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

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit has enjoined all well-stimulation treatments on the Pacific Outer Continental Shelf. That decision raises two questions of exceptional importance for administrative law, environmental regulation, and energy development. The first is whether a programmatic environmental assessment (EA) and finding of no significant impact (FONSI) constitute "final agency action" subject to judicial review under the Administrative Procedure Act (APA), when those documents studied only the potential effects of hypothetical permit approvals. The second is whether the Department of the Interior was required to review the EA and FONSI for consistency with California's coastal zone management program, even

though private parties would later be required to undertake their own consistency review when applying for permits.

The federal respondents agree with petitioners that the Ninth Circuit incorrectly decided both questions and that the Ninth Circuit "repeatedly," "fundamental[ly]," and "significant[ly]" erred. Br. 18, 19. But in an unexplained change from their petition for rehearing en banc, where they argued that the panel's decision was "exceptionally important," Fed. Resp. C.A. Pet. for Reh'g 1, they argue here that the decision is not important enough to warrant further review. They were right then, and they are wrong now. The Ninth Circuit did not simply misunderstand the relevant documents or issue a decision limited to the facts of this case. The Ninth Circuit drastically expanded the meaning of "final agency action" under the APA and "Federal agency activity" under the Coastal Zone Management Act (CZMA). Indeed, the state and private respondents defend the decision below on grounds that would apply to a wide swath of intermediate agency decisions.

Respondents maintain that further review would be premature until other courts have relied on the Ninth Circuit's decision. But this Court has not waited to review deeply wrong and practically significant decisions concerning the finality doctrine in the past. In light of the consequences for energy development on the Pacific Outer Continental Shelf, as well as the broader consequences for judicial review of agency action, the petition for a writ of certiorari should be granted.

A. The Decision Below Is Incorrect And Conflicts With This Court's Decisions

1. The federal respondents agree that the Ninth Circuit committed a "significant" error by holding that a programmatic EA and FONSI constitute "final agency action" subject to judicial review under the APA. See Br. 10-11, 19. And it is undisputed that the Department of the Interior must approve individual permits before any well-stimulation treatments may occur. Both because a programmatic EA and FONSI do not "mark the consummation of the agency's decisionmaking process" and because they are not actions "by which rights or obligations have been determined, or from which legal consequences will flow," they do not constitute final agency action. *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citations omitted).

a. As to the first prong of the *Bennett* test, the federal respondents agree with petitioners that the programmatic EA and FONSI do not "mark the consummation of Interior's decisionmaking process." Br. 11 (internal quotation marks and citation omitted); see Pet. 15-18.

The state respondents argue that the EA and FONSI constitute final agency action simply because those documents were labeled as "final." See Br. 18. But that confuses the finality of a *document* with the finality of a *decision*. For purposes of the APA, only the latter matters. For example, the "ruling of a subordinate official" may be "final" in the sense that it is no longer a draft, but that ruling is still not the final decision of the agency. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992) (citation omitted).

The state and private respondents also contend that "no further programmatic environmental review of these treatments will be conducted." State Resp. Br. in Opp. 18 (citation omitted); see Private Resp. Br. in Opp. 15. But

while the Department need not prepare another programmatic EA, it is still required to consider environmental impacts (including cumulative effects) before approving a particular application to conduct well-stimulation treatments. See Pet. 15-16. Indeed, as the federal respondents observe, the EA expressly acknowledges that "there remains incomplete or unavailable information that may only be known when there is a specific request for [well-stimulation treatment] use." Br. 11 (quoting C.A. App. 1362). A programmatic review is simply a tool for providing a preliminary, overall assessment and streamlining subsequent individualized analyses when the agency takes final actions.

The private respondents' comparison of programmatic EAs and FONSIs with circumstances in which an agency draws a conclusion and then "voluntarily revisit[s]" it is inapt. Br. 16. Consideration of the potential environmental impact of a particular application is required, not optional, and the Department must take into account the interaction between a proposed activity and other activities on the Outer Continental Shelf. See Pet. 15; 40 C.F.R. 1508.1(g)(3). As the federal respondents recognize, it is only when "a specific request for a permit approving the use of well-stimulation treatments is submitted" that the Department can finally determine whether a full "environmental impact statement 'is potentially warranted.'" Br. 11-12 (quoting C.A. App. 1363).

Indeed, the private respondents undercut their own argument when they recognize that programmatic review facilitates "tiering," which allows "site-specific documents" to "incorporat[e] by reference the general discussions" in programmatic documents. Br. 23 n.7 (internal quotation marks and citation omitted); see State Resp. Br. in Opp. 21 n.3. The need for an option to incorporate by reference confirms that it is the site-specific analysis that

consummates the Department's decisionmaking process. Further, the purpose of tiering is to "avoid duplication and delay." Memorandum from Michael Boots, Council on Environmental Quality, to Heads of Federal Departments and Agencies 12 (Dec. 18, 2014) <tinyurl.com/2014-ceqmemo> (internal quotation marks and citation omitted). Treating the programmatic stage of a tiered review as final agency action opens the door to duplicative litigation, eliminating the efficiency that programmatic review is supposed to provide.

b. As to the second prong of the *Bennett* test, the federal respondents agree with petitioners that the programmatic EA and FONSI "lack direct and appreciable legal consequences." Br. 12 (internal quotation marks and citation omitted); see Pet. 18-20.

The state and private respondents maintain that the EA and FONSI "allow[ed] the permitting process for these treatments to proceed." State Resp. Br. in Opp. 20 (quoting Pet. App. 23a); see Private Resp. Br. in Opp. 21. But countless preliminary or interlocutory agency actions are critical to allowing agency processes to proceed. The Federal Trade Commission, for example, cannot pursue an action until it concludes that it has "reason to believe" that a target is violating the law and issues a complaint. 15 U.S.C. 45(b). That procedural consequence does not transform the decision to issue a complaint into final agency action. See *Federal Trade Commission* v. *Standard Oil Co. of California*, 449 U.S. 232, 241 (1980).

The private respondents also echo the Ninth Circuit's conclusion that the EA and FONSI determined "the rights of plaintiffs to further environmental review[] and the obligation of the agencies to prepare a full [environmental impact statement]." Br. 22 (quoting Pet. App. 23a). But the issuance of the EA and FONSI did not affect the statutory and regulatory obligations concerning

the preparation of a full environmental impact statement in connection with a permit application. See Pet. 19; C.A. App. 1219, 1363.

The private respondents also contend that the EA and FONSI "establish the conditions under which well stimulations can occur." Br. 22. But it is undisputed that no one is currently authorized to conduct well-stimulation treatments; the EA and FONSI did nothing to alter that fact. If and when the Department issues permits, it will be required to consider particular environmental impacts and include appropriate restrictions on well-stimulation treatments. Any decision regarding such "conditions" would become final at that time.

c. The private respondents cite a number of circuit decisions that supposedly support the Ninth Circuit's decision. See Br. 12-13. But none of those cases involved programmatic EAs and FONSIs in a tiered review process. Indeed, one of the cases specifically holds that it is a final decision on an underlying "major federal action"—absent here—that makes a NEPA claim reviewable and permits review of NEPA documents. See *Jersey Heights Neighborhood Association* v. *Glendening*, 174 F.3d 180, 185, 187 (4th Cir. 1999).

The dictum that the private respondents quote from *Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726 (1998), is equally unavailing. See Br. 19-20. That decision addresses ripeness and says nothing about the finality of agency action. See 523 U.S. at 728. It also does not distinguish between NEPA documents that accompany final agency action and those that do not. In fact, the Court explained that programmatic actions are generally *not* ripe where further action is required for each "particular site." *Id.* at 734.

In short, as the federal respondents agree, the Ninth Circuit badly erred by holding that the programmatic EA

and FONSI constituted final agency action. Under a straightforward application of *Bennett* and this Court's other precedents, the EA and FONSI are not subject to APA review.

2. Even if the Ninth Circuit had jurisdiction over the CZMA claim, it further erred by holding that the Department was required to prepare a consistency determination under Section 1456(c)(1). Once again, the federal respondents agree. See Br. 14-17.

The CZMA generally provides that "[e]ach Federal agency carrying out" an activity affecting a State's coastal zone "shall provide a consistency determination to the relevant State agency." 16 U.S.C. 1456(c)(1)(C). But when the activity requires a federal "license or permit," including when such activities are contained in "any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act," it is the applicant—not the agency—that must undertake a consistency review. 16 U.S.C. 1456(c)(3). As the federal respondents agree, "an activity is not 'subject to' (c)(1) review if it is 'subject to' (c)(3)." Br. 17. Because well-stimulation treatments on the Outer Continental Shelf require federal permits, Section 1456 (c)(3) applies and the Department was not required to undertake a consistency review. See Pet. 21-24.

The state respondents first discern a "programmatic action" in the EA and FONSI that is distinct from any subsequent decisions to grant permits. Br. 28. But as the federal respondents explain, that argument is "doubly flawed." Br. 17. To begin with, the "programmatic action" identified by the state respondents is illusory: the EA and FONSI evaluated only the environmental impacts that *might occur* if the Department granted permits for well-stimulation treatments *in the future*. See C.A. App. 1203-1204. Moreover, Section 1456(c)(3) unambiguously

governs consistency review whenever the activity at issue requires a federal license or permit, regardless of how many licenses might be issued.

The state respondents further contend that, because Congress amended Section 1456(c)(1) to eliminate consistency review for lease sales, Congress also intended to distinguish all "programmatic activities" from permits. Br. 29-30; see H.R. Conf. Rep. No. 964, 101th Cong., 2d Sess. 970 (1990). The Ninth Circuit made the same point, see Pet. App. 59a-60a, but it lacks merit. Congress's extension of Section 1456(c)(1) to leasing activities has no bearing on whether that provision also governs permitting activities, particularly when the applicability of Section 1456(c)(3) to permits at later stages of the offshore-energy development process is "not in doubt." *Secretary of the Interior* v. *California*, 464 U.S. 312, 340 (1984).

As the federal respondents agree, Section 1456(c)(1) and Section 1456(c)(3) are "mutually exclusive." Br. 14. By instituting a new requirement for duplicative consistency reviews, the Ninth Circuit departed from the text of the CZMA and failed to heed this Court's decision in *Secretary of the Interior*. That error, like the Ninth Circuit's threshold error in exercising jurisdiction over the CZMA and NEPA claims, warrants the Court's review.

B. The Questions Presented Are Exceptionally Important And Warrant The Court's Review In This Case

In the face of the Ninth Circuit's clear errors, respondents offer no valid reason to deny review.

1. If allowed to stand, the Ninth Circuit's decision will have significant effects on energy development on the Pacific Outer Continental Shelf. The federal respondents note that there are no pending applications to conduct well-stimulation treatments. See Br. 20-22. But that is unsurprising, because the Department has been enjoined

from issuing permits since 2018. Petitioners' decision not to file futile applications does not diminish the importance of the decision enjoining them from obtaining permits in the first place.

Respondents further insist that the decision will have only limited effects on energy development. See, *e.g.*, Private Resp. Br. in Opp. 28-31. But they do not dispute that, without well-stimulation treatments, operators can recover only a third of the oil available in a reservoir. See Pet. 25. And the decision below will expose EAs and FONSIs to challenge throughout the Outer Continental Shelf, placing new pressures on agencies to produce duplicative environmental reviews. See States Amicus Br. 20-21; Chamber Amicus Br. 16-18; Fed. Resp. C.A. Pet. for Reh'g 11-12, 17. As the federal respondents told the Ninth Circuit, the decision below "threatens to stunt all manner of energy development on the Outer Continental Shelf." C.A. Pet. for Reh'g 2-3.

2. Respondents also purport to limit the Ninth Circuit's finality analysis to the particular documents at issue. See Fed. Resp. Br. in Opp. 17-20; State Resp. Br. in Opp. 13-15; Private Resp. Br. in Opp. 27-28. But it is impossible to divorce the Ninth Circuit's "misunderstanding of the nature of the challenged documents," Fed. Resp. Br. in Opp. 18, from its dramatic expansion of APA review. Whenever an agency considers whether to review permit applications in the future—for instance, under new statutory authority or in light of new technology—the court of appeals would treat a programmatic EA and FONSI as final agency action. And while this case arises in the wake of a settlement agreement, the state and private respondents' arguments in defense of the decision below illustrate that the Ninth Circuit's reasoning applies to *all* programmatic EAs and FONSIs. See pp. 3-7, *supra*.

The state respondents emphasize that no court has relied on the decision below since it was issued less than a year ago. See Br. 14-15. As an initial matter, the decision has "unleashed a flood of challenges at each stage of NEPA review." Pet. 27. As the federal respondents previously recognized, an increasing number of litigants are citing the decision to claim that "all NEPA documents should now be deemed 'final agency action.'" Fed. Resp. C.A. Pet. for Reh'g 12; see, *e.g.*, Br. of Petitioner at 28, *Chevron U.S.A. Inc.* v. *EPA*, No. 21-71132 (9th Cir. Nov. 2, 2022); Dkt. 14, at 28-32, *Cascadia Wildlands* v. *Adcock*, Civ. No. 22-1344 (D. Or. Dec. 27, 2022). And there can be no doubt that a decision from the court that heard half of all NEPA appeals over a recent fifteen-year period will have an outsized effect. See Chamber Amicus Br. 5.

More fundamentally, however, this Court does not measure the importance of a decision by what happens in the short time between the decision and the filing of a petition for certiorari. Because of the exceptional importance of the finality doctrine to administrative law, this Court has granted review and addressed the issue of finality before any other court relied on the decision under review, see *U.S. Army Corps of Engineers* v. *Hawkes Co.*, 578 U.S. 590 (2016), and it has addressed finality even when the court below did not do so, see *Sackett* v. *EPA*, 566 U.S. 120 (2012).

To understand the effect of premature judicial review on the administrative process, one need only recall what the federal respondents told the Ninth Circuit when they sought rehearing en banc. The decision below "intruded directly into the agency's decisionmaking process at its earliest stage," and it "will disrupt careful and thoughtful deliberations throughout federal agencies, replacing them with premature litigation." Fed. Resp. C.A. Pet. for Reh'g 11. The result will be that courts will "find themselves

endlessly entangled in abstract policy disagreements," which "could slow or even de[r]ail an array of agency decisionmaking processes in a way that Congress never intended." *Id.* at 2, 11. And that delay will compound the already sluggish pace of both NEPA review, which takes four and a half years on average, see Chamber Amicus Br. 16-17, and CZMA review, which imposes deadlines on States but not on federal agencies.

3. Nor is the imposition of duplicative and premature judicial review harmless simply because NEPA and the CZMA would apply anyway to subsequent actions. See Fed. Resp. Br. in Opp. 21-22; State Resp. Br. in Opp. 15. An extra round of litigation would almost certainly delay the timely approval of permit applications and increase the overall cost of developing oil, gas, and renewable energy. See Chamber Amicus Br. 16; States Amicus Br. 20-21. Once again, the federal respondents had it right when they told the Ninth Circuit that imposing duplicative review "upended the careful balance struck by the CZMA" by imposing new burdens on agencies that already "have limited resources and have many priorities competing for those resources." Fed. Resp. C.A. Pet. for Reh'g 17.

4. Finally, the questions presented remain exceptionally important and susceptible of resolution despite the ongoing consultation process under the Endangered Species Act (ESA) and petitioners' decision not to seek review on the merits of the NEPA claims. See Fed. Resp. Br. in Opp. 21; State Resp. Br. in Opp. 15. The ESA consultation process is irrelevant to the questions presented under the APA and the CZMA, and it is already underway. As for the merits of the NEPA claims, the reversal of the holding on finality would dispose of those claims in their entirety. Set Pet. 12-13 n.*.

In short, this case is an optimal vehicle in which to decide the questions presented. The serious errors committed by the Ninth Circuit cry out for further review.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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