IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS, *et al.*, Plaintiffs, v. **ZINKE,** *et al*., Federal Defendants, and **WESTERN ENERGY ALLIANCE, PETROLEUM ASSOCIATION OF WYOMING,** *et al.* Defendant-Intervenors.	Case No. 1:16-cv-01724-RC

WESTERN ENERGY ALLIANCE AND PETROLEUM ASSOCIATION OF WYOMING'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Confronted with BLM's full compliance with this Court's Order, Plaintiffs' Consolidated Reply (Dkt. 157) (Plaintiffs' Reply) attempts to confuse and obfuscate BLM Wyoming's thorough analysis of the direct, indirect, and cumulative effects of its decision. In so doing, Plaintiffs improperly attempt to utilize the National Environmental Policy Act (NEPA), a purely procedural statute, to achieve their substantive policy objectives[1] that are contrary to both NEPA and the statutory framework governing the federal onshore oil and gas leasing program.

At best, Plaintiffs delineate a few minor errors in BLM's analysis. Even viewing these errors into the worst possible light, they are not fatal and do not rise to a level of a NEPA violation. Indeed, these errors highlight the limitations and speculative nature of any forward-looking predictive analysis, particularly involving the immense technical complexities of a global climate. A thorough analysis of the record before this Court shows that these limitations are not evidence that BLM failed to take a hard look, or that BLM intended to mislead the public.

In short, Plaintiffs fail to meet their burden under the Administrative Procedure Act (APA) to show that BLM's analysis—when viewed in the record as whole—constitutes arbitrary and capricious decisionmaking. Moreover, the arbitrary and capricious standard is deferential, and a court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

The record reflects that BLM thoroughly examined the relevant and available data and articulated a rational connection between the facts found and the leasing decisions it made.

[1] As documented in Western Energy Alliance's merits brief, Dkt. 151 at 1-2, 26-28.

Motor Vehicle Mfrs., 463 U.S. at 43; *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1476 (D.C. Cir. 1998).

Plaintiffs' views on climate change and their preferred method of analysis to support those views do not define the benchmark for agency analyses under NEPA. This discretion is granted to the agency. The only relevant determination appropriately before this Court is whether the agency's decision to utilize its methodology was arbitrary or capricious, not whether a different methodology could or should have been used. *Williams v. Dombeck*, 151 F. Supp. 2d 9, 23 (D.D.C. 2001). Indeed, given the technical and scientific nature of these issues, deference to the agency is particularly appropriate.

Ultimately, Plaintiffs' claims stem from their fundamental policy disagreement with the leasing, exploration, and development of oil and gas on federal lands as required under the Mineral Leasing Act. Mere disagreement with the agency is not enough to establish a viable legal claim under NEPA and the APA. *Basel Action Network v. Mar. Admin.*, 370 F. Supp. 2d 57, 74 (D.D.C. 2005). Plaintiffs disagree with BLM's decision to offer leases for competitive sale and disagree with the level of analysis BLM performed at the leasing stage of the federal onshore oil and gas program. In addition, they seek to use their fabricated requirement that BLM conduct a "carbon budget" analysis into the conclusion that no further federal oil and gas leasing should occur.

Plaintiffs did not style their complaint as a challenge under the Mineral Leasing Act (MLA) (*see* Plaintiffs' Reply, Dkt. 157 at 23), yet challenging the MLA is their intended result. Plaintiffs seek to prevent oil and gas leasing by holding BLM to an impossible standard for NEPA review and writing into NEPA a substantive requirement for BLM to begin "transitioning

America's energy system away from fossil fuels." Plaintiffs' Reply, Dkt. 157 at 1. This is an improper use of NEPA and the APA.

BLM complied with this Court's Order and NEPA in taking a hard look at the likely impacts of its decision and deciding to offer the challenged parcels for sale. Thus, this Court should uphold BLM's decision.

ARGUMENT

I. The Administrative Record Shows BLM Complied with its NEPA Obligations and this Court's Order by Taking a Hard Look at the Environmental Effects of its Actions.

Attempts at confusion and obfuscation aside, Plaintiffs have not met their burden to show that the Supplemental Environmental Assessment (SEA) constituted arbitrary and capricious decisionmaking under the high level of deference this Court must grant to agency decisions within its technical expertise. Rather, Plaintiffs assert NEPA deficiencies simply because BLM: (1) chose a BLM-preferred, rather than a Plaintiff-preferred method of analyzing the effects of greenhouse gases (GHG); and (2) declined to issue an EIS. In fact, the Administrative Record is clear that BLM considered the relevant factors in affirming its decision to offer these parcels for lease as it relates to the minor deficiencies found by this Court in Phase One, and articulated a rational connection between the facts found through its analysis and the choices made. *Keating v. FERC*, 569 F.3d 427, 433 (D.C. Cir. 2009) (upholding agency decision where agency considered relevant factors and articulated a rational connection between the facts found and the choices made). That is all that NEPA requires. *Id*.

A. Plaintiffs' Preferences Do Not Set the Standard for NEPA.

Plaintiffs insist that BLM must use lifetime emissions rather than emission rates, and that BLM must average emissions over the leased area rather than the area open to be leased. However, Plaintiffs' preferences do not set the standard or the methodology for BLM's NEPA

review. Rather, judicial review of agency action is deferential to the agency. *Marsh*, 490 U.S. at 377 (noting a reviewing court is at its "most deferential" when the analysis of relevant documents requires a high level of technical expertise). Courts determine whether the agency "adequately" considered and disclosed the environmental impacts of the action, not whether the agency considered the proposed action in the exact manner and under the exact conditions of every commenter on the draft EA. *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016). None of Plaintiffs' arguments regarding Plaintiffs' preferred method of analysis rise to the level of "arbitrary and capricious" decisionmaking.

1. NEPA Does Not Require BLM to Analyze Lifetime Emission Rates

BLM's SEA utilized annual emission rates for the anticipated direct and indirect impacts and compared those rates to the existing baseline rates on a state, regional, and national basis. BLM provides not one, but three rational bases for its reliance on annual rates rather than Plaintiffs' proposed "lifetime" rates. Federal Defendants' Cross-Motion, Dkt. 148-1 at 9-10. As Federal Defendants explain, BLM used annual rates because: (1) this Court required that BLM use raw data on projected oil and gas development on the leased parcels; (2) the Court, consistent with NEPA and the APA, left to BLM's discretion how to use that aggregated data in the method most helpful to BLM to inform its own decisionmaking; and (3), perhaps most compellingly, Federal Defendants explain that the best available data on state, regional, and national emissions forecasts exist on an annual—rather than on a "lifetime" basis. *Id.*

This Court required BLM to "reasonably quantify the GHG emissions. . . in the aggregate" (Court's Order, Dkt. 99 at 32), and to compare those GHG emissions to state, regional, and national GHG emissions forecasts (*Id.* at 56). As state, regional, and national GHG emissions forecasts already existed based on an annual rather than a cumulative basis, it was reasonable for BLM to calculate annual project-level rates to compare to those already existing

analyses, and to conduct the Court's required comparison. Federal Defendants' Cross-Motion, Dkt. 148-1 at 9-10. This is a rational basis for BLM's decision, and all that NEPA requires. *Keating*, 569 F.3d at 433.

At its core, Plaintiffs' continued insistence on a lifetime emissions analysis is simply an attempt to re-argue that BLM's decision not to utilize a carbon budget was arbitrary and capricious. Plaintiffs' Reply, Dkt. 157 at 2-3 (arguing that "total, cumulative emissions—not annual emissions rates—is the critical factor that will determine whether humanity is able to limit global warming to internationally accepted thresholds of 1.5° or 2° C."). This Court specifically rejected this argument in the first round of briefing. Court's Order, Dkt. 99 at 49-50; *citing Sierra Club v. U.S. Dep't of Transp.,* 753 F.2d 120, 128 (D.C. Cir. 1985) (noting that it is within "the expertise and discretion of the agency" to determine the methodology for its analysis). Like the first round, Plaintiffs provide no legal authority mandating such a carbon budget analysis at the leasing stage, nor do they show that BLM's failure to engage in Plaintiffs' preferred method of analysis exceeds BLM's broad discretion to determine methods of analysis within its own expertise.

Nor does Plaintiffs' continued reliance on *South Fork Band* and *Dine CARE* support their claim that BLM's failure to consider lifetime emissions was arbitrary and capricious. Neither case uses the term "lifetime emissions" nor do those Court's decisions turn on that concept. Rather, both cases turned on the agencies' failures to evaluate the effect of additional emissions from expanding mines into new acreage. *Dine Citizens Against Ruining our Env't v. U.S. Office of Surface Mining Reclamation and Enf't*, 82 F. Supp. 3d 1201, 1213 (D. Colo. 2015); *South Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009).

These cases only held that an agency decision to extend a project's life must consider the additional emissions from that extension. *See* Alliance Cross Motion, 150-1 at 19-20. The Administrative Record here confirms that BLM considered the 40-year average life span of a federal well. Thus, there is no evidence here that BLM failed to consider the effects of a decision to extend the life of the project, and *Dine CARE* and *South Fork Band* do not dictate a finding that BLM's analysis in the SEA was arbitrary or capricious simply where BLM looked at emissions on an annual basis and acknowledged that such emissions would continue for the life of the well, estimated at 40 years.

B. NEPA Does Not Mandate that BLM Must Rely on Plaintiffs' Chosen Denominator for Estimates of Per-Acre Emissions

Plaintiffs' argument as to its preferred denominator to use for the Reasonably Foreseeable Development-based emissions similarly fails. Plaintiffs accept BLM's assertion that predicting GHG involves some level of uncertainty because it is impossible for anyone to predict how many additional acres will be leased. Plaintiffs' Reply, Dkt. 157 at 10. They then assert that despite this uncertainty, BLM's ultimate choice of denominator was *per se* arbitrary and capricious because it diluted the emissions level by some unidentified, but unacceptable amount. Again, Plaintiffs ask this Court to ignore the proper level of agency discretion.

The law grants BLM discretion to determine both the appropriate method of analysis and the method of analysis that will be most helpful to the agency. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 79 (D.D.C. 2019), citing *Sierra Club*, 753 F.2d at 128. Plaintiffs' arguments that a different number should be used does not necessitate a finding that BLM's decision was arbitrary and capricious. *Marsh*, 490 U.S. at 378 (holding that an "agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."). In short, Plaintiffs' argument regarding

BLM's chosen denominator is the ultimate example of "flyspecking." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1324 (D.C. Cir. 2015) (denying NEPA challenge based on assertion that FERC overestimated the amount of land at issue.).

Contrary to Plaintiffs' assertions, BLM's analysis complies with NEPA. This is not an instance where, as Plaintiffs assert, BLM's analysis is "grossly misleading" because there is a deliberate intent by BLM to dilute the effects to the point of zero influence. Plaintiffs' Reply, Dkt. 157 at 9, citing *Or. Nat. Res. Council Fund. v. Brong*, 492 F.3d 1120, 1129-30 (9th Cir. 2007). Rather, BLM acknowledged the limitations of its analysis, fully disclosed the assumptions that it made based on those factual limitations, and "showed its work" in its calculations to allow the public to fully consider the method, limitations, and results of its analysis. SEA, Wyo Ph-2 0000055-60. It further articulated a rational basis for its methodology and conclusions in calculating reasonably foreseeable emissions from sales in Wyoming and comparing those to state, regional, national, and global emissions. *Id.* at 65-79. Thus, it complied with its duties under NEPA. *WildEarth Guardians v. Jewell*, 738 F.3d at 310 (denying challenge to NEPA analysis where the BLM evaluated GHG emissions as a percentage of state- and nation-wide emissions.).

C. The SEA Reasonably Informs BLM's Decision Despite Minor Errors.

The remaining minor errors identified by Plaintiffs do not rise to the level of arbitrary or capricious or uninformed BLM decisionmaking. *See State of Cal. by Brown v. Watt*, 712 F.2d 584, 605-06 (D.C. Cir. 1983) (finding minor error did not necessitate remand). For example, undersigned counsel's transcription error in copying down the 4.9 mt number that appears one line above and that BLM clearly enumerated as the "total oil and gas related combustion emissions in the U.S. in 2017" instead of 31,899,836 mt number which BLM clearly explains constitutes the projected indirect emissions from the Proposed Action over 40 years into

Alliance's Memorandum does not support Plaintiffs' assertion that BLM's analysis of lifetime indirect emissions was "confusing." Plaintiffs' Reply, Dkt. 157 at 7, n. 9 (alleging that the "confusing" nature of BLM's lifetime indirect GHG emissions is confirmed by Alliance's counsel's error.) At most, it confirms that counsel copied down a number from the line above into her brief—it is not evidence of BLM's arbitrary and capricious decisionmaking.

Rather, counsel's error only reinforces the APA's proper allocation of discretion to BLM—and not lawyers—to determine the proper method for analysis of GHG under NEPA, as the former is clearly more versed in complex GHG modeling and forecasting methods and in evaluating and analyzing the likely effects of oil and gas development on the environment. *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 35 (D.D.C. 2014) (citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (noting agency has discretion in determining methodology and holding that "evaluating GHG emissions as a percentage of state-wide and nation-wide emissions . . . is a permissible and adequate approach."). Although BLM's analysis is necessarily complex, it is not confusing, and minor errors do not undermine BLM's thorough analysis.

II. Plaintiffs Cannot Reframe Their Rejected Carbon Budget Claim as an Argument That BLM Failed to Analyze Baseline Conditions

Plaintiffs' Reply simply reiterates their argument that BLM's decision not to utilize a carbon budget analysis was arbitrary *per se*. Plaintiffs' Reply, Dkt. 157 at 15-18. In so doing, Plaintiffs gloss over this Court's earlier rejection of their carbon budget policy arguments, (Court's Order, Dkt. 99 at 49) and attempt to reframe them as a legal argument that BLM failed to disclose baseline project conditions. Plaintiffs' Reply, Dkt. 157 at 15. There is no support in the record for Plaintiffs' assertion that they failed to disclose baseline project conditions, and Plaintiffs offer no rationale for this Court to reverse its prior ruling.

Plaintiffs rely on *Rose* for the unremarkable point that environmental analyses must include baseline conditions. *Id.* citing *Or. Natural Desert Ass'n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019). Even if *Rose* were relevant to GHG analysis or binding on this Court, BLM satisfied *Rose* by properly disclosing baseline environmental conditions.

As this Court acknowledged in the last round of briefing, Plaintiffs do not offer any legal authority for the proposition that NEPA requires BLM to use a "carbon budget." *See* Court's Order, Dkt. 99 at 49, citing *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt*., No. CV-16-21-GF-BMM, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018) (Plaintiffs identify no case, and the Court has discovered none, that supports the assertion that NEPA requires the agency to use a global carbon budget analysis.). Plaintiffs do not offer any new authority on this point.

In an attempt to revive their carbon budget claim, Plaintiffs argue that BLM must disclose the global carbon budget in order to adequately describe baseline environmental conditions. This argument presumes that utilizing a carbon budget was the only way for BLM to establish a baseline against which to analyze the GHG impacts of the Proposed Action. *See* Plaintiffs' Reply, Dkt. 157 at 15 (citing *Rose*, 921 F.3d at 1190). As the Administrative Record demonstrates, carbon budgets are not the only way to determine baseline GHG conditions.

As BLM explains in its responses to public comments, BLM undertook a thorough analysis of the anticipated GHG emissions from the project (i.e. "total projected emissions from existing leases and leases expected to result from reasonably foreseeable lease sales") as compared to the "baseline" of "annual statewide (Federal and 'all lands'), regional Federal, and national emissions levels." Record of Decision at Wyo Ph-2 0000012-13; *see also* Alliance's Cross Motion, Dkt. 150 at 11-14 (summarizing BLM's comparison of project to baseline

emission levels). Plaintiffs have not met their burden to show arbitrary and capricious decisionmaking.

Finally, Plaintiffs confusingly argue that because BLM did engage in what they term a "carbon budget analysis," their failure to do so under Plaintiffs' proposed method was arbitrary and capricious. Plaintiffs' Reply, Dkt. 157 at 17, citing *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs,* No. CV 16-1534 (JEB), 2020 WL 1441923, at *12 (D.D.C. Mar 25, 2020). However, this argument both presumes (with no record evidence) that BLM did engage in some level of carbon budgeting, which Plaintiffs concede they do not, and also again presumes that the only way to establish a baseline for BLM's GHG analysis is through carbon budgeting.

As explained above, BLM's decision to establish a baseline for GHG emissions, and to compare those baseline emissions to the estimated project emissions was rational. Thus, Plaintiffs' argument that BLM erred in doing so in a manner other than through carbon budgeting is unavailing. BLM complied with this Court's Order, which specifically rejected Plaintiffs' global carbon budget claim. Plaintiffs cannot revive their claim by attempting to rewrite NEPA to require carbon budgeting where NEPA, the APA, and binding precedent grant BLM the discretion to determine how to comply with its duty to disclose baseline conditions, particularly in a case where BLM thoroughly described baseline conditions.

III. BLM Complied with NEPA in Issuing the FONSIs

Again, Plaintiffs' arguments as to the alleged uncertainties are an attempt to reargue a matter which this Court has already put to rest—namely, that any "uncertainties" underlying BLM's attempts to project GHG emissions in the future requires BLM to conduct a full EIS. As this Court already found, the effects of GHG emissions "are not 'unique or unknown' and the [initial] EAs adequately summarized those risks." Court's Order, Dkt. 99 at 56. It is hard, if not impossible, to see how BLM's analysis here, which engaged in an even more robust discussion

of the specific qualitative and quantitative risks associated with GHG emissions from these leases somehow has increased the "uncertainties" since the Court's Order on March 19, 2019 which found, definitively, that no such uncertainties exist. Thus, Plaintiffs have not met their burden to show that BLM's FONSI constitutes arbitrary and capricious decisionmaking.

IV. If the Court Finds NEPA Deficiencies, Plaintiffs are Not Entitled to Their Requested Relief

Despite BLM's efficient and thorough additional analysis consistent with this Court's prior Order, Plaintiffs continue to assert that the Court is obligated to enter the extraordinary remedy of vacating BLM's lease authorizations. This assertion is wrong; vacatur is neither required nor warranted. To the contrary, the "decision whether to vacate depends on the seriousness of the [decision's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (internal citations and quotations omitted).

Moreover, remand in place of vacatur is particularly appropriate where "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014) (citing *Allied-Signal*, 988 F.2d at 151); *see also Wilderness Soc'y v. Wisely*, 524 F. Supp. 2d 1285, 1312 n.12 (D. Colo. 2007) ("The Court will not simply void the September 2005 decision to resume leasing—and all of the BLM's subsequent acts implementing that decision—as doing so might adversely affect property interests obtained by lessees as a result of the lease sale.").

Vacatur is not appropriate given the property interests at issue, particularly where the owners of the real property at issue in the case—the leases—are not properly before this Court. The disruptive consequences of vacating BLM's decisions here would be significant. Millions of

dollars and thousands of man hours have been spent by operators to evaluate whether to purchase leases that were offered for sale and to prepare to explore and develop leases that were ultimately purchased. Vacating these leases would violate valid existing property rights and subject BLM to potential lawsuits. Thus, limited remand to address any minor deficiencies is the appropriate remedy in this case.

Furthermore, the District of Idaho case that Plaintiffs cite in support of vacatur, in addition to being wrongly decided,[2] specifically distinguished the NEPA violations alleged in the present case from the NEPA violations alleged in the *W. Watersheds* case. In distinguishing the present case, the Idaho Court stated "[o]f importance in *WildEarth Guardians,* however, was the nature of the NEPA violation—a failure to fully discuss the environmental effects of the lease sales. According to the district court, this was easily remedied by incorporating an analysis that was previously omitted." *W. Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB, 2020 U.S. Dist. LEXIS 34612, at *91, n. 21 (D. Idaho Feb. 27, 2020). The Magistrate Judge in *W. Watersheds,* therefore affirmed the appropriateness of remand in cases where the BLM can remedy any deficiency through additional NEPA analysis, and distinguished it from *W. Watersheds* where the Court found the error was a failure to provide appropriate opportunities for public involvement. Thus, even if the *W. Watersheds* case were rightly decided, which Alliance disputes, it would not advise the same result here. Rather, as previously articulated by Federal Defendants (Dkt. 148-1 at 30-31), the State of Wyoming (Dkt. 147-1), API (Dkt. 152-1

[2] Western Energy Alliance, the State of Wyoming, and Federal Defendants have all filed appeals in *W. Watersheds Project, v. Zinke*, No. 1:18-CV-00187-REB, 2020 U.S. Dist. LEXIS 34612 (D. Idaho Feb. 27, 2020). *See* Ninth Circuit Court of Appeals Case Nos. 20-35291, 20-35293 and 20-35294. The Court has also entered a stay of its order vacating the lease sales pending that appeal, necessarily holding that the moving parties have demonstrated a likelihood of success on appeal. *W. Watersheds Project v. Zinke*, No. 1:18-CV-000187-REB, 2020 U.S. Dist. LEXIS 85203, *12 (D. Idaho May 12, 2020).

at 31-40), and the Alliance (Dkt. 150 at 28-29), if the Court finds any deficiencies, the proper remedy is remand to address those limited issues.

CONCLUSION

The record reflects that BLM thoroughly examined the relevant and available data and articulated a rational connection between the facts found and the leasing decisions it made. BLM complied fully with NEPA and this Court's Order in issuing the SEA, Decision Record, and Finding of No Significant Impact for the decision to offer the Wyoming parcels for lease. Plaintiffs' challenge should be rejected, and BLM's decisions affirmed.

Respectfully submitted this 22nd day of May 2020.

/s/Malinda Morain
Bret Sumner (DC Bar # 464494)
bsumner@bwenergylaw.com
Jim Martin, *Pro Hac Vice*
jmartin@bwenergylaw.com
Malinda Morain, *Pro Hac Vice*
mmorain@bwenergylaw.com
BEATTY & WOZNIAK, P.C.
216 Sixteenth St., Suite 1100
Denver, CO 80202-5115
Telephone: 303-407-4499
Fax: 800-886-6566

Attorneys for Defendant-Intervenors Western Energy Alliance and Petroleum Association of Wyoming

CERTIFICATE OF SERVICE

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

/s/Malinda Morain