

4-6-2015

## Essentially Reasonable?: Why the Ninth Circuit's Decision in *Native Village of Point Hope* Strays from the Purpose of NEPA

Timothy Wright

*Boston College Law School*, [timothy.wright@bc.edu](mailto:timothy.wright@bc.edu)

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Administrative Law Commons](#), [Animal Law Commons](#), [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

---

### Recommended Citation

Timothy Wright, *Essentially Reasonable?: Why the Ninth Circuit's Decision in Native Village of Point Hope Strays from the Purpose of NEPA*, 42 B.C. Envtl. Aff. L. Rev. E. Supp. 94 (2015), <http://lawdigitalcommons.bc.edu/ealr/vol42/iss3/9>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# ESSENTIALLY REASONABLE?: WHY THE NINTH CIRCUIT’S DECISION IN *NATIVE VILLAGE OF POINT HOPE* STRAYS FROM THE PURPOSE OF NEPA

TIMOTHY WRIGHT \*

**Abstract:** In *Native Village of Point Hope v. Jewell*, the U.S. Court of Appeals for the Ninth Circuit found that the Bureau of Ocean Energy Management did not have to include information on animal populations in its environmental impact statement (“EIS”) at the lease-sale stage of the Outer Continental Shelf Lands Act oil and gas development program. Federal agencies are required to complete an EIS before conducting a major federal action. This process ensures that decision-makers take a hard look at adverse environmental impacts. The Ninth Circuit concluded in *Native Village of Point Hope* that coverage of animal populations is not “essential” in an early-stage “programmatic” EIS, but may be appropriate at a later stage. This Comment argues that the Ninth Circuit should have followed the lead of its own precedent in holding that the missing information about animal populations is “essential” in early-stage programmatic EIS, in order to maintain consistency, transparency, and predictability in the federal courts. Moreover, it would have ensured that agencies fully evaluate the environmental impacts of offshore oil production before making critical decisions.

## INTRODUCTION

During a stormy night out on the Arctic Ocean on December 27, 2012, towlines securing the oilrig Kulluk to the icebreaking tugboat Aiviq snapped, causing the oilrig to drift toward the northwest coast of Alaska.<sup>1</sup> A few days prior to the incident, Royal Dutch Shell (“Shell”)—the owners of the Kulluk—began towing the rig out of Alaska’s jurisdiction in a suspected effort to avoid paying a multi-million-dollar state tax bill.<sup>2</sup> Shell unfortu-

---

\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2014–2015.

<sup>1</sup> See U.S. DEP’T OF THE INTERIOR, REPORT TO THE SECRETARY OF THE INTERIOR: REVIEW OF SHELL’S 2012 ALASKA OFFSHORE OIL AND GAS EXPLORATION PROGRAM 29 (2013), available at <http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf>, archived at <http://perma.cc/G72F-Y7SE> (recounting the grounding of the Kulluk in the Gulf of Alaska).

<sup>2</sup> See Marianne Lavelle, *Coast Guard Blames Shell Risk-Taking in Kulluk Rig Accident*, NAT’L GEOGRAPHIC (Apr. 4, 2014), <http://news.nationalgeographic.com/news/energy/2014/04/140404-coast-guard-blames-shell-in-kulluk-rig-accident>, archived at <http://perma.cc/K92S-NEVZ>

nately underestimated the risk inherent in winter tows.<sup>3</sup> As weather conditions rapidly worsened, the Aiviq experienced engine failure and both it and the Kulluk required U.S. Coast Guard (“USCG”) and Shell-dispatched rescue.<sup>4</sup> Over the next forty-eight hours, the emergency rescue vessels tried and failed to connect a new towline to the Kulluk.<sup>5</sup> On December 31, the Kulluk ran aground on a remote Alaskan island in a bay that serves as critical habitat for the endangered Stellar sea lion and Southwest sea otter.<sup>6</sup> In its post-accident report, the USCG decried Shell for gross mismanagement in planning and executing the Kulluk tow.<sup>7</sup> Today, the mishap stands as a stark reminder to U.S. policymakers that the Arctic Ocean’s ecosystem needs better regulatory protection from reckless oil development.<sup>8</sup>

In the last six years, the Obama Administration has opened up nearly 130 million acres of pristine Arctic waters to oil drilling, including areas in the Chukchi Sea.<sup>9</sup> Its motive in doing so appears to have been the vast potential for oil resources contained in the Arctic.<sup>10</sup> According to the U.S. Geological Survey, almost one-quarter of the world’s technically recoverable

---

(noting the U.S. Coast Guard determined the company attempted to remove the Kulluk from Alaskan waters in the final days of December to avoid paying taxes).

<sup>3</sup> *Id.*

<sup>4</sup> U.S. DEP’T OF THE INTERIOR, *supra* note 1, at 29.

<sup>5</sup> *Id.*

<sup>6</sup> See DIV. OF SPILL PREVENTION & RESPONSE, ALASKA DEP’T OF ENVTL. CONSERVATION, SITUATION REPORT: KULLUK TOW INCIDENT 2 (2013), available at [http://dec.alaska.gov/spar/perp/response/sum\\_fy13/121227201/121227201\\_sr\\_13.pdf](http://dec.alaska.gov/spar/perp/response/sum_fy13/121227201/121227201_sr_13.pdf), archived at <http://perma.cc/U8B9-9XM3> (discussing the grounding of the Kulluk on Sitkalidak and the endangered species affected).

<sup>7</sup> See U.S. COAST GUARD, REPORT OF INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE MULTIPLE RELATED MARINE CASUALTIES & GROUNDING OF THE MODU KULLUK 110–12 (2012), available at <http://www.uscg.mil/hq/cg5/cg545/docs/documents/Kulluk.pdf>, archived at <http://perma.cc/5LG9-ET46> (detailing the failures of the Shell tow vessel).

<sup>8</sup> See David Hults, *Environmental Regulation at the Frontier: Government Oversight of Offshore Oil Drilling North of Alaska*, 44 ENVTL. L., no. 3, 2014, at 761, 768 (surmising that greater regulatory controls on drilling can help mitigate the risk of oil spills). Located off the northwest coast of Alaska, the Chukchi Sea is home to large populations of walruses, polar bears, and whales. *Chukchi Sea*, AUDUBON ALASKA, <http://ak.audubon.org/chukchi-sea> (last visited Mar. 15, 2015), archived at <http://perma.cc/KW26-94VF> (discussing the environmental features of the region).

<sup>9</sup> See John M. Broder, *Obama to Open Offshore Areas to Oil Drilling for First Time*, N.Y. TIMES, Mar. 31, 2010, <http://www.nytimes.com/2010/03/31/science/earth/31energy.html>, archived at <http://perma.cc/YV58-RXPZ> (noting that President Obama has made a proposal that would include large parts of the environmentally sensitive Arctic Ocean).

<sup>10</sup> See HEATHER A. CONLEY ET AL., CTR. FOR STRATEGIC & INT’L STUDIES, ARCTIC ECONOMICS IN THE 21ST CENTURY: THE BENEFITS AND COSTS OF COLD 6 (2013), available at [http://csis.org/files/publication/130710\\_Conley\\_ArcticEconomics\\_WEB.pdf](http://csis.org/files/publication/130710_Conley_ArcticEconomics_WEB.pdf), archived at <http://perma.cc/PW9M-AQW8> (discussing the government’s balancing of risks and rewards in the Arctic). The Outer Continental Shelf is defined as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters.” Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (2012).

oil and gas is contained in the Outer Continental Shelf.<sup>11</sup> Despite the area's potential for oil exploitation, exposing the fragile Arctic environment to oil drilling is a tremendously risky endeavor.<sup>12</sup> Fish and wildlife populations are threatened by the byproduct pollution, oil spills, and drilling activities.<sup>13</sup> One need look no further than the April 2010 explosion on the Deepwater Horizon drilling platform and the resulting well blowout and catastrophic oil spill to understand that the risk of oil drilling and oil spills remains great and that greater scrutiny of oil drilling operations is needed.<sup>14</sup>

In *Native Village of Point Hope v. Jewell*, the U.S. Court of Appeals for the Ninth Circuit addressed the question of whether the Bureau of Ocean Energy Management ("BOEM") had to include information on animal populations in the Chukchi Sea in an environmental impact statement ("EIS").<sup>15</sup> Pursuant to the National Environmental Protection Act ("NEPA"), agencies must complete an EIS before any major federal action.<sup>16</sup> The Ninth Circuit held that for a "programmatic" EIS prepared at an early lease-sale stage of the Outer Continental Shelf Lands Act oil and gas development program,<sup>17</sup> the inclusion of an analysis of the dangers to animal populations is not "es-

<sup>11</sup> See Press Release, U.S. Geological Survey, 90 Billion Barrels of Oil and 1670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic (July 23, 2008), available at [http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss\\_home](http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss_home), archived at <http://perma.cc/96AJ-L6LL> (noting twenty-two percent of recoverable oil and natural gas might be in the Arctic).

<sup>12</sup> See *Deluge of Oil Highlights Research and Technology Needs for Effective Cleanup of Oil Spills: Hearing Before the Subcomm. on Energy and Env't*, 111th Cong. 21 (2010) (noting that better research is needed to understand the risks of Arctic drilling).

<sup>13</sup> See HOLLY K. OBER, EFFECTS OF OIL SPILLS ON MARINE AND COASTAL WILDLIFE 1–3 (2013), available at <http://www.wec.ufl.edu/Effects%20of%20oil%20spills%20on%20wildlife.pdf>, archived at <http://perma.cc/4XN5-W8JD>. The effects from oil spills include contaminated food supplies, suppression of the immune system, and disruptions to breeding and other routine animal activities. See U.S. FISH & WILDLIFE SERV., EFFECTS OF OIL ON WILDLIFE AND HABITAT (2010), available at <http://www.fws.gov/home/dhoilspill/pdfs/dhjicfswoilimpactswildlifefactsheet.pdf>, archived at <http://perma.cc/US3X-8VQM> (detailing the negative effects of oil spills on wildlife).

<sup>14</sup> See BOB GRAHAM ET AL., NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT 250–51 (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, archived at <http://perma.cc/W5YD-3RGX> (discussing the threats of drilling in challenging environments). On April 23, 2010, the Macondo well exploded underneath the Deepwater Horizon, an offshore oil drilling platform, killing eleven people and creating one of the worst environmental catastrophes in human history. See David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, Dec. 25, 2010, [http://www.nytimes.com/2010/12/26/us/26spill.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/12/26/us/26spill.html?pagewanted=all&_r=0), archived at <http://perma.cc/2AFQ-PGTU> (noting the timeline of events aboard the Deepwater Horizon leading up to the explosion).

<sup>15</sup> 740 F.3d 489, 495–96 (9th Cir. 2014).

<sup>16</sup> National Environmental Policy Act, 42 U.S.C. § 4332 (2012).

<sup>17</sup> Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1344, 1337, 1340, 1351 (2012); Beth C. Bryant, *NEPA Compliance in Fisheries Management: The Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications for NEPA Reform*, 30 HARV. ENVTL. L. REV. 441, 446–47 (2006) (defining a programmatic EIS as a "general policy-level" document that is more conceptual and generic than a site-specific EIS).

sential,” but that one might be appropriate at a later time.<sup>18</sup> By allowing BOEM to defer an in-depth analysis on Chukchi Sea wildlife, the court allowed the Agency avoid the regulatory requirement that the Agency evaluate alternative courses of action that could minimize the potential for environmental harm.<sup>19</sup>

This Comment argues that the Ninth Circuit should have held that the missing information is “essential to a reasoned choice among the alternatives” because such a holding would be consistent with the court’s own precedent addressing the requirements of comparable EIS reports.<sup>20</sup> The missing information in this case is essential because, through its inclusion, the information would have signified that BOEM had taken the NEPA-required “hard look” at potential environmental impacts, and was thus properly informed about the alternatives before making a critical decision about oil and gas drilling permitting in the Arctic Ocean.<sup>21</sup>

## I. FACTS AND PROCEDURAL HISTORY

BOEM is a federal agency within the U.S. Department of the Interior (“DOI”) tasked with approving oil and gas development projects.<sup>22</sup> The Agency began exploring the prospect of selling drilling leases in the Chukchi Sea in 2002.<sup>23</sup> BOEM had previously sold 483 leases in the region in 1988 and 1991, but none of those leases have resulted in significant oil production.<sup>24</sup> The tract of land at issue in *Native Village of Point Hope* is known as Lease-Sale 193.<sup>25</sup> From 2003 to 2005, BOEM gauged interest from oil and gas companies in purchasing Lease-Sale 193.<sup>26</sup> When the Agency received sufficient interest, however, it deferred sale until the completion of a five-year review program.<sup>27</sup>

---

<sup>18</sup> 740 F.3d at 497–98.

<sup>19</sup> See Appellant’s Opening Brief at 32, *Native Vill. of Point Hope*, 740 F.3d 489 (No. 12-35287) (discussing the need for effective analysis of alternatives). Through the requirement of the preparation of an EIS, NEPA requires federal agencies to provide a detailed statement about, and to make a detailed consideration of, alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii).

<sup>20</sup> See *infra* notes 86–102 and accompanying text.

<sup>21</sup> See *infra* notes 86–102 and accompanying text.

<sup>22</sup> U.S. DEP’T OF THE INTERIOR, ORDER NO. 3299, ESTABLISHMENT OF THE BUREAU OF OCEAN ENERGY MANAGEMENT, THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE (2010), available at <http://www.doi.gov/deep/waterhorizon/loader.cfm?csModule=security/getfile&PageID=32475>, archived at <http://perma.cc/9U6X-6MQY>.

<sup>23</sup> Answer Brief of Defendants-Appellees at 6, *Native Vill. of Point Hope*, 740 F.3d 489 (No. 12-35287).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at 6–7.

On September 14, 2005, BOEM and the Minerals Management Service issued a Notice of Intent to prepare an EIS for the sale pursuant to the statutory requirements of NEPA.<sup>28</sup> Two years later, in June 2007, BOEM issued a final environmental impact statement (“FEIS”).<sup>29</sup> The FEIS contained an environmental assessment and included information on four possible alternatives.<sup>30</sup> At the same time, the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”) both released Biological Opinions of the sale, pursuant to the Endangered Species Act (“ESA”).<sup>31</sup> The Biological Opinions concluded that the effects of oil activities on Alaskan habitats from Lease-Sale 193 would depend on the size and location of the activities.<sup>32</sup> In January 2008, a Final Notice of Sale was issued, notifying the public that the sale would be completed in February 2008.<sup>33</sup>

The name plaintiff-appellant, the Native Village of Point Hope (“Point Hope”), is a whale-fishing village on the Chukchi Sea located 720 miles northwest of Anchorage, Alaska.<sup>34</sup> The Inupiat community residing there is one of the oldest surviving Inupiat settlements in North America.<sup>35</sup> On January 31, 2008, Point Hope joined a coalition of conservation organizations (together the “coalition”) to challenge BOEM’s decision to sell 29.4 million acres of offshore leases in the Chukchi Sea.<sup>36</sup> The coalition fears that oil and gas activities in the Chukchi Sea will harm marine wildlife, including the Bowhead whale, and consequently, that the activities will endanger their way of life.<sup>37</sup>

---

<sup>28</sup> Outer Continental Shelf, Alaska Region, Chukchi Sea Oil and Gas Lease Sale 193 for Year 2007, 70 Fed. Reg. 54,406, 54,406 (Sept. 14, 2005) (providing statutory Notice of Intent to file an EIS pursuant to NEPA); Answer Brief of Defendants-Appellees, *supra* note 23, at 7.

<sup>29</sup> MINERALS MGMT. SERV. ALASKA OCS REGION, U.S. DEP’T OF THE INTERIOR, OCS EIS/EA MMS 2007-026, CHUKCHI SEA PLANNING AREA: OIL AND GAS LEASE SALE 193 AND SEISMIC SURVEYING ACTIVITIES IN THE CHUKCHI SEA, FINAL ENVIRONMENTAL IMPACT STATEMENT 1–2 (2007), available at [http://www.boem.gov/uploadedFiles/BOEM/About\\_BOEM/BOEM\\_Regions/Alaska\\_Region/Leasing\\_and\\_Plans/Leasing/Lease\\_Sales/Sale\\_193/LS-193-FEIS-Vol-I.pdf](http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Leasing/Lease_Sales/Sale_193/LS-193-FEIS-Vol-I.pdf), archived at <http://perma.cc/3A67-8DTT>.

<sup>30</sup> Native Vill. of Point Hope v. Jewell, 740 F.3d 489, 494 (9th Cir. 2014).

<sup>31</sup> Endangered Species Act, 16 U.S.C. § 1536(b) (2012); Answer Brief of Defendants-Appellees, *supra* note 23, at 7.

<sup>32</sup> U.S. DEP’T OF THE INTERIOR & U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION FOR CHUKCHI SEA PLANNING AREA OIL AND GAS LEASE SALE 193 AND ASSOCIATED SEISMIC SURVEYS AND EXPLORATORY DRILLING 52 (2007), available at [http://www.boem.gov/uploadedFiles/BOEM/About\\_BOEM/BOEM\\_Regions/Alaska\\_Region/Environment/Environmental\\_Analysis/bo\\_6thruappend.pdf](http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Environment/Environmental_Analysis/bo_6thruappend.pdf), archived at <http://perma.cc/KL8H-82HQ>.

<sup>33</sup> Answer Brief of Defendants-Appellees, *supra* note 23, at 9.

<sup>34</sup> *Point Hope: Overview*, TIKIGAQ, <http://www.tikigaq.com/category/shareholder/point-hope> (last visited Mar. 15, 2015), archived at <http://perma.cc/7BPT-HLK7>.

<sup>35</sup> *Id.*

<sup>36</sup> Appellant’s Opening Brief, *supra* note 19, at 1.

<sup>37</sup> *Id.* at 58.

On January 31, 2008, the coalition filed suit in the U.S. District Court of Alaska alleging violations of NEPA and the ESA.<sup>38</sup> Specifically, it alleged that BOEM had violated both statutes by failing to include in its EIS information about local animal populations relating to population estimates, feeding and breeding patterns, and habitat locations.<sup>39</sup> The coalition asserted that the missing information violated federal regulations because it was “essential to a reasoned choice among lease-sale alternatives.”<sup>40</sup> It also alleged that the EIS dramatically underestimated the amount of recoverable oil in the lease area.<sup>41</sup> After the coalition filed its complaint in district court, Shell Gulf of Mexico Inc., ConocoPhillips Co., the State of Alaska, and Statoil USA E&P Inc. successfully intervened as defendants.<sup>42</sup> Both Plaintiffs and Defendants then requested summary judgment.<sup>43</sup>

On July 21, 2010, the district court held that the EIS was inadequate and remanded it back to the DOI.<sup>44</sup> The court ruled that BOEM failed to analyze the environmental effects of oil and gas production and failed to determine whether missing information was essential under the applicable federal regulation.<sup>45</sup> BOEM responded to the remand by filing a supplemental environmental impact statement (“SEIS”) addressing the information gaps and by including a more comprehensive analysis of the effects of large oil spills in the Chukchi Sea.<sup>46</sup>

On October 3, 2011, pursuant to the SEIS, the Secretary of the Interior (the “Secretary”) affirmed BOEM’s decision to allow the lease-sale.<sup>47</sup> The coalition quickly responded by filing another complaint on November 22, 2011, challenging the Secretary’s decision.<sup>48</sup> On February 13, 2012, the district court granted BOEM summary judgment, finding that the Agency had identified missing or inadequate information and sufficiently evaluated the

---

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.* at 9–10.

<sup>40</sup> *Id.* at 2 (quoting Environmental Impact Statement, 40 C.F.R. § 1502.22 (2012)).

<sup>41</sup> *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 492 (9th Cir. 2014).

<sup>42</sup> Appellant’s Opening Brief, *supra* note 19, at 5.

<sup>43</sup> Answer Brief of Defendants-Appellees, *supra* note 23, at 9.

<sup>44</sup> *Id.*

<sup>45</sup> *Native Vill. of Point Hope*, 740 F.3d. at 494–95; *see* 40 C.F.R. § 1502.22.

<sup>46</sup> Answer Brief of Defendants-Appellees, *supra* note 23, at 10; BUREAU OF OCEAN ENERGY MGMT., REGULATION & ENFORCEMENT ALASKA OCS REGION, U.S. DEP’T OF THE INTERIOR, OCS EIS/EA BOEMRE 2010-034, CHUKCHI SEA PLANNING AREA: OIL AND GAS LEASE 193 IN THE CHUKCHI SEA, ALASKA, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT 1 (2010), *available at* [http://www.boem.gov/uploadedFiles/BOEM/About\\_BOEM/BOEM\\_Regions/Alaska\\_Region/Environment/Environmental\\_Analysis/2010\\_034.pdf](http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Environment/Environmental_Analysis/2010_034.pdf), *archived at* <http://perma.cc/74HS-KT39>.

<sup>47</sup> Appellant’s Opening Brief, *supra* note 19, at 5.

<sup>48</sup> Answer Brief of Defendants-Appellees, *supra* note 23, at 12.

information for the current stage of development.<sup>49</sup> On April 12, 2012, the coalition appealed the district court's decision to the Ninth Circuit.<sup>50</sup>

## II. LEGAL BACKGROUND

The National Environmental Protection Act ("NEPA" or the "Act") was passed in 1969 and is heralded as one of environmental law's greatest statutes.<sup>51</sup> NEPA is intended to foster cooperation between government bodies, and it still plays a vital role in balancing human development with ecological considerations.<sup>52</sup> The statute requires federal agencies to consider the adverse environmental effects of their proposed actions by completing a detailed environmental impact statement ("EIS").<sup>53</sup> This process ensures that decision-makers take a "hard look" at adverse environmental impacts before undertaking major federal actions.<sup>54</sup>

A significant component of NEPA is the requirement that agencies guide their decision-making by analyzing and rigorously exploring alternatives to a proposed action.<sup>55</sup> Pursuant to that requirement, an EIS is deemed ineffective if it submits possible alternatives but then fails to evaluate them.<sup>56</sup> Further, if an agency relies on incomplete data or finds data is unavailable in analyzing alternatives to a proposed action, it must make it clear that such information is missing.<sup>57</sup> Provided that the missing information is "essential" to a reasoned choice among alternatives and it is cost-efficient to obtain it, the agency must include that information as well.<sup>58</sup>

The U.S. Court of Appeals for the Ninth Circuit has determined that federal agencies must analyze the effects of proposed activities on animal populations in an early-stage EIS.<sup>59</sup> The Ninth Circuit ruled in *Alaska Wil-*

---

<sup>49</sup> See *Native Vill. of Point Hope*, 740 F.3d at 495.

<sup>50</sup> Appellant's Opening Brief, *supra* note 19, at 5.

<sup>51</sup> National Environmental Policy Act, 42 U.S.C. § 4331 (2012); see Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L. J. 1507, 1509 (2012) (referring to NEPA as the "Magna Carta" of environmental law).

<sup>52</sup> 42 U.S.C. § 4331.

<sup>53</sup> *Id.* § 4332(2)(C).

<sup>54</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000). A "hard look" requires a process that includes a broad dissemination of relevant environmental information relating to a proposed action. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>55</sup> 42 U.S.C. § 4332(2)(C)(iii); see *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1100 (9th Cir. 2010) (noting that the "alternatives analysis," which governs the review of alternative actions in an EIS, is the "heart of the [EIS]").

<sup>56</sup> 42 U.S.C. § 4332(2)(C)(iii); see *Or. Natural Desert Ass'n*, 625 F.3d at 1100.

<sup>57</sup> Environmental Impact Statement, 40 C.F.R. § 1502.22 (2012).

<sup>58</sup> *Id.* § 1502.22(a).

<sup>59</sup> See *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 817, 828 (9th Cir. 2008) (holding an agency must take animal populations into account at an oil lease-sale stage, despite



*erness League v. Kempthorne* that the Minerals Management Service (“MMS”) failed to take a “hard look” at whether oil exploration in the Alaskan Beaufort Sea would threaten the Bowhead whale population, an endangered species.<sup>60</sup> In 2003, after starting a five-year plan to sell leases in the Beaufort Sea, MMS prepared a lease-sale EIS to determine the consequences of an offshore drilling plan.<sup>61</sup> The EIS, however, lacked sufficient analysis of the impact of noise on whale migratory patterns and population levels.<sup>62</sup> The court acknowledged that the staged nature of the Outer Continental Shelf Lands Act (“OCSLA”) allows agencies to gradually include more detailed environmental analysis after each stage, but held that MMS could not “hide behind the cloak of [a] generalized multi-sale EIS.”<sup>63</sup>

Building upon the decision in *Alaska Wilderness League*, which demands the inclusion of animal population data in an early-stage EIS, the Ninth Circuit’s opinion in *Lands Council v. Powell* is instructive on a determination of how specific the data needs to be.<sup>64</sup> In *Lands Council*, the court held that the U.S. Forest Service (“USFS”) prepared an inadequate final environmental impact statement (“FEIS”) because it failed to take a hard look at the impact of timber harvesting on the Westslope Cutthroat trout’s habitat and population.<sup>65</sup> USFS relied on dated fish count surveys from the 1990s to study the effects of logging in the Idaho Panhandle National Forest.<sup>66</sup> The *Lands Council* court further stated that reliance on outdated fish count surveys is suspect.<sup>67</sup>

Not all federal courts, however, agree that population information must be precise in an EIS.<sup>68</sup> In 2009, in *Theodore Roosevelt Conservation Partnership v. Salazar*, the U.S. District Court for the District of Columbia ruled that the Bureau of Land Management (“BLM”) fulfilled its duty under NEPA to

presence of subsequent stages); *Lands Council v. Powell*, 395 F.3d 1019, 1027–28 (9th Cir. 2005) (stating an EIS cannot rely on suspect animal population data).

<sup>60</sup> *Alaska Wilderness League*, 548 F.3d at 820.

<sup>61</sup> *Id.* at 817–18.

<sup>62</sup> *Id.* at 825.

<sup>63</sup> *Id.* at 825, 828. Under OCSLA, federal agencies must follow a four-stage process before developing offshore oil and gas wells: (1) formulation of a five-year plan to determine the “size, timing, and location of proposed lease sales”; (2) the actual sale of the lease; (3) submission of exploration plans to the Secretary for approval; and (4) development and production. *Sec’y of the Interior v. California*, 464 U.S. 312, 337 (1984); *see* Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1344, 1337, 1340, 1351 (2012).

<sup>64</sup> *Lands Council*, 395 F.3d at 1027–28; *see Alaska Wilderness League*, 548 F.3d at 817, 828; *supra* notes 60–63 and accompanying text.

<sup>65</sup> *Lands Council*, 395 F.3d at 1027, 1031.

<sup>66</sup> *Id.* at 1031.

<sup>67</sup> *Id.*

<sup>68</sup> *See Theodore Roosevelt Conservation P’ship v. Salazar*, 605 F. Supp. 2d 263, 275 (D.D.C. 2009) (stating that examination of animal population mitigation need not be flawless, only reasonably complete).

investigate the impact of oil drilling on the Greater Sage grouse population in southern Wyoming with only a reasonably complete analysis.<sup>69</sup> An alliance of environmental organizations alleged that the BLM's EIS failed to address whether alternative projects would have varying results on the North American bird population.<sup>70</sup> The court reasoned that the BLM used the best available method of analysis at the time, and although methods had since improved, evaluation under NEPA need not be flawless.<sup>71</sup>

### III. ANALYSIS

In *Native Village of Point Hope v. Jewell*, the U.S. Court of Appeals for the Ninth Circuit considered whether missing information on animal populations was necessary in an early-stage programmatic lease-sale environmental impact statement ("EIS") for offshore Arctic oil exploration leases in the Chukchi Sea.<sup>72</sup> The Bureau of Ocean Energy Management ("BOEM") concluded that the EIS did not need to contain the missing information, as it was not necessary for the Agency to make a reasoned choice among alternatives.<sup>73</sup> The Ninth Circuit ruled that the data was not essential at the lease-sale stage of the Outer Continental Shelf Lands Act ("OCSLA") oil and gas development program, but would likely become essential at a later juncture of review.<sup>74</sup> The court stated that environmental statutes other than the National Environmental Policy Act ("NEPA")—including the Endangered Species Act ("ESA") and the Marine Mammal Protection Act—provided sufficient protections for wildlife at the lease-sale stage.<sup>75</sup>

The Ninth Circuit justified its findings with two primary reasons.<sup>76</sup> First, the court dictated that a federal agency could rely on missing or incomplete information in a lease-sale EIS.<sup>77</sup> In reaching this conclusion, the court determined that a lease-sale EIS is a "programmatic plan"—an early-stage EIS designed to develop alternatives, conduct a cost-benefit analysis, and address public concerns.<sup>78</sup> A programmatic EIS, as opposed to a later stage site-specific EIS, does not, the court held, always need to fully evaluate the environmental consequences; it only needs to provide sufficient de-

---

<sup>69</sup> *Id.* (noting that a "reasonably complete" analysis under NEPA requires less than a flawless examination of the possible environmental effects).

<sup>70</sup> *Id.* at 272, 275.

<sup>71</sup> *Id.* at 273, 275.

<sup>72</sup> 740 F.3d 489, 495 (9th Cir. 2014).

<sup>73</sup> *Id.* at 496.

<sup>74</sup> *Id.* at 498; see Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331–1356b (2012).

<sup>75</sup> *Native Vill. of Point Hope*, 740 F.3d at 498.

<sup>76</sup> See *infra* notes 77–86 and accompanying text.

<sup>77</sup> *Native Vill. of Point Hope*, 740 F.3d at 494.

<sup>78</sup> *Id.* at 497.

tails so as to inform decision-makers.<sup>79</sup> The court thus held that the multi-stage OCSLA process allows agencies to defer certain information until a subsequent stage better suited to analysis.<sup>80</sup>

Second, the Ninth Circuit found that BOEM properly concluded that the missing information—about animal populations—was not essential at the early lease-sale stage in the OSCLA review.<sup>81</sup> BOEM successfully argued that a large oil spill would affect animal populations and their feeding and breeding habits in nearly identical ways, regardless of any alternatives.<sup>82</sup> As a result, BOEM did not ascertain if the information was even obtainable, as normally required by the federal regulations promulgating NEPA.<sup>83</sup> The court was not persuaded by the Native Village of Point Hope’s and a coalition of conservation organizations’s (together the “appellants”) argument that the missing information was “essential” to inform the public of significant environmental impacts and to assist decision-makers in executing their duties.<sup>84</sup> Instead, the court deferred to BOEM, and held that the Agency should decide the scope of the analysis at the early lease-sale stage.<sup>85</sup>

The court in *Native Village of Point Hope* missed an opportunity to clarify, consistently with its own related precedent, that animal population data is essential at any stage in an EIS.<sup>86</sup> Both *Alaska Wilderness League v. Kempthorne* and *Lands Council v. Powell* demonstrate that an agency must take a “hard look” at environmental consequences on animal population data in an EIS.<sup>87</sup> The public and decision-makers need to be properly in-

<sup>79</sup> See *id.* at 497–98 (stating an early-stage programmatic EIS must provide enough information to inform decision-makers, but noting analysis of environmental consequences can depend on the specific action in question). A site-specific EIS is a later-stage plan that focuses more on implementation of the proposed action than on planning and review. See *id.* at 497.

<sup>80</sup> 43 U.S.C. §§ 1344, 1337, 1340, 1351 (2012); see *Native Vill. of Point Hope*, 740 F.3d at 498 (noting the agency has flexibility in considering the level of analysis and that the court will defer to the agency about the appropriate stage for such analysis).

<sup>81</sup> *Native Vill. of Point Hope*, 740 F.3d at 496, 498.

<sup>82</sup> *Id.* at 496.

<sup>83</sup> *Id.*; Environmental Impact Statement, 40 C.F.R. § 1502.22(b) (2015).

<sup>84</sup> See *Native Vill. of Point Hope*, 740 F.3d at 494, 497–99 (noting failures in the EIS alleged by plaintiffs and finding for BOEM that information is not needed at this stage to inform decision-making).

<sup>85</sup> See *id.* (noting the agency has flexibility in considering the level of analysis and the court will defer to the agency judgment of the appropriate stage for such analysis).

<sup>86</sup> Compare *id.* at 498 (failing to strike down lease-sale EIS for incomplete animal population data), with *Alaska Wilderness League v. Kempthorne*, 548 F.3d 817, 825 (9th Cir. 2008) (striking down EIS with inadequate animal population data and noting NEPA requirements apply at every stage of an EIS), and *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (stating an EIS cannot rely on suspect animal population data).

<sup>87</sup> See *Alaska Wilderness League*, 548 F.3d at 825 (stating that the Minerals Management Service failed to take a “hard look” at whether Shell’s drilling program affected the Bowhead whale population); *Lands Council*, 395 F.3d at 1027 (holding that the Forest Service failed to take

formed of important environmental consequences of a proposed action as early as possible.<sup>88</sup> Contrary to holding in *Native Village of Point Hope*, where the Ninth Circuit allowed BOEM to skirt the statutory consideration of alternatives requirement, an agency should be required to include sufficient information in an EIS to signify that it can and has considered and distinguished the alternatives to a proposed federal action.<sup>89</sup> Thus, the Ninth Circuit should have required BOEM to include greater detail in its early-stage programmatic lease-sale EIS to inform its analysis.<sup>90</sup>

The divergent decisions in *Alaska Wilderness League* and *Native Village of Point Hope* are likely to be due to the Ninth Circuit having reached different conclusions regarding the importance of animal population for decision-makers.<sup>91</sup> In *Alaska Wilderness League*, the MMS filed an EIS to assess the environmental impacts of oil drilling on the Bowhead whale.<sup>92</sup> In that opinion, the Ninth Circuit determined that animal population data is vital for the decision-making process, which lies in stark contrast to the decision reached in *Native Village of Point Hope*.<sup>93</sup>

Information and effects of projects on animal populations are essential to a consideration of alternatives to such a project.<sup>94</sup> An uninformed analysis of alternatives with no discussion of environmental consequences renders an EIS inadequate.<sup>95</sup> In its EIS for Lease-Sale 193, BOEM chose not to provide information on animal data on the justification that it would obtain

---

“hard look” at the cumulative effects of the timber harvesting project on Westlope Cutthroat trout populations).

<sup>88</sup> See *Alaska Wilderness League*, 548 F.3d at 824 (observing that NEPA is meant to ensure decision-makers consider relevant information on environmental effects); *Lands Council*, 395 F.3d at 1027–28 (noting that the environmental effects of the proposed action give the public and decision-makers an opportunity to properly assess environmental consequences and make rational policy choices).

<sup>89</sup> Compare *Native Vill. of Point Hope*, 740 F.3d at 498 (holding endangered whale population data was not essential in an early-stage EIS), with *Lands Council*, 395 F.3d at 1027 (stating an EIS lacked information connecting environmental harms to alternatives that may protect a fish population).

<sup>90</sup> See *Native Vill. of Point Hope*, 740 F.3d at 498 (failing to strike down the lease-sale EIS for incomplete animal population data); *Alaska Wilderness League*, 548 F.3d at 325 (striking down an EIS with inadequate animal population data and noting NEPA requirements apply at every stage of an EIS).

<sup>91</sup> See *Native Vill. of Point Hope*, 740 F.3d at 498; *Alaska Wilderness League*, 548 F.3d at 325.

<sup>92</sup> *Alaska Wilderness League*, 548 F.3d at 817–18.

<sup>93</sup> See *Native Vill. of Point Hope*, 740 F.3d at 498; *Alaska Wilderness League*, 548 F.3d at 325.

<sup>94</sup> See *Lands Council*, 395 F.3d at 1027 (stating an EIS lacked information connecting environmental harms to alternatives and thus jeopardized a fish population).

<sup>95</sup> See *id.* (noting an EIS that ignores past environmental effects of projects to inform analysis of alternatives is inadequate).

and present the information at a later stage of the OCSLA process.<sup>96</sup> The Agency further stated that, if obtained, the information would have had no impact on its consideration of alternatives.<sup>97</sup> Although BOEM would have liked to have relied on past lower court decisions that allow for merely a reasonably complete analysis of animal population data to assess alternatives, a more faithful reading of NEPA, consistent with past rulings, requires a truly complete analysis of all available data to qualify as reasonably complete.<sup>98</sup> As such, because there was animal information available, BOEM's EIS should not have been considered reasonably complete.<sup>99</sup>

Further, the Ninth Circuit's decision in *Native Village of Point Hope* suggests that it is ok to ignore the goals of NEPA if the EIS in question is an early-stage "programmatic" plan.<sup>100</sup> In *Alaska Wilderness League*, the Ninth Circuit found that although there are substantial uncertainties at the lease-sale stage, agencies cannot "hide behind the cloak of [a] generalized multi-sale EIS" and that NEPA applies to all stages of OCSLA review.<sup>101</sup> Even BOEM acknowledged in its EIS that the effects of oil drilling and a large oil spill on the environment could be severe, highlighting the need for review at every stage.<sup>102</sup>

---

<sup>96</sup> See *Native Vill. of Point Hope*, 740 F.3d at 497 (stating that the agency would not inquire as to the availability of animal population data and effects of drilling at this stage).

<sup>97</sup> *Id.* at 496 (noting that the adverse effects of drilling on animal populations would be identical for any alternative).

<sup>98</sup> See 42 U.S.C. § 4331 (2012) (noting the purpose of NEPA is to balance human development with ecological considerations); *Native Vill. of Point Hope*, 740 F.3d at 498 (stating that the agency does not need to include information about effects on animal population in a lease-sale EIS); *Alaska Wilderness League*, 548 F.3d at 325 (striking down an EIS as incompatible with NEPA because of inadequate animal population information); *Lands Council*, 395 F.3d at 1027 (stating that animal populations should be taken into account when considering alternatives); *Theodore Roosevelt Conservation P'ship v. Salazar*, 605 F. Supp. 2d 263, 275 (D.D.C. 2009) (finding an EIS including animal population data must only be "reasonably complete" with the best available method at the time); Appellant's Opening Brief, *supra* note 19, at 20 (noting the failure of BOEM to include *available* comprehensive information assessing oil and gas development effects on animal population).

<sup>99</sup> See *Theodore Roosevelt Conservation*, 605 F.Supp 2d at 275; Appellant's Opening Brief, *supra* note 19, at 20.

<sup>100</sup> See 42 U.S.C. § 4331. Compare *Native Vill. of Point Hope*, 740 F.3d at 497 (noting an agency can postpone certain environmental analyses until a later stage EIS during a multi-stage process), with *Alaska Wilderness League*, 548 F.3d at 825 (stating an agency cannot ignore the requirements of NEPA because of a multi-stage process).

<sup>101</sup> *Alaska Wilderness League*, 548 F.3d at 825.

<sup>102</sup> See *Native Vill. of Point Hope*, 740 F.3d at 496–98 (stating the agency concluded that the effects of a large oil spill would be severe, but declining to require inclusion of missing environmental effects information in the EIS); *Alaska Wilderness League*, 548 F.3d at 825 (noting multi-stage nature of OCSLA should not allow agency to escape requirements of NEPA).

## CONCLUSION

The U.S. Court of Appeals for the Ninth Circuit's decision in *Native Village of Point Hope v. Jewell*, which allows agencies to selectively determine when they will consider important animal population data for a multi-stage EIS prepared pursuant to the Outer Continental Shelf Lands Act oil and gas development program, fails to uphold the spirit and purpose of the National Environmental Policy Act, or NEPA. NEPA imposes a duty on federal agencies to gather detailed information before acting in order to explore reasonable alternatives to proposed major federal action. In *Native Village of Point Hope*, the Bureau of Ocean Energy Management, or BOEM, failed to consider important information about the effects of oil and gas drilling in the Arctic Ocean on the Bowhead whale population, and thus averted its responsibility under NEPA. As such, the Ninth Circuit's deference to BOEM has allowed the development of the Arctic to continue in a way that threatens one of the last pristine environmental regions and the animal populations that call it home.