No. 22-703

In the Supreme Court of the United States

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

v.

ENVIRONMENTAL DEFENSE CENTER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the federal respondents' final programmatic environmental assessment and finding of no significant impact were final agency actions that are subject to judicial review under the Administrative Procedure Act.

2. Whether the federal respondents violated the Coastal Zone Management Act by failing to prepare a consistency determination required under 16 U.S.C. § 1456(c)(1).

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INTRODUCTION

In 2013 and 2014, the federal agencies that are among the respondents here granted more than 50 permits for hydraulic fracturing and other well stimulation treatments off the coast of California, without notifying the public or conducting any environmental review. After those permits came to light, the relevant federal agencies entered a legal settlement imposing a moratorium on further permits until they had conducted a programmatic environmental assessment (EA) under the National Environmental Policy Act (NEPA). In 2016, they published their "Final Programmatic EA," C.A. Fed. Appellants' E.R. 1183, which evaluated the "proposed action" of approving—without environmental restriction—the use of well stimulation treatments on 22 operating platforms on the Pacific Outer Continental Shelf, *id.* at 1201, 1239. The agencies issued a finding that the proposed action "would not cause any significant impacts" and that no further analysis of environmental impact was necessary. *Id.* at 1179.

The court of appeals below held that the programmatic EA and that finding were subject to judicial review under the Administrative Procedure Act; that the agencies violated NEPA by conducting an inadequate assessment and failing to complete an environmental impact statement; that they violated the Endangered Species Act by failing to consult about effects on protected species; and that they violated the Coastal Zone Management Act (CZMA) because they did not determine whether their proposal was consistent with the State's federally-approved coastal program.

Petitioners intervened as defendants below. They now ask this Court to grant certiorari, but only with

respect to two issues. First, they argue that respondents' NEPA and CZMA claims should have been dismissed because the final programmatic EA and finding of no significant impact are not subject to judicial review under the Administrative Procedure Act. Second, they contend that the federal respondents were not required to make any consistency determination under the CZMA. But petitioners identify no persuasive reason for this Court to take up those issues.

As the federal respondents (who did not petition for certiorari) have recognized, this is an "unusual case with unusual facts." C.A. Oral Arg. at 1:39. The court of appeals correctly applied the relevant statutes to the particular record before it. Petitioners do not allege that either of the holdings they seek to challenge implicates any conflict among the lower courts. And their assertion that those holdings are of broad legal significance is belied by the decision below, which turned on case-specific facts. As to petitioners' practical concerns about ongoing delays in their business activities, the cause of those delays is not the decision below but the agencies' failure to carry out the obligations that Congress imposed on them—including the agencies' violations of NEPA and the Endangered Species Act, which neither petitioners nor the federal respondents ask this Court to review.

STATEMENT

A. Legal Background

In the Outer Continental Shelf Lands Act, Congress declared that certain submerged land beyond the boundaries of state territorial waters should be made available for the development of energy resources—"subject to environmental safeguards" and in consideration of "the rights and responsibilities of

all States . . . to preserve and protect their marine, human, and coastal environments." 43 U.S.C. §§ 1332(3), (5); *see id.* §§ 1312, 1331(a), 1332.

The Act establishes a framework for the Department of the Interior to make sites on the Outer Continental Shelf available for oil and gas production. 43 U.S.C. § 1332. The Department first creates a leasing program and auctions leases. *Id.* §§ 1344, 1337. The Department then reviews and approves exploration plans submitted by the winning bidders, and development and production plans for any viable energy deposits subsequently discovered on the leases. *Id.* §§ 1340, 1351. Lessees generally must seek additional permits before beginning drilling activities at any well, using new equipment, or otherwise modifying the activities described in their development and production plans. *See* 30 C.F.R. §§ 250.410, 250.465. Throughout these processes, affected States "are entitled to an opportunity to participate . . . in the policy and planning decisions made by the Federal Government." 43 U.S.C. § 1332(4)(C).

Consistent with Congress's declaration of purpose, the Department must comply with federal environmental statutes as it administers oil and gas leases. 43 U.S.C. § 1332(3). This case primarily involves three such statutes.

The first, the National Environmental Policy Act (NEPA), seeks to "reduce or eliminate environmental damage" and "promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321). To advance those goals, Congress required federal agencies to prepare an environmental impact state-

ment for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An agency is not required to prepare an environmental impact statement if it issues a finding of no significant impact (FONSI) based on an analysis known as an environmental assessment (EA), which is less detailed than an environmental impact statement. *See* 40 C.F.R. §§ 1501.5-1505.6; *Pub. Citizen*, 541 U.S. at 757-758.

The second statute is the Endangered Species Act. As relevant here, that Act requires federal agencies to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service before proceeding with an action that might adversely affect a protected species. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01 *et seq*.

The third statute is the Coastal Zone Management Act (CZMA), which encourages States to develop programs to manage their coastal areas. 16 U.S.C. § 1452(2), (4), (6). Once the Secretary of Commerce has approved a State's program, federal activities that "affect[] 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" the state program. *Id.* § 1456(c)(1)(A); *see also* 15 C.F.R. § 930.36(e)(2). To enforce that mandate, Congress required a formal evaluation of whether a proposed action affecting a State's coastal zone is consistent with the State's coastal program. *See* 16 U.S.C. § 1456.

There are two different types of consistency review under the CZMA. When a "Federal agency activity" affects the coastal zone, the agency must submit a "consistency determination" to the affected State. 16 U.S.C. § 1456(c)(1)(C); *see* 15 C.F.R. § 930.36. When a

third party seeks a license or permit from a federal agency to conduct an activity that affects coastal resources, including "the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act," the third party must provide the agency and the affected State with a consistency "certification." 16 U.S.C. § 1456(c)(3)(A); *see id.* § 1456(c)(3)(B). The two categories are mutually exclusive. *Id.* § 1456(c)(1)(A).

Under either type of review, the State receives an opportunity to concur with or object to the consistency evaluation. *See* 15 C.F.R. §§ 930.41, 930.62-930.63, 930.78. The State must register any objection within the applicable deadline; otherwise, it is presumed that the State has concurred. 16 U.S.C. § 1453(c)(3)(A), (B)(ii); 15 C.F.R. §§ 930.41(a), 930.62(a), 930.78(a), (b). A State's objections to a proposed activity can be overridden by the agency itself, the Secretary of Commerce, or the President. *See* 16 U.S.C. § 1456(c)(1)(B); 15 C.F.R. §§ 930.120-930.131, 930.43(d).

B. Factual and Procedural Background

1. There are 23 platforms on leases off the coast of southern California, 22 of which are used for oil and gas production. Pet. App. 14a; C.A. Fed. Appellants' E.R. 1215. Those platforms are operated by companies, including some of the petitioners here, under development and production plans approved by the Department of the Interior between 1967 and 1989. Pet. App. 14a; C.A. Fed. Appellants' E.R. 1241-1242.

Petitioners and other oil companies use "well stimulation treatments," to "make it easier for oil and gas to pass through the subterranean rock for extraction." Pet. App. 15a & n.3; *see also* C.A. Fed. Appellants' E.R. 1172. The treatments at issue here include hydraulic

fracturing, often referred to as "fracking," which "inject[s] a mixture of water, sand, and chemicals into a well at an extremely high pressure to fracture the rock formation." Pet. App. 15a. They also include acid fracturing, which "appl[ies] an acid solution at a high pressure to etch channels into the rock," and matrix acidization, which "inject[s] a mixture of acids to dissolve the rock, rather than fracture it." *Id.* at 15a n.3.

The chemicals used in those treatments "include carcinogens, mutagens, toxins, and endocrine disruptors," which threaten to "harm aquatic animals and other wildlife" in the surrounding area. Pet. App. 15a. "Well stimulation treatments also emit pollutants, including carcinogens and endocrine disruptors, into the air." *Id.* In addition, the treatments can "increase the risk of oil spills, especially because [they] are often used on old wells," like those at issue here. *Id.*

Despite those risks, between 2013 and 2014 the Department of the Interior "granted 51 permits authorizing oil companies to perform well stimulation treatments off the coast of California without any environmental review whatsoever." Pet. App. 16a; *see* C.A. Fed. Appellants' E.R. 1097. There was no public notice of either the permit applications or the Department's determinations. The practice became known to the public only when the Department disclosed it in response to FOIA requests. Pet. App. 15a-16a.

2. In 2014 and 2015, the Environmental Defense Center and the Center for Biological Diversity (respondents here) sued the Department and other federal agencies and officials. Pet. App. 16a; *see* Dkt. 1, *Envtl. Def. Ctr. v. Bureau of Safety & Envtl. Enf't*, No. 14-9281 (C.D. Cal. Dec. 3, 2014); Dkt. 1, *Ctr. for Biological Diversity v. Bureau of Ocean Energy Mgmt.*, No. 15-1189 (C.D. Cal. Feb. 19, 2015). The suits alleged

that the federal defendants violated NEPA by granting permits authorizing well stimulation treatments without an environmental review. Pet. App. 16a.

The federal defendants settled those cases by agreeing to "undertake a programmatic Environmental Assessment pursuant to [NEPA] to analyze the potential environmental impacts of certain well-stimulation practices on the Pacific OCS." Dkt. 79-1 at 3, *Envtl. Def. Ctr.*, No. 14-9281 (C.D. Cal. Jan. 29, 2016); Dkt. 41-1 at 3, *Ctr. for Biological Diversity*, No. 15-1189 (C.D. Cal. Jan. 29, 2016). They also agreed to a moratorium on permit approvals until they had completed that assessment and issued either an environmental impact statement or a finding of no significant impact. *Id.*; *see* Pet. App. 16a.

The agencies first issued a draft EA and invited public comment. *See* 81 Fed. Reg. 8743 (Feb. 22, 2016); Pet. App. 16a. In May 2016, the agencies published their "Final Programmatic EA." C.A. Fed. Appellants' E.R. 1183. The EA evaluated "the potential environmental impacts of the proposed approval of the use of [well stimulation treatments] on the 43 current leases and 23 platforms currently in operation" off the coast of Southern California. *Id.* at 1201; *see id.* at 1181-1432. The agencies' proposal was to "allow the use" of well stimulation treatments on those leases and platforms, without any restrictions, for all applications meeting preexisting performance standards. *Id.* at 1203-1204, 1217; *see id.* at 1223 (the agencies "will . . . approve" all applications that comply with performance standards). The agencies also considered three alternatives: allowing the treatments only at certain seafloor depths; allowing the treatments but prohibiting the discharge of waste fluids into the open

ocean; and prohibiting the treatments altogether. *Id.* at 1204.

The EA concluded that the proposal to allow the treatments without restriction would not "result in any cumulative effects" on the coastal environment. C.A. Fed. Appellants' E.R. 1211. The agencies also issued a FONSI, which determined that the proposed action "would not cause any significant impacts" and "does not constitute a major federal action significantly affecting the quality of the human environment." *Id.* at 1179. The agencies did not consult with the Fish and Wildlife Service or National Marine Fisheries Service about effects on protected species. Pet. App. 17a.

3. The State of California and the California Coastal Commission, as well as private respondents (including the Environmental Defense Center, the Center for Biological Diversity, and other environmental organizations) sued to challenge the EA and FONSI. Pet. App. 17a. Collectively, the suits alleged that the federal defendants (respondents here) violated NEPA, the Endangered Species Act, and the CZMA. *Id.* at 17a-18a. The district court consolidated the cases and allowed petitioners to intervene. *See id.* at 18a.

The federal defendants and one of the petitioners here moved to dismiss on the ground that the EA and FONSI were not "final agency action" under the Administrative Procedure Act. Pet. App. 68a-69a; *see* 5 U.S.C. § 704. The district court denied that motion. It reasoned that the FONSI "is the final step in [the agencies'] NEPA process and effectively lifts the moratorium" on well stimulation treatments on the Pacific Outer Continental Shelf that had resulted from the

2016 settlement agreement. Pet. App. 83a. In addition, the FONSI "determines 'rights or obligations.'" *Id.* By "finding that [well stimulation treatments] have no significant environmental impact," the agencies allowed permitting to proceed, which "impacts legal rights, as indicated by the Intervenors' involvement in this suit[.]" *Id.*

After receiving cross-motions for summary judgment, the district court granted summary judgment to the federal defendants on the NEPA claims and granted partial summary judgment to the private plaintiffs on their Endangered Species Act claims. Pet. App. 92a-157a. As to the CZMA claims, the court granted summary judgment to the state plaintiffs, holding that the agencies were required to conduct a consistency determination under 16 U.S.C. § 1456(c)(1). *Id.* at 147a-154a.

The court enjoined the federal defendants from approving any further permits for well stimulation treatments until it consulted with the Fish and Wildlife Service, as required by the Endangered Species Act, and completed the consistency review required by the CZMA. Pet. App. 157a.

4. In a unanimous decision authored by Judge Gould, and joined by Judges Wallace and Bea, the court of appeals affirmed in part and reversed in part. Pet. App. 1a-67a.

The court first held that the EA and FONSI constituted final agency action, reviewable under the Administrative Procedure Act. Pet. App. 19a-23a. The court applied this Court's holding from *Bennett v. Spear*, 520 U.S. 154 (1997), that an agency's action is "final" when it (i) "mark[s] the consummation of the agency's decision-making process" and (ii) determines

"rights or obligations" or is of a type "from which legal consequences will flow." Pet. App. 20a (quoting *Bennett*, 520 U.S. at 177-178).

The court reasoned that the first requirement was satisfied here because "[t]he 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." Pet. App. 20a. They "provide[d] the agencies' final word on the environmental impacts of the proposed action"—authorizing well stimulation treatments without restriction—which "will not be revisited." *Id.* at 21a. The court rejected the agencies' claim that the EA and FONSI represented only "preliminary steps" toward authorizing well stimulation treatments, given "the context of this litigation, where 51 permits . . . were approved without environmental review" before the agencies agreed to pause the permitting process in a legal settlement. *Id.* at 22a.

As to the second requirement for final agency action, the court reasoned that the EA and FONSI had affected the rights of oil companies by lifting the moratorium on well stimulation treatments on the Pacific Outer Continental Shelf and allowing the permitting process for those treatments to proceed. *Id.* at 23a. In addition, as a result of the FONSI, "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." *Id.*

Turning to the merits, the court held that the EA violated NEPA. Pet. App. 30a-49a. It explained that the agencies relied on arbitrary and capricious assumptions in the EA, including by forecasting no more

than five well stimulation treatments per year based on "questionable and inconclusive historical records"; by assuming that compliance with a different permitting scheme (administered by the EPA) "would render the impacts of well stimulation treatments insignificant"; and by failing to consider a reasonable range of alternatives, such as limiting the number of treatments per year. *Id.* at 30-31a, 33a, 38a-39a. In addition, the court held that the agencies should have prepared an environmental impact statement because the record presented substantial questions concerning whether the proposed action would have significant impacts. *Id.* at 41a-48a. It ordered the district court to expand its injunction to prohibit the agencies from approving permits until they issued an environmental impact statement. *Id.* at 49a, 66a.

Next, the court held that the agencies violated the Endangered Species Act because they did not consult with either of the federal agencies with wildlife expertise. Pet. App. 51a; *see id.* at 50a-54a. The agencies did not begin that process until after they were sued, *id.*, and they had not completed their consultation with the Fish and Wildlife Service, *id.* at 52a.

Finally, the court concluded that the agencies violated the CZMA by failing to consider whether their proposed action was consistent with the State's coastal management program. Pet. App. 55a-62a. It explained that Section 1456(c)(1) requires a consistency determination for each "Federal agency activity affecting the coastal zone of a state." 16 U.S.C. § 1456(c)(1)(A); *see* Pet. App. 55a. The implementing regulations define "Federal agency activity" to cover "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities"—including "activities where a Federal agency

makes a proposal for action initiating an activity or series of activities," such as a "plan that is used to direct future agency actions." 15 C.F.R. § 930.31(a); *see* Pet. App. 57a-58a. The court concluded that the agencies' programmatic action satisfied this definition. Pet. App. 58a.

The court rejected the argument that consistency review should occur only indirectly, via certifications under 16 U.S.C. § 1456(c)(3) submitted by private applicants seeking permits to use treatments at individual wells. Pet. App. 59a-62a. It acknowledged that *Secretary of the Interior v. California*, 464 U.S. 312 (1984), had held that lease sales to oil companies did not require a consistency determination by the federal agency "because the activities specifically affecting the coastal zone would be reviewed later, under [Section 1456(c)(3)], when the oil companies submitted plans to the federal agencies for approval." Pet. App. 60a. But Congress had responded to that decision by amending the CZMA to broaden its terms and require consistency determinations under Section 1456(c)(1) for lease sales, notwithstanding that site-specific activities would later require separate consistency certifications under Section 1456(c)(3). *Id.* In light of those amendments, the agencies' programmatic decision in this case to allow well stimulation treatments without restriction requires a consistency determination by the agencies because it "differs in scope and in stage from the agencies' later decisions about specific permit applications." *Id.* at 61a.

The court of appeals denied rehearing en banc, without dissent and without any judge requesting a vote. Pet. App. 166a-167a.

ARGUMENT

Petitioners do not seek review of the court of appeals' holding that the agencies violated NEPA by issuing an environmental assessment that was arbitrary and capricious and by failing to prepare an environmental impact statement. Pet. 12 n.*. Nor do they seek review of that court's ruling that the agencies violated the Endangered Species Act by failing to consult with the Fish and Wildlife Service about their proposed action. *Id.* Instead, petitioners ask this Court to grant certiorari regarding whether the particular agency actions challenged in this case were "final" for purposes of judicial review of respondents' NEPA and CZMA claims under the Administrative Procedure Act, and whether the agencies were required to conduct a consistency determination under the CZMA. The court of appeals correctly answered both of those questions based on the particular circumstances of this case. Neither holding warrants certiorari.

I. PETITIONERS OVERSTATE THE IMPORTANCE OF THE QUESTIONS PRESENTED

Petitioners do not allege that either of the questions presented implicates any circuit conflict. Instead, they seek review on the premise that both questions are "of exceptional legal and practical importance." Pet. 2. But their contentions about the "enormous" significance (*id.* at 4) of the questions do not withstand scrutiny.

To begin with, petitioners' arguments about the significance of the "final agency action" question rest on an expansive reading of the decision below that cannot be squared with what the court of appeals actually held. On petitioners' reading, "the decision below will bog down the critically important preliminary

work of NEPA review" across the board, while also exposing to judicial review "innumerable" agency actions outside "the context of NEPA." Pet. 26, 27; *see id.* at 3, 4, 14, 16. Indeed, petitioners warn, "[u]nder the Ninth Circuit's approach, *any* preliminary or interlocutory agency decision could be reconceived as a 'final' decision." *Id*. at 16. But the court of appeals held no such thing. Its analysis of the final agency action requirement of 5 U.S.C. § 704 turned on the specific circumstances of this case: the precise action addressed by the EA; the alternatives assessed by the Department; and the historical context of that assessment, including the agencies' earlier issuance of numerous permits for well stimulation treatments without environmental review, which led to the 2016 settlement agreement and moratorium. Pet. App. 19a-23a; *see infra* pp. 17-21.

There is no basis for concluding that this case-specific analysis will "unleash premature judicial review of numerous intermediate procedural decisions." Pet. 4. Petitioners do not identify a single judicial decision (published or unpublished) that has cited the court of appeals' holding on final agency action in the nearly eleven months since the court issued its decision, and the state respondents are not aware of any. Nor is there any merit to petitioners' assertion that the decision has "unleashed a flood of challenges at each stage of NEPA review," with plaintiffs "already citing [it] for the proposition that all NEPA documents are final agency actions." Pet. 27. The only example petitioners cite (*see id.*) is a single notice of supplemental authority filed with respect to a dispute over mootness. Dkt. 31, *W. Watersheds Project v. Sec'y of the Interior*, No. 21-297 (D. Or. June 9, 2022). If a court ever does invoke the decision below to support

an unduly expansive understanding of the scope of judicial review under the APA, *see* Pet. 26-28, this Court could grant review in that case. But there is no reason to expect that will happen.

Petitioners also warn that the lower court's decision will "stall vital energy projects" in their wells off the coast of southern California. Pet. 3, 4.[1] As noted, however, petitioners "do not challenge" the determinations that the EA was arbitrary and capricious, that the agencies were required to prepare an environmental impact statement, and that the agencies had failed sufficiently to consult with the Fish and Wildlife Service. Pet. 12-13 n.*. That makes it difficult to credit their contention that the court of appeals' holding regarding final agency action is what is interfering with their production efforts. Petitioners acknowledge that if their jurisdictional arguments were correct, and judicial review did not occur now, then the agencies' conclusions in the programmatic EA and FONSI would eventually be reviewable as part of judicial review of every future decision by the agencies to issue a permit for well stimulation treatments on the Pacific Outer Continental Shelf. Pet. 15, 17; *see also* Chamber of Commerce Br. 7. One way or the other, then, the now-undisputed defects in the agencies' programmatic actions will continue to "stall" permits for well-stimulation treatments—until the agencies comply with NEPA and the Endangered Species Act. It is the agencies' failure to carry out the obligations Congress imposed on them that has caused the "ongoing delay" (Pet. 25) of which petitioners complain.

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[1] *But see* C.A. Fed. Appellants' E.R. 1180 (federal agencies' assessment that use of well stimulation treatments would *not* be "essential to hydrocarbon production from these platforms").

As to the second question presented, petitioners assert that the decision below "will thwart progress on a substantial range of activities that are subject to the CZMA." Pet. 28. Here again, however, the court of appeals faithfully applied the text of the CZMA to the unique circumstances of this case. *See* Pet. App. 57a-62a; *infra* pp. 27-30. If any court ever applied that holding in the sweeping manner feared by petitioners, *see* Pet. 28-29, that decision could be subject to further review by this Court.

And with respect to this case, petitioners' assertion that it would "create years of delay" (Pet. 29) for the agencies to comply with their consistency obligations under the CZMA is hyperbole. The agencies "may use [their] NEPA documents as a vehicle for [their] consistency determination," or may submit a brief separate determination. 15 C.F.R. § 930.37; *see* California Coastal Commission, Federal Consistency, https://tinyurl.com/4ufazfbv (providing example of 28-page "detailed" federal consistency determination and 4-page "moderate" determination). Unless the agency decides to extend the response period, the State must raise any objection within 75 days after receiving the determination. And the agencies may take action starting 90 days from that receipt, if they maintain after that period that the proposed action is fully consistent with the State program, notwithstanding the State's objection. 15 C.F.R. §§ 930.41(a)-(c), 930.43(d); *see* 16 U.S.C. § 1456(c)(1)(C). The principal cause of any continued delay is not the decision below, but the agencies' failure to comply with their obligation to make a consistency determination—an obligation that was recognized by the district court more than four years ago, *see* Pet. App. 147a-154a.

II. THE DECISION BELOW IS CORRECT

Petitioners argue that the decision below is "plainly wrong" (Pet. 3) in holding that the EA and FONSI constitute final agency action and that the agencies violated the CZMA. *See id.* at 14-24. Those arguments are unpersuasive. The court of appeals correctly applied the law to the specific circumstances of this case.

A. The Challenged Actions Are Reviewable Under the Administrative Procedure Act

Petitioners first contend that the courts are powerless to review the agencies' actions because the actions are not "final" under the Administrative Procedure Act. Pet. 14-20. That is incorrect.

1. Congress has authorized judicial review of "final agency action." 5 U.S.C. § 704. "As a general matter, two conditions must be satisfied for agency action to be 'final[.]'" *Bennett v. Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 178 (citation omitted). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[.]'" *Id.* In conducting that two-part inquiry, this Court has followed a "'pragmatic' approach." *U.S. Army Corps of Engr's v. Hawkes Co.*, 578 U.S. 590, 599 (2016); *see FTC v. Standard Oil Co.*, 449 U.S. 232, 240 (1980) (describing approach to finality as "'flexible'"). The actions challenged here readily satisfy the two conditions for finality.

a. The EA and FONSI marked the consummation of the relevant agency decisionmaking process. They evaluated the environmental impacts of the "Proposed

Action," under which the agencies "will approve the use of fracturing and non-fracturing WSTs at the 22 production platforms located on the 43 active leases on the" Pacific Outer Continental Shelf, so long as applications comply with certain performance standards. C.A. Fed. Appellants' E.R. 1175. The agencies definitively "determine[d] that the Proposed Action would not cause any significant impacts." *Id.* at 1179. That determination purported to be based on the agency's "comprehensive analysis." *Id.* at 1180; *compare Hawkes*, 578 U.S. at 597-598 (holding agency action final, in part because it was based on "extensive fact-finding"). In contrast to the agency's earlier draft assessment—which the plaintiffs did not challenge, *see* Pet. App. 16a, 95a—the terms of the EA and FONSI emphasized that these programmatic determinations were "final." C.A. Fed. Appellants' E.R. 1180, 1181, 1201.

Petitioners argue that the challenged actions are not final because petitioners may not engage in treatments at individual wells until they acquire individual permits. Pet. 2-3, 15, 19-20. But the fact that petitioners intend to cause subsequent and distinct agency actions by applying for individual permits does not mean that there is anything "intermediate" about the final programmatic actions challenged in this case. *Id.* at 17. The "agencies concede that no further programmatic environmental review of these treatments will be conducted," Pet. App. 21a, and petitioners do not explain how or why the agencies would disregard that commitment in assessing a future individual permit application. The possibility that the agencies might later choose to conduct certain site-specific environmental analysis for individual wells "beyond the programmatic level," *e.g.*, C.A. Fed. Appellants' E.R. 1219,

despite their statement that they "will . . . approve" individual applications that meet performance standards without further analysis, *id.* at 1203-1204, does not make their programmatic actions nonfinal.[2] In every relevant sense, the EA and FONSI "provide the agencies' final word on the environmental impacts of the proposed action." Pet. App. 21a.

Petitioners attempt to support their argument by invoking (Pet. 17) the second sentence of 5 U.S.C. § 704, which states that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." The function of that clause is to clarify that *if* review of an earlier action was not available, review of a later action may reach back to it. *See, e.g.*, *Standard Oil*, 449 U.S. at 245 (although agency's decision to file administrative complaint could not be immediately challenged in court, Section 704 authorizes subsequent judicial review of a cease-and-desist order to examine alleged unlawfulness in the issuance of the initial complaint). But Section 704 does not define "preliminary, procedural, or intermediate" action, and it sheds little light on whether a particular action falls into that category as opposed to being (under the statute's preceding sentence) "final." Because the particular actions challenged here "conclude the agencies' programmatic

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[2] *Cf. Hawkes*, 578 U.S. at 598 (possibility that agency might revise an approved jurisdictional determination "based on 'new information' . . . is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal"); *Sackett v. EPA*, 566 U.S. 120, 126 (2012) (order that presumptively prevented plaintiffs from obtaining permits was final agency action, even though regulations allowed agency to "process a permit application" notwithstanding the order "[if] doing so 'is clearly appropriate'").

review under NEPA," they are not preliminary, procedural, or intermediate, but "final" under the first sentence of Section 704 and the first prong of the *Bennett* test. Pet. App. 20a.

b. The EA and FONSI also satisfy the second requirement for final agency action: they are actions "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178.

Before those actions, the agencies were subject to a binding 2016 agreement forbidding them from approving permit applications for well stimulation treatments on the Pacific Outer Continental Shelf. Pet. App. 16a. The EA and FONSI lifted that prohibition, "allow[ing] the permitting process for these treatments to proceed." *Id.* at 23a. What is more, because the agencies determined that "the unrestricted use of well stimulation treatments, with no cautionary limitations," would not cause any significant environmental impacts even at the programmatic level, petitioners and other "oil companies [would] not need to abide by any depth, discharge, or frequency limitations in their permit applications" for individual well stimulation treatments. *Id.* The legal consequences of the challenged action are direct and material.

Petitioners assert that the challenged actions did not "'compel[] [any]one to do anything'" and had "'no binding effect whatsoever.'" Pet. 18. That is incorrect. The EA and FONSI lifted the settlement agreement's bar on permit processing, as just mentioned. *See also* 40 C.F.R. § 1506.1(c) (restrictions on agency's ability to take actions while "work on [the] required environmental review" was "in progress"); *id.* §§ 1506.1(a), 1508.1(q)(3). The effect of the EA and FONSI was thus

to compel the agencies to resume accepting and processing permit applications for well stimulation treatments. That is why petitioners asserted, when they sought to intervene in this case, that members of the American Petroleum Institute "currently enjoy a legally protected interest in developing and operating their leases and may submit for approval [applications] involving well-stimulation technologies" that the EA "deems appropriate for use offshore California." D. Ct. Dkt. 13 at 8. The EA and FONSI significantly altered the rights and duties of private parties and the federal agencies.[3]

Judicial review of the programmatic EA and FONSI at this juncture is sensible and consistent with administrative law principles. It helps courts review the agencies' analysis of programmatic environmental effects in a manner that case-by-case review of the marginal effects of individual applications does not. *Cf. Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976)

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[3] The EA and FONSI also released the agencies from regulatory obligations that would otherwise apply as to permitting decisions. *See* 40 C.F.R. § 1501.11(a), (b), (c)(1) (allowing federal agencies to "exclude from consideration" in any subsequent proceeding any "issues already decided" in a programmatic assessment); 43 C.F.R. § 46.140(a) (allowing Department of the Interior to forgo "further analysis" of the impacts of the proposed activities that have been already "identified and analyzed in [a] broader NEPA document"); 43 C.F.R. § 46.300(a) (Department of the Interior need not prepare a full environmental assessment for actions covered in earlier document); *cf. Cure Land, LLC v. United States Dep't of Agric.*, 833 F.3d 1223, 1231 (10th Cir. 2016) ("The FONSI satisfies the second finality requirement because it establishes which [actions] the agency may implement immediately—and which would require additional process to comply with NEPA.").

(discussing importance under NEPA of considering "cumulative or synergistic" effects of agency actions). And it allows early identification of errors in the programmatic NEPA document, so that the agency can promptly begin curing those errors. Indeed, Congress has signaled that it views programmatic NEPA determinations to be appropriate for judicial review notwithstanding the fact that actual permits would require additional steps by the agency.[4]

2. Petitioners contend that the court of appeals' holding on final agency action "departed from this Court's precedents." Pet. 14. None of the precedents they invoke supports that contention.

a. Petitioners first argue that the decision below is "contrary to this Court's decision" in *Standard Oil*. Pet. 16; *see also* Chamber of Commerce Amicus Br. 8-9. In that case, the FTC filed an administrative complaint against Standard Oil and other companies regarding unfair methods of competition. *Standard Oil*, 449 U.S. at 234 & n.2. While the agency was adjudicating that matter, Standard Oil filed a civil lawsuit alleging that the administrative complaint was unlawful because the FTC did not, in fact, have "'reason to believe'" the companies were violating the Federal Trade Commission Act as averred in the administrative complaint. *Id.* at 235. This Court held that the administrative complaint did not constitute final

[4] For example, Congress enacted a statute of limitations for NEPA challenges concerning oil and gas leasing in Alaska's National Oil Preserve, which specifies that "[a]ny action seeking judicial review of the adequacy of any *program or* site-specific environmental impact statement" is barred unless brought within 60 days of "such statement['s]" publication. 42 U.S.C. § 6506a(n) (emphasis added).

agency action—but for reasons that do not support petitioners' arguments in this case.

The principal consideration invoked by the Court was that, "[b]y its terms, the [FTC's] averment of 'reason to believe' that [Standard Oil] was violating the Act is not a definitive statement of position." *Standard Oil*, 449 U.S. at 241. The administrative complaint had no function other than to "initiate the proceedings," *id.* at 242, with the companies entitled to extensive additional proceedings before any administrative finding could occur, *id.* at 241. Here, by contrast, the EA and FONSI did not "initiate" the programmatic NEPA proceeding—they concluded that proceeding and stated the agencies' finding that "the use of Well Stimulation Treatments (WSTs) on the Pacific Outer Continental Shelf" will "not cause any significant impacts." C.A. Fed. Appellants' E.R. 1172, 1179. As the agencies have acknowledged, there will be no further administrative proceedings regarding that programmatic conclusion. Pet. App. 21a.

The other "pragmatic considerations" addressed by the Court in *Standard Oil* (449 U.S. at 243) likewise point toward a finding of finality here. In *Standard Oil*, allowing the company to challenge the FTC's threshold "reason to believe" averment would have "den[ied] the agency an opportunity to correct its own mistakes" through its administrative adjudication, causing "piecemeal review" and "delay[ing] resolution of the ultimate question" of whether the Act's requirements had been violated. *Id.* at 242. Here, however, the agencies have said they will not revisit the findings in their programmatic actions. *See supra* p. 10. And it is petitioners' proposal to defer judicial review of those actions until the individual permit reviews that would delay resolution of the ultimate questions

in this case, cause piecemeal litigation, and potentially lead to conflicting rulings in different district courts on the adequacy of the programmatic review.

b. Next, petitioners contend that the decision below is at odds with *Dalton v. Specter*, 511 U.S. 462 (1994). *See* Pet. 16, 20. That case arose under an "elaborate" statutory selection process to identify military bases for closure. *Dalton*, 511 U.S. at 464. The Secretary of Defense first submitted recommendations to a special commission, which then conducted hearings and prepared a report for the President assessing the Secretary's recommendations and presenting the commission's own recommendations. *Id.* at 465. But because the President had the ultimate authority to accept or reject the commission's recommendations "for whatever reason he sees fit," *id.* at 476, this Court held that neither the Secretary's recommendations nor the commission's were final agency action, *id.* at 469-470. Rather, "the Secretary's and Commission's reports serve[d] 'more like a tentative recommendation than a final and binding determination.'" *Id.* at 469. That reasoning has no relevance to this case. The petitioners here do not assert that the federal respondents were "subordinate official[s]" whose decisions were subject to later revision by a superior. *Id.* at 469-470. The action challenged here *is* the "final" programmatic assessment by the ultimate decisionmakers. C.A. Fed. Appellants' E.R. 1201.

c. The last decision invoked by petitioners, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), is off-point for the same reason. *See* Pet. 16, 20. It concerned how federal employees stationed overseas were counted during the decennial census. *Franklin*, 505 U.S. at 795. The Secretary of Commerce issued a memorandum requiring that such employees be allocated to

their home States for purposes of apportionment. *Id.* at 793. But federal statutes made clear that only the President had power to make a definitive determination. *Id.* at 798. Unlike the EA and FONSI at issue here, the Secretary's report in *Franklin* "serve[d] more like a tentative recommendation than a final and binding determination," and was not final agency action for the same reason that "'the ruling of a subordinate official' [is] not final." *Id.* at 798 (citation omitted).

3. Petitioners do not contend that this case implicates any conflict among lower courts. But an amicus brief filed by the State of Texas asserts that the court of appeals' decision in this case "conflicts with the decisions of three of its sister circuits." Texas Amicus Br. 2. A closer look at those three decisions shows that the purported conflict does not exist.

In *Reliable Automatic Sprinkler Co., Inc. v. CPSC*, 324 F.3d 726 (D.C. Cir. 2003), the D.C. Circuit considered a challenge to an agency's announcement that its staff was investigating whether a certain product presented a "substantial product hazard" under the Consumer Product Safety Act. *Id.* at 729-730. The court reasoned that if "the filing of an administrative complaint does not constitute final agency action" under *Standard Oil*, it followed that the challenged actions, "which are merely investigatory and clearly fall short of filing an administrative complaint, are not final agency action." *Id.* at 732. In this case, by contrast, the agencies did not merely announce an inquiry into the programmatic environmental impacts of well stimulation treatments—they completed that inquiry, issued a final finding of no significant impact, and in so doing released themselves from a binding agreement.

In *Louisiana v. United States Army Corps of Engineers*, 834 F.3d 574 (5th Cir. 2016), the Fifth Circuit addressed an agency report regarding the de-authorization of a navigation channel. *Id.* at 576. The report certified that the de-authorization would be cost-effective but noted that certification "hinged directly" on obtaining the State of Louisiana's agreement "to share the costs"—which was not forthcoming. *Id.* at 582. Given that condition, the court held, the report did not constitute final agency action: "With the key provision of how to finance the closure yet to be finalized," the report "did not mark the consummation of the agency's decisionmaking process." *Id.* The main effect of the contingent certification was to "put pressure on Louisiana to comply," which did not amount to a "legal" effect. *Id.* at 583. That is not remotely comparable to the EA and FONSI in this case, which marked the consummation of the agencies' programmatic assessment and had an immediate legal effect on the federal agencies and the other parties. *See supra* pp. 20-21.

Finally, in *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002), the Fourth Circuit held that an agency report was not reviewable as final agency action where the federal statute requiring the report had specifically "prohibit[ed] the EPA (and the courts) from giving the Report 'any regulatory' effect" and had "label[ed] . . . the report as a research publication." *Id.* at 859. NEPA contains no similar limitation. To the contrary, FONSI and EA actions are frequently reviewed, by this Court and others. *See, e.g., Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 762 (2004).

B. The Agencies Violated the Coastal Zone Management Act

The court of appeals also correctly held that the agencies failed to determine whether their proposed action was "consistent to the maximum extent practicable with the enforceable policies of" the State's coastal zone management program. 16 U.S.C. § 1456(c)(1)(A); *see* Pet. App. 57a-62a.

1. Congress required agencies to conduct a consistency determination under the CZMA with respect to "[e]ach Federal agency activity within or outside the coastal zone that affects any . . . natural resource of the coastal zone." 16 U.S.C. § 1456(c)(1)(A). The Act's implementing regulations define "Federal agency activity" to cover "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities"—including "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 plan that is used to direct future agency actions." 15 C.F.R. § 930.31(a).

The "proposed action in the programmatic EA and FONSI . . . readily meets this definition." Pet. App. 57a. The agencies proposed to "[a]llow use of WSTs" on existing platforms on the Pacific Outer Continental Shelf—adjacent to the State's coastal zone—subject to no restrictions except compliance with non-environmental "performance standards identified in [agency] regulations." C.A. Fed. Appellants' E.R. 1175. That decision is both an exercise of the agencies' statutory responsibilities to make energy resources in the Outer Continental Shelf "available for expeditious and orderly development," 43 U.S.C. § 1332(3), and a plan to

direct future agency actions by allowing the permitting process to proceed under preexisting performance standards, *see* 15 C.F.R. § 930.31(a).

Petitioners argue that the agencies "need *not* provide a consistency determination" before issuing that programmatic authorization of well stimulation treatments because of the possibility that private parties will separately provide consistency certifications, under 16 U.S.C. § 1456(c)(3), when they apply for permission to commence treatments at particular platforms. Pet. 22. The court of appeals correctly rejected that argument. When addressing a single activity, consistency review under Section 1456(c)(1) and Section 1456(c)(3) are "mutually exclusive." Pet. App. 56a; *see* 16 U.S.C. § 1456(c)(1)(A). But on this issue as well, petitioners improperly conflate the programmatic action challenged here with subsequent permitting decisions: "the agencies' programmatic decision differs in scope and in stage from the agencies' later decisions about specific permit applications." Pet. App. 61a.

2. Congressional amendments to the CZMA following this Court's closely divided decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984), support the court of appeals' conclusion. That decision considered whether Section 1456(c)(1) required the Department of the Interior to provide a consistency determination for its sale of oil and gas leases on the Outer Continental Shelf. *Sec'y of the Interior*, 464 U.S. at 315. At the time, Section 1456(c)(1) applied only to actions "directly affecting" a State's coastal zone. *Id.* Following a "fairly detailed review" of "the legislative history" and "the thrust of other CZMA provisions," *id.* at 321, 331; *see id.* at 321-343, the Court held that the sale of leases is not "an activity 'directly affecting' the coastal zone" within the meaning of subsection (c)(1),

id. at 320; *see id.* at 343. The Court emphasized that Congress expressly provided for certification review under subsection (c)(3) for the exploration, development, and production stages that followed the lease sales, *id.* at 338-340, and it concluded that this structure reflected an intent to restrict consistency review to only those later stages of development, *id.* at 342-343. Four justices dissented. *See id.* at 344.

In response, Congress amended the CZMA to supersede *Secretary of the Interior*. Pet. App. 59a; H.R. Conf. Rep. No. 101-964, at 970 (1990). The amendments expanded the text of Section 1456(c)(1), including by removing the requirement that an agency activity "directly" affect the coastal zone to trigger a consistency determination. *Compare* Coastal Zone Management Act of 1972, Pub. L. No. 92-583, § 307(c)(1), 86 Stat. 1280, 1285 (1972), *with* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6208(a), 104 Stat. 1388, 1388-307 (1990). Congress thus "provided that the sale of leases could be reviewable under [subsection (c)(1)] even if site-specific activities conducted under those leases would be subsequently reviewed under [subsection (c)(3)]." Pet. App. 60a.[5]

Petitioners rely on *Secretary of the Interior* for its "recognition that Section 1456(c)(3) applies to exploration, development, and production." Pet. 22. But that

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[5] *See also* H.R. Conf. Rep. No. 101-964, at 970 (1990) (objective of amendments was "to overturn" *Secretary of the Interior*, "to make clear that outer Continental Shelf oil and gas lease sales are subject to the requirements of [subsection (c)(1)]," and to "establish[] a generally applicable rule of law that *any* federal agency activity (regardless of its location) is subject to the CZMA requirement for consistency if it will affect any natural resources, land uses, or water uses in the coastal zone").

misses the point. Following the 1990 amendments, the statute plainly contemplates a distinction between final programmatic activities affecting the coastal zone, on the one hand, and the subsequent "issuance of permits" regarding activities at particular lease sites, *id.*, on the other. To the extent that the statutorily required consistency reviews of those distinct activities involve similar or overlapping analyses, that is a direct result "of Congress's express policy judgment"—not a "violation" of it. *Id.* at 23.

Petitioners attempt to collapse that distinction by treating the programmatic authorization and any site-specific permit approvals as comprising a single "activity covered by Section 1456(c)(3)," Pet. 21, but that is at odds with the statute and unsupported by precedent. Nor is petitioners' reading necessary to avoid "duplicative" consistency reviews. *Id.* at 23. Consistency determinations regarding programmatic actions allow federal agencies to consider aggregate effects, which may not otherwise be evaluated when permit applicants submit consistency certifications regarding individual wells on a case-by-case basis. *Cf. supra* p. 21.

3. If anything, it is petitioners' legal position that threatens to interfere with Congress's policy judgments. While petitioners place great weight on the availability of consistency review when "future applicants" seek "a federal permit," *e.g.*, Pet. 21, their actual position is "that permits for well stimulation treatment[s] would *not* necessarily require review under [subsection (c)(3)]," Pet. App. 61a (emphasis added); *see* Pet. 22 ("Section 1456(c)(3) dictates that an applicant for such a permit *generally* must prepare a consistency certification." (emphasis added)). One of

the petitioners insists that it need not provide a consistency certification before using well stimulation treatments because of a statutory exemption, and asserts on that basis "a defense to . . . CZMA review." C.A. Dkt. 42 at 28 (citing 43 U.S.C. § 1351(a)); *see* Pet. App. 61a. And whatever the justification, it appears that no consistency certification was ever prepared with respect to any of the 51 permits for well stimulation treatments off the coast of southern California granted in 2013 and 2014. Accepting petitioners' legal arguments would mean that well stimulation treatments would commence in some (perhaps many) locations without *any* consistency review of the agencies' programmatic decision *or* the later site-specific permitting decisions. Those arguments cannot be squared with either the text or purpose of the CZMA, *see* 16 U.S.C. §§ 1452(2), 1456(c), and they do not establish any persuasive basis for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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