UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS et al.,

Plaintiffs,

v.

DEBRA HAALAND in her official capacity as Secretary of the Interior, et al.,

Federal Defendants,

and

AMERICAN PETROLEUM INSTITUTE, STATE OF WYOMING, NAH UTAH LLC, and ANSCHUTZ EXPLORATION CORPORATION,

Defendant-Intervenors.

Case No. 1:21-cv-00175-RC
The Honorable Rudolph Contreras

FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR AND MEMORANDUM IN SUPPORT

MOTION

The United States Bureau of Land Management ("BLM"), an agency of the United States Department of the Interior ("Interior"), and the federal officials named herein as defendants (collectively, "Federal Defendants"), hereby move the Court for a voluntary remand without vacatur of the environmental assessments ("EAs"), Findings of No Significant Impact ("FONSIs"), and determinations of National Environmental Policy Act ("NEPA") adequacy (Determinations of NEPA Adequacy) ("DNAs") for the twenty-eight oil and gas leasing decisions challenged in this case, so that Interior may conduct further NEPA analysis.

In two prior cases, the Court granted similar motions for remand following its decision in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). *See* Ex. A, Order Granting Fed. Defs.' Mot. for Voluntary Remand Without Vacatur, *WildEarth Guardians v. Haaland*, Case No. 20-cv-56, ECF No. 46 (Oct. 23, 2020); Ex. B, Mem. Op. Denying Pls.' Mot. to Am. J, *WildEarth Guardians v. Haaland*, Case No. 16-cv-1724, ECF No. 121 (July 19, 2019). In each prior motion, only Plaintiffs opposed the remand request and only insofar as the remand lacked conditions such as vacatur or commitments to postpone drilling approvals.

Since the Court's subsequent decision in *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237 (D.D.C. 2020), Federal Defendants have determined that a remand in this case is appropriate, as NEPA analysis for all of the challenged decisions was prepared before the Court's *Bernhardt* decision. Undersigned counsel has conferred via email with counsel for the other parties and advises (1) Intervenor-Defendants American Petroleum Institute, State of Wyoming, and Anschutz Exploration Corporation will oppose this motion, (2) Intervenor-Defendant NAH Utah LLC may oppose the motion, and (3) Plaintiffs will need to the review the motion before taking a position.

MEMORANDUM

1. Background

This case involves a challenge to twenty-eight lease sales under the Mineral Leasing Act of 1920, which collectively authorized the sale of oil and gas leases on 1,153 parcels of public land in the states of Colorado, Utah, Wyoming and New Mexico. Am. Compl. ¶¶ 1, 6, ECF No. 13. Those sales occurred between December 2016 and December 2020. *Id.* ¶ 1. Nine of the challenged sales occurred before this Court's *Zinke* decision, which was issued in March 2019. *See id.* tbl. A. And all but one of the challenged lease sales occurred before this Court's *Bernhardt* decision issued in November 2020. *See id.* While the last lease sale occurred one month after *Bernhardt* issued, substantial NEPA work for that sale was done before that decision issued.[1] Earlier this year, Plaintiffs brought this action alleging that the challenged decisions violated NEPA, based primarily on the Court's *Zinke* and *Bernhardt* decisions in Case No. 16-cv-1724. *See* Am. Compl. ¶¶ 9, 11, 12, 14, 106–07, 117–18, 143.

In *Zinke*, the Court concluded that the NEPA analyses for the challenged Wyoming lease sales were insufficient because they did not (1) quantify and forecast direct, drilling-related emissions of greenhouse gases ("GHGs"); (2) adequately consider the indirect GHG emissions from downstream use of oil and gas; and (3) compare those GHG emissions to regional and national GHG emissions forecasts. *Zinke*, 368 F. Supp. 3d at 83. The Court remanded the EAs and FONSIs and directed that BLM supplement those documents to address the noted deficiencies in the environmental analyses. *Id*. at 84. The Court did not vacate the decisions, nor did it vacate the associated leases, but it enjoined BLM from approving applications for permits

[1] The draft Environmental Assessments were prepared on August 14, 2020, three months before this Court's *Bernhardt* decision issued. *See* Ex. C, BLM National NEPA Register, *available at* https://eplanning.blm.gov/eplanning-ui/project/2000012/570.

to drill ("APDs") for those leases until the agency supplemented the EAs and FONSIs. *Id*. at 85.

In Case No. 16-cv-1724, Federal Defendants then moved for a voluntary remand without vacatur of the NEPA documents for the Utah and Colorado lease sales in Case No. 16-cv-1724. The Court granted that motion, remanding the NEPA documentation for the Utah and Colorado leasing decisions. Ex. B, at 5–6. In granting that motion, the Court rejected Plaintiffs' argument that remand should be conditioned on an injunction preventing BLM from approving APDs. *See id.* In Case No. 20-cv-56, the Court also remanded twenty-four challenged leasing decisions without vacatur or an APD injunction based on the intervening *Zinke* decision. Ex. A.

On November 13, 2020, the Court issued its *Bernhardt* decision rejecting supplemental NEPA analysis that BLM had prepared following the Court's *Zinke* decision. The Court concluded that BLM's supplemental NEPA analysis (1) failed to adequately analyze GHG emissions from other lease sales in the region and the country, *id.* at 247–51; (2) failed to take a hard look at GHG emissions by considering only yearly rather than total emissions, *id.* at 251–53; (3) used inconsistent per-acre GHG rates, *id.* at 253–54; and (4) insufficiently considered carbon budgeting, *id.* at 254–56. Again, the Court did not vacate the leasing decisions, but it enjoined BLM from approving APDs for those leases until the agency substantiated its supplemental NEPA analysis on remand. *Id.* at 259. The Court further "urge[d] BLM to conduct a robust [remand] analysis, using conservative estimates based on the best data, analyzed in an unrushed fashion, so that the analysis can effectively serve as a model for the other leases." *Id.* at 259 n.16.

Since the Court's *Bernhardt* decision, Interior has reassessed the adequacy of the NEPA analyses supporting the leasing decisions challenged in this case. Based on that assessment, BLM now concludes that voluntary remand for further analysis under NEPA is appropriate. For

the reasons set out herein, Federal Defendants ask that the EAs, FONSIs, and DNAs for the challenged leasing decisions be remanded without vacatur to the agency for further NEPA analysis.

2. Discussion

Courts "commonly grant motions to remand an administrative record to allow an agency to consider new evidence that became available after the agency's original decision." *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (citing *Ethyl Corp. v. Browner*, 989 F.2d 522, 523–24 & n.3 (D.C. Cir. 1993)). This approach serves dual purposes: permitting agencies to exercise their "inherent power to reconsider their own decisions," *id.* (quoting *Prieto v. United States*, 655 F.Supp. 1187, 1191 (D.D.C.1987)); and conserving judicial resources by "allow[ing] agencies to cure their own mistakes," *id.* (quoting *Ethyl*, 989 F.2d at 524). Because remands further these purposes, even without a confession of error, courts in this Circuit "generally grant an agency's motion to remand so long as 'the agency intends to take further action with respect to the original agency decision on review.'" *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *Limnia, Inc. v. Department of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017)).

Remand is especially "appropriate if the agency's motion is made in response to 'intervening events outside of the agency's control, for example, a new legal decision or the passage of new legislation.'" *Id.* at 436 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)). Such remands "comport[] with the general principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review." *Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 899 F.2d 1244, 1249–50 (D.C. Cir. 1990). Thus, "where an intervening event may affect the validity of the agency action at issue, a remand is generally required." *Sierra Club*, 560 F. Supp. 2d at 23 ("noting that it can be 'an

abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action'" (quoting *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004))).

In the instant case, Federal Defendants have determined that a remand is appropriate so they may further analyze the impacts of the challenged leasing decisions. This determination is informed by the Court's recent *Bernhardt* and *Zinke* decisions, *viz*., the "intervening event[s]" that draw[] into question "the validity of [BLM's] actions." *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). In the *Bernhardt* and *Zinke* rulings, the Court found that BLM failed to take a sufficiently hard look at the GHG emissions-related climate change impacts of oil and gas leasing, based on the supplemental NEPA analyses supporting the leasing decisions. *Bernhardt*, 502 F. Supp. 3d at 259; *Zinke*, 368 F. Supp. 3d at 83. The analyses supporting the challenged leasing decisions are similar in some respects to those that the Court considered in *Bernhardt* and *Zinke*. Remand to allow the agency to address these matters would serve the public interest because an agency's "reconsideration of the potential environmental impacts of a project furthers the purpose of NEPA." *Pellissippi Parkway*, 375 F.3d at 418.

Further, remand without vacatur is appropriate because there is "at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 97 (additional citations omitted), *subsequent determination by* 280 F. Supp. 3d 187 (D.D.C. 2017). As the Court recognized in *Bernhardt*, "nothing suggests that the agency would not be able to substantiate its prior conclusions." 502 F. Supp. 3d at 259. Because Plaintiffs "challenge only one aspect of [many] lease sales that otherwise complied with NEPA," *Zinke*, 368 F. Supp. 3d at 84, the "probability

that [BLM] will be able to justify retaining [its prior leasing decisions] is sufficiently high that vacatur . . . is not appropriate." *Id.* (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (additional citations omitted)). The same consideration should govern here.

The Court should not vacate the lease sales for two additional reasons. *First*, the Court lacks authority to "order vacatur . . . without an independent determination that [the challenged leasing decisions were] not in accordance with the law." *Carpenters Indus.*, 734 F. Supp. 2d at 135. Thus, the Court should "preserve scarce judicial resources by allowing agencies 'to cure their own mistakes,'" *id.* at 132, rather than undertake an evaluation on the merits of decisions that the agency wishes to revisit. *Second*, BLM recognizes that, under *Zinke* and *Bernhardt*, it must adequately assess potential effects of GHG emissions before making further decisions concerning these leases. Should BLM make decisions that Plaintiffs or Intervenors consider unlawful, those parties may challenge those decisions and, if appropriate, may seek to block their implementation by pursuing injunctive relief. But there is presently no need for the Court to vacate the challenged decisions without the customary showing that Plaintiffs are entitled to such relief. *See* Ex. B, at 5–6 (declining to enjoin approval of APDs on remand because "Plaintiffs have not filed a motion for preliminary injunction . . . and articulated why 'irreparable injury is likely in the absence of an injunction'" (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008))).

For all these reasons, the Court should exercise its inherent authority to manage its docket and its equitable power to grant remand, without any determination on the merits as to the challenged leasing decisions. This will avoid judicial resolution of issues that may well be resolved upon remand and further study.

Respectfully submitted this 30th day of July, 2021.

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