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EIS and Biological Opinion Invalidated for Offshore Alaska Oil Project

The Ninth Circuit vacated U.S. Department of the Interior approvals for a proposed offshore oil drilling and production facility in Alaska after finding its EIS improperly failed to consider impacts associated with foreign oil consumption and the U.S. Fish and Wildlife Service's Biological Opinion relied on overly vague mitigation measures and improperly failed to quantify the project's nonlethal take of polar bears. *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020).



Conservation groups challenged the Bureau of Ocean Energy Management's (BOEM) approval of the "Liberty Project," which proposes to produce crude oil from Foggy Island Bay off the northern coast of Alaska, for failure to comply with procedural requirements of NEPA, the ESA, and the Marine Mammal Protection Act (MMPA). Project proponents estimated that the Project would produce approximately 120 million barrels of crude oil over a period of fifteen to twenty years. To do so, the Project would require construction of various new facilities including an offshore gravel island, wells, a pipeline to transport the oil, a gravel mine, and additional ice roads and crossings. The Project site is characterized by its ecological diversity and for providing habitat and food sources for threatened and endangered marine mammals, including polar bears. **EIS That Failed to Address Greenhouse Gas Emissions Resulting from Foreign Oil Consumption Violated NEPA** The Ninth Circuit was persuaded by one of two arguments raised by the conservation groups concerning BOEM's compliance with NEPA. The court held that BOEM had failed to analyze "indirect effects" of the Project as required by NEPA by arbitrarily failing to include emissions estimates resulting from foreign oil consumption in its analysis of the Project's no-action alternative. Counterintuitively, the EIS had concluded that maintaining the status quo under the no-action alternative would result in greater air emissions of priority pollutants as compared with the Project because, BOEM said, the production gap would be filled with substitutes produced from countries with "comparatively weaker environmental protection standards." However, the EIR did not quantify the purported change in foreign oil consumption. BOEM argued that it could not have summarized or estimated foreign emissions associated with changes in foreign consumption with accurate or credible scientific evidence. The

court rejected BOEM's failure to either quantify downstream greenhouse gas emissions or to "thoroughly explain why such an estimate is impossible." The court specifically faulted the EIR for failing to "summarize existing research addressing foreign oil emissions" and for ignoring "basic economics principles," including changes to equilibrium price and demand effects of the Project. Moreover, the court declined to accord deference to BOEM's economic analysis of greenhouse gas emissions, stating that "BOEM's area of expertise is the management of 'conventional (e.g. oil and gas) and renewable energy-related' functions, including 'activities involving resource evaluation, planning, and leasing.'" Based on these findings, the court found that the BOEM's failure to address global emissions constituted an impermissible failure to evaluate reasonably foreseeable environmental impacts required to be analyzed under NEPA. **Reliance on Overly Vague Mitigation Measures to Demonstrate No Adverse Modification of Polar Bear Critical Habitat Violated the ESA** The court invalidated BOEM's approval of the Project on additional grounds that it improperly relied upon a legally deficient Biological Opinion prepared by FWS to satisfy consultation and take regulations under the ESA and MMPA. The Biological Opinion recognized that polar bears, which are classified as threatened marine mammals, are present in the Project area and that denning polar bears could be disturbed by aspects of Project construction and operation including construction vibrations and vehicular noise. Nevertheless, FWS concluded that the Project would not jeopardize their continued existence or adversely modify their critical habitat. However, with respect to FWS's habitat impact finding, the court held that the Biological Opinion impermissibly relied upon mitigation measures that the court found too vague or uncertain to be enforceable. Such impermissibly vague and unenforceable mitigation measures included (i) commitments to comply with requirements of "future authorizations" under the MMPA, (ii) cross-reference to other "possible minimization measures that would reduce effects to polar bears," and (iii) "other mitigation measures [as] may be required on a case-by-case basis." In the court's view, FWS's reliance on this mix of "yet unapproved and undefined mitigation measures under the MMPA," "noncommittal assurances," and "examples of possible strategies" respectively failed to meet its burden to rely only on mitigation measures that constitute a "clear, definite commitment of resources" and where performance is "under agency control or otherwise reasonably certain to occur." **Failure to Quantify Nonlethal Take of Polar Bears Violated the ESA** Finally, the court held that FWS impermissibly failed to quantify the amount of nonlethal take of polar bears in its incidental take statement in violation of the ESA, which required FWS to impose a numerical cap on incidental take or to explain why no cap has been provided. In the Biological Opinion, FWS supplied numerical caps only for polar bear "take" in the form of death or injury, but not for nonlethal "harassment," including "disruption of behavioral patterns [such as] migration, breathing, nursing, breeding, feeding, or sheltering." As the court noted, the Biological Opinion acknowledged the potential for increased "polar bear-human interactions" and ground disturbing construction activities that could cause polar bears to abandon their dens. Because FWS neither attempted to quantify such harassment nor show why it could not do so, the court held that FWS had violated the ESA, and in turn, that BOEM's reliance on the Biological Opinion in issuing final Project approvals was unlawful.

Authors