ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5179

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

GULF RESTORATION NETWORK, et al.,

Plaintiffs-Appellants,

v.

DEBRA HAALAND, et al.,

Defendants-Appellees,

and

AMERICAN PETROLEUM INSTITUTE and CHEVRON USA, INC.,

Intervenor Defendants-Appellees.

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

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GLOSSARY

APA	Administrative Procedure Act
Bureau	Bureau of Ocean Energy Management
EIS	Environmental Impact Statement
GAO	Government Accountability Office
Interior	U.S. Department of Interior
NEPA	National Environmental Policy Act
OCSLA	Outer Continental Shelf Lands Act
Safety Agency	Bureau of Safety and Environmental Enforcement
Safety Rules	Well Control Rule and Production Safety Rule
Well Control Rule	Blowout Preventer Systems and Well Control Regulations

INTRODUCTION

The 2018 lease sales (Lease Sales 250 and 251) each offered around 77 million acres of public land to the oil and gas industry for fossil fuel production. In their opening brief, Appellants explained how, before opening this massive area for development, the Bureau of Ocean and Energy Management ("Bureau") assumed that the impacts from resulting development would still happen regardless of whether it chose to hold the lease sales. That assumption prevented the Bureau from meaningfully comparing alternatives as the National Environmental Policy Act ("NEPA") requires. And the Bureau made two fundamental false assumptions about safety: (1) that a catastrophic oil spill was not expected because critical Safety Rules would remain in place, even though those very same Rules were on their way out the door; and (2) that rigorous enforcement by the Bureau's sister agency, the Bureau of Safety and Environmental Enforcement ("Safety Agency"), would effectively prevent accidents despite available evidence demonstrating the Safety Agency's enforcement was anything but rigorous. Those false assumptions led the Bureau to shortchange the "hard look" it is required to take under NEPA and turned the Bureau's environmental impact statement ("EIS") into a mere paper exercise. The Bureau and Intervenor-Defendants do not deny these failures. Instead, they defend the 2018 lease sale decisions by distracting from these evident failings and trivializing their import. Their efforts to muddy the waters fail.

ARGUMENT

I. The Bureau's No Action Alternative Was Unlawful.

In its Lease Sale EIS, the Bureau needed to inform itself about environmental effects relevant to: (1) whether to hold the sales and (2) how to conduct the lease sales (*e.g.*, what areas to include). Fed. Br. 22; AR5502 (for each proposed sale, the Bureau "makes individual decisions on *whether and how* to proceed." (emphasis added)). But the Bureau only considered one of these questions: how to conduct the sales. Rather than fully consider a true no action alternative, the Bureau improperly assumed "the resulting development of oil and gas" and attendant environmental effects "would most likely be postponed to a future sale." Fed. Br. 23; AR15488, 15559-60, 15613. By assuming these effects were bound to occur regardless of whether it took action, the Bureau turned what is meant to be a thoughtful consideration into an irrational Hobson's choice. This central assumption is contrary to the Outer Continental Shelf Lands Act ("OCSLA") and NEPA and is not supported with any analysis in the record.

A. The Bureau Irrationally Assumed Effects from the Lease Sales Would Occur Even Under a No Action Alternative.

OCLSA requires the Bureau to balance environmental safeguards with economic concerns at every stage before production takes place. Opening Br. 23-24. In line with those requirements, the Bureau must prepare an EIS before holding a lease sale—the "critical stage" for environmental consideration. *Id*. 23; 43 U.S.C.

§ 1346(a)(1)-(2). Under NEPA, the "heart" of the EIS is an informed comparison of alternatives. 40 C.F.R. 1502.14; *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) ("Informed and meaningful consideration of . . . the no action alternative [] is thus an integral part of the statutory scheme."). Here, the Bureau assumed that if it did not hold these sales, the incremental effects from development would "most likely be postponed to a future lease sale." AR15488. It therefore erased any meaningful comparison of alternatives, rendering its EIS unlawful. Opening Br. 26-27.

The Bureau implicitly agrees that "a no action alternative that reflected no leasing" was necessary and claims that it "tiered" to analysis from a no leasing alternative in its earlier Program EIS. Fed. Br. 16-18. But "'tiering' regulations do not relieve the [Bureau] from taking a 'hard look' at the environmental impacts." *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)). In any event, even if the Bureau incorporated by reference some of the "analysis" from the Program EIS, the Bureau ultimately "declined to revisit" the no leasing alternative when deciding whether to hold the 2018 lease sales. Fed. Br. 27 ("Interior did not have to revisit that alternative again at the leasing stage."); *id*. 16 (same).

The Bureau's argument makes clear that the agency only truly considered a "no leasing alternative" when it made its decision to finalize the five-year program and not when it considered whether to hold the 2018 lease sales. Both the Bureau

and the district court have recognized, however, that OCSLA's staged decision process requires the Bureau to fully reevaluate whether to hold the lease sales at this stage. *E.g.*, Fed. Br. 21 (OCSLA "does not mandate a particular level of leasing or production."); *Gulf Restoration Network v. Bernhardt*, 456 F. Supp. 3d 81, 97 (D.D.C. 2020) (stating OCSLA does not mandate that every lease sale proposed in a five-year plan will happen). The Bureau's assertion that its programmatic analysis is sufficient would effectively bind the agency to hold the lease sales as proposed in the five-year plan without reevaluating the impacts.

The Bureau likewise offers no support for the assertion that it need not reconsider a no leasing alternative as part of its lease sale decisions. *Biodiversity Conservation Alliance v. Jiron*, which the Bureau invokes, demonstrates the opposite. 762 F.3d 1036, 1085 (10th Cir. 2014). The Bureau misrepresents *Biodiversity* by characterizing the proposed action as deciding "whether grazing permits should be issued," Fed. Br. 27, but that case involved a challenge to a broad Forest Plan Amendment that corrected several deficiencies. *Biodiversity*, 762 F.3d at 1052-54, 1056. In rejecting an argument that the agency needed to consider a "forest-wide" no-grazing alternative in its EIS, the court distinguished *Western Watersheds Project v. Rosenkrance*, No. 4:09-cv-298, 2011 WL 39651, at *10-11 (D. Idaho Jan. 5, 2011)—where "grazing was the centerpiece of the agency action,"—from the Forest Plan Amendment, which focused on other matters.

Biodiversity, 762 F.3d at 1085. The court concluded that a no-grazing alternative "fell outside the main purposes" of the Amendment. *Id*. at 1083-85.

Here, *Western Watersheds* is directly analogous to the Bureau's decision, 2011 WL 39651, at *10. ("Most troubling is that [the agency] did not consider a real no action alternative. . . . If [the agency] truly did take no action, then the old grazing permits would expire [and] no new permits would issue . . . . No action would be no action."). Here, the Bureau assumed if it did not hold the 2018 lease sales (lets the permits expire), the sales will happen anyway at a later time (the permits will renew later). Because leasing was "the centerpiece of the agency action" and a "major issue" the Bureau needed to fully consider the no leasing alternative. *See Biodiversity*, 762 F.3d at 1084-85. It did not do so and that rendered its decision unlawful.

The Bureau nevertheless insists that it considered taking no action through its statements that any impacts "would not occur" in the absence of a sale. Fed. Br. 20. But these statements were then rendered meaningless by the Bureau's subsequent assertion that the incremental impacts would nevertheless *eventually occur* because another lease sale is highly likely in the future. Opening Br. 26-27.

Finally, the Bureau spends pages pulling apart its analysis of future leasing, implying that an "environmental baseline" analysis is something separate and apart

from the no action alternative. Fed. Br. 24-30.[1] NEPA does not make such a distinction—the no action alternative itself is meant to be the baseline. 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) (NEPA guidance explaining the no action alternative itself provides a "benchmark" to compare the magnitude of effects across alternatives). NEPA simply does not allow the agency—in setting that benchmark—to assume the impacts from the very same proposed project it is evaluating are "reasonably foreseeable" impacts that will inevitably occur. Doing so unlawfully tips the scales in favor of action.

The cases the agency cites are not analogous. They simply demonstrate that agencies should incorporate the reasonably foreseeable impacts from "*other*" actions into its no action alternative. *See, e.g.*, *Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 74-75 (D.D.C. 2000) (upholding agency's consideration in the no action alternative of "*predictable actions by other*[]" private developers); *Cascadia Wildlands v. Bureau of Indian Affs.*, 801 F.3d 1105, 1111-13 (9th Cir. 2015) (addressing reasonably foreseeable impacts of a "previously approved project"). Here, in contrast, the Bureau is not incorporating reasonably foreseeable impacts from *other* previously approved projects or from *other* actors. It is using the

[1] Appellants do not challenge the Bureau's incorporation of current activity into the no action alternative. *See* Fed. Br. 28-29.

moniker "reasonably foreseeable impacts" as cover to incorporate the impacts from the proposed project itself into the no action alternative.

Courts in this circuit and others have uniformly determined that assuming the effects from the proposed project will occur as part of a no action alternative is a serious violation of "black letter law under NEPA." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 645 (9th Cir. 2010); *see also* Opening Br. 26-27, 30-32 (citing cases). The Bureau attempts to distinguish this caselaw by arguing that it was only acknowledging the practical realities of OCSLA—"that future leasing was likely." Fed. Br. 37. But this Court has squarely rejected that argument. In *Natural Resources Defense Council v. Hodel*, the court concluded that Interior could not narrow its consideration of alternatives simply because OCSLA includes a general policy goal of development—and that doing so would swallow the agency's NEPA duties. 865 F.2d 288, 296 (D.C. Cir. 1988). This Court should reject the Bureau's similar attempt to circumvent NEPA here.

B. There is No Support for the Agency's Blanket Assumptions.

Even if the Bureau could rationally assume that the effects from its proposed actions—the lease sales—would happen later rather than not happen at all, its assumption that the same level of oil and gas development would inevitably result later is not supported by the record.

The Bureau recognizes volatilities inherent in the marketplace can drastically change development activity levels over time. Fed. Br. 31-35. Despite this, the Bureau admittedly did not evaluate how activity levels may change if a lease sale were delayed years or even decades. AR15488. *See* AR14288 ("A change in timing . . . is expected to have little influence on the . . . impacts."). The Bureau dismisses a "1- or 2-year timing difference" as "inconsequential," Fed. Br. 35, but it never forecasted how much of a delay to expect and tellingly points to nothing in the record to support its summary conclusions that timing is irrelevant. *See id*. 35; Opening Br. at 28-29.

While the Bureau highlights the range of activities considered in its spreadsheet-based models, the precision of those models is not the issue. As the activity ranges demonstrate, the geographic area of the sale is the driving factor for the predicted range of activities. AR11583 (showing Alternative A, which would offer the entire Gulf region would result in a much higher range of activities than Alternative C, which only includes the Western area). In other words, activities vary based on the scope of the sale. There is no reason to believe that the scope of the sale would not change based on the timing. *See* Opening Br. 28-30. The Bureau's spreadsheet models demonstrate that it had the capability to analyze the impacts of a delayed sale, but expressly chose not to do so. *See* AR14288.

The Bureau's blanket assertions, unsupported by the record, led to an impermissible "uninformed agency decision." *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017). They undermined the Bureau's consideration of impacts, discounted the environmental benefits of not holding the sales, and placed a heavy thumb on the scale of taking action.

II. The Bureau Relied on Incorrect Assumptions About Safety.

The Bureau made two incorrect assumptions in its Lease Sale EIS about the safety of oil drilling activities on leased areas, both of which violated NEPA's hard look requirements. *First*, the Bureau relied extensively on two Safety Rules to conclude that a catastrophic oil spill was not expected from the lease sales, even though it was keenly aware that a repeal of those same Safety Rules was imminent. *Second*, the Bureau wrongly assumed that its sister agency would rigorously enforce safety regulations and minimize the risks of oil spills, but ignored an available Government Accountability Office ("GAO") Report showing that effective enforcement was not taking place.

A. The Bureau Relied on Incorrect Assumptions that the Safety Rules Would Mitigate Catastrophic Spill Risk.

1. The Safety Rules Played a Central Role in the Bureau's Decision to Hold the 2018 Lease Sales.

The record is clear that the Safety Rules formed a critical part of the Bureau's assessment of catastrophic spill risk. *See* Opening Br. 15, 33-36. *Contra*

Fed. Br. 40 (suggesting Bureau "merely" observed the Safety Rules' benefit in two locations). The Bureau attempts to divert attention from its reliance on the Safety Rules by pointing to a quantitative analysis of historical spill data. Fed. Br. 40 (citing AR14348-50, 15080). Although the Bureau may have considered some quantitative information as *part* of its spill risk assessment, there is no support for the Bureau's contention that it reached its conclusion about the likelihood of a catastrophic spill "mainly based" on that part of the assessment. *See* Fed. Br. 40. Nowhere in the record did the agency indicate its quantitative approach was independently sufficient to show a catastrophic spill would not take place. On the contrary, the Program EIS expressly states that the Bureau's conclusion was based only "partly" on the "extremely low probability" (i.e., statistical result), but "more importantly" on safety reforms. AR14563; *see* Opening Br. 33-36.

Nor could the agency rationally rely solely on its statistical analysis of "historical OCS spill data," AR14349, to accurately assess *future* spill risks likely to result from the lease sale. *See, e.g.*, *New York v. Nuclear Regul. Comm'n*, 681 F.3d 471, 481 (D.C. Cir. 2012) ("That past leaks have not been harmful . . . does not speak to whether and how future leaks might occur, and what the effects of those leaks might be."). Despite low statistical probabilities, the *Deepwater Horizon* catastrophe still happened. The Bureau recognized that reality in its EIS

and touted its Safety Rules as the backstop that would prevent a similar disaster from reoccurring.

While the Bureau acknowledges that Interior's post-*Deepwater Horizon* reforms contributed to its conclusion that a catastrophic oil spill was not expected, it mischaracterizes the Safety Rules as just one reform among many. *See* Fed. Br. 41-42 (referencing fact sheet AR16953). As an initial matter, the cited fact sheet lists multiple categories of reforms that are a part of the Safety Rules (*e.g.*, enhanced blowout preventer testing and increased inspections). Regardless, the Well Control Rules, in particular, were the *primary* reforms Interior instituted to prevent a catastrophic spill. As the Bureau recognizes in the Program EIS, "incidents with the greatest potential for catastrophic consequences are likely to be losses of well control" or blowouts. AR14347-48. The Well Control Rules targeted precisely those risks in response to recommendations from several investigations into the *Deepwater Horizon* disaster. 81 Fed. Reg. 25,888, 25,888-89 (Apr. 29, 2016); *id*. at 25,890 (stating "primary purpose" of the rule was to "prevent future well-control incidents, including major incidents like" *Deepwater Horizon*).

Moreover, the Bureau cited the Well Control Rules and their provisions directly multiple times in the EISs as important reforms, including when discussing the risk of well blowouts, AR8398, and catastrophic spills, AR14348 (referencing the rules' new safeguards, including blowout preventer testing, barriers,

containment systems, and additional regulatory oversight). *See also* AR16309. The Bureau nowhere directly cites or even mentions other "categories of reforms" (*e.g.*, the 2010 Drilling Safety Rule) anywhere in its EISs. It is evident that, at the time it prepared its EISs, the Bureau believed the Safety Rules were critically important to prevent a catastrophic spill—the Bureau cannot run away from that conclusion now.

2. The Bureau's Reliance on the Safety Rules Was Unreasonable Because It Knew Interior was Dismantling Those Same Rules.

There is no question that the Bureau knew its sister agency was rescinding substantial portions of the Safety Rules at the time it completed the Lease Sale EIS. The Bureau acknowledged as much in response to comments on the EIS. Opening Br. 38. And before the Bureau completed the EIS, the President and Secretary of Interior ordered the revision and rescission of the Safety Rules in accordance with new executive policy. *Id*. 37-38.

The Bureau attacks a strawman, asserting that it was not required to predict the details of the final Rules. Fed. Br. 42-44. That is not the question. The issue is whether the Bureau's assumption that the Safety Rules would remain in place, unchanged, was reasonable at the time it relied on that assumption. It is precisely *because* the Bureau assumed the Safety Rules would be fully applicable to reduce spill risk that it was required to assess the accuracy of that assumption. *See* Opening Br. 39-40. It did not do so.

The Bureau argues that it need not have considered any change in the Rules because they were not yet final. NEPA does not require information to have a "legal effect" before an agency must consider it. *See* Opening Br. 40-43. And the Bureau has no response to numerous cases in this Circuit and others requiring agencies to consider future changes in analogous circumstances, even if those changes are not yet final. Opening Br. 42-43 (citing cases).[2] The issue is not whether the revisions to the Rules were final and legally binding at the time the EIS was prepared, but rather whether the factual landscape would be different if the Rules changed. *Id*. The Bureau did not need to know precisely how the final Rules would look to know that changes were happening and that its contrary assumption was invalid. *Id*. 43. *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012) ("An . . . unwarranted assumption [] can erode any pillar underpinning an agency action."). No amount of "deference" can excuse the Bureau "from ensuring the accuracy and scientific integrity of its analysis, a NEPA requirement." *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016). *Contra* Intervenor Br. 16-19.

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[2] The two cases the agency cites simply highlight that proposed regulations can change before becoming final. Fed. Br. 43.

3. *The Bureau Did Not Evaluate Whether the Safety Rule Revisions Affected Risks.*

The Bureau attempts to trivialize the changes to the Safety Rules and argues that it addressed the impact of any changes in a separate administrative record "insert" for Lease Sale 251. Fed. Br. 44. As an initial matter, the Bureau's defense of its assumptions must be made in the record, not in *post hoc* representations. *See Friends of the River v. FERC*, 720 F.2d 93, 106 (D.C. Cir. 1983) ("[T]he EIS requirement inhibits *post hoc* rationalizations of inadequate environmental decisionmaking."). The Bureau did not evaluate the effect of the Rule changes in any EIS or in any record document prior to holding Lease Sale 250.

The "insert" was also procedurally and substantively flawed. Opening Br. 39 n.9.[3] The Bureau asserts that the insert was procedurally proper because it responded to a letter from Sierra Club after Lease Sale 250. Fed. Br. 45. What matters is not whether an analysis was spurred by public input, but whether the public has had an opportunity to provide input on that analysis. *Great Basin Resource Watch v. U.S. Bureau of Land Mgmt.*, 844 F.3d 1095, 1104 (9th Cir. 2016) (rejecting similar agency attempt to claim it had "double check[ed]" validity of erroneous EIS statements using new data).

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[3] Whether the insert cured the Bureau's NEPA violation before Lease Sale 251, it could not retroactively cure the violation for Lease Sale 250, which had already been held.

The Bureau also incorrectly notes that it determined changes to the Safety Rules "did not require supplementation" of the Lease Sale EIS. Fed. Br. 45. But that cannot be true. NEPA requires supplementation when there is *new* information that emerges after an EIS is complete. 40 C.F.R. §§ 1502.9(c)(1)(i), (ii). The Bureau already knew that the Safety Rules were changing when it completed its EIS. There was no new information at the time the Bureau completed the insert—the Safety Rules were still not final. AR4053 ("Neither Rule is published as final."). Instead, the "insert" was just the Bureau's attempt to paper over its evident failings to take a hard look at the effects of the safety rule changes in its EIS, as NEPA requires.[4]

The insert is also substantively flawed. It erroneously reasons the repeals "will NOT" eliminate various requirements, when the proposed repeals expressly state that they will remove those requirements. *Compare* AR4052-53, *with, e.g.*, 82 Fed. Reg. 61,703, 61,709 (Dec. 29, 2017) (eliminating inspection system and equipment standards), 83 Fed. Reg. 22,128, 22,137 (May 11, 2018) ("removing many of the prescriptive real-time monitoring requirements"), 22,138 ("removing all references to a [BSEE-Approved Verification Organization]" for blowout preventer testing), 22,133, 22,137, 22,139 (expressly removing other

[4] Tellingly, the insert does not expressly state that the Bureau considered whether the Safety Rule revisions required *supplementation*, but it does expressly state as much with respect to royalty rates—a new issue that emerged post-EIS. AR4054.

requirements).[5] And, in the insert, the Bureau blindly defers to the Safety Agency's conclusions that the proposed rule changes "would not change or increase environmental risks." AR4053. But NEPA requires the Bureau to perform its own analysis. *Or. Env't Council v. Kunzman*, 714 F.2d 901, 905 (9th Cir. 1983) ("One agency cannot rely on another's examination of environmental effects under NEPA." (citation omitted)); *see also Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015) ("Administrative law does not permit [an agency to] excuse its inadequate responses by passing the entire issue off onto a different agency.").[6]

Finally, the Bureau highlights a white paper on the potential impacts of a catastrophic oil spill. Fed. Br. 46. While that paper describes the effects *if* such a spill were to occur, the problem is that the Bureau's NEPA documents (erroneously) assure the public and decisionmakers that catastrophic spill effects will *not* result from the sales. Opening Br. 15; AR15570; AR15604. *See Friends of Back Bay,* 681 F.3d at 588 (finding NEPA violation where agency described

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[5] Intervenors note at least one of the proposals "would maintain the status quo" of what existed *before* the Safety Rules were enacted, Intervenor Br. 21, which is precisely the point: the repeals would eliminate the Safety Rule's mitigation benefits.

[6] *City of Tacoma v. FERC* is irrelevant because it involved the Endangered Species Act where the statutory scheme directs action agencies to rely on a biological opinion prepared by expert agency. 460 F.3d 53 (D.C. Cir. 2006). *See* Intervenor Br. 22.

"potential deleterious consequences" but arbitrarily assumed consequences would not occur). If anything, the white paper demonstrates the magnitude of environmental effects that the Bureau disregarded by arbitrarily concluding a catastrophic oil spill will not occur.

Intervenors attempt to frame this issue not as about the reasonableness of the Bureau's assumptions, but as a "collateral attack" on the Safety Rule repeals. Intervenor Br. 11-16. Appellants have not challenged the legal validity of the repeals. And the non-NEPA cases on which Intervenors rely are inapposite. Intervenors' framing of Appellants' argument "as an impermissible collateral attack on [the Safety Agency's] actions . . . ignores [the Bureau's] obligation" under NEPA to take a hard look at environmental impacts. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 170-71 (4th Cir. 2018), *rev'd on other grounds* 140 S. Ct. 1837 (2020); *see also Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1160 (9th Cir. 2012) (rejecting collateral attack argument because NEPA analysis "would have no effect on the validity" of other agency's action). The fact that environmental effects result from another agency's regulation rather than a non-regulatory source does not excuse the Bureau from taking a hard look at those effects.

City of Olmsted Falls v. F.A.A., on which Intervenors rely, actually undermines their argument because the court distinguished the situation there—a

demand that the agency evaluate the legality of another agency's action in an EIS—from *Natural Resources Defense Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000), "which turned on an agency's assumption" about another agency's actions. 292 F.3d 261, 273 (D.C. Cir. 2012). *Daley* is directly on point here: the agency "initially assumed" a mitigation measure implemented by state agencies "would be mandatory. When it was revised from a mandatory to voluntary proposal, however, the [agency] never assessed the impact of the change." 209 F.3d at 755. The court found the agency's continued reliance on the mitigation measure without explanation to be "manifestly insufficient." *Id.* The same is true with the Bureau's continued reliance on the Safety Rules.

B. <u>The Bureau's Assumed Level of Safety Enforcement Was Contrary to the Available Evidence.</u>

The Bureau relied on an assumed level of rigorous enforcement by the Safety Agency to minimize the risks of an accident from the lease sales. Opening Br. 44-45. Yet the evidence before the agency—including a GAO Report—demonstrated that the Safety Agency maintained a track record of poor enforcement practices that undermine its ability to effectively oversee oil and gas operations. *Id*. 45-46. The Bureau chose to disregard that evidence without any justification and failed to adequately respond to comments raising these concerns. *Id*. 46-48. The Bureau's choice to ignore record evidence and reach contrary conclusions caused the agency to misrepresent the risks of an oil spill to both the

decisionmaker and the public, in violation of the Administrative Procedure Act ("APA") and NEPA. *Id*. 44-49

The Bureau first distracts from the issue by backhandedly suggesting it responded to the GAO report when discussing the role of the Safety Agency. Fed. Br. 47-48. That is simply not true. The only time the Bureau even mentions the GAO report is when explaining that it would decline to address the findings. *E.g.,* AR16346-47; 9838. The Report is not addressed in any of the flawed descriptions to which the Bureau points. Fed. Br. 48 (citing *inter alia* AR16346).

And although the Bureau agrees that it expressly recognized the general problem of inadequate enforcement in its Program EIS, it now posits that it declined to consider the GAO's findings in anticipation of EISs it would complete at the exploration and development stages. Fed. Br. 47-50. This explanation or "line-drawing decision" appears nowhere in the record, it is instead a product of the agency's litigation counsel. *Cf*. Fed. Br. 49. And it is inconsistent with the Bureau's repeated reliance on the Safety Agency's enforcement activities throughout the EISs, and even in its brief. *See* Opening Br. 45; Fed. Br. 48, 53 (arguing Safety Agency enforcement "contribute[s] to the mitigation of potential impacts"). The Bureau "cannot have it both ways;" it cannot simultaneously rely on the Safety Agency's enforcement to minimize the impacts of the lease sales and then brush off comments about that enforcement as only relevant after the lease

sales have taken place. *Del. Dep't of Nat. Res.*, 785 F.3d at 18. The Bureau's suggestion that it could wait to consider the GAO findings also is undercut by the fact that the Bureau typically does not prepare an EIS at the exploration and development stages. *E.g.*, Interior NEPA Manual, Part 516, Chapter 15.4(10), https://www.doi.gov/sites/doi.gov/files/elips/documents/516-dm-15.pdf (categorically excluding approval of most exploration and development plans from EIS requirements).

Regardless, the Bureau could not reasonably defer consideration of the Safety Agency's enforcement failures until the exploration and production stages.[7] First, where an agency is relying on another agency's actions to evaluate the effects of its proposed action, it must ensure its assumptions are accurate at the time of that reliance. *See Daley*, 209 F.3d at 755. Second, the Ninth Circuit rejected the Bureau's argument in *Native Village of Point Hope v. Jewell,* concluding instead that the Bureau "is required to take into account the full environmental effects of its actions" at the lease sale stage. 740 F.3d 489, 504 (9th Cir. 2014). "It is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale on the environment, *including the overall risk of oil spills* and the effects of the sale on climate change." *Id.*

[7] This rationale applies equally to the same argument Intervenors make with respect to the Safety Rule repeals. Intervenor Br. 3, 5-7, 23 (asserting rules "are relevant only to" latter stages).

(emphasis added). While it may be appropriate to defer full consideration of effects that are "site-specific" in nature (*e.g.*, harm to wildlife in a specific location) to a later analysis, *see id.* at 498-99, "[a] later project or site-specific environmental analysis is an inadequate substitute" for analyzing systemic or cumulative effects at the lease sale stage, *id.* at 504. The Safety Agency's systemic enforcement failings are not "site-specific" problems; they are overall risks touching numerous aspects of oil and gas development—oil spills, vessel collisions, air and water discharges—throughout the Gulf that must be addressed at the lease sale stage. *See, e.g.*, Opening Br. 16.

Contrary to the Bureau's characterizations, the GAO Report does not just suggest a need for improvement—it shows major deficiencies. *See* Fed. Br. 50-53; *Compare* Opening Br. 45-46. Moreover, the issue is not about any precise level or quantity of enforcement activities, but whether enforcement is as qualitatively effective as the Bureau assumed in its NEPA analysis. Opening Br. 48. The GAO report and other evidence showed it was not. *Friends of Back Bay* is directly on point for that reason: it concerned a mismatch in the levels of enforcement being implemented and those deemed adequate. 681 F.3d at 585 (noting existing enforcement patrols were not "routine[]").

III. **The Court Should Vacate Interior's Action.**

The Bureau's Records of Decision for the lease sales constitute "agency action" under the APA, 5 U.S.C. § 551(13), which should be held "unlawful and set aside." 5 U.S.C. § 706(2). The Bureau asks this Court to remand the decisions without vacatur. Fed. Br. 54. But departures from this default remedy only apply in "rare cases." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). The facts here do not warrant departing from the normal statutory remedy.

First, the deficiencies are serious and create substantial doubt as to "whether the agency chose correctly." *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). *Contra* Fed. Br. 54. The Bureau failed to meaningfully compare alternatives—"the heart of the environmental impact statement." 40 C.F.R. § 1502.14. If it had truly considered the benefits from no leasing, it may have chosen smaller lease sales or cancelled them altogether. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (indicating a proper comparison of the no action alternative may well "lead the agency to . . . deny the lease altogether"). Proper evaluation of the Safety Rule rollbacks' effect on catastrophic oil spill risk as well as a proper accounting for the lack of enforcement could also have led the Bureau "to reject altogether a lease

sale" in the Gulf. *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978), *vacated in part on other grounds*, 439 U.S. 922 (1978).

Vacatur advances the mandates of NEPA and OCSLA by preserving decisionmakers' opportunity to choose among policy alternatives and ensuring "orderly" offshore development "subject to environmental safeguards." 43 U.S.C. § 1332(3). The entire purpose of NEPA is to get this information in front of the agency before the decision is made; merely requiring the Bureau to backfill its analysis at this point is meaningless. *See Standing Rock Sioux v. U.S. Army Corps. of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) ("[W]here an agency's NEPA review suffers from a significant deficiency, refusing to vacate the corresponding agency action would vitiate the statute." (citation omitted)). If the Court allowed remand without vacatur in this case, it would invite the Bureau to treat NEPA as a mere formality. *See, e.g.*, *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) ("Experience suggests that remand without vacatur sometimes invites agency indifference." (citation omitted)). Indeed, in closely related circumstances, this Circuit vacated the 2007-2012 Five-Year Leasing Program because of Interior's failure to do an adequate environmental review. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 489 (D.C. Cir. 2009).

Second, the "disruptive consequences" from vacatur that the Bureau cites do not warrant departing from Congress's specified remedy. The argument that vacatur would disrupt industry's reliance interests is inapt. Fed. Br. 55; *see also* Intervenor Br. 29-33. As an initial matter, "it is not clear that economic concerns are as relevant in an environmental case like this one." *Pub. Emps. for Env't Resp. v. U.S. Fish and Wildlife Serv.*, 189 F. Supp. 3d 1, 3 (D.D.C. 2016). Moreover, the risks of disruption are the "nature of doing business, especially in an area fraught with bureaucracy and litigation." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017); *see also Standing Rock*, 985 F.3d at 1051, 1053 (upholding vacatur despite economic disruptions). "Otherwise, agencies would potentially be incentivized to invest heavily in potentially-illegal projects upfront, only to claim later that the economic consequences in setting aside those projects would be too massive to unwind." *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1086-89 (D. Idaho 2020). Further, any disruptions are of the companies' own making. Appellants filed this lawsuit nearly one month before Lease Sale 251 took place. The companies entered their bids with full knowledge and calculation of the risks.

The Bureau also argues against vacating the underlying EIS because it relies on the EIS for other activities. Fed. Br. 54. The Court should not credit this argument because Appellants have not challenged any of those other activities and

it is unclear why the Bureau thinks anything would be different under its preference that the Court remand without vacatur. Either way, the EIS is invalid and the agency's reliance on it in another context could be equally infirm. If the Bureau wants to continue relying on this EIS in the future, that only underscores the importance of vacatur: without it, the Bureau's significant NEPA errors will continue to seep into future approvals.

Finally, the Court should decline the Bureau's invitation to weigh whether Appellants will "suffer harm—irreparable or otherwise" from remand without vacatur. Fed. Br. 56 (quoting *Oglala Sioux Tribe v. Nuclear Regul. Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018)). Harm to the plaintiff may be relevant under the injunction standard, but it is not considered in APA statutory remedial analysis. In APA review, the focus is on the agency and its action—not the plaintiff—and as such, Congress specified the remedy of vacatur without regard to plaintiffs' interests. *See* 5 U.S.C. § 706(2); Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1138 (2020). Even in equitable departures from the statutory remedy, the relevant questions have to do with the agency and its action, not the plaintiff, *see Allied-Signal*, 988 F.2d at 150-51, and it is the agency that "bear[s] the burden to prove that vacatur is unnecessary," *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) (holding "vacatur is the default remedy").

Intervenors go further, attempting to conflate the statutory remedy of vacatur with the common-law remedy of injunction. *See* Intervenors' Br. 34-35. The Court should reject this misguided effort to change the law. Congress' stated remedy of vacatur for flawed agency actions not only is clear from the plain text of the APA, but also makes sense in the context of judicial oversight of administrative agencies, where courts are given "broad remedial" powers to enforce procedural requirements placed upon those agencies. *See, e.g.*, Sohoni, *supra*, at 1138.

Statutory remedy analysis under the APA is entirely different from the injunction standard even though both may sometimes be applied in the same case as two steps. The traditional injunction standard only is relevant in APA cases if a plaintiff requests additional relief beyond vacatur. *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 16-20 (2008) (specific preliminary injunction requested by plaintiffs); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010) (district court's injunction was "additional" relief beyond vacatur); *Standing Rock*, 985 F.3d at 1050-54 (analyzing vacatur under APA and *Allied-Signal*, then analyzing additional injunctive relief entered by district court under the common-law standard); *Oglala Sioux*, 896 F.3d at 535 (D.C. Cir. 2018) (reiterating that injunction test "is not the standard" for the default remedy of vacatur).

Here, Appellants seek the statutory remedy of vacatur, and do not request any freestanding relief beyond vacatur.[8] In *Standing Rock*, this Court distinguished situations where activity has begun (and additional injunctive relief may be required) from situations when activity has yet to begin (and vacatur would remedy the violation). 985 F.3d at 1054 (explaining that "vacating a construction permit . . . naturally implie[s] an end to construction," while vacating a pipeline authorization with oil flowing leaves "the precise consequences of vacatur uncertain."). This posture here is far different than *Standing Rock*. None of the parties have identified activities that have begun on the leases, so the consequences of vacatur are certain—no future activities can take place. Even if activities had commenced, vacatur will not automatically halt those activities—how or on what terms the Bureau will enforce its rights over the leases is a matter for it to decide in the first instance. *See id.*

In sum, this Court should follow Congress's instructions and vacate the Bureau's action, as other courts have done in similar situations. *See, e.g.*, *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) (instructing district court to vacate drilling permits for NEPA violations); *W.*

[8] Appellants mentioned the possibility of enjoining further activity under Lease Sales 250 and 251 merely as an illustration of what an intermediate remedy between vacatur and remand without vacatur could look like; it was not an independent request for injunctive relief. *See* Opening Br. 54 n.10; *Bauer v. DeVos*, 332 F. Supp. 3d 181, 184 (D.D.C. 2018).

Watersheds, 441 F. Supp. 3d at 1086-89 (vacating oil and gas leases and lease sale for NEPA violations); *WildEarth Guardians v. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 897 (D. Mont. 2020) (similar).

CONCLUSION

For the foregoing reasons, this Court should declare that the Lease Sale EIS is invalid under NEPA and the APA, and vacate the decisions to hold Lease Sales 250 and 251, the Lease Sale EIS, and the leases issued pursuant to those sales.

Respectfully submitted this 8th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 6,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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