NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-5179

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GULF RESTORATION NETWORK, et al.,
Plaintiffs/Appellants,

v.

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

Appeal from the United States District Court for the District of Columbia
No. 1:18-cv-01674 (Hon. Reggie B. Walton)

BRIEF FOR FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Opening Brief for Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Opening Brief for Appellants.

C. Related Cases

This case has not previously been before this Court. The Opening Brief for Appellants accurately identifies a related case pending in the United States District Court for the District of Columbia, *Healthy Gulf, et al. v. Debra Haaland, et al.*, No. 19-cv-707 (RBW) (D.D.C.).

/s/ *Justin D. Heminger*
JUSTIN D. HEMINGER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities on which we chiefly rely are marked with asterisks.

Statutes

Regulations

Court Rules

GLOSSARY

APA	Administrative Procedure Act
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
OCSLA	Outer Continental Shelf Lands Act

INTRODUCTION

Plaintiffs challenge the U.S. Department of the Interior's 2018 decisions under the Outer Continental Shelf Lands Act (OCSLA) to hold two lease sales for the rights to explore and develop oil and gas resources in the Gulf of Mexico. Before holding the lease sales, Interior complied with the National Environmental Policy Act (NEPA) by devoting years to intensively studying their potential impacts in not one, but three tiered Environmental Impact Statements (EISs). Interior's analyses, carefully prepared by highly qualified scientists and technical experts and spanning thousands of pages, confirm the agency took a hard look at the potential environmental effects of its proposed actions, just as NEPA requires.

Three points show that Interior's analyses are reasonable and supported by a solid record and that Plaintiffs' arguments are incorrect. *First*, Interior evaluated a true no action alternative that accurately measured the potential environmental impacts that would be avoided by not holding the lease sales. And Interior studied a no-leasing-in-the-Gulf alternative that Plaintiffs overlook. *Second*, Interior appropriately assessed the low-probability risk of a catastrophic oil spill, including the potential impact of proposed revisions to its safety regulations. *Third*, Interior's finding that its safety agency would properly enforce its regulations during OCSLA's later stages is both rational and legally correct. Because Interior's NEPA analysis is sound, the judgment below should be affirmed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under NEPA, 42 U.S.C. §§ 4321 et seq. ECF 1. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. ECF 67. That judgment was entered on April 21, 2020. ECF 67. Plaintiffs timely filed their notice of appeal on June 18, 2020, or 58 days later. ECF 68; *cf.* Fed. R. App. P. 4(a)(1)(B). The appeal is from a final judgment disposing of all parties' claims.

Plaintiffs rely on detailed declarations to support their Article III standing. Opening Brief 2. Interior has concluded that "few environmental impacts" are "reasonably expected from the lease sale itself" because the leases only authorize certain "ancillary activities," including "geological and geophysical operations, data collection, and geotechnical evaluations." Joint Appendix (J.A.) AR 15542. That said, Interior does not dispute Plaintiffs' standing.

STATEMENT OF THE ISSUES

1. Did Interior consider a proper no action alternative to holding a single lease sale?

2. Did Interior adequately consider the safety risks of energy development, when it had proposed revisions to its safety rules and a government report had recommended improvements at the agency responsible for safety?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are in the Addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Outer Continental Shelf Lands Act

Congress declared that the oil and natural gas reserves beneath the Outer Continental Shelf are "a vital national resource." 43 U.S.C. § 1332(3); *see id.* § 1331(a) (defining the Shelf as "all submerged lands" beyond the lands reserved to the States up to the edge of the United States' jurisdiction and control). In 1953, Congress enacted OCSLA so that the United States could lease areas of the Shelf to private parties for exploration and production of its resources, especially oil and natural gas. Ch. 345, § 8(a), 67 Stat. 462, 468 (authorizing Interior to lease the Shelf "to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf").

In 1978, Congress substantially amended the Act. The amendments established a graduated four-stage process by which Interior makes energy development decisions. AR 14276-77. This process is "pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466, 472-73 (D.C. Cir. 2009) (cleaned up).

In short, the four stages are: (1) Interior develops a national "five-year leasing program" of potential lease sales in areas of the Shelf; (2) Interior may hold lease sales through a competitive sealed-bid auction; (3) Interior may approve plans allowing lessees to conduct exploration activities on the leased areas; and (4) if lessees discover valuable oil and gas deposits, Interior may approve plans authorizing them to produce oil and gas from the leased areas. 43 U.S.C. §§ 1337, 1340, 1344, 1351. The Act thus fulfills Congress' express policy to make the Shelf's oil and gas reserves "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." *Id*. § 1332(3).

2. The National Environmental Policy Act

NEPA, 42 U.S.C. §§ 4321 et seq., is designed to foster better and more informed decisionmaking by federal agencies. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA requires an agency to prepare an "environmental impact statement," or EIS, before a federal agency may engage in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). "At the 'heart' of the EIS is the agency's evaluation of the potential environmental impacts of all 'reasonable alternatives' for completing the action." *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 69 (D.C. Cir. 2011). An EIS should be the agency's concise

evaluation of the direct effects, indirect effects, and cumulative impacts of a range of alternatives, including the proposed action. 40 C.F.R. § 1502.14; *see id.* §§ 1508.7, 1508.8.[2] And the agency must consider the alternative of taking "no action." 40 C.F.R. § 1502.14(d).

One way agencies may satisfy NEPA is by "tiering" their analyses. 40 C.F.R. § 1502.20. Tiering "allows an agency to meet its NEPA obligations in steps." *Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234, 1237-38 (D.C. Cir. 2018). An agency may first prepare a programmatic EIS to assess the "entire scope of a coordinated federal program," and the agency "later supplements that programmatic analysis with narrower EISs analyzing the incremental impacts of each specific action taken as part of a program." *Id.* (cleaned up). Tiering allows agencies to "eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20.

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[2] The Council on Environmental Quality has updated the NEPA regulations at 40 C.F.R. Parts 1500–1508. *See* 85 Fed. Reg. 43,304 (July 16, 2020). This brief cites the prior regulations applicable to Interior's decisions. More recently, the Council has announced its plans to change the updated regulations. Spring 2021 Unified Agenda, RIN 0331-AA05, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA05; Spring 2021 Unified Agenda, RIN 0331-AA07, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0331-AA07.

NEPA's requirements are procedural. They do not "mandate particular results" but simply prescribe the necessary process. *U.S. Department of Transportation v. Public Citizen*, 541 U.S. 752, 756 (2004) (cleaned up); *accord Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) ("As a procedural statute, NEPA does not mandate any particular outcome."). NEPA does not "require agencies to elevate environmental concerns over other appropriate considerations." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013) (cleaned up).

B. Factual background

To account for OCSLA's staged decisionmaking process, Interior conducted a tiered NEPA review for the proposed lease sales. AR 15542, 16306-307; *see* AR 14277 (flowchart); AR 5504 (showing tiering relationships for proposed Gulf lease sales). Interior's review proceeded in three primary steps.

Step 1 (Five-Year Program EIS). Before Interior established the 2017-2022 Five-Year Program, it prepared a programmatic EIS (the Program EIS) to study the environmental impacts of proposed offshore lease sales for that five-year period. AR 14242-62. The Program EIS considered two "no action" alternatives for the 2017 to 2022 period: (1) no new leasing in a single program area—for example, the entire Gulf of Mexico (Alternative C); and (2) no new leasing in all four program areas (Alternative D). AR 14288-89, 14302-03. Following that analysis, in November 2016, Interior issued a final Five-Year Program in which it

selected a schedule of ten potential lease sales in the Gulf and one sale in Cook Inlet, Alaska. AR 15197-202.

Step 2 (Multisale EIS). Before Interior decided whether to hold any of the 10 proposed Gulf lease sales, it prepared a second EIS, completed in March 2017 (the Multisale EIS). Since all 10 proposed sales in the Five-Year Program were similar actions and would occur in close timeframes, Interior decided to prepare a single generic EIS to support individual decisions for all 10 proposed sales. AR 5502; *see* 40 C.F.R. § 1502.4(c)(2) (agencies may find it "useful" to evaluate proposed actions generically, "including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter").

In the resulting three-volume Multisale EIS, spanning more than 1,800 pages, Interior exhaustively analyzed the impacts of a single proposed lease sale in the Gulf. AR 5417-69. In particular, Interior studied a no action alternative involving the "cancellation of a single proposed lease sale." AR 5529-30. Interior observed that this no action alternative would mean that "[a]ny potential environmental impacts resulting from a proposed lease sale would not occur." AR 5529. Interior also noted that the 2017-2022 Five-Year Program "discusses the impacts of cancelling all proposed Gulf lease sales included in the Five-Year Program." AR 5530. Finally, Interior explained that any later NEPA reviews

would "tier from this Multisale EIS and will summarize and incorporate the material by reference." AR 5520-21.

Step 3 (Supplemental EIS). In December 2017, Interior issued a supplemental EIS for Lease Sale 250, scheduled for March 2018, and Lease Sale 251, scheduled for August 2018 (the Supplemental EIS). AR 15471-515. Although Plaintiffs call this the "Lease Sale EIS," Opening Brief 12-13, the document more accurately is described as a *supplemental* EIS because it "supplements, tiers from, updates, summarizes, and incorporates by references all of the relevant analyses" from the Program EIS and the Multisale EIS. AR 15542.

As in the Multisale EIS, the Supplemental EIS considered a no action alternative of cancelling a single proposed lease sale. AR 15559-60. Interior noted that another alternative identified during scoping for the Supplemental EIS was to "stop issuing leases for oil and gas" in the Gulf. AR 15561. But Interior explained that because the Supplemental EIS tiers from the Program EIS, which already addressed this no action alternative, the analysis was "incorporated by reference" and "will not be addressed in this Supplemental EIS." AR 15561.

After completing the Supplemental EIS, Interior issued a February 2018 Record of Decision, selecting the alternative of a Gulf-wide oil and gas sale for Lease Sale 250. AR 1599-1606. Interior also identified mitigation measures that it

planned to adopt, some at the leasing stage and some at the exploration and development stages, to "avoid or minimize environmental harm." AR 1605-06.

In March 2018, Interior issued a memorandum confirming that since the Multisale EIS and Supplemental EIS, no significant new circumstances or information had arisen for the proposed action on Lease Sale 251. AR 16476-90. Then in a June 2018 Record of Decision, Interior selected the alternative of a Gulf-wide oil and gas sale for Lease Sale 251, again identifying and adopting mitigation measures to avoid and minimize environmental harm. AR 4129-37.

In the end, Interior prepared three environmental analyses supporting its decisions to hold Lease Sales 250 and 251—the Program EIS, the Multisale EIS, and the Supplemental EIS. The EISs span a combined 1,800 pages and another 1,800 pages of appendices. For each EIS, Interior solicited and responded to public comments and devoted significant resources to studying the impacts of the proposed actions. For instance, Interior began planning for the Multisale EIS in December 2014, establishing a two-year timeline of more than 150 tasks. AR 10560-61, 10549-56. Then Interior assembled an interdisciplinary team of subject-matter experts with advanced degrees, deep technical knowledge, and decades of collective experience. AR 5826-27. Interior relied on experts in diverse fields—marine ecology, environmental science, biology, marine archeology, and

economics, to name a few. AR 15861.[3] All told, Interior devoted nearly four years to studying the potential environmental impacts of Lease Sales 250 and 251.

C. Proceedings below

In July 2018, Plaintiffs sued to challenge Lease Sales 250 and 251. ECF 1. On cross-motions for summary judgment, the district court denied Plaintiffs' motion and granted summary judgment to Interior and Industry Intervenors. *Gulf Restoration Network v. Bernhardt*, 456 F. Supp. 3d 81 (D.D.C. 2020) (ECF 66). The court held that Interior considered a true no action alternative in the Supplemental EIS. *Id.* at 95-99. And the court also held that Interior took a hard look at the potential environmental impacts of the lease sales, rejecting Plaintiffs' argument that Interior had failed to consider the impacts of proposed rulemakings to repeal provisions in its safety regulations and a government report that criticized its safety agency's enforcement of those regulations. *Id.* at 99-102.

Plaintiffs timely appealed. Over Interior's objection, this Court granted Plaintiffs' motion to hold the appeal in abeyance pending the district court's resolution of Plaintiffs' motion to lift a stay in a related suit challenging Lease Sales 252, 253, and 254. Order (Nov. 12, 2020). After the district court denied Plaintiffs' request, the parties proceeded to briefing.

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[3] Since 1973, Interior has funded nearly $1 billion in research about the marine and coastal environment—research that contributes to its understanding of the impacts from Gulf lease sales. AR 12458.

SUMMARY OF ARGUMENT

1. Interior analyzed a true no action alternative. Plaintiffs contend that Interior never considered an alternative without future lease sales, but they have overlooked the no-leasing-in-the-Gulf alternative that Interior analyzed in the Program EIS. Then in the Multisale EIS and Supplemental EIS, Interior fully analyzed the potential environmental impacts of the relevant proposed action—holding a single regionwide lease sale in the Gulf of Mexico. In those EISs, Interior did not "erase" the distinction between the no action and action alternatives, as Plaintiffs contend. To the contrary, Interior first established an accurate environmental baseline reflecting the current environment in the Gulf and then rationally accounted for the cumulative impacts of future oil and gas leasing that was likely to occur, even in the absence of the single Gulf lease sale that Interior was evaluating. Interior's analyses are grounded in reasonable predictions based on scientific expertise, historical experience, and solid record evidence. The no action alternative adheres to NEPA's rule of reason.

2. Interior also took a hard look at the potential safety risks posed by energy development. Rather than challenge Interior's extensive technical analysis of those risks, Plaintiffs overstate the importance of two peripheral issues.

a. Plaintiffs contend that in assessing the risk of a catastrophic oil spill, Interior irrationally assumed that its 2016 safety regulations would remain in

effect, when in fact it had proposed revisions to those rules. To begin with, Plaintiffs place unjustified weight on the safety rules, when Interior mainly relied on a technical risk analysis that Plaintiffs do not challenge. And when Interior completed its NEPA analyses for the lease sales, the revisions to the safety rules were only proposals. Even if the revisions were marginally relevant, Interior did not propose to repeal or replace the safety rules. Instead, the agency proposed targeted revisions that left the rules' critical provisions intact. Ultimately, Interior *did* consider whether the proposed revisions required supplementing its NEPA analysis. They did not. Finally, although Interior viewed a catastrophic spill as a low-probability event that was not reasonably foreseeable, it still examined and disclosed the potential impacts of such a spill. That is all NEPA requires.

b. Plaintiffs assert that Interior irrationally assumed that the Bureau of Safety and Environmental Enforcement (the Safety Agency) would vigorously enforce offshore safety and environmental regulations, when a 2017 report from the Government Accountability Office found that the Safety Agency faced risks to its effective enforcement capabilities. In assessing the efficacy of mitigation measures at the leasing stage, Interior declined to consider the 2017 report's findings because those issues are not relevant at this lease-sale stage of the OCSLA process. Plaintiffs also inflate the report's criticisms of the Safety Agency. Finally, Interior need not assume—as Plaintiffs assert—that industry will

flout safety rules, or that the Safety Agency will fail to enforce the law.

In sum, Interior's NEPA analyses are sound and should be upheld.

STANDARD OF REVIEW

This Court reviews the administrative action at hand "directly, according no particular deference to the judgment of the District Court." *Indian River County v. U.S. Department of Transportation*, 945 F.3d 515, 527 (D.C. Cir. 2019) (cleaned up). The Court reviews Interior's compliance with NEPA under the APA's familiar arbitrary and capricious standard, 5 U.S.C. § 706(2)(A), to determine whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Sierra Club v. FERC*, 867 F.3d 1357, 1377 (D.C. Cir. 2017). The standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (cleaned up). Arbitrary and capricious review of an agency's decisions is "highly deferential and presumes agency action to be valid." *Defenders of Wildlife v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016).

An agency acts arbitrarily if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *American Petroleum Institute v. EPA*, 684 F.3d 1342, 1350 (D.C. Cir. 2012). Thus, Interior's decisions "must be upheld as

long as" the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *City of Tacoma v. FERC*, 460 F.3d 53, 140 (D.C. Cir. 2006) (cleaned up); *accord State Farm*, 463 U.S. at 43. And this Court affords an "extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003).

"In reviewing NEPA challenges," this Court's "role is not to 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor. Rather, it is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Indian River County*, 945 F.3d at 527 (cleaned up). The Court applies a "rule of reason" both "to an agency's identification of the available alternatives and to its examination of their relative merits." *Nevada v. Department of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006); *see* Opening Brief 20 (agreeing the rule of reason applies). Under that deferential standard, this Court will uphold an agency's EIS unless its "deficiencies are significant enough to undermine informed public comment and informed decisionmaking." *Sierra Club*, 867 F.3d at 1368.

ARGUMENT

I. Interior evaluated a true no action alternative.

Before deciding to hold Lease Sales 250 and 251, Interior took a hard look at the environmental impacts of those proposed actions, and that hard look included a detailed comparison with a "no action" alternative. Plaintiffs claim (at 21-33) that Interior never looked at a true no action alternative, but their argument fails for three reasons.

First, when Interior prepared its EIS for the 2017-2022 Five-Year Program, it studied a no action alternative that reflected *no leasing* in the Gulf of Mexico. That analysis is relevant because the Supplemental EIS challenged here "tiers" from that earlier analysis. By focusing solely on the Supplemental EIS, and ignoring the extensive tiered analyses that Interior did in three separate but interwoven EISs, Plaintiffs missed this no action alternative, which is fatal to their argument.

Second, at the leasing stage, Interior properly analyzed the no action alternative of cancelling a single lease sale. Here too, Plaintiffs overlook Interior's extensive analysis in the tiered Multisale EIS and Supplemental EIS.

Third, Interior accurately established the environmental baseline for the Gulf of Mexico and then rationally included foreseeable energy development in the cumulative impacts that would occur, even under the no action alternative. And

Interior relied on its scientific expertise to make reasonable predictions that are fully supported by the record.

In the end, Interior's rational assessment of the no action alternative complies with NEPA's rule of reason. *See Sierra Club*, 867 F.3d at 1368.

A. Interior prepared tiered NEPA analyses that analyzed a no-leasing-in-the-Gulf alternative.

Plaintiffs claim that before holding Lease Sales 250 and 251, Interior failed to disclose the environmental impacts of a no action alternative in which there was "no lease sale now or in the future." Opening Brief 27. But in the Program EIS, Interior did precisely that by examining a "no leasing" alternative. Then in the Supplemental EIS, Interior rationally declined to revisit that no leasing alternative because it tiered that analysis from the Program EIS.

In particular, in the Program EIS, Interior considered the no action alternative of holding "no new leasing during the 2017-2022 Program." AR 14279-80; *see also* AR 14248-50, AR 14256, 14302-03, 14317, 14359-73. This no leasing alternative allowed Interior to "compare the potential future effects of the activities associated with the Proposed Action with the long-term effects of taking no action." AR 14279. Interior identified 17 resource areas—air quality, water quality, marine mammals, and many others—that could be impacted. AR 14278-79. Interior then examined the direct and indirect impacts to those resources expected to result from no new leasing under the 2017-2022 Program. AR 14521-

49. Then Interior explained that the only impacts in a no new leasing scenario would be impacts from energy substitutes compensating for foregone production of oil and gas from the Shelf. AR 14521. Thus, contrary to Plaintiffs' claim, Interior did analyze a true no action alternative and did consider the impacts that would be avoided if there was no leasing at all under the entire Five-Year Program.

When Interior later prepared its NEPA analysis for Lease Sales 250 and 251, it tiered to the analysis of the no leasing alternative in the Program EIS. This approach is not only allowed by NEPA's regulations, but critically necessary for complex, multistage administrative processes like oil and gas development under OCSLA. Thus, one alternative that Interior identified during the scoping process for the Supplemental EIS was to "stop issuing leases for oil and gas in the Gulf of Mexico." AR 15561. But that alternative, Interior noted, was already addressed in the Program EIS, and because the Supplemental EIS tiered from the Program EIS, Interior incorporated its analysis by reference. AR 15561. The agency repeated this point several times: "The 2017-2022 Five-Year Program EIS discusses the impacts of cancelling all proposed [Gulf of Mexico] lease sales included in the 2017-2022 Five-Year Program." AR 15560.

Interior also made this point in response to public comments. AR 16215-17 (responding to Plaintiff Gulf Restoration Network's comment, among others, by noting that Interior "has addressed the alternative to stop issuing leases in the Gulf

of Mexico" in the Program EIS). Interior stressed that a "permanent no lease option is outside the scope of this Supplemental EIS" and that cancelling "all 10 proposed regionwide lease sales in the 2017-2022 Five-Year Program was analyzed" in the Program EIS, "from which the [Multisale] EIS and this Supplemental EIS are tiered." AR 16219; *see also* AR 16217-19. Because it had already examined the no leasing alternative in the Program EIS, Interior complied with NEPA when it tiered to that analysis in the Supplemental EIS. *See* 40 C.F.R. § 1502.20; *see also Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 511-12 (D.C. Cir. 2010) (confirming that NEPA allows tiering so that an agency "is not required to reevaluate the analyses included in the relevant project's EIS"); *Center for Biological Diversity*, 563 F.3d at 474; *Western Organization of Resource Councils*, 892 F.3d at 1237-38.

Plaintiffs never address this no leasing alternative. In a footnote, Plaintiffs mention that Interior tiered the Supplemental EIS to the Program EIS and the Multisale EIS, but otherwise they are silent. Opening Brief 13 n.5. Because they failed to even acknowledge Interior's analysis of this no action alternative—much less present an argument that it was arbitrary and capricious—Plaintiffs' challenge necessarily fails. They cannot persuasively criticize Interior for failing to consider a no leasing alternative in the Supplemental EIS when the agency considered precisely that alternative in the Program EIS to which the Supplemental EIS tiered.

B. Interior considered a proper no action alternative to holding a single lease sale.

As just shown, Plaintiffs have missed most of Interior's analysis by ignoring the no-leasing-in-the-Gulf no action alternative included in the Program EIS. But even if some of their challenge survives, it lacks merit. On that score, Plaintiffs purport to challenge the no action alternative that Interior analyzed in the Supplemental EIS. But in the more narrowly focused Supplemental EIS (tiered from the Multisale EIS, which Plaintiffs also largely ignore), Interior properly took a "hard look" at the potential environmental impacts that would be avoided by *not* holding a single lease sale in the Gulf.

Plaintiffs concede that Interior considered the no action alternative. Opening Brief 21. Yet they contend (at 26) that Interior made the "irrational assumption" that "a future lease sale will undoubtedly occur" and therefore failed to consider the impacts avoided by the no action alternative. Plaintiffs distort the record and misstate what Interior did.

The record is clear. Interior gave a hard look at the potential environmental impacts of holding a single lease sale. Interior examined these impacts in Chapter 4 of the Multisale EIS and in Chapter 4 of the Supplemental EIS. Those chapters are a detailed study of the potential impacts that each action alternative was expected to have on the current condition of the Gulf's resources and environment in comparison to the no action alternative. *See* AR 5435-36 (table in the Multisale

EIS comparing the impacts of the action and no action alternatives); AR 15567-69 (similar table in the Supplemental EIS).

All told, Interior devoted more than *600 pages* to a detailed scientific and technical analysis of the impacts on 14 resource categories—air quality, water quality, birds, protected species, commercial fisheries, socioeconomic issues (such as environmental justice), and many others. AR 5822-32, 15623-36. And as Interior repeatedly stated in plain terms, under the no action alternative (Alternative E), "[a]ny potential environmental impacts resulting from a proposed lease sale *would not occur*." AR 15488 (emphasis added) (conclusion in Supplemental EIS); AR 5529 (same conclusion in Multisale EIS). Interior noted that the potential impacts from the *action* alternatives (Alternatives A through D), were the "incremental contribution of a proposed action added to what would be expected to occur under the No Action Alternative (i.e., no lease sale)." AR 15492. This is a textbook NEPA alternatives analysis that passes muster under the rule of reason. *Sierra Club*, 867 F.3d at 1368.

Building a strawman, Plaintiffs make sweeping statements implying that Interior assumed that lease sales are "inevitable." Opening Brief 23, 27. Nowhere did Interior make this unreasonable assumption. To be sure, section 1344 of OCSLA requires Interior to prepare and maintain a schedule of proposed oil and gas leases that "best meet national energy needs for the 5-year period following its

approval or reapproval." 43 U.S.C. § 1344. But Interior explained that, while OCSLA "specifically mandates the development of an [Outer Continental Shelf] oil and gas program every five years," the Act "does not mandate a particular level of leasing or production." AR 15097. Thus, at the leasing stage, Interior may "choose any of the alternatives, including the No Action alternative, after weighing possible benefits and adverse environmental impacts." AR 9688, 16202. In the Program EIS, Interior considered the impacts avoided by a no-leasing-in-the-Gulf alternative, while in the Multisale EIS and the Supplemental EIS, Interior examined the impacts avoided by not holding a single lease sale. Interior never assumed that leasing was inevitable or required by OCSLA, so it kept an open mind when evaluating alternatives to leasing. Rather, as discussed next in Argument Point I.C., Interior rationally accounted for reasonably foreseeable future oil and gas leasing activities in its cumulative impacts analysis.

Plaintiffs also imply that Interior failed to heed Congress' instruction in OCSLA to weigh carefully environmental, social, and economic considerations along with the Nation's need for energy. Opening Brief 24-25. This is incorrect. Interior identified a need for continued energy production in the Gulf of Mexico, which in 2015 provided 16 percent of domestic oil production and 5 percent of domestic natural gas production. AR 5497-98. But it also closely followed Congress's express policy in OCSLA that the Outer Continental Shelf "should be

made available for expeditious and orderly development, *subject to environmental safeguards*." AR 5497 (quoting 43 U.S.C. § 1332(3) (emphasis added)); *see Theodore Roosevelt Conservation Partnership*, 661 F.3d at 73 (When evaluating NEPA alternatives, the agency should "always consider the views of Congress to the extent they are discernible from the agency's statutory authorization and other directives." (cleaned up)).

To that end, Interior never assumed that Lease Sales 250 and 251 must occur regardless of the environmental impacts. Rather, for each lease sale proposed in the Five-Year Program, Interior made an individual decision on "whether and how to proceed with a proposed lease sale." AR 5502. This includes remaining open to alternatives that would scale back the size of a lease sale. AR 15542. And Interior prepared the Multisale EIS and the Supplemental EIS precisely to inform those decisions about whether and how to proceed with Lease Sales 250 and 251. Only after a hard look at the environmental impacts—in the Program EIS, the Multisale EIS, and the Supplemental EIS—did Interior conclude that Lease Sales 250 and 251 furthered OCSLA's purpose and should be held. *See* AR 1599-1606; 4129-37.

C. Interior rationally accounted for foreseeable energy development.

Plaintiffs contend (at 14-15, 21-22, 26-28) that Interior improperly considered the impact of future leasing in the baseline. The most direct answer to this contention is the one they overlook. As Interior explained in the Program EIS,

the no action alternative "in this Programmatic EIS considers both the direct and indirect impacts of having *no new leasing* during the 2017-2022 Program as well as the changing or evolving condition of environmental and sociocultural resources in the [Outer Continental Shelf] program areas over the same protracted time horizon (40-70 years) considered for the activities associated with the Proposed Action (the 'effects baseline')." AR 14279 (emphasis added). Interior thus defined the baseline for each environmental resource in the Program EIS as "the present and future condition of that resource over time in the absence of the 2017-2022 Program." AR 14522. Plaintiffs have no answer to this analysis.

Turning to the leasing stage, when Interior analyzed the no action alternative to holding a single lease sale in the Multisale EIS and the Supplemental EIS, it concluded that "cancellation of a proposed lease sale would not significantly change the environmental impacts of overall [Outer Continental Shelf] oil- and gas-related activity." AR 15560. Interior noted that activities related to previously issued leases and any leases that "*may* be issued in the future under a separate decision" would continue. AR 15559 (emphasis added). Then Interior observed that if it canceled a single lease sale, "the resulting development of oil and gas would *most likely* be postponed to a future lease sale." AR 15560 (emphasis added). And relying on its cumulative impacts analysis, Interior explained that the cumulative level of oil and gas-related activity on the Shelf "would only be

reduced by a small percentage, if any." AR 15560. Plaintiffs contend that Interior's analysis erases the distinction between the no action and action alternatives, but the law and the facts support Interior's approach.

1. Interior included future leasing in the cumulative impacts analysis, not the baseline.

Contrary to Plaintiffs' position, Interior accounted for future leasing activities not in the environmental baseline, but in its cumulative impacts analysis. Cumulative impacts are "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such action." 40 C.F.R. § 1508.7. In the Supplemental EIS, Interior compared the incremental contribution of impacts from a proposed lease sale to the cumulative impacts from other current, past, and reasonably foreseeable future activities, including future oil and gas leasing on the Shelf. AR 15567-69. As Interior observed, "Many of the past, present, and reasonably foreseeable future actions and trends that would contribute to cumulative impacts under a proposed action's alternatives also contribute to cumulative impacts under the No Action Alternative." AR 15613; AR 15614-16.

Many of the criticisms that Plaintiffs level at Interior's no action alternative appear to conflate the agency's treatment of the baseline with its evaluation of cumulative impacts. Yet the record shows that in the Supplemental EIS, Interior carefully distinguished between these two parts of its analysis. *See* AR 15632-33

(describing how the cumulative impacts assessment considered the environmental baseline as well as projected future oil and gas leasing activities).[4] Plaintiffs also fault (at 22) Interior for declining (at AR 15613) to consider a "separate treatment" of cumulative impacts under the no action alternative, but that is just a corollary of Interior's rational conclusion that cumulative impacts from future oil and gas leasing were reasonably likely to occur, even under the no action alternative.

Plaintiffs do not directly challenge Interior's cumulative impacts analysis. If anything, they advocate for what Interior did here: "Inherent in the NEPA process is the requirement that an agency take full account of all reasonably foreseeable future activities and their impacts." Opening Brief 40; *see also id.* at 42-43 (citing *Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1078-79 (9th Cir. 2011)). Consistent with this principle, Interior noted that it was "reasonably foreseeable to assume that lease sales would continue to be proposed for many years to come in the Gulf of Mexico region." AR 5727; *see also* AR 5725-28, 15490, 15614. This discussion of cumulative impacts "fulfilled NEPA's goal of guiding informed decisionmaking." *Sierra Club*, 867 F.3d at 1370.

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[4] Similarly, in the Program EIS, Interior viewed future five-year programs as a reasonably foreseeable action, but it did not include them in the effects baseline for the no leasing alternative. AR 14522. Instead, the agency included them in the cumulative impacts analysis. AR 14316. Plaintiffs fail to address this.

2. The baseline accords with NEPA.

Plaintiffs contend (at 26-27) that Interior's environmental baseline for the no action alternative is legally flawed, but as the district court recognized, 456 F. Supp. 3d at 95-99, Interior's approach adheres to relevant NEPA principles.

First, Interior's approach follows its own NEPA regulations. The agency's regulations discuss the alternatives that Interior should address in an EIS. 43 C.F.R. § 46.415(b). The provision states that "analysis of the effects of the no-action alternative may be documented by contrasting the current condition *and expected future condition* should the proposed action not be undertaken with the impacts of the proposed action and any reasonable alternatives." *Id.* (emphasis added). Consistent with this requirement, Interior's analysis of the no action alternative properly reflects its assessment of the current and expected future condition of the Gulf if a single lease sale should "not be undertaken." *Id.* To illustrate, in the Multisale EIS, Interior explained that the "[c]urrent baselines (including *past and present* events) are described for all resources under their respective 'Affected Environment' subchapters" in Chapter 4. AR 5825 (emphasis added); *see also* 40 C.F.R. § 1502.15 (EIS shall succinctly describe affected environment). And in the Supplemental EIS, Interior incorporated the Multisale EIS's "baseline data" about the Gulf's affected environment, AR 15489, and again identified a current baseline that included "past and present events," AR 15627-28.

Second, at OCSLA's leasing stage, Interior correctly focused on whether to cancel a *single* lease sale among the ten scheduled sales in the 2017-2022 Five-Year Program. So the agency's observation (at AR 15560) that canceling the sale would "most likely" postpone development of the oil and gas to a future lease sale reflects a logical judgment about the current OCSLA program: that while additional lease sales are not inevitable, they are reasonably foreseeable. Interior had evaluated the no-leasing-in-the-Gulf alternative in the Program EIS. AR 15561. But after selecting a Five-Year Program with 10 proposed leases scheduled in the Gulf, Interior did not have to revisit that alternative again at the leasing stage. *See Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1085 (10th Cir. 2014) (affirming that the agency's no action alternative keeping the grazing level the same need not evaluate a "no grazing option 'forest wide'" because the proposed action was deciding "whether grazing permits should be issued"). Instead, Interior rationally concluded that it if canceled one regionwide lease sale in the Program, it would likely offer those the same areas in one of the proposed later-scheduled lease sales.

Flipping Plaintiffs' argument around, they never explain why it would be reasonable for Interior to assume that canceling *one* lease in the Gulf would lead to cancelling *all* future lease sales, including the balance of the existing 2017-2022 Five-Year Program. If anything, that would be an unreasonable head-in-the-sand

approach to NEPA. Interior has leased areas of the Gulf for decades. Armed with that historical experience, it is reasonable for Interior to predict that leasing will continue in some form.

Third, Interior's no action alternative properly accounted for past and current oil and gas activities under OCSLA, along with the cumulative impacts of reasonably foreseeable future leasing. AR 15559-60. Although the Council of Environmental Quality's regulations implementing NEPA require a no action alternative, 40 C.F.R. § 1502.14(d), they do not define what that means. Neither have Plaintiffs offered a clear, legally-binding definition. The district court observed that the Council provided non-binding guidance when issuing its regulations. 456 F. Supp. 3d at 95. And as the Tenth Circuit observed, the Council "intended that agencies compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo." *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001). "In other words, the current level of activity is used as a benchmark." *Id.*; *see also Association of Public Agency Customers, Inc. v. Bonneville Power Administration*, 126 F.3d 1158, 1188 (9th Cir. 1997) (The Council's "regulations allow the status quo to properly be the no action alternative."). Here, to evaluate the impacts of one proposed lease sale, Interior reasonably adopted a baseline that reflects the status quo in the Gulf.

This Court approved of a similar baseline in *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66 (D.C. Cir. 2011). In 2000, the Bureau of Land Management issued a record of decision allowing natural gas development in western Wyoming. *Id.* at 201-203. Then in 2005, developers presented the Bureau with a new plan that would increase the number of natural gas wells and allow for year-round drilling. *Id.* In its supplemental EIS evaluating the new plan, the Bureau defined the no action alternative as continuing to manage natural gas development under the 2000 record of decision. *Id.* This Court affirmed that choice and rejected the argument that the Bureau also had to analyze an alternative that would "cap or scale back development." *Id.* 207.

Similarly, when Interior discussed the no action alternative, it recognized the existing 2017-2022 Five-Year Program under which future leasing was likely. AR 9707-08, 15559-60, 15613-15. *See also Conservation Law Foundation v. FERC*, 216 F.3d 41, 44-48 (D.C. Cir. 2000) (affirming FERC's decision to use existing conditions, including the existence and impacts of the dam, as the baseline); *Young v. General Services Administration*, 99 F. Supp. 2d 59, 62 (D.D.C. 2000) (an agency's no action alternative may "include the effects of reasonably foreseeable development."), *aff'd*, 11 F. App'x 3 (D.C. Cir. 2000) (affirming for the reasons stated in the district court's opinion); *Young*, 99 F. Supp. 2d at 74-75; *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111-13 & n.5 (9th Cir.

2015) (approving an agency's aggregation of the cumulative impacts of a reasonably foreseeable future action into the baseline for the no action alternative).

Finally, even if Interior had included future leasing in the baseline, as Plaintiffs claim (at 26-27), rather than in the cumulative impacts analysis, the "baseline business has the whiff of a red herring." *Conservation Law Foundation*, 216 F.3d at 46. "Baseline or no baseline," the question for the Court is whether Interior "has fully examined options calling for greater or lesser environmental protection." *Id.* Interior's decision to adopt numerous mitigation measures to avoid and minimize environmental impacts "proves that" Plaintiffs "are mistaken in thinking that an existing conditions baseline preordains the rejection of any new conditions for the protection of fish and wildlife" and other environmental values. *Id.*; *see* AR 1605-06, 4135-37 (identifying and adopting mitigation measures).

3. Interior made reasonable predictions that are grounded in its expert judgment and the record.

Interior concluded that cancelling a single lease sale "would not significantly change" the environmental impacts of overall Outer Continental Shelf oil and gas activity. AR 15560. At the outset, Interior never suggested that a lease sale would have no environmental impacts, as Plaintiffs repeatedly imply. Rather, Interior observed that the impacts of not holding the lease would not "significantly *change*" the impacts from all *cumulative* oil and gas activity on the Outer Continental Shelf. AR 15560 (emphasis added). In any event, Plaintiffs assert (at 28-33) that the

record contradicts the agency's conclusion, but the record shows that Interior relied on its scientific and technical expertise to make reasonable predictions based on solid evidence. Judgments "regarding the development of the baseline against which alternatives would be assessed are the sorts of expert analytical judgments to which courts typically defer." *Village of Bensenville v. FAA*, 457 F.3d 52, 72 (D.C. Cir. 2006). The Court should defer to Interior's expert judgment here.

An agency's estimates in an EIS often involve some "reasonable forecasting and speculation." *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Some "educated assumptions are inevitable in the NEPA process," and the "effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt." *Sierra Club*, 867 F.3d at 1374. When an agency is making predictions within its "area of special expertise," this Court "must generally be at its most deferential." *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983). Here, Interior reasonably predicted the impacts of future leasing based on solid evidence, while disclosing the uncertainties and limitations of its expert analysis.

For example, Interior prepared spreadsheet-based models to forecast oil and gas exploration, discovery, development, and production scenarios. AR 15580. In modeling those scenarios, Interior relied on "historical oil and gas prices, price

trends, oil and gas supply and demand, and related factors that influence oil and gas product-price and price volatility." AR 15580. And Interior compared the modeled scenarios with "actual historical activity and infrastructure data to ensure that historical precedent, as well as recent trends" were "reflected in each activity forecast." AR 15580. Finally, recognizing the "inherent uncertainties" in predicting scenarios based on undiscovered oil and gas, Interior employed probabilistic techniques and reported its results as an estimated range. AR 15880. Interior's modeling provides solid record support for its conclusion.

Plaintiffs insist that delaying proposed lease sales "would have meaningfully different consequences and environmental effects" that Interior "did not consider." Opening Brief 28. They point to three categories of evidence that they claim support their conclusion that the environmental impacts from future lease sales will be significantly different—volatile supply and demand for oil and gas, the broader scope of leasing in Lease Sales 250 and 251, and advances in drilling technology and geologic information. Opening Brief 28-30. But the question for the Court is not whether Plaintiffs can dig up evidence in the record for their preferred position. The question is whether *Interior*'s conclusion is supported by substantial evidence.

Even the record cites that Plaintiffs rely on show that Interior considered and disclosed the uncertainties in its predictions. For example, Plaintiffs stress that supply and demand for oil and gas is highly volatile and would affect future

leasing, development, and production on the Outer Continental Shelf. *Id*. at 28 (citing AR 15341-42, 15614, 15632). Interior rationally predicted future leasing activity based on "resource availability, existing infrastructure, and projected time lapses required for any other major energy sources to come online." AR 15614. But Interior acknowledged that it could not predict future oil and gas activities in the Gulf with "absolute certainty." AR 15614. And the agency identified "unpredictable" factors that could affect its development scenarios, including "the contemporary economic marketplace, the availability of support facilities, and pipeline capacities." AR 15614.

Next, Plaintiffs highlight the region-wide scope of Lease Sales 250 and 251, describing that geographic range as "not the norm." Opening Brief 29 (citing AR 4315). Yet Plaintiffs fail to acknowledge that in the Program EIS, Interior found that this change from prior five-year programs "would make no substantive difference in environmental impacts because there are no substantive differences expected in activity levels resulting from lease sales (annually or over the long-term) from these slight changes in timing." AR 14291; *see also* AR 5521, 15201 (providing rationale for regionwide sales in the Gulf). And because Interior proposed that all 10 of the Gulf lease sales in the 2017-2022 Five-Year Program could be region-wide sales, it was reasonable for the agency to rely on this fact in its forecasts. AR 4267.

Finally, Plaintiffs assert (at 29) that advances in technology influence the size and location of lease sales. But Interior recognized that technology advancements were just one of several factors that might influence future leasing activities and environmental impacts, reinforcing that the agency made fully informed predictions based on its expertise. AR 15632.

In a footnote, Plaintiffs resort to extra-record material. They observe that "[e]ven in just the past year, leasing activity has changed significantly." Opening Brief 28 n.8. They note that oil and gas prices "have plummeted and industry interest has dropped," and they state that Interior recently "paused" leasing to evaluate the OCSLA program and withdrew a lease sale scheduled for earlier in 2021. *Id*. The Court need not consider extra-record material about events that happened after Interior's 2018 leasing decisions. Besides, NEPA does not require Interior to have a crystal ball that predicts, for example, the economic fallout from a global pandemic or the policy changes that occur after a change in presidential administrations. If anything, these developments show that Interior *overestimated* the potential environmental impacts of its actions—hardly a NEPA violation.

Plaintiffs also fail to address three other factors that informed Interior's reasonable conclusion about the potential environmental impacts from a single lease sale. *First*, Interior rationally assessed those impacts from leasing over the long time scale on which energy development is conducted, measured not in years

but *decades*. Interior estimates that the economic life of a lease sale is around 50 years. AR 5578, 5579. Because potential impacts related to lease sales under the Program are "expected to occur over a protracted time period (40-70 years)," Interior found that a "1- or 2-year timing difference in the onset of activities" following a lease sale would be "inconsequential." AR 14288.

Second, Interior compared the potential impacts from a single region-wide lease sale to the cumulative impacts of all likely leasing in the Gulf. Interior explained that one lease sale, "no matter which alternative is selected, would represent only a small proportion and small contribution to past, present, and future activity as a result of the overall forecasted Cumulative [Outer Continental Shelf] Oil and Gas Program scenario or activity forecasted to occur between 2017 and 2086." AR 5578. For example, Interior estimated that the preferred alternative of a single regionwide lease sale in the Gulf would represent only 1.2% to 4.2% of the cumulative production of oil and gas in the Gulf over a forecasted period of 70 years. AR 5578.

Third, Plaintiffs contend that Interior found that a single lease sale would have minimal adverse impacts because it improperly defined the no action alternative. But the record shows that Interior found that the potential impacts would be small for a very different reason—due to extensive mitigation. AR 15630-31. Through many decades of overseeing leasing in the Gulf, Interior has

developed a robust suite of mitigation measures to "eliminate or ameliorate potential environmental effects, where implemented." AR 15631. And Interior identified three broad categories of anticipated mitigation: (1) lease sale stipulations and mitigations, (2) site-specific mitigations that may become conditions of plan or permit approval at the postlease stage, and (3) mitigations required by other State and Federal agencies to help avoid or minimize many impacts. AR 15631; AR 9260-95 (discussing postlease mitigation measures). Interior concluded that these mitigation measures meant that the "adverse impacts with a proposed lease sale are expected to be small, and beneficial impacts are projected as well for certain activities and species." AR 15631; *see also* AR 1605-06 (adopting mitigation measures for Lease Sale 250); AR 4135-37 (same for Lease Sale 251).

To summarize, these three factors, which Plaintiffs do not address, underscore the reasonableness of Interior's conclusions.

The case law does not support Plaintiffs either. Both the court below and another judge on the district court reviewing a similar challenge to earlier OCSLA lease sales concluded that Interior's no action alternative was reasonable. *See* 456 F. Supp. 3d at 95-99; *Oceana v. Bureau of Ocean Energy Management*, 37 F. Supp. 3d 147, 170-74 (D.D.C. 2014). And both courts also agreed that Plaintiffs misplaced their reliance on cases like *Center for Biological Diversity v. U.S.*

Department of Interior, 623 F.3d 633 (9th Cir. 2010) and *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, 677 F.3d 596 (4th Cir. 2012). *See* 456 F. Supp. 3d at 97-98; *Oceana*, 37 F. Supp. 3d at 173-74. In Plaintiffs' view, cases like *Center for Biological Diversity* "invalidated agency action based on similar incorrect assumptions." Opening Brief 30. But the solid record buttressing Interior's conclusions differentiates this case from the court of appeals decisions on which Plaintiffs rely.

In *Center for Biological Diversity*, for example, the court held that the agency's no action alternative to a proposal for a land exchange was arbitrary because the agency assumed that the mining would occur absent its approval of the exchange. 623 F.3d at 642-43. The court found that without the land exchange, the mining activity could be substantially different because the Mining Law gave the agency control over development on public land. *Id*. The court thus concluded that it was arbitrary for the agency to assume that the mining operations would be exactly the same under the proposed and no action alternatives. *Id*. at 646. Unlike that case, here, Interior properly "acknowledged a practical reality of the OCSLA statutory scheme"—that future leasing was likely. *Oceana*, 37 F. Supp. 3d at 173-74 (D.D.C. 2014) (distinguishing *Center for Biological Diversity* on similar grounds and holding that Interior "did consider a true no action alternative"). And

Interior never suggested that the no action and action alternatives were equivalent or had the same potential effects.

Plaintiffs also lean heavily on *WildEarth Guardians v. U.S. Bureau of Land Management*, 870 F.3d 1222 (10th Cir. 2017), a case they did not cite below. *Compare* Opening Brief 30-31 *with* ECF 41-1 *and* ECF 56. In that case, the Tenth Circuit faulted the agency for relying on a "perfect substitution assumption" contradicted by a report from the U.S. Energy Information Administration and for failing to distinguish between the action and no action alternatives. *Id*. at 1234-37. And the court declined to defer to the agency's comparison between the action and the no action alternative because "there is nothing for the court to defer to here." *Id*. at 1238. By contrast, Interior's alternatives analysis here is supported by an extensive technical record. Interior did *not* rely on a perfect substitution theory, and it *did* take a hard look at the potential impacts of a proposed lease sale.

As the district court held, Interior reasonably evaluated the cumulative impacts of future leasing given (1) the existing schedule of proposed leases in the 2017-2022 Five-Year Program, (2) OCSLA's purpose and four-stage process, and (3) the agency's reasonable predictions based on historical information and current trends in market conditions. 456 F. Supp. 3d at 95-99. All in all, Interior's consideration of the no action alternative satisfies NEPA's rule of reason and the deferential APA standard of review.

II. Interior took a hard look at reasonably foreseeable safety risks.

Plaintiffs contend that Interior unreasonably (1) minimized the risk of a catastrophic oil spill and (2) inflated the strength of its enforcement activities. Opening Brief 33-49. But Interior's analysis of both issues complied with NEPA and the APA. Interior took the required hard look at the risk of oil spills and other accidents associated with development and production of oil and gas in the Gulf. And Interior reasonably addressed the relevance of enforcement activities by its Bureau of Safety and Environmental Enforcement (the Safety Agency).

A. Interior rationally assessed the low-probability risk of a catastrophic spill.

Interior concluded that a catastrophic oil spill event like the *Deepwater Horizon* disaster was a low-probability event that was not a reasonably foreseeable impact of a proposed lease sale. AR 8238, 8246-74, 8368, 8551. Because a catastrophic spill was not reasonably foreseeable, Interior did not have to analyze its potential impacts; NEPA does not invariably require agencies to analyze "worst-case scenarios." AR 16307-08; *see Edwardsen v. U.S. Department of Interior*, 268 F.3d 781, 785 (9th Cir. 2001) (citing *Robertson*, 490 U.S. at 354). Yet Plaintiffs contend that when Interior concluded that a catastrophic spill was a low-probability event, it (1) "relied heavily" on the two safety regulations issued in 2016 (the Safety Rules), and (2) made an "unreasonable assumption" because it

was in the middle of "substantially revising and rescinding" the 2016 Safety Rules. Opening Brief 33-44.[5] Both contentions are incorrect.

First, Plaintiffs exaggerate the weight that Interior placed on the Safety Rules when it concluded that a catastrophic spill was a low-probability event. Plaintiffs inaccurately claim that the Safety Rules' improvements "formed the *primary* bases" for Interior's conclusion, Opening Brief 34 (emphasis added), and played a "central role" in Interior's decisionmaking, *id*. at 43. The record does not bear this out. To the contrary, Interior merely observed that "recently implemented safeguards" and "additional regulatory oversight" had made a catastrophic event even "less likely than in the past." AR 14348; *see also* AR 16309 (noting that the Well Control Rule was "expected to decrease the probability of deepwater blowouts and the extent of oil spills from such blowouts"). But in the Program EIS, Interior mainly based its conclusion about the low risk of a catastrophic spill on a "quantitative approach," paired with "extreme value statistical methods and complementary risk assessment methods," which led to estimates of the likelihood of a catastrophic spill event. AR 14349; *see also* AR 14348-50; AR 15080.

[5] The Safety Rules are the Blowout Preventer Systems and Well Control Regulations, 81 Fed. Reg. 25,888 (Apr. 29, 2016) (the Well Control Rule) and the Oil and Gas Production Safety Systems Regulations, 81 Fed. Reg. 61,834 (Sept. 7, 2016) (the Production Safety Rule).

Interior also calculated the risks and impacts of a smaller spill based on historical data and updated modeling. AR 5673-82.

Plaintiffs decline to challenge Interior's technical risk analysis. Instead, they emphasize Interior's statement that a catastrophic spill was not expected "partly given the extremely low probability of such a spill in general, but more importantly, as a result of the comprehensive reforms to OCS oil and gas regulation and oversight put in place after the *Deepwater Horizon* event." Opening Brief 34-35 (quoting AR 14563). But as Plaintiffs acknowledge (at 35), Interior was referring to the full suite of reforms that it implemented after *Deepwater Horizon*. AR 16953-54.

To be sure, Interior identified the Well Control Rule as one such reform by the Safety Agency (though not the Production Safety Rule). AR 16953. But it also identified seven *other* categories of reforms, including the 2010 Drilling Safety Rule and the 2010 Safety and Environmental Management System Rule. AR 16953. Despite relying on roughly a dozen record cites, Opening Brief 34-36, Plaintiffs fail to show that Interior "relied heavily," *id.* at 33, on the Safety Rules to conclude that the risk of a catastrophic spill was low. More accurately, the record shows that Interior rationally concluded that while another *Deepwater Horizon* disaster was unlikely, the agency had reduced that risk even more through the

"most aggressive and comprehensive reforms to offshore oil and gas regulation and oversight in U.S. history." AR 16953.

Second, Plaintiffs assert that Interior unreasonably relied on the 2016 Safety Rules in its NEPA analysis for the proposed lease sales because, at "the same time," it was "moving forward with repealing many of the Rules' most important safety provisions." Opening Brief 36. This argument suffers from multiple flaws. For one thing, as just discussed, Interior did *not* rely heavily on the Safety Rules for its risk analysis. For another, when Interior completed the Supplemental EIS in December 2017, the 2016 Safety Rules had not been modified, and the revisions to those Rules were only proposed rules. Interior did not finalize the revisions to the Safety Rules until well after it decided to proceed with the *second* sale, Lease Sale 251, in June 2018. AR 4137. It took another three months to finalize the revisions to the Production Safety Rule, and nearly a year for the revisions to the Well Control Rule. *See* 83 Fed. Reg. 49,216 (Sept. 28, 2018); 84 Fed. Reg. 21,908 (May 15, 2019). Thus as Interior explained, the information that it used for its NEPA analyses was the "best available information at that time." AR 16347.

The district court agreed. 456 F. Supp. 3d at 100. As the court correctly observed, a proposed rule has no legal effect, and when an agency exercises its discretion to propose a rule, it has "no duty to promulgate" a final rule. *Id.* (cleaned up). Nor for that matter does the agency have a deadline by which it must

do so. An agency may withdraw a proposed rule, or it may adopt a rule that differs from its proposal. *See, e.g.*, *Williams Natural Gas Co. v. FERC*, 872 F.2d 438, 450 (D.C. Cir. 1989) (holding that a proposed rule "in no way bound the agency to promulgate a final rule if further reflection, or changed circumstances, convinced" the agency that "no regulatory change was warranted"); *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) ("EPA is not required to adopt a final rule that is identical to the proposed rule. . . . Agencies are free—indeed, they are encouraged—to modify proposed rules as a result of the comments they receive."). Given the inherent uncertainties surrounding the proposed revisions to the Safety Rules, it was reasonable for Interior to decline to evaluate a hypothetical future scenario in which the revisions became final as proposed. 456 F. Supp. 3d at 100.

Plaintiffs maintain that NEPA required Interior to analyze the impacts by assuming the proposed rules became final. Opening Brief 39-44. But they stretch the case law to fit their position. For example, they assert—in tension with their argument about the no action alternative—that Interior "must consider conditions as they 'are likely to exist.'" Opening Brief 41 (quoting *Carolina Environment Study Group v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975)). But here Interior had concluded that a catastrophic spill was a low-probability event. AR 8238. Even if the proposed changes to the Safety Rules were likely to become law

eventually, Interior reasonably declined in the Supplemental EIS to address how those changes might influence a risk that the agency found was not reasonably foreseeable.

And while Plaintiffs emphasize the "dozens" of Well Control Rule provisions that Interior was proposing to revise, Opening Brief 36, Plaintiffs overstate the revisions. As Interior explained, the proposed revisions impacted less than 18% of that Rule's hundreds of provisions and (1) did *not* eliminate the blowout preventer requirements, (2) did *not* remove real-time monitoring requirements, (3) did *not* remove drilling margin requirements, and (4) did *not* eliminate many other critical safety requirements in the Rule. AR 7374; *see also* AR 7373-79. Interior's approach was not, as Plaintiffs suggest, a wholesale "repeal of these rules." Opening Brief 42.

Besides, before issuing the Record of Decision for Lease Sale 251, Interior *did* analyze the potential impacts if it were to finalize the proposed revisions to the Safety Rules. AR 4052-4056. Interior explained that since publishing the Supplemental EIS, more details on the proposed rule changes had become available. AR 4052. Then Interior reviewed both the proposed changes to the Safety Rules and draft Environmental Assessments evaluating the potential environmental impacts of the changes. AR 4052-53. Based on this review, Interior found that the proposed rule changes "would not change or increase

environmental risks from what they were" under the Safety Rules. AR 4053. Thus, Interior concluded that the proposed revisions to the Safety Rules did not require supplementation of the Supplemental EIS. AR 4054; *see Friends of Capitol Crescent Trail v. Federal Transit Administration*, 877 F.3d 1051, 1059 (D.C. Cir. 2017) ("If an agency's decision not to prepare a S[upplemental] EIS turns on a factual dispute the resolution of which implicated substantial agency expertise, the court defers to the agency's judgment." (cleaned up)).

Having insisted that Interior had to analyze the impacts of the proposed revisions to the Safety Rules, Plaintiffs then attempt to dismiss that very analysis as an "eleventh hour" effort. Opening Brief 39 n.9. They contend that Interior's analysis is "procedurally improper," *id.*, relying on *Great Basin Resource Watch v. U.S. Bureau of Land Management*, in which the Ninth Circuit held that a "post-EIS analysis—conducted without any input from the public—cannot cure deficiencies in an EIS." 844 F.3d 1095, 1104 (9th Cir. 2016). As this Court has observed, "Completion of the EIS, however, does not always mark the end of the NEPA process." *Friends of Capitol Crescent Trail*, 877 F.3d at 1055. And *Great Basin Resource Watch* is inapposite because here Interior's analysis responded to a letter from Plaintiff Sierra Club re-raising the issue. *See* AR 4047-48 (Sierra Club's letter); AR 4052 (referencing Sierra Club's letter).

No doubt Plaintiffs disagree with Interior's conclusion that the revisions will not change or increase environmental risks under the Safety Rules. But Plaintiffs' concerns about the revisions themselves are not relevant because NEPA is "not a suitable vehicle for airing grievances" about Interior's "substantive policies." *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015). The only question for the Court is whether Interior adequately considered the revisions as they relate to the low-probability risk of a catastrophic oil spill and potential impacts from a single lease sale. It did.

Finally, it bears emphasis that while Interior viewed a catastrophic oil spill as not reasonably foreseeable and not part of the proposed action, the agency did not stop there. AR 8238. Interior went the extra mile and prepared a white paper examining the potential impacts of a catastrophic oil spill in the Gulf, J.A. ____-____, which it then expressly relied on in the Multisale EIS and the Supplemental EIS.[6] *See* AR 8211-12, 15633-34. Plaintiffs do not address the white paper. Nor do Plaintiffs explain how Interior's analysis failed to adequately disclose potential impacts of a catastrophic spill. By studying and disclosing those impacts, Interior did all that NEPA requires and more. *Indian River County*, 945 F.3d at 523.

[6] The parties stipulated that the white paper is in the record. Fed. R. App. P. 16(b).

B. Interior reasonably accounted for regulatory oversight at later OCSLA stages.

In assessing potential environmental impacts that may occur at later OCSLA stages, Interior reasonably considered the Safety Agency's oversight role. The Safety Agency enforces offshore safety and environmental regulations and lease-term stipulations during the exploration and development stages. AR 14276, 14255, 6523-47. Plaintiffs contend that Interior's analysis is flawed because a February 2017 Government Accountability Office report concluded that the Safety Agency was not effectively enforcing its regulations. Opening Brief 44-49. But Interior adequately considered the Safety Agency's oversight role and reasonably declined to explore the findings in the 2017 report.

In the Program EIS, Interior assumed that in the later OCSLA stages, the Safety Agency would "implement requirements for safe operations and environmental protection." AR 14290. When responding to public comments about a *2016* Government Accountability Office report, however, Interior stated that in future lease sale EISs, it would more closely evaluate the Safety Agency's role, its "regulatory compliance responsibilities," the "shortcomings in regulatory oversight identified" in the 2016 report, and "implemented or planned remedies." AR 15118. Then in the Multisale EIS and Supplemental EIS, Interior followed through on this plan by further evaluating the Safety Agency's role, regulatory responsibilities, and reforms.

In those EISs, Interior highlighted the Safety Agency's important role *after* the leasing stage. As Interior explained, each exploration and development plan and any pipeline applications would undergo a NEPA review during which project-specific mitigation measures would be applied. AR 15563, AR 5545-47. And the Safety Agency has the authority to "monitor and enforce these conditions" and "may seek remedies and penalties from any operator that fails to comply with those conditions, stipulations, and mitigating measures." AR 15563. In response to comments, Interior noted that it had addressed the Safety Agency's "rigorous postlease process" in the Multisale EIS. AR 16201; AR 6523-47 (Appendix A).

When commenters again raised concerns about the Government Accountability Office's findings, this time in the 2017 report, Interior responded by highlighting its "aggressive and comprehensive reforms" to offshore oil and gas regulation and oversight since the *Deepwater Horizon* disaster. AR 16346; *see also* AR 16200-02, 16318, 16953. And Interior affirmed that both the Safety Agency and the Bureau of Ocean Energy Management would "remain vigilant in instituting reform efforts and lessons learned since the *Deepwater Horizon* explosion, oil spill, and response." AR 16346. Interior also acknowledged the concerns expressed by commenters about the 2017 report and recommended that they contact the Safety Agency directly about those concerns. AR 16374. But Interior concluded that the report's findings were "outside the scope" of the

Supplemental EIS because the Safety Agency's operations were "outside the leasing process." AR 16346-74.

This is sensible. NEPA "involves an almost endless series of judgment calls," and the "line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts." *WildEarth Guardians*, 738 F.3d at 312 (cleaned up). Interior drew a reasonable line by declining to analyze how the 2017 report's findings about the Safety Agency could influence the mitigation of potential impacts during OCSLA's exploration and development stages. Plaintiffs claim (at 47-48) that Interior breached a NEPA and APA obligation to respond to "relevant and significant comments," but Interior *did* respond, just not in the way Plaintiffs thought it should have.

Interior's NEPA obligations do not end at the lease sale stage. Because Interior is "required to comply with NEPA at various stages of the oil and gas development process," it is "not required at the lease sale stage to analyze potential environmental effects on a site-specific level of detail." *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 493-94 (9th Cir. 2014). Consistent with OCSLA's pyramidic structure, Interior does more NEPA review at the exploration and production stages. AR 16197-99. At those stages, Interior may conduct site-specific environmental reviews that analyze impacts on a "finer geographic scale" than in the Multisale EIS and Supplemental EIS. AR 15564. And Interior also

"applies mitigations as conditions of approval to permits, as appropriate." AR 15564-65. The Safety Agency's oversight role does not kick in until these later OCSLA stages. AR 14277 (figure 1.3-1). If the Safety Agency's enforcement efforts were somehow relevant then, Interior might further analyze the 2017 report. But it reasonably declined to delve into those findings at the leasing stage.

What is more, Plaintiffs misconstrue the 2017 report when they claim that it shows that the Safety Agency is "not adequately enforcing its safety regulations." Opening Brief 49. As the district court found when it rejected Plaintiffs' interpretation, the report "does not suggest that [the Safety Agency] is not performing its enforcement duties at all; it merely suggests that there is room for improvement of the [Agency's] existing policies." 456 F. Supp. 3d at 101; AR 27102-03. For example, the report notes that the Safety Agency has made progress in monitoring and enforcement but opines that progress has been "limited" and recommends changes to address "risks to the effectiveness of its enforcement capabilities." AR 27102-04. And the report states that Interior "agreed that additional reforms—such as documented policies and procedures—are needed" but "neither agreed nor disagreed" with the report's specific recommendations. AR 27105.

This back-and-forth shows that the oversight process is working. The 2017 report confirms that over the years, the Government Accountability Office—whose

mission is to identify risks and suggest steps to improve performance—has made many recommendations to Interior. AR 27217-18. Some the Office had closed. *Id*. Some remained open. *Id*.

Contrary to Plaintiffs' argument (at 48-49), the 2017 report did not require Interior to assume that industry lessees "will disobey" regulations and lease conditions "to an environmentally significant degree," or that the Safety Agency "will allow such disobedience." *Florida Keys Citizens Coalition, Inc. v. U.S. Army Corps of Engineers*, 374 F. Supp. 2d 1116, 1149 (S.D. Fla. 2005) (cleaned up). Instead, Interior presumed that lessees will seek to comply with the law and with mitigation conditions in their leases, plans, and permits—an approach that courts have affirmed is reasonable. *See Bicycle Trails Council v. Babbitt*, 82 F.3d 1445, 1457 (9th Cir. 1996) (reasoning that an agency conducting a NEPA analysis of a new regulation "should no more assume that citizens will violate any other law than that they will violate the regulation being promulgated"); *City of San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) (affirming NEPA analysis that pollution would stay below significant levels in part because the lessee "would be required to conform to all applicable pollution control laws and regulations as a condition of tenancy"); *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985) (upholding consideration of legally-enforceable conditions in permits).

Just as courts apply a presumption of regularity that public officers have properly discharged their official duties, *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2011), Interior reasonably presumed that the Safety Agency would perform its oversight function in good faith. The 2017 report is far from "clear evidence to the contrary," *id.*, to override that presumption. *Cf. Moapa Band of Paiutes v. U.S. Bureau of Land Management*, No. 2:10-CV-02021, 2011 WL 4738120, at *7 (D. Nev. Oct. 6, 2011) (considering "reasonable" an agency's assumption that "regulatory agencies charged with permit enforcement would ensure compliance with the permit requirements"), *aff'd sub nom.*, *Moapa Band of Paiutes v. U.S. Bureau of Land Management*, 546 F. App'x 655 (9th Cir. 2013).

The district court agreed that, despite the 2017 report, Interior reasonably concluded that the Safety Agency would fulfill its responsibilities. 456 F. Supp. 3d at 100-102. Plaintiffs insist that the district court "erred by asking the wrong question" and rely on *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 589 (4th Cir. 2012). But the district court understood Plaintiffs' argument and correctly found that *Friends of Back Bay* was no help to them. *See* 456 F. Supp. 3d at 101-102. In *Friends of Back Bay*, the agency found no significant environmental impacts and issued a permit conditioned on adequate funding to enforce a no-wake zone in a national wildlife refuge. 681 F.3d at 585. The court held that this condition was a "demonstrably incorrect assumption"

because the agency knew that funding for enforcement was unavailable, and there was no "reasonable basis to conclude" that the no-wake zone "was being adequately enforced or its efficacy was otherwise assured." *Id.* at 589.

By contrast, in the Multisale EIS, Interior reviewed the Safety Agency's processes and concluded that the Agency had a "rigorous postlease process" in place. AR 16201, 16356, 6523-47. Interior did not rely on absolute compliance, perfect enforcement, or complete elimination of environmental impacts and safety risks. Nor was that necessary. The district court correctly held that the 2017 report did not make Interior's conclusion arbitrary. 456 F. Supp. 3d at 100-102.

Again, Interior mainly relied on historical data and quantitative analysis to assess potential impacts at the exploration and development stages, and Plaintiffs do not meaningfully challenge that analysis. But Interior also correctly recognized that the Safety Agency was implementing and enforcing regulations that should contribute to the mitigation of potential impacts. When evaluating mitigation, NEPA does not require Interior to put mitigation into effect or have a "perfect" program. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991) (cleaned up). Interior's analysis is reasonable.

III. Even if a remand were necessary, vacatur is unwarranted.

Even if the Court were to find that Interior violated NEPA, the Court should grant remand without vacating the Supplemental EIS, the Records of Decision for Lease Sales 250 and 251, and the leases sold in 2018. Contrary to Plaintiffs' argument, both *Allied-Signal* factors weigh against vacatur. Opening Brief 51-54 (citing *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

First, any error is not serious enough to warrant vacatur. Without a doubt, Interior carefully studied and disclosed the potential environmental impacts of the proposed lease sales. Even if NEPA demands more, Plaintiffs have offered no "reason to expect that the agency will be unable to correct those deficiencies" on remand. *Oglala Sioux Tribe v. Nuclear Regulatory Commission*, 896 F.3d 520, 538 (D.C. Cir. 2018); *see Heartland Regional Medical Center v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur." (cleaned up)).

Second, vacatur would cause disruptive consequences "while the agency proceeds to satisfy NEPA." *Oglala Sioux Tribe*, 896 F.3d at 538. Over the last several years, Interior has relied on both the Multisale EIS and the Supplemental EIS to ensure NEPA compliance for other lease sales, permits, and approvals.

Vacatur could have unintended and collateral effects on those decisions and on parties that are not before the Court.

As to the Records of Decision and the leases sold in Lease Sales 250 and 251, the companies that bought leases in 2018 have relied on Interior's actions by investing significant resources in the leases—first by paying more than $300 million in the lease auctions, and then by incurring planning expenditures and monthly rental payments. *See* Industry Intervenors' Response to Motion to Hold in Abeyance 4, 11-12 (Sept. 28, 2020) (citing Declaration of Carl Rewerts, attached as Exhibit 2). Given the years that have lapsed since the lease sales—including delay attributable to Plaintiffs' opposed request that the Court place their own appeal in abeyance—it would be inequitable to upset these reasonable reliance interests.

Although Plaintiffs contend that courts "rarely rely" on economic consequences to justify remand without vacatur, this Court has done so on several recent occasions. This includes *Oglala Sioux Tribe*, 896 F.3d at 538, and *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016)—a case that Plaintiffs cite—which held that when deciding whether to halt a project pending completion of an EIS, this Court must consider the "economic costs of delay" among other factors, *id.* at 1084 (cleaned up). *See also id.* at 1084 ("Delaying construction or requiring Cape Wind to redo the regulatory approval

process could be quite costly."); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, No. 20-1045, 2021 WL 3354747, at *6 (D.C. Cir. Aug. 3, 2021) (declining to vacate FERC's orders when that might imperil the intervenors' ability to obtain funding necessary to complete their projects in a timely fashion).

"More important," Plaintiffs and their members should "not suffer harm—irreparable or otherwise—from a disposition that leaves" Interior's decisions and the lease sales "in effect *for now*." *Oglala Sioux Tribe*, 896 F.3d at 538 (emphasis original). An OCSLA lease only authorizes lessees to conduct ancillary activities with few anticipated environmental impacts. AR 15542. Before lessees may conduct exploration and production activities on their leases, Interior must approve plans to do so. AR 16198-99. For any of those activities that have proceeded in the years since the 2018 lease sales were held, Plaintiffs' proper remedy would be to challenge those separate decisions.

In short, vacatur is not warranted. Rather, if the Court finds any error in Interior's NEPA analyses, it should remand to allow the agency to do further analysis.

CONCLUSION

For all these reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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ADDENDUM

National Environmental Policy Act
42 U.S.C. § 4332(C)—Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

Outer Continental Shelf Lands Act
43 U.S.C. § 1331(a)—Definitions

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

Outer Continental Shelf Lands Act
43 U.S.C. § 1332(3)—Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

. . .

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

Outer Continental Shelf Lands Act
43 U.S.C. § 1344—Outer Continental Shelf leasing program

(a) Schedule of proposed oil and gas lease sales

The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter. The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval. Such leasing program shall be prepared and maintained in a manner consistent with the following principles:

(1) Management of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.

(2) Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of--

(A) existing information concerning the geographical, geological, and ecological characteristics of such regions;

(B) an equitable sharing of developmental benefits and environmental risks among the various regions;

(C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;

(D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;

(E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;

(F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;

(G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and

(H) relevant environmental and predictive information for different areas of the outer Continental Shelf.

(3) The Secretary shall select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.

(4) Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government.

(b) Estimates of appropriations and staff required for management of leasing program

The leasing program shall include estimates of the appropriations and staff required to—

(1) obtain resource information and any other information needed to prepare the leasing program required by this section;

(2) analyze and interpret the exploratory data and any other information which may be compiled under the authority of this subchapter;

(3) conduct environmental studies and prepare any environmental impact statement required in accordance with this subchapter and with section 4332(2)(C) of Title 42; and

(4) supervise operations conducted pursuant to each lease in the manner necessary to assure due diligence in the exploration and development of the lease area and compliance with the requirements of applicable law and regulations, and with the terms of the lease.

(c) Suggestions from Federal agencies and affected State and local governments; submission of proposed program to Governors of affected States and Congress; publication in Federal Register

(1) During the preparation of any proposed leasing program under this section, the Secretary shall invite and consider suggestions for such program from any interested Federal agency, including the Attorney General, in consultation with the Federal Trade Commission, and from the Governor of any State which may become an affected State under such proposed program. The Secretary may also invite or consider any suggestions from the executive of any affected local government in such an affected State, which have been previously submitted to the Governor of such State, and from any other person.

(2) After such preparation and at least sixty days prior to publication of a proposed leasing program in the Federal Register pursuant to paragraph (3) of this subsection, the Secretary shall submit a copy of such proposed program to the Governor of each affected State for review and comment. The Governor may solicit comments from those executives of local governments in his State which he, in his discretion, determines will be affected by the proposed program. If any comment by such Governor is received by the Secretary at least fifteen days prior to submission to the Congress pursuant to such paragraph (3) and includes a request for any modification of such proposed program, the Secretary shall reply in writing, granting or denying such request in whole or in part, or granting such request in such modified form as the Secretary considers appropriate, and stating his reasons therefor. All such correspondence between the Secretary and the Governor of any affected State, together with any additional information and data relating thereto, shall accompany such proposed program when it is submitted to the Congress.

(3) Within nine months after September 18, 1978, the Secretary shall submit a proposed leasing program to the Congress, the Attorney General, and the Governors of affected States, and shall publish such proposed program in the Federal Register. Each Governor shall, upon request, submit a copy of the proposed leasing program to the executive of any local government affected by the proposed program.

(d) Comments by Attorney General on anticipated effect on competition; comments by State or local governments; submission of program to President and Congress; issuance of leases in accordance with program

(1) Within ninety days after the date of publication of a proposed leasing program, the Attorney General may, after consultation with the Federal Trade Commission, submit comments on the anticipated effects of such proposed program upon competition. Any State, local government, or other person may submit comments and recommendations as to any aspect of such proposed program.

(2) At least sixty days prior to approving a proposed leasing program, the Secretary shall submit it to the President and the Congress, together with any comments received. Such submission shall indicate why any specific recommendation of the Attorney General or a State or local government was not accepted.

(3) After the leasing program has been approved by the Secretary, or after eighteen months following September 18, 1978, whichever first occurs, no lease shall be issued unless it is for an area included in the approved leasing program and unless it contains provisions consistent with the approved leasing program, except that leasing shall be permitted to continue until such program is approved and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter.

(e) Review, revision, and reapproval of program

The Secretary shall review the leasing program approved under this section at least once each year. He may revise and reapprove such program, at any time, and such revision and reapproval, except in the case of a revision which is not significant, shall be in the same manner as originally developed.

(f) Procedural regulations for management of program

The Secretary shall, by regulation, establish procedures for--

(1) receipt and consideration of nominations for any area to be offered for lease or to be excluded from leasing;

(2) public notice of and participation in development of the leasing program;

(3) review by State and local governments which may be impacted by the proposed leasing;

(4) periodic consultation with State and local governments, oil and gas lessees and permittees, and representatives of other individuals or organizations engaged in activity in or on the outer Continental Shelf, including those involved in fish and shellfish recovery, and recreational activities; and

(5) consideration of the coastal zone management program being developed or administered by an affected coastal State pursuant to section 1454 or section 1455 of Title 16.

Such procedures shall be applicable to any significant revision or reapproval of the leasing program.

(g) Information from public and private sources; confidentiality of classified or privileged data

The Secretary may obtain from public sources, or purchase from private sources, any survey, data, report, or other information (including interpretations of such data, survey, report, or other information) which may be necessary to assist him in preparing any environmental impact statement and in making other evaluations required by this subchapter. Data of a classified nature provided to the Secretary under the provisions of this subsection shall remain confidential for such period of time as agreed to by the head of the department or agency from whom the information is requested. The Secretary shall maintain the confidentiality of all privileged or proprietary data or information for such period of time as is provided for in this subchapter, established by regulation, or agreed to by the parties.

(h) Information from all Federal departments and agencies; confidentiality of privileged or proprietary information

The heads of all Federal departments and agencies shall provide the Secretary with any nonpriviledged1 or nonproprietary information he requests to assist him in preparing the leasing program and may provide the Secretary with any privileged or proprietary information he requests to assist him in preparing the leasing program. Privileged or proprietary information provided to the Secretary under the provisions of this subsection shall remain confidential for such period of time as agreed to by the head of the department or agency from whom the information is requested. In addition, the Secretary shall utilize the existing capabilities and resources of such Federal departments and agencies by appropriate agreement.

National Environmental Policy Act
Council on Environmental Quality Regulations
40 C.F.R. § 1502.4(c)—Major Federal actions requiring the preparation of environmental impact statements

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

National Environmental Policy Act
Council on Environmental Quality Regulations
40 C.F.R. § 1502.14—Alternatives including the proposed action

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

National Environmental Policy Act
Council on Environmental Quality Regulations
40 C.F.R. § 1502.15—Affected environment

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

National Environmental Policy Act
Council on Environmental Quality Regulations
40 C.F.R. § 1502.20—Tiering

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

National Environmental Policy Act
Council on Environmental Quality Regulations
40 C.F.R. § 1508.7—Cumulative impact

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

National Environmental Policy Act
Council on Environmental Quality Regulations
40 C.F.R. § 1508.8—Effects

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

National Environmental Policy Act
U.S. Department of the Interior Regulations
43 C.F.R. § 46.415(b)—Environmental impact statement content, alternatives, circulation and filing requirements

(b) Alternatives. The environmental impact statement shall document the examination of the range of alternatives (paragraph 46.420(c)). The range of alternatives includes those reasonable alternatives (paragraph 46.420(b)) that meet the purpose and need of the proposed action, and address one or more significant issues (40 CFR 1501.7(a)(2–3)) related to the proposed action. Since an alternative may be developed to address more than one significant issue, no specific number of alternatives is required or prescribed. In addition to the requirements in 40 CFR 1502.14, the Responsible Official has an option to use the following procedures to develop and analyze alternatives.

(1) The analysis of the effects of the no-action alternative may be documented by contrasting the current condition and expected future condition should the proposed action not be undertaken with the impacts of the proposed action and any reasonable alternatives.

(2) The Responsible Official may collaborate with those persons or organization that may be interested or affected to modify a proposed action and alternative(s) under consideration prior to issuing a draft environmental impact statement. In such cases the Responsible Official may consider these modifications as alternatives considered. Before engaging in any collaborative processes, the Responsible Official must consider the Federal Advisory Committee Act (FACA) implications of such processes.

(3) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.