ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5179

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GULF RESTORATION NETWORK, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs-Appellants,

v.

DEBRA A. HAALAND, in her official capacity as Secretary of Interior; LAURA DANIEL-DAVIS, in her official capacity as the Principal Deputy Assistant Secretary of Land and Minerals Management; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT,

Defendants-Appellees,

and

AMERICAN PETROLEUM INSTITUTE and CHEVRON USA, INC.,

Intervenor Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
NO. 1:18-CV-01674
HONORABLE REGGIE B. WALTON, U.S. DISTRICT COURT JUDGE

OPENING BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 27(a)(4), Plaintiffs-Appellants Gulf Restoration Network, Sierra Club, and Center for Biological Diversity submit the following certificate of counsel, under Cir. R. 28(1)(1).

A. Parties

The parties who appeared before the district court are:

1. *Plaintiffs*: Gulf Restoration Network, Sierra Club, and Center for Biological Diversity.

2. *Defendants*: Debra A. Haaland, in her official capacity as Secretary of Interior; Laura Daniel-Davis, in her official capacity as the Principal Deputy Assistant Secretary of Land and Minerals Management; U.S. Department of the Interior; Bureau of Ocean Energy Management.

3. *Intervenors*: American Petroleum Institute and Chevron U.S.A. Inc.

B. Rulings Under Review

The rulings under review are the Order and the Memorandum Opinion entered by the United States District Court for the District of Columbia (Hon. Reggie B. Walton) on April 21, 2020, in case no. 1:18-cv-1674-RBW. The Memorandum Opinion is reported as *Gulf Restoration Network v. Bernhardt,* 456 F. Supp. 3d 81 (D.D.C. 2020).

C. Related Cases

To the best of counsel's knowledge, no related cases are pending in this Court. A related case is pending, however, in the United States District Court for the District of Columbia entitled *Healthy Gulf et al., v. Debra A. Haaland et al.*, Civ. No. 19-cv-707 (RBW) (D.D.C. filed Mar. 13, 2019).

/s/ Brettny E Hardy
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Proc. 26.1 and D.C. Cir. R. 26.1 and 28(a), the Appellants respectfully submit the following corporate disclosure statement: Gulf Restoration Network, Sierra Club, and Center for Biological Diversity have no parent corporation, nor does any person or corporate entity own ten percent or more of the association.

Respectfully submitted,

/s/ Brettny Hardy
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GLOSSARY

APA	Administrative Procedure Act
BSEE	Bureau of Safety and Environmental Enforcement
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
CEQ	Council on Environmental Quality
EIS	Environmental Impact Statement
GAO	Government Accountability Office
FERC	Federal Energy Regulatory Commission
Interior	U.S. Department of the Interior
NEPA	National Environmental Policy Act
OCSLA	Outer Continental Shelf Lands Act
Production Safety Rule	Oil and Gas Production Safety Systems Regulations
Safety Rules	Well Control Rule and Production Safety Rule
Well Control Rule	Blowout Preventer Systems and Well Control Regulations

INTRODUCTION

Plaintiffs appeal from a district court judgment upholding two lease sale decisions by the Department of the Interior ("Interior") in 2018 to offer millions of acres of public land offshore in the Gulf of Mexico for oil and gas development. In offering those sales, Interior made three irrational assumptions that undermined its environmental analysis in violation of the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). First, Interior failed to make an informed decision about whether to hold the lease sales. In evaluating the option of taking "no action," it discounted the benefits of foregoing the lease sales by ultimately concluding that the lease sales and the resulting environmental effects would happen even if Interior did not hold the sales. Second, in concluding that the risk of a catastrophic oil spill was low and in assurances to the public about those risks, Interior relied heavily on two new safety regulations it had adopted to prevent a major accident like *Deepwater Horizon*. However, Interior knew those rules only offered a false promise of protection because Interior was in the process of revising and repealing the safety requirements contained in those regulations. Finally, Interior depended on the effective enforcement of its regulations in the field to further lower spill risks despite recent evidence that its enforcement was in reality insufficient to prevent harm.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question) because the claims arose under NEPA, 42 U.S.C. §§ 4321 *et seq*. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Plaintiffs have Article III standing to seek relief from this Court, as demonstrated by the declarations of Scott Eustis, Peter Galvin, Athan Manuel, Kenneth Saxon, and Todd Steiner, which were filed in support of Plaintiffs' motion for summary judgment in the district court. *See* ECF Nos. 41-3 to 41-7. Plaintiffs timely noticed this appeal on June 18, 2020, within 60 days of the district court's issuance of its April 21, 2020 Order. ECF Nos. 67, 68; *cf*. Fed. R. App. P. 4(a)(1)(B). This appeal is from an order disposing of all parties' claims and a judgment rendered final. *See* Fed. R. Civ. P. 58(a).

STATEMENT OF THE ISSUES

1. Did Interior fail to adequately analyze a true "no action" alternative under NEPA based on an assumption that future lease sales would happen and have substantially the same effects even if it chose not to hold the proposed lease sales?
2. Did Interior comply with NEPA when it relied on the fiction that existing safety regulations would remain effective and lower the risks of a catastrophic oil spill even when it was revising and rescinding those same regulations?

3. Did Interior comply with NEPA when it assumed that it could adequately enforce safety regulations despite a history of lax enforcement and a recent Government Accountability Office ("GAO") report documenting Interior's ongoing failure to adequately enforce its safety requirements?

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the separately bound Addendum.

STATEMENT OF THE CASE

I. The National Environmental Policy Act

NEPA is this country's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1 (2019); [1] *see* 42 U.S.C. § 4331 *et seq.* NEPA secures protections through exacting procedural requirements which place environmental impacts at the forefront of agency decisionmaking. 42 U.S.C. §§ 4321, 4331(a)–(b); *see New York v. Nuclear Regul. Comm'n*, 681 F.3d 471, 476 (D.C. Cir. 2012). The procedural requirements of NEPA are "action-forcing," requiring agencies to carefully "consider[] detailed information concerning

[1] The Council on Environmental Quality ("CEQ") recently revised its regulations implementing NEPA. 85 Fed. Reg 43,304 (July 16, 2020). Those new regulations do not apply to the NEPA analyses at issue here, which began in August 2016. 81 Fed. Reg. 55,480 (Aug. 19, 2016). *See also* 85 Fed. Reg. at 43,373, 43,340 (stating new regulations only "apply to any NEPA processes begun after September 14, 2020").

significant environmental impacts" before committing to a decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA review also ensures full and effective public participation in decisionmaking. 42 U.S.C. § 4332(2)(C); *id.* (NEPA "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience."). This Circuit has confirmed that "[t]he NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). NEPA's aim is not to produce better documents, but to achieve better decisions. 40 C.F.R. § 1500.1(c).

The cornerstone of NEPA is the requirement that an agency "take a 'hard look' at the environmental consequences of its actions, including alternatives to its proposed course." *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) ("*Sierra Club I*") (citations omitted); *see also Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016) ("[T]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed." (internal quotations omitted)); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). In an environmental impact statement ("EIS"), an agency must "[r]igorously explore and objectively evaluate all reasonable

alternatives," including "the alternative of no action," and must "[d]evote substantial treatment to each alternative considered." 40 C.F.R. §1502.14(a), (b), (d). Only by taking into proper account all possible approaches, including total abandonment of a project, "is it likely that the most intelligent, optimally beneficial decision will ultimately be made." *Calvert Cliffs' Coordinating Comm., Inc. v U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

II. History of Oil and Gas Leasing in the Gulf of Mexico

This case concerns two lease sales, which took place in 2018, and offered vast swaths of offshore land in the Gulf of Mexico to oil and gas companies for development. The Bureau of Ocean and Energy Management ("BOEM")[2] offered 77.3 million acres for sale in March 2018 (Lease Sale 250) and 78.2 million acres for sale in August 2018 (Lease Sale 251), making each the largest oil and gas lease sale in U.S. history at the time. AR0001636, 0004130. Prior to 2017, Interior had never held a lease sale spanning the Gulf of Mexico. Historically, Interior only offered leases in certain areas of the Gulf based on factors such as industry interest. AR0004424. Beginning in the 1980s, Interior held separate lease sales for the three

[2] The Secretary of Interior made BOEM responsible for managing the development of offshore resources, including offering lease sales and conducting environmental analyses for the sales, 76 Fed. Reg. 64,432, 64,432 (Oct. 18, 2011); 30 C.F.R. § 550.101, and the Bureau of Safety and Environmental Enforcement ("BSEE") responsible for offshore safety and environmental regulation and enforcement, 76 Fed. Reg. at 64,432; 30 C.F.R. § 250.101.

discrete planning areas of the Gulf: the Western, Central, and Eastern Planning Areas. *Id.*; AR0014291.

However, Interior changed its leasing approach when it adopted a five-year leasing program for 2017–2022 that proposed to offer essentially all unleased acres in the Gulf in each of ten lease sales, two per year. *See* 81 Fed. Reg. 84,612, 84,613 (Nov. 23, 2016); 82 Fed. Reg. 6643 (Jan. 19, 2017). Interior adopted the "region-wide approach" to provide "more frequent opportunity to bid on rejected, relinquished, or expired [Outer Continental Shelf] lease blocks in all three planning areas." AR0001636; *see also* AR0004315–16. The effect of increasing the supply of available acreage in each lease sale and opportunities to bid is reduced competition among bidders, which consequently drives down bid prices and enables companies to acquire broader areas of oil and gas leases for less money. AR0015357.

This expanded leasing program affects an area that is nationally treasured—the Gulf of Mexico—but that has become a sacrifice zone for industrialized energy production. The Gulf of Mexico is ecologically rich and vitally important to the communities all along its coast. It is home to thousands of marine and coastal species, including invertebrates, coral, fish, marine mammals, shore and coastal birds, and five of the world's seven species of sea turtles. AR0014396–428, 0026772–76. The region's abundant resources also support a robust economy,

which includes tourism, recreation, and a "highly popular and profitable recreational fishery." AR0026758, 0026774. The Gulf's commercial fisheries and coastal tourism alone generate more than $40 billion annually in economic activity and produce more than one-third of the nation's domestic seafood supply. Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling, Report to the President* 186–87 (2011) (hereinafter "Nat'l Comm'n");[3] AR0026048.

Oil and gas structures also permeate the Gulf of Mexico, including thousands of platforms, vast networks of pipelines that crisscross the seafloor, numerous transport vessels, storage facilities, and onshore terminals. AR0008304–07, 0008348–59. These industrial operations take a heavy environmental toll; oil leaks and spills, noise, and other accidents cause environmental harm on a daily basis. AR0008289–395, AR0008522–9012. Between 2002 and 2015, there were nearly 5,000 oil spill events just in the near-shore waters of the Gulf. AR0008373–76. From 2007 through 2015, Interior's records show six losses of well control per year on average (48 total) in the Gulf. AR0008396.

Loss of well control as a result of an equipment or human failure usually results in a release of pollutants like oil or gas into the environment and can lead to

[3] This document does not have Bates numbers, but is part of the administrative record. ECF No. 41-2.

the uncontrolled flow of fluids from the well (known as a blowout). *Id*. A blowout is not easy to control and may turn catastrophic, as when the *Deepwater Horizon* drilling rig exploded and sank. *See, e.g.*, AR0014348. Once a blowout occurs, it can release oil and other fluids uncontrolled into the environment for months before being stopped. For example, an oil well owned by Taylor Energy that was damaged by Hurricane Ivan in 2004 continuously released untold gallons of oil for more than fifteen years; Interior estimates that the oil discharge from that site "could continue for 100 years or more." AR0008382–83.

III. Interior's lack of oversight and enforcement

A. Interior's Historical Failings

The number and intensity of spills and accidents in the Gulf stems from two primary causes: (1) new and riskier technologies, and (2) a historical lack of oversight on the part of federal regulators. Over time, the oil and gas industry in the Gulf has drilled in ever deeper waters. AR0008298; Nat'l Comm'n, vii–ix, 39–53, 73. Operations at deeper depths pose unique risks, exposing equipment to strong ocean currents, low water temperatures, and high water pressures. AR0008397; Nat'l Comm'n, ix, 51–53. In addition, experts still understand relatively little about the geology and effects of pressure in ultra-deepwater wells. Nat'l Comm'n, 52.

And, as development has grown riskier, the federal government has both failed to conduct adequate environmental reviews before permitting operations and failed to implement sufficient regulatory controls and oversight to ensure safety. The *Deepwater Horizon* disaster was a product of these failures. The crew on the *Deepwater Horizon* rig were drilling the Macondo well on April 20, 2010, in deepwater—5,000 feet below the sea surface—when a blowout caused an explosion that sank the rig, killing eleven people and causing the largest offshore oil spill in the history of the United States. AR0025300–23. The explosion caused 134 million gallons of oil and unquantified amounts of natural gas to gush continuously and uncontrollably from the Macondo well over 87 days. AR0025307. The spill caused severe damage to the ecosystems throughout the Gulf, killed billions if not trillions of animals, and resulted in significant economic harms to communities along the Gulf Coast. *E.g.*, AR0021560–66, 0025324–960, 0026726–27, 0028408–25, 0028585–96; 0028636–37; Nat'l Comm'n, 185–91.

In the disaster's aftermath, the Presidentially appointed National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling described BOEM's predecessor as an agency that was "unable to . . . [keep] pace with the changing risks and volume of offshore activity." Nat'l Comm'n, 79. The Commission found that the spill was linked to the agency's "culture of complacency with regard to NEPA." *Id*. at 82. The expert panels investigating the

disaster also identified systemic lax and ineffective regulatory enforcement, lack of inspections, and failed implementation of safety reforms as a fundamental cause of the accident. Nat'l Comm'n, 55–85, 126–27. One "consistent element" in the investigations was that stricter federal requirements for blowout preventers[4] and well-control equipment and practices were needed to ensure drilling safety. 80 Fed. Reg. 21,504, 21,508 (Apr. 17, 2015).

Seven years after the *Deepwater Horizon* disaster, in 2017, the GAO found that BSEE (the enforcement bureau established after the spill) still had not corrected deficiencies "in its investigative, environmental compliance, and enforcement capabilities identified by investigations after the Deepwater Horizon incident." AR0027101–05. Among other problems, the report noted that BSEE failed to update its investigative and enforcement policies and procedures and, as a result, failed to "ensure quality control" and "continues to face risks to the effectiveness of its enforcement capabilities." AR0027102–03.

B. Interior's Repeal of Critical Offshore Drilling Safety Measures

After *Deepwater Horizon*, Interior did take some regulatory action to improve drilling and production safety. In 2016, BSEE enacted two sets of

[4] Blowout preventers are mechanisms of last resort that are intended to seal a well and prevent oil and gas from erupting from the seafloor if operators lose control of the well. AR0008398.

offshore safety regulations to implement lessons learned from the disaster and help ensure that the same errors are not made again: (1) the Blowout Preventer Systems and Well Control Regulations ("Well Control Rule") and (2) the Oil and Gas Production Safety Systems Regulations ("Production Safety Rule") (collectively, the "Safety Rules"). 81 Fed. Reg. 25,888 (Apr. 29, 2016); 81 Fed. Reg. 61,834 (Sept. 7, 2016). Before Interior could realize the benefits of its new measures, however, it repealed many of these new regulatory requirements, increasing the risks of offshore accidents and oil spills.

The Well Control Rule prescribed dozens of new technological and methodological requirements to reduce the risk of a loss of well control and blowout during drilling operations. 81 Fed. Reg. at 26,013–38; *see also* 80 Fed. Reg. at 21,509–11. Interior concluded each of these measures would improve drilling safety and significantly reduce the risks of a catastrophic spill. *E.g.*, 81 Fed. Reg. at 25,890–91, 25,894, 25,986–87 & n.27, 25,990. The Production Safety Rule required "improved safety and pollution prevention equipment . . . design, maintenance, and repair requirements"—which Interior similarly concluded would reduce the number of oil spills and were "*necessary* to improve human safety, environmental protection, and regulatory oversight." 81 Fed. Reg. at 61,834 (emphasis added); *see also* AR007275.

Just one year later, under a new administration, Interior began working to

repeal many of the Safety Rules' most critical provisions. In December 2017, Interior proposed to eliminate the Production Safety Rule's inspection requirements and minimum system design standards, deferring instead to industry to decide for itself what design and inspection protocols are safe enough. 82 Fed. Reg. 61,703, 61,704, 61,709, 61,715 (Dec. 29, 2017). At around the same time, Interior proposed extensive cuts to the Well Control Rule, including, among other things, eliminating blowout preventer requirements, independent safety inspections, and drilling monitoring and oversight requirements. 83 Fed. Reg. 22,128 (May 11, 2018). By making these changes, Interior reverted to a regulatory baseline it previously said had "the potential for another well control event with consequences similar to those of the *Deepwater Horizon* incident," 81 Fed. Reg. at 25,991, all in the name of "promot[ing]" oil and gas development in the Gulf and ensuring it is "not unnecessarily delayed or inhibited." AR0004250. Interior finalized these repeals in 2018 and 2019. 83 Fed. Reg. 49,216 (Sept. 28, 2018); 84 Fed. Reg. 21,908 (May 15, 2019).

IV. Interior's Irrational Consideration of Environmental Impacts

BOEM decided to hold the two lease sales at issue in this case in March and August of 2018: Offshore Lease Sales 250 and 251. 83 Fed. Reg. 7070 (Feb. 16, 2018); 83 Fed. Reg. 32,897 (July 16, 2018). BOEM relied on the same EIS to inform its decisions for both lease sales: the Lease Sale EIS, which BOEM

published in December 2017. AR0015471–6365; 82 Fed. Reg. 59,644 (Dec. 15, 2017).[5] The Lease Sale EIS directly "inform[ed] the decision on whether and how to proceed" with each of the two lease sales. AR0001635, 0004129. In particular, the Lease Sale EIS should have informed whether or how to adjust the number or locations of acreage it offered for lease to avoid unacceptable environmental impacts; the lease sale stage is the last point at which BOEM can make such adjustments. *See, e.g.*, AR0016913 ("During the pre-lease sale process, the size of any individual lease sale could be reduced, and a smaller area offered for leasing, should circumstances warrant."). However, the Lease Sale EIS suffered from two fundamental flaws: (1) it failed to adequately analyze a no action alternative based on a conclusory and irrational assumption about future development; and (2) it relied on fundamentally incorrect assumptions that Interior's offshore safety regulations would remain in place and be rigorously enforced to adequately reduce oil spill risks.

A. Interior's Irrational Consideration of a No Action Alternative

In the Lease Sale EIS, BOEM expected holding each of the proposed lease

[5] The Lease Sale EIS tiered to, updated, and incorporated by reference two previous, broader environmental analyses that BOEM had completed: (1) a Programmatic EIS ("Program EIS") analyzing the effects of the five-year program "on national and regional scales,"AR0014278; *see* AR0014242–15179, and (2) a Programmatic Multi-sale EIS ("Multi-sale EIS"), AR0005502, *see* AR0005417–7274. AR0015542.

sales would result in a substantial amount of oil and gas development in the Gulf. BOEM estimated that each lease sale would result in the development of between 0.211 and 1.118 billion barrels of oil and between 0.547 and 4.424 trillion cubic feet of natural gas. AR0001636, 0004130. BOEM also forecast that holding each sale would substantially increase the amount of oil and gas activities in the Gulf: resulting in as many as 1,700 new wells and 2,100 kilometers of new pipelines over the next 50 years. AR0015582–83.

Despite this, in the Lease Sale EIS, BOEM painted an inaccurate picture of the effects of holding the lease sales by artificially inflating the expected comparative effects of the status quo—the "no action" alternative. When briefly stating what a "no action" alternative entails, BOEM correctly stated it would mean not holding a lease sale (Alternative E). AR0015553–60. And BOEM acknowledged that not holding a lease sale would avoid incremental effects on water, air, and other resources. *E.g.*, AR0015497–508. But, at the same time, BOEM paradoxically concluded that the activity levels and the environmental effects of holding a lease sale (the preferred alternative) would occur in the future even under the no action alternative. *E.g.*, AR0015559–60. BOEM based this conclusion on the assumption that even if the proposed lease sale were not held, the leases eventually would be sold and the resulting development would happen anyway: "If a lease sale were to be cancelled, the resulting development of oil and

gas would most likely be postponed to a future lease sale; therefore, the overall level of [Outer Continental Shelf] oil- and gas-related activity would only be reduced by a small percentage, if any." AR0015488. The Assistant Secretary of the Interior for Land and Minerals Management adopted those conclusions—that not holding the lease sale would have no significant environmental benefits—when he signed the final Records of Decision to hold Lease Sales 250 and 251. AR0001640, 0004135.

B. Interior's Reliance on Unreasonable Assumptions About Safety Measures

In the Lease Sale EIS, BOEM depended substantially on the application and rigorous enforcement of Interior's new safety regulations to lower environmental risks and harms from development of new leases. First, BOEM relied on an assumption that the Safety Rules would be fully implemented to conclude that losses of well control and blowouts "are rare events and of a short duration," AR0008551, 0015659, and that a catastrophic spill "is not reasonably foreseeable and not part of a proposed action," *e.g.*, AR0008551, 0015508. *See also* AR0009814–15, 0009820, 0014348, 0014563, 0016346, 0016350. BOEM also relied on these Safety Rules when presenting the risks and explaining the expected oversight of new lease development to the public. *See, e.g.*, AR0009776, 0009796, 0009814–15, 0012465, 0016309, 0016953.

Yet BOEM knew at the time that its sister bureau within Interior, BSEE, was in the process of repealing many of the Safety Rules' most critical measures. *E.g.*, AR0016347 (acknowledging in response to comments that BOEM was "aware of changing regulations"); *see also* Answer ¶ 122, ECF No. 24. BOEM did not even acknowledge that these revisions were taking place in the body of the Lease Sale EIS, however, much less address the effect of these changes on its assumption that the Safety Rules would be implemented in full.

Second, BOEM relied on a presumption that BSEE would rigorously enforce regulations and lease stipulations to adequately mitigate the risks of oil spills, vessel collisions, and other accidents from development of new leases. *E.g.*, AR0015601, 0015543–44, 0015561–65, 0015808, 0016342–44, 0016349–50. BOEM was aware, however, that the GAO had recently found BSEE's enforcement was *not* rigorous. In its Program EIS, BOEM had acknowledged the need to evaluate the implications of those findings—but in the Lease Sale EIS, BOEM expressly declined to consider them, while still assuming that BSEE would rigorously enforce its now outdated safety regulations. AR0015118, 0016346–47.

Ultimately, in deciding to hold Lease Sales 250 and 251, the Assistant Secretary relied on BOEM's assessment that BSEE had "raised standards" to conclude that a catastrophic spill "is not reasonably expected to result from th[e]

lease sale" because BSEE maintained "strong regulatory oversight and appropriate measures to protect human safety and the environment." AR0001638, 0004132.

V. Proceedings Below

In 2018, Plaintiffs challenged BOEM's authorization of Lease Sales 250 and 251 under NEPA because BOEM's assumption that future lease sales were inevitable was unreasonable and BOEM irrationally relied on safety measures that Interior was actively repealing. The district court denied summary judgment to Plaintiffs. *Gulf Restoration Network,* 456 F. Supp. 3d at 105.

The district court held, *inter alia,* that it was reasonable for BOEM to assume that future lease sale(s) would occur and present substantially the same environmental risks and effects even if BOEM took no action. The district court concluded that the agency's assumption was reasonable given that one of the policy directives of the underlying authorizing statute, the Outer Continental Shelf Lands Act ("OCSLA"), calls for expeditious development. The district court also held that BOEM did not need to consider the implications of the Safety Rule repeals because the repeals did not yet have final legal effect at the time BOEM issued the Lease Sale EIS. Further, the court found that BOEM was entitled to rely on BSEE's enforcement to mitigate environmental risk because there was no evidence that BSEE was not entirely abrogating its enforcement responsibilities. Plaintiffs timely appealed. ECF No. 68.

SUMMARY OF ARGUMENT

BOEM made its decisions to offer two massive lease sales—each of which will lead to the development of as many as 1,700 new wells and 2,100 kilometers of new pipeline in the Gulf of Mexico—based on flawed environmental analysis and false assumptions. BOEM's NEPA violations in the Lease Sale EIS led it to underestimate the true environmental impacts of the lease sales.

First, BOEM arbitrarily assumed that the environmental impacts of holding the sales would only be postponed—not avoided—if the agency canceled Lease Sales 250 and 251 (took no action) because future lease sales and resulting development will inevitably happen. As a result, BOEM failed to take the objective hard look that NEPA demands and presented an incomplete and misleading picture of the environmental benefits from not offering the lease sales. Further, BOEM's assumption runs headlong into the underlying statute—OCSLA—which calls for a thorough evaluation of decisions at every stage of the leasing process, most especially at the lease sale stage, to ensure the sale is in the national interest and avoids environmental harms.

Second, BOEM assumed that two important regulatory safety mechanisms would be implemented to reduce the oil spill risk and environmental harm from the lease sales: (1) the 2016 Safety Rules; and (2) BSEE's rigorous and effective enforcement of safety regulations. But BOEM knew that these assumptions were

wrong at the time it made them. BOEM was keenly aware that BSEE was actively working to repeal the 2016 Safety Rules and BOEM ignored a recent GAO report documenting BSEE's ineffective enforcement. BOEM nonetheless leaned into these two false assumptions and assured the public and decisionmakers that new leasing carries minimal risk. In doing so, BOEM contravened NEPA's primary disclosure objectives by presenting an inaccurate picture of the lease sales' environmental effects.

This Court should vacate the Lease Sale EIS, the Records of Decision to hold the lease sales, and the leases issued pursuant to those sales. Vacatur is especially appropriate here to further NEPA's fundamental purpose to accurately inform decision-makers and the public *before* the agency makes a decision.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011). The Court reviews BOEM's compliance with NEPA under the APA. *Sierra Club I*, 867 F.3d at 1367. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious if an agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a

'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The Supreme Court has articulated a "rule of reason" standard inherent in NEPA review. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). Under that standard, courts "do not hear cases merely to rubber stamp agency actions," *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000), nor can they "accept [an agency's] bare conclusory allegations as fact," *Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997). Instead, the "reviewing court must conduct a searching and careful inquiry into the record in order to assure itself that the agency has examined the relevant data and articulated a reasoned explanation for its action including a rational connection between the facts found and the choice made." *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1499 (D.C. Cir. 1984) (quoting *Burlington Truck*, 371 U.S. at 168) (internal quotations omitted); *accord State Farm*, 463 U.S. at 43. Likewise, this court is "responsible for holding agencies to the standard the statute establishes." *Sierra Club I*, 867 F.3d at 1367–68. Under the standards of NEPA, "[a]n EIS is deficient, and the agency action it undergirds is arbitrary and capricious, if the EIS does not contain 'sufficient discussion of the relevant issues and opposing viewpoints.'" *Id*. at 1368 (quoting

Nevada v. Dep't of Energy, 457 F.3d 78, 93 (D.C. Cir. 2006)); *id*. ("The overarching question is whether an EIS's deficiencies are significant enough to undermine informed public comment and informed decisionmaking.").

ARGUMENT

I. BOEM's No Action Alternative was Based on Irrational Assumptions.

BOEM's analysis of the two massive lease sales at issue recognized that canceling those sales would avoid incremental environmental impacts. BOEM included a "no action" alternative—Alternative E—which BOEM described as "the cancellation of a single proposed [] lease sale." AR0015488, 0015559. BOEM recognized that if it canceled the proposed lease sales, the resulting environmental impacts "would not occur." AR0015488; *see also* AR0015497–508 (concluding that incremental impacts on air, water, and other resources would be avoided).

Nevertheless, BOEM ultimately discounted the long-term environmental benefit of selecting this "no action" alternative. BOEM improperly assumed that the effects would still occur because the proposed lease sale would simply be postponed to a future date along with the resulting oil and gas exploration, development, and production activities. *E.g.*, AR0015488 ("If a lease sale were to be cancelled, the resulting development of oil and gas would most likely be postponed to a future lease sale . . . ."), 0015559–60 (same), 0015613 (selecting "no action" alternative would mean that "[t]he opportunity for development of the

estimated oil and gas that could have resulted from a proposed action (i.e., a single proposed lease sale) . . . would be precluded or postponed to a future lease sale"). Further, BOEM did not consider "a separate treatment of the cumulative effects under Alternative E" because "the opportunity for development" that could have resulted from the proposed sale "would be precluded or postponed to a future lease sale." AR0015613.[6]

BOEM's assumption that a future lease sale and development would happen regardless of its decisions about Lease Sales 250 and 251 vitiates NEPA's fundamental requirement to compare the effects of holding the lease sales against a status quo without the sales. Moreover, nothing in the statutory directives, purposes, and policies of the underlying statute, OCSLA, justifies this assumption. To the contrary, OCSLA emphasizes that BOEM must evaluate and thoroughly compare all alternatives, particularly at this most critical stage of the leasing process. Finally, evidence in the administrative record demonstrates that even if BOEM wished to assume that some future lease sale may occur, the effects of a postponed lease sale would be substantially different, contrary to BOEM's summary treatment of the issue.

[6] The district court recognized that BOEM relied on these assumptions in evaluating the "no action" alternative. *Gulf Restoration Network*, 456 F. Supp. 3d at 98 (stating BOEM assumed "that the effects of holding the lease sales now, as opposed to sometime in the future, are virtually the same").

A. BOEM's Conclusions Turn Both OCSLA and NEPA on Their Heads.

Neither OCSLA nor NEPA support a conclusion that lease sales are inevitable. First, OCSLA specifically requires that BOEM prepare an EIS at the lease sale stage—a "critical stage" in the leasing process.[7] *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 481 (D.C. Cir. 2009) (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999)); 43 U.S.C. § 1346(a)(1); *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984). This requires BOEM "to take into account the full environmental effects of its actions when deciding whether and in what manner to pursue the lease sale." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 504 (9th Cir. 2014) (citing 42 U.S.C. § 4332(2)(C)). "It is also only at the lease sale stage that the agency can take into account the effects of oil production in deciding which parcels to offer for lease." *Id.* OCLSA authorizes BOEM to hold lease sales only if, after this full environmental consideration, they are necessary to "meet national energy needs." 43 U.S.C. § 1344(a). *See also* 43 U.S.C. § 1332(3) (OCSLA policy that any development be "subject to environmental safeguards").

[7] OCSLA prescribes four, tiered stages for the Secretary to manage offshore oil and gas development: 1) five-year leasing programs; 2) lease sales; 3) exploration plans; and 4) development and production plans. 43 U.S.C. §§ 1344, 1337, 1340, 1351.

Contrary to the district court's findings, OCSLA does not promote the expeditious and orderly development of the outer continental shelf in a vacuum. *See Gulf Restoration Network*, 456 F. Supp. 3d at 97. The statute instead explicitly requires development to be conditioned on environmental safeguards and requires an appropriate balance between economic and environmental considerations at every stage of the leasing process. *E.g.*, 43 U.S.C. §§ 1344(a)(3), 1340(g)(3), 1351(h)(1)(D)(i), 1332(3) ("expeditious and orderly development" of resources is "subject to environmental safeguards."); *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015) ("Rigorous substantive requirements accompany each procedural stage. Congress calls on Interior to strike an appropriate balance at each stage between local and national environmental, economic, and social needs.").

As a result, OCSLA does not prescribe a certain amount of activity, or a continuous number of lease sales to occur in the same area from one year to the next. Rather, under the plain language of OCSLA, the frequency, size, and locations of lease sales should change, based on varying environmental considerations and national interests. As the district court recognized, OCSLA "does not mandate" that every planned lease sale will happen. *Gulf Restoration Network*, 456 F. Supp. 3d at 97. In light of the balancing that OCSLA requires,

BOEM's assumption that future lease sales with substantially similar environmental effects will happen was inherently unreasonable.

This Circuit has emphasized the importance of evaluating conservation alternatives even in light OCSLA's policy of expeditious development. In *Natural Resources Defense Council v. Hodel*, Interior argued, in part, that it need not consider certain conservation alternatives in an EIS for a leasing program because OCSLA calls for continued or increased development. 865 F.2d 288 (D.C. Cir. 1988). The D.C. Circuit squarely rejected that argument, concluding that it "proves too much, because it would relieve the Secretary of [her] duty under NEPA to consider alternatives altogether." *Id*. at 296. Such an argument allows one of OCSLA's policy objectives to swallow the agency's NEPA duties, something the statutory language of OCSLA explicitly forbids. *Id*. (citing 43 U.S.C. § 1866(a)) ("OCSLA explicitly provides that nothing in the Act diminishes the requirements of NEPA."). So too here. The *potential* for future development consistent with OCSLA's policy directives does not mean that BOEM can assume it is inevitable or that the environmental risks will be substantially the same.

An informed analysis of alternatives to a proposed action is integral to NEPA's goal of ensuring that agencies incorporate environmental concerns in decision-making. BOEM violated this fundamental requirement because its Lease Sale EIS failed to fully analyze and consider what would happen if no action is

taken. 40 C.F.R. § 1502.14(a)–(d) (requiring agencies to rigorously evaluate, in comparative form, a no action alternative). An "[a]nalysis of the 'no-action alternative' is at the heart of the NEPA process; thus, failure to provide a valid one casts a shadow over the process as a whole." *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013). According to CEQ, an accurate analysis of no action "provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives." 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). As the Ninth Circuit recently stated, agencies must engage in an "[i]nformed and meaningful" analysis of the no action alternative "to provide a baseline against which every action alternative is evaluated." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734–35 (9th Cir. 2020) (quoting *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988)).

BOEM's assumption that a future lease sale will undoubtedly occur undermines the informed decision-making that NEPA requires. As a practical matter, this erases all practical difference between the effects of the two choices of taking action and taking no action. The salient point is not whether or to what extent BOEM included a "no action alternative" in the EIS. The legal problem is that BOEM's assumption that the same or similar action would occur in the future imported the action and its effects into the no-action baseline, rendering a comparison between those choices meaningless. By equating the effects of the

alternatives, BOEM "misapprehend[ded] [] the baseline conditions," and rendered its EIS arbitrary and capricious. *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012); 40 C.F.R. § 1502.14(a). *See N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 599–600, 602–03 (4th Cir. 2012) (persuasively noting that "courts not infrequently find NEPA violations when . . . the baseline assumes the existence of a proposed project" when holding that agency's failure to disclose such assumptions violated NEPA).

The whole point of NEPA's alternative analysis is to disclose and consider "what if" there were no lease sale now or in the future. BOEM dismissed that question by concluding that there would inevitably be a lease sale with the same risks. BOEM's unsupported assumption that the sale of leases would remain constant, regardless of whether Lease Sales 250 and 251 took place, avoided these questions and its resulting decisions were neither "fully informed" nor "well-considered." *See Nevada*, 457 F.3d at 93 (quoting *Nat. Res. Def. Council v. Hodel,* 865 F.2d at 294). Taken to its logical end, BOEM's position would leave lease sale action as a *fait accompli*. The only choices left to evaluate in an EIS would be marginal questions about the precise size or scope of a lease sale, not whether to hold one in the first place. But lease sales are simply not preordained and NEPA does not allow agencies to predetermine the outcome of their analysis or engage in this kind of meaningless paper exercise. *See Citizens Against*

Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991) ("Deference [] does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies . . . .").

B. BOEM'S Assumption Contradicts the Record.

Moreover, even if BOEM could assume that some future lease sales would happen, BOEM could not reasonably conclude that the environmental impacts from postponed lease sales "would not significantly change." AR0015559–60. The record demonstrates that delaying the proposed lease sales would have meaningfully different consequences and environmental effects, which BOEM did not consider. First, oil and gas supply and demand over time is highly volatile in nature, changing the number and sizes of leases that industry will purchase and the amount of resulting development and production. *See* AR0015341–42, 0015614 (noting "uncertainty in oil prices" makes future oil and gas activities speculative), 0015632 (same). For example, lower oil and gas demand or increased energy supply from elsewhere (*e.g.*, growing renewables) in the future may reduce industry interest in purchasing leases in the Gulf of Mexico. AR0015293; *see also* AR0014284–85.[8]

[8] Even in just the past year, leasing activity has changed significantly. Oil and gas prices have plummeted and industry interest has dropped. *See Short-Term Energy Outlook*, EIA (Apr. 1, 2021), https://www.eia.gov/outlooks/steo/. Interior has recently "paused" leasing in order to evaluate the oil and gas leasing program and has withdrawn its earlier decision to hold a lease sale this year. 86 Fed. Reg. 7619,

Second, the scope of leases offered in Lease Sales 250 and 251 were not the norm. Offering essentially all unleased acres is the exception to the decades-long practice of offering smaller, discrete portions of the Gulf of Mexico in each lease sale. *See, e.g.*, AR0004315. BOEM cannot rationally assume this more recent deviation from the typical leasing practice will continue in the future and result in future lease sales of the same scope and magnitude.

Finally, the record demonstrates that advances in drilling technology and geologic information over time influence the amount and geographic scope of the leases that are sold. AR0015632. For example, there is significantly more industry interest in deepwater tracts now than there was several years ago, resulting in different patterns of lease bidding and, subsequently, different risks and effects from development of those leases. *See, e.g.*, AR00008397, 0015244 ("The greatest undiscovered resource potential in the U.S. [Outer Continental Shelf] is forecast to exist in the deep and ultra-deep waters of the [Gulf of Mexico]."); Nat'l Comm'n, vii–ix, 39–53, 73.

Given these challenges and technological changes, the water depths targeted for lease bids by industry likely will change over time, along with the attendant

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7624 (Feb. 1, 2021); 86 Fed. Reg. 10,132 (Feb. 18, 2021). And, in the past, Interior has cancelled planned lease sales. *E.g.*, Chukchi Sea, Lease Sale 237, 80 Fed. Reg. 74,796 (Nov. 30, 2015); Beaufort Sea, Lease Sale 242, 80 Fed. Reg. 74,797 (Nov. 30, 2015).

risks and uncertainties. Alternatively, the nation's demand for oil (or prices) could drop and make such deepwater drilling less economical and unlikely to happen overall. The point is that BOEM cannot summarily assume that even if future lease sales happen, Interior will offer the same areas for sale, that industry will have the same interest in leasing in the same areas or in the same quantity, or that environmental risks would not be significantly different.

At least two other courts of appeal have invalidated agency action based on similar incorrect assumptions. In *WildEarth Guardians v. BLM*, the Tenth Circuit evaluated an EIS for an agency's issuance f several coal leases. 870 F.3d 1222 (10th Cir. 2017). In the EIS, the agency determined that there was no significant difference between the total carbon dioxide emissions in the preferred alternative and the no-action alternative because, even if it denied the leases, the same amount of coal would be sourced from another location and burned in the future. *Id*. at 1227–28. "[T]he blanket assertion that coal would be substituted from other sources, unsupported by hard data, does not provide 'information sufficient to permit a reasoned choice' between the preferred alternative and no action alternative." *Id*. at 1235. Here, BOEM has made blanket assertions that future lease sales will occur and present the same environmental risks under the no action alternative without providing any record evidence or rational explanation. As the Tenth Circuit explained, such a failure to adequately distinguish between

alternatives defeats NEPA's purpose and leads to an "uninformed agency decision" that does "not adequately disclose the [agency's] rationale to the public." *Id*. at 1237.

In *Center for Biological Diversity v. U.S. Department of Interior* ("*CBD*"), the Ninth Circuit similarly held that an EIS for a federal land exchange with a mining company was invalid because the agency assumed that the "mining would occur in the same manner" and result in the same environmental impacts no matter who owned the lands. 623 F.3d 633, 642–43 (9th Cir. 2010). In reality, the legal regimes governing mining activities imposed more protection for lease activities if the lands remained in federal hands (under the no action alternative) than if the company held title (under the action alternatives). *Id*. As here, the manner and extent of mining activity depended on the details of the extent, scope, and timing of future mining activities under these different legal regimes; so the agency could not simply assume the activities would occur in the same way under the action and no action alternatives. *Id.*; *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of the Interior*, 655 F. App'x 595, 598 (9th Cir. 2016) ("[A] 'no action' alternative is 'meaningless' if it assumes the existence of the very plan being proposed." (quoting *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008))).

The district court distinguished *CBD* on the basis that the underlying assumptions were at odds with the controlling statute in that case. *Gulf Restoration Network*, 456 F. Supp. 3d at 98. But that is a distinction without a difference. The Ninth Circuit focused not on the underlying reason for the differences, but on the existence of the differences and held both that the statutory realities and the evidentiary record did not support the agency's assumptions. *CBD*, 623 F.3d at 643–46. The agency's attempt to equate the nature and scope of activities, which undermined a comparison between alternatives, were serious violations of "black-letter law under NEPA." *Id*. at 645. Here, like in *CBD*, record evidence does not support BOEM's assumptions and BOEM failed to make a meaningful comparison of the long-term environmental consequences of the alternatives. *Id*. at 645–46.

BOEM's faulty assumption that a future lease sale would act as a near perfect substitute was arbitrary and capricious, prevented BOEM from "tak[ing] into proper account" the environmental effects likely to result from the proposed lease sale, and caused it to undervalue the environmental benefits of "total abandonment" of the 2018 lease sales. *Calvert Cliffs'*, 449 F.2d at 1114. "Without substantive, comparative environmental impact information regarding" the no action alternative, the ability of the Lease Sale EIS to inform BOEM's decisions to hold the 2018 lease sales and "facilitate public involvement" was "greatly degraded." *WildEarth*, 870 F.3d at 1227 (quoting *New Mexico ex rel. Richardson*

v. BLM, 565 F.3d 683, 708 (10th Cir. 2009)). BOEM's improper treatment of the no action alternative violates NEPA and is arbitrary and capricious under the APA.

II. BOEM Relied on Incorrect Assumptions to Underestimate Safety Risks.

A. BOEM Premised Its Assessment of Catastrophic Oil Spill Risk on an Admittedly Incorrect Assumption Regarding Applicable Regulations.

BOEM expressly and substantially relied on the two 2016 Safety Rules when assessing the likelihood of a catastrophic oil spill throughout the Lease Sale EIS. BOEM's assumption that the Rules would govern operations on new leases in the future was a significant—if not the primary—basis for concluding that the risk of a catastrophic spill is low. However, when BOEM completed the Lease Sale EIS, BOEM knew that its sister bureau within Interior, BSEE, was in the process of repealing many of the 2016 Safety Rules' most important protections. Even though the precise changes to the Safety Rules were not yet final, it was reasonably foreseeable at the time BOEM was completing the Lease Sale EIS that the existing Safety Rules would be substantially revised. BOEM's unreasonable assumption that the Safety Rules would remain in effect unchanged is arbitrary and capricious under the APA and violates NEPA's hard look requirement.

1. BOEM relied heavily on the false assumption that implementation of the 2016 Safety Rules would continue.

BSEE originally promulgated the Safety Rules in 2016 to enact measures it determined were necessary to improve worker safety and reduce the risks of

blowouts, losses of well control, and catastrophic oil spills. *E.g.*, 81 Fed. Reg. at 25,890; 81 Fed. Reg. at 61,838. BSEE concluded, based on extensive evidence, that the measures—particularly those governing real-time monitoring and blowout preventer specifications—would significantly reduce such risks. *E.g.*, 81 Fed. Reg. at 25,890–91, 25,894, 25,986; *see also* 81 Fed. Reg. at 61,834.

BOEM leaned heavily on the benefits of the original 2016 Safety Rules in the Lease Sale EIS to justify its conclusions that operations under the 2018 lease sales would be safe. In evaluating the risk of a spill, BOEM considered historical spill data, but also noted that in addition to historical spill data, "[a]ctual risk can be highly variable depending on . . . an operator's approach to risk management." AR0014349. So BOEM evaluated what effect the Safety Rules would have on future risk, particularly on the risk of a catastrophic spill. The Safety Rules' improvements formed the primary bases for BOEM's conclusion that the likelihood of a catastrophic oil spill is so low that one is not reasonably foreseeable to result from a lease sale, and thus does not warrant concern. *See, e.g.*, AR0008551, 0015508, 0015659. BOEM concluded that the then-existing Rules' new provisions (*e.g.*, blowout preventer testing, well containment systems, and regulatory oversight) "make [a catastrophic spill] event less likely than in the past." AR0014348. BOEM explained that it ultimately did not expect a catastrophic spill "partly given the extremely low probability of such a spill in general, but more

importantly, as a result of the comprehensive reforms to [Outer Continental Shelf] oil and gas regulation and oversight put in place after the *Deepwater Horizon* event," including the Well Control Rule. AR0014563 (citing AR0016953); *see also, e.g.*, AR0008398, 0009814–15, 0015080, 0016309, 0016346, 0016350. BOEM went on to state that "these reforms help ensure that the U.S. can safely and responsibly expand" offshore oil and gas development. AR0014563.

In addition to relying on the Safety Rules in its catastrophic spill assessment, BOEM repeatedly cited the Safety Rules when presenting environmental impacts to the public and decisionmakers elsewhere in its NEPA process. *E.g.*, AR0009776, 0009796 (stating "[s]afety measures and technologies have increased since the *Deepwater Horizon* oil spill" in response to comments). For example, in response to public comments raising concerns about future well blowouts, BOEM stated that "finalization of the Well Control Rule on April 29, 2016, resulted in reforms, such as increased regulation of blowout preventers, that are expected to decrease the probability of deepwater blowouts and the extent of oil spills from such blowouts." AR0016308–09; *see also, e.g.*, AR0009776, 0009796, 0009814–15. BOEM also responded to the National Oceanic and Atmospheric Administration's critiques of its catastrophic risk analysis by pointing to "regulatory reforms" from the Safety Rules. AR0015080. BOEM stated it relied on "the changes in regulations as a result of the 2010 *Deepwater Horizon* explosion,

oil spill, and response to determine the impact-producing factors that have the greatest impact potential." AR0008532. And the agency distributed materials at its public meetings about the lease sales touting the benefits of the rules. *See, e.g.*, AR0016953, 0012465. The Records of Decision for the lease sales ultimately confirm that BOEM relied on the Safety Rules during "its environmental analyses;" indeed, the Records of Decision themselves relied directly on post-*Deepwater Horizon* reforms as evidence that the risk of major oil spills is low. AR0001638, 0004132–33.

2. BOEM knew BSEE was substantially revising and rescinding those same Safety Rules.

At the same time BOEM was relying on the Safety Rules as part of its NEPA analysis for the lease sales, its sister agency, BSEE, was moving forward with repealing many of the Rules' most important safety provisions. The planned revisions and repeals to the Safety Rules undermined the very protections BOEM relied on to conclude risk was low. For example, BSEE planned to repeal dozens of Well Control Rule provisions, the most consequential of which included: (1) eliminating requirements to obtain regulator approval before taking certain higher-risk drilling actions; (2) eliminating required improvements to blowout preventers that the device be capable of sealing the wellbore "at all times" and "achiev[ing] an effective seal" and removing the "centering mechanism" requirement; (3) removing requirements to monitor wells in real-time to detect

potential problems; (4) eliminating required independent certifications that certain equipment will function properly; and (5) eliminating the minimum "safe" level at which well pressures must be kept. 83 Fed. Reg. at 22,132–42. BSEE also planned to eliminate the Production Safety Rule's inspection requirements and minimum system design standards that ensure drilling systems will function effectively in all conditions that may be encountered. 82 Fed. Reg. at 61,704, 61,709, 61,715, 61,709.

As a consequence of these planned changes, the risks of blowouts, losses of well control, and catastrophic spills from development of future leases necessarily increased. *Cf., e.g.*, 81 Fed. Reg. at 25,990 ("BSEE considers this [Well Control Rule] *necessary* to reduce the likelihood of any oil or gas blowout . . . ." (emphasis added)); *id.* at 25,991 (stating that declining to enact Well Control Rule's measures would create "the potential for another well control event with consequences similar to those of the *Deepwater Horizon* incident"); 81 Fed. Reg. at 61,834 (similar findings for Production Safety Rule).

BOEM was aware of these planned changes, but held steadfast to its misguided assumption in the Lease Sale EIS that the original Safety Rules would stay in place. On the same day that BOEM released the draft Lease Sale EIS, President Trump issued Executive Order 13,783 directing Interior to review all policies and regulations "that potentially burden the development or use of

domestic" fossil fuels and required Interior to "as soon as practicable, suspend, revise, or rescind" those policies or regulations. 82 Fed. Reg. 16,060, 16,093, 16,093–94 (Mar. 31, 2017). In accordance with that Order, Secretary Zinke, one month later, issued Secretarial Order 3350, which specifically directed BSEE to review, reconsider, and recommend revising or rescinding provisions of the Safety Rules. AR0004251, 0016620. On December 6, 2017, nine days before BOEM published notice of the final Lease Sale EIS, BSEE released its draft environmental assessment of the Safety Rule revisions. AR0007277; AR0007343; 82 Fed. Reg. 59,644 (Dec. 15, 2017). And, by the end of that month, BSEE published a proposed rule to revise and rescind parts of the Production Safety Rule and submitted a proposed rule to rescind many of the measures in the Well Control Rule to the Office of Management and Budget. 82 Fed. Reg. 61,703 (Dec. 29, 2017); *See* Compl. ¶ 121, ECF No. 1; Answer ¶ 121, ECF No. 24.

BOEM even acknowledged in response to public comments on the Lease Sale EIS that it was "aware of changing regulations." AR0016347; *see also* Answer ¶ 122, ECF No. 24 ("Defendants admit proposed revisions to the Production Safety Rule and Well Control Rule were under consideration when BOEM finalized the 2018 [Lease Sale] EIS."). Yet, BOEM simply stated, "The information used to conduct these analyses was the best available information at that time." AR0016347. However accurate the information about the Safety Rules

"was" in the past, it no longer was correct or the "best available" at the time BOEM completed its NEPA analysis.[9]

3. BOEM's reliance on unreasonable and incorrect assumptions about the Safety Rules violated NEPA and the APA.

BOEM's reliance on the incorrect assumption that the Safety Rules would remain in place unchanged in the face of evidence to the contrary violates NEPA's "hard look" requirement and the APA. NEPA requires agencies to use accurate assumptions and information when evaluating the environmental effects of an action. 40 C.F.R. §§ 1500.1(b), 1502.24. It follows that "[a]n agency fails to meet its 'hard look' obligation when it 'rel[ies] on incorrect assumptions or data' in drafting an EIS." *Native Ecosystems Council v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018) (alteration in original) (citation omitted); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 198 (D.D.C. 2008) (use of inaccurate data in model invalidates EIS). "[T]he adequacy of an [EIS] is judged by reference to the information available to the agency at the time of review." *City of Bos. Delegation*

[9] BOEM did finally recognize the Safety Rule repeals in its Record of Decision for Lease Sale 251 through an administrative record "insert." AR0004052–56, 0004132–33. BOEM's attempt to address the issue at the eleventh hour underscores the irrationality of BOEM's refusal to consider the changes before that point. Nevertheless, BOEM's brief discussion in the insert and Record of Decision was inadequate and incorrect, and BOEM's use of a post-EIS insert was procedurally improper under NEPA because the explanation was not presented in the EIS. *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1104 (9th Cir. 2016).

v. FERC, 897 F.3d 241, 253 (D.C. Cir. 2018). And, under the APA, "[r]eliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003).

The district court did not reach the question of whether BOEM's use of false assumptions about the Safety Rules violated NEPA. Rather, it erred by crediting BOEM's argument that the agency was not required to consider the implications of the repeals because BSEE had not yet finalized its revisions to the Safety Rules, so the rules had no independent legal effect. *Gulf Restoration Network*, 456 F. Supp. 3d at 100. But whether the Safety Rules had independent legal effect was not the right lens to view the issue because the Rules did not govern the legal requirements of the NEPA analysis itself. The new rules were important because they changed BOEM's conclusions about the practical effects of the lease sales by increasing the likelihood of damage from oil spills—and it was those environmental effects that BOEM inaccurately analyzed.

NEPA does not limit consideration of environmental effects or impacts in an EIS to only those that flow from final rules or regulations. Quite the opposite. Inherent in the NEPA process is the requirement that an agency take full account of all reasonably foreseeable future activities and their impacts. "Reasonable forecasting . . . is thus implicit in NEPA, and we must reject any attempt by

agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). *See, e.g.*, 40 C.F.R. §§ 1508.7 (must include all "reasonably foreseeable future actions" as part of cumulative impact analysis); 1508.8 (indirect effects include "reasonably foreseeable" effects); 43 C.F.R. § 46.30 (Interior defines reasonably foreseeable future actions to include proposals identified by bureaus within Interior). While there is no need "to explore every extreme possibility which might be conjectured," BOEM must consider conditions as they "are likely to exist." *Carolina Env't Study Grp. v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975). Here, BOEM did not need a crystal ball to know the existing Safety Rules were changing. Yet it pretended otherwise and relied on the existing protections in the Lease Sale EIS.

The case law does not support the notion that NEPA review is limited only to the effects from final rules or those that have "legal effect." *Gulf Restoration Network*, 456 F. Supp. 3d at 100. Instead, the cases the district court cited merely highlight that proposed regulations do not have legal effect for the purpose of criminal or civil enforcement—questions that are irrelevant to this litigation. *E.g.*, *United States v. Springer*, 354 F.3d 772, 776 (8th Cir. 2004)). Under NEPA, the question is not whether industry was legally obligated to comply with the Safety

Rules when BOEM issued the Lease Sale EIS, but whether BOEM's assumption in the EIS about the continued, future applicability of the Safety Rules was accurate based on the information available at the time. It was not; Interior's repeal of these rules was far along by the time BOEM completed the EIS.

In analogous circumstances, courts in this Circuit and others have required agencies to consider the environmental effects of future actions, even if they are not yet finalized. *E.g.*, *City of Bos. Delegation*, 897 F.3d at 247, 252–53 (recognizing that cumulative impacts from a future project were reasonably foreseeable even though the application for the project was not complete until months after the agency completed the EIS); *Scientists' Inst. for Public Info.,* 481 F.2d at 1092 (requiring EIS for research and development program even though the overall program had not yet crystalized because "[t]he agency . . . [cannot] avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting"); *New Mexico ex rel. Richardson*, 565 F.3d at 707–08 (10th Cir. 2009) (requiring agency to evaluate effects of future leasing in an EIS even though it was difficult to predict the overall level of development at that stage because NEPA analysis must be completed at "the earliest possible time" (quoting 40 C.F.R. § 1501.2)); *N. Plains Resource Council, Inv. v. Surface Transp. Bd.*, 688 F.3d 1067, 1079 (9th Cir. 2011) (invalidating cumulative effects analysis in an EIS when it did

not incorporate available information about future coal bed methane well development, even though the agency had not yet approved the wells because "projects need not be finalized before they are reasonably foreseeable").

Here, the writing was on the wall. At the time of the Lease Sale EIS, it was extremely unlikely that the existing Safety Rules would remain in place unchanged. BOEM was aware that the Executive and the Secretary of Interior had ordered BSEE to revise and rescind the Rules according to new executive policy. Before BOEM released the final EIS, BSEE had completed an environmental assessment for the Safety Rule repeals. And around the same time BOEM issued the final Lease Sale EIS, BSEE also published the proposed Production Safety Rule repeal in the Federal Register and submitted the proposed Well Control Rule repeal to the Office of Management and Budget. Given the Executive Order and secretarial directive, not to mention the intensity of efforts behind them, the implementation of these changes was not in question.

The fact that the Safety Rules served such a central role in BOEM's decisionmaking further highlights its irrational treatment of the pending repeals. In this case, BOEM not only declined to consider the impacts of the Safety Rule repeals, but also actively presumed that they would not happen in order to draw conclusions about spill risks. As a result, it was even more of an imperative for the agency to consider the changes. Instead, BOEM presented the agency

decisionmaker and public with skewed analyses and conclusions regarding catastrophic spill risks based on its inaccurate assumption that the Safety Rules would remain fully intact, and thus failed to base its conclusions on the accurate facts and assumptions NEPA and the APA require.

B. BOEM Ignored Evidence Undermining Its Assumptions that BSEE Was Adequately Enforcing Safety Regulations.

BOEM also relied on what it assumed would be BSEE's rigorous implementation and enforcement of offshore safety and environmental regulations to diminish the risks of accidental events and oil spills on the environment. The evidence before the agency—a GAO Report—however, demonstrated that BSEE was not effectively enforcing its regulations at the time. BOEM's incorrect assumption led it to present a distorted picture of offshore safety and environmental risks, in violation of NEPA and the APA. *See State Farm*, 463 U.S. at 43; *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). Further, BOEM told public commenters it would address the GAO's findings in the Lease Sale EIS; but then failed to do so, violating its duty to "respond meaningfully to objections raised by a party" in violation of the APA and NEPA. *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014) (citation omitted).

BOEM specifically relied on BSEE's enforcement of its safety regulations when discussing environmental risks in the Lease Sale EIS. For example, it relied

on BSEE's "rigorous enforcement programs" and "rigorous inspection program" to conclude that mitigation stipulations in lease terms would be adequately implemented to avoid harmful effects to marine mammals and the environment. *E.g.*, AR0016343, 0016344, 0016346.

At the time it made these statements, BOEM knew that BSEE had a history of poor enforcement practices, which the national commissions on *Deepwater Horizon* had determined contributed to the accident. And the GAO, more recently, had found that BSEE's enforcement and inspection programs were anything but rigorous. Rather, the GAO explained "BSEE continues to face risks to the effectiveness of its enforcement capabilities" that helped precipitate the *Deepwater Horizon* disaster. AR0027102–03. More specifically, the GAO found "long-standing deficiencies in [BSEE's] investigative, environmental compliance, and enforcement capabilities." AR0027216. It explained BSEE was continuing to use inadequate pre-*Deepwater Horizon* policies and procedures and had reversed "steps taken to address post-Deepwater Horizon incident concerns." AR0027217; *see, e.g.*, AR0027226 (finding BSEE's training for equipment inspectors "did not teach them how to inspect the equipment"). Ultimately, the GAO concluded, "BSEE's deficient oversight capabilities continue to undermine its ability to effectively oversee offshore oil and gas development." AR0027227.

The report's conclusions are irreconcilably at odds with BOEM's assumptions that BSEE would effectively oversee offshore oil and gas development. Without "any reasonable basis to conclude that [regulations are] being adequately enforced," BOEM's assumption that BSEE's enforcement is effective is a "logical nullity" and invalidates its associated conclusions. *Friends of Back Bay*, 681 F.3d at 589 (finding NEPA document invalid because court was "unable to divorce the [agency's] demonstrably incorrect assumption of . . . effective [enforcement] from its ultimate conclusion").

BOEM did not even acknowledge the identified failings in BSEE's enforcement efforts, as CEQ recommends. *Cf.* 46 Fed. Reg. at 18,032 ("If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement."). When commenters confronted BOEM with this incongruity between its analyses and the GAO report, BOEM initially acknowledged at the five-year program stage that it would evaluate "[t]he role of BSEE, its regulatory compliance responsibilities, the shortcomings in regulatory oversight identified in the GAO 2016 report, and implemented or planned remedies . . . in future lease sale EISs." AR0015118. But in the Lease Sale EIS, on the exact same page where BOEM stated it was relying on BSEE's "rigorous inspection program" to assess whether mitigation would be effective, BOEM claimed it could not consider the GAO report because "BSEE's

operations are outside of the leasing process." AR0016346–47; *see also* AR0009838 ("The GAO report is outside the scope of [the EIS]."). That statement is belied by BOEM's express reliance on BSEE's operations (i.e., enforcement) to reduce the risks of a spill. BOEM "cannot have it both ways;" "it cannot simultaneously rely on [BSEE's enforcement] and then brush off comments about [that enforcement] as beyond its purview." *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015); *see also Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1311 (11th Cir. 2019) ("[T]he fact that other agencies have regulatory responsibilities in [an] area does not mean [an agency] is relieved of its own duties.").

BOEM's failure to adequately respond to comments violated the APA and NEPA. *E.g.*, 40 C.F.R. § 1503.4. This Circuit has held that an agency must respond to "relevant and significant comments" in order to enable the public to see what major issues the agency considered and why the agency treated those issues as it did. *Del. Dep't of Nat. Res.*, 785 F.3d at 15. In *Delaware Department of Natural Resources*, the Court determined that EPA had not adequately responded to comments when it refused to engage with commenter concerns and "contradicted earlier responses." *Id*. The same holds true here. BOEM failed to engage with the GAO report in any way and even provided contradictory responses. When the accuracy of BOEM's analysis was challenged, it was required to "provide a

'complete analytic defense of its model (and) respond to each objection with a reasoned presentation.'" *Sierra Club v. Costle*, 657 F.2d 298, 333 (D.C. Cir. 1981) (citation omitted). BOEM did not do so. BOEM's failure to consider this important issue or confront the evidence running counter to its flawed assumption about enforcement violates NEPA and the APA. *See, e.g.*, *State Farm*, 463 U.S. at 43; *Native Ecosystems Council v. Forest Serv.*, 418 F.3d at 964.

The district court erred by asking the wrong question in evaluating BOEM's reliance on BSEE's supposedly rigorous enforcement program: whether BSEE is "performing its enforcement duties *at all*." *Gulf Restoration Network*, 456 F. Supp. 3d at 101 (emphasis added). Of course, BSEE is conducting *some* enforcement. But the question here is whether it is performing its enforcement at the level of rigor that BOEM assumed in its NEPA analysis. The GAO found it is not. The district court likewise erred in distinguishing *Friends of Back Bay*, where the question was not whether there was an enforcement "at all," but whether a regulation "was being adequately enforced." 681 F.3d at 589.

The other cases that the district court cited are inapposite. While those cases establish that an agency generally may presume another agency will properly administer and enforce regulatory requirements in its jurisdiction, they do not speak to whether those assumptions are proper in the face of evidence to the contrary. *E.g.*, *Okanogan Highlands All. v. Williams*, No. CIV. 97-806-JE, 1999

WL 1029106, at *4 (D. Or. Jan. 12, 1999), *aff'd*, 236 F.3d 468 (9th Cir. 2000) (allowing Forest Service to presume that EPA and other agencies would properly enforce regulations, but noting that result could change if it were reasonably foreseeable that agencies would violate their statutory mandates).

The GAO report demonstrates that BSEE is not adequately enforcing its safety regulations. This record evidence negates any entitlement BOEM may have had to assume effective enforcement. Here, BOEM's assumption that BSEE is effectively enforcing its regulations is fundamentally incorrect and counter to the record evidence, causing the agency to misrepresent the risks from accidental events, in violation of the APA and NEPA's hard look requirement.

III. BOEM's Decisions Must Be Vacated.

For the reasons detailed above, BOEM's decisions to hold Lease Sales 250 and 251 violated NEPA and the APA. The agency's Lease Sale EIS, Records of Decision to hold the lease sales, and the leases issued pursuant to those decisions, accordingly, should be vacated. This Court can and should determine remedy, by remanding to the district court with instructions to vacate, or by vacating directly. *See, e.g.*, *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) (remanding to district court with instructions to vacate agency action); *Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1090 (D.C. Cir. 2016) (directly vacating agency action).

A. Vacatur Is the Standard Remedy and Should Be Applied.

The NEPA claims in this case arise under the APA, which directs reviewing courts to "hold unlawful and set aside agency action" found to be arbitrary or contrary to law. 5 U.S.C. § 706(2)(A); *see also FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) ("in all cases agency action must be set aside" if inconsistent with APA). Given the APA's plain text, courts in this Circuit have "consistently affirmed" that "vacating a rule or action promulgated in violation of NEPA is the standard remedy." *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (citing *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001)); *Pub. Emps. for Env't Resp. v. Fish and Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) ("A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations."). *See also New York*, 681 F.3d at 483 (vacating rule governing storage of nuclear waste due to invalid EA/FONSI).

Here, the proper subjects of vacatur are the Lease Sale EIS, the decisions to hold Lease Sales 250 and 251, and the leases issued pursuant to those decisions. Courts in the past have vacated oil and gas lease sales for NEPA violations, *see, e.g.*, *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1086–89 (D. Id. 2020), and, this Court has noted that "[g]overnment leases issued in violation of the law [m]ay, in appropriate cases, be invalidated," *Alaska v. Andrus*, 580 F.2d 465, 485

(D.C. Cir. 1978), *vacated in part on other grounds*, 439 U.S. 922 (1978). *See also Diné Citizens*, 923 F.3d at 859 (finding NEPA violations and remanding to district court with instructions to vacate agency's NEPA documentation, decision documents, and associated drilling permits); *WildEarth Guardians v. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 897 (D. Mont. 2020) (vacating oil and gas leases). This Court should follow the default approach under the APA and vacate BOEM's action in Lease Sales 250 and 251.

B. Remand Without Vacatur Is a Limited Exception and Not Warranted Here.

In limited cases, this Circuit recognizes a narrow exception to the default APA remedy of vacatur. *See Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Under this exception, courts consider the seriousness of the flaws in the agency's action and the disruptiveness of vacatur. *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). Such an exception remains appropriate only in the "rare case[]." *Id.*; *American Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) (remand without vacatur is an "exceptional remedy"). Defendants, not plaintiffs, bear the burden of showing that they are entitled to this exception. *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019). Here, neither factor favors remand without vacatur.

First, BOEM's errors were serious. NEPA is a decision-making statute, meaning that violations are procedural violations that deal with the integrity of the decision-making process. They directly cast doubt on "whether the agency chose correctly," *Allied-Signal*, 988 F.2d at 150, and should be weighted heavily when considering remand without vacatur. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) ("[B]ecause NEPA is a purely procedural statute, where an agency's NEPA review suffers from a significant deficiency, refusing to vacate the corresponding agency action would vitiate the statute." (internal quotations and citation omitted)).

Here, BOEM acknowledged the important decision-making role played by the Lease Sale EIS. *See* AR0015475. Yet, in that same EIS, the agency made inaccurate and improper assumptions that are fatal to its reliability. These defects undermined BOEM's ability to frame correctly and render a reasoned decision on whether to hold lease sales at all, and if so, what the scope and parameters of those sales would be. Proper analysis of even one of these issues could "have led [the Secretary] to reject altogether a lease sale," *Alaska*, 580 F.2d at 485, or to narrow the scope of the sale to exclude, for example, high safety risk areas. For this reason, BOEM's action was critically flawed, and sufficient "doubt [exists as to] whether the agency chose correctly" to warrant vacatur. *Allied-Signal*, 988 F.2d at 150.

Second, any disruptive consequences do not outweigh a need to vacate. Disruptive consequences can favor remand without vacatur in an environmental case, but mainly when vacatur would leave the environment with even less protection than before. *E.g.*, *N. Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). Withholding vacatur of Lease Sales 250 and 251, however, would not favor the environment. It would do the opposite: allowing further development to occur on leases that were issued in violation of the law would result in increased harms from exploration and production wells.

Other than disruptive environmental consequences, courts occasionally evaluate economic consequences under the second *Allied-Signal* factor but rarely rely on them to justify remand without vacatur. *See, e.g.*, *Standing Rock Sioux Tribe*, 985 F.3d at 1051, 1053 (upholding district court's decision to vacate despite economic disruptions). Any economic disruptions in this case are not sufficient to stray from the ordinary course of vacatur. If, after a legally-compliant NEPA analysis, BOEM were to choose to conduct Lease Sales 250 and 251 again, such a re-run of the lease sales would take place under different market conditions, and potentially with different scopes and parameters. While the numbers and locations of leases obtained by each participant, and the amount paid for each, might differ from the past results, any such differences simply represent "the nature of doing business, especially in an area fraught with bureaucracy and litigation." *WildEarth*

Guardians v. Zinke, 368 F. Supp. 3d 41, 84 n.35 (D.D.C. 2019) (quotations omitted).

In sum, remand without vacatur is an unusual remedy, limited to narrow situations that do not apply here. This Court should not allow the lease sales to remain in place, exposing Plaintiffs and the public to the very impacts that BOEM unlawfully failed to analyze in the first place.[10] This Court should accordingly either vacate the Records of Decision for Lease Sales 250 and 251, the leases issued for those sales, and the Lease Sale EIS, or remand to the district court with instructions to do so in accordance with this Court's opinion.

CONCLUSION

For the foregoing reasons, this Court should declare that the Lease Sale EIS is invalid under NEPA and the APA, and vacate the Lease Sale EIS, the decisions to hold the lease sales, and the leases issued pursuant to those sales.

[10] If the court were to deny vacatur, it can and should impose an alternative remedy with the same practical effect of preventing the action from continuing before completion of the required NEPA review. This equitable remedy appears in a number of NEPA cases, and falls on the "spectrum between complete vacatur and mere remand." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 2:17-cv-372, 2021 WL 855938, at *4 (S.D. Ohio Mar. 8, 2021) (enjoining agency from issuing new permits before remanded NEPA review is complete).

Respectfully submitted this 27th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(a)(1) and Fed. R. App. P. 32(a)(7), the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 12,788 words, excluding the parts of the brief exempted by Circuit Rule 32(e)(1) and Fed. R. App. P. 32(f).

The undersigned used Microsoft Word 2016 to compute the word count.

Respectfully submitted,

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