Nos. 14-459 and 14-504

In the Supreme Court of the United States

CENTURY EXPLORATION NEW ORLEANS, LLC,
PETITIONER

v.

UNITED STATES OF AMERICA

CHAMPION EXPLORATION, LLC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq*., as well as current and future regulations issued pursuant to OCSLA, are incorporated by reference into every federal offshore oil and gas lease. After the April 2010 Deepwater Horizon disaster, the Department of the Interior (Interior) made a number of regulatory changes and clarifications pursuant to its authority under OCSLA to improve the safety of offshore oil and gas operations and to protect the environment. The question presented is as follows:

Whether Interior breached petitioners' offshore oil and gas lease by requesting additional blowout and oil-spill information from offshore lessees pursuant to OCSLA regulations as part of the OCSLA-mandated Exploration Plan submitted by lessees for Interior's approval.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 745 F.3d 1168. The opinion of the Court of Federal Claims (Pet. App. 27a-104a) is reported at 110 Fed. Cl. 148.

[1] Unless otherwise noted, references to "Pet." and "Pet. App." are to the petition and appendix in No. 14-459.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2014. A petition for rehearing was denied on July 18, 2014 (Pet. App. 105a-106a). On October 3, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 30, 2014. The petition for a writ of certiorari in No. 14-459 was filed on October 17, 2014, and the petition in No. 14-504 was filed on October 30, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Century Exploration New Orleans, LLC (Century) and Champion Exploration, LLC (Champion) jointly leased the mineral rights to land on the Outer Continental Shelf from the government. Their lease stated that it was subject to all existing and future regulatory requirements under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, and "all other applicable statutes and regulations," see Pet. App. 115a. Petitioners argue that regulatory actions taken in the wake of the Deepwater Horizon oil spill in 2010 breached their lease because, in petitioners' view, the Department of the Interior (Interior) undertook those actions pursuant to the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, rather than under OCSLA.

1. OCSLA provides that the United States shall have jurisdiction and control over the submerged lands of the Outer Continental Shelf. 43 U.S.C. 1332(1). The statute seeks to ensure that a "vital national resource reserve held by the Federal Government for the public" will be "made available for expeditious and orderly development, subject to envi-

ronmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. 1332(3). To further that objective, Interior enters into mineral leases that allow private parties, such as oil companies, to explore the Outer Continental Shelf for oil and natural gas. See 43 U.S.C. 1333(a)(1), 1334. Such operations are to be "conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health." 43 U.S.C. 1332(6).

OCSLA directs Interior to regulate exploratory activities undertaken by private parties under their oil and gas leases, as well as the companies' ensuing development and production activities. 43 U.S.C. 1334. The statute provides that Interior "may at any time prescribe and amend such rules and regulations as [the Secretary] determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter." 43 U.S.C. 1334(a).

Exercising that authority, Interior has promulgated regulations and orders that govern a lessee's oil exploration, development, and production activities on the Outer Continental Shelf. See 30 C.F.R. Pt. 250

(2008); 30 C.F.R. Pt. 550.[2] Those regulations provide for the issuance of Notices to Lessees and Operators (NTLs) that "clarify, supplement, or provide more detail about certain requirements" of the OCSLA statute and regulations, and "outline what [lessees] must provide as required information in [their] various submissions" to Interior. 30 C.F.R. 250.103 (2008); see 70 Fed. Reg. 51,478 (Aug. 30, 2005) (explaining that Interior "issues NTLs to explain and clarify its regulations.")

2. Congress enacted the OPA in 1990 after the Exxon Valdez oil spill. OPA imposes strict liability on parties responsible for releasing oil into navigable waters, see 33 U.S.C. 2701-2713, and created the national Oil Spill Liability Trust Fund for oil spill clean-up. See 33 U.S.C. 2712. Companies leasing land on the Outer Continental Shelf must comply with both OCSLA and OPA, each of which contains measures concerning preparations for and responses to oil spills.

OCSLA and its implementing regulations require each lessee to submit an Exploration Plan before undertaking any exploratory drilling activities. See 43 U.S.C. 1340(c)(1) and (e)(2); 30 C.F.R. 250.201 (2008). Of particular relevance here, those OCSLA regulations provide that an Exploration Plan must include "[t]he calculated volume of [the lessee's] worst case discharge" and "[a] description of the worst case discharge scenario that

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[2] When petitioners acquired their lease, the pertinent OCSLA regulations were codified at 30 C.F.R. Part 250 (2008). Those regulations have since been recodified at Part 550 of the same title. See Pet. App. 32a n.6. Consistent with the citations used by the courts below, this brief cites the Part 250 regulations that were in effect when the lease was acquired.

could result from [the lessee's] proposed exploration activities." 30 C.F.R. 250.219(a)(2)(iv) and (v) (2008). Interior has defined the "worst case discharge scenario" as "'the daily rate of an uncontrolled flow of natural gas and oil from all producible reservoirs into the open well-bore' that would result from a blowout, such as the one that triggered the Deepwater Horizon disaster." Pet. App 12a-13a (quoting Bureau of Ocean Energy Mgmt., *Worst Case Discharge Determination*, http://www.boem.gov/Oil-and-Gas-Energy-Program/Resource-Evaluation/Worst-Case-Discharge/Index.aspx (last visited Dec. 30, 2014)). The OCSLA regulations require lessees to attest in connection with their Exploration Plan that they "have demonstrated or will demonstrate oil spill financial responsibility for facilities proposed in [their Exploration Plan]," and that they "have or will have the financial capability to drill a relief well and conduct other emergency well control operations." 30 C.F.R. 250.213(e)(2) and (3) (2008).

OPA requires Outer Continental Shelf lessees to obtain approval of an Oil Spill Response Plan (OSRP), which must include a worst case discharge scenario. The OCSLA regulations cross-reference the OPA regulation's general parameters for calculating worst case discharge volume. See 30 C.F.R. 250.219(a)(2)(iv) (2008) (citing 30 C.F.R. 254.26(a)).

3. Petitioners obtained an oil and gas lease from the government for a 5760-acre tract called Block 920, Ewing Bank (EW920), located on the Outer Continental Shelf in the Gulf of Mexico. Pet. App. 3a. The lease "became effective on August 1, 2008, and had an initial term running through July 31, 2016."[3] *Ibid.*

[3] In 2011, the lease term was extended through July 31, 2017, at petitioners' request. See Pet. App. 48a, 65a. Petitioners made an

Section 1 made the lease subject to all then-existing applicable statutes and regulations, and to future regulations issued pursuant to OCSLA. See *id.* at 115a.[4]

On April 20, 2010, an explosion and fire on the Deepwater Horizon oil rig killed 11 workers. The mechanism designed to stop the flow of oil in the event of a blowout failed to function, and crude oil continued to flow into the Gulf of Mexico for nearly 90 days after the explosion before the well was capped. See Pet. App. 4a-5a, 38a-39a.

On June 18, 2010, Interior issued Notice to Lessees No. 2010-N06 (NTL-06). See 14-504 Pet. App. 192-199. The agency subsequently published a "Frequently Asked Questions" (FAQ) document related to NTL-06. See *id.* at 200-210. Those materials were intended to provide clarifying guidance to lessees regarding the manner in which they should calculate worst case discharge volume for purposes of their OCSLA-

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initial payment of $23,236,314 to acquire the lease, and they subsequently made additional rental payments. See *id.* at 48a, 114a. Petitioners later relinquished their lease back to the United States.

[4] Section 1 of the lease provided:

> This lease is issued pursuant to the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462[,] 43 U.S.C. 1331 et seq., as amended (92 Stat. 629), (hereinafter called the "Act"). The lease is issued subject to the Act; all regulations issued pursuant to the Act and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf and the protection of correlative rights therein; and all other applicable statutes and regulations.

Pet. App. 115a.

mandated Exploration Plans. See Pet. App. 15a. In addition, on September 27, 2010, Interior sent Century an email in which the agency requested various revisions to Century's regional OSRP. *Id.* at 137a-139a. Century later made the requested changes, and Interior approved the revised OSRP in November 2012. See Pet. 11-12.

Two aspects of those documents are particularly relevant here. First, the FAQ document issued in conjunction with NTL-06 stated that, in calculating the daily volume of oil that could be expected to flow after an uncontrolled blowout, lessees "should assume that the wellbore is free of drillpipe, logging tools, or other similar equipment." 14-504 Pet. App. 207. Although the regulations that govern worst case discharge calculations do not specifically address this issue, some lessees had previously assumed "that certain equipment, such as drillpipe, logging tools, and drill bits were in the wellbore, thereby reducing total discharge volume, when they calculated worst case discharge volume." Pet. App. 17a. Second, the agency's email to Century stated that Century's regional OSRP should consider an uncontrolled blowout response time of 120 days rather than 30 days. *Id.* at 138a. Petitioners contend that the guidance provided in the FAQ document and email, taken together, made it infeasible for them to provide the attestations of financial capability related to oil spill preparedness that are required by OCSLA regulation to be included with an OCSLA-mandated Exploration Plan.

3. In January 2011, Century filed suit in the Court of Federal Claims (CFC), asserting a variety of theories in support of its contention that the government had breached its lease. As relevant here, Century

alleged that the government had breached the lease agreement by altering the manner in which worst case discharge volumes are calculated. Century further alleged that the guidance had effected a breach of contract because it violated the Administrative Procedure Act (APA), 5 U.S.C. 553, 706, and was therefore unauthorized. Champion adopted the allegations of Century's complaint. See Pet. App. 5a.

The CFC granted partial summary judgment to the government. Pet. App. 27a-104a. The court observed that Section 1 of petitioners' lease "allocates the risk of certain legal changes—future regulations issued pursuant to OCSLA—to [petitioners], and it allocates the risk of other legal changes—future statutes, amendments of existing statutes, and future regulations issued pursuant to statutes other than OCSLA—to the government." *Id.* at 58a. The court further explained, based on its analysis of pertinent lease provisions, that "the lease contemplated the government's issuance of NTLs, and requires [petitioners], as well as their operators, employees, and subcontractors, to meet the requirements of the 'most current' NTLs issued under OCSLA's implementing regulations." *Id.* at 68a.

Of particular relevance here, the CFC held that the agency's issuance of NTL-06 and the FAQ document did not breach the lease agreement. See Pet. App. 70a-78a. The court explained that, although "[t]he OSRP regulations do set forth a number of assumptions and factors to be considered in calculating the worst-case discharge volume, and those assumptions are incorporated into the regulations that govern [Exploration Plans]" under OCSLA, Interior's OCSLA regulations specifically provide that the agen-

cy may request additional information if the circumstances warrant it. *Id.* at 72a (citations omitted). For that reason, the court observed, "the information required for [Exploration Plans], including the required blowout scenario, is not a fixed or stagnant set of requirements, as [petitioners] suggest." *Ibid.* The court concluded that "the requirements imposed by both NTL-06 and the e-mail correspondence from the agency were well within the government's authority under the lease; the regulations in effect when the lease was executed; and the lease requirements that subjected operators to the most current NTLs issued pursuant to the implementing regulations." *Id.* at 73a. The CFC further held that, because it lacked jurisdiction to decide APA claims, it could not consider either (a) petitioners' contention "that NTL-06 is a substantive regulation that should have been issued in accordance with the requirements of notice-and-comment rulemaking," *id.* at 71a n.25, or (b) petitioners' challenges to the reasonableness or substantive validity of the contested regulatory actions, see *id.* at 78a-80a. The CFC also held, in the alternative, that the government would be shielded from liability by the sovereign acts doctrine even if it had breached the lease. See *id.* at 85a-102a.

4. The court of appeals affirmed. Pet. App. 1a-26a. The court explained (*id.* at 6a-7a) that, in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), this Court had interpreted a lease provision that was nearly identical to the one at issue here. The Court in *Mobil Oil* held that the leases were subject to all statutes and regulations in existence as of the leases' effective date, and were also subject to OCSLA regulations issued after that date.

Id. at 615. The Court further explained, however, that the leases were not subject to statutes enacted, or regulations promulgated under statutes other than OCSLA, after the leases' effective date. See *id.* at 616. Accordingly, the Court held that Interior had breached the leases when it imposed new requirements pursuant to a statute (the Outer Banks Protection Act (OBPA), 33 U.S.C. 2753) that was enacted after the leases took effect. See 530 U.S. at 615-620.

In the present case, petitioners contended that a similar breach had occurred, on the theory that Interior had imposed new worst case discharge requirements pursuant to OPA rather than OCSLA. See Pet. App. 15a. Petitioners argued that NTL-06 and the related guidance "are equivalent to new regulations within the meaning of the lease provisions." *Ibid.* The court of appeals rejected those contentions, stating that "[e]ven assuming the [documents] are new regulations, * * * they were issued pursuant to OCSLA, and thus do not breach the lease." *Ibid.*; see *id.* at 18a-23a. The court explained that "OCSLA authorized the government to adopt regulations concerning blowout protection and worst case discharge scenarios; the government did not need to act under the authority granted by OPA." *Id.* at 19a.

The court of appeals recognized that "the mere existence of government authority to act under OCSLA does not immunize the government from liability for regulatory changes. To avoid liability for changes, the government must also have acted *pursuant* to OCSLA authority." Pet. App. 20a. Thus, in *Mobil Oil,* it was not sufficient that OCSLA might have authorized the regulatory actions at issue, because the government had cited the OBPA rather than OCSLA as the au-

thority for its measures. See *id.* at 21a ("In reaching this conclusion, the Supreme Court emphasized the government's *chosen source of authority:* the government cited the [OBPA], not OCSLA regulations.") (citing *Mobil Oil*, 530 U.S. at 617-618).

The court of appeals concluded that the regulatory actions at issue here, by contrast, were undertaken pursuant to OCSLA. The court observed that "NTL-06 itself identified OCSLA regulation § 250.103 as its source of authority," and "only referenced and discussed OCSLA regulations and requirements." Pet. App. 22a. "As NTL-06 explains, OCSLA regulations § 250.219 and § 250.250 required 'all [OCSLA exploration] plans' to be 'accompanied by information regarding oil spills, including calculations of [the lessee's] worst case discharge scenario.'" *Ibid.* The court of appeals concluded that "NTL-06 simply augmented the factors lessees must consider when calculating their worst case discharge scenario for *OCSLA purposes*." *Ibid.*

The court of appeals further explained that "there has been no showing or even suggestion that the NTL-06 changes applied outside the OCSLA context." Pet. App. 23a. The court observed that "NTL-06 did not change the text of the relevant OPA regulation, § 254.47, and nothing suggests that NTL-06 altered any part of the OPA regulation." *Ibid.* Rather, "NTL-06 merely changed the way an OCSLA regulation incorporates an OPA calculation." *Ibid.* The court of appeals also affirmed the CFC's holding that it lacked jurisdiction to consider petitioners' APA challenges to the validity of NTL-06 and the related guidance. *Id.* at 25a-26a. Because the court concluded that no breach had occurred, it did not review the

CFC's analysis of the sovereign acts doctrine. *Id.* at 26a.

The court of appeals subsequently denied a petition for en banc review without recorded dissent. Pet. App. 105a-106a.

ARGUMENT

Petitioners contend that two documents issued by Interior (the FAQ document issued in conjunction with NTL-06, and an email sent to Century) breached petitioners' lease agreement by altering the manner in which worst case discharge calculations are to be performed. Invoking this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States,* 530 U.S. 604 (2000), they argue (Pet. 23-26) that Interior's authority under OCSLA is irrelevant because the agency's actions were in fact undertaken pursuant to OPA. Petitioners further contend (Pet. 26-30) that issuance of those documents breached the lease because neither document was a published regulation.

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. In issuing the two challenged documents, Interior implemented regulatory requirements that existed at the time petitioners' lease became effective. To the extent petitioners contend that the agency actions are invalid, either because they were undertaken without notice-and-comment rulemaking or because they are substantively unreasonable, the courts below correctly held that such challenges must be brought in district court under the APA. In any event, the courts below correctly articulated the applicable legal framework, under which petitioners' lease was subject both to

existing statutes and regulations, and to any new regulations promulgated under OCSLA. Petitioners' fact-bound challenges to the lower courts' application of that framework lack merit and do not warrant this Court's review.

1. Petitioners contend (Pet. 17-22) that the court of appeals failed to follow this Court's decision in *Mobil Oil*, *supra*, which involved a lease provision substantially identical to the provision at issue here. The Federal Circuit addressed the application of *Mobil Oil* at length (see Pet. App. 6a-7a, 20a-21a), and the court of appeals' analysis is fully consistent with that decision.

a. The Court in *Mobil Oil* recognized that the lease provision in that case (like Section 1 of petitioners' lease, see Pet. App. 115a) made the leases subject to all statutes and regulations in existence as of the leases' effective date. See 530 U.S. at 615. The provision likewise made the leases subject to OCSLA regulations issued after the leases' effective date. *Ibid.* In *Mobil Oil*, however, the agency imposed new requirements on lessees pursuant to the OBPA, which had been enacted after the relevant lease took effect. *Id.* at 620.

The government contended in *Mobil Oil* that no breach had occurred because Interior could legitimately have taken the challenged action (a delay in the agency's evaluation of an Exploration Plan submitted by the lessee) under OCSLA. See 530 U.S. at 617. The Court rejected that argument, emphasizing that Interior had explicitly based its decision on the OBPA. *Id.* at 617-618. The Court concluded on that basis that the "OBPA in effect created a *new* requirement," and that "any such new requirement would not

be incorporated into the contracts" because it was premised on a statute that did not exist when the leases took effect. *Id.* at 618.

b. The courts below correctly held that Interior, in issuing NTL-06 and the attendant FAQ document, had acted pursuant to the authority created by OCSLA. OCSLA regulations required that lessees submit a blowout scenario and a worst case discharge figure, including underlying assumptions and calculations, as part of their Exploration Plans. Pet. App. 71a. OCSLA regulations also permitted the government to request additional information or to limit the information to be submitted with an Exploration Plan. *Id.* at 72a; 30 C.F.R. 250.201(b) and (c), 250.186(a) (2008). Thus, as the CFC recognized, "the information required for [Exploration Plans], including the required blowout scenario, is not a fixed or stagnant set of requirements, as [petitioners] suggest." Pet. App. 72a.

NTL-06 rescinded a portion of a previous NTL that had limited the blowout and worst case discharge information that lessees were required to submit with an Exploration Plan pursuant to OCSLA regulations. Pet. App. 43a-45a; see 14-504 Pet. App. 192-199. NTL-06 and the accompanying FAQ document also provided guidance as to those information requirements. *Ibid.*; see *id.* at 200-210. In identifying the sources of the agency's authority to act, NTL-06 cited 12 separate existing regulatory provisions, all of which were promulgated pursuant to OCSLA. See *id.* at 197-198. The court of appeals concluded that "NTL-06 simply augmented the factors lessees must consider when calculating their worst case discharge scenario for *OCSLA purposes*." Pet. App. 22a. Interior's issu-

ance of NTL-06 and the attendant FAQ document was thus quite different from the regulatory action involved in *Mobil Oil*, in which this Court "emphasized the government's *chosen source of authority:* the government cited the [OBPA], not OCSLA regulations." *Id.* at 21a.

In this Court, petitioners' specific grievance is not with any language contained in NTL-06 itself, but with Interior's statement in the accompanying FAQ document that, in calculating worst case discharge volumes for purposes of their OCSLA Exploration Plans, lessees "should assume that the wellbore is free of drillpipe, logging tools, or other similar equipment." Pet. App. 136a. In the past, lessees had "counted the fact that certain equipment * * * [was] in the wellbore, thereby reducing total discharge volume, when they calculated worst case discharge volume." *Id.* at 17a. But while Interior had sometimes approved Exploration Plans that reflected this assumption, nothing in the regulations promulgated under OCSLA or OPA, or in any official guidance regarding those regulations, specifically addressed the question. In stating that lessees henceforth should assume an unobstructed wellbore when performing "worst case" calculations, Interior therefore was clarifying the proper application of existing regulations rather than altering or deviating from the regulatory framework that had existed when petitioners' lease took effect.

"NTL-06 itself identified OCSLA regulation § 250.103 as its source of authority," and "only referenced and discussed OCSLA regulations and requirements." Pet. App. 22a. NTL-06 also explained that "OCSLA regulations § 250.219 and § 250.250 required 'all [OCSLA exploration] plans' to be 'accompanied by

information regarding oil spills, including calculations of [the lessee's] worst case discharge scenario.'" *Ibid.* And while the attendant FAQ document disapproved a worst case calculation methodology that some lessees had employed in the past, the methodology that the agency endorsed going forward was fully consistent with the pre-existing statutory and regulatory framework, to which petitioners' lease was expressly made subject. See *id.* at 115a.

c. Interior likewise did not breach petitioners' lease when it sent Century an email (see Pet. App. 137a-139a) that directed the company to make various revisions to its OSRP. That email stated, *inter alia*, that in analyzing the company's ability to respond to a prolonged worst case discharge, Century should "[i]ncrease the length of time [of] the uncontrolled blowout response from 30 days to 120 days." *Id.* at 138a. OPA regulations that existed when petitioners' lease took effect provide that Interior may require revisions to an existing OSRP "if significant inadequacies are indicated by * * * '[i]nformation obtained during drills or actual spill responses * * * [or] [o]ther relevant information.'" 30 C.F.R. 254.30(e)(2) and (3).

Based on information the agency had obtained from the Deepwater Horizon disaster, Interior reasonably concluded that additional information was necessary to support its review of Century's OSRP, particularly with respect to Century's capacity for prolonged response to a substantial uncontrolled discharge. The email cited 30 C.F.R. 254.30(d) and (e) as the agency's source of authority for requiring the various changes to Century's OSRP. See Pet. App. 137a. Thus, while petitioners are correct that the email relied on an

OPA (rather than an OCSLA) regulation, the agency did not purport to add or amend any OPA rule, but rather invoked a regulation that had been in force when petitioners' lease took effect.

As petitioners emphasize (*e.g.*, Pet. 8, 29), a different OPA regulation required that every OSRP must contain a "worst case discharge scenario" appendix "show[ing] how you will cope with the initial spill volume upon arrival at the scene and then support operations for a blowout lasting 30 days." 30 C.F.R. 254.26(d)(1). That baseline requirement, however, did not preclude Interior from insisting, based on information obtained from the Deepwater Horizon disaster, that Century revise its OSRP to consider a longer time frame. The point of the residual authority conferred by 30 C.F.R. 254.30(e) is to ensure that OSRPs reflect the latest and most complete relevant information, even when a particular OSRP complies with the specific requirements set forth in other regulatory provisions.

2. Century identifies as the court of appeals' "most basic" error the court's purported failure to recognize that its lease refers to "regulations issued pursuant to [OCSLA] in the future," whereas the guidance at issue in this case did not constitute a regulation. Pet. 26. In a related vein, Century argues (Pet. 31-33) that the decision below will have the practical effect of giving the government unfettered power to alter the terms of OCSLA leases so long as the government invokes OCSLA as the source of its authority. Those arguments reflect a misunderstanding of the decision below.

In the court of appeals, petitioners did not meaningfully assert, as a distinct objection to Interior's

conduct in this case, that the agency had issued informal guidance rather than promulgating a published regulation. As evidence that the argument was preserved below, Century quotes a single sentence from the Conclusion section of its Federal Circuit reply brief. See Pet. 26-27 (quoting Century C.A. Reply Br. 30). On the same page of that reply brief, however, Century asserted that "[t]he Government has issued its substantive changes by NTL, and by the way in which they are administered by [Interior], these changes have the intent and effect of new regulation." Century C.A. Reply Br. 30. The court of appeals understood petitioners' argument to be "that the NTLs in this case are equivalent to new regulations within the meaning of the lease provisions." Pet. App. 15a. The court concluded that, "[e]ven assuming the NTLs are new regulations, * * * they were issued pursuant to OCSLA, and thus do not breach the lease." *Ibid.*

In any event, petitioners' lease was expressly subject not only to OCSLA and regulations promulgated thereunder, but to "all other applicable statutes and regulations" that were in force on the lease's effective date. Pet. App. 115a. Thus, quite apart from Interior's authority to issue new OCSLA regulations that would govern the operation of the lease, petitioners' rights under the lease were subject to an array of existing laws. And, as the CFC explained, "the lease contemplated the government's issuance of NTLs, and requires [petitioners], as well as their operators, employees, and subcontractors, to meet the requirements of the 'most current' NTLs issued under OCSLA's implementing regulations." *Id.* at 68a.

Petitioners thus had ample notice that their rights under the lease would be subject not only to new OCSLA regulations, but also to informal agency guidance that clarified the proper application of pre-existing laws. Nothing in the lease suggests that Interior was required to conduct notice-and-comment rulemaking before issuing such guidance. Petitioners contend that, under the decision below, lessees in their position will have no remedy even if Interior issues informal guidance that is inconsistent with applicable statutes or regulations. See, *e.g.*, Pet. 32 (stating that the court of appeals' decision "creates a situation where the government can change the rules whenever it wishes"). The courts below did not hold, however, that lessees in petitioners' position are without recourse if Interior issues informal guidance that is contrary to law. Rather, those courts simply recognized that lessees alleging such illegality must file suit in the district court under the APA, rather than incorporating their challenges to the validity of agency action into a breach-of-contract suit in the CFC. See Pet. App. 25a-26a, 55a, 71a n.25, 78a-80a.

Petitioners do not challenge that holding directly, and the lower courts' recognition of alternative remedies substantially undermines petitioners' assessment of this case's practical significance. To the extent petitioners contend that NTL-06, the related FAQ document, and/or the agency email created new, substantive regulatory requirements without proper procedural safeguards, Pet. 30-33, their proper course of action is to bring a proceeding in district court under the APA. To date, none of the owners of the more than 6000 offshore leases subject to the Interior guidance at issue, including petitioners, has done so.

3. Petitioners contend (Pet. 30; 14-504 Pet. 14) that the ruling below is inconsistent with decisions of other courts of appeals concerning the limits on agency use of informal guidance. The decisions on which petitioners rely, however, involved traditional judicial review of agency action in suits brought either in district court or under special review provisions authorizing direct review in the courts of appeals. As noted above, the Federal Circuit did not question the general principle that informal agency guidance must be consistent with published regulations; it simply held that the CFC lacked jurisdiction to consider APA challenges of this kind in petitioners' breach-of-contract suit. Petitioners cite no decision of any other circuit that is inconsistent with that holding, which was based on an established line of precedent from the Federal Circuit and the CFC.

4. Century asserts that "[t]his case presents a particularly favorable vehicle for addressing these recurring issues of national importance and for providing guidance to lower courts regarding *Mobil Oil*." Pet. 36. Both of the courts below, however, correctly articulated the governing legal framework. Consistent with *Mobil Oil*, the court of appeals recognized that petitioners' lease is subject to new regulations only when those regulations are issued pursuant to OCSLA. See Pet. App. 18a-19a, 20a-21a. The CFC likewise explained that Section 1 of petitioners' lease "allocates the risk of certain legal changes—future regulations issued pursuant to OCSLA—to [petitioners], and it allocates the risk of other legal changes—future statutes, amendments of existing statutes, and future regulations issued pursuant to statutes other than OCSLA—to the government." *Id.* at 58a.

At bottom, petitioners' argument is simply that the courts below misapplied established principles to the circumstances of a particular case. Petitioners' challenge is especially idiosyncratic because it rests substantially on the fact that some of Interior's OCSLA regulations cross-reference OPA regulations. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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