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,
and

STATE OF LOUISIANA,
Intervenor-Defendant.

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

MEMORANDUM IN SUPPORT OF LOUISIANA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Outer Continental Shelf Lands Act (OCSLA) sets out an orderly system for the leasing, exploration, and development of oil and gas resources in offshore waters. Under longstanding D.C. Circuit precedents, Plaintiffs' National Environmental Policy Act claims challenging *this* stage of that process—the lease-sale stage—for Lease Sale 257 are unripe. Here, the Bureau of Ocean Energy Management need consider only the consequences resulting *from the sale itself*—not from the exploration, drilling, and emissions resulting from later stages in the leasing process. That's because OCSLA mandates a comprehensive system of environmental review at each stage, allowing BOEM to make rational and informed decisions about reasonably foreseeable environmental risks. Because Plaintiffs' challenges are unripe, Louisiana is entitled to summary judgment. And even if this Court has jurisdiction, precedent also forecloses each of Plaintiffs' attempts to flyspeck BOEM's comprehensive environmental reviews. Finally, in the unlikely event the Court finds any deficiency with BOEM's environmental analyses, remand without vacatur is the appropriate remedy.

BACKGROUND

I. STATUTORY FRAMEWORKS FOR OIL AND GAS LEASING ON THE OUTER CONTINENTAL SHELF.

Congress enacted OCSLA in 1953 "to meet the urgent need for further exploration and development of oil and gas deposits." Pub. L. 83-212 (1953). OCSLA declares "the outer Continental Shelf" to be "a vital national resource reserve held by the Federal Government for the public." 43 U.S.C. §1332(3). After the shock of the OPEC oil embargo, years of declining domestic production, and dissatisfaction with the Secretary's management of the leasing program, Congress stepped in and amended OCSLA in 1978 to "establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf." *Id*. §1802(a). Those updated policies and procedures "are intended to result in expedited exploration and development of the Outer

Continental Shelf 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.* To those ends, OCSLA directs the Secretary of the Interior to make the Shelf "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." *Id.*; *see also Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 339 (E.D. La. 2011) (noting "OCSLA's overriding policy of expeditious development").

OCSLA facilitates the expeditious development of the Shelf's oil and gas resources by directing the Secretary to administer a competitive leasing program that consists of four parts and includes multiple robust consultation requirements. *See Sec'y of the Interior v. California*, 464 U.S. 312, 337 (1984) ("Each stage includes specific requirements for consultation with Congress, between federal agencies, or with the States.").

First, the Secretary must formulate a five-year leasing plan. *See* 43 U.S.C. §1344(a) ("The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval."). The five-year plan "achieves important practical and legal significance" because it serves as "the basis for future planning by all affected entities, from federal, state and local governments to the oil industry itself." *State of Cal. ex rel. Brown v. Watt*, 668 F.2d 1290, 1299 (D.C. Cir. 1981). Accordingly, "[c]ompliance with the mandates of [OCSLA] is extremely important to the expeditious but orderly exploitation of OCS resources." *Id.*

Reflecting its importance, the creation of the five-year plan is a massive undertaking consisting of environmental assessments, mandatory consultation requirements, and multiple

comment periods. *See California*, 464 U.S. at 337. Specifically, OCSLA requires multiple State consultations when promulgating the five-year plan. During that time, the Secretary is required to "invite and consider suggestions for such program from ... the Governor of any State which may become an affected State under such proposed program." 43 U.S.C. §1344(c)(1). Then, after a proposed plan is completed, the Secretary "shall submit a copy of such proposed program to the Governor of each affected State for review and comment." *Id.* §1344(c)(2). If a State Governor requests "a modification of such proposed program, the Secretary shall reply in writing granting or denying such request in whole or in part, or granting such request in such modified form as the Secretary considers appropriate, and stating his reasons therefor." *Id.* "The proposed leasing program is then submitted to the President and Congress, together with comments received by the Secretary from the governor of the affected state." *California*, 464 U.S. at 337 (citing 43 U.S.C. §1344(d)).

The second stage of the OCSLA leasing process consists of holding lease sales and includes another round of mandatory State consultation. OCSLA grants "[a]ny Governor of any affected State or the executive of any affected local government" the right to "submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale." 43 U.S.C. §1345(a). The Secretary "shall accept" these recommendations if the Secretary "determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." *Id.* §1345(c).

The third stage of the leasing process "is known as the exploration stage; during this stage, the Secretary reviews the lessee's exploration plan" *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 150 (D.D.C. 2014) (citing 43 U.S.C. § 1340). This stage involves robust environmental review and an environmental "plan must ... be disapproved if it would 'probably

cause serious harm or damage ... to the marine, coastal, or human environment.'" *California*, 464 U.S. at 339 (quoting 43 U.S.C. §§1334(a)(2)(A)(i)).

The fourth stage is "development and production." This stage also includes robust environmental requirements, including that "the Secretary reviews the development and production plan of the lessee for the purposes of actually producing oil and gas from the leaseholds." *Oceana*, 37 F. Supp. 3d at 150. The production "plan may ... be disapproved if it would 'probably cause serious harm or damage ... to the marine, coastal or human environments.'" *California*, 464 U.S. at 340 (quoting 43 U.S.C. §1351(h)(1)(D)(i)). At this stage, the Secretary must also "forward the plan to the governor of any affected state and, on request, to the local governments of affected states, for comment and review." *Id.*

II. THE 2017-2022 OCSLA FIVE YEAR PROGRAM.

Current lease sales in the Outer Continental Shelf are governed by the 2017-2022 Five Year Oil and Gas Leasing Program ("the Current Five-Year Program" or "Five-Year Program"). See BOEM, 2017-2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program 3-1 (Nov. 18, 2016). The process of creating the Current Five-Year Program began in 2014 during the Obama Administration. President Obama's BOEM published a request for information in the Federal Register and sent a letter to Governors, Tribes, and interested federal agencies requesting input on the Program. See 79 Fed. Reg. 34349 (June 16, 2014). BOEM received over 500,000 comments in response to the RFI, allowing it to discharge its obligation under OCSLA to consider economic, social, and environmental values in making its leasing decisions. See 43 U.S.C. §1344(a). In 2015, President Obama's BOEM published the Draft Proposed Program. That published draft incorporated responses to the RFI comments and set out a draft schedule of potential lease sales. And it started a 60-day comment period in which BOEM received over one million comments. 80 Fed. Reg. 4941 (Jan. 29, 2015). After considering those comments, BOEM

next published the Proposed Program, thereby starting a new 90-day comment period. 81 Fed. Reg. 14881 (Mar. 18, 2016). Again, BOEM received over one million comments, held public meetings, and created environmental impact statements in compliance with the National Environmental Policy Act (NEPA). *Id.*

After all that, President Obama's BOEM published the Proposed Final Program in November 2016. In it, the Secretary determined which areas to include in the lease sales. In recognition that "[t]he Gulf of Mexico is known to contain significant oil and gas resources and already has world-class, well-developed infrastructure, including established spill response capability," the "PFP schedules 10 region-wide lease sales in the areas of the Gulf of Mexico that are not under Congressional moratorium or otherwise unavailable for leasing." BOEM, 2017-2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program 3-1 (Nov. 18, 2016). The Proposed Final Program also observed that "[i]n the Gulf of Mexico, infrastructure is mature, industry interest and support from affected states and communities is strong, and there are significant oil and gas resources available." *Id.* Thus, "[t]o take advantage of these incentives to OCS activity, the region-wide sale approach makes the entire leasable Gulf of Mexico OCS area available in each lease sale." *Id.*

On January 17, 2017—60 days after the Final Program was transmitted to President Obama and Congress—the Secretary approved the Final Program, "which schedules 11 potential oil and gas lease sales, one sale in the Cook Inlet (Alaska) Program Area and 10 sales in the GOM Program Areas," with "one sale in 2017, two each in 2018-2021, and one in 2022." Record of Decision and Approval of the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program 3 (Jan. 17, 2017). The Secretary's approval further specifically affirms the Final Program's specification that "[t]he GOM sales would be region-wide and include unleased acreage not subject to moratorium

or otherwise unavailable ... to provide greater flexibility to industry, including more frequent opportunities to bid on rejected, relinquished, or expired OCS lease blocks." *Id.*[1]

III. LEASE SALE 257.

The Final Program approved and scheduled the lease sale at issue here—GOM OCS Oil and Gas Lease Sale 257. Lease Sale 257 covers the Western and Central Planning Areas of the Gulf of Mexico, together with a portion of the Eastern Planning Area not subject to congressional moratorium. *Id.* In accordance with the Five-Year Program, BOEM published a Proposed Notice of Sale for Lease 257 in the Gulf of Mexico in November 2020. See 85 Fed. Reg. 73508 (Nov. 18, 2020). As OCSLA requires, BOEM sent the Proposed Notice to Governors of the affected States and opened it for public comment. *Id.*

The Secretary approved the Notice of Sale in a Record of Decision. *See* 86 Fed. Reg. 6365 (Jan. 21, 2021). In the ROD, the Secretary analyzed five separate alternatives, including a no-action option, and determined that Alternative A—a regionwide lease sale with minor exclusions—would be "in the best interest of the Nation and meets the purposes of the OCS Lands Act." Bernhardt Record of Decision at 5. The Secretary also determined that Lease Sale 257 "promotes domestic energy production, which can reduce the need for oil imports," and promotes other national interests including "continued employment, labor income, [and] tax revenues." *Id.* at 8. Additionally, the Secretary found that "[c]ontinued oil and gas leasing on the OCS may also reduce the risk of spills from the transportation of imported energy resources," and that "revenue sharing with applicable coastal states and political subdivisions ... can help mitigate the risks and costs assumed by the States and communities in the area of the lease sale." *Id.* at 5, 8.

[1] 3 Until the halt of Lease Sale 257, all lease sales in the Five-Year Program occurred on schedule.

In the ROD, the Secretary rejected the no-action alternative because "the needed domestic energy sources and the subsequent positive economic impacts from exploration and production, including employment, would not be realized. Furthermore, revenue would not be collected by the Federal Government nor subsequently disbursed to the States." *Id.* at 10. Additionally, the Secretary found that other sources of energy "may have different but comparable levels of negative environmental impacts, such as the risk of spills from the transportation of alternative oil supplies over long distances." *Id.* That meant the no-action alternative "would not avoid the incremental contribution of the energy substitutes' impacts to those same cumulative effects." *Id.* Finally, the Secretary's approval noted that the Lease Sale 257 stipulations included "all practicable means to avoid or minimize environmental harm from the selected alternative." *Id.* at 11. Lease Sale 257 was formally scheduled for March 17, 2021. *Id.* at 1.[2]

After rescinding the Lease Sale 257 ROD in February, DOI reissued the ROD on August 31, 2021. The new Record of Decision readopts the Bernhardt ROD's selection of Alternative A, which is a Gulf of Mexico regionwide lease sale of all available blocks subject to limited exceptions. See Record of Decision for Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 257 (Aug. 31, 2021).[3] BOEM published a Final Notice of Sale on October 4, 2021. 86 Fed. Reg. 54728 (Oct. 4, 2021).[4] Lease Sale 257 is scheduled to occur on Wednesday, November 17, 2021. *Id.* at 54728.

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[2] In the ROD, the Secretary referred to the Lease Sale 257 Final Notice of Sale several times. The FNOS had been sent to the Office of the Federal Register along with the ROD, but by happenstance was not published before the new Administration was able to pull it back from the Federal Register. *See Louisiana*, 2021 WL 2446010, at *15.

[3] https://www.boem.gov/sites/default/files/documents/oil-gas-energy/GOM-LS-257.pdf.

[4]https://www.boem.gov/sites/default/files/documents/about-boem/regulations-guidance/federal-register/86-FR-54728.pdf

STANDARD OF REVIEW

A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Gulf Restoration Network v. Bernhardt*, 456 F. Supp. 3d 81, 93 (D.D.C. 2020). Claims alleging that an agency action has violated NEPA are governed by the Administrative Procedure Act (APA). *Id.* Because of "the limited role a district court plays in reviewing the administrative record, the typical summary judgment standards set forth in Federal Rule of Civil Procedure 56 are not applicable." *Id.* at 93-94. Instead, the Court employs highly deferential review under the APA and NEPA. *Id.* at 94.

"Under the APA, a reviewing court may set aside agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Oceana*, 37 F. Supp. 3d at 154. This "narrow" standard of review does not allow a court to "'substitute its judgment for that of the agency.'" *Id.* "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.'" *Id.* Courts must ensure the "'agency took a hard look at the environmental consequences of its decision to go forward with the project.'" *Id.* And agencies are accorded "an extreme degree of deference" when "evaluating scientific data within its technical expertise." *Id.*

ARGUMENT

I. PLAINTIFFS' NEPA CLAIMS ARE NOT RIPE.

"[A]n Article III court cannot entertain the claims of a litigant unless they are 'constitutionally and prudentially ripe,'" precluding courts from adjudicating "cases not involving present injury." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999). In cases "involving multi-stage leasing programs[,] arising in the oil and gas context," NEPA

challenges are not ripe until "an agency reaches th[e] critical stage when it 'no longer retain[s] the authority to preclude all surface disturbing activities subsequent to issuing an oil and gas lease." *Fisheries Survival Fund v. Jewell*, 2018 WL 4705795, at *7 (D.D.C. Sept. 30, 2018), *aff'd sub nom.* 858 F. App'x 371 (D.C. Cir. 2021). That makes Plaintiffs' challenge—occurring before the lease sale is even held—demonstrably unripe.

This is a straightforward case. Private parties acquire no right to engage in any surface disturbing activity whatsoever until a lease has been issued. Merely holding a lease sale confers no right to perform any surface disturbing activity. And BOEM retains authority to reject bids and impose conditions upon leases issued. Thus, BOEM has full authority to prevent any surface-disturbing activity—confirming that Plaintiffs' claims are unripe.

Precedent puts the unripeness of Plaintiffs' claims beyond doubt. In *Center for Biological Diversity v. Department of the Interior*, the D.C. Circuit examined the OCSLA framework and held that "[i]n the context of multiple-stage leasing programs, ... 'the point of irreversible and irretrievable commitment of resources and the concomitant obligation to fully comply with NEPA do not mature *until leases are issued*." 563 F.3d 466, 480 (D.C. Cir. 2009). Accordingly, the court rejected a NEPA challenge to a five-year OCSLA program as unripe. *Id.*

The D.C. Circuit and courts in this Circuit have consistently applied this precedent to reject NEPA challenges to OCSLA oil and gas actions as unripe whenever they occur before leases are issued. For example, in *Center for Sustainable Economy v. Jewell*, the D.C. Circuit rejected a challenge to an OCSLA Five Year Plan as unripe because "no lease sale has yet occurred and no irreversible and irretrievable commitment of resources has been made." 779 F.3d 588, 599 (D.C. Cir. 2015). Although the challengers could bring their claims once leases were issued, "[i]n the meantime ... no drilling will have occurred, and consequently, no harm will yet have occurred to

the animals or their environment." *Id.* at 600; *see also WildEarth Guardians v. Jewell*, 738 F.3d 298, 304 (D.C. Cir. 2013) (NEPA claim ripe because "*leases have been issued* to Antelope Coal for the tracts") (emphasis added).

Indeed, the D.C. Circuit recently rejected as unripe a challenge to OCSLA leases that had *already been issued*. *Fisheries Survival Fund v. Haaland*, 858 F. App'x 371, 372 (D.C. Cir. 2021). The court observed that the OCSLA leases reserved BOEM's right to preclude the lessee from engaging in "any activities pending submission of site-specific proposals." *Id.* at 372. It follows *a fortiori* that a challenge *before the sale has even occurred* is even less ripe than the challenge rejected in *Fisheries Survival Fund*—BOEM retains authority both to reject bids and to place conditions in the leases issued.[5] As the district court observed, an OCSLA "lease sale does not represent the final word on anything, nor does it commit any resources, even putting aside the question of whether it does so irretrievably." *Fisheries Survival Fund*, 2018 WL 4705795, at *9.

As a result, this Court lacks jurisdiction to hear Plaintiffs' NEPA challenges. *Ctr. for Biological Diversity*, 563 F.3d at 480 ("Here, Petitioners' NEPA-based claims are not ripe due to the multiple stage nature of the Leasing Program."). Summary judgment should be granted on that ground alone.

II. THE GOVERNMENT COMPLIED WITH NEPA'S REQUIREMENTS.

A. BOEM was not required to consider downstream climate effects at the lease-sale stage.

Plaintiffs' sole attack (at 29-35) on the adequacy of BOEM's environmental analysis is that it "fail[ed] to adequately analyze the greenhouse gas emissions associated with Lease Sale 257." That challenge fails because the extensive environmental review they demand is not necessary at

[5] Even after Lease Sale 257 is held on November 17, 2021, this case will be nowhere close to being ripe. BOEM must still evaluate bids, accept or reject them, and issue leases and lease stipulations.

the lease-sale stage of OCSLA's tiered system of environmental review. Plaintiffs focus incorrectly on the downstream effects of oil-and-gas development. The proper focus of review at the lease-sale stage is "the limited preliminary activities permitted to the lessees during the lease sale phase." *N. Slope Borough v. Andrus*, 642 F.2d 589, 606 (D.C. Cir. 1980).[6]

The D.C. Circuit's holding in *North Slope Borough* is dispositive. There the Court rejected a challenge alleging that an EIS prepared for an OCSLA lease sale violated NEPA because it failed to consider the environmental harms from a potential future oil spill. The Court held that Interior was not required to consider such effects at the lease-sale stage because "[d]rilling for commercial quantities of oil is in all likelihood at least two years away, even under a turn of events most favorable to the government and the oil companies." *Id.* at 605-06. And OCSLA's tiered structure ensured that "[u]ncertainty over remote hazards can be rectified as more information is collected." *Id.* at 606. Considering the effects of future drilling at the lease-sale stage is not "logical and efficient" because "[i]t may eventuate that exploratory drilling is disappointing, or that severe environmental hazards become more clearly perceived." *Id.* "[T]he multistage approach mandated by Congress" in OCSLA, including the "second EIS ... covering the development and production stage of an OCS project," means that a lease sale EIS must focus on "those hazards associated with the limited preliminary activities permitted to the lessees during the lease sale phase" rather than the effects of exploration and drilling. *Id.* Thus, the D.C. Circuit held that the EIS need only

[6] In accordance with *North Slope*, the Ninth Circuit has held that a lease-sale stage EIS passed NEPA muster even though it didn't "consider a worst case scenario of a 100,000–barrel oil spill" because "such an analysis was unnecessary at the lease sale stage." *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1191-92 (9th Cir. 1988). The Ninth Circuit rejected the plaintiffs' NEPA challenge based on the same "general principle" from *North Slope*—"the amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA's stages." *Id.* (citing *Secretary of the Interior v. California*, 464 U.S. 312 (1984); *Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir.1977); *Sierra Club v. Morton*, 510 F.2d 813, 828 (5th Cir.1975)).

"cover[] imminent and prospective environmental difficulties" arising from the lease sale itself and upheld Interior's decision not to consider "remote hazards" at the lease sale stage. *Id.*

North Slope decides this case. The hazard of climate change exclusively relied upon by Plaintiffs is far more remote than the hazard of an oil spill that the court considered there. The emissions Plaintiffs highlight come only after leases are issued; exploration occurs; oil or gas is discovered, extracted, transported, and refined; and—then—emissions follow. The oil spill scenario in *North Slope* would occur at the extraction or transport phase, long before the emission phase. The emissions forming the basis of Plaintiffs' claim are "far[ther] removed from categorical relevance at th[e lease] stage" than the hazards in *North Slope*. *Id.* at 605. Accordingly, "[a]t this stage, with prodigious proposing and reviewing to follow," there is "no doubt that this EIS, useful and reasonably foresighted as it is, is valid under NEPA." *Id.* at 606.

Courts in this Circuit and around the country have applied *North Slope* to reject arguments that NEPA requires Interior to consider the effects of drilling and emissions at the lease sale stage. *See Wilderness Soc. v. Salazar*, 603 F. Supp. 2d 52, 60 (D.D.C. 2009) ("[I]n the context of Outer Continental Shelf Lands Act [] leasing, courts have acknowledged that the limited information available at the leasing stage necessarily limits the scope of the environmental analysis."). The Ninth Circuit, for example, was "the least troubled by what may seem to be incomplete or speculative data at the lease sale stage" because before "exploration, it is difficult to make so much as an educated guess as to the volume of oil likely to be produced or the probable location of oil wells. *Hodel*, 869 F.2d at 1192. And "[w]ithout this information, an oil spill risk analysis can never be more than speculative, regardless of what methodology is used. More accurate information will be available at later stages of the exploration process, and the Secretary can make appropriate alterations in the oil development plan at that time. *Id.* Because Interior "may refine [its] analysis

based on information learned during later stages of exploration," the Ninth Circuit concluded that "[u]nder the standard applicable to the lease sale stage" the "Secretary's environmental impact statement for Lease Sale 92 was adequate to meet the requirements of NEPA." *Id.*

More recently, the Southern District of Alabama applied the same rule to reject a NEPA challenge to the holding of Gulf of Mexico Lease Sale 213 of the 2007-2012 Five Year Plan:

> Congress has enacted an express directive that courts conduct environmental review on a stage-by-stage basis for OCSLA purposes. The particular stage that is relevant to this proceeding is the lease sale stage. Not the exploration stage. Not the production stage. Not any other drilling stage. "If the distinction between a sale of a lease and the issuance of a permit to explore for, produce, or develop oil or gas seems excessively fine, it is a distinction that Congress has codified with great care." *Sec'y of Interior*, 464 U.S. at 335–36, 104 S. Ct. 656.
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> ....
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> Where, as here, "a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available and incorporated in a further EIS, it cannot be said that deferment violates the rule of reason." *Suffolk County v. Secretary of Interior*, 562 F.2d 1368, 1378 (2nd Cir.1977). On that basis, the Court finds that the Federal Defendants and Intervenor Defendants are entitled to judgment as a matter of law on the NEPA claims joined herein.

Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., Regul., Enf't, 871 F. Supp. 2d 1312, 1338-39 (S.D. Ala. 2012).

BOEM was not required to consider the effects of Lease Sale 257 on carbon emissions. Plaintiffs can cite no contrary case. The cases they do cite fall into two categories: those that involved non-OCSLA programs, *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 2021 WL 3667986 (D. Alaska Aug. 18, 2021), and a case involving the drilling stage rather than the lease-sale stage, *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020). Indeed, *Center for Biological Diversity* demonstrates the fatal flaw in

Plaintiffs' claim. That case involved Interior's approval of a specific offshore oil drilling and production facility at the fourth stage of the OCSLA process. *Id.* The Ninth Circuit's holding demonstrates that, at that later stage, Interior will have the opportunity to consider precisely the climate effects forming the basis of Plaintiffs' allegations. But it need only do so at the third or fourth stages of the OCSLA process when "[u]ncertainty over remote hazards can be rectified as more information is collected." *N. Slope Borough*, 642 F.2d at 606.

BOEM was not required to consider downstream greenhouse gas emissions at the lease sale stage and certainly not to the degree of detail Plaintiffs suggest.

B. Even if BOEM were required to consider downstream climate effects, it did so.

Although Interior was not required by NEPA to consider carbon emissions resulting from production and transportation, it did prepare an extensive analysis considering Lease Sale 257's effect on foreign and domestic carbon emissions. To be sure, an OCSLA lease sale does not involve an "irretrievable commitment of resources"; but even if it did, "NEPA does not require an agency to issue ... wholly speculative assessments at the leasing stage." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 66 (D.D.C. 2019). Instead, as discussed, BOEM will "'continue to assess impacts as more information becomes available," and doing so "does not indicate that [it] failed to take a 'hard look' at the environmental consequences of the proposed action here." *Id.* at 67.

Even so, in three comprehensive environmental impact statements and a supplemental Determination of NEPA Adequacy, BOEM extensively addressed Lease Sale 257's domestic and global climate effects. These were not the "sparse discussions of downstream GHG emissions" that this Court rejected as insufficient in *WildEarth Guardians*. *Id.* at 75. Rather, BOEM extensively discussed the effects of GHG emissions in the Programmatic EIS, AR0014379; the Multisale EIS, AR000816; and Lease Sale EIS, AR0015471.

In the face of BOEM's extensive analysis, Plaintiffs (at 31) can identify only one purported flaw—BOEM's "fail[ure] to quantify foreign emissions." But this Court has explicitly rejected an argument that an agency must "identify any past, present, or reasonably foreseeable GHG-emitting projects *worldwide*" and instead specifically held that an agency "would satisfy NEPA's hard look requirement" by quantitatively and qualitatively analyzing "local, regional, and national climate change." *Wildearth Guardians*, 368 F. Supp. 3d at 77. This Court also rejected an attempt to impose the social cost of carbon protocol, which examines global GHG emissions, and a global carbon budget on the agency's NEPA analysis. By quantitatively and qualitatively analyzing domestic GHG emissions and qualitatively analyzing global GHG emissions and "thoroughly explain[ing]" why quantification of global emissions "is not possible or helpful," BOEM has complied with this Court's guidance.[7] Just as in *WildEarth*, Plaintiffs' demand that BOEM quantify global emissions is "of the flyspecking variety" and "does not rise to the level of a NEPA violation." 368 F. Supp. 3d at 78.

BOEM also went above and beyond its NEPA requirements by issuing a Determination of NEPA Adequacy Supplement[8] that addresses *precisely* the concerns Plaintiffs raise. AR0029963. In the Supplement, BOEM extensively discusses the Ninth Circuit's holding in *Center for Biological Diversity* and reaffirms BOEM's conclusion that it is "simply not possible at this time to calculate quantitative estimates [of global GHG impact] with the necessary credibility or

[7] *WildEarth* involved the Mineral Leasing Act, under which the issuance of a lease is an irretrievable authorization to begin drilling activities. That's a far cry from OCSLA, which—as discussed extensively—requires several more stages between lease issuance and drilling. Accordingly, BOEM is not required to provide as detailed an analysis at the leasing stage under OCSLA as BLM is required to at the leasing stage under the MLA.

[8] Contrary to Plaintiffs' assertion, the January 5, 2021, Supplement, which is in the administrative record without objection, is appropriate to consider because it was part of the decisionmaking record before the agency when the Lease Sale 257 ROD was initially issued in January 2021 and when it was reissued in August 2021.

scientific rigor." AR0029965. And contrary to Plaintiffs' repeated assertions, BOEM does specifically recognize that it is "likely that foreign consumption would increase as a result of lower oil prices." *Id.* In compliance with the Council on Environmental Quality's binding NEPA regulations, BOEM also explicitly "identifie[s] that there is incomplete and unavailable information under 40 C.F.R. §1502.22 (2019 ed.) regarding the degree to which different countries would be impacted by a small drop in oil prices resulting from OCS production" and thus relies on a qualitative analysis. Under any fair reading, BOEM went beyond its obligation to conduct "a robust qualitative discussion of local, regional, and national climate change" and easily "satisf[ied] NEPA's hard look requirement." *WildEarth Guardians*, 368 F. Supp. 3d at 77.[9]

III. BOEM WAS NOT REQUIRED TO SUPPLEMENT THE ENVIRONMENTAL IMPACT STATEMENT.

None of the purportedly new information Plaintiffs identify warrants a supplemental environmental impact statement before holding Lease Sale 257. "The Supreme Court has explained that under the rule of reason, 'an 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.

[9] For the reasons discussed in Section II.A, the Ninth Circuit cases Plaintiffs rely upon are inapposite because they examined actions at later stages of the oil and gas leasing and exploration process under different statutes. The Ninth Circuit has been clear that "the amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA's stages." *Tribal Vill. of Akutan*, 869 F.2d at 1192. And when that court, like the D.C. Circuit, has considered the precise statutory scheme and stage of the program at issue here, it has unequivocally held that "any technical deficiencies at the lease sale stage are unlikely to result in environmental damage." *Id.*

3d at 102-03. The unwieldly list identified by Plaintiffs contains neither "new" nor significant information. And BOEM has already considered each of the areas Plaintiffs identified.[10]

A. Climate.

The entirety of Plaintiffs' argument regarding new climate information is a plain attempt to enlist this Court to impose their preferred policy on the Executive. The "new information" identified by Plaintiffs is simply a policy prescription—the IPCC's recommendation that global warming should be limited to 1.5ºC. This policy recommendation is both old information for NEPA purposes and irrelevant; BOEM has no authority whatsoever to enact a 1.5ºC global warming goal. The Paris Climate Agreement, which the current Administration has formally rejoined,[11] sets a 2ºC global warming target. Neither BOEM nor the courts have authority to alter the official position of the Executive Branch. *See Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017) ("[W]here the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.") (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)). And even if BOEM had discretion to depart from the Paris Climate Agreement target, it is not the role of the courts in conducting NEPA review to impose a policy prescription upon an executive agency. *Id.* ("A court's 'role in reviewing an agency's decision not to prepare an EIS is a limited one, designed

[10] Contrary to Plaintiffs' equivocal assertion (at 36) that even they do not seem to believe that BOEM bound itself to issue a Lease Sale 257-specific EIS, BOEM has consistently stated that its analyses "may be applied and supplemented as necessary to inform decisions for each remaining proposed lease sale scheduled in the 2017-2022 Five Year Program." AR0015477; *cf. Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560–61 (9th Cir. 2000) ("[I]f extra-record evidence shows that an agency has rectified a NEPA violation after the onset of legal proceedings, that evidence is relevant to the question of whether relief should be granted."). No party disputes that such tiering in the OCSLA context is permitted.

[11] White House, *Paris Climate Agreement* (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/.

primarily to ensure that no arguably significant consequences have been ignored.'"). NEPA is not a vehicle to require BOEM to adopt a new global warming target in conflict with the White House's announcement.

B. Deepwater Drilling.

This Court has already considered and rejected NEPA challenges indistinguishable from Plaintiffs' about the dangers specific to deepwater drilling. In *Oceana*, this Court upheld a BOEM conclusion that dangers arising from deepwater drilling "are postlease operational issues that cannot be reasonably predicted at the lease stage without site-specific information." *Oceana*, 37 F. Supp. 3d at 166-67. As BOEM explained, "'[i]n the postlease stage, applicants submit site-specific data on conditions, and BOEM technical staff reviews this data to determine whether conditions on approval, based on well data are appropriate.'" *Id.* This Court held that this approach to the hazards of deepwater drilling "is 'consistent with the staged environmental review dictated by the structure of offshore leasing under the OCSLA.'" *Id.* Here, as in *Oceana*, Plaintiffs have presented no evidence of a "trend indicating that increased risk of oil spills in deepwater," *id.*, to undermine BOEM's extensive analysis of the deepwater issue in the three EISs it has prepared, *see, e.g.*, AR0009792 (addressing comment raising issue of "significant spike in ultra-deepwater drilling"); *see generally* AR0009227 (Appendix A to Multisale EIS extensively discussing deepwater drilling). Accordingly, "it is evident that BOEM did take a hard look at the risks of deepwater spills." *Oceana*, 37 F. Supp. 3d at 167.

C. Pipeline Safety.

Plaintiffs also assert that a 2021 GAO report about pipeline safety was also significant new information that required a supplemental EIS. Again, this Court has specifically rejected precisely this assertion. GAO's concerns about the Bureau of Safety and Environmental Enforcement's (BSEE) inspection program are not new. In *Gulf Restoration Network*, this Court considered and

rejected a NEPA challenge alleging BOEM failed to consider a GAO report allegedly concluding that "'BSEE's enforcement and inspection programs [were] anything but rigorous.'" 456 F. Supp. 3d at 99. The Court rejected this argument by first noting that "an agency may properly base its evaluation of environmental impacts on the assumption that other specialized agencies with jurisdiction will enforce permits and related mitigation measures according to the law." *Id.* at 101. The Court went on to hold that "simply 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 the [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.'" *Id.* at 101-02. The alleged shortcomings identified in the 2021 GAO report are the same ones raised in the 2017 report. This was not significant new information that required supplementation. *Id.* at 102 ("BOEM's reliance on the BSEE's safety regulations was not arbitrary and capricious.").

D. Rice's Whale.

BOEM does not need to consider the impacts of drilling on Rice's Whale at this stage because the lease sale itself will not affect wildlife. In any event, Plaintiffs fundamentally misunderstand the standard for supplementation under NEPA. "A supplemental EIS is only required where new information provides a seriously different picture of the environmental landscape." *City of Olmsted Falls, Ohio v. Fed. Aviation Admin.*, 292 F.3d 261, 274 (D.C. Cir. 2002). BOEM has been monitoring the status of Bryde's (now Rice's) whale throughout the 2017-2022 OCSLA leasing program. *See, e.g.*, AR0008235 ("Limiting leasing in such a relatively small area would not limit the exposure of sperm whales and Bryde's whales to chemicals because chemicals may still enter these areas via the Mississippi River."). And BOEM specifically addressed the status of the Rice's whale and the 2021 Biological opinion. It explained that the area

identified as endangering the whale from vessel strikes is not included in the lease sale. Additionally, BOEM described the Protected Species Stipulation and "other specific conditions of approval" to protect the whale. BOEM thus specifically addressed the findings of each biological opinion identified by Plaintiffs and further supplementation is not required.[12] *See City of Olmsted Falls*, 292 F.3d at 274; *see also Stop B2H Coal. v. Bureau of Land Mgmt.*, 2021 WL 3410039, at *9 (D. Or. Aug. 4, 2021); *Powder River Basin Res. Council v. United States Bureau of Land Mgmt.*, 37 F. Supp. 3d 59, 87-88 (D.D.C. 2014); *Pub. Emps. for Env't Resp. v. Beaudreau*, 25 F. Supp. 3d 67, 127-28 (D.D.C. 2014).

E. Fracking & Wind Projects.

Plaintiffs' passing mention of fracking and wind projects is not sufficient to raise the issue. Parties in NEPA challenges "cannot raise ... issues in a passing fashion and expect the Court to invalidate the Department's entire review." *Stand Up for California! v. U.S. Dep't of Interior*, 410 F. Supp. 3d 39, 58 (D.D.C. 2019), *aff'd sub nom.* 994 F.3d 616 (D.C. Cir. 2021). Plaintiffs do not even try to demonstrate how the supposedly new information about fracking made any difference to BOEM's extensive analysis of the issue in each EIS. Indeed, many of these same Plaintiffs raised the same concerns regarding fracking in the comment period, which BOEM considered and rejected. *See, e.g.*, AR00015825-27; AR0009733. A new-information NEPA claim is not a second bite at the apple. *See City of Olmsted Falls*, 292 F.3d at 274 ("As respondents point out, much of what Olmsted Falls dubs 'new' is not."). Finally, Plaintiffs' mention of wind projects is strange since BOEM has already gone ahead with extensive environmental reviews for wind power on the

[12] Although Plaintiffs disagree with BOEM's substantive conclusions regarding Rice's Whale, NEPA provides for only review of BOEM's procedural compliance, and they fail to bring a separate claim under the Endangered Species Act. *Gulf Restoration Network*, 456 F. Supp. 3d at 88 ("[B]ecause NEPA's requirements are 'essentially procedural,' the statute does 'not mandate particular substantive environmental results.'").

OCS. *See, e.g.*, BOEM, *Notice of Intent to Prepare and Environmental Impact Statement for Empire Offshore Wind, LLC's Proposed Wind Energy Facilities Offshore New York*, 86 Fed. Reg. 33351 (June 24, 2021). And BOEM has already responded to comments raising this same issue in its environmental analyses. *See, e.g.*, AR0009737. Accordingly, Plaintiffs' "'laundry list' of other complaints also fails to paint a '*seriously* different picture of the environmental landscape' that would require a supplemental EIS." *Stand Up for California!*, 410 F. Supp. 3d at 58.

IV. IF THE COURT HOLDS THAT BOEM VIOLATED NEPA, REMAND WITHOUT VACATUR IS THE APPROPRIATE REMEDY.

If this Court holds that any portion of BOEM actions violated NEPA, the appropriate remedy is a remand to the agency without vacatur. "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, 518 (D.C. Cir. 2020). Ultimately, "[t]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *WildEarth Guardians*, 368 F. Supp. 3d at 84. "Put otherwise, this Court must determine whether there is 'at least a serious possibility that the [agency] will be able to substantiate its decision on remand,' and whether vacatur will lead to impermissibly disruptive consequences in the interim." *Id.*

Even if the Court holds that BOEM failed to properly analyze the climate effects or any of the other purported shortcomings identified, BOEM almost certainly can remedy any deficiency on remand. *See id.* ("BLM's NEPA violation consists merely of a failure to fully discuss the environmental effects of those lease sales; nothing in the record indicates that on remand the

agency will necessarily fail to justify its decisions to issue EAs and FONSIs.") The serious of any deficiency would therefore be small. *Id.*

Separately, however, remand without vacatur is warranted because the disruptive consequences of vacatur would be overwhelming. Plaintiffs ask this Court to vacate a lease-sale process that is in progress. To vacate the sale would be to disrupt a massive undertaking and unsettle the lessee's ability to bid on leases and prepare for exploration planning. And even if "the disruptive consequences of vacatur might not be great, the probability that [BLM] will be able to justify retaining [its prior leasing decisions] is sufficiently high that vacatur ... is not appropriate." *WildEarth Guardians*, 368 F. Supp. 3d at 84.

CONCLUSION

For the foregoing reasons, this Court should grant Louisiana's cross-motion for summary judgment and deny Plaintiffs' motion for summary judgement.

Respectfully submitted,

Dated: November 10, 2021

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CERTIFICATE OF SERVICE

I filed this motion and its attachments with the Court via ECF, which will notify Plaintiffs' and Defendants' counsel.

Dated: November 10, 2021 */s/ Elizabeth B. Murrill*