IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, et al.,
Plaintiffs,

v.

DEBRA A. HAALAND, et al.,
Defendants,

STATE OF LOUISIANA,
Intervenor-Defendant.

Case No. 1:21-cv-02317-RC

[PROPOSED] MEMORANDUM OF [PROPOSED] INTERVENOR-DEFENDANT THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Asserting purported violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, Plaintiffs claim that the Department of the Interior's ("Interior") decision to move forward with Offshore Oil and Gas Lease Sale 257 ("Lease Sale 257") based on a 2018 Final Supplemental Environmental Impact Statement ("2018 SEIS") should be vacated until further environmental studies under NEPA are undertaken and completed. *See* Mem. In Supp. of Pls.' Mot. for Summ. J., ECF Doc. 34-1 at 1-2 ("MSJ").

Plaintiffs' challenge fails for numerous reasons. First, because the issuance of offshore oil and gas leases pursuant to Lease Sale 257 will not "constitute an irreversible and irretrievable commitment of resources," Plaintiffs' claims are not ripe and should be dismissed. *Fisheries Survival Fund v. Jewell*, No. 16-2409, 2018 U.S. Dist. LEXIS 168532, *23 (D.D.C. Sept. 30, 2018) [*hereinafter "Fisheries"*]; *see also Ctr. for Biological Diversity v. Interior*, 563 F.3d 466, 480-483 (D.C. Cir. 2009) [*hereinafter* "*CBD*"] (NEPA claims not ripe "due to the multiple stage nature of [Interior's offshore] Leasing Program"); *N. Slope Borough v. Andrus*, 642 F.2d 589, 593 (D.C. Cir. 1980) ("no drilling — not even of an exploratory nature" is permitted with the purchase of a lease); *cf. Oceana v. Bureau of Ocean Energy Management*, 37 F. Supp. 3d 147, 176 n. 27 (D.D.C. 2014) (when Interior issues an offshore oil and gas lease, "nothing irreversible has been done" because Interior "must still review any exploration and development plans to ensure those plans comport with NEPA and the ESA before drilling can be done.").

Moreover, Plaintiffs rely on categorically inapplicable and erroneously-reasoned case law,[1] while failing even to mention *Oceana v. Bureau of Ocean Energy Management*, *supra*, in which this Court rejected a similar NEPA-based challenge to two offshore Gulf of Mexico Lease Sales. In misapplying the case law, Plaintiffs ignore the four-stage structure of the federal offshore oil and gas leasing program and mischaracterize the extensive record of environmental review by the agency. Interior's actions and findings at issue here, to which the judiciary owes considerable deference, satisfied Interior's obligations under NEPA and the APA. *See, e.g.*, *Oceana*, 37 F. Supp. 3d at 154 ("'extreme degree of deference'" owed to an agency's evaluation of scientific data), *quoting Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004)).

II. LEGAL FRAMEWORK

A. NEPA

Enacted in 1970, NEPA requires that federal agencies "consider[] the environmental impact of their actions in decisionmaking." Conference Report on NEPA, 115 Cong. Rec. 40416 (1969). Thus, under NEPA, any major federal action "significantly affecting the human environment" must undergo an environmental review which results in "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, [and] (iii) alternatives to the proposed action . . . ." 42 U.S.C. § 4332(2)(C). This detailed statement is called an Environmental Impact Statement ("EIS"). *Oceana*, 37 F. Supp. 3d at 151. The Council of Environmental Quality ("CEQ") has primary responsibility for implementing NEPA and has

[1] *Ctr. For Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) [*hereinafter* "*Liberty*"]; *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *Sovereign Inupiat v. Bureau of Land Management*, 3:20-cv-00290, 2021 U.S. Dist. LEXIS 155471 (D. Alaska Aug. 18, 2021) [*hereinafter* "*Willow*"].

promulgated regulations that establish the procedures required for NEPA compliance. *See* 40 C.F.R. § 1500 *et seq.* The NEPA regulations require agencies to supplement an EIS in two circumstances: (1) when the "agency makes *substantial changes* in the proposed action that are relevant to environmental concerns"; or (2) when there are "*significant new circumstances or information* relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1) (2005) (emphasis added).

Significantly, NEPA "simply prescribes the necessary process" that agencies must undertake but "does not mandate particular results[.]" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). At bottom, NEPA is an "essentially procedural" statute, "meant to ensure 'a fully informed and well-considered decision[.]'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)).

B. OCSLA's Mandatory Four-Stage Process for Offshore Oil and Gas Development.

The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, *et seq.* ("OCSLA") governs the development of offshore oil and gas resources on the Outer Continental Shelf ("OCS"). Congress substantially revised OCSLA in 1978, in part to coordinate the offshore leasing program with environmental laws like NEPA. Thus, the stated purpose of the 1978 amendment was to "expedite exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." *Id.* § 1802(1); *see also id.* § 1332(3) (the OCS "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"). Indeed, Congress specified that it wished to "make [OCS] resources available to meet the

Nation's energy needs as rapidly as possible." *Id.* § 1802(2)(A). OCSLA accordingly "has an objective — the expeditious development of OCS resources." *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981). Because "[t]he first stated purpose of the Act . . . is to establish procedures to expedite exploration and development of the OCS," OCSLA's "remaining purposes primarily concern measures to eliminate or minimize the risks attendant to that exploration and development. Several of the purposes, in fact, candidly recognize that some degree of adverse impact is inevitable." *Id.*

To facilitate OCSLA's stated purpose to "promote the swift, orderly and efficient exploration" of OCS oil and gas resources,[2] Congress created "four distinct statutory stages to developing an offshore oil [or gas] well: (1) formulation of a five year leasing plan . . . ; (2) lease sales; (3) exploration by the lessees; (4) development and production." *Sec'y of the Interior v. California*, 464 U.S. 312, 337 (1984), *superseded by statute on other grounds* (1990 CZMA amendments); *see also DBD*, 563 F.3d at 472-473 (hereinafter, "*CBD*"). Responsibility for implementing and overseeing the multi-stage process resides principally in the Secretary of the Interior ("Secretary"), *see* 43 U.S.C. § 1331(b), much of whose authority relevant to this dispute is delegated to the Bureau of Ocean Energy Management ("BOEM").

First, at the planning stage, Interior "shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of [OCSLA]" (the "Five-Year Program"). 43 U.S.C. § 1344(a). Each Five-Year Program must include "a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which [the Secretary] determines will best meet national energy needs for the five-year period following its approval." *Id.* In developing that Five-Year Program, Interior must "consider[] [the] economic,

[2] H.R. Rep. No. 95-590, at 53 (1977), reprinted in 1978 U.S.C.C.A.N. 1450, 1460.

social, and environmental values of the renewable and nonrenewable resources contained in the [OCS], and the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments." *Id.* § 1344(a)(1). "[P]rospective lease purchasers acquire no rights to explore, produce, or develop at this first stage." *Sec'y of Interior*, 464 U.S. at 338.

Second, at the lease sale stage – which is at issue in this case – Interior conducts the lease sales provided for in the previously-adopted Five-Year Program, *see* 43 U.S.C. § 1337(a)(1), by "solicit[ing] . . . bids and . . . issu[ing] . . . offshore leases," *Sec'y of Interior*, 464 U.S. at 338. "A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization." *Id*. at 317. *See also id*. at 339; *N. Slope Borough*, 642 F.2d at 593 (noting that "no drilling — not even of an exploratory nature" is permitted with the purchase of a lease). Because "no activities beyond certain ancillary activities are actually authorized by the [issuance of a] lease[,] … there are few environmental impacts reasonably expected from the lease sale itself." AR_0008199 (Multisale EIS).

Third, at the exploration stage – which is the first time that the lease owner is authorized to conduct drilling operations – "Interior reviews and determines whether to approve the lessees' more extensive exploration plans." *CBD*, 563 F.3d at 473. *See also* 43 U.S.C. § 1340(c). In making this decision, the Secretary "shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section [1334(a)(2)(A)(i)] of this title [serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment], and (B) such proposed activity cannot be modified to avoid such

condition." 43 U.S.C. § 1340(c). Additionally, the Secretary shall only issue an exploration permit to a lessee if the Secretary determines, among other qualifications, that "such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance." *Id.* at § 1340(g)(3).

Fourth, at the development and production stage, Interior, along with affected state and local governments, reviews an additional and more detailed plan from the lessee, *see* 43 U.S.C. § 1351, for (in typical cases) construction of a production platform, installation of processing equipment, and the laying of pipelines. A lessee's development plan must set forth, among other things, the specific work to be performed; all facilities and operations located on the OCS that are proposed to be directly related to the proposed development; the environmental safeguards to be implemented; and the safety standards to be met. *See id*. § 1351(c). "The Secretary shall disapprove a plan . . . if the Secretary determines," under specified conditions, "that [] implementation of the plan would probably cause serious harm or damage to life . . ., to property, to any mineral deposits . . . , to the national security or defense, or to the marine, coastal or human environments." *Id*. § 1351(h)(1)(D)(i).

This leasing structure is "pyramidic," "proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *CBD*, 563 F.3d at 473 (internal quotations omitted). This approach "was designed to forestall premature litigation regarding adverse environmental effects that … will flow, if at all, only from the latter stages of OCS exploration and production." *Id.* (internal quotations omitted). Given the multi-stage, pyramidic nature of the leasing program under OCSLA, under NEPA's regulations Interior may "conduct a tiered approach to preparing an EIS." *Id.* at 474. Under this tiered approach, Interior

may "issue a broader EIS at the earlier … stage[s] of a program, and issue subsequent, more detailed environmental impact statements at the program's later stages." *Id. See also Oceana*, 37 F. Supp. 3d at 162 ("[A]gencies are allowed 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.'" (*quoting* 40 C.F.R. § 1502.20)).

C. Harmonizing NEPA and OCSLA

As in prior challenges to Interior's OCSLA-based offshore oil and gas leasing program, resolution of Plaintiffs' NEPA claims must harmonize these two statutes to the greatest degree possible.[3] Here, that means recognizing two important points. ***First***, Congress has *mandated* that Interior issue offshore oil and gas leases. Thus, the D.C. Circuit has observed:

> Petitioners' consumption-related claims appear to stem from the flawed premise that, before Interior approves an offshore oil and gas Leasing Program, it must first consider whether it should extract oil and gas from the OCS at all. But Congress has already decided that the OCS should be used to meet the nation's need for energy. Indeed, OCSLA instructs Interior to ensure that oil and gas are extracted *from the OCS* in an expeditious manner that minimizes the *local* environmental damage to the OCS. *See 43 U.S.C. § 1344*. Interior simply lacks the discretion to consider any global effects that oil and gas consumption may bring about.

[3] *E.g.*, *False Pass v. Clark*, 733 F.2d 605, 614 (9th Cir. 1984) (reasoning that because "each stage [of OCSLA] remains separate," and "NEPA may require an environmental impact statement at each stage," Interior did not have to analyze the impacts from a worst case scenario oil spill at the lease sale stage); *Sierra Club v. Sigler*, 695 F.2d 957, 967 (5th Cir. 1983) ("The mandate to develop and use environmentally conscious decisionmaking procedures found in [NEPA] is supplementary to existing policy mandates of federal agencies … each agency must mesh the requirements of NEPA with its own governing statute as far as possible."); *N. Slope Borough v. Andrus*, 642 F.2d 589, 594 (D.C. Cir. 1980) (multiple stages of offshore leasing program called for different levels of environmental review); *cf. Pattern v. Dist. of Columbia*, 9 F.4th 921 (D.C. Cir. 2021) (referring to "the 'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination.'" (*quoting United States v. Fausto*, 484 U.S. 439, 453 (1988))).

CBD, 563 F.3d at 485. Likewise, this Court observed in *Oceana* that "a practical reality of the OCSLA statutory scheme" is that Congress has "mandate[d] that the Secretary, who delegates authority to BOEM, implement lease sales of the OCS in 5-year increments." 37 F. Supp. 3d at 174. ***Second***, implementation of OCSLA's "statutory scheme" unfolds over a four-part, "multiple stage … Leasing Program," *CBD*, 563 F.3d at 480. *See also Sec'y of Interior*, 464 U.S. at 337.

These elements of the offshore federal oil and gas leasing program have been pivotal in prior challenges. Thus, for example, in the D.C. Circuit's 2009 *CBD* decision, the court rejected challenges under both NEPA and the Endangered Species Act ("ESA") to Interior's Five-Year Program for 2007-2012.[4] Plaintiffs had alleged that Interior failed to consider the economic and environmental costs of greenhouse gas emissions that would result from the Five-Year Program – *i.e.*, the first of the four stages that Congress created in OCSLA. First, the Court rejected the Plaintiffs' "substantive standing":

> In this case, Petitioners rely on too tenuous a causal link between their allegations of climate change and *Interior's action in the first stage of this Leasing Program*. In order to reach the conclusion that Petitioners are injured because of Interior's alleged failure to consider the effects of climate change with respect to the Leasing Program, Petitioners must argue that: adoption of the Leasing Program will bring about drilling; drilling, in turn, will bring about more oil; this oil will be consumed; the consumption of this oil will result in additional carbon dioxide being dispersed into the air; this carbon dioxide will consequently cause climate change; this climate change will adversely affect the animals and their habitat; therefore Petitioners are injured by the adverse effects on the animals they enjoy. Such a causal chain cannot adequately establish causation because Petitioners rely on the speculation that various different groups of actors not present in this case … might act in a certain way in the future. Moreover, Petitioners' causal chain fails to take into

[4] However, the Court did allow a claim based on OCSLA's environmental review requirements to go forward.

> account that, *at each successive stage of the Leasing Program, the law requires that Interior conduct additional and more detailed assessments of the Program's potential effect on the proposed leasing areas.*

CBD, 563 F.3d at 478-479 (emphasis added). Then, after concluding that Plaintiffs did have "procedural standing," the Court held that the NEPA and ESA claims were not ripe, because:

> At the point that Petitioners filed their petitions, Interior had only approved the Leasing Program at issue. No lease-sales had yet occurred. The Leasing Program here had therefore not yet reached that "critical stage" where an "irreversible and irretrievable commitment of resources" has occurred that will adversely affect the environment.

Id. at 480-481. And, in holding that that the ESA claims were not ripe, the Court stated:

> Given the multi-stage nature of leasing programs under OCSLA, we must consider any environmental effects of a leasing program on a stage-by-stage basis… Regardless whether there has been an agency action under the ESA, the completion of the first stage of a leasing program does not cause any harm to anything ….

Id. at 483. In *Center for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2014), the court relied on its *CBD* decision to dismiss a NEPA-based challenge to the 2012-2017 Five-Year Program, again finding that, due to lack of ripeness, that first OCSLA stage was immune from challenge under NEPA (though the Court did recognize the plaintiffs' ability to raise certain OCSLA-based challenges).

Here, as the Court determines its jurisdiction and as it applies the APA's deferential standard of review, the fact that Interior is only at the second stage of its "multiple-stage Leasing Program" (*CBD*, 563 F.3d at 483) necessarily figures heavily into the resolution of this case.

III. FACTUAL BACKGROUND

A. Events Underlying Interior's Decision to Hold Lease Sale 257

The Programmatic EIS and the 2017-2022 Leasing Program. The development of a Five-Year Program is an extensive, multi-year process. As part of its development of the Five-Year Program pursuant to which Lease Sale 257 will be held, Interior elected to prepare a Programmatic Environmental Impact Statement (the "Programmatic EIS") under NEPA. AR_0014242. The Programmatic EIS "addresses potential environmental impacts that could result if activities occur under leases issued from the schedule of lease sales for 2017-2022" and explores potential alternative actions. AR_0014248*; see also* AR_0008200. "Where relevant, if information on reasonably foreseeable significant adverse impacts was incomplete or unavailable, the need for the information was evaluated to determine if it was essential to making a reasoned choice among the alternatives and, if so, it was either acquired or accepted scientific methodologies were applied in its place in the event it was impossible or exorbitant to acquire." AR_0014246.

On January 17, 2017, the Secretary of Interior issued a Record of Decision ("ROD") approving a "Proposed Final" Five-Year Program for 2017 – 2022 (the "2017-2022 Program"). AR_0015453-15455 [*hereinafter* the "2017-2022 Program ROD"]. Lease Sale 257, at issue here, is one of the Gulf of Mexico lease sales authorized under the 2017-2022 Program. *See* AR_0015455. Interior's 2017-2022 Program ROD was based on Interior's extensive comparative analysis of four alternatives, including analyzing the "reasonably foreseeable environmental consequences" of each alternative; that analysis was distilled in the Programmatic EIS. *See* AR_0015453. The 2017-2022 Program "went through a substantial vetting process, which included millions of comments, approval from affected Governors, publishing of a Final Program that was sent to the President and Congress, and final approval by the Secretary of the DOI."

Louisiana v. Biden, No. 2:21-CV-0078, 2021 U.S. Dist. LEXIS 112316, *40 (W.D. La. June 15, 2021).

The Multisale EIS. In March 2017, "[i]n order to make an informed decision on a single proposed lease sale," BOEM published a three-volume "Multisale EIS." AR_0008118. In the Multisale EIS, which tiered on the Programmatic EIS, BOEM acknowledged the need to hold lease sales "to further the orderly development of OCS resources" as required under OCSLA. AR_0008125. BOEM also explained that it individually evaluates each proposed lease sale before deciding to move forward. To inform its decision-making with respect to the Gulf of Mexico ("GOM") lease sales included in the 2017-2022 Program, BOEM developed the Multisale EIS, which evaluates a single lease sale scenario. AR_0008201. BOEM intended to use the findings in the Multisale EIS to inform "each of the subsequent proposed lease sales[,]" including Lease Sale 257. *Id*. ("The analyses contained in this Multisale EIS examine[] the impacts of a single proposed lease sale, which would apply to any of the 10 proposed GOM lease sales.").

The Supplemental EIS. In December 2017, BOEM published a "Supplement EIS," which tiered from the Multisale EIS and the Programmatic EIS to "inform decisions" relating to the region-wide GOM lease sales scheduled in the 2017-2022 Program. AR_0015475. The Supplemental EIS considered additional and site-specific environmental impacts from holding the region-wide lease sales contemplated by the 2017-2022 Program. *See* AR_0015479. Like the Multisale EIS, the Supplemental EIS was intended "to inform each of the 10 proposed lease sale decisions," including for Lease Sale 257.[5] AR_0015480; *see also* AR_0015481.

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[5] Plaintiffs inaccurately characterize the Supplemental EIS as relating *only* to Lease Sales 250 and 251. MSJ, pp. 7, 8. To the contrary, the Supplemental EIS supplements the Multisale EIS and is plainly intended to inform not only Lease Sales 250 and 251, but also "decisions for each of the remaining proposed regionwide lease sale scheduled" in the 2017-2022 Program. AR_0015475; *see also* AR_0015477 ("This Supplemental EIS is expected to be used to inform decisions for each

Proposed Notice of Lease Sale 257 & Original ROD. On November 18, 2020, BOEM published a proposed notice of sale for Lease Sale 257. 85 Fed. Reg. 73,508 (Nov. 18, 2020). On January 21, 2021, BOEM issued a Record of Decision (the "Original ROD"), reflecting Interior's decision "to hold oil and gas Lease Sale 257 as a GOM regionwide lease sale." AR_0029946. In the Original ROD, the Secretary of Interior explained that "Lease Sale 257, as described in this ROD and in the Final Notice of Sale, is subject to adequate environmental safeguards and is consistent with the maintenance of competition and the meeting of national energy needs." AR_0029948.

The Directed Leasing Pause and the Injunction Thereof. On January 26, 2021, one week after BOEM published the Original ROD, the Biden Administration issued Executive Order 14008 ("E.O. 14008"). E.O. 14008, 86 Fed. Reg. 7619 (Jan. 26, 2021). E.O. 14008 directed Interior to "pause new oil and natural gas leases . . . in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices[.]" E.O. 14008, Sec. 208. On February 18, 2021, Interior rescinded the Original ROD "to comply with" E.O. 14008. 86 Fed. Reg. 10132 (Feb. 18, 2021).

On March 24, 2021, thirteen states – including Intervenor-Defendant State of Louisiana – filed a lawsuit challenging the directed leasing pause imposed by E.O. 14008 and Interior's implementation of that leasing pause. *Louisiana et al. v. Biden*, 2:21-cv-00778 (W.D. La. *Filed* Mar. 24, 2021).[6] On March 31, 2021, the Plaintiff States filed a Motion for Preliminary Injunction,

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of the two proposed regionwide lease sales in 2018 and to be used and supplemented as necessary for decisions on future [GOM] proposed regionwide lease sales.").

[6] Several other lawsuits, including one filed by Proposed Intervenor-Defendant API, also challenge the directed leasing pause. *See* Complaint, *American Petroleum Institute et al. v. DOI et al.*, 2:21-cv-02506, Doc. 1 (W.D. La. *Filed* Aug. 16, 2021); Complaint, *Western Energy Alliance et al. v. Biden*, 0:21-cv-00013, Doc. 1 (D. Wyo. *Filed* Jan. 27, 2021); Complaint, *State of Wyoming v. U.S.*

requesting that the court order the federal Defendants "to disregard" the leasing pause directed by E.O. 14008 and "to execute the statutory duties of their offices regarding oil and gas leasing" as though the directed leasing pause "did not exist." Mot. for Prelim. Inj., *Louisiana et al. v. Biden*, 2:21-cv-00778, ECF Doc. 3. On June 15, 2021, the Court granted the Plaintiff-States' motion and ordered a nation-wide preliminary injunction pursuant to which Federal Defendants are "enjoined and restrained from implementing the [directed pause] of new oil and natural gas leases on public lands or in offshore waters" and from "implementing said [p]ause with respect to Lease Sale 257" (the "Preliminary Injunction"). *Louisiana v. Biden*, 2021 U.S. Dist. LEXIS 112316, at *64-65.[7] Stated affirmatively, the district court ordered Interior to proceed with holding Lease Sale 257.

The Adequacy Determination and the New ROD. Following the Preliminary Injunction, BOEM resumed progress towards holding Lease Sale 257. Importantly, before deciding to move forward with the lease sale, BOEM extensively evaluated whether it needed to issue a supplemental EIS based on new information. That process involved BOEM's review of "all relevant new information available" since the Multisale EIS and the Supplemental EIS. AR_0029803. Because "no new information or circumstances were identified … that could change the conclusions" of the Multisale EIS and the Supplemental EIS, BOEM determined that those EISs "remain[ed] valid and [could] be used to support the ROD for proposed Lease Sale 257 without further supplementation." AR_0029804. On August 27, 2021, BOEM published a Determination of NEPA Adequacy (the "Adequacy Determination"), which explained BOEM's analysis of the new information. A.R._0029801.

DOI et al., 21-cv-00056, Doc. 1 (D. Wyo. *Filed* Mar. 24, 2021); Complaint, *State of North Dakota v. Interior et al.*, 1:21-cv-00148, Doc. 1 (D.N.D. *Filed* July 7, 2021).

[7] The Federal Defendants appealed the preliminary injunction to the Fifth Circuit, and that appeal remains pending. *Louisiana v. Biden*, No. 21-30505 (5th Cir. Aug. 17, 2021).

On August 31, 2021, BOEM issued a new Record of Decision for Lease Sale 257 ("New ROD"). AR_0029788. Like the Original ROD, the New ROD reflects Interior's decision to hold "GOM region-wide oil and gas Lease Sale 257." AR_0029790. In the New ROD, Interior explained that "Lease Sale 257, as described in this ROD and in the forthcoming Final Notice of Sale, is subject to adequate environmental safeguards and is consistent with the maintenance of competition and the meeting of national energy needs."[8] Further, Interior stated in the ROD that having "reviewed relevant information since the 2018 GOM Supplemental EIS", "the 2018 GOM Supplemental EIS adequately addresses the environmental effects" of Lease Sale 257, and "[t]here are no new circumstances, information, or changes in the proposed action or its impacts that require supplementation of the 2018 GOM Supplemental EIS." AR__0029789. On October 4, 2021, BOEM issued a Final Notice of Lease Sale 257, scheduling the lease sale for November 17, 2021.[9]

B. The Heightened Importance of Lease Sale 257.

Lease Sale 257 has a unique importance. Interior has not yet published any of the public notice documents necessary to hold the two remaining GOM OCS lease sales scheduled under the 2017-2022 Program (Lease Sale 259 and Lease Sale 261). Due to Interior's implementation of the directed leasing pause in E.O. 14008 prior to the Western District of Louisiana's preliminary injunction, Interior has not held an offshore lease sale since November 2020. If the E.O. had not been enjoined, 2021 would have been ***the first calendar year since 1965 without an offshore lease sale in the Gulf of Mexico***. Moreover, because Interior has been dilatory in discharging its statutory duty to publish a new Five-Year Program, when the 2017-2022 Program expires in

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[8] AR_0029790. This was the eighth ROD to rely on the 2018 Supplemental EIS. AR_0029788.

[9] 86 Fed. Reg. 54728 (Oct. 4, 2021). *See also* BOEM, Lease Sale 257, https://www.boem.gov/Sale-257 (last visited Nov. 10, 2011).

February 2022 there will not be a newly approved Five-Year Program that will come into effect. Because Interior may not hold a lease sale absent an active Five-Year Program, and because Interior's development of a Five-Year Program is a multi-year process, the offshore oil and gas industry is facing an unprecedented scarcity of the opportunity to acquire new leases in the coming years. Under these circumstances, Lease Sale 257 has a heightened significance.

Many of API's members have already invested millions of dollars in acquiring and exploring leases in reliance on the availability of adjacent or nearby lease tracts for leasing in scheduled lease sales, including Lease Sale 257. If lessees and operators are unable to obtain the additional adjacent or nearby lease tracts, their substantial investments may be lost or significantly limited. This is particularly important in the context of deepwater leases, where access to leasing is necessary to plan for multi-billion dollar, capital-intensive exploration and development activities that can span more than a decade.

For this reason, in addition to moving to intervene in this lawsuit, API and several other trade associations filed a lawsuit in the Western District of Louisiana challenging the directed leasing pause. *API et al. v. Interior et al.*, 2:21-cv-02506 (W.D. La. *filed* Aug. 16, 2021) [*hereinafter* the "API Complaint"]. In that lawsuit, API asserts that the directed leasing pause (*inter alia*) unlawfully violates OCSLA and the APA. Among several other arguments, API asserts that Interior's rescission of the initial ROD for Lease Sale 257, violates the OCSLA (*Id.* at ¶¶ 112-117) and the APA's notice-and-comment rulemaking requirements (*Id.* at ¶¶ 132-138). API also challenges Interior's failure to adopt a new Five-Year Program to succeed the 2017-2022 Program. *Id.* at ¶¶ 118-125. While that pending litigation unfolds, it is critical that the opportunity to hold one of the last Lease Sales remaining in 2017-2022 Program not be missed.

At the same time that Lease Sale 257 constitutes an opportunity to obtain newly-issued leases that might not arise again for a number of years, it is important to recognize that the number of active and producing Gulf of Mexico leases is at a 10-year low. The following data from BOEM's website show the precipitous decline in new leasing in the Gulf of Mexico in recent years and thereby further demonstrates the importance of Lease Sale 257 in fulfilling Congress' mandate that the federal OCS be offered for oil and gas leasing.[10]

Gulf of Mexico Active Leases

	October 2011	October 2016	October 2021
Number of Active Leases	5,981	3,519	2,062
Number of Producing Leases	1,268	879	509
Acreage of Active Leases	35,151,927	18,818,548	10,974,778
Acreage of Producing Leases	6,164,869	4,332,977	2,630,397

IV. ARGUMENT

A. Plaintiffs' Claims Should Be Dismissed Because They Are Not Ripe.

It is well-established that, with respect to Interior's actions pursuant to the OCSLA, Interior's "NEPA obligations mature only once it reaches a 'critical stage of decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment." *CBD* 563 F.3d at 271. In "[c]ases involving multiple-stage [oil and gas] leasing programs … an agency reaches this critical stage when it 'no longer retain[s] the authority to

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10 BOEM, Combined Leasing Status Report, *available at* https://www.boem.gov/oil-gas-energy/leasing/combined-leasing-status-report.

preclude all surface disturbing activities subsequent to issuing an oil and gas lease[.]'" *Fisheries*, 2018 U.S. Dist. LEXIS 168532, at 21 (*quoting Wyo. Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999)). Thus, in both *CBD* and *Center for Sustainable Economy*, the D.C. Circuit concluded that the Plaintiffs' NEPA-based challenge to BOEM's publication of a Five-Year Program – the first of OCSLA's four stages – were "not ripe," because no drilling (and "consequently, no harm") could occur from that preliminary stage in OCSLA's framework. *Ctr. for Sustainable Econ.*, 779 F.3d at 599. The same conclusion applies to the second of OCSLA's four stages – *i.e.*, the Lease Sale stage.

In *Fisheries*, this Court applied *CBD* and *Center for Sustainable Economy* to hold that the plaintiff's NEPA-based challenge to BOEM's issuance of an offshore wind lease under OCSLA was not ripe. There, the issuance of the offshore wind lease only gave the lessee the "exclusive right" to submit plans for operations on the leased area; BOEM retained "complete authority … to preclude [] activity in the leased area[.]" *Fisheries* at 22; *see also id.* at 23 ("On its own, the lease at issue does no more than grant [the lessee] the exclusive right to submit [plans] to BOEM for approval."). Given this context, the Court held that the plaintiffs' NEPA-based claims were "not ripe" because "issuing the lease [did] not constitute an irreversible and irretrievable commitment to resources[.]" *Id.* at 28; *see also id.* at 23.

Like the OCSLA offshore wind leases at issue in *Fisheries*, any offshore oil and gas lease issued pursuant to Lease Sale 257 will give the lessee "only a priority in submitting plans to conduct" exploration and development activities. *Sec'y of Interior*, 464 U.S. at 339; *see also Mobil Oil Expl'n & Prod. Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (lease issuance gives lessee "opportunity *to try to obtain* exploration and development rights") (emphasis added). Further, as with OCSLA wind leases, here too BOEM (with its sister Interior subagency, BSEE)

retains the authority after lease issuance to "preclude [] activity in the leased area[.]" *Fisheries* at 22. *See also N. Slope Borough*, 642 F.2d at 593 (noting that "no drilling — not even of an exploratory nature" is permitted with the purchase of a lease).[11] Thus, when Interior issues an offshore oil and gas lease, "nothing irreversible has been done" because Interior "must still review any exploration and development plans to ensure those plans comport with NEPA and the ESA before drilling can be done." *Oceana*, 37 F. Supp. 3d at 176, n. 27. Thus here, as in *Fisheries Survival Fund*, because the issuance of leases pursuant to Lease Sale 257 does not "itself authorize" any activity that could impact the environment, Plaintiffs' NEPA claims are "not ripe" and their case should be dismissed.[12]

B. Alternatively, Interior's NEPA Compliance is Subject to Judicial Deference.

Plaintiffs face a formidable hurdle in pursuing their claims because a court "review[s] an agency's compliance with NEPA . . . under the deferential 'arbitrary or capricious' standard" of the APA. *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1248 (11th Cir. 2012); *see also Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 901–02 (9th Cir. 2012).

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[11] "BOEM will use Form BOEM-2005 (February 2017) to convey leases resulting from" Lease Sale 257. *See* 86 Fed. Reg. 54728 (Oct. 4, 2021) (Final Notice of Lease Sale 257). That lease form prohibits operations on the leased premises without agency approval of an Exploration or Development Plan. Form BOEM-2005, Sec. 9, *available at* https://www.boem.gov/sites/default/files/about-boem/Procurement-Business-Opportunities/BOEM-OCS-Operation-Forms/BOEM-2005.pdf

[12] This case is thus categorically different than *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019), in which this Court held that Interior's issuance of federal *onshore* leases, pursuant to a wholly different set of enabling statutes than OCSLA, constituted an "irreversible"/"irrevocable commitment." 368 F. Supp. 3d at 65-66. In contrast to offshore leases issued pursuant to Lease Sale 257, "once the Wyoming Leases were issued, BLM could no longer prevent the lease-holders from exploring the parcels and drilling for oil and gas." *Id.*

Oceana, in which this court rejected a NEPA-based challenge to GOM Lease Sales 216 and 222, summarized the deferential standard of review applicable to the NEPA-based challenges as follows:

> Under NEPA, the court's role 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." *Baltimore Gas & Elec. v. NRDC, 462 U.S. 87, 97-98, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983)*. "An environmental impact statement is reviewed to ensure that the agency took a hard look at the environmental consequences of its decision to go forward with the project." *Nat'l Comm. for the New River v. F.E.R.C., 373 F.3d 1323, 1327, 362 U.S. App. D.C. 276 (D.C. Cir. 2004)* (citations omitted). "When an agency is evaluating scientific data within its technical expertise, an extreme degree of deference to the agency is warranted." *Id.* (internal quotation marks and citation omitted).

Oceana, 37 F. Supp. 3d at 154.[13] The deference to agency expertise extends to an agency's choice of methodology, to which a court "must defer . . . so long as it bears a rational relationship between the method and that to which it is applied." *Pub. Emps. for Envtl. Responsibility v. U.S. Dep't of the Interior*, 832 F. Supp. 2d 5, 26 (D.D.C. 2011) (quotation and alteration omitted).

"The procedural duty imposed upon agencies by [NEPA's EIS requirement] is quite precise, and the role of the courts in enforcing that duty is similarly precise." *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976). Thus, in considering Plaintiffs' NEPA claims, "this Court's inquiry is not whether it agrees with BOEM's actions, or whether it would have proceeded differently had it been standing in BOEM's shoes[.]" *Defenders of Wildlife v. BOEMRE*, 871 F.

[13] *See also Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985) ("When a court considers the sufficiency of an agency's environmental analysis, the court is not to rule on the relative merits of competing scientific opinion." (quotation omitted)); *Miami-Dade Cnty. v. U.S. EPA*, 529 F.3d 1049, 1065 (11th Cir. 2008) (court "must look at the agency's decision not as the chemist, biologist, or statistician that it is qualified neither by training nor experience to be, but rather as a reviewing court exercising certain minimal standards of rationality" (quotation and alterations omitted)).

Supp. 2d 1312, 1321 (S.D. Ala. 2012). Instead, the "proper analysis" is whether the record on summary judgment establishes that Plaintiffs have met their burden of showing that BOEM's decision to move forward with the Lease Sales was arbitrary and capricious. *Id*. at 1321–1322.

C. Plaintiffs have Failed to Establish that Interior's Decision to Hold Lease Sale 257 is "Arbitrary and Capricious" under the APA.

Plaintiffs allege that the EISs underlying Lease Sale 257 are insufficient under NEPA because they "fail[] to adequately analyze the greenhouse gas emissions associated with Lease Sale 257." MSJ, p. 29. Specifically, Plaintiffs assert that "[b]efore deciding to hold Lease Sale 257," Interior was required "to quantitatively estimate the magnitude of foreign emissions that would result" from foreign consumption if Interior did not hold Lease Sale 257. MSJ, p. 35. Plaintiffs' argument fails for several reasons.

1. Interior's analysis of scientific data is entitled to an "extreme degree of deference."

Plaintiffs ignore the "extreme degree of deference" owed to an agency's consideration of scientific data. *Oceana*, 37 F. Supp. 3d at 154 (*quoting Nat'l Comm. for the New River, Inc.*, 373 F.3d at 1327). The Supreme Court has recognized that "determination of the extent and effect of" "[c]umulative environmental impacts" – including "climatic changes" – "is a task assigned to the special competency of the appropriate agenc[y]." *Kleppe*, 427 U.S. at 413-414. Although *Oceana* was issued by this court and, like this case, concerned a NEPA-based challenge at OCSLA's lease sale stage, Plaintiffs fail even to mention the *Oceana* case, let alone distinguish their claim from the NEPA-based claim that this court rejected in *Oceana*.

Although Plaintiffs lament the sufficiency of BOEM's review of relevant scientific studies, in *Oceana* this Court recognized that BOEM does not need to thoroughly explain every detail of the studies and processes it used to arrive at its environmental conclusions regarding lease sales:

> Just because BOEM did not specifically re-cite and evaluate [scientifically credible evidence based upon accepted methodologies] . . . does not mean that it did not make the requisite evaluations at all. On the contrary, BOEM stated *generally* that it was relying on accepted scientific methods and approaches and *then specifically* applied relevant studies for each effected resource it examined throughout the 2012 SEIS.

Oceana, 37 F. Supp. 3d at 161. The record here leaves no doubt that Interior extensively considered the potential climate impacts of Lease Sale 257. For example, in the Programmatic EIS, the Multisale EIS, and the Supplemental EIS, BOEM identified numerous studies that influenced its analysis of climate change.[14] BOEM also included a separate discussion of climate change "to provide additional context and further characterize the affected environment and support the impact analysis." AR_0014278 (Programmatic EIS). And, BOEM identified various direct and indirect impacts of the then-proposed Five-Year Plan on climate change (AR_0014377-14379 (Programmatic EIS)) and acknowledged that various wildlife would be affected by the Proposed Action (including due to climate change) (*see e.g.*, AR_0014534 (Programmatic EIS), 14539 (Programmatic EIS), 14542 (Programmatic EIS), *etc.*). Recognizing Congress's mandate in OCSLA of "expedited exploration and development of the [OCS]" (43 U.S.C. § 1802(1)), BOEM also explained that various scientific studies "anticipate a long-term need for oil and natural gas[.]" AR_0014284. Further, in its Adequacy Determination, BOEM explained that it had

[14] *E.g.*, USEIA's 2016 Annual Energy Outlook (AR_0014284 (Programmatic EIS)); International Energy Agency's World Energy Outlook 2015 (*id.*); Solomon et al. 2007 (AR_0014377); IPCC 2007 (*id.*); IPCC 2014 (*id.*); USEPA 2016a (*id.*); Levitus et al. 2012 (*id.*); Bindoff et al. 2007 (AR_0014378 (Programmatic EIS)); AR_0008460 (Multistate EIS)); Doney et al. 2014 (AR_0014378 (Programmatic EIS)); NRC 2011 (*id.*); Symon et al. 2005 (*id.*); Jefferies and Richter Menge 2014 (*id.*); Wolvovsky and Anderson 2016 (AR_0014381 (Programmatic EIS)); UN 2015 (*id.*); McGlade and Elkins 2015 (*id.*); Hansen et al. (*id.*); Kyle and Brabets 2001 (AR_0014444 (Programmatic EIS)); Church and White 2011 (AR_0008460 (Multistate EIS)); IPCC 2012 (*id.*); U.S. Global Change Research Program (AR_0008461 (Multistate EIS)); Karl et al. 2009 (*id.*); *etc.*

reexamined the impact analyses underlying the Programmatic EIS, the Multisale, and the Supplemental EIS, in light of new information. AR_0029814. Based on its review, BOEM concluded that "no new relevant information or circumstances for [the] resources were identified that would alter the impact conclusions" presented in the three EISs. AR_0029814. And, in both the Adequacy Determination and the New ROD, BOEM explained that it had considered (among other new information) the most recent Intergovernmental Panel on Climate Change's report released on August 9, 2021, and determined the report did "not provide any information that would change the incremental impacts from this lease sale from those analyzed" in the earlier EISs (AR_0029850 (Adequacy Determination)) and did "not present sufficient cause to supplement the EIS" (AR_0029794 (New ROD).

In cases involving OCSLA's lease sale stage, Interior has repeatedly rejected NEPA-based claims that target Interior's collection and analysis of speculative and imprecise data. For example, in *Gulf Restoration Network v. Bernhardt*, this Court rejected a NEPA-based claim to two other lease sales that, like Lease Sale 257, arise from the 2017-2022 Program. 456 F. Supp. 3d 81, 105 (D.D.C. 2020).[15] There, this Court held that BOEM's alternatives analysis in the Programmatic EIS, the Multisale EIS, and the Supplemental EISs – the very same EISs at issue here – were reasonable given the number of uncertainties regarding post-lease oil and gas development. *Id.* at 98. This Court reasoned that BOEM's projections in the EISs were the "best assumptions and estimates of a set of future conditions that are considered reasonably foreseeable and suitable for presale impact analyses." *Id.* As another example, in *North Slope Borough v. Andrus*, the D.C.

[15] The plaintiffs in *Gulf Restoration Network* appealed the district court's decision to the D.C. Circuit, and that appeal remains pending. *Gulf Restoration Network et al. v.* Zinke et al., No. 20-05179 (D.C. Cir. *filed* June 18, 2020).

Circuit rejected a NEPA-based challenge to a 1979 lease sale for lease blocks in the Beaufort Sea, reasoning that at the lease sale stage of OCSLA's framework, Interior is not required to consider all worst case environmental impacts, which remained highly speculative at the lease sale stage. 642 F.2d 589 at 606.[16] Similarly here, the potential climate impacts implicated by the alternatives considered – particular at this early stage in OCSLA's framework – remain "speculative[,]"[17] rendering the omission of particular, detailed, and imprecise information about potential climate impacts "immaterial" at this stage in the overall process.[18]

In short: BOEM carefully considered numerous scientific studies evaluating the potential impacts of various alternatives on climate change and greenhouse gas emissions, and because this case involves only the preliminary lease sale stage of OCSLA, evaluating the environmental consequences of lease operations at this point in time is tenuous at best. As in *Oceana*, BOEM's analysis and decision in this case is entitled to substantial deference from this Court.

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[16] *See also False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984) (holding the Secretary did not violate NEPA by not considering the impact of a potential worst case oil spill at the lease sale stage because OCSLA's multi-stage process may require an EIS at every stage giving the agency other chances to consider the information).

[17] *See e.g.*, AR_0014382 (Programmatic EIS) (acknowledging that changes to legal frameworks or governmental policies could influence the climate impacts of its proposed actions), AR_0008197 (Multistate EIS) (same).

[18] *Cf. Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1988) ("In light of the speculative nature of the oil spill risk analysis at the lease sale stage, the omission of information regarding the Secretary's selection of the number and location of oil spill points, and the amount of oil assumed to have spilled from each point, is immaterial."); *Fisheries*, 2018 U.S. Dist. LEXIS 168532, at *23, *28 (D.D.C. Sept. 30, 2018) (dismissing plaintiffs' NEPA-based challenge to an offshore lease sale as unripe because "issuing the lease does not constitute an irreversible and irretrievable commitment of resources").

2. Interior's consideration of climate impacts, including greenhouse gas emissions arising from oil consumption, was adequate at this early stage in the OCSLA framework.

Plaintiffs allege that Interior's NEPA analysis was insufficient because it failed to quantify the degree to which greenhouse gas emissions would increase as a result of foreign consumption in the context of the "No Action" alternative. But Plaintiffs ignore that the lease sale stage does not "itself authorize[]" (*CBD*, 563 F.3d at 481, n. 1) any activity that could impact the environment. Instead, as a result of a lease sale, a "lessee acquires only a priority in submitting plans to conduct" exploration and development activities. *Sec'y of Interior*, 464 U.S. at 339. "If these plans, when ultimately submitted [after lease issuance], are disapproved, no further exploration or development is permitted." *Id.* The Supreme Court has recognized that:

> the lease contracts … gave the companies rights to explore for, and to develop, oil. But the need to obtain Government approvals so qualified the likely future enjoyment of the exploration and development rights that the contract, in practice, amounted primarily to an *opportunity* to try to obtain exploration and development rights in accordance with the procedures and under the standards specified in the cross-referenced statutes and regulations.

Mobil Oil, 530 U.S. at 620 (2000). As merely an "opportunity to try to obtain exploration and development rights," acquiring an offshore federal oil and gas lease is a far cry from actually drilling a well, discovering oil or gas in paying quantities, installing production facilities, and producing oil and gas.

In *Sierra Club v. FERC*, the D.C. Circuit considered a similar challenge to the Plaintiffs' challenge in this case. 827 F.3d 59 (D.C. Cir. 2016). The plaintiffs there asserted that the NEPA analysis underlying FERC's approval of a pipeline project was flawed because FERC had failed to consider certain "indirect effects" arising from a greater volume of natural gas exports. *Id.* at 68. The court rejected the plaintiffs' argument because it "presuppose[d] that the [FERC decision]

[would] increase natural gas export capacity and thereby expose the domestic natural gas market to new international demand." *Id.* Contrary to the plaintiffs' "presupp[osition,]" an additional regulatory step – a permit from the Department of Energy – was required before an increase in exports could legally occur. *Id*. Given that additional agency approvals would be required before the exports could increase, the Court concluded that FERC's action was "not the legally relevant cause of the indirect effects Sierra Club raises." *Id.* Thus, the Court concluded that FERC "did not need to consider" those "indirect effects" in its NEPA analysis relating to the preliminary step of FERC's approval of the pipeline project. *Id.* (noting that "Sierra Club, of course, remains free to raise these issues in a challenge to the Energy Department's NEPA review of its export decision").

As in *Sierra Club*, here the Plaintiffs focus on Interior's evaluation of "indirect impacts" of Lease Sale 257 – *viz.*, greenhouse gas emissions resulting from consumption of oil that may be produced from the leases issued in Lease Sale 257 as compared to greenhouse gas emissions resulting from foreign consumption of foreign production in the event of no lease sale. But, as in *Sierra Club* where FERC's preliminary decision did not itself authorize the impact about which plaintiffs were concerned, here too Lease Sale 257 will not itself authorize the activities that would result in an uptick in greenhouse gas emissions. Because it is the subsequent permitting of operations (drilling, installing production facilities, producing) rather than Lease Sale 257 that is the (potentially) "legally relevant" cause of the indirect impact on which Plaintiffs focus, Interior need not consider those impacts any further at the Lease Sale stage.[19] The Plaintiffs here "remain[]

[19] *Cf. CBD*, 563 F.3d at 485 (recognizing that Interior "lacks the discretion" under OCSLA to consider "global effects of oil and gas consumption" and, therefore, that it should focus on the extraction process and "need not consider the impacts of *consumption* of oil and gas after it has been extracted[.]"; *Ctr. for Sustainable Econ.*, 779 F.3d at 607 ("OCSLA does not mandate that

free to raise these issues in a challenge" to subsequent agency decisions that would authorize production – *i.e.*, when the "indirect impacts" that are their focus may be relevant.

3. NEPA does not require Interior to evaluate environmental impacts associated with actions or inactions outside of its discretion.

Plaintiffs' focus on Interior's treatment of the "No Action" alternative in the EIS fails because (*inter alia*) it ignores OCSLA's requirement that Interior continue to pursue development of the OCS to satisfy the country's energy needs.

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court held that "[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information." *See also Sierra Club*, 867 F.3d at 1372 ("That rule was the touchstone of [the Supreme Court's decision in] *Public Citizen.*"). There, the Supreme Court considered whether NEPA and the Clean Air Act "require[d] the Federal Motor Carrier Safety Administration (FMCSA) to evaluate environmental effects of cross-border operations of Mexican-domiciled motor carriers[.]" *Public Citizen*, 541 U.S. at 756. The Court held that "[b]ecause FMCSA lack[ed] discretion to prevent the[] cross-border operations[,]" it was not required under NEPA to evaluate the environmental effects of those operations. *Id.*

The D.C. Circuit has similarly held that where an agency lacks discretion to take certain action, it does not violate NEPA by failing to consider the environmental implications of that

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Interior track what proportion of OCS-derived fuels are consumed in the United States…. National energy needs may be addressed by Interior's consideration of total energy production capacity, without regard to where the energy would ordinarily be consumed."). In both *CBD* and *Ctr. for Sustainable Econ.*, because the court had held that Plaintiffs' NEPA-based claims were not ripe, the court made these statements in analyzing Plaintiffs' separate OCSLA-based claims.

action. Thus, in rejecting a challenge to a NEPA analysis conducted by FERC, the D.C. Circuit in *Sierra Club v. FERC*, explained:

> [T]he Commission's NEPA analysis did not have to address the indirect effects of the anticipated *export* of natural gas. That is because the Department of Energy, not [FERC], has sole authority to license the export of any natural gas going through the Freeport facilities. In the specific circumstances where, as here, an agency "has no ability to prevent a certain effect due to" that agency's "limited statutory authority over the relevant action[]," then that action "cannot be considered a legally relevant 'cause' of the effect" for NEPA purposes. *Public Citizen*, 541 U.S. at 771.

827 F.3d 36, 47 (D.C. Cir. 2016) ("The [DOE's] independent decision to allow exports – a decision over which [FERC] has no regulatory authority – breaks the NEPA causal chain and absolves [FERC] of responsibility to include in its NEPA analysis considerations that it 'could not act on' and for which it cannot be 'the legally relevant cause.'").

As in *Public Citizen* and *Sierra Club*, and consistent with this Court's ruling in *Oceana*, Interior lacks authority under OCSLA to withhold leasing of the OCS. *See Oceana*, 37 F. Supp. 3d at 174 ("[T]he OCSLA mandates that the Secretary, who delegates authority to BOEM, implement lease sales of the OCS in 5-year increments. See 43 U.S.C. § 1344."). Consistently, Courts have repeatedly recognized that the "No Action" alternative at the OCSLA lease sale stage necessarily lacks an actual, material impact. In *Oceana*, this Court rejected a challenge to the adequacy of Interior's analysis of the "No Action" alternative in the EIS underlying Lease Sales 216/222, holding that BOEM had properly concluded that the "No Action" alternative (that is, not holding the lease sales) would have no practical cumulative impact, because under the OCSLA statutory scheme, "regardless of this particular lease sale going forward, in all likelihood, another one eventually will[.]" *Id.*

This Court's analysis in *Oceana* of the "No Action" alternative for Lease Sales 216/222 is particularly significant given that the relevant language in the EIS for Lease Sales 216/222 was *effectively identical to the language* concerning the "No Action" alternative in the EIS for Lease Sale 257:

EIS Underlying Lease Sale 216/222 and Addressed in *Oceana*	**Supplemental EIS Underlying Lease Sale 257**
Canceling the lease sale would eliminate the effects described in Alternative A. The incremental contribution of the proposed lease sale to cumulative effects would also be avoided, but effects from other activities, including other OCS lease sales, would remain. … [T]he resulting development of oil and gas would most likely be postponed to a future sale; therefore, the overall level of OCS activity in the CPA would only be reduced by a small percentage, if any. Therefore, the cancellation of the proposed lease sale would not significantly change the environmental impacts of overall OCS activity. … Other sources of energy may substitute for the lost production [of oil and gas and] revenues collected by the Federal Government (and thus revenue disbursement to the States) would be adversely affected also. *Oceana*, 37 F. Supp. 3d at 172 (*quoting* Lease Sale 216/222 EIS).	Alternative E is the cancellation of a single proposed lease sale. … Any potential environmental impacts resulting from a proposed lease sale would not occur. Activities related to previously issued leases and permits … related to the OCS oil and gas program would continue. … [T]he resulting development of oil and gas would most likely be postponed to a future lease sale; therefore, the overall level of OCS oil- and gas-related activity would be reduced only by a small percentage, if any. Therefore, the cancellation of a proposed lease sale would not significantly change the environmental impacts of overall OCS oil- and gas-related activity. … However, cancellation of a proposed lease sale may result in direct economic impacts to the individual companies, and the revenues collected by the Federal Government (and thus revenue disbursements to the States) could also be adversely affected. … AR_008228 (Multisale EIS)

Given that the EIS at issue here uses the exact same analysis and effectively identical language as the EIS at issue in *Oceana*, the holding in *Oceana* applies equally to BOEM's "No Action" alternative in the EIS for Lease Sale 257. Indeed, applying *Oceana*, this Court has already upheld

the "No Action" alternative at issue in this case. 456 F. Supp. 3d at 95-97. Specifically, in *Gulf Restoration Network*, the Court rejected a NEPA challenge to Lease Sales 250 and 251, which – like Lease Sale 257 – arose from the 2017-2022 Program. *Id.* at 89. There, recognizing the "nearly identical" language between the EIS at issue in *Oceana* and the EISs at issue in both *Gulf Restoration Network* and here, the Court applied *Oceana* to uphold BOEM's "No Action" alternative analysis. *Id.* at 95-97. Here, too, BOEM's evaluation of the "No Action" alternative should be upheld.

Against this backdrop, Plaintiffs' argument that NEPA requires Interior to collect and evaluate quantitative data regarding emissions arising from foreign consumption in the "No Action" alternative fails. Under NEPA, data must be "essential to a reasoned choice among alternatives" to the trigger the requirement that an agency collect and evaluate that data. *Oceana*, 37 F. Supp. 3d at 154 (*citing* 40 C.F.R. § 1502.14(a)). Given Interior's "continuing duty" under OCSLA to develop the OCS (*CBD*, 563 F.3d at 485), the quantitative consumption data sought by Plaintiffs is not "essential" to Interior's "reasoned choice" to hold Lease Sale 257 rather than to elect the "No Action" alternative.[20] And, in any case, in *Oceana* this Court recognized that NEPA "does not require that complete information about the environmental impact of a project be obtained before a project is undertaken." *Oceana*, 37 F. Supp. 3d at 159-160 (internal quotations omitted). Here, as in *Oceana*, "the vast administrative record[,]" which exceeds 44,000 pages and

[20] In ruling on the OCSLA-based claims in *CBD* (after dismissing the NEPA claims), the D.C. Circuit found that, under OCSLA, Interior "lacks the discretion" to consider "global effects of oil and gas consumption" and, therefore, that Interior should focus on the extraction process and "need not consider the impacts of consumption of oil and gas after it has been extracted[.]" *CBD*, 563 F.3d at 485. *See also Ctr. for Sustainable Econ.*, 779 F.3d at 607 (after dismissing the NEPA claims as not ripe, explaining: "National energy needs may be addressed by Interior's consideration of total energy production capacity, without regard to where the energy would ordinarily be consumed.").

includes several iterations of tiered EISs, "undermines" the Plaintiffs' contention that Interior "did not gather the essential information" required by NEPA. *Id.* at 161.

Finally, under the NEPA regulations, "[i]mpacts shall be discussed [in an EIS] in proportion to their significance"; potential impacts that are not "significant" shall be addressed only in a "brief discussion." 40 C.F.R. § 1502.2(b). Any impact to the overall greenhouse gas emissions associated with the development of OCS resources under OCSLA will not substantially differ regardless of whether Interior holds Lease Sale 257, because Interior is required under OCSLA to pursue the development of the OCS.[21] Against this backdrop, it is clear that quantified consumption trends in foreign markets is neither a "relevant factor" in the context of Interior's leasing decisions under OCSLA nor a particularly "significant" data element under the NEPA regulations. Accordingly, Interior's "brief discussion" of the potential emissions arising from possible foreign consumption of potential foreign production, only one piece of Interior's greenhouse gas analysis (which, in turn, is only one piece of Interior's overall environmental analysis), satisfied NEPA.

4. The *Liberty* and *Willow* cases are neither applicable nor binding.

Plaintiffs rely heavily on the recent decisions in *Center For Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) ("*Liberty*") and *Sovereign Inupiat for a Living Arctic v. BLM*, No. 3:20-cv-00290, 2021 U.S. Dist. LEXIS 155471 (D. Alaska Aug. 18, 2021) ("*Willow*"). Neither of those cases supports Plaintiffs' claims.

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[21] *See* AR_0014275 (Programmatic EIS) (OCSLA "requires … Interior to prepare a schedule of OCS oil and gas lease sales for the next five years in consideration of th[e] potential need [for oil and gas], even if changes in energy or climate policy, changes in technology, or progress in alternative energy sources could reduce the need for fossil fuels at some point in the future.").

Most importantly, because neither the *Liberty* case nor the *Willow* case concern the Lease Sale stage of the multi-stage offshore leasing program, those cases are categorically inapplicable here. The *Liberty* case concerned installation of a drilling and production facility on an offshore lease,[22] and the *Willow* case concerned a proposed development project on an onshore lease.[23] Thus, rather than the preliminary offshore lease sale stage, both of those cases concerned authorizing activities that could actually result in emissions. Here, unlike *Liberty* and *Willow*, Plaintiffs' NEPA challenge arises in the context of the "preliminary and relatively self-contained"[24] lease sale stage of OCSLA's framework. (Indeed, in *Willow*, the court recognized that the leasing stage under OCSLA is distinct from later stages that may give rise to actual operations. *See Willow*, 2021 U.S. Dist. LEXIS 155471, at *15, n. 73 (*citing North Slope Borough*, 642 F.2d at 593).) Further, while the courts in *Liberty* and *Willow* concluded that the agencies were required to provide a more robust explanation of their conclusion that development of a reliable model that accounted for foreign consumption was necessary,[25] the explanation provided by BOEM here is sufficient given the preliminary nature of the lease sale stage of OCSLA's framework. Because the lease sale stage does not "itself" result in production that will be consumed resulting in greenhouse gas emissions, the *Willow* case and the *Liberty* case have no

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[22] *See Liberty*, 982 F.3d at 731 (addressing BOEM's and FWS' approval a project for an offshore drilling and production facility along the coast of Alaska).

[23] *See Willow*, 2021 U.S. Dist. LEXIS 155471, at *4 (addressing a "proposed oil and gas development project under leaseholds in the northeast area of the National Petroleum Reserve in Alaska.").

[24] *North Slope Borough*, 642 F.2d at 593; *False Pass*, 733 F.2d at 616.

[25] *E.g.*, *Willow*, 2021 U.S. Dist. LEXIS 155471, at *26 (finding that BLM failed to "thoroughly explain" why it was not possible to develop a reliable estimate of the greenhouse gas emissions that would result from foreign consumption in a "No Action" alternative); *Liberty*, 982 F.3d at 739 (finding that BOEM had failed to adequately explain why it was unable to quantitatively evaluate the emissions generated" by foreign consumption in a "No Action" alternative).

relevance here.[26] *See Sierra Club*, 827 F.3d at 68 (where subsequent permitting is the "legally relevant" cause of the targeted impacts, an agency need not fully consider those impacts until that subsequent permitting).

Further, in *Willow* and *Liberty* the courts failed to afford BOEM the deference due to its determination that it was not feasible to quantify how the "No Action" alternative might affect foreign greenhouse gas emissions. Although the MarketSim analysis may be able to estimate effects of foreign oil consumption if Lease Sale 257 is not held, any such estimate would itself be insufficient to evaluate how the "No Action" alternative would ultimately affect greenhouse gas emissions. Plaintiffs' narrow focus on oil consumption overlooks that foreign markets will necessarily rely on substitute energy sources to meet their energy demands and that those substitute energy sources will impact the ultimate greenhouse gas emissions. These impacts – particularly at this early stage in OCSLA's framework – remain highly "speculative[.]" Because "determination of the extent and effect of" "[c]umulative environmental impacts" "is a task assigned to the special competency of the appropriate agenc[y,]"[27] the Court owes Interior an "extreme degree of deference" in this situation. *Oceana*, 37 F. Supp. 3d at 154 ("'extreme degree of deference'" owed to an agency's evaluation of scientific data, *quoting Nat'l Comm. for the New River, Inc.* 373 F.3d at 1327). Plaintiffs' reliance on *Liberty* and *Willow* (neither of which is binding on this Court) thus fails for numerous reasons.

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[26] This Court's decision in *WildEarth Guardians v. Zinke*, *supra*, likewise does not support Plaintiffs' claims. At issue there was (*inter alia*) potential GHG emissions resulting from (a) operations *on* the leases themselves, and (b) consumption of hydrocarbons produced *from* those leases. *WildEarth Guardians v. Zinke* had nothing to do with quantifying foreign emissions that may result from not holding an offshore lease sale.

[27] *Kleppe*, 427 U.S. at 413-414.

5. Interior was not required to supplement the EIS.

Under Interior's NEPA regulations, the agency "should use existing NEPA analyses for assessing the impacts of a proposed action and any alternatives." 43 C.F.R. § 46.120(a). It is a priority of the agency to "avoid redundancy and unnecessary paperwork" in fulfillment its NEPA requirements. *Id.* at § 46.120(d). Thus, "[a]n existing environmental analysis . . . may be used in its entirety if the [agency] determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives." *Id.* at § 46.120(c). Such supporting documentation "must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id.*

Courts apply the "rule of reason" in evaluating whether an agency is required to supplement an EIS. Under this "rule of reason":

> [A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. Rather, a supplemental EIS must be prepared only when a new action will affect the quality of the environment in a significant manner or to a significant extent not already considered.

Gulf Restoration Network, 456 F. Supp. 3d at 102 (internal quotation omitted) (*quoting Stand Up for Cal.! v. United States DOI*, 410 F. Supp. 3d 39, 57 (D.D.C. 2019) & *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989)).[28]

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[28] *See also Stand Up for Cal.! v. United States DOI*, 994 F.3d 616, 628 (D.C. Cir. 2021) ("The overarching question is whether an EIS's deficiencies are significant enough to undermine informed public and comment and informed decisionmaking.").

Whether the agency should have prepared a supplemental EIS is a factual dispute that "implicates substantial agency expertise." *Marsh*, 490 U.S. at 376.[29] Therefore, an agency's decision not to prepare a supplemental EIS is entitled to substantial deference. *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1059 (D.C. Cir. 2017) (citing *Marsh*, 490 U.S. at 376-77 ("Because analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.")).

A court may not order an agency to "reassess its decisions every time new forecasts [are] released, [otherwise the court] would risk immobilizing the agency." *Friends of River v. Federal Energy Regulatory Com.*, 720 F.2d 93, 109 (D.C. Cir. 1983). Here, Plaintiffs have failed to meet their steep burden to establish that BOEM's decision to proceed without issuing a supplemental EIS was arbitrary or capricious.

a. Interior extensively evaluated the adequacy of its NEPA analysis before issuing the ROD.

The record belies Plaintiffs' assertion that BOEM "failed to consider whether it was required to supplement its EISs" and failed to comply with its "previous commitment to make individual lease sale decisions 'after completion of the appropriate supplemental NEPA documents.'" MSJ, p. 36-37. *BOEM did not*, as Plaintiffs assert, *commit* to publication of a new EIS for each lease sale; rather, BOEM committed to developing "appropriate supplemental NEPA documents[.]"[30] BOEM further explained:

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[29] *See also Gulf Restoration Network*, 456 F. Supp. 3d at 102 (*quoting Stand Up for Cal.!*, 410 F. Supp. 3d at 57 ("Courts must also defer to the agency's 'informed discretion about whether to prepare a supplemental EIS'" because making that decision requires "'substantial agency expertise.'").

[30] *See* AR_0008125 (Multisale EIS, stating: "individual decisions will be made on each supplemental lease sale after completion of the appropriate supplemental NEPA documents").

> Pursuant to the OCSLA staged leasing process, for each lease sale proposed in the Five-Year Program, BOEM makes individual decisions on whether and how to proceed with a proposed lease sale. Federal regulations allow for several related or similar proposals to be analyzed in one EIS (40 CFR § 1502.4). Since each proposed lease sale and the projected activities related to such a lease sale are very similar and would occur in close timeframes, BOEM has decided to prepare a single programmatic EIS to support the 10 proposed GOM lease sales scheduled in the Five-Year Program [including Lease Sale 257]. However, as previously noted, OCSLA requires individual decisions to be made for each lease sale. Therefore, in order to make an informed decision on a single proposed lease sale, the analyses contained in this Multisale EIS examine impacts from a single proposed lease sale. A lease sale scenario … includes all of the activities that could occur over a 50-year analysis period. The findings of these analyses can be applied individually to each of the subsequent proposed lease sales.…
>
> An additional NEPA review (e.g., a Determination of NEPA Adequacy, an environmental assessment [EA] or, if determined necessary, a Supplemental EIS) will be conducted prior to the decision on an individual proposed GOM lease sale to address any relevant new information.…
>
> The Multisale EIS approach allows for subsequent NEPA analyses to focus on the potential changes in each of the proposed lease sales and on any new issues and information that may have become available since the publication of the previous NEPA document.

AR_0008201-8202 (Multisale EIS). In accordance with its statements in the EIS, before BOEM decided to hold Lease Sale 257, it extensively considered whether "there [was] significant new information or circumstances bearing on a proposed action or its impacts that trigger BOEM's obligation to supplement the [Multisale EIS] and [Supplemental EIS]." AR_0029803. BOEM reviewed "all relevant new information available since publication of the [Multisale EIS] and [Supplemental EIS]." *Id.* As a result of this review, BOEM concluded:

> [N]o new information or circumstances were identified since publication of the 2017-2022 GOM Multisale EIS and 2018 GOM Supplemental EIS that could change the conclusions of the 2017-

> 2022 GOM Multisale EIS and the 2018 GOM Supplemental EIS. Therefore, the conclusions reached in the 2017-2022 GOM Multisale EIS and 2018 GOM Supplemental EIS remain valid and can be used to support the ROD for proposed Lease Sale 257 without further supplementation.

AR_00029804; *see also* AR_ 0029789 (New ROD). On August 27, 2021, contemporaneous with the ROD for Lease Sale 257, BOEM published its Adequacy Determination, a 142-page document in which BOEM explained the basis for its conclusion that a supplemental EIS is not required for Lease Sale 257. Thus, the record plainly contradicts Plaintiffs' assertion that BOEM "failed to consider whether it was required to supplement its EISs." MSJ, p. 37. Contrary to Plaintiffs' argument, NEPA does not require BOEM to supplement the Supplemental EIS simply because years have passed since its issuance. *See* MSJ, p. 36. Here, in reliance on its "substantial agency expertise," BOEM made an "informed decision" that supplementation is not required. Thus, deference to BOEM's decision is warranted. *See Stand up for Cal!*, 410 F. Supp. 3d 39.

b. BOEM appropriately handled new climate information.

Plaintiffs' assertion that new studies demonstrate "a need to halt additional oil and gas leasing activity" (MSJ, pp. 36-37) misses the mark. In OCSLA Congress *mandated* the "expeditious development of OCS resources." *Watt*, 668 F.2d at 1316. Because under OCSLA Interior *must* move forward with additional lease sales regardless of whether it holds this particular lease sale, the cumulative impact of any specific lease sale – including Lease Sale 257 – is not material. Unless and until ***Congress decides*** that there is a "need to halt additional oil and gas leasing" (MSJ, pp. 36-37) on the OCS and amends OCSLA accordingly, Interior *must* comply with the statutory mandate that the OCS be developed to meet the nation's energy needs. Thus, Plaintiffs have not – and cannot – demonstrate how any new material suggesting that OCS leasing activity should be "halt[ed]" can negate the statutory mandate upon BOEM to hold lease sales.

Further, Plaintiffs' contention that BOEM should have discussed new climate-related studies in the Determination in more detail ignores this Court's rejection of a strikingly similar argument in *Oceana*. As in this case, the plaintiffs in *Oceana* asserted that BOEM "simply stat[ing]" that it had reviewed and used credible scientific evidence as "insufficient[.]" *Oceana*, 37 F. Supp. 3d at 162. And there, this Court recognized that BOEM's decision not to extensively discuss all facets of its analysis does "not mean that [BOEM] did not make the requisite evaluations at all" and accepted BOEM's general statements about the data that it had reviewed.

Here, in its Adequacy Determination, BOEM identified several sources that it used to search for new information regarding climate, including "Google Scholar, government agencies, and climate science journal publications." AR_0029849. BOEM identified several new climate-related publications that it reviewed during its analysis of whether a supplemental EIS was necessary. *See* AR_0029851-29852 (listing climate-related references). BOEM acknowledged that its evaluation of the newly available information "contributes to [its] understanding of climate change issues" and summarized how the new information fits within its analysis of climate change based on the studies underlying the Programmatic EIS, the Multisale EIS, and the Supplemental EIS. AR_0029850 (analyzing Duncobme 2021 research, Merrill 2018 research, NAS 2018 research, Blunden and Boyer 2020 research, and AMS 2021 research). Ultimately, BOEM concluded that the new information did not "change the incremental impacts from this lease sale from those analyzed in the 2017-2022 Five-Year Program EIS (tiered to the other lease sale EISs) to a point requirement supplementation of the EIS." AR_0029850; *see also* AR_0029812 (new

information did not "disturb BOEM's prior assessments of the incremental climate impacts of" Lease Sale 257).[31]

Even if the Court here finds BOEM did not "conduct its analysis the way the Court might have, it still took a 'hard look'" at the developments in certain environmental policies since the preparation of the 2018 Supplemental EIS. *See Oceana*, 37 F. Supp. 3d at 165. *See also Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) ("Although the contours of the 'hard look' doctrine may be imprecise, our task 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.'" (quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983)).[32] Further, and as discussed in greater detail above, the degree of BOEM's climate and emissions analysis was adequate given the preliminary stage of OCSLA's framework at issue.

c. BOEM appropriately handled other new information.

Aside from climate-related information, Plaintiffs also allege that BOEM was required to publish a supplemental EIS to address various other new information, each of which relates to post-lease operations (*e.g.*, drilling, "fracking discharges," decommissioning,[33] and effects of post-

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[31] BOEM also explained that none of the three EISs were affected by EPA's actions related to the regulation of greenhouse gas emissions, new blowout preventer rules published by BSEE in 2019, NOAA's proposed expansion of the Flower Garden Banks National Marine Sanctuary, the IPCC's August 2021 report on climate change, and the Ninth Circuit's decision in *Liberty*. AR_002973-28785 (New ROD).

[32] *See also Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 569 (D.C. Cir. 2007) (because the agency "thoroughly considered the environmental issues surrounding" the proposed project, it "plainly met its NEPA obligation to take a 'hard look'").

[33] Plaintiffs assert that "a 2021 report from the GAO [] undermines its previous assumptions about safety of current oil and gas operations in the Gulf" because the report "concluded that [BSEE's] regulatory inspection program is woefully inadequate[.]" MSJ, p. 40. But this court has already considered and rejected this exact argument (albeit with respect to an earlier GAO report), finding that BOEM's reliance on BSEE to fulfill its obligations is not arbitrary and capricious. *Gulf*

lease operations on wildlife, effects of post-lease operations on offshore wind leasing). Plaintiffs' argument fails from the start because, once again, Plaintiffs fail to consider the lease sale stage within the context of OCSLA's four-stage process for development of the OCS. Here, as this Court recognized in *Oceana*, "postlease operational issues [] cannot be reasonably predicted at the lease stage[.]" 37 F. Supp. 3d at 167. Moreover, *after leases are issued but before operations begin*, lessees must submit "site-specific data" that BOEM's "technical staff reviews … to determine whether conditions on approval" are required to protect the environment.[34] *Id*. Thus, there is no requirement that BOEM publish a supplemental EIS at the lease sale stage to address "postlease operational issues[.]" *Id*.[35]

Plaintiffs' assertion that BOEM "failed to consider significant new information about the effects of leasing on Gulf wildlife" (MSJ, p. 40) also fails. In support of this argument, Plaintiffs focus on BOEM's analysis of the impacts of leasing on the Rice's whale (f/k/a GOM Bryde's whale), which was listed as endangered in 2019. *Id.* Plaintiffs' assertion that Interior "did not

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Restoration Network, 456 F. Supp. 3d at 101-02 ("[S]imply because the GAO report identified areas for needed improvement within the BSEE does not render the BOEM's underlying assumption when it relied on the BSEE's rules that the BSEE would perform its duties to be demonstrably incorrect, and even given BSEE's past enforcement failures, this Court will not presume that the BSEE would have necessarily failed to comply with enforcement requirements for future projects." (internal quotation omitted)).

[34] *See* AR_0029809 (Adequacy Determination, stating: "[W]hen any plan is submitted, BOEM conducts a review to determine if a site-specific environmental assessment (EA) or EIS is required and whether additional controls are necessary. Such a review informs BOEM's decision to require additional mitigation measures to reduce impacts from projected activities or to disapprove the plan if impacts cannot adequately be reduced.").

[35] Further, Plaintiffs chide BOEM for purportedly failing to consider the fact that it has in recent years approved more well permits in deep water than in shallow water. But Plaintiffs present no argument for why these facts (if true) alter the adequacy of the EISs. Lease Sale 257 will offer the same locations for lease that have been contemplated since BOEM's adoption of the 2017-2022 Program. And, BOEM's issuance of the leases does not authorize any drilling activity.

consider" the new information regarding Rice's whale is simply wrong. For instance, Plaintiffs completely ignore that in the Adequacy Determination BOEM explained:

> On April 15, 2019, NMFS published the final rule to list the GOM Bryde's whale [] as endangered, and [that listing] became effective on May 15, 2019 []. Th[i]s status change[] [was] included in BOEM's previous NEPA analysis since [it was] anticipated and considered.

AR_0029883. Further, regarding the listing of Rice's whale as a "distinct species" (MSJ, p. 41), BOEM explained: "NMFS revises the common name to Rice's whale [from Bryde's whale] …. The changes to the taxonomic classification and nomenclature do not affect the species' listing status under the ESA or any protections and requirements arising from its listing." *Id.* Finally, Plaintiffs state that "new evidence" demonstrates that the Rice's whale is more prone to vessel strikes than previously understood. MSJ, p. 41. But Plaintiffs fail to recognize that BOEM addressed this development in the Adequacy Determination (*see* AR_0029936-29937) and that every lease issued pursuant to Lease Sale 257 will include a stipulation mandating that lessees comply with the terms and conditions of the Biological Opinion issued for Lease Sale 257 on March 13, 2020 (AR_0036866),[36] including implementing mitigating measures designed to protect the Rice's whale.[37]

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[36] The Biological Opinion "addresses any future lease sale and any approvals issued by BOEM and BSEE, under both existing and future OCS oil and gas leases in the GOM, over a 10-year period." *See* AR_0029936.

[37] *See* 86 Fed. Reg. 54728 (Oct. 4, 2021); BOEM Final Notice of Sale, Gulf of Mexico Oil and Gas Lease Sale 257, Lease Stipulations, *available at* https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/Sale-257-Lease-Stipulations.pdf.

d. Conclusion

"It is well settled that the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Nevada*, 457 F.3d at 93. Here, BOEM conducted a robust review of new information and ultimately, based on its expertise and judgment, concluded that a supplemental EIS is not required.

D. Plaintiffs have not Carried Their Burden to Establish that Vacatur (or Injunctive Relief) is Warranted.

Assuming *arguendo* that Plaintiffs' lawsuit is both ripe and could establish that Interior's decision to hold Lease Sale 257 was "arbitrary and capricious" (which API denies), Plaintiffs have failed to carry their burden to establish that the Court should "vacate the Bureau's decision to hold Lease Sale 257." MSJ p. 45.

"To determine whether to remand without vacatur, this court considers first, the seriousness of the action's deficiencies and, second, the likely disruptive consequences of vacatur." *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020); *see also Wildearth Guardians*, 368 F. Supp. 3d at 84. Declining vacatur is "appropriate when vacatur would disrupt settled transactions." *Am. Great Lakes Ports Ass'n*, 962 F.3d at 519 (affirming district court's remand without vacatur). Here, the alleged deficiency is not of such a serious nature to warrant vacatur because Interior will have additional opportunities to consider the environmental impacts of operations on leases issued pursuant to Lease Sale 257 before any operations could lawfully begin. And, considering that API members will have disclosed their highly confidential valuation of unleased GOM acreage when bids are opened at Lease Sale 257 on November 17, 2021, and that the high bidders will make bonus payments for newly issued leases, vacatur would unquestionably "disrupt settled transactions."

Further, insofar as Plaintiffs ask the Court to "[v]acate and enjoin leases executed pursuant to Lease Sale 257," ECF Doc. 1 (Complaint, Request For Relief), Plaintiffs have not established their entitlement to injunctive relief.[38] "[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). A plaintiff seeking an injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that the remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that considering the balance of hardships . . . , a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (citation omitted). Unless Congress has clearly indicated otherwise, irreparable harm is not presumed in the event of a statutory violation.[39] Notably, courts have refused to enjoin a lease sale in part because "the balance of hardships weighs in favor of Defendants who have invested significant time and expense in preparing for the scheduled sales."[40]

[38] *Compare Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1054 (D.C. Cir. 2021) (vacating agency's NEPA analysis, but declining to enjoin pipeline activity) (cited by Plaintiffs at MSJ, p. 43).

[39] *Monsanto*, 561 U.S. at 158 ("It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test."). *See also Kleppe*, 427 U.S. at 407 (upholding lower court conclusion that injunction was improper "even if" a NEPA violation occurred "because [plaintiffs] had shown no irreparable harm that would result absent an injunction and the record disclosed that irreparable harm would result to the intervenors who sought to carry out their business ventures and to the public who depended on their operations.").

[40] *N. Slope Borough v. Minerals Mgmt. Serv.*, No. 3:07-cv-0045, 2008 U.S. Dist. LEXIS 1503, at *13 (D. Alaska Jan. 8, 2008), *aff'd by N. Slope Borough v. Minerals Mgmt. Serv.*, 343 f. App'x 272 (9th Cir. 2009).

Here, because Plaintiffs have not even purported to establish all four requirements to obtain the "extraordinary remedy" (*Winter*, 555 U.S. at 22) that they seek, their request for injunctive relief should be denied, without further analysis. *E.g.*, *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (applicant for injunctive relief must carry burden on all factors). And, in any case, Plaintiffs would not be able to satisfy these requirements. Given that Congress has determined that offshore leasing serves the public interest (and that Lease Sale 257 is one of a few remaining lease sales under the only existing approved Five-Year Program), given that holding Lease Sale 257 will not itself result in any drilling operations or GHG emissions, and given that Interior retains the ability to deny permits for lease operations if it determines that the environmental impacts of those operations would be excessive,[41] Plaintiffs cannot establish the "public interest," "irreparable harm," or "inadequate remedy" elements. *See Winter*, 555 U.S. at 22 ("Issuing a[n]…injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

Considering the "balance of hardships" further illustrates that Plaintiffs are not entitled to injunctive relief. Plaintiffs' concerns about the environmental impacts caused by operations on OCS leases are not implicated by the preliminary OCSLA stage of holding a lease sale. "[N]o drilling — not even of an exploratory nature" is permitted with the purchase of a lease. *N. Slope Borough*, 642 F.2d at 593. Thus, the Court's refusal to vacate the ROD and enjoin (or vacate) the

[41] For example, when a plan is submitted by a lessee, "BOEM conducts a review to determine if a site-specific environmental assessment (EA) or EIS is required and whether additional controls are necessary." AR_0029792 (ROD). "Site specific mitigating measures are also applied by BOEM during plan and permit reviews." AR_0015565 (Supplemental EIS). *See also* AR_ 0029792 (ROD) ("BOEM has the authority to disapprove a plan [submitted post-lease sale] or require additional mitigation to reduce impacts from a facility's projected emissions.").

leases issued pursuant to Lease Sale 257 will not cause the harm about which Plaintiffs are concerned.

On the other hand, Federal Defendants, Intervenor-Defendant State of Louisiana, and API's members will suffer substantial hardship if the ROD is vacated and if the leases issued pursuant to Lease Sale 257 are vacated or enjoined. The Federal Defendants have spent years preparing for this sale as part of BOEM's 2017-2022 Five-Year Program and the leases will generate valuable payments to the United States. *See* AR_0015537-15540 (Supplemental EIS). The State of Louisiana relies heavily on the revenues that it receives from offshore leasing in federal waters (including its share of bonuses paid for leases in certain geographic areas). The leases issued pursuant to Lease Sale 257 will be valuable contractual and property interests[42] that will also promote employment (including for many API members), labor income, tax revenues, and other economic impacts that would benefit Louisiana and other Gulf coastal states and be distributed across the United States. AR_0015797. And, of course, API's members, who are deeply engaged in the exploration for and development of offshore oil and gas resources as leaseholders, lease operators, and service companies, are heavily invested in leasing of the OCS. Moreover, API members who bid on leases at Lease Sale 257 will disclose their highly proprietary valuations of unleased acreage in the Gulf of Mexico. If, after those bids are opened, the leases are vacated or enjoined based on Plaintiffs' lawsuit, the API members whose bids were made public will have forfeited the confidentiality of highly valuable proprietary commercial data, making it impossible to re-conduct the lease sale in the future in a fair and competitive manner.

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[42] *Mobil Oil*, *supra*; *Union Oil Co v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975).

Further, the 2017-2022 Leasing Program is set to expire on July 1, 2022, and no subsequent Five-Year Lease Program has been published to come into effect when the 2017-2022 Program expires. API's members are thus faced with unprecedented uncertainty regarding their continued ability to acquire new leases and engage in the activities that are critical to their businesses. Under these circumstances, the harm to API's members of vacating Lease Sale 257 (and vacating or enjoining any leases granted pursuant thereto) greatly outweighs any harm to Plaintiffs of granting leases to high bidders at Lease Sale 257.

V. CONCLUSION

For the foregoing reasons (and those asserted by Federal Defendants and Intervenor-Defendant State of Louisiana), API respectfully requests that Plaintiffs' Motion for Summary Judgment be denied and API's Cross-Motion for Summary Judgment be granted.

November 10, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 2021, I caused a true and correct copy of the foregoing Memorandum to be filed with the Court electronically and served by the Court's CM/ECF System upon all attorneys of record.

/s/ *Alexander Breckinridge*