "park lands . . . or ecologically critical areas." *Id.* Many of its waters and islands have special designation, including the Channel Islands National Park and Marine Sanctuary. The amicus brief filed by Members of Congress refers to the area as the "Galapagos of North America" and notes that 25 endangered species are present in the channel on a seasonal or permanent basis.

In the Final EA, the agencies responded to concerns about the unique characteristics of the area by asserting that the platforms' distance from the Channel Islands Marine Sanctuary would mitigate any effects to the area. But Plaintiffs contend that the entire Santa Barbara Channel region is a unique and globally important ecosystem: "Cool, subarctic waters converge with warmer, equatorial waters in the Channel, fostering a richness of marine and other wildlife, including blue, fin, humpback, minke, and killer whales, porpoises, dolphins, pinnipeds (seals and sea lions), the southern sea otter, and hundreds of species of birds, fishes, and invertebrates." These species rely on the entire Channel, not just the Park and Sanctuary, for their survival and recovery. And the affected area also has "proximity to historic or cultural resources" including the

submerged remains of the Chumash people. Congress expressly designated the Channel Islands National Park to protect important cultural resources, including "archaeological evidence of substantial populations of Native Americans." 16 U.S.C. § 410ff(6). This significance factor satisfies the standard we apply to evaluate whether preparing an EIS is required.

### 3. The effects of offshore well stimulation treatments are highly uncertain and involve unknown risks

An EIS is also warranted when the possible effects of the proposed action are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). The lack of data regarding the toxicity of well stimulation fluids, and the uncertainty this poses for evaluating the potential environmental effects of the proposed action, counsels us that an EIS should have been prepared. The agencies lack toxicity data for "31 of the 48 distinct chemicals" used in offshore well stimulation treatments. During the period for public comment on the agencies' draft EA, scientists identified as a critical data gap the fact that "no studies have been conducted on the toxicity and impacts of well stimulation fluids discharged in federal waters." They urged the agencies to conduct a full EIS due to the "many data gaps and uncertainties." The regulatory body in California that supervises oil and gas development, the Division of Oil, Gas, and Geothermal Resources, also commented on the draft EA that "effects of discharging WST fluids on marine life are not fully understood due to the lack of toxicity data" and urged the agencies to conduct toxicity testing to address this gap.

An agency must prepare an EIS where uncertainty regarding the environmental effects of a proposed action may be resolved through further data collection. *Nat'l Parks & Conserv. Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th

Cir. 2001), *abrogated on other grounds by Monsanto*, 561 U.S. 139. In *Babbitt*, we held that the National Park Service needed to prepare an EIS before authorizing more cruise ships to enter Glacier Bay National Park because of the level of uncertainty posed by increased vessel traffic. 241 F.3d at 731-733. We concluded that the agency's statement of reasons for why the missing information could not be obtained was unconvincing, and we explained that an agency's "lack of knowledge does not excuse the preparation of an EIS; rather it requires the [agency] to do the necessary work to obtain it." *Id.* at 733.

In the final EA and FONSI, the agencies acknowledged the "unknown toxicity of WST fluid constituents" but concluded that the uncertainty is mitigated by several factors. First, the agencies assert that they know the toxicity values of many of the chemicals used in the treatments. Second, the chemicals will be diluted with seawater. Third, the agencies assert that they have no reason to believe that chemicals for which they have no toxicity data are likely to be more toxic than the chemicals for which they have toxicity data. Fourth, the agencies contend that historical discharges of water containing trace amounts of similar chemicals have been discharged into the ocean "for decades" and studies have not detected significant effects. The agencies also contend that it would be impossible to test the toxicity of every chemical used in well stimulation treatments against every potentially exposed species.

We are not persuaded that this reasoning is permissible as a basis to avoid preparing an EIS evaluating alternatives to introducing novel and toxic chemicals in the marine environments at risk here. That the well stimulation fluids will be diluted with seawater does not excuse the data gaps regarding the specific "effects of discharging

WST fluids on marine life" nor the lack of data on the "chronic impacts of these chemicals" in seawater. The record reflects that some well stimulation treatment fluids have been tested on land, but this does not help us to assess the unknown effects of these fluids in a marine environment. That the agencies know the toxicity of *some* chemicals used in well stimulation treatments does not adequately respond to the concerns raised about the uncertainty of how these chemicals interact when mixed together, when interacting with subsurface minerals, or when coming into contact with surrounding formation rock. The regulations implementing NEPA require agencies to obtain missing information when it is "essential to a reasoned choice" and the costs of obtaining it are not "exorbitant." 40 C.F.R. § 1502.22(a). The agencies have not provided convincing reasons for why these data gaps are not essential or could not be mitigated through further study. Nor did they consider, as discussed above, an alternative that allows offshore well stimulation treatments but requires testing to help fill in these data gaps. Guesswork by the agencies does not discharge their responsibilities under NEPA.

The importance of gathering more information about the toxicity of well stimulation treatment fluids is important here where the programmatic EA represents the first time the agencies have analyzed the environmental impacts of offshore well stimulation treatments. We can agree with the agencies that they need not test every chemical against every marine species. But Plaintiffs point to the lack of toxicity data not to suggest that the agencies must test every chemical but that the unknown risks posed by these chemicals warrant fuller review of the proposed action through an EIS. "No matter how thorough, an EA can never substitute for preparation of

an EIS, if the proposed action could significantly affect the environment." *Anderson*, 314 F.3d at 1023.

Defendants' reliance on *Salmon River Concerned Citizens v. Robertson* is unpersuasive. In *Salmon River*, we upheld the agency's analysis of the effects of herbicide formulation when toxicity data was missing for some of the ingredients. 32 F.3d 1346, 1358-60 (9th Cir. 1994). An important point overlooked by Defendants, however, is that the agencies in that case *had* prepared an EIS and had taken steps to reduce uncertainty regarding the missing information. *Id.* at 1358 n.21. The lack of toxicity data in *Salmon River* and the preparation of an EIS in that case give more reason to believe that an EIS should have been prepared in this situation, where there is a lack of toxicity data and the effects of well stimulation fluids pose unknown risks. The record establishes that Plaintiffs have raised "substantial questions" relating to several significance factors about the effects of allowing well stimulation treatments offshore California.[6] We hold that the agencies violated NEPA by not providing an EIS on the effects of authorizing offshore well stimulation treatments.

**D.**

To summarize our discussion of the alleged NEPA violations, we are compelled to conclude that the agencies did not take the "hard look" mandated by NEPA. They relied on flawed assumptions in the EA that distorted and rendered irrational their finding of no significant impact. They did not give full and meaningful consideration to a reasonable range of alternatives. This failure to take the

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[6] Having determined that several significance factors are present and an EIS is warranted, we need not reach Plaintiffs' additional arguments that the impacts of offshore well stimulation treatments are highly controversial or that the agencies did not adequately analyze the cumulative impacts of allowing well stimulation treatments.

requisite "hard look" renders the EA inadequate under NEPA. The agencies also should have prepared a full EIS in light of the unknown risks posed by the well stimulation treatments and the significant data gaps that the agencies acknowledged. NEPA review cannot be used "as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). But that appears to be what happened here. The agencies, which had already ventured down the path of allowing well stimulation treatments without environmental review until they were sued by the environmental groups, did not give a meaningful assessment of reasonable alternatives, offered post-hoc rationalizations for their decision, and disregarded necessary caution when dealing with the unknown effects of well stimulation treatments and the data gaps associated with a program of regular fracking offshore California in order to increase production and extend well life.

We reverse the district court's grant of summary judgment upholding the EA and hold that the agencies violated NEPA both because their EA was inadequate and also because they should have prepared an EIS. We vacate the inadequate EA, which is the presumptive remedy for agency action that violates the NEPA as reviewed through the APA. *See All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). We remand to the district court with instructions to amend its injunction to prohibit the agencies from approving permits for well stimulation treatments until the agencies have issued an EIS and have fully and fairly evaluated all reasonable alternatives.

## IV. ESA

The environmental groups also sued the agencies under the ESA, alleging that they violated the ESA's consultation requirement. On this issue, the district court granted summary judgment to Plaintiffs, and Defendants appeal. We review this issue *de novo*. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012). The agencies' sole argument in appealing the district court's ESA ruling is that the ESA claim is not ripe. They argue that there was no "agency action" requiring consultation. The district court rejected this argument, as do we.

The fundamental purpose of the ESA is to conserve endangered and threatened species as well as their critical habitats. 16 U.S.C. § 1531(b). The ESA provides protections for listed species such as prohibiting unauthorized taking of the species, preserving necessary habitat for species' survival, and, as pertinent here, requiring consultations with expert wildlife agencies about the risks to wildlife species from any proposed federal action. Section 7(a)(2) of the ESA requires agencies to consult with expert wildlife agencies to ensure that any agency action "is not likely to jeopardize" any endangered or threatened species or result in the "adverse modification" of their habitats. *Id.* § 1536(a)(2). The statute defines agency action as "any action authorized, funded, or carried out" by an agency. *Id.*; *see also* 50 C.F.R. § 402.02 (further defining agency action as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies"). Depending on the species, the federal agency must consult with one of two expert wildlife agencies, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service. The ESA's implementing reg-

ulations require agencies to review proposed actions "at the earliest possible time." 50 C.F.R § 402.14(a).

The ESA provides for two types of consultation. Informal consultation is proper if the acting federal agency concludes that its action is not likely to adversely affect any species listed in the ESA. 50 C.F.R. § 402.13(a). If the wildlife expert agency concurs in writing, informal consultation is complete, and no further action is required under the ESA. *Id.* § 402.13(c). If, on the other hand, the acting agency concludes that its proposed action is likely to adversely affect any listed species, formal consultation is required. *Id.* § 402.14(a). In the case of formal consultation, the acting agency must first prepare a biological assessment, and then send a letter to the expert wildlife agency requesting formal consultation and providing information about the proposed action. *Id.* § 402.14(c). The expert wildlife agency will then prepare a biological opinion that determines whether the action is likely to cause "jeopardy" for a listed species or its critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. §§ 402.14(g), (h).

Here, the agencies did not engage in consultation before issuing the EA. In the final EA, they responded to comments expressing concern over the lack of ESA consultation, explaining that they believed consultation was unnecessary because the EA is a "decision support tool for future proposals" but does not approve any well stimulation treatments itself. After being sued over the lack of consultation, and a week before filing their motion to dismiss, the agencies initiated the ESA consultation process by sending biological assessments to the expert wildlife agencies. In the biological assessment sent to the National Marine Fisheries Service, BOEM and BSEE determined that no species would likely be adversely affected by the use of well stimulation treatments. The National Marine

Fisheries Service concurred in the agencies' no adverse effects determination, which concluded the ESA consultation process because no formal consultation was required. For species under the jurisdiction of the Fish and Wildlife Service, BOEM and BSEE determined that three species—the western snowy plover, California least tern, and southern sea otter—were likely to be adversely affected by oil spills. The Fish and Wildlife Service requested more information before beginning formal consultation, which was required because of the agencies' conclusion that three species were likely to be adversely affected.

The district court held that the ESA claim regarding the initial failure to consult with the National Marine Fisheries Services was cured, and consequently mooted, by completion of the consultation with that agency. But because the agencies had not completed consultation with the Fish and Wildlife Service, the district court held that this claim was not moot. BOEM and BSEE have advised us that consultation with the Fish and Wildlife Service is still ongoing, making this claim ripe for our review.

We use a two-step test to determine whether an action qualifies as a sufficient "agency action" under the ESA. First, relying on the text of the statute, which is always the appropriate starting place for analysis, *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011), we consider whether an agency "affirmatively authorized, funded, or carried out the underlying activity." *Karuk Tribe*, 681 F.3d at 1021. If this standard is met, we next determine whether the action was discretionary, in this context meaning that the agency had "some discretion to influence or change the activity for the benefit of a protected species." *Id.*

The district court correctly held that by issuing the EA and FONSI for the proposed action of allowing well

stimulation treatments offshore California, the agencies "affirmatively authorized" private companies to proceed with these treatments. In a case such as this where a mix of federal and private action is involved, *Karuk Tribe* instructs that there is agency action for ESA purposes if the agency made an "affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed." *Id.* at 1027. There, we held that the Forest Service violated the ESA by not consulting with wildlife agencies before approving four notices of intent to conduct mining activities within a national forest. *Id.* at 1022-27. The approval of the notices of intent "affirmatively decide[d] to allow the mining to proceed," even though, like here, the private companies would still need to obtain subsequent federal permits before conducting the challenged activity. *Id.* at 1024. By issuing the EA and FONSI, and concluding that well stimulation treatments would have no significant impact, the agencies "affirmatively decide[d]" to allow the treatments to proceed. *Id.*

The second step of the *Karuk Tribe* test is also met because the agencies had "discretion to influence or change the activity for the benefit of a protected species." *Id.* at 1021. This standard is met by agency action that itself does not directly authorize private activity but rather establishes criteria for *future* private activity and has an "ongoing and long-lasting effect." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994); *see also Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1031-33 (9th Cir. 2005), *abrogated on other grounds as recognized in Cottonwood*, 789 F.3d at 1089 (holding that the agency's registration of pesticides triggered ESA consultation even though implementation of the pesticides might approve additional, later approvals). In *Pacific Rivers*, we rejected the Forest Service's argument that the ESA did not apply to programmatic documents that themselves

did not "mandate any action." 30 F.3d at 1055. We disagreed, concluding that these programmatic documents constituted agency action because they "set forth criteria" that would influence future activities. *Id.*

The agencies argue that these cases do not apply here because the EA did not establish binding criteria for well stimulation treatment use. This argument is without merit. Throughout the EA, the agencies presented and dismissed alternative options that would have imposed restrictions affecting the oil companies' subsequent applications. In other words, the agencies had "discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe*, 681 F.3d at 1021. Choosing the alternative without any restrictions as their proposed action sets an unregulated and uncontrolled future direction for the use of well stimulation treatment. The agencies rejected Alternative 2, which set depth restrictions. They also rejected Alternative 3, which set discharge restrictions. The agencies implemented no restrictions whatsoever. The agencies should not enjoy insulation from ESA consultation for selecting the alternative *without* restriction. In substance, the agencies decided to let fracking proceed unregulated.

The programmatic analysis and approval of the use of offshore well stimulation treatments without restriction in the EA and FONSI meets our definition of "agency action." The agencies make no other arguments about the merits of the ESA claims brought by the environmental groups. Concluding that the proposed action in the agencies' EA and FONSI constitutes "agency action" under the ESA, we affirm the district court's grant of summary judgment to the environmental groups on the ESA claims.

## V. CZMA

We next turn to California's CZMA claim. Congress enacted the CZMA to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. § 1452(1). When a "Federal agency activity" affects the coastal zone of a state, the CZMA requires the federal agency to review the proposed activity and determine whether it is consistent with the affected state's coastal management program. *Id.* § 1456(c)(1)(A). California alleges that the agencies violated the CZMA because they did not conduct a consistency review to determine whether the use of offshore well stimulation treatments is consistent with California's coastal management program. The agencies contend that the proposed action in the programmatic EA and FONSI is not a "Federal agency activity" and does not warrant CZMA consistency review because private companies would still have to obtain permit approval before performing well stimulation treatments.

Upon *de novo* review of this question of statutory interpretation, we agree with the district court that the agencies' proposed action to allow well stimulation treatments in the Pacific Outer Continental Shelf qualifies as a "Federal agency activity" under § (c)(1) of the CZMA. We hold that the agencies violated the CZMA by failing to conduct the requisite consistency review with California's coastal management program. Summary judgment was properly granted to California on the CZMA claims.

### A.

Whenever a "Federal agency activity" may affect a state's coastal zone, the CZMA requires review of the action to confirm that it is consistent with the affected

state's coastal management program. 16 U.S.C. § 1456. Not all consistency review under the CZMA is the same, however. If the federal agency takes the action itself, then § 1456(c)(1) of the CZMA requires the agency to "provide a consistency determination" to the designated state agency specifying whether the proposed action is consistent with the state's coastal management program. But if the agency is not taking the action itself, and instead is approving a proposed plan or issuing a federal license or permit to an applicant, then § 1456(c)(3) requires the applicant to conduct the consistency review and include a "consistency certification" in its application confirming that the proposed activity complies with the affected state's coastal management program. *Id.* § 1456(c)(3). In other words, § (c)(1) review reaches activities where the federal agency is the "principal actor" while § (c)(3) review encompasses the "federally approved activities of third parties." *Sec'y of the Interior v. California*, 464 U.S. 312, 332 (1984). If a proposed federal agency activity can be reviewed under § (c)(3), the CZMA specifically provides that it cannot be reviewed under § (c)(1). 16 U.S.C. § 1456(c)(1)(A). Review under § (c)(1) and § (c)(3) is therefore mutually exclusive. *California v. Norton*, 311 F.3d 1162, 1170 (9th Cir. 2002).

Classification of a proposed activity under § (c)(1) or § (c)(3) impacts more than who is required to conduct the consistency review. The speed of review also differs. Review of a "Federal agency activity" under § (c)(1) requires more than three months because the agency must complete the CZMA review process at least 90 days before giving final approval to the proposed activity. *Id.* § 1456(c)(1)(C).[7] By contrast, if a state does not respond to a private

[7] The agencies contend that this review could take years due to their resource limitations.

applicant's consistency certification within three months, the state's concurrence is "conclusively presumed" by statute. *Id.* § 1456(c)(3)(B)(ii). Review under § (c)(3) also allows the Secretary of Commerce to approve a proposed activity over a state's objections that the activity is not consistent with its coastal management program. In this way, § (c)(3) review encourages oil and gas development by expediting the consistency review process and giving states less leverage to block proposed activities.

**B.**

We must first decide whether the proposed action in the programmatic EA and FONSI is a "Federal agency activity." If it is a "Federal agency activity," then we must then decide whether the action falls outside the scope of the permit and license review of § (c)(3). We answer both questions in the affirmative.

**1. The proposed action is a "Federal agency activity"**

The CZMA does not define "Federal agency activity," but the implementing regulations do. The regulations broadly define "Federal agency activity" as encompassing "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities." 15 C.F.R. § 930.31(a). The proposed action in the programmatic EA and FONSI—"Alternative 1: Proposed Action—Allow Use of WSTs"—readily meets this definition. Deciding whether, and under what circumstances, to allow certain drilling activities on the Pacific Outer Continental Shelf is a function performed by the agencies pursuant to their "statutory responsibilities" under the OCSLA to make oil and gas reserves in this region "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is con-

sistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). And the agencies prepared the EA and FONSI as an "exercise of [their] statutory responsibilities" under NEPA, also satisfying the definition of "Federal agency activity" provided by the regulations. 15 C.F.R. § 930.31(a).

The CZMA regulations further provide that "Federal agency activity" covers a "range of activities where a Federal agency makes a *proposal for action* initiating an activity or a series of activities when coastal effects are reasonably foreseeable," such as a "plan that is used to direct future agency actions." 15 C.F.R. § 930.31(a) (emphasis added). It would strain the English language for us to say that the "Proposed Action" in the programmatic EA is not a "proposal for action." *Id.* And we are further convinced that the proposed action here is a plan that BSEE and BOEM will use to "direct future agency actions." *Id.* The proposed action in the EA and FONSI is for the agencies to "approve the use of fracturing and non-fracturing WSTs" at all oil platforms on the Pacific Outer Continental Shelf if the treatments are "deemed compliant with performance standards identified in BSEE regulations." This proposed action is a "plan that is used to direct future agency actions," and meets the regulatory definition of a "Federal agency activity." 15 C.F.R. § 930.31(a).

We reject the agencies and Intervenors' contention that the programmatic EA is a "bare NEPA analysis" document divorced from any agency action. The district court correctly determined that the EA and its proposed action "reflects a plan for allowing WSTs" on the Pacific Outer Continental Shelf and "is not merely an abstract analytical document unmoored from any proposed action." By concluding that the proposed action of allowing well stimulation treatments would not lead to significant

environmental impacts, the agencies return to the pre-moratorium status quo of approving well stimulation treatments offshore California that existed prior to Plaintiffs' FOIA requests and the ensuing litigation. As described *supra* in our discussion of the ESA claims, the agencies' proposed action of allowing well stimulation treatments without restrictions on a programmatic level constitutes a plan that will shape and direct future agency activity in consideration of site-specific permits.

**2. The proposed action falls outside the scope of § (c)(3) of the CZMA**

After determining that the proposed action is a "Federal agency activity" under the CZMA, we must next decide whether it falls outside the scope of § (c)(3) of the CZMA, which covers applications for federal permits and licenses authorizing activities in the coastal zone. 16 U.S.C. § 1456(c)(3)(A). This is because an action cannot be reviewed under § (c)(1) if it can be reviewed under § (c)(3) of the CZMA. *Id.* § 1456(c)(1)(A). Our decision in *Norton* is instructive.

*Norton* involved the Department of the Interior's decision to grant suspensions of oil leases off the coast of California to extend the lives of the leases and avoid their premature expiration. 311 F.3d at 1165. Like in this case, California sued, seeking an injunction that would require the agencies to conduct CZMA consistency review under § (c)(1) and to issue an EIS under NEPA. *Id.* at 1169. In explaining why § (c)(1) review applied to the lease suspensions in *Norton*, we provided a history of the CZMA, which we briefly repeat here.

In 1990, Congress specifically amended the CZMA to overturn the Supreme Court's decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984). In *Secretary of*

*the Interior*, the Court held that the original sales of leases to oil companies were not subject to consistency review because the activities specifically affecting the coastal zone would be reviewed later, under § (c)(3), when the oil companies submitted plans to the federal agencies for approval. *Id.* at 667-68. Amending the CZMA in 1990 to overturn *Secretary of the Interior*, Congress specifically provided that the sale of leases could be reviewable under § (c)(1) of the CZMA even if site-specific activities conducted under those leases would be subsequently reviewed under § (c)(3). *See* H.R. Conf. Rep. No. 01-508 at 970 (1990); H.R. Conf. Rep. No. 01-508 at 970 (1990); *see also Norton*, 311 F.3d at 1173 (discussing this legislative history).

In *Norton*, we interpreted Congress's 1990 amendments to the CZMA as allowing duplicative review for actions of different scope and at different stages in oil production. We held that "section (c)(3) review will be available to California at the appropriate time for specific individual new and revised plans as they arise, and section (c)(1) review is available now for the broader effects implicated" by the agency action. 311 F.3d at 1174. We emphasized that the lease suspensions at issue in *Norton* "[had] *never* been reviewed by California," and the agency decision "represent[ed] a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production." *Id.* at 1173. We reject the attempts by the agencies and Intervenors to cabin *Norton*'s application to lease suspensions and find it on all fours with the facts of this case.

Like the agency action at issue in *Norton*, the proposed action of allowing well stimulation treatments without restriction in the Pacific Outer Continental Shelf "has

never been reviewed by California" and is a "significant decision to extend the life of oil exploration and production" by allowing companies to access oil they could otherwise not obtain through conventional drilling methods. *Id*. As in *Norton*, we are not concerned about duplicative review because there is none: the agencies' programmatic decision differs in scope and in stage from the agencies' later decisions about specific permit applications.

And even though the agencies and Intervenors urge us to hold that the authorization of well stimulation treatments should be subject to the expedited consistency review of § (c)(3) and not § (c)(1), they concede that permits for well stimulation treatment would not necessarily require review under § (c)(3). Further, the CZMA does not apply to development and production undertaken pursuant to an oil and gas lease that was issued prior to September 18, 1978, in an area in which oil or gas had been discovered prior to that date. *See* 43 U.S.C. § 1351(a)(1). In fact, Intervenor DCOR maintains that it is not required to file a Supplemental Development and Production Plan for its proposed use of well stimulation treatments because of this exemption. This means that well stimulation treatments very well could continue to evade environmental review, just as they did before this litigation. These facts underscore to us the need for programmatic-level consistency review to take place under § (c)(1) of the CZMA for the programmatic-level proposed action by the agencies to authorize offshore well stimulation treatments. Even if site-specific permits could, or would, be reviewed later pursuant to § (c)(3) of the CZMA, this does not change our interpretation of the statute or our decision in *Norton*. We hold that the agencies' proposed action falls outside the scope of § (c)(3) review and is "Federal agency activity" requiring the agencies to conduct a consistency review pursuant to § (c)(1) of the CZMA. Section

(c)(1) review must be available now for the "broader effects implicated" by the agencies' proposed action. *Norton*, 311 F.3d at 1174.

It is important to keep in mind that in this sphere of the law, both the federal government and California have an important role to play to keep the coastline safe and prosperous. Indeed, management of the coastal zone is a paradigmatic example of complementary joint regulation by state and federal governments to advance important interests through our dual federalism system. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 630 (2012) (Ginsburg, J., concurring in part and dissenting in part) ("[T]he interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance."); *see also* 16 U.S.C. § 1451(i) (discussing cooperation among federal, state, and local governments as the key to protection of the coastal zone).

## VI. RELIEF

Intervenors Exxon and DCOR challenge the injunctive relief the district court awarded to remedy the ESA and CZMA violations, which enjoined the agencies from approving any permits allowing well stimulation treatments offshore California until the agencies completed consultation with the Fish and Wildlife Service and consistency review with California.

We review a district court's decision to issue injunctive relief for an abuse of discretion. *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018). We first must determine, upon *de novo* review, whether the district court "identified the correct legal rule to apply." *Id.* (citation omitted). If the district court applied the correct legal standard, we will reverse only if the district court's application was "(1)

illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (citation omitted).

The district court applied the correct four-factor test for injunctive relief. Before issuing a permanent injunction, a district court must find that a plaintiff demonstrated:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*Monsanto*, 561 U.S. at 156-57 (citation omitted). The district court identified this standard and found that Plaintiffs established all four factors in both the ESA and CZMA contexts. We cannot conclude that the district court's application of this test was illogical, implausible, or without support from the record. *Azar,* 911 F.3d at 568. The injunction is narrowly tailored to remedy the agencies' ESA and CZMA violation—prohibiting the agencies from approving permits allowing offshore well stimulation treatments until the consultation with the Fish and Wildlife Service and the consistency review with California have been completed.

Intervenors' primary contention is that the district court presumed irreparable harm to Plaintiffs from the procedural violations of the ESA and CZMA. We agree with Exxon and DCOR that *Monsanto* makes clear that courts may not make such a presumption, but we do not agree that the district court did so here. As the district court points out in its order, the irreparable harm in this

case extends beyond the mere procedural violation of the ESA and encompasses the issuance of permits that could lead to harm to endangered species or be inconsistent with California's coastal zone management program. The district court recognized that a risk of irreparable harm is present here because the agencies "have made no clear commitment" to withhold the issuance of well stimulation permits pending the completion of consultation. We agree that the failure to consult with the wildlife agencies and conduct a consistency review with California "can no longer be cured" once drilling permits are issued.

The district court's conclusion on irreparable harm is also supported by facts in the record and inferences that follow. The programmatic EA identifies harmful effects of well stimulation treatments on listed species, and the agencies' Biological Assessment determined that three species were likely to be adversely affected. The environmental groups submitted declarations with their summary judgment briefs detailing how their members face imminent harm from the harm that well stimulation treatments pose to wildlife.

This potential harm to endangered species supports a finding of irreparable harm because "[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018) (citation omitted). Environmental injury, by its nature, "is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). That the agencies might conduct ESA review on individual permits in the future does not affect our analysis. Site-specific review cannot cure a failure to consult at the programmatic level,

and incremental-step consultation is inadequate to comply with the ESA. *See Conner v. Burford*, 848 F.3d 1441, 1455 (9th Cir. 1988). Were it otherwise, "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest." *Nat'l Wildlife Fed'n*, 524 F.3d at 930.

It was reasonable for the district court to conclude that the agencies' violations of the ESA and CZMA would result in irreparable harm if the agencies could approve well stimulation treatment permits before the protective environmental requirements of these statutes were followed. And the district court did not abuse its discretion in its analysis of the other three factors. The Supreme Court has recognized that injury to the environment "can seldom be adequately remedied by money damages and is often permanent." *Amoco*, 480 U.S. at 545. Nor did the district court abuse its discretion in finding that the balance of hardships and the public interest favors injunctive relief. It determined that "any interest in proceeding forward" with well stimulation treatments is outweighed by the public interest in ensuring that the proposed action is reviewed for consistency with California's coastal management plan and undergoes consultation with expert wildlife agencies. The ESA, as one of the most far-reaching environmental statutes, "did not seek to strike a balance between competing interests" but rather "singled out the prevention of species . . . as an overriding federal policy objective." Lazarus, *supra*, at 73. The district court did not abuse its discretion by fashioning relief that advances this overriding federal policy objective. And upon DCOR's motion for reconsideration, and after receiving full briefing on the *Monsanto* factors, the district court determined that DCOR's "projection of tens of millions" of dollars in injuries were speculative and temporary. Because the oil "will still remain in the ground," the district

court reasonably concluded that DCOR's lost profits will likely be delayed, not lost. And the district court doubted whether any claimed losses would even be attributed to the injunction it granted because DCOR did not submit the supplemental development and production plan the agencies requested in January 2017.

The district court's findings on injunctive relief do not amount to an abuse of discretion. The district court applied the correct test and gave additional consideration to the *Monsanto* factors when considering the merits of DCOR's motion for reconsideration.[8] We affirm the injunctive relief previously fashioned by the district court and remand with instructions that the district court amend its injunction to enjoin the agencies from approving well stimulation treatment permits until the agencies issue a complete EIS, rather than the inadequate EA on which they had relied.

## CONCLUSION

The district court had subject matter jurisdiction and properly held that Plaintiffs' claims were ripe. We reverse the grant of summary judgment to Defendants on the NEPA claims, and we affirm the grant of summary judgment to Plaintiffs on the ESA and CZMA claims. We remand for further proceedings consistent with this opinion.

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[8] DCOR also challenges the district court's denial of its motion for reconsideration. In that motion, DCOR sought to have the district court amend the injunction to allow the agencies to consider DCOR's two pending permits to conduct well stimulation treatments in the Pacific Outer Continental Shelf. We review for an abuse of discretion a district court's decision to deny a motion to alter or amend a judgment. *McQuillion v. Duncan*, 342 F.3d 1012, 1014 (9th Cir. 2003). The district court did not abuse its discretion in determining that DCOR did not meet the standards articulated in Rule 59(e) or 60(b) for this exceptional type of relief.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANANDED.**

**APPENDIX B**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 16-8418 PSG (FFMx)

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ENVTL. DEF. CTR. ET AL.,
PLAINTIFFS,

v.

BUREAU OF OCEAN ENERGY MGMT. ET AL.,
DEFENDANTS

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Filed: July 14, 2017

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**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS**

GUTIERREZ, United States District Judge.

Before the Court are Defendants Bureau of Ocean Energy Management ("BOEM"), Richard Yarde, David Fish, Abigail Hopper, Brian Salerno, Bureau of Safety and Environmental Enforcement ("BSEE"), Joan Barminski, Mark Fesmire, U.S. Department of the Interior, and Sally Jewell (collectively "federal Defendants"), and Intervenor Defendant American Petroleum Institute's ("API") motions to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure

12(b)(1). Dkts. # 43, 46. Defendants move to dismiss on two grounds. First, they argue that Plaintiffs' National Environmental Policy Act ("NEPA") and Coastal Zone Management Act ("CZMA") claims are not justiciable because Plaintiffs cannot identify a "final agency action" that makes BOEM and BSEE's actions subject to judicial review under § 702 of the Administrative Procedure Act ("APA"). Second, Defendants argue that Plaintiffs' Endangered Species Act ("ESA") claim is not ripe and moot.

The Court received oppositions to Defendants' motions from three sets of Plaintiffs: (1) Environmental Defense Center and Santa Barbara Channel Keeper ("EDC" and "EDC Opp."), Dkts. # 57, 60; (2) the People of the State of California and the California Coastal Commission ("State Opp."), Dkt. # 58; and (3) the Center for Biological Diversity and the Wishtoyo Foundation ("CBD" and "CBD Opp."), Dkts. # 64, 66.[1]

The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having read and considered the papers filed in connection with these motions, the Court **DENIES** Defendants' motions to dismiss.

I. Background

This consolidated case relates to two prior cases previously brought in this Court: *Environmental Defense Center et al. v. BSEE et al.*, No. CV 14-9281 PSG (FFMx), and *Center for Biological Diversity et al. v. BOEM et al.*, No. CV 15-1189 PSG (FFMx). The cases alleged that the

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[1] Unless otherwise indicated, citations to "EDC Opp." and "CBD Opp." refer to Plaintiffs' oppositions to the federal Defendants' motion to dismiss. Dkts. # 43, 64. Similarly, citations to "Mot." and "Reply" refer to the federal Defendants' motion to dismiss, Dkt. # 43, and the reply, Dkt. # 70.

federal Defendants violated NEPA by approving fifty-one permits that authorized offshore well-stimulation treatments ("WSTs")—more commonly known as "fracking" or "acidizing"—on the Pacific Outer Continental Shelf ("POCS") without conducting an adequate environmental review. *See EDC Opp.* 4:16-27. Both prior cases culminated in substantively similar Settlement Agreements entered by the Court on March 24, 2016. *See* CV 14-9281, Dkt. # 85; CV 15-1189, Dkt. # 85. In the Settlement Agreements, the federal Defendants agreed to conduct an Environmental Assessment ("EA") of the potential environmental impacts of WSTs off the coast of California in the vicinity of Santa Barbara, Ventura, and Los Angeles counties. *See Settlement Agreement* (CV 15-1189), Dkt. # 43-1, at 8, ¶ I.A; *Settlement Agreement* (CV 14- 981), Dkt. # 43-1, at 18, ¶ I.A.

> Specifically, in the Settlement Agreements, the federal Defendants agreed: BOEM and BSEE will undertake a programmatic Environmental Assessment ("EA") pursuant to the National Environmental Policy Act ("NEPA") to analyze the potential environmental impacts of well-stimulation practices on the Pacific OCS, including hydraulic fracturing and acid well stimulation. The focus of the EA will be on foreseeable future well-stimulation activities requiring federal approval, not past completed or expired activities for which no further federal actions remain, except to the degree that analysis of such past actions may be relevant to assessing the environmental baseline and/or an analysis of cumulative or other effects. This assessment will result in a determination that either an Environmental Impact Statement ("EIS") and Record of Decision ("ROD") is required or a Finding of No Significant Impact ("FONSI") is appropriate. BOEM and BSEE shall complete and issue the final

> programmatic EA by May 28, 2016, and will also issue a FONSI by that date if BOEM and BSEE determine that a FONSI is the appropriate outcome of the EA

*See Settlement Agreement* (CV 15-1189), Dkt. # 43-1, at 8, ¶ I.A; *Settlement Agreement* (CV 14- 981), Dkt. # 43-1, at 18, ¶ I.A. Although Plaintiffs reserved their right to challenge the "EA/FONSI or EIS/ROD" as a separate legal action, the Settlement Agreement also states that "[n]othing in this Settlement Agreement constitutes, or may be construed to constitute, a waiver of sovereign immunity by the United States." *See Settlement Agreement* (CV 15-1189), Dkt. 43-1, at 8, 13, ¶¶ I.A, E; *Settlement Agreement* (CV 14-981), Dkt. # 43-1, at 19, 23, ¶¶ I.A, F.

As required by the Settlement Agreements, BOEM and BSEE completed a timely EA and ultimately decided to issue a FONSI, concluding that the use of WSTs on the POCS would have "no significant impact" on the "human environment." *See Hall Decl.*, Exs. 1A, 1B, Dkt. # 57-1. Prior to issuing the EA and FONSI, BOEM and BSEE released a draft EA and solicited comments from many sources, including Plaintiffs. *See State Compl.* ¶¶ 42-47. The EA focused on the "Proposed Action" of "allowing the use of WSTs" without restriction. *See Hall Decl.*, Exs. 1A, 1B, Dkt. # 57-1. The EA compared this "Proposed Action" to three alternatives: (1) allow use of WSTs with subsurface seafloor depth stipulations, (2) allow use of WSTs but no open water discharge of WST waste fluids, and (3) do not allow the use of WSTs. *Hall Decl.*, Ex. 1B, Dkt. # 57-1, at 307. In the final EA, BOEM and BSEE adopt the Proposed Action and "propose to allow the use of selected well stimulation treatments ("WSTs") on the 43 current active leases and 23 operating platforms on the Southern California Outer Continental Shelf." *Hall Decl.*, Ex. 1A, at

23:6-9. BOEM and BSEE acknowledged that, if the Proposed Action were approved:

> BSEE technical staff and subject matter experts will continue to review applications for permit to drill (APDs) and applications for permit to modify (APMs), and, if deemed compliant with performance standards identified in BSEE regulations at Title 30, Code of Federal Regulations, Part 250, subpart D (30 CFR Part 250, subpart D), will approve the use of fracturing and non-fracturing WSTs at the 22 production platforms[1] located on the 43 active leases on the POCS.

*Id.* at 308. BOEM and BSEE formally concluded in the FONSI:

> It is our determination that the Proposed Action would not cause any significant impacts. It is our determination that implementing the Proposed Action does not constitute a major federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Protection Act.

*Id.* at 312. Plaintiffs describe this decision as ending the "moratorium on permit approvals involving the use of WSTs" and "opening the door to these practices." *See, e.g.*, *EDC Opp.* 2:1-3.

After BOEM and BSEE issued its EA and FONSI, Plaintiffs filed suit in the Centra District of California challenging the EA and FONSI. *See Envt'l Def. Ctr. et al. v. Bureau of Ocean Energy Mgmt. et al.*, CV 16-8418 (filed

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[1] BOEM and BSEE reference a different number of platforms in the EA and the FONSI. The EA refers to 23 "operating platforms," *see Hall Decl.*, Ex. 1A, at 23:6–9, while the FONSI refers to 22 "production platforms," *id.*, Ex. B, at 308.

Nov. 11, 2016); *Ctr. for Biological Diversity et al. v. Bureau of Ocean Energy Mgmt. et al.*, CV 16-8473 (filed Nov. 15, 2016); *California et al. v. U.S. Dep't of Interior et al.*, CV 16-9352 (filed Dec. 19, 2016). Plaintiffs allege that the federal Defendants violated NEPA by "failing to take a hard look at the impacts of their action by neglecting to analyze all potential impacts or a reasonable range of alternatives, and understating the frequency and intensity of the impacts." *EDC Opp.* 1:12-16. The State of California additionally alleges that Defendants violated CZMA by failing to prepare a consistency determination for the Proposed Action.[1] *State Compl.* ¶¶ 66-69. The EDC and CBD Complaints allege that Defendants violated the ESA because they "failed to engage in consultation to ensure their action does not jeopardize listed species or result in the destruction or adverse modification of their critical habitat." *EDC Compl.* ¶ 204. All three cases were transferred to this Court, and the Court consolidated the cases for all purposes on February 17, 2017, administratively closing the two later-filed cases. *See* CV 16-8418, Dkt. # 22.

After Plaintiffs filed this litigation and a week before the federal Defendants filed their motion to dismiss in

[1] The CZMA encourages states to develop management plans for their coastal zones and requires federal agency activities occurring within the coastal zone, or affecting the water or resources of the coastal zone, to be "carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." 16 U.S.C. § 1452(1). In order to ensure consistency, the federal agency must submit a "consistency determination" to the relevant state agency for review. *Id.* § 1456(c)(1)(C); 15 C.F.R. § 930.36. The state agency then informs the federal agency of its concurrence with or objection to the consistency determination. 15 C.F.R. § 930.41.

March 2017, BOEM and BSEE prepared and submitted Biological Assessments to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (collectively, "the Services"). *See Mitchell Decl.*, Dkt. # 43-1, Exs. 2, 4. The ESA indicates that the submission of such a Biological Assessment to the Services is one of the first steps in the ESA "consultation" process. *See* 50 C.F.R. § 402.14(c); 16 U.S.C. § 1536(c); *see also Mot.* 5:1-18.

The federal Defendants now move to dismiss the Complaints on Rule 12(b)(1) grounds. Intervenor Defendant API joins in the federal Defendants' arguments, and raises some limited, additional concerns about the CZMA claim. *See API's Reply*, Dkt. # 68.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) requires a court to dismiss a case if the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). At the pleading stage, plaintiffs bear the burden of demonstrating that the court has subject matter jurisdiction and must do so by "clearly alleg[ing] facts demonstrating" each element. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

A jurisdictional attack under Rule 12(b)(1) may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *Id.* By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. *Id.* Here, Defendants' attack on the Complaint is a factual attack because Defendants challenge whether the EA and FONSI

are final agency actions under the APA, and they cite to the declaration of Michael Mitchell and other exhibits to support their argument. *See id.* (citing *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003) (recognizing that a jurisdictional challenge is factual where it "relied on extrinsic evidence and did not assert lack of subject matter jurisdiction solely on the basis of the pleadings")); *see also Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 972 (E.D. Cal. 2012) (reviewing a motion to dismiss as a factual challenge where defendants attached exhibits and argued that the agency had not yet taken a "final agency action").

In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). The court need not presume the truthfulness of plaintiffs' allegations. *White*, 227 F.3d at 1243. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage*, 343 F.3d at 1039 n.2.

III. Discussion

Defendants raise two arguments for dismissing the Complaints under Rule 12(b)(1). First, Defendants argue that the EA and the FONSI are not "final agency action[s]," and therefore Plaintiffs' NEPA and CZMA claims are not justiciable under § 702 of the APA. *See Mot.* 6:20-7:21. Second, Defendants assert that Plaintiffs' ESA claims are not ripe because BOEM and BSEE have not taken any action that would trigger the ESA's section 7

consultation requirements, or are otherwise moot because BOEM and BSEE have already started the consultation process by submitting Biological Assessments to the Services. The Court first addresses the NEPA and CZMA arguments, and then turns to the ESA arguments.

A. Justiciability of Plaintiffs' NEPA and CZMA Claims

The United States, as sovereign, is immune from suit "save as it consents to be sued." *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2001) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). Neither the NEPA nor the CZMA statutes provide for judicial review. *See*, *e.g.*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205-06 (9th Cir. 2004); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-76 (1989); *cf. Bennett v. Spear*, 520 U.S. 154, 173-74 (1997) (recognizing that the ESA has its own citizen-suit provision that provides judicial review for claims such as those brought here). The only mechanism for judicial review of an agency's NEPA or CZMA determination is § 702 of the APA, which provides a limited waiver of the federal government's sovereign immunity to allow judicial review over NEPA and CZMA claims. *See Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104-05 (9th Cir. 2007). Section 702 provides a right to judicial review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 702; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *see also Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (recognizing § 702 as a form of non-constitutional, statutory standing that requires the plaintiff to identify an "agency action" and show that the "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by statute").

The parties dispute whether the EA and the FONSI issued by BOEM and BSEE in March 2016 are "final agency actions." The EA and the FONSI are both products created by NEPA. NEPA is a federal statute that informs agency decisionmakers of the significant environmental effects of proposed major federal actions, and ensures that relevant information is made available to the public. *See* 42 U.S.C. § 4332(2)(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA review begins with the preparation of an EA that evaluates whether a Proposed Action might have a "significant impact" on the environment. *See* 40 C.F.R. §§ 1501.4, 1508.9. If the analysis in the EA demonstrates that the Proposed Action will not have a significant impact, the agency prepares a FONSI. *Id.* §§ 1501.4(c), 1508.13. If the analysis demonstrates that the Proposed Action will have a significant impact, the agency prepares an Environmental Impact Statement ("EIS"). *See* 42 U.S.C. § 4332(2)(C). When an agency prepares an EIS, it must also issue a Record of Decision ("ROD") that states the agency's decision, identifies alternatives considered, and discusses how environmental harms will be avoided or minimized. 40 C.F.R. § 1505.2. Although an agency might determine that an EIS is not necessary, an agency may still choose to conduct additional site-specific environmental analysis. *Id.* § 1508.28.

Plaintiffs argue that the EA and the FONSI are "final agency actions" that qualify for judicial review. Defendants counter that the EA and the FONSI are neither "agency actions" nor are they "final" because BOEM and BSEE must still issue a permit to any entity that wishes to use WSTs on the POCS. Defendants would have Plaintiffs wait until BOEM and BSEE issue permits before

challenging the agencies' actions in Court.[1] *See Mot.* 18:23-25 ("NEPA analyses themselves can only be challenged when they are relied upon to support a final agency action that is properly subject to judicial review.").

The Court first examines whether the EA and FONSI are "agency actions," and then, having found that they are, the Court examines whether the EA and FONSI are "final" agency actions subject to judicial review.

*i. Agency Action*

An "agency action" is the "whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(13). A "license" includes "the whole or a part of an agency permit . . . approval . . . or other form of permission." *Id.* § 551(8). Courts have interpreted the term "agency action" broadly to "cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531

[1] There is some dispute among the parties as to whether BOEM and BSEE have already issued two permits for WSTs to DCOR, LLC for DCOR well S-55 and DCOR well B-35. *See EDC Opp.* 17:2-18:15. Defendants assert that the DCOR permits are not for WSTs because they authorize only "routine clean-up operations involving the use of acid at volumes that fell below the threshold for being considered 'well stimulation treatments.'" *Mot.* 16:2-11; *see also Settlement Agreement* (CV 15-1189), Dkt. # 43-1, at 9:9-10 ("Well stimulation treatment does not include routine well cleanout work"); *Settlement Agreement* (CV 14-981), Dkt. # 43-1, at 19:18-26 (same). Plaintiffs contend that even these routine clean-up operations can be environmentally harmful, and the "complaint specifically identifies these forms of acid use as part of the challenge," so Plaintiffs assert that these permits are necessarily encompassed in the Settlement Agreement and the moratorium on WSTs. *EDC Opp.* 18:2-12. The Court does not reach this issue for it finds that the EA and the FONSI are "final agency actions" subject to judicial review.

U.S. 457, 478 (2001) (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238 n.7 (1980)).

Plaintiffs assert that the EA and the FONSI are "agency actions" because they constitute an "approval or other form of permission." *EDC Opp.* 14:12-13. They point out that the EA and the FONSI selected among alternative proposals, and ultimately elected to "propose to allow the use of well stimulated treatments." *See Hall Decl.*, Ex. 1A, at 23. Defendants contend that the EA and FONSI are not approvals of any sort because they do "not actually approve anything—[they] merely serve[] as the procedural end point to close out this preliminary analysis." *Mot.* 14:1-3.

This issue is resolved by the Ninth Circuit's decision in *Laub v. U.S. Department of the Interior*, 342 F.3d 1080, 1088-89 (9th Cir. 2003). In *Laub*, the Ninth Circuit concluded that the CALFED Bay-Delta Program's EIS and ROD were agency actions because "the Preferred Program Alternative set out in the EIS will influence subsequent site-specific actions." *Id.* at 1088 (citing *Idaho Conservation League v. Mumma*, 956 F.3d 1508, 1520 (9th Cir. 1992)). Although CALFED's decision to conduct an EIS and issue a ROD is the opposite of the conclusion that BOEM and BSEE reached here when they decided to issue a FONSI, the FONSI similarly influences subsequent site-specific actions. *See Hall Decl.*, Ex. 1B. As the Ninth Circuit explained in *Laub*:

> Whenever a broad environmental impact analysis has been prepared and a subsequent narrower analysis is then prepared on an action included within the entire program or policy, the subsequent analysis need only summarize the issues discussed in the broader analysis and incorporate discussions from the broader anal-

> ysis by reference. This is known as tiering. Tiered documents focus on issues specific to the subsequent action and rely on the analysis of issues already decided in the broader programmatic review. Absent new information or substantially changed circumstances, documents tiering from the CALFED Final Programmatic EIS/EIR will not revisit the alternatives that were considered alongside CALFED's Preferred Program Alternative nor will they revisit alternatives that were rejected during CALFED's alternative development process.

342 F.3d at 1088 (citing the ROD issued by CALFED).

BOEM and BSEE's finding of no significant environmental impact will similarly affect subsequent WST permitting decisions. Although BOEM and BSEE may conduct site-specific environmental analysis when issuing permits, BOEM and BSEE will never need to revisit their determination that WSTs have no significant environmental impact or their rejection of alternative plans. Therefore, as the Ninth Circuit recognized in *Laub*, the FONSI is a document that grants "approval or other form of permission" to the Proposed Action. *See id.*; *see also Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994) ("[P]laintiffs need not wait to challenge a specific project when their grievance is with the overall plan."). The EA and FONSI are therefore "license[s]" that qualify as "agency action[s]" as defined in the APA. *See* 5 U.S.C. § 551(8), (13).

*ii. Final Agency Action*

In addition to disputing whether the EA and the FONSI are "agency actions," the parties dispute whether the EA and the FONSI are "*final* agency actions." *See Mot.* 17:17-18:3. An agency action is considered "final" if

it (1) "mark[s] the consummation of the agency's decision making process," and (2) is "one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (the "*Bennett*" finality test). "[T]he core question is whether the agency has completed its decision-making, and whether the result of that process is one that will directly affect the parties." *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)).

The Ninth Circuit has repeatedly held that final NEPA documents constitute final agency actions that are immediately justiciable to procedural challenges. *See, e.g.*, *Laub*, 342 F.3d at 1088-89 (treating an EIS/ROD as "final agency action"); *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118 (9th Cir. 2010) (finding "no doubt" that a citizen may challenge a final NEPA decision); *Or. Nat. Res. Council v. Harrell*, 52 F.3d 1499, 1503 (9th Cir. 1995) (holding a ROD as a final agency action); *accord Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 815 (8th Cir. 2006) (finding that a FONSI is a "final agency action" and noting that "[t]he Supreme Court has strongly signaled that an agency's decision to issue . . . an environmental impact statement is a 'final agency action' permitting immediate judicial review under NEPA"); *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 958 (7th Cir. 2003) (stating that NEPA "documents are intended to be the culmination of an agency's environmental assessment"). In finding that the FONSI is a "final agency action," this Court therefore joins a long-line of cases that allow judicial review after an agency culminates its NEPA process.

Defendants attempt to distinguish this line of cases by citing to *Center for Biological Diversity v. Salazar*, 706

F.3d 1085, 1095-96 (9th Cir. 2013), and *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 86-87 (D.C. Cir. 1991), but the Court is not persuaded that either case controls here because neither case addresses the relevant point. In *Salazar*, for example, the Ninth Circuit concluded that NEPA review was not required when the Bureau of Land Management issued a new reclamation bond for mining operations in Arizona. 706 F.3d at 1095. The court did not hold, however, that the issue was not justiciable. Similarly, in *Foundation on Economic Trends*, the D.C. Circuit held that the plaintiff did not have standing to challenge what it deemed an "informational injury." 943 F.3d at 85. But the D.C. Circuit expressly excluded "the typical NEPA case," like this one, where a plaintiff faults a federal agency for failing to conduct an environmental review that "might change its mind and thereby avert damage to those interests." *Id.* at 84 ("In such cases, . . . the alleged injury arises directly from the agency's proposed action rather than from the agency's failure to create or consider an impact statement."). Neither *Salazar* nor *Foundation on Economic Trends* is therefore persuasive here.

Rather, Plaintiffs are correct that this case more closely resembles *Cure Land, LLC v. U.S. Department of Agriculture*, 833 F.3d 1223, 1231 (10th Cir. 2016); *accord Sierra Club*, 446 F.3d at 815. In *Cure Land*, the Tenth Circuit expressly held that a FONSI is a "final agency action" that satisfies § 702's finality requirement because it is the final step in the agency's NEPA decision-making process, and "there is no indication that the FONSI's conclusion . . . is tentative or interlocutory in nature." *Id.* The court also reasoned that "legal consequences" flow from the FONSI because "it establishes changes to the conservation program the agency may implement immediately." *Id.* It was the FONSI, and not any later action, that

caused plaintiff's harm because the determination of the no significant environmental impact is the "procedural injury" that plaintiff advanced in its litigation. *Id.* (citing *Ohio Forestry Ass'n*, 523 U.S. at 737).

The same reasoning that applied in *Cure Land* applies to the EA and FONSI now before the Court. BOEM and BSEE's FONSI meets the first *Bennett* finality requirement because it is the final step in BOEM and BSEE's NEPA process and effectively lifts the moratorium on WSTs in the POCS. *See Bennett*, 520 U.S. at 177-78. Additionally, the agencies' determination was not equivocal. BOEM and BSEE concluded, "It is our determination that the Proposed would not cause any significant impacts." *Hall Decl.*, Ex. 1B, at 312. Although the agencies note that additional site-specific analysis may be required, the agencies concede that no additional environmental analysis is required on a programmatic level.

The FONSI also meets the second *Bennett* finality requirement because it determines "rights or obligations." *Bennett*, 520 U.S. at 177-78. By finding that WSTs have no significant environmental impact, BOEM and BSEE allowed the WST permitting process to proceed. This surely impacts legal rights, as indicated by the Intervenors' involvement in this suit, as well as the legal rights of Plaintiffs, who contend that they have incurred a procedural injury by BOEM and BSEE's alleged failure to consider certain factors in their environmental analysis.

Having thus reviewed the relevant case law, the Court finds ample precedent for concluding that the EA and FONSI are "final agency action[s]" subject to judicial review. Defendants' motion to dismiss Plaintiffs' NEPA and CZMA claims is therefore **DENIED**.

B. ESA Claims

The EDC and CBD Plaintiffs additionally allege that federal Defendants violated section 7(a)(2) of the ESA by failing to consult the Services before issuing their completed EA and FONSI. Section 7(a)(2) of the ESA requires federal agencies to ensure that any action that they "authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat." *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02 (definition of an "action"), 402.03. The ESA uses the term "action agency" to refer to the agency that is taking the action that requires consultation. Here, BOEM and BSEE are the "action agencies."

Although the ESA does not require action agencies to reach a certain substantive outcome, the ESA mandates procedures that an action agency must follow before authorizing, funding, or carrying out "actions." If a proposed action "may affect" a listed species or critical habitat, the action agency must, at least, informally consult with the Services. *See* 50 C.F.R. § 402.13(a). An informal consultation includes discussions and correspondence between the action agency and the Services, and may include a Biological Assessment prepared by the action agency for the Services' review. *Id.* §§ 402.13, 402.14(c); 16 U.S.C. § 1536(c). If during informal consultation, the action agency and the Services concur that the action is not likely to adversely affect a listed species or critical habitat, no further consultation is necessary. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). However, if the action agency or the Services determines that the action is "likely to adversely affect" listed species or critical habitat, the agencies then engage in "formal consultation." *Id.* §§ 402.13(a), 402.14(a)-(b).

Formal consultation leads to the issuance of a "Biological Opinion" or "BiOp" by the Services that assesses the likelihood of "jeopardy" to the species or "destruction or adverse modification" of critical habitat. *Id.* § 402.14(g)-(h).

Defendants contend that Plaintiffs' ESA claim is not ripe and moot. First, Defendants assert that the ESA claim is not ripe because BOEM and BSEE have not yet taken an "action" that triggers the ESA. Second, Defendants argue that the ESA claim is moot because BOEM and BSEE sent Biological Assessments to the Services in March 2017, and so have already begun the consultation process required by ESA. The Court first addresses ripeness and then turns to mootness.

*i. Ripeness*

Defendants challenge the ripeness of Plaintiffs' ESA claim on two grounds. First, they argue that the claim is "unripe" because BOEM and BSEE have not yet taken an "action" that would require ESA consultation. *See Mot.* at 22. Second, the federal Defendants assert that adjudication of Plaintiffs' ESA challenge at this point is improper because future site-specific consultations might result in mitigation or elimination of any potential harm. In response, Plaintiffs point to the EA and the FONSI, and assert that BOEM and BSEE were required to consult the Services before issuing these determinations. Because they allege procedural injuries, Plaintiffs additionally contend that their claims are ripe now.

The ESA requires consultation with the Services for any "agency action" that "may affect" a listed species or critical habitat. 16 U.S.C. § 1536(a)(2). An "action" for ESA purposes is "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," and includes the "granting of licenses"

and "actions directly or indirectly causing modifications to the land, water or air." 50 C.F.R. § 402.02. The Ninth Circuit assesses the "action" inquiry under the ESA in two steps: "First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency has some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020-21 (9th Cir. 2012) (en banc). "There is 'agency action' whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed." *Id.* at 1011.

The record in this case shows that the EA and the FONSI qualify as "action" under the ESA. In the FONSI, BOEM and BSEE "affirmatively authorize[d]" private entities to proceed with WSTs on the POCS, reasoning that such activities would not have a significant environmental impact on human activities. *See Hall Decl.*, Ex. 1B. Although private entities must still obtain permits from BOEM and BSEE to conduct site-specific WSTs, the EA and FONSI set an affirmative future direction for these activities and set the course for how these activities are conducted. *See Karuk Tribe of Cal.*, 681 F.3d at 1011 (treating a "Notice of Intent" to authorize mining activities as an "agency action" because the notice described "under what conditions" mining could proceed on the Klamath River). Plaintiffs have also shown that WSTs "may affect" twenty-five threatened or endangered species, and the Biological Assessments that Defendants submitted to the services confirm as much. *See Mitchell Decl.*, Exs. 2, 5. Moreover, it is clear that BOEM and BSEE had "some discretion" over how to supervise WSTs, given that the EA and FONSI presented and dismissed alternative options, including safety measures that could have changed

how WSTs were conducted. Indeed, having now issued its FONSI, there is no opportunity for BOEM or BSEE to revisit those alternatives on a programmatic scale.

The Court similarly rejects Defendants' arguments that challenges to the EA and the FONSI are not procedurally ripe. "The doctrine of ripeness prevents courts from becoming involved in abstract questions which have not affected the parties in a concrete way." *S. Cal. Edison Co. v. FERC*, 770 F.2d 779, 785 (9th Cir. 1985). To determine ripeness in an agency context, courts consider:

> (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

*Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006) (applying this test to an ESA claim). Judicial intervention does not interfere with further administrative action when an agency's decision is "at an administrative resting place." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003). Further, courts have held that "no additional factual development is necessary after a procedural injury has occurred." *Cottonwood Envtl. Council v. U.S. Forest Serv.*, 789 F.3d 1075, 1084 (9th Cir. 2015) (citing *Ohio Forestry Ass'n*, 523 U.S. at 737 (holding that a procedural dispute is ripe "at the time the [procedural] failure takes place")).

The Court finds Plaintiffs' ESA claim ripe for judicial review. Plaintiffs do not argue for a particular substantive result, but rather Plaintiffs allege that BOEM and BSEE failed to comply with the procedural requirements of the

ESA when they did not consult with the Services before issuing the EA and FONSI. Because courts have held that plaintiffs asserting procedural injuries "may complain of that failure at the time the failure takes place" and "the claim can never get riper," *Ohio Forestry Ass'n*, 523 U.S. at 737, Plaintiffs have incurred injury and their claim is ripe now. Moreover, the Court is confident that judicial review at this juncture would not interfere with further administrative action because BOEM and BSEE have reached "an administrative resting place." *Citizens for Better Forestry*, 341 F.3d at 977. The agencies are at a "resting place" because they have not yet issued a significant number, if any, permits for WSTs but have definitively concluded that WSTs do not have any significant environmental effects. Finally, the Court does not need to wait for "further factual development" because the procedural injury, if any, has already occurred.

In sum, the Court concludes as a matter of law that the EA and the FONSI are "action" under the ESA. This holding comports with other Ninth Circuit cases that have come to the same result under factually analogous circumstances. *See P. Rivers Council v. Thomas*, 30 F.3d 1050, 1051 (9th Cir. 1994) (concluding that a programmatic document that "set out guidelines" for forest management was an ESA-triggering action); *Wash. Toxic Coal. v. Envtl. Protection Agency*, 413 F.3d 1024, 1031-33 (9th Cir. 2005) (concluding that the approval and registration of certain pesticides was subject to ESA consultation because it approves of certain practices, even though the implementation of the pesticides might involve additional approvals).

*ii. Mootness*

Defendants next contend that Plaintiffs' ESA claim is moot because Defendants submitted Biological Assessments to the Services the week before they filed their motion to dismiss. *See Mot.* 24:10-25:20. Plaintiffs counter that their ESA claim is not moot because the Biological Assessments are incomplete, and because there is still action that the Court can take to remedy the Plaintiffs' injuries. *See EDC Opp.* 22:18-25:20; *CBD Opp.* 20:14-25:24.

The basic question in determining mootness is "whether there is a present controversy as to which effective relief can be granted." *N.W. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1986)); *see also W. Oil & Gas Ass'n v. Sonoma Cty.*, 905 F.2d 1287, 1290 (9th Cir. 1990) (distinguishing the ripeness inquiry, which asks "whether there is yet any need for the court to act" from the mootness inquiry, which asks "where there is anything left for the court to do"). "[I]n deciding a mootness issue, 'the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *N.W. Envtl. Def. Ctr.*, 849 F.2d at 1244-45. Because of this standard, the burden of demonstrating mootness is a "heavy" one. *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

Plaintiffs point to at least two steps that the Court can still take to provide effective relief to Plaintiffs even though Defendants have already submitted Biological Assessments to the Services. First, Plaintiffs contend that there remains a "live controversy" over whether Defendants must initiate formal consultation that results in a

BiOp, and the Court could still order the federal Defendants to initiate such a process. *See Or. Nat. Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 995 (D. Or. 2010) (holding that claim is not moot "in light of the fact that federal defendants have yet to demonstrate that *formal* consultation has been properly initiated").

Second, Plaintiffs argue that their claim as to Defendants' failure to initiate consultation is still live because BOEM and BSEE's Biological Assessments are incomplete. *See EDC Opp.* 23:19-25:7. Plaintiffs fault the Biological Assessments for (1) failing to assess the full range of activities challenged in Plaintiffs' complaint, including how toxic chemicals will affect certain species and the potential impact of large-scale oil spills; and (2) for omitting any consideration of the effects on the scalloped hammerhead shark. *See id.* When plaintiffs have been able to identify such failures in ESA consultations in the past, courts have not rendered plaintiffs' claims moot because the Court can still offer effective relief by requiring defendants to assess the full range of possible effects. *See, e.g.*, *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014) (ruling that a consultation claim was not moot where a BiOp did not discuss certain impacts to certain species); *Cal. Trout, Inc. v. U.S. Bureau of Reclamation*, 115 F. Supp. 3d 1102, 1114 n.9 (C.D. Cal. 2015) (requiring defendants to engage in full consultation that addresses additional effects).

Defendants do not offer a convincing retort to Plaintiffs' claims. *See Reply* 10:7-12:23. Although the Court has no reason to doubt that "formal consultation could still occur" and that BOEM and BSEE will continue to consult the Services, *id.* 11:10-13, this does not mean that there is nothing left for the Court to do. Defendants offer no reason why the Court could not still require BOEM and

BSEE to conduct a more complete Biological Assessment, or to engage in formal consultation, if warranted.

Because Plaintiffs have shown that the Court may still grant "effective relief," the Court DENIES Defendants' motion to dismiss the ESA claim on the ground that it is moot.

## IV. CONCLUSION

The Court DENIES Defendants' motions to dismiss. It concludes that the EA and FONSI are "final agency action[s]" that make Plaintiffs' NEPA and CZMA claims subject to judicial review under § 702 of the APA. Additionally, the Court concludes that Plaintiffs' ESA claim is ripe because BOEM and BSEE have already taken an "action" that triggered the ESA's consultation requirements and because the Court can still take meaningful action to remedy Plaintiffs' injuries even though Defendants have submitted Biological Assessments to the Services.

**IT IS SO ORDERED**.

## APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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No. CV 16-8418-PSG (FFMx)

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ENVIRONMENTAL DEFENSE CENTER ET AL.,
PLAINTIFFS,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT ET AL.,
DEFENDANTS

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Filed: November 9, 2018

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**ORDER GRANTING IN PART AND DENYING IN PART THE CROSS-MOTIONS FOR SUMMARY JUDGEMENT**

GUTIERREZ, United States District Judge.

Before the Court are seven motions for summary judgment relating to a federal proposal to allow the use of fracking and acidizing in oil production off the coast of California. Plaintiffs the State of California and the California Coastal Commission ("California Plaintiffs"), Environmental Defense Center and Santa Barbara Channelkeeper ("EDC Plaintiffs"), and Center for Biological Diversity and Wishtoyo Foundation ("CBD Plaintiffs")

(collectively "Plaintiffs") ask the Court to find that the Federal Defendants violated their statutory obligations under the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), and Coastal Zone Management Act ("CZMA").[1] Federal Defendants Bureau of Ocean Energy Management ("BOEM"), Richard Yarde, David Fish, Walter Cruickshank, Scott Angelle, Bureau of Safety and Environmental Enforcement ("BSEE"), Joan Barminski, Mark Fesmire, United States Department of the Interior, and Ryan Zinke, Secretary of the Interior (collectively "the Federal Defendants"), as well as Intervenor Defendants American Petroleum Institute ("API"), DCOR, LLC ("DCOR"), and Exxon Mobil Corporation ("Exxon") (collectively "Defendants") ask the Court to uphold the federal actions.[2] The parties have filed oppositions and replies.[3] The Court held a hearing on this matter on November 5, 2018.

After considering the moving papers and the arguments made at the hearing, the Court **GRANTS** in part and **DENIES** in part all seven motions. Specifically, the Court concludes that the Federal Defendants satisfied their obligations under the National Environmental Policy Act ("NEPA") in preparing the environmental assessment that is the subject of this suit. But the Court also concludes that the Federal Defendants violated the Endangered Species Act ("ESA") by failing to consult with the relevant federal services and violated the Coastal

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[1] *See* Dkts. # 95 ("*California Mot.*"), 96 ("*EDC Mot.*"), 97 ("*CBD Mot.*").

[2] *See* Dkts. # 102 ("*Gov't Cross-Mot.*"), 106 ("*API Cross-Mot.*"), 107 ("*DCOR Cross-Mot.*"), 108 ("*Exxon Cross-Mot.*").

[3] Dkts. # 109 ("*CBD Opp.*"), 111 ("*EDC Opp.*"), 113 ("*California Opp.*"), 118 ("*Gov't Reply*"), 119 ("*API Reply*"), 120 ("*DCOR Reply*"), 121 ("*Exxon Reply*").

Zone Management Act ("CZMA") by failing to prepare a consistency determination and submit it to California for review as required by that statute.

I. Background

A. Underlying Facts

This is a consolidated case that is a successor to two cases previously brought in this Court: *Environmental Defense Center v. BSEE*, CV 14-9281 PSG (FFMx), and *Center for Biological Diversity v. BOEM*, CV 15-1189 PSG (FFMx). In those cases, the plaintiffs alleged that the Federal Defendants violated NEPA by approving fifty-one permits for offshore well-stimulation treatments ("WSTs")—more commonly known as "fracking" or "acidizing"—on the Pacific Outer Continental Shelf ("POCS") without conducting an adequate environmental review. *See July 14, 2017 Order,* Dkt. # 74, at 2. Both prior cases culminated in substantively similar settlement agreements entered by the Court on March 24, 2016. *See Settlement Agreement*, CV 14-9281, Dkt. # 79-1; *Settlement Agreement*, CV 15-1189, Dkt. # 41-1. In the settlement agreements, the Federal Defendants agreed to conduct an Environmental Assessment ("EA") of the potential environmental impacts of WSTs off the coast of California in the vicinity of Los Angeles, Santa Barbara and Ventura counties. *See Settlement Agreement* (CV 15-1189), ¶ I.A; *Settlement Agreement* (CV 14-9281), ¶ I.A.

Specifically, in the Settlement Agreements, the Federal Defendants agreed:

> BOEM and BSEE will undertake a programmatic Environmental Assessment ("EA") pursuant to the National Environmental Policy Act ("NEPA") to analyze the potential environmental impacts of well-stimulation practices on the Pacific OCS, including hydraulic

> fracturing and acid well stimulation. The focus of the EA will be on foreseeable future well-stimulation activities requiring federal approval, not past completed or expired activities for which no further federal actions remain, except to the degree that analysis of such past actions may be relevant to assessing the environmental baseline and/or an analysis of cumulative or other effects. This assessment will result in a determination that either an Environmental Impact Statement ("EIS") and Record of Decision ("ROD") is required or a Finding of No Significant Impact ("FONSI") is appropriate. BOEM and BSEE shall complete and issue the final programmatic EA by May 28, 2016, and will also issue a FONSI by that date if BOEM and BSEE determine that a FONSI is the appropriate outcome of the EA.

*See id.* The Federal Defendants agreed to withhold approvals of future applications for permits for WSTs on the POCS until the Final EA was completed. *See Settlement Agreement* (CV 15- 1189), ¶ I.C; *Settlement Agreement* (CV 14-9281), ¶ I.C.

The Federal Defendants issued a Draft EA on February 22, 2016. *See Administrative Record*, Dkt. # 93 ("*AR*"), 16024 et seq. After a thirty-day public comment period, they issued a Final EA in May 2016. *See id.* 106599 et seq. The Final EA examined the Proposed Action of allowing the use of WSTs on the POCS ("Alternative 1"). Under this proposal,

> BSEE technical staff and subject matter experts [would] continue to review applications for permit to drill (APDs) and applications for permit to modify (APMs), and, if deemed compliant with performance standards identified in BSEE regulations at Title 30, Code of Federal Regulations, Part 250, subpart D (30

> CFR Part 250, subpart D), will approve the use of fracturing and non-fracturing WSTs at the 22 production platforms located on the 43 active leases on the POCs.

*Id.* 16288-89. The Final EA also examined three more limited proposals: applying subsurface seafloor depth stipulations to future permit approvals ("Alternative 2"), prohibiting open water discharge of WST waste fluids ("Alternative 3"), and not allowing any use of WSTs in the future ("Alternative 4"). *Id.* 16289-90. After hundreds of pages of analysis, the Final EA concluded that none of the four proposals were "expected to result in adverse impacts on the environment." *See id.* 16504. Based on the analysis in the Final EA, BOEM and BSEE issued a Finding of No Significant Impact ("FONSI") on May 27, 2016. *See id.* 16568-75.

B. Procedural History

In late 2016, the three groups of Plaintiffs in this case filed separate suits in this Court, challenging the EA and FONSI. *See Envt'l Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, CV 16- 8418 PSG (FFMx) (filed Nov. 11, 2016); *Ctr. for Biological Diversity v. Bureau of Ocean Energy Mgmt.*, CV 16-8473 PSG (FFMx) (filed Nov. 15, 2016); *California v. U.S. Dep't of Interior*, CV 16-9352 PSG (FFMx) (filed Dec. 19, 2016). Plaintiffs alleged that the Federal Defendants violated NEPA by, among other things, failing to take a "hard look" at the potential environmental effects of WSTs and failing to prepare an environmental impact statement ("EIS") instead of an EA. *See EDC Compl.*, Dkt. # 1, ¶¶ 222-41; *CBD Compl.*, CV 16-8473, Dkt. # 1, ¶¶ 103-112; *California Compl.*, CV 16-9352, Dkt. # 1 ¶¶ 49-65. The California Plaintiffs additionally alleged that Defendants violated the CZMA by failing to prepare a consistency determination for the proposed action of allowing WSTs. *California Compl.* ¶¶ 66-69. And

the EDC and CBD Plaintiffs alleged that the Federal Defendants violated the ESA by failing "to engage in consultation to ensure their action does not jeopardize listed species or result in the destruction or adverse modification of their critical habitat." EDC *Compl.* ¶¶ 242-51; CBD *Compl.* ¶¶ 113-18. All three cases were transferred to this Court, and the Court consolidated the cases for all purposes on February 17, 2017, administratively closing the two later-filed cases.

The Federal Defendants and Intervenor Defendant API moved to dismiss the cases, arguing that the Court lacked jurisdiction to hear the NEPA and CZMA claims under the Administrative Procedure Act ("APA") because the issuance of the EA and FONSI was not a "final agency action." *See July 14, 2017 Order* at 5. Defendants also argued that the ESA claim was not ripe, or alternatively, that it was moot. *Id.* The Court denied the motion. *See id.* It found that the FONSI was a final agency action because it was "the final step in BOEM and BSEE's NEPA process and effectively lift[ed] the moratorium on WSTs in the POCS." *Id.* at 10. In reaching this conclusion, the Court put significant emphasis on the fact that the agencies would not have to engage in another programmatic environmental analysis before processing requests for WST permits. *See id.* As for the ESA claims, the Court found that they were ripe because the issuance of the EA and FONSI triggered the ESA's consultation requirements. *Id.* at 11-13. And it further found that the claims were not moot because while the agencies had begun the required consultations, they had not yet been completed. *Id.* at 13-15.

The parties now cross-move for summary judgment on all claims.

## II. Legal Standard

### A. Summary Judgment

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Here, there are no material facts in dispute—all relevant facts are contained in the administrative record. The parties dispute only whether the Federal Defendants complied with NEPA, the ESA, and the CZMA in issuing the EA and the FONSI. It is appropriate for the Court to make these legal determinations on a motion for summary judgment.

### B. APA Review

Judicial review of the agencies' compliance with NEPA and the CZMA is governed by § 706 of the APA. *See* 5 U.S.C. § 706. The Court reviews the agency actions to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). "An agency action is arbitrary and capricious 'only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1257 (9th Cir. 2017) (quoting *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2012)). "Agency action is valid if the agency considered the relevant factors and articulated

a rational connection between the facts found and the choices made." *Conservation Congress*, 720 F.3d at 1054. Further, courts are at their "most deferential" when "reviewing scientific judgments and technical analyses within the agency's expertise." *Id.*

III. Discussion

A. National Environmental Policy Act ("NEPA") Claims

Plaintiffs argue that the Federal Defendants failed to comply with the requirements of NEPA. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The purpose of the statute is to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(c).

NEPA requires agencies to prepare an "environmental impact statement" ("EIS") whenever they propose taking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2)(C). To determine whether an EIS is required—i.e. to determine whether a proposed action will significantly affect the quality of the human environment—an agency can choose to prepare an "environmental assessment" ("EA"). 40 C.F.R. § 1501.4(b). An EA is a "concise public document" that serves to "briefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact [FONSI]." *Id.* § 1508.9(a). In summary, agencies can choose to prepare an EA to determine whether they must undertake the burden of preparing a more extensive EIS. If an agency determines through the EA process that its action will

have no significant impact, it does not need to prepare an EIS and can instead issue a FONSI. *See id.* § 1501.4(e).

Here, BOEM and BSEE prepared an EA examining four proposed plans relating to the approval of WSTs. After finding that none of the plans would have a significant impact on the human environment, they issued a FONSI. Plaintiffs challenge this determination. But before addressing these arguments about the substance of the Final EA, the Court first must confront the Federal Defendants' argument that the agencies have not yet taken any "major federal action" and therefore were not required by NEPA to undertake *any* kind of environmental analysis. *See Gov't Cross-Mot.* 15:12-19:13; 42 U.S.C. § 4332(2)(C) (requiring agencies to prepare an EIS when they take "major Federal actions significantly affecting the quality of the human environment"). If the Federal Defendants are correct, then NEPA's requirements have not yet been triggered, and the statute could not have been violated no matter how unconvincing the substance of the EA might be.

*i. "Major Federal Action"*

That there is even a question about whether the agencies prepared the EA as part of a "major federal action" is a product of the somewhat unusual procedural background of this case. As the Court understands things, agencies generally do not prepare an EA or EIS until they themselves have determined that they are proposing to take a "major federal action." But in this case, BOEM and BSEE prepared an EA because they were required to do so by the settlement agreements in the previous cases. *See Settlement Agreement*, (CV 14-9281); *Settlement Agreement*, (CV 15-1189). However, Plaintiffs are not suing to enforce the settlement agreements. They are suing under NEPA. Therefore, the Court must determine

whether the EA that was prepared pursuant to the settlement agreements was also *required* to have been prepared under NEPA (because the agencies proposed major federal action).

The Federal Defendants argue that no major federal action has taken place because the EA and FONSI, on their own, do not authorize the use of WSTs on the POCS. *See Federal Cross-Motion* 14:1-6. Instead, operators wishing to perform WSTs must get additional approvals from BOEM and BSEE—namely approvals of a Development and Production Plan ("DPP") and an Application for Permit to Drill ("APD"). Further, if an operator later wishes to alter some aspect of its existing well operations, it must submit and get approval of an Application for Permit to Modify ("APM"). *See id.* 2:9-24, 14:7-15:2. Because no WSTs can be used until the agencies have approved these plans and permits, the Federal Defendants contend that there can be no "major federal action" under NEPA until permits have been issued.[4]

As they see it, the EA was prepared merely "in anticipation of, and to provide possible support for, any future authorizations for WST[s]" and therefore cannot be challenged until it is relied upon as the basis for WST authorizations. *Id.* 14:10-13.

Plaintiffs disagree. They argue that the Court's previous ruling that the EA and FONSI are reviewable final agency actions under the APA settled this issue, and therefore the Federal Defendants' argument is barred by

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[4] Since the entry of the settlement agreements in the previous cases in 2016, the agencies have received only one application for a permit, filed by Intervenor Defendant DCOR. *See* AR 52268-70. While the parties appear to disagree about the current status of the application, all agree that it has not yet been approved.

the law of the case doctrine. *See CBD Opp.* 3:3-15; *California Opp.* 2:13-4:22. And they further argue that the agencies took major federal action by engaging in active consideration of whether to allow WSTs in the future and by lifting the moratorium on accepting permit applications for WSTs. *CBD Opp.* 5:4-6:24.

*a. Law of the case*

Under the law of the case doctrine, a court is generally precluded from reconsidering an issue that it has already decided. *United States v. Almazan-Becerra*, 537 F.3d 1094, 1096 (9th Cir. 2017). Plaintiffs contend that the Federal Defendants' argument that no major federal action has occurred is a veiled attempt to get the Court to revisit its previous order on Defendants' motion to dismiss, where it found that it had jurisdiction to review the EA and FONSI because they were "final agency actions" within the meaning of the APA. *See California Opp.* 2:13-4:22.

It is true that Defendants make essentially the same argument here that they made in support of their motion to dismiss. In support of that motion, Defendants argued that the EA and FONSI were not "final agency actions" because entities could not use WSTs on the POCS without getting additional permits from BOEM and BSEE. *See July 14, 2017 Order* at 6-7. The Court rejected that argument, finding that the FONSI was a final agency action because it was "the final step in BOEM and BSEE's NEPA process" and "effectively lift[ed] the moratorium on WSTs in the POCS." *Id.* at 10. It also emphasized the fact that the FONSI was not equivocal and that the agencies would not have to conduct additional environmental analysis on a programmatic level before allowing WSTs. *Id.*

At the motion to dismiss stage, the Court was deciding whether it had jurisdiction under the APA. Doing so required determining whether the EA and FONSI were "final agency actions." However, the current motions present a different question: whether the agencies have taken a "major federal action" within the meaning of NEPA. While the arguments and analysis for this second question might be similar to those that applied to the earlier jurisdictional question, they are not necessarily identical. After all, whether agencies have taken "major federal action" under NEPA involves different language in a different statute than the Court analyzed when conducting its analysis under the APA. Therefore, the Court concludes that its earlier decision that the EA and FONSI were final agency actions does not inexorably lead to the conclusion that the agencies have also proposed a major federal action under NEPA. Because the two questions are distinct, the law of the case doctrine does not apply. Accordingly, the Court will proceed to address the merits of the Federal Defendants' argument.

*b. Whether the Agencies Proposed a Major Federal Action*

As explained above, NEPA's requirements are triggered when an agency proposes a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In deciding whether the agencies in this case have proposed a "major federal action," the Court is guided by the Supreme Court's analysis in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Kleppe*, the Supreme Court confronted the question of whether NEPA required the Department of the Interior to prepare an EIS relating to coal-related operations in the "Northern Great Plains region." *Id.* at 394-95. The Court found that there was no major federal action requiring the

preparation of an EIS because "there was no existing or proposed plan or program on the part of the Federal Government for the regional development of the area." *Id.* at 400. Without such a plan, the Court noted that it "would be impossible to predict the level of coal-related activity that [would] occur, and thus to analyze the environmental consequences and the resource commitments involved, and alternatives to, such activity." *Id.* at 402. *Kleppe* made clear that "mere contemplation" of action is not sufficient to trigger NEPA's requirements. *Id.* at 404 (cleaned up).

However, the facts of this case are quite different from the facts of *Kleppe*. Unlike in *Kleppe* where there was "no existing or proposed plan or program on the part of the Federal Government," the EA here makes clear that it was produced to evaluate a proposal for allowing WSTs. The very first sentence of the EA reads: "[BSEE] and [BOEM] propose to allow the use of selected well stimulation treatments (WSTs) on the 43 current active leases and 23 operating platforms on the [POCS]." *AR* 16286. It later elaborates that the "purpose of the proposed action (use of certain WSTs, such as hydraulic fracturing) is to enhance the recovery of petroleum and gas from new and existing wells on the POCS, beyond that which could be recovered with conventional methods (i.e. without the use of WSTs)." *Id.* 16302. This language describes a definite proposal for allowing the use of WSTs on the POCS. This is especially evident in light of the fact that the agencies had previously allowed fracking and acidizing on the POCS, *see id.* 16428-30, until they agreed to a temporary moratorium on permit approvals pending completion of an EA as part of the settlement agreements in the previous cases. *See Settlement Agreement* (CV 15-1189) ¶ I.C; *Settlement Agreement* (CV 14-9281) ¶ I.C. Given this background, the Court finds that the EA is fairly read to

reflect a proposal for returning to something approximating the pre-moratorium status quo whereby BOEM and BSEE allowed fracking and acidizing on the POCS. This crosses the line from "mere contemplation" to a proposal for a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2)(C); *Kleppe*, 427 U.S. at 404.

The Ninth Circuit has made clear that NEPA plaintiffs "need not wait to challenge a specific project when their grievance is with an overall plan." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994). That is because "if the agency action could only be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). While both *Salmon River* and *Idaho Conservation League* addressed whether the plaintiffs had suffered an injury for standing purposes before an agency issued final site-specific approvals, adopting the Federal Defendants' argument here would essentially render those holdings a nullity by forcing Plaintiffs to wait to challenge WST permit approvals on a site-specific basis. In both *Salmon River* and *Idaho Conservation League*, the Ninth Circuit addressed the merits of the plaintiffs' NEPA claims even though further agency approvals were required before any action directly affecting the environment took place. *See Salmon River*, 32 F.3d at 1355-60; *Idaho Conservation League*, 956 F.2d at 1519-1523. The Court follows the Ninth Circuit's lead in doing so here.

The Federal Defendants argue the issuance of the EA and FONSI cannot itself be major federal action because otherwise, under NEPA, it would require its *own* supporting EA or EIS. *See Federal Reply* 5:1-14. But the Court

does not find that the EA and FONSI themselves are major federal action. Rather, it finds that the EA and FONSI analyze a proposal for allowing WSTs on the POCS, and that *proposal* is for major federal action.

The Federal Defendants further argue that no major federal action will occur until the agencies rule on a future WST permit application. They point to two cases that found a lack of major federal action because additional agency approvals would be required before any actual activity would be allowed to take place. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 64 F. Supp. 3d 128, 140-141 (D.D.C. 2014); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 900 F. Supp. 2d 1151, 1154-59 (D. Nev. 2012). But the Court finds the cases distinguishable. In *Sierra Club*, the court found a lack of major federal action because the agency had not yet received an application for approval of an oil spill response plan and therefore was "certainly not engaged in the process of considering any such plan or request." *Sierra Club*, 64 F. Supp. 3d at 141. But here, even though the agencies have not yet granted any permits, they clearly have engaged in the process of considering how they will handle permit requests. In addition to the EA's proposed action of allowing WST use, the agencies examined alternative proposals for allowing WSTs with subsurface seafloor depth limitations and allowing WSTs but not allowing open water discharge of WST waste fluids. *See AR* 16311-12. This evaluation of proposed limitations on WST permits shows that the agencies have already made some decisions about how permit requests will be handled and whether certain limitations will generally be required. This is a far cry from the situation in *Sierra Club* where the agencies had yet to engage in any planning. *See Sierra Club*, 64 F. Supp. 3d at 141. *Center for Biological Diversity* also does not support the Federal Defendants' position. The court there

found that the Fish and Wildlife Service did not engage in a major federal action when it entered into a memorandum of agreement with various state, tribal, and private entities, because the agreement primarily concerned conservation measures designed to *assist* an endangered species of fish and because merely entering into the agreement had no impact on a state engineer's decision to order a pump test that allegedly could have harmed the fish's environment. *Ctr. for Biological Diversity*, 900 F. Supp. 2d at 1159. In contrast, the actions the agencies have taken toward allowing WSTs on the POCS are entirely within their control and *could* impact the environment.

Because BOEM and BSEE proposed a programmatic action of allowing the use of WSTs on the POCS—an "overall plan" in the words of *Salmon River*—leaving only permitting for individual sites to be decided, the Court finds that the agencies have engaged in major federal action and therefore were required to determine whether that action would have a significant impact on the environment. Accordingly, the Court turns to the merits of Plaintiffs' NEPA claims.

*ii. Merits*

Plaintiffs make four arguments for why the Federal Defendants violated NEPA. First, they take issue with certain assumptions and findings of the Final EA. *See California Mot.* 7:19-20:3; *EDC Mot.* 13:23-18:25; *CBD Mot.* 8:4-13:23. Second, they argue that under the relevant regulations, the agencies should have prepared an EIS instead of an EA. *See EDC Mot.* 8:10-13:17; *CBD Mot.* 16:11-25:22. Third, they argue that the Final EA's purpose and need statement was unduly narrow. *California Mot.* 20:5-21:24; *EDC Mot.* 19:1-20:6; *CBD Mot.* 13:24-15:11. And finally, they claim that the agencies failed to

consider a reasonable range of alternatives. *See California Mot.* 22:1-24:3; *EDC Mot.* 20:7-21:11; *CBD Mot.* 15:13-16:10.The Court addresses each set of arguments in turn.

*a. Adequacy of the EA*

As explained above, review of the final EA under NEPA is governed by the APA, which provides that "agency action may be overturned only when it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Barnes v. FAA*, 865 F.3d 1266, 1269 (9th Cir. 2017) (cleaned up). In reviewing whether the Final EA adequately supports the issuance of a FONSI, the Court looks to whether the agencies have "taken a 'hard look' at the consequences of [their] actions, based [their] decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant." *Id.* (cleaned up). The Court does not necessarily have to agree with the agencies' conclusion. It must uphold the agencies' NEPA actions if it is satisfied that they "fostered informed decision-making and public participation." *Nat'l Parks & Conserv. Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 667, 680 (9th Cir. 2000).

Plaintiffs make several arguments for why the EA failed to take a "hard look" at the potential environmental consequences of allowing the use of WSTs. The Court addresses each in turn.

*1. Frequency of WSTs*

In the Final EA, BOEM and BSEE analyzed the potential environmental impact of WSTs based on a forecast that up to five WST permits would be approved each year. *See AR* 106644. This projection was grounded in part on historical data. *See id.* Since 1982, there have been no more than four WSTs approved in a single year. *See id.*

And since 2000, there have been only six WSTs approved in total—and no more than three in any given year. *See id*. The analysis in the Final EA is therefore based on a projected yearly rate of WST approvals that is *higher* than any year on record and *significantly higher* than the trend in recent years. The agencies noted that this estimate is "conservative in its approach" and "potentially overestimates the potential for impacts." *Id*.

Nevertheless, Plaintiffs argue that the estimate of five WST approvals per year is unreasonably low. *See California Mot.* 8:15-16; *EDC Mot.* 14:7-15:10; *CBD Mot.* 10:19-11:23. Specifically, they argue that the agencies' decision to adopt this projection was arbitrary and capricious because it relied on unreliable historical data about the use of WSTs, ignored the fact that the nature of the POCS makes it a prime candidate for increased use of WSTs, and disregarded the Intervenor Defendants' own statements indicating that they intend to increase their use of WSTs. *See California Mot.* 8:15-16; *EDC Mot.* 14:7-15:10; *CBD Mot.* 10:19-11:23.

Plaintiffs, especially the California Plaintiffs, attack the historical data used by the agencies to determine that no more than four WSTs permits have ever been approved in a single year. *See California Mot.* 8:12-12:11. They point to a 2016 email from a BSEE official stating that while the agency was "sued on 13" acidizing jobs, "a lot more routine acid jobs have taken place, we do not have number between 1984-2011." *AR* 1099. They also direct the Court to an email from a government scientist stating that "[i]t appears that there is not enough information on [discharge monitoring reports] to identify WSTs." *Id*. 1034. And finally, they focus on a July 2016 academic article reporting that no formal data collection system has been set up to track the use of WSTs. *See id*. 24424. Based

on these potential shortcomings in the data, Plaintiffs argue that the agencies decision to adopt a projection of five WSTs per year is "simply arbitrary." *California Mot.* 10:2.

But while the historical data before the agency may not have been perfect, the Court is not convinced that it was so unreliable that it was arbitrary and capricious for the agencies to base their projections on it. The information before the agencies indicated that the actual number of WSTs was quite low. Based on that data, since 2000, only six WSTs *in total* have been approved and implemented on the POCS—an average of less than one every two years. *See AR* 106644. Even assuming for the sake of argument that some WSTs may not have been counted, the agencies adopted a forecast of five WSTs per year that is more than *ten times higher* than the rate in recent years. There is no evidence that the historical data miscounted WSTs by such a large magnitude that it would be unable to support a projection that no more than five WSTs per year would be approved in the future. Accordingly, it was not unreasonable for the agencies to rely on this data. If anything, given the historical numbers, it appears that the agencies were extraordinarily conservative in their estimate.

Plaintiffs argue that Defendants acted arbitrarily in undervaluing the possibility that WST use would increase in the future because, Plaintiffs argue, the POCS oil reservoirs are "prime candidates" for WSTs. *See California Mot.* 10:4-11:2. The Final EA noted that the reservoirs on the POCS have been in production for between 26 and 48 years and that the oil and natural gas pressures in the reservoirs have been gradually declining with this production. *See AR* 106636. It further noted that the use of WSTs might "support the continued recovery of oil and natural

gas" because they allow for the recovery of oil and natural gas that cannot easily be recovered by traditional means. *See id*. Plaintiffs argue that because the POCS reservoirs are now aging, it is highly likely that well operators will increasingly need to employ WSTs. *See California Mot.* 10:27-11:2. In support, they point to statements that the Intervenor Defendants have made during this litigation. For example, in its motion to intervene, Intervenor Defendant Exxon stated that it anticipated that it would need to use WSTs to re-start production at its existing platforms and to drill and complete new wells. *See Exxon Mot. to Intervene*, Dkt. # 20, 7:25-8:5. And in conjunction with its motion to intervene, the manager of Intervenor Defendant DCOR said in a declaration that the company has "near-term plans to use hydraulic fracturing as a well stimulation technique." *Declaration of Alan C. Templeton*, Dkt. # 19, ¶ 19.

But other information before the agencies suggested that a significant increase in the use of WSTs on the POCS is unlikely. The Final EA reports that the offshore Monterrey Formation is naturally highly fractured, and therefore there has been little need for fracturing by WSTs in order to extract oil and natural gas. *See* AR 106761. The Final EA also found that most of the "undiscovered, technically recoverable resources in the area" are "expected to be found in highly permeable sandstone reservoirs" that will "not require the application of WST[s]." *Id*. 106671. Plaintiffs have not disputed these scientific findings. And while the Intervenor Defendants had an incentive to play-up their plans for future use of WSTs in their motions to intervene in this case, in 2013, operators were informally polled about their future plans to use fracking in the Monterrey Formation, and all said that they had no future plans to do so. *See id*. 106668.

Plaintiffs rely on *Center for Biological Diversity vs. Bureau of Land Management*, 937 F. Supp. 2d 1140 (N.D. Cal. 2013), in support of their argument that the agencies' estimate of future WST frequency was unreasonably low. But the facts of that case are distinguishable. In *Center for Biological Diversity*, the Bureau of Land Management issued a FONSI after analyzing the potential for fracking on leased parcels of federal land. *Id.* at 1144. The agency projected that only one well would be drilled on the leased area based on the fact that in the previous 20 years, none of the lease sales in the area had had any wells drilled on them. *See id.* at 1155. The court found the one-well projection unreasonable because the lands were considered "high potential" for oil, and oil prices were "significantly higher" than in the past. *Id.* Given these facts, the court found that the agency should have considered the possibility that more than one well would be drilled. *See id.* at 1155-58.

But the facts of this case could not be more different. Unlike the "high potential" land in *Center for Biological Diversity*, the agencies have determined that the POCS has a *low* potential for additional WSTs, in large part because its geological composition renders WSTs unnecessary for extracting oil. *See* AR 106761. Further, unlike in *Center for Biological Diversity*, where the agency relied on the fact that no wells had been drilled in the past to project that only one would be drilled in the future, here the agencies adopted a projection for WST approvals that is higher than any year on record and significantly higher than in recent years which have seen only six approvals in total since 2000. This was a conservative estimate. Plaintiffs' arguments that the agencies should have been even *more* conservative rests on speculation about future WST use that is not supported by the information that was in front of the agencies.

The agencies took a hard look at the information about the likelihood of future WSTs and made a reasonable projection that no more than five WST permits would be approved each year. The Court concludes that this projection was not arbitrary and capricious.

*2. Fluid Pollutant Discharges*

One possible way the use of WSTs could affect the environment is through the discharge of WST fluids into the ocean. WSTs involve the use of various chemicals. *See AR* 106627. During a WST, some of the chemicals become commingled with water from the geological formation. *Id.* This commingled fluid, referred to as "produced water" is recovered by the WST operator, treated, and either discharged into the ocean or "reinjected" into a reservoir beneath the seafloor. *Id.*

In 2014, EPA, pursuant to its authority under the Clean Water Act, issued National Pollution Discharge Elimination System General Permit CAG 280000 (the "NPDES Permit") to regulate "[d]ischarges from offshore [oil and gas] exploration, development and production facilities in the Federal waters off the southern California coast." *Id.* 106683. The NPDES Permit regulates twenty-two types of discharges from oil and gas facilities, including pollutants that are discharged in produced water waste fluid from WSTs. *Id.* The limits on effluent concentrations imposed by the NPDES Permit apply at the boundary of a 100-meter mixing zone around the point where the effluents are discharged into the water. *See id.* 106651. In the Final EA, the agencies assumed that WST site operators would comply with the limits of the NPDES Permit and concluded on that basis that "no effects on water quality are expected beyond the mixing zone." *Id.*

Plaintiffs raise several issues with this conclusion. They first argue that the agencies cannot abdicate their hard look obligations under NEPA by simply relying on permitting done by the EPA. *See California Mot.* 14:17-16:12; *EDC Mot.* 15:11-22; *CBD Mot.* 9:10-10:2. They cite to two Ninth Circuit cases in support. *See S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004). But both of those cases involved situations where an agency did not perform its own environmental analysis and instead attempted to rely on non-NEPA documents from other agencies. Here, the agencies *did* perform their own analysis of whether the use of WSTs was likely to significantly impact water quality. *See AR* 106683-93. They used the NPDES Permit only to establish facts about the likely concentrations of fluid discharges by assuming that well operators would discharge fluids in compliance with the permit. *See id.* 106834. And they concluded that discharges complying with the NPDES Permit were not likely to have a significant impact on the environment. *Id.* This was a permissible use of the NPDES Permit.

Plaintiffs also argue that the testing performed under the NPDES Permit is not sufficient to determine the impact of fluid discharges on wildlife. *See California Mot.* 16:13-17:7; *CBD Mot.* 9:21-10:2. They point out that the tests take place only quarterly and are not timed to coincide with the use of WSTs. However, the Final EA specifically acknowledged this issue and explained that the NPDES Permit requires oil and grease sampling, as well as visual monitoring of free oil, in conjunction with *every* use of a WST. *See AR* 106796. The agencies found that quarterly tests, combined with visual monitoring, would work together to help detect a potential loss of control

over discharges. *Id*. While Plaintiffs undoubtedly wish that EPA would test more frequently, the Court concludes that BOEM and BSEE took the requisite hard look at the testing issue and reasonably concluded that testing under the NPDES Permit is sufficient to ensure that there will be no significant impact on the environment.

Plaintiffs also take issue with the Final EA's conclusion that dilution of WST chemicals discharged in the ocean would render any impacts insignificant. *See California Mot.*17:10-18:10. But the Final EA explains how it estimated dilution. *See*, *e.g., AR* 106797. And, in response to comments, the agencies analyzed data collected from actual well treatment fluids used on the POCS in 2014 and 2016 to estimate the concentrations of chemicals in discharges. *See id*. 106798. Relying on this data, they found that the estimated concentrations were "generally very low." *Id*. 106799. This demonstrates that the agencies seriously evaluated potential chemical concentrations and reached a reasoned decision that they were not likely to be high enough to impact the environment.

Finally, Plaintiffs take issue with the fact that the agencies reached the conclusion that discharges would not have a significant impact on the environment even though there is no toxicity data available for many WST fluids. *See California Mot.* 16:20-26; 17:20-18:10. The Final EA specifically acknowledges that toxicity information is not available for some chemicals but notes that the NPDES Permit program and the Whole Effluent Toxicity ("WET") limits that must be adhered to prior to discharge help ensure that the unknown toxicity of these chemicals is accounted for in the analysis. *AR* 106781. The California Plaintiffs argue that the agencies should have sought out further toxicity data. *See California Mot.* 18:12-19:26. But the Final EA describes the "exhaustive search" that the

agencies conducted to discover any and all relevant scientifically credible information. *AR* 106781. The Court concludes that the agencies considered all reasonably available information. This is all that NEPA requires.

*3. Routine Acid Use*

The EDC Plaintiffs briefly argue that the Final EA improperly failed to examine the effects of the use of acid for wellbore cleanups. *See EDC Mot.* 15:23-16:3. However, the Court agrees with the Federal Defendants that the agencies sufficiently addressed this routine use of acid—which differs significantly from acidizing in that it is not intended to penetrate into the formation and uses much smaller volumes and concentrations of acid—in the fourth proposal, which proposed prohibiting WSTs but allowing routine acid use. *See Gov't Cross-Mot.* 30:2-13; *AR* 106834. As part of this discussion, the Final EA found that "the use of acid washes for routine well cleanup is not expected to result in any adverse environmental impacts on the POCS." *AR* 106834. This determination was not arbitrary or capricious.

*4. Other Issues*

The EDC Plaintiffs make conclusory arguments that the Final EA failed to adequately analyze potential effects on air quality, seismicity from the use of WSTs, and the potential indirect effects of increased oil production. However, all of these issues were addressed in the Final EA. The Court concludes that the agencies took the requisite hard look at these issues and therefore determines that their analysis satisfies NEPA.

*5. Summary*

For the reasons set forth above, the Court finds that the agencies took a hard look at the potential environmental effects of allowing WSTs on the POCS and reasonably concluded that they would have no significant impact. Accordingly, the Court concludes that they did not act arbitrarily or capriciously in preparing and issuing the EA and FONSI.

*b. Whether the Agencies Should Have Prepared an EIS*

The Court now turns to Plaintiffs' argument that the relevant regulations required BOEM and BSEE to prepare an EIS instead of an EA. "An EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (cleaned up). In making this determination, agencies are guided by regulations adopted by the Council on Environmental Quality ("CEQ"). *See id.* at 865. Under these regulations, the agency must consider whether a proposed action will significantly affect the environment. *See id.* "Significantly" has two components: context and intensity. *See* 40 C.F.R. § 1508.27. Context refers to the affected interests and affected locality. *See id.* § 1508.27(a). Intensity refers to "the severity of the impact." *Id.* § 1508.27(b). The regulation lists ten factors that agencies should consider in evaluating intensity. *See id.* One factor "may demonstrate intensity . . . on its own," mandating the preparation of an EIS instead of an EA, "although the presence of one factor does not necessarily do so." *Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir. 2017).

To prevail on a claim that an agency should have prepared an EIS, "a plaintiff need not show that significant effects *will in fact occur*." *Ocean Advocates*, 402 F.3d at 864 (cleaned up). Instead, it is sufficient for plaintiffs to raise "substantial questions whether a project may have a significant effect." *See id.* at 864-65. The Ninth Circuit has described this as "a low standard." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

Plaintiffs argue that BOEM and BSEE should have prepared an EIS instead of an EA because several of the intensity factors are present here. *See EDC Mot.* 9:7-13:17; *CBD Mot.* 16:13-22:26. The Court addresses each relevant factor in turn.

*1. Controversy*

The regulation provides that "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" should be considered in evaluating intensity. 40 C.F.R. § 1508.27(b)(4). "'Controversial' refers to disputes over the size or effect of the action itself, not whether or how passionately people oppose it." *Wild Wilderness*, 871 F.3d at 728. When evidence "raised prior to the preparation of . . . [a] FONSI . . . casts serious doubt upon the reasonableness of an agency's conclusions," the burden is placed on the agency "to come forward with a 'well-reasoned explanation' demonstrating why those responses disputing the EA's conclusions do not suffice to create a public controversy based on potential environmental consequences." *Nat'l Parks & Conserv. Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (cleaned up).

Plaintiffs argue that there has been an "outpouring of public protest" about the use of WSTs on the POCS, pointing to the 5,964 negative comments submitted about the Draft EA. *See EDC Mot.* 11:5-8. The Court agrees with the Federal Defendants that the mere presence of negative comments alone does not create a public controversy. But the comments could still give rise to a public controversy if they "cast serious doubt" on the agencies' conclusions. *See Nat'l Parks*, 241 F.3d at 736. However, the Court has reviewed the comments that Plaintiffs rely on and does not believe that they give rise to a public controversy. These comments primarily raised questions about whether the agencies' conclusions were grounded in sufficient data. *See, e.g., AR 2678* (comments from the California Coastal Commission focusing on the "many unknowns and uncertainties surrounding WST use on the OCS"); *id.* 4332 (letter from thirty-two scientists highlighting "significant data gaps on basic questions regarding offshore fracking and acidizing"). Plaintiffs have not identified any comments that provided information affirmatively undercutting the agencies' conclusions.

The agencies addressed the negative comments in the Final EA, explaining that they used the best data available and did not believe that any of the data gaps were material given their projection that the use of WSTs on the POCS would be limited. *See id.* 106855. They further noted that while the effects of *onshore* fracking might be controversial, this controversy did not translate to WSTs on the POCS given their limited projected scope. *See id.* 106860. As discussed above, the Court believes that these projections about the scope of WST use were reasonable. Accordingly, the Court is convinced that the agencies "made a reasoned decision based on [their] evaluation of

the significance—or lack of significance—of the" information provided in the public comments. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

Given the agencies' reasoned decision making and the lack of affirmative evidence contradicting the agencies' findings, the Court finds that Plaintiffs have failed to "cast serious doubt on the reasonableness of [the agencies'] conclusions." *See Nat'l Parks*, 241 F.3d at 736. Accordingly, no public controversy exists that would require the preparation of an EIS.

*2. Unique Characteristics*

The CEQ regulations provide that "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas" should be considered in evaluating intensity. 40 C.F.R. § 1508.27(b)(3).

Plaintiffs argue that the Santa Barbara Channel, where most of the drilling on the POCS takes place, is a unique area. *See EDC Mot.* 9:18-10:16; *CBD Mot.* 20:19-22:12. As the Final EA recognizes, the area is home to the Channel Islands Marine Sanctuary and Channel Islands National Park. It is also home to several endangered species, such as the blue whale. *See AR* 107267-70. The CBD Plaintiffs also point out that the area contains cultural resources, such as submerged remains of the Chumash people. *CBD Mot.* 21:12-20.

The agencies do not dispute that the area is unique. But in the Final EA, they found that discharges from platforms using WSTs would not affect the water quality or use of these sensitive areas because of the distance between the areas and the platforms. The closest platform to the Channel Islands Marine Sanctuary is 1,100 meters

from the sanctuary's outer boundary, which itself extends six nautical miles from the Channel Islands National Park. *See AR* 106824. The agencies found that the "dilution and natural breakdown of WST constituents" over those distances "should preclude any impacts on water quality at the sanctuary or the natural park." *Id.*

Plaintiffs argue that several district courts have required the preparation of an EIS "when a proposed activity will affect an environmentally sensitive area." *See EDC Opp.* 7 n.6 (citing *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1196 (N.D. Cal. 2004); *Greater Yellowstone Coalition v. U.S. Forest Serv.*, 12 F. Supp. 3d 1268, 1275-79 (D. Idaho 2014); *Helena Hunter & Anglers v. Tidwell*, 841 F. Supp. 2d 1129, 1136-37 (D. Mont. 2009)). However, these cases involved situations where there was either serious uncertainty or a lack of analysis about why an activity would not affect a sensitive area, *see Greater Yellowstone*, 12 F. Supp. 3d at 1276; *Helena Hunters*, 841 F. Supp. 2d at 1138, or a situation where the agency conceded that the activity would adversely affect a sensitive area but concluded that the benefits outweighed the adverse effects, *see Blackwell*, 389 F. Supp. 2d at 1197. In contrast, the agencies here have explained why the limited use of WSTs will not adversely affect the Channel Islands Marine Sanctuary and the Channel Islands National Park. BOEM and BSEE concluded that there is not expected to be any adverse effect on water quality outside of the 100-meter mixing zone around the discharge point. *See AR* 106651. The Marine Sanctuary is 1,110 meters away from the closest discharge point—eleven times the distance at which the agencies concluded that dilution will render the WST chemicals harmless—and the National Park is much further still. *See id.* 106824. The Court concludes that this analysis reasonably explains why WST use will not impact these environmentally sensitive areas,

and therefore this factor does not counsel in favor of preparing an EIS.

*3. Uncertainty*

The CEQ regulations provide that "the degree to which possible effects on the human environment are highly uncertain or involve unique or unknown risks" should be considered in evaluating intensity. 40 C.F.R. § 1508.27(b)(5).

The Final EA notes that "[d]ue, in part to the lack of toxicity data for many constituents of WST fluids, potential effects on marine life within the [100-meter] mixing zone are not fully understood." *AR* 106792. Several commenters also identified this issue. *See id*. 2677-90 (California Coastal Commission comments); *id*. 3434-54 (EDC comments); *id*. 14132-33 (Channelkeeper comments); *id*. 14135-40 (EPA comments). However, BOEM and BSEE referenced studies that examined the potential effects within the mixing zone of discharges that may or may not have contained WST fluids. *Id*. 106792. These studies found little effect on water quality or on various animal species. *Id*. The agencies ultimately concluded that "[b]ecause (1) WSTs are infrequent activities, (2) WST fluids contain <1% chemical additives, and (3) recovered WST fluids are mixed and highly diluted with much greater volumes of produced water, it is unlikely that the presence of WST chemical constituents at expected levels . . . would alter conditions observed near platforms, as reported in these studies." *Id*. 106793.

Plaintiffs argue that this conclusion is highly uncertain given the lack of information about the toxicity of several WST chemicals and their impact on the environment. *See EDC Mot.* 12:6-7; *CBD Mot.* 19:15-20:3. However, the

agencies specifically addressed this concern in the Final EA, stating that any uncertainty is limited by:

- The known toxicity of many of the chemicals
- The lack of effects of most of the toxic compounds for which toxicity values *are* available
- The low likelihood that chemicals without known toxicity values would have toxicities that are substantially higher than most of the chemicals for which the toxicity *is* known
- The fact that studies have not detected significant effects from historical discharges of greater quantities of produced water than are expected to be discharged on the POCS, and the fact that it is a practical impossibility to test the toxicity of every discharged chemical against every potentially exposed marine species.

*AR* 106876-77.

The regulation does not automatically require that an EIS be prepared just because data gaps exist. Instead, it states that an EIS should be prepared when those gaps render the effects of the action "highly uncertain." 40 C.F.R. § 1508.27(b)(5); *see also Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006) ("[T]he regulations do not anticipate the need for an EIS anytime there is *some* uncertainty, but only if the effects of the project are 'highly uncertain.'"). Here, the agencies analyzed this precise issue and made a reasoned decision that the lack of toxicity data for some chemicals did not render the effects of WSTs highly uncertain. This is sufficient to satisfy NEPA.

Further, the gaps in the data were not caused by a failure on the part of the agencies to seek out all available toxicity data, but rather by the fact that data simply is not available, in part because some of the chemicals are proprietary. *See AR* 106790. Plaintiffs have not explained how additional toxicity data could be obtained if the agencies prepared an EIS. *But see Gov't Reply* 9:5-7 ("An EIS at this point in time would not contain any more specific information regarding the proposed fluid amounts or components than what is contained in the [Final EA]."). While they suggest that the agencies may have been able to obtain additional information by conducting their own studies of WST use in the Gulf of Mexico, *see CBD Mot.* 20:11-17, the Court concludes that the agencies satisfied their NEPA obligations by evaluating the information that was reasonably available to them. *See Methow Forest Watch v. U.S. Forest Serv.*, 383 F. Supp. 2d 1263, 1273 (D. Or. 2005) (finding that an agency satisfied NEPA when it explicitly acknowledged that there were no available studies analyzing the issue in question and explained the limitations of relying on the studies that were available).

*4. Other Factors*

Plaintiffs briefly argue that the potential cumulative effects of WST use and the potential for WSTs to adversely affect endangered or threatened species counsel in favor of preparing an EIS. *See EDC Mot.* 13:7-17; *CBD Mot.* 22:14-27. However, BOEM and BSEE expressly addressed these issues in the Final EA. They found that "[g]iven the estimated negligible to small potential impacts of future WST activities on various resources in the POCS . . . incremental impacts from the proposed action are not expected to result in any cumulative effects on the resources of the POCS and adjacent coastal and mainland

areas." *AR* 106629. And they examined the potential impacts to listed species, concluding that WSTs were not likely to cause adverse effects for most species. *Id.* 106810-22. Given these reasoned findings, the Court finds that the agencies reasonably concluded that neither factor counseled in favor of preparing an EIS.

*5. Summary*

For the foregoing reasons, the Court finds that the agencies reasonably concluded that none of the intensity factors of 40 C.F.R. § 1508.27 are present here. Accordingly, they did not act arbitrarily or capriciously in failing to prepare an EIS.

*c. Purpose and Need Statement*

An agency preparing an EA must supply a statement that "briefly specif[ies] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R.§ 1502.13. Such statements are reviewed for "reasonableness." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013). Agencies are afforded "considerable discretion" in how they choose to define a project's purpose and need. *Id.* However, "[a] purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained." *Id.*

> BOEM and BSEE defined the purpose and need of the EA as follows:
>
> The purpose of the proposed action (use of certain WSTs, such as hydraulic fracturing) is to enhance the recovery of petroleum and gas from new and existing wells on the POCS, beyond that which could be recovered with conventional methods (i.e. without the use of

> WSTs). The use of WSTs may improve resource extraction from some existing wells, and in some future new wells, on the POCS. The need for the proposed action is the efficient recovery of oil and gas reserves from the POCS.

*AR* 106619. Plaintiffs argue that this statement is improperly narrow because it is effectively the same as the proposed action that was adopted and therefore did not allow for consideration of other alternatives. *See California Mot.* 20:24-21:12; *EDC Mot.* 19:11-16; 14:4-15. They primarily complain that the agencies failed to incorporate environmental considerations into the purpose and need statement given the Outer Continental Shelf Lands Act's ("OCSLA") requirement that the agencies ensure "environmental safeguards" are in place and in light of Congress's purpose to "balance orderly energy resource development with protection of human, marine, and coastal environments." *See* 43 U.S.C. §§ 1332(3), 1802(2)(B). The Federal Defendants contend that the purpose and need statement was largely a product of the settlement agreements in the earlier cases, which required the agencies to "analyze the potential environmental impacts of well-stimulation practices on the Pacific OCS, including hydraulic fracturing and acid well stimulation." *Settlement Agreement* (CV 15-1189), ¶ I.A; *Settlement Agreement* (CV 14-9281), ¶ I.A. They argue that it was only natural for the agencies to define their purpose and need in terms of allowing WSTs, since the agreements specifically required analysis of the impact of WSTs.

The Court agrees with the Federal Defendants. Agencies are given considerable discretion in deciding how to formulate purpose and need statements, and it was reasonable for BOEM and BSEE to frame the EA in terms of allowing WSTs given the settlement agreements in the

previous litigation. Further, the EA expressly considered three alternatives to allowing WSTs without conditions—including an alternative proposal for prohibiting the use of WSTs altogether. The Court does not believe that the purpose and need statement unduly constrained the agencies from considering these alternative options. Therefore, the statement did not violate NEPA.

*d. Reasonable Range of Alternatives*

NEPA requires agencies to "study, develop, and describe appropriate alternatives." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013). While an agency preparing an EA instead of an EIS must still "give full and meaningful consideration to all reasonable alternatives," the "obligation to discuss alternatives is less than in an EIS." *Id.* (cleaned up). That said, an EA will be ruled inadequate if a viable, but unexamined, alternative exists. *Id.*

Here, the EA evaluated four proposals: (1) allowing the use of WSTs, (2) allowing the use of WSTs with subsurface seafloor depth stipulations, (3) allowing WSTs but not allowing open water discharge of WST waste fluids, and (4) not allowing the use of WSTs. *AR* 106641-44. Plaintiffs argue that the agencies should have considered additional alternatives, specifically: limiting the number of WSTs authorized each year, limiting the use of WSTs to only certain locations or certain times of year to protect migrating endangered species, only allowing specific types of WSTs (for example, only allowing acidizing), requiring the disclosure of WST fluid constituents and additives, and requiring notice to state agencies and the public prior to conducting WSTs or waste discharges. *See California Mot.* 22:1-23:17; *CBD Mot.* 15:13-16:10.

Some of the alternatives Plaintiffs proffer *were* covered by the Final EA. The EA examined a proposal for allowing up to five WST approvals per year and a proposal for not allowing any WST approvals—finding that both proposals would have no significant impact on the environment. Given this finding, there was no need for the agencies to consider imposing different limits on the number of WSTs per year. As for the site-specific and timing proposals, the Court agrees with the Federal Defendants that these would be better addressed during a site-specific permitting inquiry rather than in a programmatic EA like the one at issue here. With regard to proposals for only allowing certain kinds of WSTs, Plaintiffs can hardly complain that the agencies did not examine a proposal for only allowing acidizing when they themselves entered into a settlement agreement that required the agencies to examine both acidizing *and* fracking. *Settlement Agreement* (CV 15-1189), ¶ I.A; *Settlement Agreement* (CV 14-9281), ¶ I.A. The Court finds that the decision to consider both forms of WSTs was appropriate given the history leading up to the preparation of the EA. As for proposals for disclosure requirements, Plaintiffs do not explain how imposing such requirements would affect the impact of WSTs on the environment. *See Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004) ("[A]n agency is not required to consider remote and speculative alternatives." (cleaned up)).

The Court concludes that BOEM and BSEE considered a reasonable range of alternatives in preparing the EA.

*iii. Summary*

For the foregoing reasons, the Court concludes that BOEM and BSEE did not act arbitrarily and capriciously in preparing the EA and issuing a FONSI. Accordingly,

the Court **GRANTS** Defendants' motions for summary judgment on the NEPA claims and **DENIES** Plaintiffs' motions for summary judgment on those claims.

B. Endangered Species Act ("ESA") Claims

The EDC and CBD Plaintiffs bring claims for violation of the ESA. Before turning to the merits of these ESA claims, the Court first must determine which specific claims remain in dispute. In their complaint, the EDC Plaintiffs alleged that the Federal Defendants violated Section 7 of the ESA by failing to initiate consultation with the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively "the Services"), violated Section 9 of the ESA by permitting a "taking" of an endangered species, and unlawfully determined that allowing WSTs would have "no effect" on listed species. *EDC Compl.*, Dkt. # 1, ¶¶ 242-51. The CBD Plaintiffs alleged that the Federal Defendants violated the ESA by failing to initiate consultations with the Services under Section 7 and by failing to request from the Services a list of ESA-listed species or habitats that might be affected by WSTs. *CBD Compl.*, CV 16-8473, Dkt. # 1, ¶ 117.

However, the Federal Defendants correctly point out that in their current motions, the EDC Plaintiffs have not addressed their claims based on Section 9 and the CBD Plaintiffs have not addressed their claims based on the failure to request a list of species and habitats. *See Gov't Cross-Mot.* 40:5-17. The Court finds that Plaintiffs have abandoned those claims and therefore **GRANTS** summary judgment in favor of Defendants on those theories of liability. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009). The Court will now address the remaining ESA claims, which concern the agencies' failure to initiate consultations and their allegedly unlawful

determination that WSTs will have "no effect" on listed species.

*i. Consultation Under Section 7(a)(2)*

Section (7)(a)(2) of the ESA requires federal agencies to ensure that any action that they "authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat." *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02 (definition of an "action"), 402.03. The ESA uses the term "action agency" to refer to the agency that is taking the action that requires consultation. Here, BOEM and BSEE are the "action agencies."

Although the ESA does not require action agencies to reach a certain substantive outcome, the ESA mandates procedures that an action agency must follow before authorizing, funding, or carrying out "actions." If a proposed action "may affect" a listed species or critical habitat, the action agency must, at the least, informally consult with the Services. *See* 50 C.F.R. § 402.13(a). An informal consultation includes discussions and correspondence between the action agency and the Services, and may include a Biological Assessment ("BA") prepared by the action agency for the Services' review. *Id.* §§ 402.13, 402.14(c); 16 U.S.C. § 1536(c). If during informal consultation, the action agency and the Services concur that the action is not likely to adversely affect a listed species or critical habitat, no further consultation is necessary. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). However, if the action agency or the Services determine that the action is "likely to adversely affect" listed species or critical habitat, the agencies then engage in "formal consultation." *Id.* §§ 402.13(a), 402.14(a)-(b). Formal consultation leads to the issuance of a "Biological Opinion" or "BiOp" by the

Services that assesses the likelihood of "jeopardy" to the species or "destruction or adverse modification" of critical habitat. *Id.* § 402.14(g)-(h).

The EDC and CBD Plaintiffs allege that Defendants violated Section 7(a)(2) by failing to consult with the Services about the effects of WSTs on wildlife before issuing the EA.[5] There is no dispute that BOEM and BSEE did not initiate informal consultations with the Services before issuing the Final EA in May 2016. However, in March 2017, a week before they filed their motion to dismiss in this case, the agencies sent BAs to the Services. *See AR* 106023-111 (BA sent to FWS), 106112-71 (BA sent to NMFS). The BAs determined that for the species within the jurisdiction of NMFS, all would either not be affected or may be affected, but would be unlikely to be adversely affected, by the use of WSTs. *See id.* 106112-71. For the species within the ambit of FWS, the BAs found that most would either not be affected, or may be affected, but were unlikely to be adversely affected, by the use of WSTs. *See id.* 106023-111. However, it found that three of the species—the Western snowy plover, California least tern, and Southern sea otter—were likely to be adversely affected by any oil spills. *See id.* 106081.

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[5] The EDC Plaintiffs specifically allege that BOEM and BSEE failed to consult with FWS about the southern sea otter, Guadalupe Fur Seal, light-footed Ridgway's rail, western snowy plover, marbled murrelet, California least tern, short-tailed albatross, Hawaiian petrel, and California Ridgway's rail. *EDC Compl.* ¶ 251. They allege that the agencies failed to consult with NMFS about the black abalone, white abalone, sei whale, blue whale, fin whale, North Pacific right whale, humpback whale, sperm whale, southern California steelhead, scalloped hammerhead shark, southern green sturgeon, tidewater goby, loggerhead turtle, leatherback turtle, green turtle, and olive ridley turtle. *Id.*

In December 2017, NMFS issued a letter concurring in BOEM and BSEE's effects determinations with regard to the species within its domain. *See id.* 106301-26. In July 2017, FWS sent BOEM and BSEE a letter requesting more information before beginning the formal consultation process, which was required because the agencies determined that WST use was likely to adversely affect some species. *See id.* 106294-98.

With this factual background established, the Court turns to the question of whether the Federal Defendants violated the ESA. Making this determination requires the Court to analyze four questions: (1) whether the agencies have taken an "action" that triggered the consultation requirements, (2) whether the agencies initiated informal consultations by sending the BAs to the agencies in March 2017, (3) whether consultations that began after the Final EA was issued can cure a failure to initiate consultations before the issuance of the Final EA, and (4) whether Plaintiffs have demonstrated that they are entitled to any further relief.

*a. Existence of an "Action"*

The Federal Defendants first argue that the ESA's consultation requirements have not been triggered because the agencies have not yet taken an "action" within the meaning of the statute. *See Gov't Cross-Mot.* 40:19-43:15.

The ESA requires consultation with the Services for any "agency action" that "may affect" a listed species or critical habitat. 16 U.S.C. § 1536(a)(2). An "action" for ESA purposes is "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," and includes the "granting of licenses" and "actions directly or indirectly causing modifications to

the land, water or air." 50 C.F.R. § 402.02. The Ninth Circuit assesses the "action" inquiry under the ESA in two steps: "First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency has some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020-21 (9th Cir. 2012) (en banc). "There is 'agency action' whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed." *Id.* at 1011.

The Federal Defendants argue that no "action" has taken place because the agencies have not yet authorized any permits for WSTs on the POCS. *See Gov't Cross-Mot.* 40:19-41:14. But this is a rehash of an argument that the Court rejected at the motion to dismiss stage. *See July 14, 2017 Order* at 11-13. In its order denying Defendants' motion to dismiss, the Court applied the two-step inquiry from *Karuk Tribe* and found both steps satisfied. *See id.* at 12. The Court found that BOEM and BSEE had "affirmatively authorized" private entities to proceed with WSTs because the EA and FONSI had "set an affirmative future direction for these activities and set the course for how these activities are conducted."[6] *Id.* (citing *Karuk Tribe*, 681 F.3d at 1011). And it found that the agencies had "some discretion" over how to supervise WSTs, given that the EA and FONSI presented and dismissed alternative options. *Id.*

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[6] It is not disputed that the use of WSTs "may affect" at least some listed species—another requirement for triggering the ESA's consultation requirements. *See* 16 U.S.C. § 1536(a)(2). As the Court noted in its July 17, 2017 Order, the agencies have acknowledged as much in the BAs sent to FWS and NMFS. *See July 17, 2017 Order* at 12.

The Court's decision was in accord with cases from the Ninth Circuit finding that the ESA's consultation requirement can be triggered by a programmatic analysis that plots the course for future individual approvals. *See id.* at 13; *Wash. Toxic Coal. v. EPA*, 413 F.3d 1024, 1031-33 (9th Cir. 2005); *P. Rivers Council v. Thomas*, 30 F.3d 1050, 1051 (9th Cir. 1994). The Federal Defendants concede that at least *some* programmatic approvals trigger the ESA but argue that this one does not because it "is only a bare NEPA analysis unassociated with an action mandating NEPA review or ESA consultation." *Gov't Cross-Mot.* 42:24-25. But, as explained above with regard to the NEPA claims, the Final EA is not merely a document floating in space, unassociated with any concrete plan. Instead, the EA analyzes a definite proposal for allowing WSTs on the POCS and creates the framework under which future requests for WST permits will be evaluated. Accordingly, the Court adheres to its decision at the motion to dismiss stage that the Final EA reflects an agency action that triggered the ESA's consultation requirements. Because the agencies did not consult with the Services before issuing the Final EA, they violated the ESA.

*b. Whether the Agencies Initiated Consultations*

In their complaints, the EDC and CBD Plaintiffs ask the Court to declare that BOEM and BSEE violated the ESA and order the agencies to "initiate or reinitiate consultation pursuant to Section 7 of the ESA." *See EDC Compl.* at 72; *CBD Compl.* at 33. Accordingly, the Court turns to the question of whether the agencies initiated (or reinitiated) consultation within the meaning of the ESA when they sent the BAs to the Services in March 2017. If they did, then Plaintiffs may already have received at least some of the relief they seek.

The Court's analysis of this question is made more difficult by Plaintiffs' tendency to confuse informal and formal consultations. For example, the CBD Plaintiffs argue that the agencies must engage in *formal* consultations with the Services whenever they conclude that an action "may affect" a listed species. *See CBD Mot.* 23:20. But this simply misstates the law. As explained above, if a proposed action "may affect" a listed species, the agency must, at a minimum, engage in *informal* consultations with the relevant Service. *See* 50 C.F.R. § 402.13(a). However, if, during these informal consultations, the agency and Service both conclude that the action is not likely to adversely affect a listed species or critical habitat, no further consultations are necessary—that is, the agency and Service do *not* have to engage in formal consultations. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). Formal consultations are required only if the agency or the Service determine that the action is "likely to adversely affect" a listed species. *See id.* §§ 402.13(a), 402.14(a)-(b). With this framework in mind, the Court turns to Plaintiffs' complaints about the agencies' consultations with NMFS and FWS.

*1. NMFS Consultations*

BOEM and BSEE submitted a BA to NMFS analyzing the projected effects of WST use on various species of marine animals. *See AR* 106112-106171. For each of these species, BOEM and BSEE found that they may be affected by WSTs but were not likely to be adversely affected.[7] *See id.* 106137. NMFS issued a letter concurring

[7] Specifically, the agencies made this determination for the blue whale, fin whale, humpback whale, North Pacific right whale, sei whale, sperm whale, Western gray whale, Guadalupe fur seal, leatherback sea turtle, loggerhead sea turtle, green sea turtle, olive ridley sea turtle, green sturgeon, steelhead trout, white abalone, and black abalone. *AR* 106137.

in BOEM and BSEE's "may affect, but not likely to adversely affect" determinations for all of the species. *Id.* 106301-26. As explained above, when the relevant Service concurs in an agency's determination that an action is not likely to adversely affect a listed species, that is the end of the consultation process. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). No further formal consultations are needed. *See id.* §§ 402.13(a), 402.14(a)-(b). Because NMFS concurred in BOEM and BSEE's determinations, the Federal Defendants argue that they have satisfied their consultation obligations with regard to the species within NMFS's domain. *See Gov't Cross-Mot.* 43:24-44:5.

However, Plaintiffs raise three issues with the NMFS consultations. First, the CBD Plaintiffs argue that the BA submitted to NMFS failed to evaluate impacts to the scalloped hammerhead shark. *See CBD Mot.* 25 n.4. However, the Federal Defendants explain that this was merely an oversight. *See Gov't Cross-Mot.* 44 n.23. After the agencies realized that the scalloped hammerhead shark had been left out of the BA, they consulted with the National Oceanic and Atmospheric Administration ("NOAA")—the agency that oversees NMFS—and NOAA agreed that WSTs were not likely to adversely affect the sharks because they rarely visit the waters off of Southern California. *See AR* 106277. The Court finds that this adequately cured BOEM and BSEE's initial omission of scalloped hammerhead sharks from the BA.

Second, Plaintiffs argue that BOEM and BSEE's consultations with NMFS were not coextensive with the proposal for the use of WSTs in the Final EA because the NMFS concurrence letter purportedly conditioned the agency's concurrence on the assumption that no more than five WSTs would take place each year. *See EDC Mot.* 24:18-22. However, Plaintiffs misread the NMFS letter.

While the letter states that BSEE "expects to review and approve . . . up to 5 well stimulation treatments," NMFS did not explicitly condition its concurrence on no more than five WSTs occurring each year. *See AR* 106304. It described the five-WST-per-year number as an expectation, not a hard limit. *See id*. Further, it was appropriate for BOEM and BSEE to describe the proposed action as encompassing up to five WSTs per year because that is the projection adopted in the Final EA. In the event that the agencies propose to approve more than five WSTs per year, they will undoubtedly have to engage in additional NEPA analysis and further ESA consultations. However, as things stand now, the Court concludes that the consultation with NMFS adequately reflected the scope of the proposed action.

Finally, Plaintiffs complain that the BAs submitted to the Services did not evaluate the potential impacts of a large-scale oil spill, excluded other types of acid use that may affect listed species, and ignored indirect effects that could be caused by extending the life of aging infrastructure. *See EDC Mot.* 14:1-10; *CBD Mot.* 25 n.4. While NMFS's concurrence letter, agreeing with BOEM and BSEE that the use of WSTs is not likely to adversely affect listed species, is subject to judicial review, Plaintiffs do not challenge that concurrence here. Instead, they allege that BOEM and BSEE failed to *initiate* consultations. *EDC Compl.*, Dkt. # 1, ¶¶ 242-51; *CBD Compl.*, CV 16-8473, Dkt. # 1, ¶ 117. While the Court previously left open the possibility that it could order the agencies to prepare more complete Biological Assessments, *see July 14, 2017 Order*, after further briefing—and after reviewing NMFS's concurrence letter, which was issued after the Court's previous order—the Court does not believe that such relief is appropriate here. This is not a situation where the agencies submitted sham BAs in an attempt to

moot Plaintiffs' consultation claims. Instead, the BAs contain a thorough analysis of the effect of WSTs on listed species. While Plaintiffs may believe that the agencies failed to consider some important factors, the Court concludes that these arguments are more appropriately raised in a challenge to NMFS's concurrence letter rather than through their current claims for failure to *initiate* consultation.

Accordingly, the Court finds that BOEM and BSEE adequately initiated and completed consultation with NFMS, subject to Plaintiffs' timeliness argument which is discussed below.

*2. FWS Consultations*

BOEM and BSEE submitted a BA to FWS that analyzes the effect of WST use on listed species within FWS's purview. *See AR* 106023-111. The agencies found that WST use would have "no effect" on the California condor, California Ridgway's rail, and California sea-blite. *See id.* 106035-38. They further found that WSTs may affect, but were unlikely to adversely affect, the short-tailed albatross, Hawaiian petrel, light-footed Ridgway's rail, marbled murrelet, California red-legged frog (and its critical habitat), tidewater goby (and its critical habitat), and the salt mark bird's beak. *See id.* 106038-39, 106081. But BOEM and BSEE found that the Western snowy plover (and its critical habitat), California least tern, and Southern sea otter *were* likely to be adversely affected in the event of an oil spill. *See id.* 106081. Because the agencies concluded that WSTs were likely to adversely affect some of the species, they asked FWS to engage in formal consultation. *See* 50 C.F.R. §§ 402.13(a).

On July 28, 2017, FWS responded with a letter asking BOEM and BSEE to provide more information before

formal consultation began. *See AR* 106294-98. Specifically, FWS asked the agencies to confirm the scope of WST use, elaborate on how artificial lighting and noise would be used, and provide further information about oil spill scenarios and the discharge of WST chemicals. *See id.* FWS informed the agencies that it would not begin formal consultation until it received either the requested information or a statement explaining why that information could not be made available. *See id.* 106298. While the Federal Defendants represent that they are "actively working with FWS to address its needs for completion of the reinitiated consultation," *see Gov't Cross-Mot.* 47:12-14, they were unable to provide any additional information at the hearing as to where things currently stand.

Plaintiffs argue that this impasse means that the agencies have not adequately initiated consultation with FWS. To the extent they complain about omission of certain factors from the BA, the Court finds—as explained above with regard to the NMFS—that these arguments are better made in a challenge brought after the consultations are completed. The same goes for the EDC Plaintiffs' argument that the agencies arbitrarily concluded in the Final EA that the use of WSTs would have "no effect" on the North Pacific right whale, short-tailed albatross, and Hawaiian petrel. *See EDC Mot.* 24:24-25:13. While it is perhaps understandable that they brought this claim in their complaint given that BOEM and BSEE had not yet begun any consultation with the Services at the time, the agencies have now prepared and submitted BAs to the Services that address the "no effect" findings. The Court agrees with the Federal Defendants that complaints about the "no effect" determinations should be brought as challenges to the results of the consultation process.

The EDC Plaintiffs do make one argument that is specific to the consultations with FWS. They argue that the BA submitted to FWS by the agencies did not constitute an initiation of consultation because FWS responded by requesting additional information. *See EDC Mot.* 24:12-14. However, the regulations define informal consultation as "all discussions, correspondence, etc. between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13. It is clear under the plain language of this definition that the BA the agencies submitted to FWS commenced informal consultation because it was "correspondence" designed to assist the agencies in determining whether formal consultation was required. *See id.* In other words, contrary to Plaintiffs' contention, informal consultation has already begun.

However, unlike with NMFS, the agencies' consultation with FWS has not yet been completed because FWS is waiting for additional information before beginning the formal consultation phase. *See AR* 106298. The Court addresses below whether this merits judicial intervention.

*c. Timeliness*

As discussed above, the Court has concluded that the agencies have commenced informal consultation with FWS and have commenced and completed consultation with NMFS. However, these consultations did not begin until after BOEM and BSEE issued the Final EA. The CBD Plaintiffs argue that these after-the-fact consultations cannot cure the agencies' initial failure to consult because the ESA requires consultations to take place *before* an agency takes an action that may adversely affect a listed species. *See CBD Mot.* 25:13-22.

The ESA does not explicitly provide that consultations must occur before an agency action takes place. *See* 16 U.S.C. § 1536(2).[8] In support of their argument that consultations must precede the agency action, the CBD Plaintiffs rely on the Ninth Circuit's decision in *Natural Resources Defense Council v. Houston*, 146 F.3d 118 (9th Cir. 1998). In *Houston*, an agency executed water contracts before completing consultations with the Services about whether the contracts would adversely affect the winter-run chinook salmon. *See id.* at 1126-27. After the contracts had been executed, FWS issued a BiOp concluding that the contracts would not jeopardize the existence of the salmon. *See id.* at 1128. The agency argued that this subsequent BiOp mooted any claims based on their failure to consult before the contracts were executed. *See id.* But the Ninth Circuit disagreed. *See id.* at 1129. It found that the plaintiffs had still suffered a procedural injury because if the BiOp had been issued before the contracts were executed, the agency and the FWS would have had more flexibility to modify the contracts to take conservation recommendations into account. *See id.*

However, the Court does not read *Houston* to mandate that consultations take place before an agency action in all circumstances. In *Houston*, the Ninth Circuit focused on the fact that the agency had made a "irreversible and irretrievable commitment of resources" before consultations were completed. *See id.* at 1128; *see also* 16 U.S.C. § 1536(d) ("After the initiation of consultation . . . the Federal agency and the permit or license applicant

[8] The statute reads "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(2).

shall not make any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures."). It cited this factor in distinguishing *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724 (10th Cir. 1997), where the Tenth Circuit held that informal consultation that took place after an agency action mooted an ESA claim based on a lack of consultations. *Houston*, 148 F.3d at 1128; *see Smith*, 110 F.3d at 728 ("An injunction ordering consultation is no longer warranted. There is no point in ordering an action that has already taken place."). The Court finds it significant that the Ninth Circuit distinguished *Smith* on its facts rather than categorically foreclosing the possibility that later consultations could cure an initial failure to consult. Accordingly, the Court interprets *Houston* to hold only that an agency cannot cure an earlier failure to engage in consultations after it has made an "irreversible and irretrievable commitment of resources," and to leave open the possibility that after-the-fact consultations can cure an ESA violation when no such commitment of resources has been made.

The Federal Defendants suggest that the agencies would have made an "irreversible and irretrievable commitment of resources" had they proceeded with issuing WST permits. *See Gov't Cross-Mot.* 45:1-5. Had this occurred, they concede that it is possible that an initial failure to consult could not be cured by post-hoc consultations. *See id*. However, because no permits have been issued, Defendants argue that they can still cure any violation because there is time for the consultations with the Services to alter the final plan before resources are irreversibly committed. *See id*. 45:6-20. For example, BOEM

and BSEE could incorporate feedback and recommendations from the Services into their permitting decisions. *See id.*

The Court is persuaded by the Federal Defendants' argument. While it perhaps would have been prudent for BOEM and BSEE to consult with the Services before issuing the Final EA, the agencies have not yet passed the point of no return. Before any resources have been irreversibly or irretrievably committed, they have begun (and in the case of NMFS, completed) the required consultations. Accordingly, the Court rejects the CBD Plaintiffs' argument that the agencies' initial failure to consult cannot be cured by the consultations that began in March 2017.

Because the NMFS consultation has been completed, the Court finds that the agencies' initial failure to consult with NMFS has been cured. Accordingly, the claim based on a failure to consult with NMFS is now **MOOT**. *See Smith*, 110 F.3d at 728. However, because the agencies' consultation with FWS is ongoing, there remains a live controversy with regard to that consultation. Therefore, the Court will proceed to analyze whether Plaintiffs are entitled to relief on this claim.

*d. Remedy*

In their complaint, the EDC Plaintiffs ask the Court to:

- Declare that Defendants have violated the ESA by failing to initiate consultation with respect to all listed species that may be present;
- Declare that Defendants have violated the ESA, and its implementing regulations,

by making unlawful "no effect" determinations.

- Enjoin Defendants from issuing Permits (to Drill or Modify) for well stimulation treatments, until and unless Defendants comply with the ESA and all other applicable laws.

*EDC Compl.* at 72. In a similar vein, the CBD Plaintiffs ask the Court to:

- Declare that the agencies violated the procedural and substantive provisions of Section 7 of the ESA, and order them to initiate or reinitiate consultation.

- Prohibit the agencies from authorizing offshore fracking and other well stimulation practices until they comply with the ESA.

*CBD Compl.* at 33. As explained above, the Court concludes that the CBD Plaintiffs' "no effects" claim must be brought in a separate challenge at the completion of the consultation process. And the claims based on lack of consultation with NMFS are now moot. That leaves only Plaintiffs' claims for declaratory and injunctive relief with regard to the agencies' failure to consult with FWS before issuing the Final EA.

Declaratory relief on this claim is certainly appropriate. As the Court has explained, the ESA required the agencies to consult with FWS before issuing the Final EA, and they did not do so. Further, this violation has not yet been cured because the belated consultation has not been completed. Accordingly, the Court turns to the question of whether an injunction is also appropriate.

The general rule is that a plaintiff seeking an injunction must demonstrate that (1) it has suffered an irreparable injury, (2) the remedies available at law, such as monetary damages, are inadequate to compensate for that injury, (3) that a remedy in equity is warranted, taking into account the balance of the hardships, and (4) that the public interest would not be disserved by a permanent injunction. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). In *Monsanto*, the Supreme Court held that this "traditional four-factor test" applies when a plaintiff seeks an injunction to remedy a NEPA violation, and the Court assumes that it likewise applies to injunctions sought to remedy ESA violations. *See id.* at 157.

The Court agrees with Plaintiffs that *Houston* and the ESA itself prohibit the Federal Defendants from approving WST permits before consultation with FWS is complete because doing so would constitute an "irreversible or irretrievable commitment of resources." 16 U.S.C. § 1536(d); *Houston*, 146 F.3d at 1128. After permits have been issued, Defendants' ESA violation can no longer be cured. *See Houston*, 146 F.3d at 1128. The possibility that the Federal Defendants will move forward with approving WST permits before consultation is complete therefore presents a risk of irreparable harm.

However, the Federal Defendants appear to recognize this in their briefs, stating that "an analogous situation [to the execution of water contracts in *Houston*] might be if Defendants had approved [WST permits] allowing the use of WSTs before ESA consultation was completed." *See Gov't Cross-Mot.* 45:1-5. Given this representation, the Court has considered whether an injunction is necessary to ensure that the agencies do not move forward with per-

mitting before the FWS consultation is complete, as it appears that the agencies may voluntarily suspend permitting until that time. However, Defendants have made no clear commitment to this effect, and therefore the Court concludes that it is appropriate to issue an injunction to prevent the irreparable harm that Plaintiffs will suffer if the agencies issue WST permits before ESA consultation with FWS has been completed.

The other *Monsanto* factors also counsel in favor of an injunction. Money damages would be insufficient to remedy the harm caused by the ESA violation. The Federal Defendants seem unlikely to suffer harm from an injunction since it appears that even without an injunction they would await the completion of consultation before proceeding with WST permitting. And the public interest is served by an order ensuring the government complies with the law. Accordingly, the Court will order the Federal Defendants to refrain from approving APDs, APMs, or DPPs for the use of WSTs on the POCS unless and until they complete consultation with FWS under the ESA.

Plaintiffs also ask the Court to order Defendants to begin formal consultation with FWS. But even assuming that this could be appropriate under some circumstances—and there are reasons to think that it is not, *see Gov't Reply* 15:1-12—the Court concludes that it is not necessary in this case, because the injunction prohibiting the agencies from proceeding with permitting until consultation is complete should provide them with a sufficient incentive to complete the consultation. If the agencies drag their feet, they hurt only themselves by prolonging the period in which they may not approve WST permits.

*e. Summary*

For the foregoing reasons, the Court **GRANTS** Plaintiffs' motions for summary judgment on their claims that the agencies violated the ESA by failing to consult with FWS before issuing the Final EA. The Court **DENIES** Defendants' motions for summary judgment on these claims. And the Court finds that the claims based on failure to consult with NMFS are **MOOT**.

The Court **GRANTS** Plaintiffs' request for a declaration that the agencies violated the ESA and further **GRANTS** their request for an injunction. Defendants are prohibited from approving any plans or permits (APDs, APMs, or DPPs) for the use of WSTs on the POCS unless and until they complete consultation with FWS under the ESA.

C. Coastal Zone Management Act ("CZMA") Claims

Under federal law, the seaward boundaries of coastal states extend three miles from their coastlines. *See* 43 U.S.C. § 1312. The CZMA gives coastal states the right to review "Federal agency activity within or outside the coastal zone that affects any land or water use or natural resources of the coastal zone" for consistency with the state's coastal management programs. 16 U.S.C. § 1456(c)(1)(A); *see California v. Norton*, 311 F.3d 1162, 1167 (9th Cir. 2002). If a state determines that a proposed federal activity is inconsistent with its coastal management program, it may seek mediation of the dispute or relief in federal court. *See Norton*, 311 F.3d at 1167.

The California Coastal Commission ("the Commission") is the agency responsible for the planning and management of California's coastal zone, which includes exercising the state's powers under the CZMA. Cal. Pub. Res. Code § 30330. The California Plaintiffs allege that BOEM

and BSEE violated the CZMA and associated regulations by failing to prepare and submit to the Commission a determination as to whether the proposed use of WSTs is consistent with California's coastal management program. *See California Compl.*, CV 16-9352, Dkt. # 1, ¶ 67; *California Mot.* 24:5-25:20.

Defendants do not dispute that the agencies failed to submit a determination to the Commission for review. Instead, they argue that BOEM and BSEE have not yet taken any "federal agency activity" within the meaning of the CZMA and therefore have not triggered the consistency review requirements. *See Gov't Cross-Mot.* 49:19-24; *API Cross-Mot.* 11:6-17:14; *see also* 16 U.S.C. § 1456(c)(1)(A).

*i. Applicability of § 1456(c)(1) of the CZMA*

The California Plaintiffs are suing under Section 1456(c)(1) of the CZMA. *See California Compl.* ¶ 67. This section provides that "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." 16 U.S.C. § 1456(c)(1)(A). The regulations implementing the CZMA define "Federal agency activity" as follows:

> The term "Federal agency activity" means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. The term "Federal agency activity" includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources,

> a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. "Federal agency activity" does not include the issuance of a federal license or permit to an applicant or person (see subparts D and E of this part) or the granting of federal assistance to an applicant agency (see subpart F of this part).

15 C.F.R. § 930.31.

However, an agency action is not necessarily reviewable under § 1456(c)(1) of the CZMA—the provision Plaintiffs invoke here—just because it falls within the regulatory definition of "Federal agency activity." Section 1456(c)(3) of the CZMA provides for a separate consistency review of federal licenses or permits. *See* 16 U.S.C. § 1456(c)(3); *Norton*, 311 F.3d at 1170. Sections 1456(c)(1) and 1456(c)(3) are "mutually exclusive." *Norton*, 311 F.3d at 1170; 16 U.S.C. § 1456(c)(1)(A). If a federal agency activity can be reviewed under § (c)(3), it cannot be reviewed under § (c)(1).[9] Therefore, in order to be reviewable under § (c)(1), an agency action must both qualify as a "Federal agency activity" under the regulatory definition and fall outside the scope of the permit and license review of § (c)(3).

*a. Federal Agency Activity*

The Court first addresses whether BOEM and BSEE engaged in "Federal agency activity." The definition in the regulation is broad by its own terms and has several provisions that are directly relevant to the action at issue here. *See* 15 C.F.R. § 930.31. It states that federal agency activity means "any functions performed by . . . a Federal

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[9] Federal agency activity that is reviewable under § 1456(c)(2) is also not reviewable under § 1456(c)(1), but that provision is not at issue in this case.

agency in the exercise of its statutory duties." *Id*. The Final EA appears to satisfy this criterion in that it highlights BOEM and BSEE's obligations under the Outer Continental Shelf Lands Act in explaining why the agencies have prepared the report. *See AR* 106633. The definition of federal agency activity also states that it includes "a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable," for example, "a plan that is used to direct future agency actions." 15 C.F.R. § 930.31. The Final EA appears to fall into the category of "a plan that is used to direct future agency actions," because it charts the course that the agencies will follow in evaluating requests for WST permits.

But the Federal Defendants disagree. Similar to their position with regard to the NEPA claims, they argue that the Final EA is not an "activity," "proposal," "plan," or "proposed rulemaking" but rather a bare NEPA analysis divorced from anything that could be described as an agency activity.[10] *See Gov't Reply* 15:22-16:7; *see also API Reply* 1:16-22. However, as the Court has explained in analyzing both the NEPA and ESA claims, the Final EA reflects a plan for allowing WSTs on the POCS. It is not merely an abstract analytical document unmoored from any proposed action. It therefore falls within the regulatory definition of "Federal agency action."

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[10] The Federal Defendants appear to acknowledge that this argument largely rises and falls with their argument that the agencies have not yet taken major federal action under NEPA. *See Gov't Cross-Mot.* 48:6-9 ("Although this claim is distinct from Plaintiffs' NEPA claims, the NEPA discussion above is helpful for understanding the CZMA claim. As discussed above, the only action at issue in these cases is the NEPA analysis itself.")

Intervenor Defendant API argues that the WSTs themselves are the only things that will have coastal effects. Because they will be performed by private companies, API argues that they are not "functions performed by or on behalf of a Federal agency," and therefore are not Federal agency activity within the meaning of the CZMA. *See* 15 C.F.R. § 930.31. But the Court disagrees with the underlying premise. The regulation makes clear that the term "Federal agency activity" encompasses a "proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable," including a plan that is used to direct future agency actions. *See id.* It is "reasonably foreseeable" that the agencies' decision to move forward with considering WST permits will have coastal effects. Accordingly, the Court concludes that BOEM and BSEE have taken "Federal agency action" within the meaning of the CZMA.

*b. Whether the Agency Action Falls Under § 1456(c)(3)*

As explained above, even though the agencies took "Federal agency activity," their actions cannot be reviewed under § (c)(1) if they are separately reviewable under § (c)(3). Different from § (c)(1), which applies to federal agencies, § (c)(3) requires license and permit *applicants* to certify that their proposed activity is consistent with the state's coastal management programs. *See* 16 U.S.C. § 1456(c)(3). The state then has an opportunity to object to the certification. *See id.* If a state objects, the agency cannot issue the permit unless the Secretary of Commerce overrules the objection or finds that the activity is necessary in the interest of national security. *See id.*

Defendants argue that because the companies seeking WST permits will have to certify under § (c)(3) that their

use of WSTs is consistent with California's coastal management program, BOEM and BSEE's proposal for allowing WSTs cannot also be reviewed under § (c)(1), because § (c)(1) and § (c)(3) are mutually exclusive. *See Gov't Cross-Mot.* 49:19-51:1; *API Cross-Mot.* 15:4-17:9. The California Plaintiffs counter that while individual permitting requests may later be reviewed under § (c)(3) of the CZMA, the overarching federal plan to allow WSTs on the POCS is not subject to § (c)(3) review. *See California Reply* 19:15-21:11. Because review under § (c)(3) will address only site-specific activities rather than the proposed action described in the Final EA, they argue that the mutual exclusivity provision does not apply. *Id.*

Both sides rely heavily on the Ninth Circuit's decision in *Norton*, though they disagree about its implications. In *Norton*, the Department of Interior granted "suspensions" of leases for oil production off the coast of California, which had the effect of extending the life of the leases. *See Norton*, 311 F.3d at 1164-65. The state of California argued that this decision was subject to review under the § (c)(1) of the CZMA. *Id.* at 1169. The United States argued that review under § (c)(1) would be duplicative because any activities that took place under the extended leases would be reviewed for consistency under § (c)(3) when exploration plans or DPP's were approved. *See id.* at 1172. In particular, the government focused on a section of the CZMA which provides that after a DPP has undergone consistency review under § (c)(3), the subsidiary licenses and permits needed to carry out the activities provided in the plan are not subject to another round of consistency review. *See id.*; *see also* 16 U.S.C. § 1456(c)(3)(B). From there, it "extrapolate[d] that federal agency activities antecedent and prerequisite to exploration and development and production plans . . . could

not logically be subject to consistency review because consistency review occurs once, and once only—at the exploration and [DPP] stage." *Norton*, 311 F.3d at 1172.

But the Ninth Circuit rejected this view and instead agreed with California. *See id.* It found that while the "subsidiary licenses and permits" needed to carry out DPPs may not be subject to consistency review, it did not follow that the lease suspensions were not subject to review under § (c)(1), because the suspensions were not subsidiary to the DPPs. *See id.* It pointed out that Congress had specifically provided that the sales of leases could be reviewable under § (c)(1) even though activities conducted under those leases would also be reviewed under § (c)(3). *See id.* at 1173. From this, the Ninth Circuit found that Congress had "made it clear that the statute does not prohibit consistency review of federal agency activities that are not subsidiary to exploration and [DPPs]." *Id.* In sum, it held that "[t]he exploration plan and [DPP] stages are *not* the only opportunities for review afforded to States under the statutory scheme." *Id.* The Court then went on to find that the lease suspensions were subject to review under § (c)(1), noting that "the leases at issue ha[d] *never* been reviewed by California" and that the suspensions "represent[ed] a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production." *Id.*

The Court reads *Norton* to stand for two propositions. First, the CZMA does not prohibit multiple rounds of consistency review for related activities. *See id.* And second, federal agency activities that are "not subsidiary to exploration and [DPPs]" may be reviewed under § (c)(1) even though a DPP, APD, or APM may later be subject to review under § (c)(3). *See id.*

These holdings would appear to doom Defendants' arguments. The agencies' proposal to move forward with allowing WSTs—the activity at issue in this case—does not appear to be subsidiary to a DPP; instead, it is antecedent to review of APDs, APMs, and DPPs for the use of WSTs. But Intervenor Defendant API argues this conclusion is not so obvious after all. *See API Reply* 14:14-18:1. California has previously concurred in DPPs for oil production on the POCS, albeit likely under the assumption that production would use traditional methods rather than WSTs. *See, e.g., AR* 48637-47. API argues that this previous concurrence in DPPs means that any APDs or APMs for the use of WSTs will be subsidiary to the previous concurrence. *See API Reply* 15:18-17:9. It contends that California cannot argue that permit requests for WSTs fall outside the scope of the state's previous concurrence until the requests have been submitted. *See id.*

But this argument is too clever by half. Whatever California may have concurred in with regard to past plans and permits for oil production on the POCS, it seems clear that it has not concurred in the use of WSTs. Further, what is at issue in this case is action by the *agencies* to move forward with a proposal for allowing WSTs. In no sense can this agency action be said to be subsidiary to DPPs created by private oil companies. And California certainly has not concurred in this federal proposal for allowing WSTs on the POCS, as the Final EA marks the first time the issue has been comprehensively studied.

Accordingly, the Court finds that regardless of whether individual permits or development plans can later be challenged under § (c)(3) of the CZMA, BOEM and BSEE's proposal for allowing the use of WSTs on the POCS cannot. Therefore, it is reviewable under § (c)(1).

*iii. Remedy*

In their complaint, the California Plaintiffs ask the Court to issue an injunction prohibiting the Federal Defendants from approving WST permits until they comply with the CZMA by submitting a consistency determination to the Commission and completing the CZMA review process. *See California Compl.* at 25.

The Court agrees that this injunction is appropriate. Applying the *Monsanto* factors, the Court finds that the California Plaintiffs have suffered an irreparable injury in being denied their right under the CZMA to receive and be given an opportunity to review a consistency determination under 16 U.S.C. § 1456(c)(1). Money damages are ill-suited for remedying this type of violation. And the balance of the hardships appears to tip heavily in California's favor. The Court is separately enjoining the Federal Defendants from approving permits pending the completion of consultations with FWS under the ESA. It is possible that the CZMA process could be completed before the ESA process, in which case Defendants will suffer no additional harm. Further, the Federal Defendants have repeatedly emphasized the fact that operators are only rarely expected to request permits for WSTs on the POCS. *See*, *e.g.*, *Gov't Cross-Mot.* 27:24-29:4. Accordingly, the Court does not anticipate that an injunction requiring the Federal Defendants to complete the CZMA process before issuing WST permits will substantially interfere with the course of action that the agencies would otherwise take.

Finally, the public interest would not be disserved by issuing an injunction because any interest in proceeding forward with WSTs is outweighed by the interest of the people of the state of California in ensuring that their representatives are afforded their statutory right to review

the proposed action for consistency with California's coastal management plan. The Court's conclusion is in line with *Norton* where the Ninth Circuit affirmed the district court's decision to issue an injunction to remedy a CZMA violation. *See Norton* 311 F.3d at 1169, 1178. Accordingly, the Court concludes that an injunction should issue.

For the foregoing reasons, the Court **GRANTS** the California Plaintiffs' motion for summary judgment on their CZMA claims and **DENIES** Defendants' motions for summary judgment on these claims. The Federal Defendants are prohibited from approving any plans or permits (DPPs, APDs and APMs) for the use of WSTs on the POCS unless and until they complete the CZMA process under 16 U.S.C. § 1456(c)(1) for the proposed action described in the Final EA.

IV. Conclusion

For the foregoing reasons, Plaintiffs' and Defendants' motions for summary judgment are **GRANTED** in part and **DENIED** in part.

On the NEPA claims, the Court **GRANTS** Defendants' motions for summary judgment and **DENIES** Plaintiffs' motions for summary judgment.

On the ESA claims, the Court **GRANTS** the EDC and CBD Plaintiffs' motion for summary judgment with regard to their claims based on the agencies' failure to consult with FWS. It **DENIES** Defendants' motions for summary judgment on these claims. The Court finds that Plaintiffs' claims based on the agencies' failure to consult with NMFS are **MOOT** because this consultation has been completed.

On the CZMA claims, the Court **GRANTS** the California Plaintiffs' motion for summary judgment and **DENIES** Defendants' motion for summary judgment.

The Court concludes that injunctive relief is appropriate. The Federal Defendants are **ORDERED** to refrain from approving any plans or permits (DPPs, APDs, or APMs) for the use of WSTs on the POCS unless and until they (1) complete consultation with FWS under the ESA and (2) complete the CZMA process under 16 U.S.C. § 1456(c)(1) for the proposed action described in the Final EA.

This order closes the case.

**IT IS SO ORDERED**.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 19-55526

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA NON-PROFIT CORPORATION; SANTA BARBARA CHANNELKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT,
DEFENDANT-APPELLEE

AMERICAN PETROLEUM INSTITUTE,
INTERVENOR-DEFENDANT-APPELLANT

AND

RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY MANAGEMENT; DAVID FISH, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL

ENFORCEMENT; JOAN BARMINSKI, PACIFIC REGION DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR; DEB HAALAND, SECRETARY OF THE INTERIOR, DEFENDANTS

EXXON MOBIL CORPORATION; DCOR, LLC, INTERVENOR-DEFENDANTS

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No. 19-55707

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA NON-PROFIT CORPORATION; SANTA BARBARA CHANNELKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY; WISHTOYO FOUNDATION, PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT; RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY MANAGEMENT; DAVID FISH, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; BUREAU OF SAFETY

AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR,
BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR,
BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS

AMERICAN PETROLEUM INSTITUTE; DCOR, LLC,
INTERVENOR-DEFENDANTS

AND

EXXON MOBIL CORPORATION,
INTERVENOR-DEFENDANT-APPELLANT

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No. 19-55708

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION,
PLAINTIFFS-APPELLANTS

AND

PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB
BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL
COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY;
WISHTOYO FOUNDATION,
PLAINTIFFS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR,
OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN
ENERGY MANAGEMENT; KEVIN M. SLIGH, SR.,
DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR,
BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR,
BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLEES

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC,
INTERVENOR-DEFENDANT-APPELLEES

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No. 19-55718

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA,
EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA
COASTAL COMMISSION; CENTER FOR BIOLOGICAL

DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE
OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN
ENERGY MANAGEMENT; KEVIN M. SLIGH, SR.,
DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; BUREAU OF SAFETY
AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR,
BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR,
BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION,
INTERVENOR-DEFENDANTS

AND

DCOR, LLC
INTERVENOR-DEFENDANTS-APPELLANT

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No. 19-55725

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ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA NON-PROFIT CORPORATION; SANTA BARBARA CHANNELKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

v.

BUREAU OF OCEAN ENERGY MANAGEMENT; RICHARD YARDE, REGIONAL SUPERVISOR, OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY MANAGEMENT; DAVID FISH, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; JOAN BARMINSKI, PACIFIC REGION DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR; DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLANTS

AND

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC
INTERVENOR-DEFENDANTS

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No. 19-55727

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PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL;
CALIFORNIA COASTAL COMMISSION,
PLAINTIFFS-APPELLEES

v.

ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA NON-PROFIT CORPORATION; SANTA BARBARA CHANNELKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY; WISHTOYO FOUNDATION,
PLAINTIFFS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR,
OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY MANAGEMENT; DAVID FISH, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR,

BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR,
BUREAU OF SAFETY AND ENVIRONMENTAL
ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLEES

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC,
INTERVENOR-DEFENDANTS-APPELLEES

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No. 19-55728

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CENTER FOR BIOLOGICAL DIVERSITY;
WISHTOYO FOUNDATION,
PLAINTIFFS-APPELLEES

AND

ENVIRONMENTAL DEFENSE CENTER, A CALIFORNIA
NON-PROFIT CORPORATION; SANTA BARBARA
CHANNELKEEPER, A CALIFORNIA NON-PROFIT
CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA,
EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA
COASTAL COMMISSION,
PLAINTIFFS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT;
RICHARD YARDE, REGIONAL SUPERVISOR,
OFFICE OF ENVIRONMENT, BUREAU OF OCEAN ENERGY
MANAGEMENT; DAVID FISH, BUREAU OF SAFETY

AND ENVIRONMENTAL ENFORCEMENT;
AMANDA LEFTON, DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT; KEVIN M. SLIGH, SR., DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT;
JOAN BARMINSKI, PACIFIC REGION DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT;
MIKE MITCHELL, ACTING PACIFIC REGION DIRECTOR, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR,
DEFENDANTS-APPELLEES

AMERICAN PETROLEUM INSTITUTE;
EXXON MOBIL CORPORATION; DCOR, LLC,
INTERVENOR-DEFENDANTS-APPELLEES

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Filed: September 26, 2022

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**ORDER**

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Before: WALLACE, GOULD, and BEA, Circuit Judges.

Judge Gould has voted to deny the Petitions for Rehearing *En Banc* and Judges Wallace and Bea so recommend. *See* Docket Entry Nos. 139, 140, 141, 142.[1] The full court has been advised of the Petitions, and no judge has requested a vote on whether to rehear the matter *en banc*.

[1] These Petitions for Rehearing *En Banc* were filed in all of the above-captioned cases. For simplicity, this order refers only to the docket entry numbers for *EDC, et al. v. BOEM, et al.* (No. 19-5552).

Fed. R. App. P. 35. Accordingly, the Petitions are **DE-NIED**.

## APPENDIX E

### Statutory Provisions Involved

Section 704 of Title 5 of the United States Code provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 1456(c) of Title 16 of the United States Code provides in relevant part:

> (1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

* * *

> (C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated

under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.

* * *

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program.

* * *

(B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land or water use or natural resource of the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with the enforceable policies of such state's approved manage-

ment program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information.

* * *