IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS; and PHYSICIANS FOR SOCIAL RESPONSIBILITY, Plaintiffs, v. DAVID BERNHARDT; WILLIAM PERRY PENDLEY; and U.S. BUREAU OF LAND MANAGEMENT, Defendants, WESTERN ENERGY ALLIANCE; PETROLEUM ASSOCIATION OF WYOMING; AMERICAN PETROLEUM INSTITUTE; STATE OF WYOMING; and STATE OF UTAH, Intervenor-Defendants.	No. 1:16-cv-01724-RC

REPLY MEMORANDUM OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Paul G. Afonso
Ben Norris
AMERICAN PETROLEUM INSTITUTE
1220 L St., N.W.
Washington, D.C. 20005
Phone: (202) 682-8000
Fax: (202) 682-8033
norrisb@api.org

Steven J. Rosenbaum
Bradley K. Ervin
COVINGTON & BURLING, LLP
One CityCenter
850 Tenth St., N.W.
Washington, D.C. 20001
Phone: (202) 662-6000
Fax: (202) 662-6291
srosenbaum@cov.com

Counsel for Intervenor-Defendant American Petroleum Institute

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INTRODUCTION

Plaintiffs' challenge to the Federal Defendants' Supplemental Environmental Assessment ("SEA") rests, at bottom, on their view that the Bureau of Land Management ("BLM") "has an important role to play in transitioning America's energy system away from fossil fuels." Pls.' Reply (Dkt. No. 157) at 1. No law imposes such an obligation on BLM. The National Environmental Policy Act ("NEPA"), upon which Plaintiffs' claims are founded, does not mandate substantive results or "compel agencies to elevate environmental concerns over other appropriate considerations." *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1251 (10th Cir. 2019) (quotation omitted). *See also, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."); *id*. at 350–51 ("[I]t would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived" from the proposed project "justified the issuance of a . . . permit, notwithstanding the loss of . . . even 100 percent of the mule deer herd.").

By contrast, through the Mineral Leasing Act, Congress directed that the Nation's oil and gas deposits "shall" be made available for private development, 30 U.S.C. § 181; *see also id*. § 352, through lease sales "for each State where eligible lands are available at least quarterly," *id*. § 226(b)(1)(A). Likewise, the Federal Land Policy and Management Act identifies "mineral exploration and production" among the "principal or major uses" of public land. *See* 43 U.S.C. § 1702(1). In short, Plaintiffs' lawsuit rests on a policy disagreement with Congress about the use of public lands because Plaintiffs, unlike Congress, wish to preclude all oil and gas leasing and development on those lands.

The American Petroleum Institute ("API") and its members are committed to delivering solutions that reduce the risks of climate change while meeting society's growing energy needs. Switching to natural gas from higher carbon intensity sources has been the principal contributor to the United States having reduced carbon emissions more than any other nation since 2000,[1] accounting for 61% of the 27% decrease in CO_2 emissions from electric power generation, and contributing to the 10% decrease in net greenhouse gas ("GHG") emissions, from 2005 to 2018.[2] *See also* Wyo Ph-2 0000065 (explaining "global GHG emissions could be reduced by increased production of natural gas"); Wyo Ph-2 0000051 (explaining that 1990 to 2017 "decrease in CO2 emissions from fossil fuel combustion was a result of multiple factors, including a continued shift from coal to natural gas" (quoting U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017*)).

But NEPA is not a climate change statute. That BLM's decision to conduct the challenged lease sales does not square with Plaintiffs' policy preference is not a violation of BLM's purely procedural obligations to consider potential environmental impacts under NEPA.

Focused on policy over the law or the record of Federal Defendants' review of the future GHG emissions that may potentially arise from the challenged lease sales, Plaintiffs fall well short of their heavy burden of demonstrating on the merits that Federal Defendants' SEA and

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[1] *See*, *e.g.*, International Energy Agency, *Global CO2 Emissions in 2019* (Feb. 11, 2020), https://www.iea.org/articles/global-co2-emissions-in-2019 (last visited May 22, 2020); U.S. Energy Information Administration ("EIA"), *U.S. Energy-Related Carbon Dioxide Emissions, 2018*, at 9, 12, 18–19 (Nov. 2019), https://www.eia.gov/environment/emissions/carbon/pdf/2018_co2analysis.pdf (last visited May 22, 2020).

[2] EIA, *U.S. Energy-Related Carbon Dioxide Emissions, 2018*, at 12; U.S. Environmental Protection Agency ("EPA"), *Data Highlights: Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2018*, at 1, https://www.epa.gov/sites/production/files/2020-04/documents/us-ghg-inventory-1990-2018-data-highlights.pdf (last visited May 22, 2020).

resulting decision to affirm the prior leasing decisions were arbitrary or capricious. *See City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002) ("The party challenging an agency's action as arbitrary and capricious bears the burden of proof." (quotation and alteration omitted)). Nor do Plaintiffs justify the extraordinary relief they seek. *See Winter v. Natural Res. Defense Council, Inc*., 555 U.S. 7, 22 (2008); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).[3]

ARGUMENT

I. BLM PROPERLY CONSIDERED THE CHALLENGED LEASE SALES' GHG EMISSIONS.

This Court remanded the Federal Defendants' original decisions to conduct the challenged Wyoming lease sales to consider discrete issues of GHG emission quantification to remedy narrow violations of NEPA. *E.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84 (D.D.C. 2019) (*WildEarth*) (noting that "Plaintiffs challenge only one aspect of nine lease sales that otherwise complied with NEPA"); API Summ. J. Mem. (Dkt. No. 152), at 5–7 (describing, *inter alia*, Plaintiffs' NEPA challenges accepted and rejected by the Court). Notably, the Court made clear—and, indeed, it was a ground for the Court's ruling—that the record already contained information that the Federal Defendants could use to quantify direct GHG emissions from development operations on the challenged leases and further consider indirect GHG emissions from downstream combustion of any oil and gas eventually produced from the challenged leases. *See, e.g.*, *WildEarth*, 368 F. Supp. 3d at 68 (noting record is "replete with information on oil and gas development and GHG emissions" as well as "studies quantifying and

[3] API further incorporates by reference the arguments in reply made by Federal Defendants, and Intervenor-Defendants Western Energy Alliance, State of Wyoming, and State of Utah.

categorizing GHG emissions more generally"). The Court then left BLM to choose among the "multiple methods" available to quantify GHG emissions. *Id*. at 69.

Relying on its considerable discretion to develop a reasonable methodology and make predictive judgments in its areas of expertise—for example, the extent and nature of oil and gas development operations, production, and emissions—BLM complied with the Court's directives. *See, e.g.*, *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) ("particularly deferential review" applies where an agency decision involves "predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable" (quotation omitted)); *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012) ("The mere fact that [the plaintiff] disagrees with the methodology" used by the agency "does not constitute a NEPA violation."). Far from "a paperwork exercise," Pls.' Reply at 1, BLM used conservative assumptions to develop a detailed methodology to quantify GHG emissions from oil and gas development operations and downstream combustion, and placed those calculations in the context of wider state, regional, and national GHG emissions. *See* API Mem. at 8–17 (summarizing the SEA's analysis).

As API's opening brief demonstrated, BLM's analysis and resulting renewed leasing decision thus fully complied with NEPA, and Plaintiffs' arguments to the contrary mischaracterize governing law and the record in pursuit of Plaintiffs' policy goals. *See id*. at 17–31. Plaintiffs' reply simply restates the arguments from their opening brief. Those arguments fare no better upon repetition. As before, Plaintiffs' disagreement with, and flyspecking of, BLM's chosen methodology do not amount to a NEPA violation. *See, e.g.*, *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) ("It is well settled that the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor.").

A. BLM Properly Considered GHG Emissions From Development Operations On The Proposed Wyoming Leases, And The Downstream Combustion Of Produced Oil And Gas.

As in their opening brief, Plaintiffs contend that BLM's methodology for quantifying GHG emissions violates NEPA because it calculates (1) only annual GHG emissions from future potential oil and gas development operations, and (2) anticipated per-acre GHG emission rates based upon all lands open to oil and gas leasing in each BLM field office. *See* Pls.' Reply at 2–10. Neither challenge carries Plaintiffs' burden to demonstrate that BLM's methodology and decision were arbitrary or capricious. *See* API Mem. at 22–27. Rather, the record makes clear that both of Plaintiffs' arguments amount to little more than complaints "that BLM did not analyze certain issues in the manner or level of detail plaintiffs would have preferred." *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 31 (D.D.C. 2014). "Unfortunately for plaintiffs, the applicable standard of review neither contemplates nor countenances that type of judicial second-guessing of agency decisionmaking . . . ." *Id.*

1. BLM Reasonably Calculated Annual GHG Emissions Rates.

In Plaintiffs' view NEPA requires BLM to calculate "total, cumulative emissions" for future potential development operations on the challenged leases and combustion of any future produced oil and gas, "not annual emissions rates." Pls.' Reply at 2. *See also id*. at 3–7. But NEPA imposes no such requirement or otherwise expresses any preference among annual or "lifetime" estimates. NEPA instead leaves questions of methodology and predictions to the agency's discretion and expertise. *See supra* p. 4.

Plaintiffs' continued attempts to support their position in reliance on *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009), and *Diné Citizens Against Ruining Our Environment v. U.S. Office of Surface Mining, Reclamation & Enforcement*, 82 F. Supp. 3d 1201 (D. Colo. 2015), are baseless. The

NEPA violations in those cases were not—as Plaintiffs claim—that the agency prepared annual rather than "lifetime" environmental analyses. *See* Pls.' Reply at 5. Rather, the agencies had failed to analyze the proposed actions' changes to the status quo. In each case, the annual rates of coal combustion and ore transportation would not change based on the challenged agency approvals, but the approved expansion of existing mining operations would change the length of time over which those same annual rates would continue. *See South Fork*, 588 F.3d at 725–26; *Diné Citizens*, 82 F. Supp. 3d at 1214–15. Here, by contrast, the challenged lease sales change the status quo by issuing new leases that may in the future result in new development and potentially emit GHGs in the process. The SEA evaluated that change by quantifying potential future GHG emissions from lease development and combustion of produced oil and gas.

Indeed, exercising its considerable methodological discretion and subject-matter expertise, BLM used readily available information, *see WildEarth*, 368 F. Supp. 3d at 68–69, to estimate GHG emissions from direct development of the challenged leases on an annual basis. In so doing, BLM explained that this "step-down, planning-area-based analysis provides greater consistency and continuity with previous analyses and utilizes existing data," Wyo Ph-2 0000056; *see also* API Mem. at 8–13, 22–25, as directed by the Court. Indeed, because the existing data sources upon which BLM relied also presented data in annual terms, *see* Fed. Defs.' Summ. J. Mem. (Dkt. No. 149) at 10, BLM's methodology comports with the timescales set forth in the record. NEPA requires no more of BLM than analyzing potential environmental impacts and explaining its reasoning. *E.g.*, *WildEarth Guardians*, 920 F.3d at 1258 ("NEPA leaves substantial discretion to an agency to determine how best to gather and assess information about a project's environmental impacts." (quotation omitted)).

To the extent that Plaintiffs' complaint is simply that the SEA does not provide a cumulative total of direct operational GHG emissions for the typical 40-year lifetime of a well, that is a simple matter of multiplying the projected annual direct GHG emissions from oil and gas operations (56,111.0 CO_2e mt/year, *see* Wyo Ph-2 0000057) by 40, which equals 2,244,440 mt.[4] But BLM is not required to present the data in the manner Plaintiffs prefer, *see*, *e.g.*, *WildEarth*, 8 F. Supp. 3d at 31, and Plaintiffs do not explain how the mere absence of one simple multiplication in the SEA undermined public review or agency decisionmaking. *E.g.*, *Consolidated Gas Supply Corp. v. FERC*, 606 F.2d 323, 328–29 (D.C. Cir. 1979) (agency decision will not be overturned based on technical error unless "there is substantial doubt" that agency would have reached the same result without the error); *Del Norte Cnty. v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984) (noting "the general rule that insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside"); *cf. Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (explaining that "single alleged oversight on a peripheral issue . . . must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding").

The SEA does, as Plaintiffs concede, *see* Pls.' Reply at 3, estimate indirect GHG emissions from combustion of any oil and gas eventually produced over the standard 40-year operational life of a well. *See* Wyo Ph-2 0000059. While Plaintiffs allege a computational error in BLM's subsequent comparison of that estimate to EPA's annual emissions total because of the

[4] That total is still dwarfed by lifetime indirect GHG emissions from downstream combustion. *See* Wyo Ph-2 000059 ("Based on a 40 year well life assumption, the total projected indirect emissions . . . would be 31,899,836 mt[.]").

EPA's inclusion of data for coal combustion, any such error was harmless. *See* API Mem. at 25 n.11. Far from lacking "record support," Pls.' Reply at 6 & n.5, API's demonstration that removing EPA's coal emission data from BLM's comparison results in an insignificant change—from 0.65% to 0.87% of EPA's annual U.S. oil and gas emission total, *see* API Mem. at 25 n.11—rests on basic math; subtracting the coal emissions—themselves only a fraction of oil and gas emissions—identified by the EPA, *see* Wyo Ph-2 0009955, and then simply recalculating the percentage with the coal emissions removed. Moreover, as the State of Wyoming noted, *see* Wyoming Summ. J. Mem. (Dkt. No. 147), at 28, BLM disclosed that the national GHG emissions value it used reflected all (*i.e.*, including coal) "fossil fuel combustion," Wyo Ph-2 0000051. At any rate, aside from their conclusory insistence that this small correction is "significant," Pls.' Reply at 6 n.5, Plaintiffs make no effort to explain how BLM's (at most) minor computational error caused them harm. *See Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."). *Compare Larry Grant Constr. v. Mills*, 956 F. Supp. 2d 93, 97–98 (D.D.C. 2013) (holding agency decision arbitrary and capricious where mathematical error changed the statutory designation of small business).

2. BLM Reasonably Calculated Per-Acre GHG Emissions.

Plaintiffs further argue that BLM's methodology is "inaccurate and unreliable" because the agency averaged "the total emissions rates projected from" each BLM field office's Reasonably Foreseeable Development ("RFD") scenario "over lands . . . *open to leasing*" rather than only lands already leased or proposed for leasing. Pls.' Reply at 8. Plaintiffs' challenge again founders on the record and the law.

To quantify potential future GHG emissions, BLM developed a per-acre estimate of development and consumption-related GHG emissions "based on existing development and

RFD[],” Wyo Ph-2 0000056, projections of future development necessary to extract the oil and gas resources “for the lands that are open to oil and gas development” in each planning area, Wyo Ph-2 0000043. *See also* Wyo PH-2 0000054 (explaining how emission inventories and emission factors were “used to prepare an emissions estimate for the projected RFD”). Each “RFD is the result of a technical analysis that projects the total number of wells that could be developed in a field office . . . .” Wyo Ph-2 0000043. Far from a numerical mismatch, *see* Pls.’ Reply at 8–9, because all land open to leasing in a planning area was used to generate the RFDs’ projections, *see, e.g.*, Wyo Ph-2 0000043 (explaining that RFD projections “coincide with the lands in the planning area . . . that are open to oil and gas development”), BLM divided the projected GHG emissions by the full acreage used to calculate the emissions. In other words, the units—acres of land open to leasing—were consistent across BLM’s calculation.

Plaintiffs, for their part, have “failed to show that it was entirely inappropriate” to estimate future potential GHG emissions based on the land area covered by the RFD projections. *Zirkle Fruit Co. v. U.S. Dep’t of Labor*, --- F. Supp. 3d ---, 2020 WL 1182287, at *10 (E.D. Wash. Mar. 2, 2020). Nor could they. To divide GHG emissions derived from RFD projections based upon the development of all areas in a field office open to leasing by only the challenged lease parcels, as Plaintiffs demand, would significantly overestimate the per-acre GHG emissions by packing the emissions calculated for the entire planning area into only a subset of that area.

Despite Plaintiffs’ unsupported musing about the type of calculation they would prefer, *see* Pls.’ Reply at 8–10, they identify no existing data establishing the potential oil and gas resources, and thus GHG emission potential, solely of the challenged lease parcels. While BLM “considered estimating emissions based on estimates of numbers of new wells that could potentially be installed on the . . . [challenged] lease parcels,” it concluded that such an approach

would be problematic because it would duplicate the RFD analyses and "require untenable assumptions" about site-specific conditions due to the variability in well and development conditions across Wyoming. Wyo Ph-2 0000056. Indeed, as this Court already concluded, "[a]t the leasing stage, BLM could not reasonably foresee the projects to be undertaken on specific leased parcels, nor could it evaluate the impacts of those projects on a parcel-by-parcel basis." *WildEarth*, 368 F. Supp. 3d at 66. *See also id*. ("NEPA does not require an agency to issue these types of wholly speculative assessments at the leasing stage, even assuming an irretrievable commitment of resources.").

BLM instead concluded that averaging across all open lands "accounts for differences in emissions among well types expected across the planning area." Wyo Ph-2 0000056. Because "there is no dataset distinguishing" the oil and gas reserves underlying the proposed lease parcels from unleased parcels, *Zirkle Fruit*, 2020 WL 1182287, at *11 (rejecting challenge to model using data on all berry growers rather than simply blueberry growers), Plaintiffs' complaint that BLM arbitrarily overlooked a significant detail necessarily fails. Having quantified GHG emissions as required by this Court and made clear the reasonableness of the method it chose, BLM's analysis complies with its obligations under NEPA. *See, e.g.*, *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983) ("Our only task is to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made.").

Plaintiffs' resort to general and conclusory statements regarding scientific integrity under NEPA, *see* Pls.' Reply at 8–9, are therefore unavailing. At any rate, *Environmental Defense v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69 (D.D.C. 2007), is inapposite. At the outset, the case involved the agency's attempt—unlike here—to satisfy a substantive standard under the

Clean Water Act and analyze that attempt in a parallel NEPA document. *See id*. at 77. More fundamentally, the court rejected the Corps' decision to focus on a calculation of the short-term loss of a floodplain along the Mississippi River to the complete exclusion of a longer-term loss "despite [the latter's] acknowledged role" in protecting the floodplain fish population at issue. *Id*. at 82–83. The court thus faulted the agency for removing part of the long-term floodplain from consideration. Here, by contrast, Plaintiffs complain that BLM kept the long-term leasable land—currently unleased, but open for future leasing—in its calculations. *See supra* pp. 8–9. *Environmental Defense* thus undercuts Plaintiffs' attempt to ignore lands that (as BLM's RFDs acknowledge) contribute both to available oil and gas resources, and potential future development.

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120 (9th Cir. 2007), is no more helpful to Plaintiffs. Again, *Brong* involved the agency's direct violation, *see id*. at 1128–29, of substantive directives in a Forest Plan that "give priority to environmental concerns," *id*. at 1125.[5] In reviewing an agency plan to permit salvage of burned trees in a highly protected forest area, the court concluded that the agency drastically underestimated the trees that would remain available for habitat purposes in the salvage area because the agency conceded that the remaining trees would be concentrated in parts of the forest not subject to the salvage. *See id*. at 1129–30 (noting that under agency plan "over two-thirds of the affected acreage will be *completely* stripped of all salvageable trees"). Here, there is no comparable substantive requirement, and BLM's per-acre GHG emission estimates do not "dilute the impacts," Pls.' Reply at 9, of leasing because the calculations simply treat both unleased and leased lands similarly because they both

[5] By focusing on caselaw involving the application of substantive environmental requirements, Plaintiffs' reply further confirms that Plaintiffs' challenge is fundamentally a question of policy.

contributed to the underlying RFD estimates of oil and gas resources, and are both subject to future potential development.

Plaintiffs' suggestion that Federal Defendants disagree with API's showing that Plaintiffs' per-acre GHG emissions calculations claim lacks merit, *see* Pls.' Reply at 10, is similarly misleading because Plaintiffs recite a sentence fragment from the Federal Defendants' brief out of context. The Federal Defendants' full statement is completely consistent with API's showing that projected GHG emissions for each field office were properly divided across all lands open to leasing ***because*** the unleased lands (no less than leased lands) "represent a portion of the RFD" estimates upon which the GHG emission estimates were based. *See* Fed. Defs.' Mem. at 15. In other words, the Federal Defendants did not, as Plaintiffs suggest, claim that the RFD only provides oil and gas estimates for a portion of the leasable acreage in the planning area. Consistent with the record, *see supra* pp. 8–10, and API's argument, Federal Defendants stated the exact opposite.

3. Plaintiffs' Remaining Arguments Reflect Harmless Flyspecking Of The SEA.

Plaintiffs' further alleged errors in the SEA are even less significant. Tellingly, Plaintiffs raise the majority of BLM's alleged mathematical errors in footnotes. *See*, *e.g.*, Pls.' Reply at 2 n.1, 6 n.7; Pls.' Summ. J. Mem. (Dkt. No. 143), at 22 n.16, 23 n.17, 25 nn.20–21, 28 n.23, 29 n.27, 39 n.35. *Cf. CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("A footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture.").

Indeed, the alleged errors largely reflect only Plaintiffs' misunderstanding or mischaracterization of the SEA, or harmless flyspecks that could not have impacted BLM's decisionmaking. *See*, *e.g.*, API Mem. at 27 (identifying Plaintiffs' misreading of SEA

calculation of total annual development and downstream emissions); Wyoming Mem. at 27–30 (detailing mischaracterization of SEA in alleged errors); Fed. Defs.' Mem. at 12 n.6 (explaining Plaintiffs' misunderstanding of SEA Table 5); *id*. at 14 n.8, 15 n.10 (explaining inadvertent failure to update number in one part of discussion when numbers were correct elsewhere); *see also Nat'l Wildlife Fed'n v. Souza*, No. 08-cv-14115, 2009 WL 3667070, at *12 (S.D. Fla. Oct. 23, 2009) (where correct numbers were elsewhere in the document, mere "typographical error by itself" is not arbitrary or capricious). Aside from conclusory assertions, *see* Pls.' Reply at 2 n.1, Plaintiffs have made no attempt to explain how such errors—even assuming *arguendo* that the errors are legitimate—materially misinform the public or BLM decisionmakers. *See supra* pp. 7, 8 (citing cases). *Cf. Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974) ("NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula."); *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1211 (10th Cir. 2002) (citing *Lynn* and noting that NEPA does not mandate preparation of plaintiffs' proffered "study as a prerequisite to action"); *Mejia v. U.S. Dep't of Housing & Urban Dev.*, 688 F.2d 529, 534 (7th Cir. 1982) ("[N]othing in the NEPA or its regulations suggests that a mathematical error automatically renders the . . . review defective.").

Moreover, here any uncertainty arising from BLM's minor alleged errors were accounted for, in part, by the SEA's repeated conservative assumptions that present a development picture closer to a "worst-case scenario." *WildEarth Guardians*, 920 F.3d at 1255, 1258 (rejecting challenge to alleged lack of specificity in EA where agency assumed that ***all*** lynx habitat would be affected by action even though geographic extent of impact was not yet known). Among other things, BLM's calculations (1) assumed that all issued leases would be developed despite the fact that, historically, less than 50% are developed, *see* Wyo Ph-2 0000044 (explaining that

47% of federal leases in Wyoming are in production); Wyo Ph-2 0000046 (noting that only "approximately 50%" of approved applications for permits to drill "are actually started"); (2) assumed that all produced oil and gas would be combusted even though recent data showed "about 13% of total petroleum products consumed in the United States were for non-combustion use," *see* Wyo PH-2 0000061; and (3) disclosed "emission levels from existing development plus new emissions from the projected RFDs, which include ***both non-Federal and Federal*** well projections," Wyo PH-2 0000056 (emphasis added). *Cf. Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 510–11 (D.C. Cir. 2010) (upholding agency's decision to use an "outdated" methodology where agency concluded it "was an acceptable and conservative method").

B. BLM Properly Analyzed Cumulative Lease Sale Emissions In Comparison To State, Regional, And National GHG Emissions.

With respect to BLM's analysis of the cumulative GHG emissions of the challenged lease sales, Plaintiffs again repeat two challenges from their opening brief: (1) BLM improperly failed to consider GHG emissions from allegedly reasonably foreseeable lease sales outside Wyoming, *see* Pls.' Reply at 11; and (2) BLM's "carbon budget analysis, *see* Pls.' Reply at 17, was arbitrary and capricious. As with Plaintiffs' challenges to the SEA's analysis of developmental and downstream GHG emissions, these arguments cannot square with the record or governing law.

As API's opening brief demonstrated, *see* API Mem. at 15–17, 28–30, having quantified annual GHG emissions for development of the challenged leases and combustion of any produced oil and gas, BLM then compared the lease sale emissions to: (1) cumulative direct CO_2e emissions from "all existing and reasonably foreseeable Federal lease projects in Wyoming," Wyo Ph-2 0000065–67; (2) "existing annual direct CO2 emissions from the Rocky

Mountain and Northern Great Plains Regions" in the U.S. Geological Survey's 2018 Scientific Investigations Report ("SIR"), Wyo Ph-2 0000068–69; and (3) EPA's data on all national oil and gas emissions in 2017, see Wyo Ph-2 0000071. *See also* Wyo Ph-2 0000073–74 (comparing projected downstream combustion emissions to regional and national emissions). In short, BLM placed the projected GHG emissions in context "as a percentage of state-wide and nation-wide emissions," which this Court found "a permissible and adequate approach." *WildEarth*, 368 F. Supp. 3d at 79 (quoting *WildEarth Guardians*, 8 F. Supp. 3d at 35).

In response to BLM's analysis and API's showing, Plaintiffs are simply wrong in contending that "API acknowledged BLM did not consider 'other reasonably foreseeable BLM lease sales in the region and the nation,'" Pls.' Reply at 11 n.15, because that assertion assumes Plaintiffs' mistaken view of NEPA's requirements. As API previously detailed, BLM employed existing data and studies to consider the potential future development of the challenged lease sales by placing them in the context of (1) the federal mineral estate provided by existing data in the U.S. Geological Survey's SIR, *see* API Mem. at 11–12, 15–16; Wyo PH-2 0000050 (explaining that SIR set out "gross GHG emission estimates for ***all*** Federal mineral estates in the U.S., ***and each of the states*** which contain Federal minerals, including those within the Rocky Mountain and Northern Great Plains regions" (emphases added)), and (2) total national GHG emissions from the EPA's *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017*, *see* API Mem. at 12, 15–17. *See also id*. at 28–29 (citing Wyo Ph-2 0000043 and Wyo Ph-2 0000050). That Plaintiffs would prefer that BLM instead parse every RFD, *see* Pls.' Reply at 14–15, in Wyoming, surrounding states, and the nation as a whole to project GHG emissions for every existing RFD in every planning area in the country does not amount to a NEPA violation.

Nor do Plaintiffs identify any authority for such a requirement. Plaintiffs support their extreme position almost wholly with *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019). *See* Pls.' Reply at 14. That case is completely inapposite. Indeed, Plaintiffs' proposed "critical holding" in that case—that "development projections in RFDs are 'reasonably foreseeable,'" Pls.' Br. at 14—amounts to little more than question-begging here because Plaintiffs' wholly ignore the different contexts. *Diné* involved a challenge to BLM's approval of drilling permits in New Mexico's Farmington Field Office. In that context, the Court held that projected future drilling projects set forth in ***that Field Office's*** updated RFD rendered those future projects "reasonably foreseeable" and thus the appropriate subject for a cumulative impacts analysis of the challenged drilling permits. *See Diné*, 923 F.3d at 835–36, 852–53. The Court therefore ordered BLM "to consider the cumulative environmental impacts associated" with the projected wells in the updated Farmington Field Office RFD when approving drilling plans in that Field Office. *See id*. at 853.[6]

The *Diné* Court therefore did not, as Plaintiffs suggest, issue a blanket ruling that every RFD in a state, a region, or a nation as a whole is a reasonably foreseeable cumulative impact for a proposed oil and gas development project. *Diné* instead kept the geographic scope of its ruling within a single BLM field office. That is fully consistent with the D.C. Circuit's admonition that "[a] NEPA cumulative-impacts analysis need only consider the effect of the current project[s] along with any other past, present or likely future actions ***in the same geographic area*** as the project[s] under review." *Sierra Club v. FERC*, 672 F. App'x 38, 39 (D.C. Cir. 2016) (quoting

[6] In addition, BLM had itself relied on the previous Farmington Field Office RFD in discussing cumulative impacts for a number of the Field Office's drilling permits at issue. *See Diné*, 923 F.3d at 853. Plaintiffs point to no such prior practice in this case.

Sierra Club v. FERC, 827 F.3d 36, 50 (D.C. Cir. 2016)) (emphasis original). *See also Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (explaining that "identification of the geographic area within which [cumulative impacts] may occur" is left to the "special competency" of the agency).

Plaintiffs' insistence that BLM nevertheless failed to "*analyze[]* the climate impacts of emissions from the challenged leases *when added to* other regional oil and gas activity," Pls.' Reply at 13, likewise seeks to impose a requirement beyond NEPA. As courts have regularly accepted, "[g]iven the state of the science, it is not possible to associate specific actions with the specific global impacts such as potential climate effects." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (quotation omitted). *See also WildEarth*, 368 F. Supp. 3d at 79. The SEA followed suit. *See, e.g.*, Wyo Ph-2 0000057 ("The currently available information about GHGs and climate change does not permit an assessment of the relationship between specific project-scale GHG emissions and specific effects on climate change because climate change operates on a global scale."). BLM thus described the potential impacts of climate change in a qualitative fashion. *See* API Mem. at 9–10 (citing Wyo PH-2 0000038–42).[7]

Against this authority, *Southwestern Electric Power Company v. U.S. EPA*, 920 F.3d 999 (5th Cir. 2019), does not suggest that NEPA requires more. *See* Pls.' Reply at 13. That case considered the EPA's admittedly out-of-date rules' compliance with substantive requirements under the Clean Water Act. *See Sw. Elec.*, 920 F.3d at 1003–04. Because the EPA was under a

[7] Despite Plaintiffs' assertion that BLM relied on "outdated" data with respect to climate trends, *see* Pls.' Reply at 12, as Intervenor Western Energy Alliance has demonstrated, recent data from the EIA show a flattening in global energy-related emissions in 2019, *see* WEA Summ. J. Mem. (Dkt. No. 150), at 5. Indeed, the 2018 SIR reported "decreases in emissions for all three [primary] greenhouse gases" over the preceding decade. Wyo Ph-2 0000050.

statutory directive to enact regulations that would reduce water pollutants, it could not justify its failure—for nearly thirty years—to promulgate new rules to reduce a particular pollutant that was very significant in "an absolute sense" based on that pollutant's relative size compared to other large pollutants. *Id*. at 1032–33. *See also id*. at 1033 ("EPA ***conceded*** that it lacked discretion to ignore leachate based on its allegedly small size[.]" (emphasis added)). BLM is under no such substantive regulatory directive here, and has instead complied with this Court's order to place the challenged leases' potential future GHG emissions in context, including as a percentage of regional and national GHG emissions. *See WildEarth*, 368 F. Supp. 3d at 79.

Plaintiffs' final complaint that "BLM's carbon budget analysis was irrational because . . . it failed to disclose the baseline amount of the remaining carbon budget," Pls.' Reply at 15, likewise mischaracterizes the SEA and this Court's prior holding. BLM did not conduct a carbon budget analysis of the type Plaintiffs describe (or demand); nor was it required to adopt Plaintiffs' preferred methodology. Rather, BLM simply noted one carbon project's view of ***annual*** oil and gas carbon emissions for 2018, and compared that number to the projected GHG emissions for the challenged lease sales, thereby placing the lease sales in a global (as well as regional and national) context. *See* Wyo Ph-2 000075 (comparing challenged leases' projected GHG emissions with "the Global Carbon Project's projected 2018 total of 4.0 Gt for both oil and gas"). That was fully consistent with this Court's decision, which made clear that NEPA does not require ***any*** carbon budget analysis and that BLM could reasonably assess cumulative impacts—as it did in the SEA—as a percentage of larger-scale emissions. *See WildEarth*, 368 F. Supp. 3d at 79.[8]

[8] Plaintiffs' assertion that API's argument includes a mistake again founders on the record, which instead confirms API's point. Contrary to Plaintiffs' suggestion, *see* Pls.' Reply at 18 (continued…)

II. THE LEASES SHOULD NOT BE VACATED UNDER ANY CIRCUMSTANCES.

A. At Most, Remand Of The Lease Sale Decisions Without Vacatur Of The Issued Leases Would Be Appropriate.

In the unlikely event that any NEPA shortcoming were identified, this Court has already recognized that a reviewing court is not required to vacate every agency decision that violates NEPA, and that where, as here, the alleged violation amounts merely to a failure fully to consider potential environmental impacts of a decision, remand without vacatur is appropriate. *See WildEarth*, 368 F. Supp. 3d at 84 (explaining, *inter alia*, that "Plaintiffs challenge only one aspect of nine lease sales that otherwise complied with NEPA"). Aside from claiming that BLM has produced an inadequate SEA on remand, Plaintiffs point to no new circumstances that now warrant vacatur of the issued leases.

By contrast, BLM's response to this Court's first decision demonstrates that it can work expeditiously to address any further narrow—and, likely, now even narrower—NEPA violation. As before, this is not a situation "in which the agency must redo its analysis from the ground up," *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 100 (D.D.C. 2017) (quotation omitted), and because "there is a nontrivial likelihood" that Federal Defendants "could justify" the challenged leasing decisions, remand without vacatur would be appropriate under the first prong of the *Allied-Signal* test, *Bauer v. DeVos*, 332 F. Supp. 3d 181, 186 (D.D.C. 2018) (quotation omitted). *See also Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding where "plausible that FERC can redress its failure of explanation on remand while reaching the same result").

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n.24, BLM compared the projected 2018 carbon total to the data derived from Tables 10 and 15 of the SEA, which set forth projected cumulative GHG emissions from lease development and downstream combustion. *See* API Mem. at 30–31; Wyo Ph-2 0000075; Wyo Ph-2 0000067; Wyo Ph-2 0000072.

In claiming otherwise, "[i]n essence, WildEarth is saying that it does not trust" BLM to comply with the law, but courts "generally presume that government agencies comply with the law and NEPA creates no exception to this presumption." *WildEarth Guardians*, 920 F.3d at 1261. *See also Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010) ("[W]e presume that agencies will follow the law."); *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1186–87 (D.C. Cir. 2012) (noting the "presumption of regularity that agency proceedings enjoy"); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies[.]"). At bottom, the seriousness of the agency's failure depends upon its ability on remand to cure the defect. *See Standing Rock*, 282 F. Supp. 3d at 102–03 ("[T]he Court's role here is not to determine the wisdom of agency action or to opine on its substantive effects. Instead, it must consider the [agency's] likelihood on remand of fulfilling NEPA's . . . requirements and justifying its prior decision.") (citation omitted). That ability remains here despite any minor deficiencies in the SEA or Plaintiffs' distrust of BLM.

Nor has the law in this Circuit changed with respect to the availability of a remand without vacatur. Instead, Plaintiffs point to two recent district court decisions from the Ninth Circuit (one of which is already on appeal). Neither case supports Plaintiffs' request for vacatur. *Western Watersheds Project v. Zinke*, --- F. Supp. 3d ---, 2020 WL 959242 (D. Idaho Feb. 27, 2020), involved a ***substantively invalid*** agency action, *see id*. at *18, 26, 28, rather than a purely procedural NEPA violation that can readily be cured with further consideration and explanation. Similarly, unlike this case, the recent vacatur order in *WildEarth Guardians v. BLM*, No. 18-cv-73, 2020 WL 2104760 (D. Mont. May 1, 2020), involved an agency failure to conduct an analysis, "rather than . . . a flawed analysis." *Id*. at *13. Because any BLM NEPA violation in

this case remains merely "a failure to fully discuss the environmental effects of th[e] lease sales" and "nothing in the record indicates that on remand the agency will necessarily fail to justify its decisions," *WildEarth*, 368 F. Supp. 3d at 84, remand without vacatur is still warranted.[9]

B. Plaintiffs Fail To Establish An Entitlement To Relief.

More broadly, Plaintiffs do not dispute that, in this case, vacatur and injunctive relief will have the same practical effect. Where, as here, "the practical effect of the two forms of relief will be virtually identical," the propriety of the relief "should be judged by essentially the same standards." *PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed. Cir. 2004) (quoting *Samuels v. Mackell*, 401 U.S. 66, 71–73 (1971)). Requiring a plaintiff to satisfy the traditional requirements for extraordinary injunctive relief, *see* API Mem. at 31–32, thus conforms with the APA's express preservation of "the power or duty of the court to . . . deny relief on any other appropriate . . . equitable ground." 5 U.S.C. § 702. Accordingly, federal courts consistently consider vacatur to be "tantamount to a request for injunctive relief." *PGBA*, 389 F.3d at 1228. *See also, e.g.*, *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1239 (10th Cir. 2017) ("Vacatur of agency action is a . . . form of injunctive relief."); *ForestKeeper v. La Price*, 270 F. Supp. 3d 1182, 1226 (E.D. Cal. 2017) (explaining that vacatur "has the effect of an injunction, and

[9] Plaintiffs citation of the recent decision in *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, --- F. Supp. 3d ---, 2020 WL 1441923 (D.D.C. March 25, 2020), Pls.' Reply at 25, is misleading. While Plaintiffs suggest that *Standing Rock* held an Environmental Impact Statement ("EIS") required on remand because the agency failed adequately to satisfy NEPA on an initial remand, the EIS was required based on a further application of NEPA, not the number of times the agency had reviewed the challenged action. *See, e.g.*, *Standing Rock*, 2020 WL 1441923, at *9–10 (holding that agency did not adequately respond to concerns expressed by experts).

[plaintiff] therefore 'must establish'—with a 'clear showing'—that it is entitled to such extraordinary relief" (quoting *Winter*, 555 U.S. at 20, 22)).[10]

"An injunction is a matter of equitable discretion[,] it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. Rather, "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987), and "pay particular regard for the public consequences" of an injunction, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). API has demonstrated that this balance tilts decisively against Plaintiffs' requested injunctive relief in light of existing development and mitigation as well as public and private economic and reliance interests that would be damaged by vacatur. *See* API Mem. at 33–36.

For their part, Plaintiffs do not even attempt to satisfy their affirmative burden to establish an entitlement to the injunctive relief they seek. Nor may Plaintiffs attempt to satisfy their affirmative burden to demonstrate an entitlement to the injunctive relief they seek for the first time in reply to API's arguments. *See, e.g.*, *Ineos USA LLC v. FERC*, 940 F.3d 1326, 1329 (D.C. Cir. 2019) ("[A]rguments made for the first time in a Reply Brief are generally forfeited."); *Nolen v. FedEx Servs.*, No. 13-6245, 2014 WL 12887530, at *3 (6th Cir. May 28, 2014) (plaintiff could not provide evidence to meet her affirmative burden for the first time in

[10] For this reason, Plaintiffs' reliance, *see* Pls.' Reply at 25 n.26, on *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), is misplaced. At any rate, the vacatur order—let alone the nature of that relief—was not at issue in *Monsanto*, *see id*. at 155–56 (petitioners did not challenge vacatur portion of remedial order), and the Court merely noted that, in that case, vacatur of the agency's alfalfa deregulation decision was less drastic than the further injunctive relief at issue, including detailed restrictions on alfalfa planting, *id*. at 147–48.

reply brief). Again, having failed to make a "clear showing" that Plaintiffs satisfy the traditional test, *Winter*, 555 U.S. at 22, Plaintiffs are not entitled to extraordinary relief.

CONCLUSION

For the foregoing reasons, and those set forth in API's opening summary judgment brief, Plaintiffs' motion for summary judgment should be denied, and API's cross-motion for summary judgment should be granted.

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
Bradley K. Ervin
COVINGTON & BURLING, LLP
One CityCenter
850 Tenth St., N.W.
Washington, D.C. 20001
Phone: (202) 662-6000
Fax: (202) 662-6291
srosenbaum@cov.com

Paul G. Afonso
Ben Norris
AMERICAN PETROLEUM INSTITUTE
1220 L St., N.W.
Washington, D.C. 20005
Phone: (202) 682-8000
Fax: (202) 682-8033
norrisb@api.org

Counsel for American Petroleum Institute

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2020, I caused a true and correct copy of the foregoing to be filed with the Court electronically via the CM/ECF system, which will serve the foregoing by electronic means on all counsel of record in this case.

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
COVINGTON & BURLING, LLP
One CityCenter
850 Tenth St., N.W.
Washington, D.C. 20001
Phone: (202) 662-6000
Fax: (202) 662-6291
srosenbaum@cov.com