No. 22-703

In the Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL DEFENSE CENTER, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that a programmatic environmental assessment of the use of well-stimulation treatments on oil and gas platforms on the Pacific Outer Continental Shelf and an accompanying finding of no significant impact constituted "final agency action" for purposes of the Administrative Procedure Act, 5 U.S.C. 704.

2. Whether the court of appeals erred in concluding that the Department of the Interior violated a provision of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1), that sets out a review process for "Federal agency activit[ies]," when the agency did not perform a review to determine whether the use of well-stimulation treatments by operators of oil and gas platforms is consistent with California's coastal management program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 36 F.4th 850. The orders of the district court (Pet. App. 68a-91a, 92a-157a) are not published in the Federal Supplement but are available at 2017 WL 10607254 and 2018 WL 591096. A subsequent order of the district court is not published in the Federal Supplement but is available at 2019 WL 2996508.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2022. Petitions for rehearing en banc were denied on September 26, 2022 (Pet. App. 158a-167a). On December 15, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 25, 2023, and the petition was

filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, federal agencies are required to provide either an environmental assessment and finding of no significant impact or, if necessary, a more detailed environmental impact statement to support any "major Federal actions significantly affecting" the environment. 42 U.S.C. 4332(C); see 40 C.F.R. Pt. 1502; 40 C.F.R. 1508.1. In 2016, the U.S. Department of the Interior (Interior) issued a programmatic environmental assessment and finding of no significant impact with respect to the use of certain well-stimulation practices on oil and gas development platforms on the Pacific Outer Continental Shelf. C.A. E.R. 1201. But Interior did not prepare that environmental assessment to support a particular federal action; it produced the assessment as part of a pair of 2016 settlement agreements that resolved litigation brought by respondents the Environmental Defense Center and the Center for Biological Diversity. *Id.* at 805-824.

In those earlier suits, these two respondents alleged that Interior had improperly approved 51 permits authorizing the use of well-stimulation treatments on oil and gas platforms on the Pacific Outer Continental Shelf without undertaking the environmental assessments they asserted were required by federal law. 14-9281 D. Ct. Doc. 1 (Dec. 3, 2014). To resolve those suits, in January 2016, Interior agreed to undertake a "programmatic Environmental Assessment * * * pursuant to [NEPA] to analyze the potential environmental impacts of well-stimulation practices" on platforms in the region. C.A. E.R. 807, 817. The agreements further

provided that the "focus of the [environmental assessment] will be on foreseeable future well-stimulation activities requiring federal approval." *Ibid.* And the agreements provided that there would be a moratorium on the approval of permits allowing well-stimulation treatments for the relevant oil and gas platforms until the environmental assessment (and, if necessary, a more detailed environmental impact statement) was completed. *Id.* at 807-808, 818.

Five months after the settlement agreements were finalized, Interior issued a programmatic environmental assessment and a finding of no significant impact. C.A. E.R. 1172-1482. The documents examined the proposed action of continuing to approve permit applications authorizing the use of well-stimulation treatments on the Pacific Outer Continental Shelf, and the programmatic analysis found no significant impact from that proposed action. *Ibid.* But the environmental assessment explained that it analyzed the use of well-stimulation treatments only on a "programmatic basis," and "there remains incomplete or unavailable information that may only be known when there is a specific request for [well-stimulation treatment] use." *Id.* at 1362. The documents further recognized that, once a specific request to use well-stimulation treatments is made by a platform operator, the agency will "be in a better position to determine whether" to supplement the programmatic environmental analysis and whether a more detailed environmental impact statement "is potentially warranted." *Id.* at 1363. In response to concerns from commentators opposed to the use of well-stimulation treatments on the Pacific Outer Continental Shelf, the programmatic environmental assessment emphasized that it was "not itself a decision document for

whether and how to proceed with [well-stimulation treatment] use on the [Outer Continental Shelf]," *id.* at 1437, and that "[s]pecific proposals for [well-stimulation treatment] use received by [Interior] will be evaluated on a case-by-case basis to determine whether and/or how to approve the request," *id.* at 1462.

b. When Interior issued the environmental assessment documents in May 2016, there were no requests pending with Interior to use well-stimulation treatments on platforms on the Pacific Outer Continental Shelf. C.A. E.R. 1462. On December 6, 2016, petitioner DCOR, LLC submitted an application for a permit that would allow for the use of well-stimulation treatments on one of its platforms. D. Ct. Doc. 43-1, at 43 (Apr. 3, 2017); see D. Ct. Doc. 142, at 2 (Mar. 25, 2019). Interior's Bureau of Ocean Energy Management (BOEM), which oversees the development of offshore resources, determined that the permit could not be approved because it contemplated activities that were not described in DCOR's existing "Development and Production Plan." D. Ct. Doc. 43-1, at 43.

Under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, Interior is barred from granting a license or permit to undertake development or production activities on oil and gas platforms located on the Outer Continental Shelf unless those activities are described "in detail" in a "development and production plan" that has been submitted by the platform operator and approved by Interior. 43 U.S.C. 1351(a)(1) and (d). In DCOR's case, BOEM determined that DCOR's previously approved development and production plan did not adequately describe the well-stimulation treatments DCOR's permit application contemplated. D. Ct. Doc. 43-1, at 43. BOEM therefore informed DCOR that it

would need to submit a supplemental development and production plan that had been through the appropriate review processes before DCOR's permit could be approved. *Ibid.* DCOR did not submit a revised plan. D. Ct. Doc. 142, at 3. Nonetheless, three years later DCOR filed another application for a permit that would allow it to use well-stimulation treatments on one of its platforms. *Ibid.* Interior returned the second application for the same reason as the first, *ibid.*, and no other platform-operator has submitted a permit application that contemplates the use of well-stimulation treatments on the Pacific Outer Continental Shelf, see Pet. 15 (recognizing that there are no pending permit applications involving the use of well-stimulation treatments).

2. a. After Interior released the 2016 programmatic environmental assessment and finding of no significant impact, respondents Environmental Defense Center, Center for Biological Diversity, Santa Barbara River Channelkeeper, and Wishtoyo Foundation (organizational respondents), as well as the State of California, and the California Coastal Commission (California respondents), brought suit against the federal respondents alleging that the environmental analysis did not satisfy NEPA's requirements and that the agency had failed to undertake consultations required by the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* Pet. App. 72a-73a.

The California respondents further alleged that Interior had violated 16 U.S.C. 1456(c)(1), a provision of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.* 16-cv-9352 D. Ct. Doc. 1, at 24-25 (Dec. 19, 2016). That provision requires a federal agency to perform a "consistency determination" when

it undertakes a "Federal agency activity" that affects a State's coastal zone, to ensure that the activity is consistent with the State's coastal management program "to the maximum extent practicable." 16 U.S.C. 1456(c)(1)(A) and (C). A "Federal agency activity" is "subject to" Section 1546(c)(1) "unless it is subject to" Subsection (c)(3)'s separate consistency-review process for federal approvals of plans and permit applications submitted by third parties. 16 U.S.C. 1456(c)(1)(A). California did not dispute that any approval by Interior of a request to use well-stimulation treatments by a particular platform operator would be subject to Subsection (c)(3), but it alleged that Interior was nevertheless required to undertake a consistency determination regarding the use of well-stimulation treatments under 16 U.S.C. 1456(c)(1). 16-cv-9352 D. Ct. Doc. 1, at 24-25.

Petitioners DCOR, American Petroleum Institute, and Exxon Mobil Corporation intervened to defend the validity of the environmental assessment documents. D. Ct. Doc. 35 (Mar. 10, 2017); D. Ct. Doc. 71 (July 11, 2017).

b. Federal respondents and petitioners moved to dismiss, alleging that the challenged environmental assessment documents did not constitute "final agency action" under the Administrative Procedure Act (APA), 5 U.S.C. 704. Pet. App. 74a. Federal respondents explained that the environmental assessment documents did not meet the requirements for final agency action because the documents "merely" constituted "a programmatic analysis to support potential *future* approvals of not-yet submitted" development and production plans and permits. D. Ct. Doc. 43, at 13-14, (Mar. 3, 2017); see *id.* at 20; D. Ct. Doc. 102, at 24 (Apr. 12, 2018). Federal respondents further explained that, before any

permit for using well-stimulation treatments could be approved, BOEM would need to confirm that those activities were adequately described in an approved development and production plan. D. Ct. Doc. 43, at 18-19. Otherwise, the operator would need to submit a new or supplemental development and production plan adequately describing the use of well-stimulation treatments, and that new or supplemental plan would need to undergo an operator-initiated CZMA consistency review process under Subsection (c)(3), as well as additional environmental assessments under NEPA. *Ibid.*

The district court denied the motions to dismiss. Pet. App. 68a-91a. In subsequent summary judgment decisions, the court determined that the environmental assessment documents complied with NEPA, *id.* at 99a-116a, but the court concluded that Interior had violated the CZMA by failing to conduct a consistency review under Subsection (c)(1). *Id.* at 147a-157a. The court also found that Interior had not undertaken certain consultations required by the Endangered Species Act. *Id.* at 129a-147a. The court then enjoined Interior from approving any well-stimulation permits on the Pacific Outer Continental Shelf until the CZMA consistency review and Endangered Species Act consultations concerning Interior's programmatic environmental assessment are completed. *Id.* at 157a.

3. The court of appeals affirmed in part and reversed in part, concluding that the non-federal respondents were entitled to summary judgment on the NEPA, CZMA, and Endangered Species Act claims. Pet. App. 1a-67a. As most relevant here, the court concluded that the environmental assessment documents produced to satisfy the 2016 settlement agreements constituted "final agency action" under 5 U.S.C. 704 of the APA, Pet.

App. 19a-23a, and the court concluded that Interior was required to undertake a consistency review of the use of well-stimulation treatments under Subsection (c)(1) of the CZMA, *id.* at 55a-62a.[*]

The court of appeals first noted that "[a]gency action is final and reviewable under the APA" when it "'mark[s] the consummation of the agency's decision-making process'" and either "determine[s] 'rights or obligations'" or produces "'legal consequences.'" Pet. App. 20a (quoting *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997)). The court acknowledged that the challenged environmental assessment documents did not themselves approve the use of any well-stimulation treatments, recognizing that "the use of [such] treatments will not occur in practice until an individual permit application has been approved." *Id.* at 21a. But the court rejected the federal respondents' assertion that the documents mark only the "first, preliminary steps toward making a decision." *Id.* at 22a. The court took the view that the documents represent the "final word on the environmental impacts of" the proposed use of well-stimulation treatments. *Id.* at 21a. The court also stated that it could find "no argument or evidence that" the 51 permits that two of the organizational respondents had challenged in the litigation giving rise to the settlement agreements "will be revisited." *Id.* at 22a. And the court concluded that the environmental assessment documents constituted a final decision that "review under the CZMA is not warranted." *Ibid.*

The court of appeals also concluded that the second prong of the finality analysis was satisfied. Pet. App.

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[*] Petitioners do not challenge the court of appeals' rulings with respect to the ESA. Pet. 12 n.*.

22a-23a. It reasoned that the issuance of the documents lifted the settlement agreements' moratorium on granting permits approving the use of well-stimulation treatments and conclusively deprived the organizational respondents of their procedural rights "to further environmental review." *Id.* at 23a. In addition, the court viewed the documents as "green light[ing] the unrestricted use of well stimulation treatments." *Ibid.*

Turning to the CZMA, the court of appeals concluded that Interior had violated its obligations under that statute because it "did not conduct a consistency review" under Subsection (c)(1) "to determine whether the use of offshore well stimulation treatments is consistent with California's coastal management program." Pet. App. 55a. The court recognized that the consistency-review procedures in Subsection (c)(1) of the CZMA apply where "the federal agency takes the action itself," and that the review process in Subsection (c)(3) applies if the agency "instead is approving a proposed plan or issuing a federal license or permit to an applicant." *Id.* at 56a. The court further recognized that "[r]eview under § (c)(1) and § (c)(3) are mutually exclusive." *Ibid.* The court concluded, however, that the environmental assessment documents represent a federal plan for "allowing well stimulation treatments without restrictions," such that it was appropriate to subject the use of well-stimulation treatments to review under both Subsections (c)(1) and (c)(3). *Id.* at 59a

The court of appeals remanded with instructions to expand the district court's injunction to prevent federal respondents from approving any permits allowing the use of the well-stimulation treatments on the Pacific Outer Continental Shelf until Interior has prepared an environmental impact statement under NEPA

analyzing the use of the well-stimulation treatments that were the subject of the environmental assessment documents, completed the CZMA consistency-review process under Subsection (c)(1), and concluded consultations under the Endangered Species Act. Pet. App. 76a.

4. Petitioners and federal respondents each petitioned for rehearing en banc with respect to the court of appeals' conclusions regarding finality and CZMA review. The court denied the petitions without calling for a response. Pet. App. 158a-167a.

ARGUMENT

The court of appeals erred in concluding that the challenged environmental assessment documents constituted "final agency action" under the APA, 5 U.S.C. 704, and in requiring Interior to conduct a consistency review of the use of well-stimulation treatments under Subsection (c)(1) of the CZMA. But the court's errors were predicated primarily on a misunderstanding of the challenged environmental assessment documents, rather than a mistaken view of the governing legal standards, and the extent to which the decision may have broader effects is not certain. Further, petitioners acknowledge (Pet. 15-16, 23) that there are no requests pending with Interior for permits approving the use of well-stimulation treatments on the Pacific Outer Continental Shelf. And, even without the injunction, Interior could not approve any use of well-stimulation treatments unless the proposed activity had been subjected to consistency review under Subsection (c)(3) of the CZMA and NEPA. Review of the decision below by this Court is therefore unwarranted.

1. The court of appeals erred in concluding that the challenged environmental assessment documents

constituted "final agency action" under the APA, 5 U.S.C. 704. This Court has "distilled * * * two conditions that generally must be satisfied for agency action to be 'final.'" *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 597 (2016) (citation omitted). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (citations and internal quotation marks omitted). The environmental assessment documents in this case do not satisfy either of those requirements.

a. The programmatic environmental assessment documents do not "mark the 'consummation' of" Interior's "decisionmaking process." *Bennett*, 520 U.S. at 178 (citation omitted). To the contrary, the environmental assessment expressly cautions that it is "not itself a decision document for whether and how to proceed with [well-stimulation treatment] use on the" Outer Continental Shelf. C.A. E.R. 1437. Nor do the documents purport to represent a final or conclusive assessment even of the environmental effects of well-stimulation treatments. The environmental assessment explains that well-stimulation treatments were evaluated on a "programmatic basis," and "there remains incomplete or unavailable information that may only be known when there is a specific request for [well-stimulation treatment] use." *Id.* at 1362. The documents further recognize that, if and when a specific request for a permit approving the use of well-stimulation treatments is submitted, Interior will "be in a better position to

determine whether" to supplement its environmental analysis and whether a more detailed environmental impact statement "is potentially warranted." *Id.* at 1363.

The documents also lack "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 178. The documents do not approve or authorize any use of well-stimulation treatments, and they make clear that no requests for a permit to use such applications were pending and that any future requests would "be evaluated on a case-by-case basis." C.A. E.R. 1462. The challenged documents therefore stand in stark contrast to the agency actions this Court has previously deemed to have "legal consequences" and thus to constitute final agency action. *Bennett*, 520 U.S. at 178 (citation omitted). The biological opinion that *Bennett* found final authorized the killing of endangered fish, *ibid.*; the "final" jurisdictional determination in *Hawkes* "deprive[d] respondents of a five-year safe harbor from liability," 578 U.S. at 600; and the compliance order in *Sackett* v. *EPA*, 566 U.S. 120, 126 (2012), "expose[d] the Sacketts to double penalties" and imposed a higher standard on their permit applications. No similar effects flow from the challenged documents in this case, which were designed to satisfy the terms of settlement agreements and have not been used to support any final agency determination of rights or any decision approving a permit for the use of well-stimulation treatments.

b. The court of appeals' conclusion that the environmental assessment documents nonetheless constituted final agency action was predicated on an erroneous view of the documents' import. While the court began its analysis by correctly recognizing that "well stimulation treatments will not occur in practice until an individual permit application has been approved," it mistakenly

believed that the assessment documents "provide[] the agencies' final word on the environmental impacts of * * * well stimulation treatments" and that "[t]his programmatic conclusion will not be revisited." Pet. App. 21a. That understanding is directly contradicted by the documents themselves, which recognize that the programmatic assessment is based on "incomplete" information, C.A. E.R. 1362, and that "[a]s new permits are submitted in the future," the agency will "be in a better position to determine whether any supplementation of the [programmatic assessment] is appropriate, or whether an [environmental impact statement] is potentially warranted." *Id.* at 1363.

Further, the court of appeals erroneously stated that there was "no argument or evidence that * * * 51 already-approved permits * * * will be revisited, especially after the agencies approved unrestricted use of well stimulation treatments in the" environmental assessment documents. Pet. App. 22a; see *id.* at 23a (concluding that the documents "green light[] the unrestricted use of well stimulation treatments"). In its briefing before the court of appeals, the government informed the court that "[a]ll of the 51 permits" that had been challenged in the prior litigation that gave rise to the settlement agreements "have expired, meaning that no well stimulation treatments are currently authorized anywhere on the Pacific Outer Continental Shelf." Gov't First Cross-Appeal C.A. Br. 12. And both the government's briefing, *ibid.*, and the programmatic environmental assessment itself explained that there were (and are) "no currently pending requests to conduct" well-stimulation treatments on the Pacific Outer Continental Shelf. C.A. E.R. 1462. But in any event, the challenged documents did not "approv[e]" or "green light[]"

the "unrestricted use of well stimulation treatments." Pet. App. 22a-23a. The programmatic environmental assessment clearly states that it is "not a decision document" and that each "[s]pecific proposal[]" for the use of well-stimulation treatments will be evaluated individually, C.A. E.R. 1462, and may trigger a revised or greatly expanded environmental analysis, *id.* at 1363.

2. The court of appeals also erred in concluding that Interior's issuance of the general environmental assessment documents required Interior to conduct a review "to determine whether the use of offshore well stimulation treatments is consistent with California's coastal management program" under Section 1456(c)(1) of the CZMA. Pet. App. 55a. The plain text of the CZMA, 16 U.S.C. 1456(c), and the Outer Continental Shelf Lands Act, 43 U.S.C. 1351(d), provides that it is the party actually seeking to develop mineral resources on the Outer Continental Shelf—and not the federal government—that is responsible for conducting a consistency review to determine whether the proposed activity is consistent with an affected State's coastal management program.

Sections 1456(c)(1) and (c)(3) of the CZMA set out two different, mutually exclusive procedures for ensuring that activities on the Outer Continental Shelf are consistent with an affected State's coastal management program. As this Court has recognized, Section 1456(c)(1) "reach[es] activities in which the federal agency is itself the principal actor," while Section 1456(c)(3) "reaches the federally approved activities of third parties." *Secretary of the Interior* v. *California*, 464 U.S. 312, 332 (1984).

Both Sections 1456(c)(1) and (c)(3) task the party undertaking the activity that affects the State's coastal

zone with completing the consistency review process. Thus, Subsection (c)(1) provides that "[e]ach Federal agency carrying out an activity" that affects a State's coastal zone "shall provide" the State an opportunity to review "a consistency determination" reflecting the federal agency's efforts to align its activities with the State's coastal management program. 16 U.S.C. 1456(c)(1)(C). The same subsection further provides that a federal activity "shall be subject to [Subsection (c)(1)] *unless* it is subject to" Section 1456(c)(3). 16 U.S.C. 1456(c)(1)(A) (emphasis added). The provision therefore ensures that a federal activity is subject to Section 1456(c)(1) only if the activity is not subject to Section 1456(c)(3)—the provision that "reaches the federally approved activities of third parties," *California*, 464 U.S. at 332.

Section 1456(c)(3), in turn, provides that a third party that seeks federal approval to conduct activities affecting a State's coastal zone must complete a consistency review as a condition of that federal approval. The provision mandates that "any applicant for a required Federal license or permit to conduct an activity" that affects a State's coastal zone—and, in particular, "any person who submits to the Secretary of the Interior any plan for" exploration, development, or production on the Outer Continental Shelf—"shall provide in the application" to Interior or "attach to such plan a certification" that the proposed activity complies with the State's coastal management program. 16 U.S.C. 1456(c)(3)(A) and (B). Subsection (c)(3) further provides that a third party must simultaneously submit its certification to the affected State, and "[n]o Federal official or agency shall grant" a permit authorizing third-party activities that affect a State's coastal zone until

the State has had an opportunity to "concur[] with" or reject a certification describing those activities. 16 U.S.C. 1456(c)(3)(A) and (B).

Under these provisions, the use of well-stimulation treatments by platform operators on the Outer Continental Shelf is subject to the operator-initiated consistency-review process set out in Subsection (c)(3) rather than the agency-led process in Subsection (c)(1). That understanding is confirmed by provisions of the Outer Continental Shelf Lands Act. That Act provides that a party that seeks to develop mineral resources on the Outer Continental Shelf must submit a "development and production plan" that "describ[es] all" the platform's proposed "operations." 43 U.S.C. 1351(a)(2). The Act further specifies that Interior "shall not grant any license or permit for any activity described in detail in a plan and affecting" a State's coastal zone "unless the State concurs or is conclusively presumed to concur" with the operator's certification of consistency with the State's coastal management program, or unless the Secretary of Commerce has made a determination under Section 1456(c)(3)(B)(iii) that allows the operator's activities to proceed notwithstanding the nonconcurrence by the State. 43 U.S.C. 1351(d). The Outer Continental Shelf Lands Act therefore reiterates that federally approved activities on oil and gas platforms on the Outer Continental Shelf must undergo consistency review, but it places responsibility for completing that review squarely in the hands of the party undertaking the activity rather than the federal government.

The court of appeals' contrary view, like its ruling on the "final agency action" issue, was based primarily on its misunderstanding of the nature of the environmental assessment documents. The court acknowledged that

CZMA Subsection (c)(3) applies when a federal agency is "approving a proposed plan or issuing a federal license or permit to an applicant," and the court recognized that "[r]eview under § (c)(1) and § (c)(3)" are "mutually exclusive." Pet. App. 56a. But the court determined that the environmental assessment documents nonetheless triggered review under Subsection (c)(1) because those documents should be construed as a federal plan for "allowing well stimulation treatments without restrictions." *Id.* at 59a. Based on that understanding, the court concluded that it would not be "duplicative" to require the federal government to undertake consistency review under Subsection (c)(1), while also requiring a platform operator to undertake consistency review of a particular proposed use of well-stimulation treatments under Subsection (c)(3). *Id.* at 61a. That conclusion is doubly flawed because it contravenes Congress's determination that an activity is not "subject to" (c)(1) review if it is "subject to" (c)(3). 16 U.S.C. 1456(c)(1)(A), and it is based on a faulty premise. The environmental assessment documents cannot be understood as a federal plan to allow the use of well-stimulation treatments "without restrictions," Pet. App. 59a, because the programmatic environmental assessment explicitly instructs that any request to use well-stimulation treatments will be assessed on a "case-by-case basis," C.A. E.R. 1462.

3. While petitioners are therefore correct that the decision below is wrong, the court of appeals' decision does not warrant this Court's review. Because of the case-specific nature of the court of appeals' errors, the extent to which the decision below may affect decisions in future cases or create discord in the circuits is uncertain at this time, and the consequences for this

particular case do not in themselves warrant review by this Court.

a. The fundamental defect in the court of appeals' decision is its misunderstanding of the nature of the challenged documents rather than an erroneous view of the legal standards governing the determination of "final agency action" under the APA, 5 U.S.C. 704, and the framework governing CZMA review. With respect to the standard for final agency action, the court of appeals relied on *Bennett*, correctly explaining that "[a]gency action is final and reviewable" only when it both "'mark[s] the consummation of the agency's decision-making process'" and "determine[s] 'rights or obligations.'" Pet. App. 20a (quoting *Bennett*, 520 U.S. at 177-178). Similarly, in analyzing the CZMA, the court of appeals properly recited the interpretation of the statute dictated by its text and this Court's precedent, recognizing that "§ (c)(1) review reaches activities where the federal agency is the 'principal actor' while § (c)(3) review encompasses the 'federally approved activities of third parties.'" *Id.* at 56a (quoting *California*, 464 U.S. at 332). And the court of appeals correctly observed that "[i]f a proposed federal agency activity can be reviewed under § (c)(3), the CZMA specifically provides that it cannot be reviewed under § (c)(1)." *Ibid.*

The court of appeals' errors therefore arose in its application of the legal standards to the circumstances of this case. The court repeatedly and erroneously concluded that the challenged documents embody a federal decision to "green light[] the unrestricted use of well stimulation treatments, with no cautionary limitations," Pet. App. 23a, even though the programmatic environmental assessment expressly stated that it is "*not* itself a decision document for whether and how to proceed

with [well-stimulation treatment] use on the" Outer Continental Shelf. C.A. E.R. 1437 (emphasis added); see *id.* at 1362-1363, 1462. That error is significant, but because it is case-specific, it does not warrant this Court's review.

Moreover, the environmental assessment documents in this case are unlike the agency decisions this Court reviewed in *Bennett*, *Sackett*, and *Hawkes*, which were the product of standard agency practices or procedures. The documents in this case were instead produced to satisfy settlement agreements, see pp. 2-3, supra, and the court of appeals' mistaken belief that the documents represent a blanket authorization of the use of well-stimulation treatments appears to have been influenced by this history. The court concluded, for example, that the documents satisfy the APA finality requirements in part because their issuance triggered a "lifting of the moratorium" that the settlement agreements had imposed on the issuance of permits authorizing the use of well-stimulation treatments during the pendency of the NEPA review. Pet. App. 23a. Similarly, in erroneously "reject[ing]" federal respondents' and petitioners' argument that the challenged documents constitute "'bare NEPA analysis'" that does not trigger consistency review under Subsection (c)(1) of the CZMA, the court of appeals stated that the issuance of the documents allows "the agencies [to] return to the pre-moratorium status quo," and the documents themselves constitute a "plan" of "allowing well stimulation treatments without restriction." *Id.* at 58a-59a. Because this reasoning is specific to this case, it is unclear to what extent the court's errors might carry over to other cases involving more typical NEPA assessments.

To be sure, there is a risk that district courts in the Ninth Circuit will "miscontrue[]" the court of appeals' decision, thereby distorting the APA finality analysis and the consistency-review requirements of the CZMA. Gov't Pet. for Reh'g En Banc 2. The government argued in its petition for rehearing en banc that the panel's "final agency action" decision was "'exceptionally important'—not due to its immediate effect on oil and gas lessees" because none has a permit application pending with Interior—but because it "could be misconstrued as authorizing courts to review 'merely tentative or interlocutory agency analyses.'" *Id.* at 1-2. And the rehearing petition further argued that the panel's discussion of the CZMA—which was largely derivative of its analysis concerning "final agency action"—"could * * * impact" the development of other offshore energy projects by imposing a burdensome, counter-textual requirement for "federal agencies, and not the operators, to complete consistency reviews" of the operators' proposed activities on the Outer Continental Shelf. *Id.* at 17; see *id.* at 2-3. But the court of appeals denied the government's and petitioners' requests for rehearing without even calling for a response. Pet. App. 157a-158a. That denial may reflect the circuit's view that the panel's opinion need not be construed to have the broader potential effects the government described. But if the government's concerns are born out in future district court decisions in the Ninth Circuit, those decisions will present another opportunity for the court of appeals to correct the error and—if necessary—for this Court to step in.

b. Petitioners err in asserting (Pet. 25) that review is warranted because of the effects of the injunction the lower courts imposed in this case. The current

injunction bars Interior from "approving well stimulation treatment permits until the agencies issue a complete" environmental impact statement under NEPA with respect to the well-stimulation treatments analyzed in the environmental assessment documents, perform CZMA review of that undertaking under Section 1456(c)(1), and complete the consultation requirements imposed under the Endangered Species Act. Pet. App. 66a. Petitioners do not challenge the decision below with respect to the Endangered Species Act consultations, which are still under way. See Pet. 12 n*. But even setting that aside, petitioners err in contending that the injunction is currently preventing the approval of permits seeking to use well-stimulation treatments because—as petitioners concede (Pet. 15)—no such permits are pending.

Further, even if petitioners prevail, Interior could not approve any permit for the use of well-stimulation treatments on an oil and gas platform on the Outer Continental Shelf unless the permit request was subjected to review under NEPA and the proposed activity was described in a development and production plan that has been subjected to review under CZMA Section 1456(c)(3). Petitioners concede as much. They correctly recognize (Pet. 15) that, "in reviewing any future permit applications, [Interior] must consider the environmental impact of the proposed well-stimulation treatments and may revisit any previous findings" to satisfy NEPA's requirements. And petitioners further acknowledge (Pet. 23) that any "*hypothetical* permit approvals * * * would indisputably be subject to [Subsection (c)(3)]" of the CZMA. See p. 16, *supra*. Because NEPA and the CZMA independently mandate review as a precondition for permit approvals, the additional

burdens imposed by the injunction's conditions with respect to the NEPA and CZMA do not warrant this Court's intervention.

Indeed, while petitioners contend (Pet. 25) that certiorari is warranted because the injunction is preventing the use of well-stimulation treatments on the Pacific Outer Continental Shelf, petitioner DCOR has declined to undertake the steps necessary to submit a valid permit application. More than six years ago, DCOR submitted a permit application contemplating the use of well-stimulation treatments, and Interior informed DCOR that it would have to submit a revised development and production plan before Interior could consider such a permit application. D. Ct. Doc. 43-1, at 43. Then DCOR submitted a second permit application in 2019, which was returned for the same reason. D. Ct. Doc. 142, at 3.

After the district court issued its injunction in this case, DCOR moved for reconsideration based in part on the assertion that its two permit applications were still pending. D. Ct. Doc. 133, at 5 (Jan. 10, 2019). When federal respondents explained that the permits had been returned because DCOR's development and production plan did not "describe the activities" the permits proposed, D. Ct. Doc. 142, at 3, DCOR filed a reply arguing that the agency's determination should be viewed as "non-binding," D. Ct. Doc. 150, at 11 (Apr. 15, 2019). The district court rejected DCOR's argument and denied the motion for reconsideration, D. Ct. Doc. 153, at 5-6 (Apr. 23, 2019); the court of appeals affirmed, Pet. App. 66a n.8; and petitioners now acknowledge (Pet. 15) that there are no pending applications for a permit for the use of well-stimulation treatments.

DCOR has not submitted a revised development and production plan describing the use of well-stimulation treatments, and it does not appear to have initiated the Subsection (c)(3) CZMA consistency-review process that an operator must complete before Interior "may approve any revision of an approved plan," 43 U.S.C. 1351(i), even aside from the Subsection (c)(1) review that the court of appeals' decision requires. These circumstances undermine petitioners' contention (Pet. 25) that the injunction in this litigation is currently the primary impediment to the approval of the use of well-stimulation treatments on the Pacific Outer Continental Shelf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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