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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ENVIRONMENTAL DEFENSE CENTER, SANTA BARBARA CHANNELKEEPER, CENTER FOR BIOLOGICAL DIVERSITY, AND WISHTOYO FOUNDATION

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QUESTION PRESENTED

Whether a programmatic environmental assessment and finding of no significant impact authorizing the use of oil and gas well stimulation treatments off the coast of Southern California constitute "final agency action" for purposes of the Administrative Procedure Act, 5 U.S.C. § 704.

PARTIES TO THE PROCEEDINGS

Petitioners correctly identify the parties to the proceedings below. This brief is submitted on behalf of Respondents Environmental Defense Center, Santa Barbara Channelkeeper, Center for Biological Diversity, and Wishtoyo Foundation, which were plaintiffs in the district court and cross-appellants and appellees in the court of appeals.

RULE 29.6 STATEMENT

Environmental Defense Center, Santa Barbara Channelkeeper, Center for Biological Diversity, and Wishtoyo Foundation are nonprofit organizations that have no parent corporations, and no publicly held company has any ownership interest in any of these organizations.

RELATED PROCEEDINGS

To counsels' knowledge, there are no related proceedings beyond those included in Petitioners' Rule 14.1(b)(iii) statement.

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INTRODUCTION

Petitioners seek review of a unanimous decision holding that the U.S. Department of the Interior's final National Environmental Policy Act (NEPA) analysis and authorization of the use of well stimulation treatments at oil and gas platforms in federal waters off California constitutes a final agency action reviewable under the Administrative Procedure Act (APA). This holding flowed from the panel's application of settled law to the "unique procedural posture" of the case. Pet. App. 10a.

Petitioners offer no compelling reason for this Court to review the case. Petitioners do not allege a circuit split on the final agency action issue. Nor could they, as courts across the country hold that final NEPA documents such as the one at issue here are reviewable final agency actions. Instead, Petitioners claim the decision below was wrong and misconstrue its implications while relying on inapposite caselaw.

The panel properly applied this Court's two-part test for evaluating when an agency action is final. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The court correctly determined that test was satisfied because (1) the action at issue marked the consummation of the agency's decisionmaking process on the environmental impacts of allowing well stimulations off California; and (2) legal consequences flow from that action by, *inter alia*, fully determining Respondents' rights to further environmental review and establishing the conditions under which well stimulations can occur in the

region. Accordingly, the decision is consistent with well-settled tenets of administrative law and the policies underlying the finality doctrine.

Contrary to Petitioners' contentions, the decision below does not have far-reaching practical or legal implications. Rather, this case came about because the Department had been permitting certain types of unconventional oil extraction practices (i.e., well stimulations) at offshore leases on the Pacific Outer Continental Shelf issued decades ago without ever having studied the environmental impacts of these practices. The decision is cabined to the specific facts before it, and only affects the approval of four specifically defined types of well stimulations from roughly a dozen platforms that are still active off California.

In short, this case does not raise issues of national importance worthy of this Court's review. The petition should be denied.[1]

STATEMENT OF THE CASE

I. Legal Background

The question presented implicates three statutes.

Outer Continental Shelf Lands Act. Congress enacted OCSLA in 1953 to govern the development of offshore mineral resources. *See* 43 U.S.C. § 1332. In

[1] As Respondents here did not bring the Coastal Zone Management Act claim at issue in Petitioners' second question presented, Respondents address only the first question presented.

1978, Congress amended OCSLA to strike a balance between resource development and the "protection of the human, marine, and coastal environments." *Id*. § 1802(2). OCSLA provides the "structure for every conceivable step to be taken on the path to development of an OCS leasing site." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015) (citation and internal quotation marks omitted).

The statute establishes "a four-stage process," for developing an offshore well, "with each stage more specific than the last." *Id*. The four stages include "(1) formulation of a 5-year leasing plan . . . ; (2) lease sales; (3) exploration by the lessees; [and] (4) development and production." *Sec'y of Interior v. California*, 464 U.S. 312, 337 (1984) (superseded by statute on other grounds). At the fourth stage, once a development and production plan is approved, the Department can issue drilling permits for activities covered in an approved plan. 30 C.F.R. §§ 250.410, 550.281(a)(1), (b).

National Environmental Policy Act. NEPA represents a "broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (citing 42 U.S.C. § 4331). Enacted after a catastrophic oil spill during drilling operations off California, NEPA requires federal agencies to prepare "a detailed statement on . . . the environmental impact" of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i).

NEPA has two principal purposes: (1) to ensure that agencies "will have available, and will carefully consider, detailed information concerning significant environmental impacts" and (2) to "guarantee[] that the relevant information will be made available to the larger audience." *Robertson*, 490 U.S. at 349. An examination of the environmental consequences of a proposed action "ensures that important effects will not be overlooked or underestimated," and "gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.'" *Id.* (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983)). To achieve its purposes, NEPA requires agencies to take a "hard look" at the environmental consequences of a proposed action. *Robertson*, 490 U.S. at 350 (citation omitted).

Administrative Procedure Act. The APA authorizes judicial review of "final agency actions." 5 U.S.C. § 704. Under the APA, agency actions are presumptively reviewable. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). This Court has long emphasized that the APA's judicial review provision is "generous" and its "purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes." *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

An agency action is final and reviewable under the APA when two conditions are met. First, the action must be the "'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78 (citation omitted). Second, the action must determine

"rights or obligations" or be one "from which 'legal consequences will flow.'" *Id.* at 178 (citation omitted).

II. Facts and Procedural History

1. *Administrative Proceedings.* The Department began leasing the Pacific Outer Continental Shelf for oil and gas development in 1963. *See*, *e.g.*, Bureau of Ocean Energy Management, 2023-2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program 4-16 to 4-18 (July 2022), https://tinyurl.com/proposedprogram2023-2028. The last lease sale on the Pacific Outer Continental Shelf occurred in 1984. *Id*. at 4-16. The only currently active leases are off Southern California, where oil companies installed 23 platforms roughly 30 to 50 years ago. Pet. App. 14a. The platforms operate under development and production plans approved during that time. *Id*.

These 23 platforms are located in one of the most diverse seascapes in the world, with a vast array of habitats, coastal and marine species, and important cultural resources. For example, the Santa Barbara Channel is habitat for several endangered species, including blue whales, sea turtles, and black abalone. *See id*. at 43a-44a. Since time immemorial, the Chumash Peoples have depended upon the cultural resources within the Channel to maintain their ways of life, cultural practices, and ancestral connections. *Id.* at 44a-45a.

When the platforms were installed, their anticipated lifespan was approximately 15 to 35 years. *See*,

e.g., Union Company of California, Plan of Development and Production Point Pedernales Field I-2 (Nov. 1983), https://tinyurl.com/mpfdjj9p; Shell California Production Inc., Environmental Report for Platform Eureka 2-20 (Jan. 1984), https://tinyurl.com/4vpwbwdf. Eight of the 23 platforms are no longer producing and are being decommissioned. *See* Bureau of Ocean Energy Management, Draft Programmatic Environmental Impact Statement for Oil & Gas Decommissioning Activities on the Pacific Outer Continental Shelf 1-2 (Oct. 2022), https://tinyurl.com/yj2544df. Only the 15 producing platforms are at issue in this case.

In 2013, public records requests revealed that the Department was authorizing well stimulation treatments off California without ever having evaluated the environmental impacts of these oil extraction practices as required by NEPA. Pet. App. 15a-16a. Respondents sued the Department, contending that its issuance of drilling permits allowing well stimulations violated NEPA. *Id.* at 16a. The cases settled, with the Department agreeing to (1) a comprehensive review of the environmental impacts of well stimulation treatments on the Pacific Outer Continental Shelf under NEPA and (2) a moratorium on these treatments pending completion of environmental review via a programmatic environmental assessment (EA) and finding of no significant impact (FONSI) or, if required by NEPA,

an environmental impact statement (EIS) and record of decision. *Id.*[2]

In May 2016, the Department released an EA and FONSI. *Id*. The EA and FONSI state that the proposed action is "to allow the use of selected well stimulations" and that "the purpose of the proposed action . . . 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 (i.e., without the use of [well stimulations])." *Id.* at 104a, 125a-126a (citation omitted); *see also* ROA.1172, ROA.1201.[3]

The Department evaluated the impacts of four specifically defined types of well stimulations, including hydraulic fracturing and acid fracturing. Pet. App. 15a, 15a n.3. Hydraulic fracturing involves injecting chemicals into a well at high pressure to fracture rock below the seafloor and create passages through which oil and gas can flow. *Id.* Acid fracturing is similar to hydraulic fracturing except that instead of using a solid material to keep fractures open, an acid solution

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[2] Under NEPA and its implementing regulations, an EA serves the principal function of determining whether an agency is required to prepare a more comprehensive EIS, 40 C.F.R. § 1508.9(a)(1) (2016)—which must include a more in-depth review of impacts and alternatives, *id*. at §§ 1502.14-1502.16 (2016), and affords more procedural rights to those the action affects. *See id.* § 1503.1 (2016). If the agency decides that no EIS is required, it documents that legal decision in a FONSI. *See id.* § 1508.13 (2016).

[3] ROA refers to the Record on Appeal in the Ninth Circuit.

is used to etch channels in the rock walls. *Id.* at 15a n.3.

The Department examined four alternatives: (1) the proposed action of authorizing well stimulation treatments; (2) authorizing well stimulations at depths of more than 2,000 feet below the seafloor only; (3) authorizing well stimulations but prohibiting the discharge of well stimulation waste fluids; and (4) prohibiting the use of well stimulations. *Id*. at 17a. The Department's EA and FONSI adopted the proposed action, Alternative 1, "allow[ing] the use of selected well stimulation treatments" at all active oil and gas leases in the Pacific Outer Continental Shelf without restrictions, finding it "would not cause any significant impacts." *Id.* at 16a-17a (alteration in original). In doing so, the Department stated that it "will approve" well stimulations provided drilling permits are deemed compliant with existing performance standards. ROA.1203-04, ROA.1175. Based on this analysis, the Department also made a final determination that no EIS is required.

2. *District Court Proceedings.* As relevant here, Respondents challenged the EA and FONSI in the U.S. District Court for the Central District of California alleging the Department's EA and FONSI violated NEPA. Pet. App. at 17a-18a. Respondents also alleged that the Department's approval of well stimulations violated the Endangered Species Act. *Id.* at 18a. The State of California and California Coastal Commission also filed a lawsuit, arguing the EA and FONSI

violated NEPA and the Coastal Zone Management Act. *Id.* Petitioners intervened as defendants. *Id*.

The Department and Petitioner American Petroleum Institute moved to dismiss, claiming that the Department's issuance of the EA and FONSI was not a final agency action under the APA. *Id*. The district court denied the motion. Relying on extensive caselaw from multiple circuits, it held "that final NEPA documents constitute final agency actions that are immediately justiciable to procedural challenges." *Id.* at 81a.

At summary judgment, the Department made "essentially the same argument" regarding final agency action. *Id.* at 102a. Again, the district court rejected that argument and held that the "programmatic action of allowing the use of [well stimulations]" triggered the duty to analyze environmental impacts under NEPA. *Id.* at 107a.

On the merits, the district court upheld the Department's EA and FONSI and held that the Department violated the Endangered Species Act and Coastal Zone Management Act by failing to engage in the processes mandated by these statutes. *Id.* at 93a-94a.[4] The district court enjoined the Department's issuance of plans or permits allowing well stimulations pending the completion of consultation under the Endangered

[4] As Petitioners have not sought review on the Endangered Species Act claim, Respondents do not address it here. *See* Pet. 12-13*.

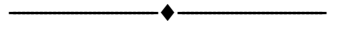
Species Act and consistency review under the Coastal Zone Management Act. *Id.* at 147a, 156a.

3. *Appellate Court Proceedings.* A unanimous panel affirmed the district court's final agency action ruling. The panel recognized that "many of the questions that arise from this appeal are a result of its unique procedural posture." *Id*. at 10a. The panel agreed that the Department's EA and FONSI constitute final agency action, holding they meet both prongs of *Bennett*'s long-established test for final agency action. *Id*. 20a-23a.

The court ruled that the Department's EA was inadequate and that an EIS was required pursuant to NEPA. *Id*. at 48a-49a. The court affirmed the district court's injunction and remanded to the district court with instructions that it amend its injunction to enjoin the Department from issuing well stimulation permits until the Department completes an EIS. *Id.* at 66a.

As a result of the panel's decision, the Department is currently prohibited from approving permits for well stimulation treatments until it completes an EIS under NEPA, as well as the proper review under the Coastal Zone Management Act. *See id.* The court's order does not apply to the permitting of conventional drilling activities.

4. Petitioners and the Department sought rehearing en banc. No judge voted to grant the petitions. *Id*. at 166a-167a. This petition followed.



REASONS TO DENY THE PETITION

The first question presented does not warrant the Court's review. First, there is no circuit split on the final agency action issue raised in the petition. Indeed, Petitioners and their amici do not cite a single case where a court held that the issuance of a final EA and FONSI did not constitute a "final agency action" under the APA. Second, the decision below correctly applied the well-established test from *Bennett* and is consistent with other decisions of this Court. Third, the panel's fact-bound decision does not raise issues of national importance.

I. There Is No Circuit Split on Whether an EA/FONSI Can Constitute a Final Agency Action

Petitioners do not even attempt to argue that the panel decision implicates a circuit split. That is because circuit courts that have addressed the issue have consistently held that final NEPA documents, and particularly FONSIs determining that no EIS is legally required, are final agency actions.

Sierra Club v. U.S. Army Corps of Engineers provides an example. 446 F.3d 808 (8th Cir. 2006). There, the Eighth Circuit held that a FONSI was a final agency action reviewable under the APA. *Id.* at 816. It did so because the agency's "decision to issue a FONSI was the culmination of the agency's NEPA decision-making." *Id.* The court noted that "to deny judicial review of the agency's NEPA compliance because

additional steps are required before" the proposed action could occur "would undermine the purpose of judicial review under NEPA—to 'ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'" *Id.* (quoting *Robertson*, 490 U.S. at 349).

In *Cure Land, LLC v. U.S. Department of Agriculture*, the Tenth Circuit held that a FONSI constituted a final agency action under the APA. 833 F.3d 1223, 1231 (10th Cir. 2016). This was because the FONSI was "the final step in the agency's NEPA decision-making process . . . and there [was] no indication that the FONSI's conclusion" there would not be significant impacts "is tentative or interlocutory in nature." *Id.* (citation omitted).

Similarly, in *Southwest Williamson County Community Association v. Slater*, the Sixth Circuit held that review of a FONSI was appropriate because "[i]ssuance of a FONSI is final agency action and provides notice that [the agency] has completed its evaluation of the environmental impact of the action in question." 173 F.3d 1033, 1037 (6th Cir. 1999).

The D.C. Circuit came to the same conclusion in *Citizens Association of Georgetown v. Federal Aviation Administration*, 896 F.3d 425, 432-34 (D.C. Cir. 2018). In that case, the court held that the Federal Aviation Administration's completion of its environmental process and issuance of a FONSI consummated the agency's decisionmaking process. *Id.* No further

environmental review would occur to address the potential impacts of the proposed flight patterns. *Id.*

In *Highway J Citizens Group v. Mineta*, the Seventh Circuit reiterated the importance of requiring judicial review of an EA/FONSI "because these documents are intended to be the culmination of an agency's environmental assessment." 349 F.3d 938, 959 (7th Cir. 2003).

Along the same vein, circuit courts have consistently found that other actions completing the NEPA review process, such as approving a record of decision and EIS, constitute final agency action. *See*, *e.g.*, *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186-87 (4th Cir. 1999) (A record of decision approving one of several alternatives for a highway bypass "was the final agency action" for purposes of calculating the statute of limitations even though the bypass required additional permits); *Goodrich v. United States*, 434 F.3d 1329, 1335 (Fed. Cir. 2006) (agreeing with cases "from our sister circuits holding that, for purposes of the [APA], a [record of decision] is a 'final agency action'" (citations omitted)); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1173 (11th Cir. 2006) (holding that it is "well settled that 'a final EIS or the record of decision issued thereon constitute[] final agency action.'" (alteration in original) (citation omitted)).

In all cases, the circuit courts affirm that the culmination of the NEPA process—and, specifically, approval of FONSIs foreclosing preparation of an

EIS—constitutes final agency action subject to judicial review under the APA.

II. The Decision Below Is Correct and Consistent With This Court's Decisions

Because Petitioners do not allege a split, they seek review based on mere disagreement with the decision below. Everyone agrees that the panel applied the proper test for final agency action from *Bennett*. Petitioners' only disagreement is with *how* the panel applied that test to the "unique procedural posture" of this case. Pet. App. 10a. But this Court does not take cases "when the asserted error" is "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, the court below correctly applied *Bennett*. Under *Bennett*, an agency action is final and reviewable under the APA if it (1) "marks the consummation of the agency's decisionmaking process" and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-78 (citations omitted). The panel applied this test to the narrow fact-bound question of whether the Department's EA and FONSI are final agency action. It correctly found both prongs satisfied. *See* Pet. App. 20a-23a.

Petitioners' concerns with this analysis stem from their mischaracterization of the Department's action as interlocutory. But its EA and FONSI are the Department's last word on the impacts of well stimulation treatments across the Pacific Outer Continental Shelf

and establish the conditions under which such activities can occur. The panel's conclusion that the Department's EA and FONSI are reviewable is entirely consistent with this Court's decisions.

A. The Department's EA and FONSI Marked the Consummation of the Agency Decision-making Process

The panel below correctly applied *Bennett*'s first prong. The Department "considered four alternatives ranging from not authorizing well stimulation treatments to authorizing well stimulation treatments without restriction." Pet. App. 20a. The Department selected Alternative 1, which is titled "*Allow* Use of WSTs," and stated that it "*will approve*" well stimulations at platforms so long as drilling permits are deemed compliant with existing performance standards. ROA.1203-04, ROA.1175 (emphasis added). The Department issued a FONSI finding that this alternative (i.e., allowing the unrestricted use of well stimulations) would have no significant impacts and thus no EIS was required. Pet. App. 20a. The panel properly concluded "[t]here is nothing preliminary or tentative about these documents." *Id.* at 21a.

The Department's EA and FONSI represent the culmination of its evaluation of the impacts of its proposal to allow well stimulations at the programmatic scale. In the FONSI, the Department itself concluded that "[i]t is our determination that the Proposed Action

would not cause any significant impacts." ROA.1179. There is nothing tentative about that conclusion. Final NEPA documents, like the Department's FONSI in this case, are not "interim" decisions, Pet. 14, but represent the agency's final word on the environmental impacts of their actions. The circuit courts agree that such NEPA documents are justiciable. *See supra* pp. 11-14. In fact, the Department's regulations explicitly provide that a FONSI "concludes" the environmental assessment process. 43 C.F.R. § 46.325(2).

Petitioners assert that the Department "may revisit any previous findings." Pet. 15. But, as both the appellate and district courts recognized, "the agencies concede that no further programmatic environmental review of these treatments will be conducted." *See* Pet. App. 21a. The mere potential that an agency could voluntarily revisit its past conclusion does not undermine its current finality. Otherwise, as this Court has explained, virtually no agency action could be deemed final. *See*, *e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016) (holding that although an agency could revise its jurisdictional determination based on "new information," such possibility "is a common characteristic of agency action" and does not render the action nonfinal (citations omitted)); *Sackett v. Env't Prot. Agency*, 566 U.S. 120, 127 (2012) (concluding that the "mere possibility that an agency might reconsider [a compliance order] . . . does not suffice to make an otherwise final agency action nonfinal.").

Petitioners make much of the fact that the Department did not approve any permits in the EA and

FONSI documents themselves, and that it must comply with NEPA if it does so. Pet. 15-16. But the panel squarely (and correctly) rejected this argument. Pet. App. 21a-22a. The Department conceded that it will not conduct additional analysis of well stimulation treatments at the programmatic scale, i.e., regarding the cumulative impacts of approving multiple actions in the same geographical area. *Id.* at 21a.[5] Accordingly, the panel explained that the "the effect of the FONSI is that it provides the [Department's] 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." *Id*. Because that conclusion "will not be revisited," there is a "completeness of action by the agency." *Id*. (citation omitted).

None of the cases Petitioners rely on to undercut the panel decision supports their position. Pet. 16. In *Federal Trade Commission v. Standard Oil Company*, the Court found that there was no final agency action where the agency had only made a preliminary determination that there was "reason to believe" a company violated the law—which was "not a definitive statement of position" but rather "a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." 449 U.S. 232,

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[5] Under NEPA's implementing regulations, agency actions subject to NEPA review encompass both "[a]pproval of specific projects" as well as the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan." 40 C.F.R. § 1508.18(b)(3)-(4) (2016).

241 (1980). Here, in contrast, the Department has concededly completed its programmatic environmental review and definitively concluded that well stimulation activities in the area at issue will not have any significant environmental impacts. From the standpoint of the agency's compliance with NEPA, there is nothing left to resolve; the EA and FONSI are the Department's "definitive statement of position" that well stimulation treatments do not cause significant impacts, and hence that an EIS is not required to address such impacts. *See* ROA.179.

Dalton v. Specter is likewise inapposite. *See* 511 U.S. 462 (1994). There, the Court concluded that an agency's "recommendation" to the President was not a final action because the President, not the agency, had the authority to act. *Id*. at 469-70. As such, the action at issue was "more like a tentative recommendation than a final and binding determination" and therefore not subject to review. *Id.* (citation omitted). In contrast, the EA and FONSI do not make a recommendation to anyone else because the Department itself is the final decisionmaker on issuance of the permits; and the Department conclusively, not tentatively, determined the programmatic use of well stimulation presents no significant impacts warranting consideration in an EIS. *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 766-70 (2004) (holding that, where the President had final decisionmaking over the action in question, the Department of Transportation was not required to engage in NEPA analysis over the matter). *Franklin v.*

Massachusetts is distinguishable for the same reason. *See* 505 U.S. 788, 798 (1992).

Petitioners next make an unpersuasive argument based on labels. They claim that the panel below "ran afoul of the distinction between substantive and procedural actions," pointing to the APA's description of "final agency action," which is subject to review, and a certain "preliminary, procedural, or intermediate" action, which only becomes reviewable at a later date. Pet. 17 (citing 5 U.S.C. § 704). Petitioners' argument simply begs the relevant legal question: whether the Department's definitive NEPA documents, however labeled, satisfy the test for finality set forth in *Bennett* and other precedents. As explained by the panel below, they do.[6]

Indeed, insofar as NEPA is concerned, this Court's precedents establish that NEPA's "procedural" focus supports rather than undermines judicial review of final NEPA documents. In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, the Court held that a plaintiff challenging a failure to comply with NEPA's procedural requirements "may complain of that failure at the time the

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[6] In *Bennett* itself, the Court held that a document that could be characterized as procedural—a biological opinion issued by a consulting agency to be used by another agency for addressing its substantive obligations under the Endangered Species Act—qualified as a final agency action because the opinion represented the consulting agency's definitive determination as to the impacts on listed species. *See* 520 U.S. at 177-78. The Court's analysis makes clear that it is the application of the two-part test for finality, rather than any labeling of a document as procedural or substantive, that is determinative.

failure takes place, for the claim can never get riper." 523 U.S. 726, 737 (1998). This case illustrates that principle perfectly: the Department has declared that its programmatic NEPA review is final, that the action analyzed will proceed, and that the Department will not prepare an EIS in connection with any of the well stimulations encompassed by the EA/FONSI. Those determinations are definitive and Respondents' challenge to their legality "can never get riper." *Id.*

Finally, Petitioners are wrong in characterizing the lower court's reference to the Department's history of issuing permits allowing well stimulations off California without any environmental review as "baffling." Pet. 17-18. In that part of its decision, the panel highlighted the "unique" factual context of the Department's disregard of its NEPA obligations until it prepared the programmatic document at issue in observing why, as a practical matter, programmatic environmental review is particularly appropriate in this case. Pet. App. 22a ("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."). Regardless, the Department's EA and FONSI represent its final, definitive determination on its programmatic NEPA compliance and hence are reviewable now.

B. The Department's EA and FONSI Determine Rights and Obligations and Have Legal Consequences

The panel also correctly applied *Bennett*'s second prong and found it satisfied because "[t]he conclusion of the programmatic environmental review of offshore well stimulation treatments determines rights, obligations, and legal consequences." Pet. App. 23a.

First, by ending the environmental review process, the Department lifted a moratorium on new well stimulation permits. The panel recognized that by concluding there are no significant impacts, the agencies have not only made a definitive legal determination that no EIS is required, but have also "allowed the permitting process for these treatments to proceed," which represents a "return to the pre-settlement status quo and lifting of the moratorium" on these practices. *Id*. That, in turn, affects the rights of all the interests represented in the litigation, including the "legal rights of oil companies" to proceed with well stimulations under the parameters established in the EA and FONSI. *Id*.

Second, the Department's FONSI means it will not conduct any further environmental review of its decision to allow well stimulation treatments on the Pacific Outer Continental Shelf. This deprives Respondents of additional information regarding the impacts of these practices and additional public process that the preparation of an EIS must provide. *See Robertson*, 490 U.S. at 349-50 (publication of draft and final EIS provides for public participation and the "broad dissemination

of relevant environmental information"). The panel correctly concluded that the EA and FONSI therefore definitively determine "the rights of plaintiffs to further environmental review[] and the obligation of the agencies to prepare a full EIS." *Id*. Those two rights are "fully and finally determined by the FONSI and are not subject to any further administrative procedure." *Id*.

Third, the Department's EA and FONSI establish the conditions under which well stimulations can occur. The Department considered what, if any, specific limits to impose, and concluded it would impose no such limits. *See* ROA.1203-05; Pet. App. 23a. The panel below concluded that the action has legal consequences within the meaning of *Bennett* because it establishes that 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." Pet. App. 23a. The panel again addressed the issue of future permit approvals head on in highlighting that the Department's only "work left to do" is site-specific approvals subject to the findings and conditions in the EA and FONSI, and that the Department conceded its "programmatic review of well stimulation treatments offshore California is complete." *Id*. This straightforward application of *Bennett* is consistent with this Court's decisions.

Petitioners' contrary arguments distort the Department's action at issue. Petitioners say that the

Department did not approve these practices because individual permits are required. *See* Pet. 19. The Department, however, selected the alternative that "[a]llow[s]" the use of well stimulation, *without restriction*, throughout a specific region. ROA.1175. That was a final and complete decision to allow these activities in this area without any additional measures designed to avoid, minimize, or mitigate impacts.

The Department's own pronouncements leave no doubt that in reviewing subsequent permits, these practices "will" be approved if consistent with performance standards cited in the NEPA documents. *See id*.[7] The Department has made its decision about whether, and to what extent, to allow the four types of well stimulation analyzed in the EA. That decision has clear legal and practical consequences because it allows the use of these well stimulations offshore of California and determines the conditions under which they could occur.

Petitioners' assertion that future permits will be subject to legal requirements "including the obligation to undertake an EIS if necessary" ignores the decisionmaking process established by the NEPA implementing regulations. Pet. 19 (citing ROA.1219). As

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[7] This is consistent with the NEPA implementing regulations, which provide for "tiering" of site-specific documents off more comprehensive, programmatic documents. *See* 40 C.F.R. § 1508.28 (2016) (providing that "site-specific" documents "incorporat[e] by reference the general discussions" in programmatic documents); *cf.* Chamber Amicus Br. 13-15.

noted, the principal purpose of an agency's preparation of an EA is to determine if an action may have significant impacts such that further analysis is required in an EIS. *See* 40 C.F.R. § 1508.9(a)(1) (2016). The only two possible outcomes are a decision that an EIS is required or a conclusion that an EIS is not required resulting in issuance of a FONSI (as the Department did here). *See id.*

In issuing a FONSI, therefore, the Department reached a final decision that it will *not* prepare an EIS on the programmatic use of well stimulation treatments. This decision has indisputable "legal consequences" under *Bennett*. Moreover, Petitioners' suggestion that the Department may prepare an EIS in the future, Pet. 19, is untenable. The Department's conclusion that well stimulation across *all* active leases off California does not entail any significant impact effectively forecloses a finding that a *single* well have such an impact. Even if the Department somehow did reach that counterintuitive conclusion, the impacts analyzed would only address the effects associated with the specific permitted activity, not the cumulative impacts in the area or the set of four practices the Department already approved in the EA and FONSI. Therefore, the Department's EA and FONSI entail serious legal and practical consequences with respect to the public's right to the informed decisionmaking process that NEPA guarantees.

Petitioners claim that while there may be "indirect" consequences of the EA and FONSI if the Department issues a permit, such indirect consequences

cannot "render an agency action final." Pet. 20. In support, Petitioners again point to cases where the Court found a mere "recommendation" to the President did not qualify as agency action. *Id.* (citing *Dalton*, 511 U.S. at 470, and *Franklin*, 505 U.S. at 798). But, as explained previously, the EA and FONSI are not mere recommendations on which the Department has no authority to act. Rather, the EA and FONSI themselves determine rights and obligations under federal law and have legal consequences for Petitioners, Respondents, and the Department. Accordingly, nothing about the decision below is in tension with *Dalton* or *Franklin*.

The decision below is consistent with this Court's rulings in *Sackett* and *Hawkes*. The panel pointed to specific legal consequences of the EA and FONSI, just as the Court did with respect to the compliance order in *Sackett*. 566 U.S. at 126. As for *Hawkes*, the Court in that case recognized that a decision could have sufficient legal consequences to trigger judicial review even where some further agency action had yet to occur. 578 U.S. at 599. The Court held that an agency's determination that a property contains waters subject to the Clean Water Act was a final agency action although the determination itself did not give rise to enforcement actions, but, rather, denied the property owner the "safe harbor" that a negative determination would provide. *Id.* The Court noted that this ruling is consistent with its " 'pragmatic' approach" to the finality doctrine. *Id.* (citation omitted). In doing so, the Court cited *Frozen Food Express v. United States*, which held that

an agency order specifying which commodities the agency believed were exempt from regulation was final and "immediately reviewable" even though the order "'had no authority except to give notice of how the Commission interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought against a particular carrier.'" *Hawkes*, 578 U.S. at 599-60 (citing *Frozen Food Express*, 351 U.S. 40, 44-45 (1956)). Likewise, here, the final EA and FONSI have immediate legal and practical consequences, rendering them final and reviewable irrespective of whether future site-specific permits may be required.

III. This Case Does Not Raise Issues of National Importance

Petitioners strain to suggest that this case raises issues of national importance requiring the Court's involvement. Pet. 4, 24-28. Again, because the circuit courts uniformly hold that final NEPA documents, such as the one at issue here, are reviewable, any notion that this case will somehow trigger a "flood" of litigation, *id.* at 26-27, is fanciful. What is more, the unusual procedural background and distinct facts underlying this case mean that the panel's ruling does not have far-ranging practical implications.

A. The Decision Below Applied *Bennett* to a Unique Procedural Posture and Unique Facts

Many of the issues in this case "are a result of its unique procedural posture." Pet. App. 10a. And the impact of the decision is further limited by the unique facts regarding the status of drilling operations in federal waters off California. As the panel explained, "[f]or offshore oil and gas development activities, agencies are supposed to conduct environmental review of proposed activities *before* . . . authorizing . . . such activities." *Id*. Yet, here, the agencies "authorized permits for offshore well stimulation treatments without first conducting the normally required environmental review." *Id.*

The EA and FONSI at issue "represent[] the first time the [Department] ha[s] analyzed the environmental impacts of offshore well stimulation treatments" on the Pacific Outer Continental Shelf. *Id.* at 47a. As such, the decision will not "bog down the critically important preliminary work of NEPA review." Pet. 26; *see also* Chamber Amicus Br. 12-18. Rather, the panel's decision fully supports NEPA's "broad national commitment to protecting and promoting environmental quality" by ensuring such considerations are "infused into the ongoing programs and actions of the Federal Government." *Robertson*, 490 U.S. at 348 (citations omitted).

The court's decision is based on a fact-specific situation involving the particular NEPA documents at

issue here—which prescribe the conditions under which certain drilling operations off California may proceed. The decision is narrow in scope and affects only 23 drilling platforms, eight of which are now in the process of being decommissioned and are no longer engaged in oil production. *Supra* p. 6. The decision below in no way impedes drilling or other energy operations on the entire Pacific Outer Continental Shelf or anywhere else. *Cf.* Pet. 4.

Contrary to Petitioners' suggestion, *id.* at 24-25, ensuring proper environmental review occurs before allowing unconventional well stimulation practices to continue is fully consistent with OCSLA. The statute does not simply seek to promote offshore drilling, but also to ensure offshore oil and gas activity is "balance[d] . . . with protection of the human, marine, and coastal environments." 43 U.S.C. § 1802(2)(B); *see also id.* § 1332(3) (noting "orderly development" should be "subject to environmental safeguards"); Pet. App. 57a ("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." (citation omitted)).

Notably, the Ninth Circuit did not enjoin all drilling activity off California pending completion of an EIS. First, the decision does not affect all drilling, just four specifically defined types of well stimulation treatments. ROA.1202-03 (noting that the programmatic EA applied to four well stimulation treatments known as "Diagnostic Fracture Injection Test," "Hydraulic

Fracturing," "Acid Fracturing," and "Matrix Acidizing."). The Department can continue to permit other types of drilling activity. *See*, *e.g.*, ROA.1228 (EA noting that prohibiting the use of well stimulations would still allow "enhanced oil recovery techniques" other than the four specific well stimulations analyzed in the EA). Moreover, the decision does not ban these types of well stimulation treatments indefinitely; rather, it disallows permits to issue until and unless the Department complies with the law.

Nor does the decision below affect all remaining oil and gas resources on the Pacific Outer Continental Shelf. *Cf.* Pet. 25. In implying otherwise, Petitioners cite recent estimates for the remaining oil and gas resources in waters off Oregon, Washington, Northern California, Central California, and Southern California. *See id.* (citing Bureau of Ocean Energy Management, 2021 Assessment of Oil and Gas Resources: Assessment of the Pacific Outer Continental Shelf Region 11 (Sept. 1, 2021)). Other than Southern California, none of these areas contain active oil and gas leases. *See* Bureau of Ocean Energy Management, Combined Leasing Report as of March 1, 2023, https://tinyurl.com/3kbwr5ad. The Department's EA and FONSI apply only to the active leases on the Southern California Outer Continental Shelf. *See*, *e.g.*, ROA.1201 (The Department "us[ed] the term [Pacific Outer Continental Shelf] throughout [the EA] to refer to the Southern California [Outer Continental Shelf]

area with the 43 leases and associated oil and gas platforms in Federal waters.").[8]

There is likewise no basis for Petitioners' or their amici's assertions that the panel's decision will undermine energy development "on the entire Outer Continental Shelf." Pet. 4; *see also id.* at 25-26; State Amici Br. 20. Nor is there any validity to Petitioners' related claims that "the consequences of the Ninth Circuit's decision [are not] limited to the context of NEPA" such that "innumerable agency actions will be subject to challenge." Pet. 27. In evaluating whether an agency action constitutes a justiciable final agency action under the APA, courts will continue to be required to apply the *Bennett* test based on the specific facts of the case before them. The decision below determined that this test was satisfied not only because the Department's decision "allows a process . . . to proceed," *id.* (citing Pet. App. 23a), but because it was the final word on the agency's analysis of the environmental impacts of well stimulations and established the conditions under which such practices could occur in federal waters off California. Pet. App. 23a (noting that the

[8] To open additional areas of the Pacific Outer Continental Shelf to oil and gas drilling, the Department would first have to include these waters in a five-year oil and gas leasing program and hold a lease sale under that program. *See California v. Watt*, 712 F.2d 584, 588 (D.C. Cir. 1983). The Department has not included the Pacific Outer Continental Shelf in a five-year program since the 1980s. *See* Bureau of Ocean Energy Management, 2023-2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program 4-16 to 4-18 (July 2022), https://tinyurl.com/proposedprogram2023-2028.

Department authorized well stimulations "with no cautionary limits").

The decision below will thus have no effect on oil and gas activity in any other region but Southern California. And it is limited to the use of certain types of well stimulation treatments, at less than 20 operational platforms, and only until the Department complies with the law. It will not affect other energy projects that will be subject to environmental review based on the facts of each proposal.

B. Petitioners' and Their Amici's Cases Are Inapposite

None of the cases Petitioners rely on support their contention that the decision below "upend[s] longstanding doctrine about reviewability." Pet. 26 (citation omitted). Rather, Petitioners' cases involve different legal and factual contexts that have no relevance here.

There is no support in the caselaw for Petitioners' suggestion that there must be some separate decision for the Department's EA and FONSI to be reviewable. *Cf. id*. For example, *Public Citizen* involved whether an agency had to consider an environmental effect in a NEPA analysis when it had no legal power to prevent that effect. 541 U.S. at 766-70. The Court nowhere addressed, let alone resolved, whether an EA and FONSI must await "some independently reviewable final agency action" before there can be judicial review. Pet. 26. That the Department's decision to allow the

unrestricted use of well stimulations off California occurs within the NEPA documents themselves does not change the fact the EA and FONSI are a programmatic approval and final agency action. *See* Pet. App. 23a.

Petitioners' reliance on *Center for Biological Diversity v. U.S. Department of the Interior* is also inapt. Pet. 26-27. That case involved a challenge to a five-year program—the first stage of the OCSLA process—which establishes when and where the Department may offer oil and gas leases over the next five-year period. *Ctr. for Biological Diversity*, 563 F.3d 466, 473 (D.C. Cir. 2009) (describing OCSLA process). In holding the plaintiffs' NEPA claims unripe, the court noted that NEPA claims for "multiple-stage leasing programs" do not ripen "until the leases are issued." *Id*. at 480 (citation omitted). Here, both the lease sales and subsequent approvals of development and production plans occurred decades ago—meaning the agencies have long-since passed "that 'critical stage' where an 'irreversible and irretrievable commitment of resources' has occurred." *See id*. (citation omitted).

This case is therefore also unlike *Flue-Cured Tobacco Cooperative Stabilization Corporation v. Environmental Protection Agency*, relied on by Petitioners and their amici. Pet. 27; State Amici Br. 18-19. There, the court held an agency report warning of the health hazards of secondhand smoke was not a final agency action because it had no legal consequences. *Flue-Cured Tobacco*, 313 F.3d 852, 856-57 (4th Cir. 2002). Factoring heavily in the court's decision was the fact the statute requiring the agency to issue the report

(the Radon Act) expressly stripped the agency of any authority to act based on that report. *Id.* at 855-56, 858-59.

Here, the Department's EA and FONSI are not a mere agency report, but the Department's final word on the environmental impacts of well stimulation treatments in federal waters off California. The Department had the authority under OCSLA to act on the information in the environmental analysis by, for example, prohibiting the discharge of chemicals used in well stimulation treatments or prohibiting the practices entirely. But it did not do so, meaning oil companies can use well stimulation treatments without "abid[ing] by any depth, discharge, or frequency limitations." Pet. App. 23a.

Nor is *CSX Transportation, Inc. v. Surface Transportation Board* on point. Pet. 27. That case involved a challenge under the Hobbs Act to an "interlocutory order" that authorized the agency to proceed to an adjudication process. *CSX Transp.*, 774 F.3d 25, 30 (D.C. Cir. 2014). The court held the order was not a final action because it "did not . . . fix the parties' rights and obligations" since the plaintiff "may well emerge victorious from the rate reasonableness phase, leaving nothing for them to appeal." *Id.*

Amici's reliance on *Louisiana v. U.S. Army Corps of Engineers* is also misplaced. State Amici Br. 16-17. *Louisiana* involved an agency report to Congress recommending that the federal government share the costs of implementing certain parts of a project with

the state of Louisiana. 834 F.3d 574, 576, 578 (5th Cir. 2016). The court held that the report was not a final action because the cost-sharing was contingent upon agreement of "the non-Federal sponsor," and thus had no legal consequences. *Id.* at 582-83.

And *Reliable Automatic Sprinkler Company, Inc. v. Consumer Product Safety Commission*, State Amici Br. 17-18, involved an agency letter informing the plaintiff that the agency "intended to make a preliminary determination" that the plaintiff's sprinkler head product was hazardous. *Reliable Automatic*, 324 F.3d 726, 729 (D.C. Cir. 2003). Before making a final determination, however, the Consumer Product Safety Act required the agency to first "hold a formal, on-the-record adjudication" which it had not done. *Id.* at 732. As such, the court held that the letter regarding the preliminary determination was "merely investigatory" and not a final agency action. *Id.*; *see also id.* at 734 (noting that whether sprinkler heads were even subject to regulation under the statute "remains to be determined." (citation omitted)).

In the end, rather than demonstrate how the decision below will lead to a "flood" of litigation, Pet. 27, the cases cited by Petitioners and their amici merely demonstrate that the final agency action determination is highly fact-specific and (as this Court has stressed) pragmatic. Petitioners' and their amici's policy arguments in no way call into question the

correctness of the lower court's opinion or establish a need for this Court to review it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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