UNITED STATES DISTRICT COURT
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. 21-cv-02317-RC

PLAINTIFFS' COMBINED OPPOSITION AND REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Gulf of Mexico is one of the nation's most diverse and productive ecosystems, but decades of industrial oil and gas development and increasing harms from climate change have taken a heavy toll on the region's wildlife and communities. The Bureau of Ocean Energy Management's ("the Bureau") November 17, 2021 offshore Lease Sale 257—the largest such offering in U.S. history—further threatens this national treasure and is incompatible with the urgent need to slow global warming and avert drastic changes to the world's climate system. Despite the stakes, the Bureau approved the sale without conducting a thorough analysis of the environmental impacts. This failure violates the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") in two ways.

First, the Bureau relied on faulty methods to evaluate the indirect climate impacts that would result from the sale, which led to its counterintuitive conclusion that greenhouse gas ("GHG") emissions would *increase* if the Bureau decided *not* to hold the sale. Two courts have separately determined that this exact same methodology is fatally flawed. Despite this, the Bureau did not revisit its modeling or try to fully estimate emissions before deciding to move forward with this massive lease sale. In its opposition, the Bureau continually asserts it did not have the data to fix its analysis. Those excuses ring hollow. Only seven weeks after reaching its decision to hold Lease Sale 257, the Bureau conceded both that its emissions modeling was faulty and that it could use a simple generic emissions factor to fix the error and provide a full picture of GHG emissions. Applying that solution in its Draft Environmental Impact Statement for Lease Sale 258, the Bureau determined that foregoing even a much smaller lease sale in Alaska would result in substantially fewer emissions, not more. The Bureau provides no reasonable explanation for why it failed to similarly correct its modeling and evaluate emissions for Lease Sale 257. The Bureau's reliance on false and irrational assumptions about emissions

meant that it did not take a hard look at the full environmental effects of holding Lease Sale 257 and caused it to arbitrarily underestimate the negative climate effects of the sale.

Second, the Bureau failed to analyze or even consider significant new information about a range of environmental impacts brought to the Bureau's attention before it reached its decision to hold Lease Sale 257. The Bureau's counsel attempts to backfill justifications for the agency's omissions, but these *post-hoc* arguments cannot cure *the Bureau's* failure to analyze and weigh this extensive new information in a supplemental EIS. This Court should vacate the Bureau's decision to hold Lease Sale 257—the ordinary remedy required for APA and NEPA violations. [1]

ARGUMENT

I. The Bureau Failed to Adequately Consider and Analyze the Climate Impacts of Lease Sale 257

To estimate GHG emissions that would result from Lease Sale 257, the Bureau relied on a flawed model that excluded the effects of foreign energy substitutes on the global market. As a result, the agency failed to compare the climate impacts across alternatives. Instead, the Bureau assumed that climate impacts from not holding the lease sale would be similar to (and even slightly higher than) the impacts of holding the lease sale. The Bureau argues that it did not have sufficient information to evaluate how U.S. production would affect foreign consumption and demand as part of its analysis. But two other federal courts have explicitly rejected that very same argument and conclusion as arbitrary and capricious because evidence available at the time demonstrated just the opposite. Indeed, just seven weeks after publishing the Record of Decision ("ROD") for Lease Sale 257, the Bureau itself demonstrated the information is available and the analysis is possible. The Bureau used a generic emissions factor to evaluate changes in foreign

[1] Plaintiffs address Intervenor Louisiana and Proposed Intervenor API's meritless ripeness arguments below.

consumption that would result from a lease sale in Alaska, incorporating the same information it continues to insist is unavailable or somehow insufficient here. In doing so, the Bureau found that, contrary to its earlier assessments, foregoing that lease sale would *prevent* 31.4 million tons of GHG emissions in comparison to holding the sale. In other words, the analysis the Bureau continues to disclaim as impossible is not only feasible but produces results that demonstrate far greater climate impacts from holding a lease sale—directly contradicting both the Bureau's analysis and conclusions for Lease Sale 257.

In light of its recent analysis and the flaws revealed by the existing record, the Court should reject the Bureau's insistence that it lacked the tools or the information to fix its modeling to comply with *Liberty* and *Willow* before deciding to offer 80 million acres of the Gulf in Lease Sale 257. Nothing in the record before the Court, including the Bureau's procedurally flawed Addendum or its *post hoc* arguments in the opposition brief, save its decision. The Bureau's failure to estimate the magnitude of foreign emissions that would result from Lease Sale 257 or provide a reasonable explanation for why it could not do so is unlawful, in violation of NEPA and the APA, and must be set aside.

A. The Bureau Relied on Flawed Modeling that Undermined Its Climate Analysis.

The Bureau violated NEPA by relying on a flawed model that undervalued the GHG emissions that would result from the lease sale. To examine GHG emissions from offshore leases, the Bureau applied a market simulation model ("MarketSim") to predict the GHG emissions from energy sources that would substitute for oil and gas not produced from leasing. AR0014208, AR0014351. However, in applying MarketSim, the Bureau "[e]xclud[ed] the foreign oil and gas markets" and resulting foreign emissions from its estimate of total global emissions. AR0014220.

Instead of estimating changes in foreign consumption, the Bureau assumed that foreign consumption would remain static, that other oil producing countries will supply oil for U.S. production, and "[t]he production of oil and gas from other global sources [would be] more carbon-intense relative to oil and gas produced on the OCS." AR0014190, AR0014220. Based on these assumptions, the Bureau reached the counterintuitive conclusion that U.S. GHG emissions "would be slightly higher" if the Bureau were to have no lease sales. AR0014233, AR0014381 ("Overall, the [GHGs] from the activities associated with the Proposed Action would be similar to but slightly lower than the No Action Alternative in both low- and high-price scenarios … due to the economic substitution effects from onshore and overseas sources expected under the No Action Alternative."). The Bureau incorporated by reference the MarketSim modeling into its Multisale EIS and Lease Sale EIS, which led it to again conclude "the greenhouse gases from the activities associated with the proposed action [the lease sale] would be … lower" "due to the economic substitution effects from onshore and overseas sources." AR0008545, AR0015651.

Two courts previously rejected the exact same modeling assumptions the Bureau relied on here. *Ctr. for Biological Diversity v. Bernhardt* ("*Liberty*"), 982 F.3d 723, 738 (9th Cir. 2020); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.* ("*Willow*"), Nos. 3:20-cv-00290, 3:20-cv-00308-SLG, 2021 WL 3667986, at *10–12, *10 n.107, *11 n.125. Specifically, the Ninth Circuit and the District of Alaska rejected two separate EIS evaluations that the Bureau and the Bureau of Land Management ("BLM") completed because the agencies relied on the same flawed model and "failed to include emissions estimates resulting from foreign oil consumption in its analysis of the no-action alternative." *Liberty*, 982 F. 3d at 736; *Willow*, 2021 WL 3667986, at *12 (same). Rather than assessing foreign consumption, the agencies limited their analysis to U.S. emissions and predicted that the absence of oil and gas from the project

would actually increase downstream GHG emissions. *Liberty*, 982 F.3d at 739. Further, the agencies did not "thoroughly explain why such an estimate [of foreign emissions] is impossible," "cite any materials in support of [its] statements nor describe the research it relied upon to reach these conclusions," nor address studies in the record that countered the agency's "contention that it could not have summarized or estimated foreign emissions with accurate or credible scientific evidence." *Willow*, 2021 WL 3667986, at *12 (quoting *Liberty*, 982 F.3d at 738–39).[2]

Accordingly, the two courts directed the agencies to either (1) give a complete quantitative estimate of the downstream GHG emissions that will result from consuming oil abroad, or (2) if quantification is not feasible, thoroughly explain why it could not do so and provide a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis. *Willow,* 2021 WL 3667986, at *14; *Liberty*, 982 F.3d at 740 (quoting *Sierra Club v. FERC* ("*Sierra Club II*"), 867 F.3d 1357, 1374 (D.C. Cir. 2017). The D.C. Circuit reached the same conclusion under similar circumstances. *Sierra Club II*, 867 F.3d at 1374 (finding the agency's justification for its omission—that "emission estimates would be largely influenced by assumptions rather than direct parameters about the project"—unsatisfactory).

The Bureau claims excluding foreign oil and gas markets was reasonable because it "did not have adequate information to determine which countries would consume less oil," Fed. Defs.' Mot. Summ. J. Mem. ("Fed. Br.") 14, ECF No. 45 (citing AR0014220), and attempts to

[2] Intervenors' assertions that these cases are distinguishable because they concerned different stages of the leasing process is irrelevant. [Proposed] Intervenor-Def. American Petroleum Institute's Mem. Supp. ("API Br.") 31–32, ECF No. 43-1; Intervenor-Def. Louisiana Mem. Supp. ("La. Br.") 13–14, ECF No. 42-1. The substantive analytical flaws in the modeling have nothing to do with the context in which they were applied. Moreover, the fact that the flaws arose in the context of an EIS for a Drilling and Production Plan in *Liberty* has no bearing on justiciability of the claim here as the Bureau does not prepare an EIS at the DPP stage in the Gulf of Mexico. *See infra* Section III.A.1.

minimize its failure to properly analyze emissions by inflating the other aspects of its analysis, *see id*. at 11–14. None of these justifications hold water. First, the Bureau's insistence that there was a lack of sufficient information is not supported in the record. The Bureau points to one page in its emissions report (the Wolvovsky and Anderson report) to support its claim. *Id*. at 14 (citing AR0014220). That page of the report explains that "[e]xcluding the foreign oil and gas markets is reasonable" because "[o]il consumption in each country is different, and [the Bureau] does not have information related to which countries would consume less oil." AR0014220. However, as the Ninth Circuit noted, that exact same report page "does not cite any materials in support of those statements nor describe the research it relied upon to reach these conclusions." *Liberty*, 982 F.3d at 738. Moreover, on that same page, the Bureau acknowledged that not leasing will cause foreign oil consumption to decline and estimated that not leasing results in a reduction in foreign oil consumption of approximately 1, 4, and 6 billion barrels of oil," depending on market price; AR0014220, but as the Ninth Circuit noted, the resulting impacts in emissions "are not captured" in its analysis, *Liberty*, 982 F.3d at 737. As the Ninth Circuit determined, available information in the record shows that changes in U.S. oil and gas production translate into shifts in global prices, global consumption, and associated GHG pollution. *Id*. at 738–39. *See generally* AR0026911–58; *see also* AR0026967–69 (concluding that increased U.S. oil production would result in substantial increases in global oil consumption). But, as in *Liberty*, the Bureau ignored this information.

The Bureau points to other pages in the report to support its notion that oil and gas substitutes have higher emissions. Fed. Br. 21 (citing AR0014207–09). While those pages support the idea that substitutes would generally result in slightly higher emissions, they offer no information about changes in energy substitutes that might occur as a result of changes in foreign

consumption. Nor do they provide support for the idea that the Bureau did not have information to evaluate energy markets in different countries.

Second, the Bureau's and Louisiana's attempt to minimize this error fails. Fed. Br. 17; La. Br. 15. As the Ninth Circuit held, "[e]missions resulting from the foreign consumption of oil are surely a 'reasonably foreseeable' indirect effect" that is "just as foreseeable as the emissions resulting from the consumption of oil." *Liberty*, 982 F.3d at 738. And NEPA requires "estimation or explanation" of those effects. *Id*. The Bureau "should have either given a quantitative estimate of the downstream gas emissions that will result from consuming oil abroad," or "provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis." *Id*. at 739 (quoting *Sierra Club II*, 867 F.3d at 1374). By ignoring reasonably foreseeable impacts, the Bureau's alternatives analysis did not meet the hard look requirement of NEPA and was arbitrary and capricious.

The Bureau's attempt to distinguish *Sierra Club II* falls short. Fed. Br. 20–21. The Bureau argues that it did disclose its assumptions and quantified domestic emissions even if it could not quantify the foreign emissions. That misses the point. *Id*. at 20–21. In *Sierra Club II*, the D.C. Circuit emphasized that quantification was important in order to compare total emissions across projects, and it was difficult to see how the agency could engage in informed decisionmaking or allow the public to submit informed comments without that comparison. 867 F.3d at 1374. Here, by excluding foreign consumption variables, and failing to quantify them, the agency concluded emissions across alternatives would be the same and undermined any way for the public or decisionmakers to meaningfully compare alternatives. As a result, it was precisely because the Bureau failed to quantify the change in foreign consumption that it did not engage in

informed decisionmaking.[3]

Contrary to the Bureau's and Intervenors' contentions, the Bureau is not entitled to deference for its flawed analysis as it does not have expertise in economic analysis of foreign GHG emissions. Deference applies only when the agency is making predictions "within its area of special expertise." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). In *Liberty*, the agency sought deference for its choice of methodology, and its determination that it lacked the necessary reliable data. However, the *Liberty* court declined to defer to the Bureau because "the scope of its expertise does not include the economic analysis of greenhouse gas emissions." *Liberty*, 982 F.3d at 740. Similarly, here, the Bureau's scope of expertise "is the management of 'conventional (e.g., oil and gas) and renewable energy-related' functions, including 'activities involving resource evaluation, planning, and leasing,'" not in economic analysis. *Id*. at 740 (citation omitted). The court should not defer to its methodology. *See Willow,* 2021 WL 3667986, at *11 n.125.

The Bureau's reliance on false and irrational assumptions about emissions meant that it did not take a hard look at the full environmental effects of holding Lease Sale 257 and caused it to arbitrarily underestimate the negative climate effects of the sale. This significant error undermines NEPA's fundamental purpose to inform the public and decisionmakers about the consequences of all the alternatives to Lease Sale 257 and to foster informed choices among those alternatives. *See Liberty*, 982 F.3d at 740 (finding that if analysis shows significant

[3] The Bureau's attempt to analogize this case to *dicta* in *WildEarth Guardians v. Jewell,* 738 F.3d 298, 309 (D.C. Cir. 2013) fares no better as the validity of the agency's emissions analysis was not an issue. Fed. Br. 24. The Court evaluated only (1) whether BLM had to go the extra step and figure out what ***the impacts*** would be from the emissions; and (2) whether BLM had to add in emissions from 11 other pending projects. *Jewell*, 738 F.3d at 320-21. The Court explained, but did not evaluate, the modeling approach and associated assumptions and uncertainties that BLM disclosed.

impacts, agency "may well approve another alternative included in the EIS or deny the lease altogether.") [4]

B. The Bureau's Argument that the Analysis was Impossible is Incorrect.

The Bureau did not provide a reasonable explanation for why it could not account for changes in foreign consumption in its EIS, as described above. The Bureau peppers its brief with statements that it "did not have" the information needed and "could not conduct" the required analysis. Fed. Br. 14. *See also id.* at 2, 10, 16, 17, 19, 26. The Bureau's "did not and could not" argument contradicts the record before the agency and is fatally wounded by the fact that merely seven weeks after signing the Lease Sale 257 ROD, the Bureau used a generic factor to estimate foreign consumption and emissions that enabled it to accomplish what it paints as impossible in its brief. After performing that analysis, it found a dramatic ***decrease*** in GHG emissions from foregoing a lease sale—the opposite of what it concluded here. While the Bureau's actions for Lease Sale 258 underscore that the analysis could certainly be done, the agency also had before it sufficient information in the record as far back as 2017 to complete this analysis, which was

[4] API's various suggestions that the Outer Continental Shelf Lands Act ("OCSLA") requires a lease sale and therefore forecloses consideration of alternatives based on climate impacts or other effects turns both OCSLA and NEPA on their heads. *See* API Br. at 26–30, 36. OCSLA requires a thorough evaluation of decisions at every stage of the leasing process, most especially at the lease sale stage when the decisionmaker retains a maximum range of options, to ensure the sale is in the national interest and avoids environmental harms. 43 U.S.C. § 1344(a); *see also* 43 U.S.C. § 1332(3) (OCSLA policy that "expeditious and orderly development" of resources is "subject to environmental safeguards"); *id.* at § 1344(a)(3). This requires the Bureau "to take into account the full environmental effects of its actions when deciding whether and in what manner to pursue the lease sale." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 504 (9th Cir. 2014) As this district has recognized, OCSLA simply "does not mandate" that every planned lease sale will happen. *Gulf Restoration Network v. Bernhardt*, 456 F.Supp.3d 81, 97 (D.D.C. 2020). *See also Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 295–296 (D.C. Cir. 1988) (rejecting argument that Interior need not consider certain conservation alternatives in an EIS for a leasing program because of OCSLA's call for continued development, concluding that it "proves too much, because it would relieve the Secretary of [her] duty under NEPA to consider alternatives altogether." (*citing* 43 U.S.C. § 1866(a)).

confirmed in the *Liberty* and *Willow* decisions. The Bureau unsuccessfully attempts to remedy the EIS's shortcomings by reiterating "reasons why quantitative analysis of the reductions in foreign emissions was not feasible" in a separate, "Determination of NEPA Adequacy," which the Bureau refers to as "DNA" or "addendum." Fed. Br. 15–16; AR0029964–67. However, the agency's attempt to correct its flaws in an addendum, and not in an EIS, is procedurally flawed. Additionally, the *Liberty* and *Willow* courts already rejected the same justifications the Bureau offers again here. And given that the Bureau recently acknowledged that it actually ***does*** have the tools and information to evaluate changes in foreign consumption, those recycled justifications are even less convincing.

1. The Bureau was capable of estimating foreign emissions for Lease Sale 257.

The agency had both the tools and information it needed to calculate GHG emissions from foreign consumption when it decided to hold Lease Sale 257. On October 22, 2021, seven weeks after the Bureau issued the Record of Decision for Lease Sale 257, it published a Draft Environmental Impact Statement ("DEIS") for Lease Sale 258 in Cook Inlet, Alaska. *See* Fed. Br. 17 n.6 (citing DEIS for Lease Sale 258 ("LS 258 DEIS"), excerpts attached to Emile Decl. Ex. A). Contrary to its assertion in the ROD and Addendum that the analysis is not possible, the Bureau conducted a quantitative analysis of impacts on foreign oil consumption and the resulting GHG emissions "to comply with the two recent court decisions [*Liberty* and *Willow*]" LS 258 DEIS 46; *see also* Fed. Br. 17 n.6. Specifically, the Bureau used a "foreign oil consumption estimate made by MarketSim and a generic GHG emissions factor published by the EIA" to make a "reasonable estimate for GHG emissions from foreign oil consumption." LS 258 DEIS 46. When the Bureau used this generic emission factor it showed that "[f]oreign oil consumption estimated under the No Action Alternative emits 31.4 million metric tons … less GHG emissions

compared to foreign consumption estimated under the Proposed Action." *Id*. at 47. This is in stark contrast to the Bureau's previous conclusions: when excluding foreign consumption from its analysis it concluded that U.S. GHG emissions "would be slightly higher" if the Bureau decided *not* to any hold lease sales, AR0014233, and that the overall emissions from Lease Sale 257 sale in particular "would be similar to but slightly lower than the No Action Alternative in both low- and high-price scenarios … due to the economic substitution effects from onshore and overseas sources expected under the No Action Alternative." AR0014381. *See also* AR0014221 (original analysis erroneously concluding that GHG emissions from holding a Cook Inlet lease sale were lower than not holding the sale across all price scenarios).

Moreover, the Lease Sale 258 DEIS explicitly confirms that "[n]o new data or capabilities have been made available to BOEM since the Liberty decision," LS 258 DEIS 42–43, but it was nevertheless possible to complete this analysis with "a single generic emissions factor." LS 258 DEIS 43. In other words, contrary to the repeated assertions in its brief, the Bureau did not have—and did not need—any new information. In light of this, the Bureau's claim that "[t]his new analysis was not reasonably available during the timeline for the Lease Sale 257 decision," *see* Fed. Br. 17 n.6, strains credulity. The Bureau tellingly does not—and cannot— rationally explain that it lacked this information and capability seven weeks earlier to analyze foreign GHG emissions as a result of Lease Sale 257.

Even without the analysis in the Lease Sale 258 DEIS, the Bureau had adequate information to quantify the Lease Sale's effects on foreign oil consumption before deciding to hold the sale but failed to perform that analysis. *See* Pls.' Mem. Supp. ("Pls. Br.") 11, ECF No. 34-1 (pointing to available information that the Bureau failed to utilize). In fact, the agency had before it sufficient information in the record as far back as 2017 to complete this analysis, as the *Liberty* and *Willow* decisions both confirmed. That evidence demonstrates the agency could have

at least estimated the effect on foreign consumption more generally. *See Liberty*, 982 F.3d at 738 ("Various studies provided by CBD in the administrative record confirm the effect of increasing domestic oil supply on foreign consumption and the feasibility of its estimation."). Studies in the record completed by Peter Erickson and others at the Stockholm Institute demonstrated that estimations of foreign energy consumption have been possible for years. AR0026913, AR0026935–38, AR0026967–69.

The Bureau's counsel provides several *post hoc* critiques of the "Stockholm study" in its brief that appear nowhere in the record or even the agency's Addendum. Fed. Br. 22–24. This Court cannot accept these *post hoc* explanations where the Bureau itself never explained why it refused to use the methodology outlined in the Stockholm study to calculate foreign consumption. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citations omitted). NEPA's "EIS requirement inhibits *post hoc* rationalizations of inadequate environmental decisionmaking." *Friends of the River v. F.E.R.C.*, 720 F.2d 93, 106 (D.C. Cir. 1983). Counsel's *post hoc* rationalizations merely underscore the agency's failure to take a "hard look" at the problem before making a decision on the Lease Sale.

In fact, contrary to counsel's critiques, in the Lease Sale 258 DEIS, the Bureau concluded that it "agrees with the primary contention of both [Erickson] papers" and used Erickson's model described in the Stockholm Study to estimate foreign emissions in the Lease Sale 258 DEIS. LS 258 DEIS 47–48 ("The lower global oil consumption associated with the No Action Alternative has been quantitatively analyzed for other oil infrastructure projects, such as the Keystone XL pipeline (Erickson and Lazarus, 2014) and BOEM's 2017–2022 National OCS Oil and Gas Leasing Program (Erickson, 2016)"); AR0026911–58 (full 2016 Stockholm Institute study). Moreover, none of these various critiques of assumptions and uncertainty, even if valid, change

the fact that the Bureau had the tools to estimate the effect of leasing on foreign consumption. As the Ninth Circuit concluded in rejecting similar complaints about the Stockholm study's purported "simplistic assumptions," it was "unclear from the record why these assumptions are any more simplistic than those the [MarketSim] model incorporates." *Liberty*, 982 F.3d at 739. So too here.

WildEarth Guardians v. Zinke further supports Plaintiff's argument. Like in this case, the agency "did in fact have information allowing it to forecast GHG emissions" and could explain uncertainties. *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 70 (D.D.C. 2019). The Court determined that the qualitative discussion of emissions "was not reasonable given the data available to [the agency]." *Id*. at 70–71; *id.* at 68 (determining that agency's assertion that "quantifying GHG emissions … would be overly speculative" was "belied by an administrative record replete with information on oil and gas development and GHG emissions"). As the Bureau concedes, "agencies must use the information available to them to forecast reasonably foreseeable downstream emissions or explain why such an analysis is not feasible." Fed. Br. 12 (citing *Zinke*, 368 F.Supp.3d at 67–75) "[F]oreign oil consumption is critical to [the Bureau's] alternatives analysis." *Liberty*, 982 F.3d at 736. Here the "record belies BOEM's contention that it could not have summarized or estimated foreign emissions with accurate or credible scientific evidence." *Liberty,* 982 F.3d at 738. *See, e.g.*, AR0026967–69. The Bureau should have used its ability to estimate foreign emissions, as it did for Lease Sale 258, rather than zeroing out a key variable. The Bureau's reliance on *Center for Sustainable Economy v. Jewell*, to claim that "replacing offshore oil with other sources of energy 'carries its own environmental risks and harms'" is misplaced. Fed. Br. 21 (citing *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015)). The question is not whether there are risks or other costs associated with energy substitutes—foreign emissions would admittedly not zero out if the Bureau did not hold

the Lease Sale. The question is whether the Bureau properly quantified those risks. It did not. It simply ignored changes in consumption that would occur and assumed equal substitution which was not accurate given the evidence it had.

The Bureau's reliance on *Sierra Club v. U.S. Dep't of Energy* ("*Sierra Club I*") is also misplaced. Fed. Br. 19–20. Nothing in that case conflicts with or distinguishes this situation from *Liberty* and *Willow*. In *Sierra Club I*, the D.C. Circuit upheld an agency analysis of downstream GHG emissions related to its approval of a liquefied natural gas ("LNG") export terminal. The agency evaluated all emissions "associated with electricity generated using U.S. LNG in Europe or Asia, and compare[d] these with emissions from electricity generated from coal or other sources of gas." *Sierra Club I*, 867 F.3d 189, 195–196 (D.C. Cir. 2017). Here, of course, the Bureau declined to conduct an analysis of foreign emissions ***at all***. In rejecting Sierra Club's argument that the agency should have gone further to examine whether LNG would displace renewables in foreign countries, the court emphasized that the information needed to do this analysis was simply not available and the resulting analysis would be far too speculative to be useful. *Id*. at 202. That is manifestly not true here, where the Bureau had the necessary information to do the analysis in 2017 when it first issued the EIS. *See supra* at 11–12. And, as it demonstrated last month in its analysis of Lease Sale 258, the Bureau was fully capable of completing this analysis even without the "detailed" missing information it complains of throughout its brief.[5] *See supra* at 9–10.

[5] Indeed, in distinguishing *Sierra Club I* in a later decision, the D.C. Circuit emphasized that "some educated assumptions are inevitable in the NEPA process," which can be "checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt." *Sierra Club II,* 867 F.3d at 1374. Contrary to what it did in Lease Sale 258, the Bureau did not even attempt to do this in its EIS for Lease Sale 257 and instead drew an incorrect conclusion that emissions would *decrease* with the Lease Sale.

2. The Bureau's Addendum is procedurally and substantively flawed.

The Bureau's post-EIS discussion of this important issue in its Addendum is procedurally improper and cannot cure deficiencies in the EISs. NEPA documents serve a vital informational role—to give "the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process and, perhaps more significantly, provide[] a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (internal quotation marks and citation omitted). The requirement that the analysis appear within the EIS ensures "NEPA's goal of allowing the public the opportunity to 'play a role in … the decisionmaking process'" is given effect. *Id.*; *Sierra Club II,* 867 F.3d at 1374 (agency's assumptions "can be checked" by disclosing the estimates so that readers could make informed decisions regarding the project and its consequences). The discussion and emissions analysis must appear within the EIS, not in an Addendum that the public never saw.

The Bureau attempts to distinguish *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1103 (9th Cir. 2016) by casting the Addendum in that case as including additional NEPA "analysis" rather than an "explanation." Fed. Br. 27. This is pure semantics. The Addendum states that it "provides the following qualitative ***analysis*** of the Proposed Action's impacts on foreign GHG emissions to provide more information to both decisionmakers and the public." AR0029966 (emphasis added). Of course, that analysis was not made available to the public before the decision, which illustrates the problem: whether the Bureau provided "analysis" or "explanation" in its Addendum—the public did not have an opportunity to review or comment on it. Unlike *Friends of Animals v. U.S. BLM*, 232 F.Supp.3d 53, 63 (D.D.C. 2017), where the Bureau had presented a draft DNA to the public for comment before finalizing the DNA, "a post-EIS analysis—conducted without any input from the public—cannot cure deficiencies in an EIS." *Great Basin Res. Watch*, 844 F.3d at 1103 (citation omitted).

Even if it were procedurally proper, the Bureau's reliance on the Addendum fails because it merely repeats the same justifications the *Liberty* and *Willow* courts rejected. First, the Bureau asserts in its Addendum that the planned Lease Sale would only have a marginal effect on emissions globally, so would not meaningfully change the Bureau's analysis. Fed. Br. 17. Yet the *Willow* court rejected the contention that because emissions from the action would have "a negligible impact on overall global GHGs" the effect of excluding any change to foreign emissions is insignificant. *Willow*, 2021 WL 3667986, at *11. Further, the Bureau cannot ignore an error on the basis that it is insignificant within the context of global emissions. What is important is how the error changes the estimated emissions that will result from the particular action. The Bureau's analysis of emissions for Lease Sale 258 is evidence that this factor has a significant consequence—it can change an erroneous conclusion that holding a lease sale is somehow more beneficial for the climate than not holding that sale.

Second, the Bureau repeats the same insufficient justification in its Addendum that was explicitly rejected in *Liberty* and *Willow*; "[e]xcluding the foreign oil and gas markets is reasonable" because "[o]il consumption in each country is different", and the Bureau does not have "reliable information on foreign emissions factors and consumption patterns." AR0029965–66; *compare with Liberty*, 982 F.3d at 738; *Willow*, 2021 WL 3667986, at *11 ("BLM similarly contended it lacked sufficiently reliable data on foreign emissions factors and consumption patterns."). The Bureau claims that to calculate how an action would affect foreign emissions, it must determine the effect on consumption in each foreign economy, and it is not possible to do that quantitatively. *See* AR0029965. However, the Bureau does not provide any evidence to support its assertions that a detailed analysis of each foreign country's energy consumption is actually necessary, nor that the information was unavailable. And as explained above, neither of these contentions is supported by the record.

The Bureau attempts to distinguish the insufficient justifications in *Liberty* and *Willow* because in those cases, the explanation was provided in response to public comment, in contrast to including it in the Addendum. Fed. Br. 26. However, the location of the explanation is irrelevant to the explanation's sufficiency. The *Willow and Liberty* courts did not take issue with *where* the explanation was provided, but with the sufficiency of the explanation. *See Liberty*, 982 F.3d at 738–739 (rejecting agency's justifications for excluding foreign oil and gas markets); *Willow*, 2021 WL 3667986, at *11 (finding that BLM offered the same basic reasons "rejected in *Liberty*: a negligible impact and a purported lack of information on foreign energy consumption and emissions patterns"). Repeating those same flawed explanations in a different place "still does not 'thoroughly explain why such an estimate [of foreign emissions] is impossible'" nor "cite any materials in support of [its] statements nor describe the research it relied upon to reach these conclusions." *Willow*, 2021 WL 3667986, at *12 (citing *Liberty*, 982 F.3d at 738–39).

Finally, the Bureau claims a "qualitative analysis" of emissions in its Addendum was sufficient to make a reasoned decision among alternatives. Fed. Br. 17–18; AR0029964, AR0029966–67. However, the standard laid out in *Liberty* and *Willow* is not met with "qualitative" explanation. The Bureau acknowledges this in the Cook Inlet DEIS. LS 258 DEIS 42 ("the court's decision directed the corresponding agency to include a quantitative assessment of GHG emissions resulting from shifts in foreign consumption attributable to the Proposed Action or to explain why such quantitative assessment could not be done"). The bigger problem here, however, is not what type of analysis the Bureau could conduct; rather, the problem is that the Bureau chose to estimate emissions quantitatively, left out a key variable, and failed to provide any rational explanation for why it could do so.

The Bureau simply failed to "thoroughly explain why such an estimate [of foreign emissions] is impossible" and its "exclusion of foreign emissions in its alternatives analysis in

the [] EIS is also arbitrary and capricious." *Willow*, 2021 WL 3667986, at *12. Its insufficient "qualitative analysis" in the Addendum does not change that. Any agency must either give a quantitative estimate of the downstream GHG emissions that will result from consuming oil abroad or thoroughly explain why it could not have done so. *Sierra Club II*, 867 F.3d at 1374. The Bureau had the information and ability to estimate foreign emissions but simply chose not to do so for Lease Sale 257. As in *Liberty* and *Willow*, that error is fatal to its decision.

* * *

The Bureau's failure to quantify the impact on foreign GHG emissions led it to undervalue the GHG emissions that would result from the biggest oil and gas lease sale in U.S. history. This omission of foreign emissions from its analysis led the Bureau to arbitrarily conclude that producing up to 1.12 billion barrels of oil and 4.4 trillion cubic feet of natural gas will not contribute to climate change, and in fact will reduce GHG emissions. This fundamental error has huge implications for the environment given the urgent need to limit emissions in the face of a rapidly warming climate, as well as for the Gulf region which has already felt the impacts of rising temperatures. Given the extreme threat climate change poses to human health and our ability to inhabit this planet, an incorrect assumption about the Lease Sale's impacts on climate change is of the utmost significance to its evaluation and choice among alternatives. Pls. Br. 14–17. Before deciding to hold Lease Sale 257, the Bureau was required to quantitatively estimate the magnitude of foreign emissions that would result or provide a thorough explanation for why it could not. It did neither. The Court should hold that the Bureau's decision to proceed with the sale violates NEPA and the APA and set it aside.

II. The Bureau Violated NEPA by Failing to Supplement Its Lease Sale EISs Before Deciding To Hold Lease Sale 257

NEPA and its implementing regulations impose a continuing duty on agencies to prepare

a supplemental EIS whenever significant new information relevant to the environmental impact of the proposed action comes to light. 40 C.F.R. § 1502.9(c)(1)(ii); 43 C.F.R. § 46.120(c). While the Bureau is not required to supplement its analysis by addressing every new study, when potentially significant new information comes to light, "the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance" as to warrant supplementation. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000) (citation omitted); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 385 (1989) ("[T]he Corps had a duty to take a hard look at the proffered [new] evidence."). "[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information." *Marsh,* 490 U.S. at 378.

Significant new information about the heightened risks of oil and gas leasing on the climate, water quality, wildlife, and human health has come to light since the Bureau last issued an EIS four years ago. This new information paints a significantly different picture of the environmental landscape and consequences of oil and gas leasing. The Bureau failed to account for, or even acknowledge, this new information before taking action, despite the agency's previous commitment to make individual lease sale decisions "after completion of the appropriate supplemental NEPA documents." AR0008125, AR0008202 (outlining its intent "to issue a Supplemental EIS once a calendar year"), AR0008203 fig. 1-6. Now, after laying out a plan and telling the public it would supplement the EIS, the Bureau takes the position that was never the plan at all.[6] Fed. Br. 29.

[6] When an agency commits to a measure in an EIS, it may create a duty to implement that measure. *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1245 (D.C. Cir. 2018) (citing 40

The Bureau cannot point to evidence in the record showing that it considered all of the new information presented by Plaintiffs or otherwise available to the agency. For the few studies it did consider, the Bureau does not provide a rational justification for finding that supplementation was not warranted. The agency's failure to examine and analyze the significant new information about the environmental effects of a lease sale on the environment before deciding to hold Lease Sale 257 violates NEPA. The Court can and should set aside the Lease Sale 257 decision on this basis alone.

A. The Bureau Failed to Supplement Its EISs with New Science About the Climate Impacts of Leasing.

New information about the causes, effects, and urgent actions necessary to address the climate crisis paints a "seriously different picture of the environmental landscape" than was considered in the EIS. *Nat'l Comm. for the New River v. F.E.R.C.*, 373 F.3d 1323, 1330 (D.C. Cir. 2004); *see* Pls. Br. 16–18 (discussing new information on climate change, including studies that demonstrate a need to halt additional oil and gas leasing to avoid the worst effects of climate change, and disproportionate effects on low-income communities and communities of color in the Gulf). The Bureau had a duty to "consider [this information], evaluate it, and make a reasoned determination whether it is of such significance" as to warrant supplementation. *Friends of the Clearwater*, 222 F.3d at 558. The Bureau, however, ignored the bulk of this information. It acknowledged only two studies—the IPCC Report and the Merrill study—but dismissed those with conclusory and irrational statements regarding their significance. *See* AR0030016–17 (the Report "doesn't change the conclusions" presented in the EISs),

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C.F.R. § 1505.3). While the Bureau argues this is "*dicta*," the agency's "affirmative commitments" must have some meaning. *See Friends of Animals*, 232 F.Supp.3d at 63 (implying the agency created an affirmative duty to uphold its commitments). The Bureau's violation of its commitment undercuts its claims that it was reasonable to proceed with the Lease Sale based on an outdated EIS.

AR0029794 ("the [IPCC] report does not present sufficient cause to supplement the EIS, at this time").

Plaintiffs cite fifteen studies providing significant new information about the effects of climate change and the contribution of federal oil and gas leasing to the problem. *See* Pls. Br. 14–17; *see also* Hardy Decl. ¶¶ 8–13, 16–21, ECF No. 34-9; *see also* Monsell Decl. ¶ 3–5, ECF No. 34-32. The Bureau asserts it "adequately reviewed these resources and other available scientific literature." Fed. Br. 31. However, apart from the Merrill study and the IPCC report, the Bureau does not point to evidence in the record showing it examined or considered whether any of these new studies warranted supplementation. For example, Plaintiffs cite a 2019 United Nations study highlighting the importance of immediately halting all new fossil fuel infrastructure projects to preserve a livable planet and detailing the United States' role as a primary contributor to fossil fuel emissions. Pls. Br. 15. Yet, the Bureau cannot point to evidence in the record that shows it considered this evidence, much less made a significance determination regarding this study. *See* AR0029849, AR0029851–52 (listing references). Indeed, in its brief the Bureau claims it "reviewed the relevant literature and, after considering it, found that it did not significantly affect its analysis" Fed. Br. 32 (citing AR0029859). But the study it cites for that proposition is an irrelevant water quality assessment, which has nothing to do with "recent scientific research on climate change." *Id.*

Blanket assertions and "conclusory statements" are not a substitute for reasoned decision-making. *Getty v. Fed. Sav. & Loan Ins. Corp*., 805 F.2d 1050, 1055, 1057 (D.C. Cir. 1986). The Bureau must do more than "parrot[] the language of a statute," it must "provid[e] an account of how it reached its results" in order to survive review under the APA. *Dickson v. Sec'y of Def.,* 68 F.3d 1396, 1405 (D.C. Cir. 1995). To the extent the Bureau seeks deference for its decision, it is not warranted here because the Bureau has not made determinations to which the Court could

defer. *See Sprint Nextel Corp. v. F.C.C.*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (review under the APA "require[s] more than a result; we need the agency's reasoning for that result").

The cases the Bureau invokes to excuse its failure to consider this information are inapt. In *Friends of Animals*, "the Bureau considered new information related to health standards, endangered species, and other potentially affected animals, and found nothing substantially changed the analysis of the proposed action." 232 F.Supp.3d at 61. In that case, the Bureau cited new studies in a post-EIS evaluation, evidencing that it had at least considered the new information. That is not the case here, where the Bureau fails even to cite or address this information anywhere in its Addendum or elsewhere. *Friends of the Clearwater*, 222 F.3d at 558–59 (finding NEPA violation where there was "no evidence in the record that ... the Forest Service ever considered whether [pieces of new information] were sufficiently significant to require preparation of an SEIS").

The Bureau attempts to shift the burden onto Plaintiffs to show that the new information "will affect the quality of the human environment in a significant manner." Fed. Br. 32 (quoting *Stand Up for California! v. U.S. Dep't of the Interior,* 994 F.3d 616, 628 (D.C. Cir. 2021)). The Bureau takes this quote out of context. *Stand Up for California!* does not conclude that it is plaintiffs' duty to show that new information is significant. "[T]he decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance," *Stand Up for California!*, 994 F.3d at 628 (quoting *Marsh*, 490 U.S. at 374), implying that, like the decision to prepare an EIS, it is the agency's duty to determine whether the information is significant. Plaintiffs need only demonstrate that the new information may reflect a significant impact, not that it will. *See Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997) ("a party challenging the agency's decision not to prepare an EIS must show only that there is a substantial possibility that the action may have a significant impact on the environment, not that

it clearly will have such an impact."). It is the agency's duty to take a hard look at that evidence and make a determination about its significance. The Bureau did not do that here.

Additionally, *Stand Up for California!* is distinguishable because that case was not about new information necessitating a supplemental EIS. Plaintiffs in that case argued that the agency should have prepared a supplemental EIS when it switched its preferred location for a casino between the draft and final EIS. 994 F.3d at 627. The Court rejected that claim because the chosen site was included and fully evaluated among the alternatives in its draft EIS. *Id*. The fact that the agency merely shifted its preference during the process did not require a supplemental EIS where both locations had been fully examined and there was no new information affecting the impacts of the project. The situation here is much different. Plaintiffs point to numerous new studies that discuss new information on climate change and the negative effects of oil and gas leasing that were not examined in the EIS or Addendum.

As to the two studies the Bureau acknowledges, its explanation for dismissing them in its ROD—repeated in its brief—is completely irrational. Fed. Br. 32 (citing AR0029764) ("[t]he [2021 IPCC] report as well as additional analysis of climate change *may be* a significant consideration in the Department's decisions regarding oil and gas leasing programs *in the future*"). As explained in Plaintiffs' opening brief, NEPA's purpose is to ensure that decisionmakers and the public can evaluate information *before* the agency acts. Pls. Br. 38. If a factor relating to climate change may be significant in the future, it may be equally significant now when deciding to offer a lease sale that will produce billions of tons of GHG emissions and further exacerbate climate change. "It is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale on the environment, including … the effects of the sale on climate change." *Vill. of Point Hope*, 740 F.3d at 504. *See also id.* ("[a] later project or site-specific environmental analysis is an inadequate substitute" for analyzing

systemic or cumulative effects at the lease sale stage). Pushing off consideration of a study's significance to an unspecified later date is not evidence that the agency "evaluate[d] it, and ma[de] a reasoned determination whether it is of such significance" to warrant supplementation. *Friends of the Clearwater*, 222 F.3d at 558. Just the opposite.

The Bureau's failure to consider this information at all or to determine whether its significance merits supplementing its EISs, much less take a "hard look" at the effects of its action in light of this information, violates NEPA's most basic requirements. *See* 40 C.F.R. § 1502.9(d); *Robertson*, 490 U.S. at 349–50; *Friends of the Clearwater*, 222 F.3d at 558–59.

B. The Bureau Violated its Duty to Supplement Its EISs with New Information Contradicting Its Previous Conclusions About Risks from Drilling and Development and Harm to Gulf Wildlife.

In addition to the substantial new information about climate that has emerged since the Bureau last updated its EIS in 2017, new information about drilling, pipeline safety, and endangered species also significantly affects the Bureau's evaluation of environmental harm. The Bureau did not even consider the significance of most of this new information before reaching its decision to hold Lease Sale 257. Instead, the agency's counsel offers *post hoc* explanations in an attempt to minimize the importance of the evidence. The Court "may not accept [] counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n, Inc.*, 463 U.S. at 50 (citation omitted). Moreover, counsel's attempt to minimize the significance of the information fails. The evidence shows that operations are taking place in deeper waters than the Bureau assumed, creating higher risks of spills and other accidents. New evidence also shows that the critically-endangered Gulf of Mexico Bryde's whale occupies more habitat near lease blocks and is in greater trouble from a range of activities than the agency believed in 2017. Finally, new evidence demonstrates that the Bureau's analysis of pipeline risks underestimated the risk of spills. NEPA

obligated the Bureau to supplement its EIS and evaluate all of this significant new information before deciding to offer Lease Sale 257.

1. New Information Demonstrates that Production on Leases Sold in Lease Sale 257 Will be Riskier than the Bureau Previously Presumed.

New information about the risks from drilling contradicts the Bureau's previous conclusions about the environmental impacts of Lease Sale 257. When confronted with this important new information, "it was incumbent on the [agency] to evaluate the existing EIS to determine whether it required supplementation." *Friends of the Clearwater,* 222 F.3d at 558 (citing *Marsh*, 490 U.S. at 374). The Bureau did not examine this new information at all before reaching its decision to proceed with Lease Sale 257, fatally undermining its decision to proceed with Lease Sale 257.

In evaluating production scenarios that would result from a lease sale in its EIS, the Bureau concluded that "most exploration drilling activity," structure installation, and development drilling activity "is expected to occur on the continental shelf," in waters less than 650 feet deep. AR0015585–90, AR0015592 ("Relatively more exploration and development drilling and structure installation would occur on the shelf (in depths <200 m [660 ft.]) than in deep water, regardless of the production case scenario."); *see also* Pls. Br. 17, 39. In contrast to these predictions, new information from the Bureau of Safety and Environmental Enforcement ("BSEE"), demonstrates that in 2020, the agency approved ***thirteen times*** the number of drilling permits in deeper water (greater than 500 ft. deep) than in shallower water (less than 500 ft. deep). *See* Pls. Br. 18 (35 total (new and revised new well) shallow water approvals compared to 464 such approvals in deep water water). The agency's website reveals a similar differential in 2021, with 47 total (new well and revised new well) approvals in shallow water compared to 376 total such approvals in deep water—an eight-fold difference. *Status of Gulf of Mexico Well*

Permits, BSEE, https://www.bsee.gov/stats-facts/offshore-information/status-of-gulf-of-mexico-well-permits (last visited Nov. 23, 2021). A 2019 study on production in the Gulf of Mexico likewise shows that in 2017, 52 percent of U.S. oil production was from ultra-deep wells (≥ 1500 m water depth). Monsell Decl. Ex. 26 at 1, 5, 9, ECF No. 34-36.

While nothing in the record demonstrates that the agency grappled with this unanticipated shift to significantly riskier deep water drilling, it now offers the *post hoc* notation that the "projected numbers of … wells" in its 2017 EIS are comparable to the total number of wells on Interior's website. Fed. Br. 33. This misses the point entirely. The new evidence is not important with respect to the ***number*** of wells, but rather the ***location*** of those wells. As Plaintiffs explained, the location of the wells matters. Drilling in deep water carries much greater risks—arising from exposure to extreme conditions, making it more likely that accidents like the BP spill will happen, and makes response and clean up far more difficult. Pls. Br. 18–19, 39. By concluding that most drilling that will result from a lease sale will take place in shallow water, the Bureau significantly underestimated the risk of accidents and spills and the effects of those accidents.

The Bureau and Intervenors cite *Michigan Gambling Opposition v. Kempthorne* for the proposition that the Bureau can avoid its obligation to supplement if it can minimize the impacts later at the development stage. Fed. Br. 33–34; *see also* API Br. 39 (suggesting the Bureau can implement and evaluate mitigation in the future); La. Br. 18 (suggesting that the Bureau should evaluate the effects of deepwater drilling at later stage). *Michigan Gambling* does not support the Bureau's argument. That case was about whether ***existing*** mitigation was sufficient to support a Finding of No Significant Impact; it does not speak to whether NEPA analysis is required if ***future*** mitigation is ***possible***. Moreover, neither OCSLA nor agency regulations require the Bureau to prepare an EIS or even do NEPA analysis before approving development plans. *See*

infra Section III.A.1. In fact, the Bureau has claimed a "categorical exclusion" from NEPA with respect to its development plan approvals in the Gulf of Mexico. *See infra* at 39–40. So, the promise that the Bureau "will conduct an additional NEPA analysis" to correct this flaw later rings hollow. Fed. Br. 33. Moreover, the time to properly analyze "which parcels to offer for lease," and "the overall risk of oil spills" as a result of a Gulf-wide lease sale is *before* the agency decides the size and location of the sale; not sometime later and on a site-specific piecemeal basis. *Point Hope*, 740 F.3d at 504.

2. New Information about Pipeline Safety and Spill Risks Undermines the Bureau's Analysis of Impacts.

Similarly, the Bureau failed to consider or even disclose new U.S. Government Accountability Office ("GAO") information that undermines its previous assumptions about the safety of pipeline operations in the Gulf and the risks of pipeline spills, let alone analyze its effects on the agency's previous assumptions. In the Multisale EIS, the Bureau noted specifically that improved safety, as well as increased regulatory checks and inspections make the risk of a catastrophic oil spill less likely. AR0008604. However, the recently released GAO report directly undermines those assumptions. *See* Pls. Br. 22–23, 39–40. New information about the risk of oil spills is undoubtedly significant as it "show[s] that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374.

In its 2017 EIS, the Bureau concluded that a Gulf-wide lease sale would result in up to 1,330 miles of new pipelines and recognized that pipeline leaks and failures present a risk of spills. Pls. Br. 21 (citing AR0015593, AR0015583, AR0008308, AR0015601); *see also* AR008271 (accidental events, including pipeline failures can cause impacts); AR0008845 ("Pipelines pose the greatest risk of a large spill occurring in coastal waters."). At the same time,

the Bureau relied on monitoring and enforcement by its sister agency, BSEE, to reduce the risk of pipeline spills. Pls. Br. 21–22; AR0008604; AR0009234 ("The BSEE is responsible for regulatory oversight of the design, installation, modification, repair, and decommissioning of OCS producer-operated oil and gas pipelines."); *see also* AR0009010 (asserting oil and gas development is "carried out under comprehensive, state-of-the-art, enforced regulatory procedures designed to ensure public and work place safety and environmental protection"). And the Bureau estimated that only about one spill will occur from a pipeline leak over the next 50 years as a result of a lease sale. AR0015605.

A report that the GAO released earlier this year determined that BSEE's regulations are sorely outdated and it "does not have a robust oversight process for ensuring the integrity of approximately 8,600 miles of active offshore oil and gas pipelines located on the seafloor of the Gulf of Mexico." Hardy Decl. Ex. 12 at Summary (PDF p. 2), 24–25, ECF No. 34-21; *see also* Pls. Br. 22–23. Although BSEE published a proposed rule to update its pipeline regulations in 2007, BSEE has failed to develop and implement improved regulations over the intervening 13 years. Hardy Decl. Ex. 12 at 25. The GAO reported two main problems with BSEE's management: (1) it does not conduct regular inspections of active pipelines and cannot ensure the integrity of its active pipelines, *id*. at 5–12, and (2) it does not have a process to address the risks of decommissioned pipelines left on the seafloor because it typically allows companies to leave decommissioned pipelines in place and does not monitor the condition of those pipelines, *id*. at 12–24. The GAO recommended that BSEE develop, finalize, and implement updated pipeline regulations. *Id*. at 26.

Although the Bureau did not review or disclose the GAO report before deciding to hold Lease Sale 257, the Bureau offers a *post hoc* assessment that the GAO recommendations have no bearing because the recommendations are addressed to its sister agency, BSEE. Fed. Br. 34. This

is wrong for several reasons. First, it ignores the Bureau's extensive reliance on BSEE's regulatory oversight and cooperation in managing operations in the EIS. *E.g.* AR0015543–44; AR0009222–23. Indeed, the Bureau specifically relied on BSEE's monitoring and enforcement of pipeline regulations to reduce the risk of a pipeline accident. Where an agency is relying on another agency's actions to evaluate the effects of its proposed action, it must ensure its assumptions are accurate at the time of that reliance. *See Nat. Res. Def. Council v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000). Moreover, in its EIS, the Bureau reviewed an earlier GAO report which provided recommendations to improve BSEE regulations. The Bureau discussed the implications of the GAO's recommendations and BSEE's regulatory response. *E.g.,* AR0015654–55. The Bureau cannot explain why those earlier GAO regulatory recommendations are significant but the more recent ones are not. Finally, the GAO report includes both recommendations ***and*** new information. Even if the recommendations did not directly implicate the Bureau's responsibilities, the extensive information and reporting on BSEE's failures to detect and address pipeline leaks and spills in the GAO report should have informed the Bureau's analysis of the impacts of adding thousands of miles of pipelines in the Gulf as a result of Lease Sale 257.

Counsel also invokes references in the EIS where the Bureau generally acknowledged the risks from pipelines and spills. Fed. Br. 34.[7] This misses the point. While the Bureau recognized the reality that pipelines can fail and pipeline leaks can cause spills, the problem is that the Bureau underestimated the magnitude of the risk of those spills occurring. The GAO report demonstrates that the risk from pipeline spills is much greater, given that BSEE is unable to

[7] Counsel also notes that the Bureau "determined that there was no new information that would … affect the analysis" for potential oil spills generally. Fed. Br. 34–35. The cited page, however, does not say anything about the risk of a pipeline spill or the effectiveness of pipeline regulations or pipeline safety. AR0029835.

detect and report leaks on active pipelines and does not even monitor decommissioned pipelines. The Bureau needed to evaluate that information, disclose it as part of a supplemental EIS, and incorporate it into its risk analysis before deciding to proceed with a lease sale that will increase the miles of new pipeline, and hence the risks of spills from those pipelines, in the Gulf.[8]

3. New Information about the Vulnerability and Range of the Gulf of Mexico Bryde's Whales Significantly Affects the Bureau's Consideration of Impacts from Lease Sale 257.

The Bureau likewise failed to consider significant new information about the effects of leasing on Gulf wildlife. When it published the EIS in 2017, the Bureau brushed aside the effects of the Lease Sale on the Gulf of Mexico Bryde's whales. It stated that "there was insufficient data" to determine the population status of the Gulf of Mexico Bryde's whale. Pls. Br. 19 (citing AR0008794). The Bureau did not evaluate even the impact of vessel strikes on the whale because it concluded the whale's primary habitat, the Eastern Planning Area, is closed to new leasing. *Id*. (citing AR0008800). The Bureau ultimately concluded that incremental effects from a lease sale on the whale would be negligible and it did not revisit these conclusions before deciding to hold Lease Sale 257. *Id*. (citing AR0008808, AR0008825, AR0008826, AR0015750, AR0015567–68, AR0015751). Contrary to the Bureau's conclusions, more recent studies demonstrate that the Gulf of Mexico Bryde's whale is highly imperiled. Protective measures are needed beyond its primary habitat area, especially because the whales spend the majority of their time at night near the surface, making them highly susceptible to vessel strikes. Hardy Decl. Ex. 20, ECF No. 34-29; Monsell Decl. Ex. 28, ECF No. 34-38. New information from another

[8] Intervenors reference another case considering an earlier 2017 GAO report and suggests that "[t]he alleged shortcomings [here] are the same ones raised in the 2017 report." La. Br. 19; API Br. 38 n.33 ("this court has already considered and rejected this exact argument"). That is not true. The 2017 Report was about other serious enforcement shortcomings at BSEE, not specifically addressing pipeline enforcement.

federal agency, the National Marine Fisheries Service ("Fisheries Service"), in the last four years also provides evidence about the heightened vulnerability of the whale. Since 2017, the Fisheries Service listed the whale as endangered and determined that a range of effects from oil and gas activities likely jeopardize its continued existence. Pls. Br. 41. The Biological Opinion that the Fisheries Service prepared to evaluate impacts confirms the whale's biologically important habitat is larger than previously understood and that the whales travel to areas where leasing occurs. Pls. Br. 19–20, 40–41. And it finds that the population in extremely vulnerable: "Given this precarious status, any effects that are expected to reduce the fitness of individuals or result in mortality are of great concern." AR0037444. The Bureau failed to consider this significant new information about the effects of oil and gas development from the Fisheries Service before deciding to go forward with Lease Sale 257.

In its opposition brief, the Bureau attempts to paint its decision as addressing this information. Those efforts fall flat. First, the Bureau and API point to the Bureau's August DNA Addendum, which incorrectly implies that the Service's jeopardy determination rested solely on the potential for harm from vessel strikes and that a reasonable and prudent alternative would prevent all harm. Fed. Br. 35–36 (citing AR0029936); API Br. 40 (same, citing AR0029936–37). To the contrary, the Fisheries Service's jeopardy determination was based on the aggregated effects of multiple stressors from oil and gas development, including risks from oil spills and harmful noise from seismic airguns. AR0037441–45 (Fisheries Service's findings that the species is threatened by oil exploration, development, and production, oil spills and oil spill response, noise pollution, and vessel strikes, all of which can cause mortality, chronic stress, hearing loss, behavioral disruption, and significant interference with communication). As required by its regulations, the Fisheries Service proposed a reasonable and prudent alternative ("RPA") in its Biological Opinion that the Fisheries Service believed would reduce harm to the

degree necessary to avoid jeopardizing the continued existence of the species—i.e., cause extinction or preclude recovery. *See* 50 C.F.R. § 402.14(g) (outlining steps in preparing biological opinion); 50 C.F.R. § 402.02 (defining "jeopardize" as reducing the likelihood of survival and recovery); *id*. (defining reasonable and prudent alternative as a measure that the Fisheries Service "believes would avoid the likelihood of jeopardizing the continued existence"). The RPA is limited to curbing vessel speed within a small area of the whale's range with the hope that it will reduce the number of whales injured or killed by ship strikes. AR0037488–0037491. Thus, even if perfectly implemented, the proposed RPA is intended only to reduce harm from ***one*** of these multiple threats from oil and gas development to a degree that the Service concluded would reduce risk just enough to avoid pushing the species to extinction. Nothing about implementing this limited RPA absolves the Bureau from examining the rest of the significant new information about the myriad other harms detailed in the Biological Opinion.

Second, in its Addendum, the Bureau concluded that the Lease Sale would have no effect because there are no lease parcels in the area where the Bryde's whale is known to inhabit. Fed. Br. 36 (citing AR0029936). Yet new information demonstrates the Gulf of Mexico Bryde's whales are distributed widely throughout the Gulf, not just in their primary habitat area. In 2019, when listing the whale as endangered, the Fisheries Service determined that the species' biologically important area ("BIA") is larger than previously understood and concluded that "[i]f oil and gas development and production were to move closer to the BIA or expand within the BIA or if seismic survey activity levels near or within the BIA were to increase, extremely detrimental effects on the remaining individuals within the population could result." Pls. Br. 19–20 (citing 84 Fed. Reg. 15,446, 15,472 & 15,458 (Apr. 15, 2019); AR0037056 (Bryde's whales are found outside their expected area, "such as in the central and western Gulf, one of which was observed off the coast of Texas during … 2018."). *See also* https://restoreactscienceprogram.

noaa.gov/projects/rices-whales (website for Fisheries Service research project showing extent of study area based "previously documented … sightings" extending west to Texas/Mexico border) (last visited Nov. 23, 2021). Moreover, the effects of oil and gas development extend beyond leased areas. For example, as the BP *Deepwater Horizon* catastrophe demonstrated, the effects of oil spills are felt far beyond the point of origin and can harm whales wherever they are found—even in their "core" habitat. *See* AR0050166, & Fig. 2.3-2 (map and description of 15,300 square-mile detectable oil slick form BP spill); AR0037060 (Fisheries Service findings that BP "spill and response heavily impacted the Gulf of Mexico Bryde's whale population" even though "the … platform was not located within" the whale's core habitat).

Finally, the Bureau suggests that its intent to comply with this RPA in the Biological Opinion obviated the need for any additional analysis of the effects on the Gulf of Mexico Bryde's whale. Fed. Br. 36. *But see* Pls. Br. 41–42.[9] This argument is fatally flawed. Even if the narrow RPA is effective at eliminating jeopardy, compliance with a no-jeopardy RPA does not equate to a finding that there will be "no harm" from vessel strikes or any of the other stressors affecting the whale and hence cannot supplant the Bureau's duty to evaluate significant new information about the effects of its actions on this species. *See* AR0037445 (summarizing multiple stressors). Courts have repeatedly rejected attempts to equate a "no jeopardy" conclusion under the Endangered Species Act with a finding that an action will have "no significant impact" under NEPA because "there can be a significant impact on a species even if its existence is not jeopardized." *Makua v. Rumsfeld*, 163 F.Supp.2d 1202, 1218 (D. Haw. 2001).

[9] Contrary to the incorrect statement in the ROD that the April 2021 Incidental Take Statement "remove[d] the jeopardy determination" for the Gulf of Mexico Bryde's whale, AR0029799, the Bureau now admits that the Incidental Take Statement merely repeated, rather than removed, the Service's earlier determination that oil and gas operations will jeopardize the Gulf of Mexico's Bryde's whale. Fed. Br. 36.

A "no jeopardy" conclusion means only that the effects of an activity are not so severe as to "jeopardize the continued existence of endangered species." *Id.* NEPA, "by contrast," requires "review of the potential for significant impact, ***including impact short of extinction."*** *Id.* (emphasis added); *see also N.W. Env't Def. Ctr. v. Nat'l Marine Fisheries Serv.,* 647 F.Supp.2d 1221, 1248 (D. Or. 2009) (upholding NEPA analysis because it independently examined whether action had significant impacts on species and did not "merely repeat the BiOp's no jeopardy finding"); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1275–76 (10th Cir. 2004) ("no jeopardy" conclusion does not necessarily mean impacts are insignificant); *Sierra Club v. Norton*, 207 F.Supp.2d 1310, 1322 (S.D. Ala. 2002) (similar). As these courts have recognized, significant effects can occur long before there is an existential threat to the species' very survival. The Court should reject the agency's belated insistence that the RPA absolves it of the duty to evaluate the significant new information about this critically endangered whale's status, distribution, and vulnerability to oil and gas activities.

4. Other New Information Bears on the Impacts of Lease Sale 257.

The agency also failed to supplement its EISs with new information about the extent and harm of fracking discharges. *See* Pls. Br. 23, 42. In its brief, counsel offers a *post hoc* determination that the new information regarding fracking is not significant, but the pages cited in support do not mention or even reference the recent reports on fracking cited by Plaintiffs. The Addendum only indicates that the Bureau reviewed older emails and reports from 2015, 2016, and 2017. AR0029831–32, AR0029836–38. The fact that one of the reports cited by Plaintiffs was issued by Center for Biological Diversity ("CBD") is irrelevant to whether the study necessitated a supplemental EIS. Fed. Br. 37–38. Contrary to this argument, CBD's report does not merely contain policy recommendations, but also shows the high amount of fracking that takes place in the Gulf. Hardy Decl. Ex. 22 at 1–2, ECF No. 34-31. The Bureau tellingly has

nothing to say about a joint industry report that identifies harm from fracking. Pls. Br. 23 (citing Monsell Decl. Ex. 29, ECF No. 34-39 (report that the oil industry submitted to EPA in 2021)). Significant new information on the extent and harms of fracking exists, but the Bureau failed to consider whether any of it—in addition to or independently from the other information discussed above—would require supplementation.

Finally, while the Bureau's August Addendum demonstrates that the Bureau was aware of its own steps to prepare a wind lease sale in the Gulf, its conclusion that the new information did not warrant supplementation was unreasoned. To the contrary, the Bureau's Programmatic EIS demonstrates that oil and gas development creates space/use conflicts for wind energy projects. Pls. Br. 42 (citing A0014358). The Bureau's unsupported conclusion that new wind energy projects did not require supplementation was arbitrary. *Motor Vehicle Mfrs. Ass'n, Inc*, 463 U.S. at 30–31 (agency must draw a rational connection between its conclusions and the record evidence).

* * *

The Bureau's failure to consider the new information about the environmental effects of its Lease Sale could lead the Bureau to consider different alternatives or even reach a different decision. *See* 40 C.F.R. § 1502.14 (identifying and analyzing alternatives is "the heart of" the NEPA process). Requiring the agency to comply with NEPA and to fully consider the effects of offering 80 million acres of the Gulf of Mexico for drilling will allow the Bureau and the public to transparently consider new approaches, including those that would not undermine the nation's effort to fight the climate crisis, preserve wildlife, and protect Gulf communities from the dual threats posed by pollution and climate change.

III. Plaintiffs' NEPA Claims Are Ripe for Review

Although the Bureau tellingly does not contest the ripeness of Plaintiffs' claims,

Intervenors spend the bulk of their briefs arguing both that Plaintiffs' challenge is unripe and that NEPA compliance should be evaluated at some later stage of the leasing process, namely at the exploration and development stages. *See, e.g*, La. Br. 1–4, 8–14, 18; API Br. 3–9, 16–18, 22–31, 38–39. Under Article III, courts must entertain claims that are constitutionally ripe. *Wyo. Outdoor Council v. U.S. Forest Serv.,* 165 F.3d 43, 48 (D.C. Cir. 1999); *see also Lexmark Int'l, Inc. v. Static Control Components*, 572 U.S. 118, (2014) ("'[A] federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" (citation omitted)). Plaintiffs' procedural injuries under NEPA were complete upon the Bureau's issuance of its Record of Decision ("ROD") to hold Lease Sale 257, AR0029788–800, establishing that "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 0029804. Constitutional ripeness is coextensive with the injury-in-fact requirement of standing. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Plaintiffs have demonstrated that they meet the injury-in-fact requirement. Pls. Br. 29 n.13. No party has argued otherwise. Plaintiffs' claims that the Bureau failed to analyze the impacts of offering 80 million acres for oil and gas leasing—on climate change, wildlife, and the Gulf ecosystem—are therefore constitutionally ripe.[10]

[10] To the extent that Intervenors may attempt to assert that prudential ripeness applies here, "the continuing vitality of the prudential ripeness doctrine" has been called into question by the Supreme Court. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). Even if prudential ripeness applies, none of those considerations counsel against judicial review. Plaintiffs' claims present purely legal issues about a procedural violation that will not benefit from further agency refinement or factual development. *Eagle–Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985); *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1084 (9th Cir. 2015). Because the Bureau's NEPA analysis of Lease Sale 257 is complete, judicial review of the adequacy of the EIS would not "interfere with further administrative action" or cause hardship to any parties. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). To the contrary, because of the Bureau's tiered approach to NEPA compliance, any subsequent decisions regarding specific leases under the 2017-2022 Leasing Program will be tiered to the Lease Sale

In fact, this Court and others have heard multiple previous challenges to lease sales. *Gulf Restoration Network*, 456 F.Supp.3d 81 (addressing merits of NEPA challenge to BOEM's decision to hold a lease sale); *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F.Supp.3d 147 (D.D.C. 2014) (same); *Point Hope*, 740 F.3d at 504 (addressing merits of NEPA challenge to offshore lease sale and holding that is "only at the lease sale stage that the agency can adequately consider" impacts like the "overall risk of oil spills and the effects of the sale on climate change" and "the effects of oil production in deciding which parcels to offer for lease."). This lease sale is no different. Indeed, Intervenors fail to cite a single case in which a court held a challenge to an oil and gas lease sale under OCSLA was not ripe. To the contrary, the D.C. Circuit has repeatedly indicated that challenges to NEPA analysis for oil and gas lease sales under OCSLA are ripe at the lease sale stage. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009); *Ctr. for Sustainable Econ.*, 779 F.3d at 594. Intervenors' arguments are based on mischaracterizations of the case law and contradict NEPA, OCSLA, and the Bureau's regulatory structure for leasing in the Gulf of Mexico.

A. The Bureau's NEPA Obligations are Mature at the Lease Sale Stage.

In the context of the staged process for oil and gas leasing under the OCSLA, this Circuit has focused its ripeness analysis on the question of when the Bureau's NEPA obligations mature. "[A]n agency's NEPA obligations mature only once it reaches a 'critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment.'" *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d at 480 (quoting *Wyo. Outdoor Council*, 165 F.3d at 49).

Though not affecting the outcome here, it bears noting that the question of when the

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EIS, replicating this error for any remaining lease sales or activities. *See* Fed. Br. 10. A decision this Court now would serve to avoid further reliance on an EIS that violates the law.

Bureau is obligated to comply with NEPA is not a question of ripeness, but instead goes to the merits of the agency's obligations under the statute. Indeed, the two cases that the Circuit in *Wyoming Outdoor Council* relies on did not address ripeness at all but instead involved the merits of the plaintiffs' NEPA claims. *See Mobil Oil Corp. v. FTC*, 562 F.2d 170 (2d Cir. 1977) (holding that an adjudicatory proceeding conducted by the Federal Trade Commission does not require completion of an EIS under NEPA); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (holding that the Department of Interior's decision to issue oil and gas leases on federal lands without completing an EIS violated NEPA). Drawing on these two NEPA cases, the standard that the Circuit in *Wyoming Outdoor Council* adopted in its analysis of when the Bureau's NEPA obligations mature—"irreversible and irretrievable commitments of resources"—is taken directly from NEPA itself. *Compare* 42 U.S.C. § 4332(2)(C)(v) *with Mobil Oil Corp.*, 562 F.2d at 173 and *Peterson*, 717 F.2d at 1414. In other words, whether or not Lease Sale 257 represents an irreversible and irretrievable commitment of resources goes to merits issues about whether NEPA is triggered and the adequacy of the agency's review, not whether a case is ripe for review in the first place. Neither the Bureau nor Intervenors argue that the Lease Sale did not trigger the need for an EIS. Nor could they. The Lease Sale is unarguably a "major federal action." 42 U.S.C. § 4332(2)(C). Moreover, OCSLA suggests that NEPA compliance is required at the lease sale stage. 43 U.S.C. § 1346(a)(1)–(2). *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984) ("At the lease sale stage, OCSLA implies [environmental] review must meet NEPA standards.").

Nonetheless, the decision to hold Lease Sale 257 easily clears the bar Intervenors construct from *Wyoming Outdoor Council* and several other cases. The D.C. Circuit explained that the Bureau's action is an irretrievable commitment of resources unless the Bureau "reserves both the authority to preclude ***all*** activities pending submission of site-specific proposals and the

authority to prevent proposed activities if the environmental consequences are unacceptable." *Fisheries Survival Fund v. Haaland*, 858 Fed. App'x 371, 372 (D.C. Cir. 2021) (emphasis added) (quoting *Peterson*, 717 F.2d at 1415). The Bureau's decision to hold the Lease Sale does neither of these things: it does not preclude ***all*** activities (some may begin immediately) and it does not reserve the Bureau's unfettered authority to later prevent additional activities. To the contrary, the Bureau has more limited discretion to disapprove exploration or development plans or to cancel a lease. As a matter of law and practice, the lease sale stage is the last time the Bureau will prepare an EIS that fully considers whether, where, or how to offer leases based on a range of aggregate effects such as GHG emissions and effects on wildlife from selling multiple leases.

1. The lease sale stage is the last time the Bureau will prepare an EIS.

Contrary to Intervenors' suggestions, the Bureau will not conduct a similar NEPA review sometime in the future, as the agency does not prepare an EIS at the exploration or development stages in the Gulf of Mexico. In fact, OCSLA only requires the Bureau to treat the approval of development plans as a major federal action that would trigger NEPA ***outside the Gulf region***. 43 U.S.C. § 1351(e)(1) ("At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, ***other than the Gulf of Mexico***, to be a major Federal action."). The Bureau's regulations also exclude the Gulf region from NEPA compliance at the later development stage. 30 C.F.R. § 550.269 ("At least once in each OCS planning area (***other than the Western and Central [Gulf of Mexico] Planning Areas***), the Director will declare that the approval of a proposed [Development and Production Plan] is a major Federal action, and [the Bureau] will prepare an EIS."). In fact, the Bureau has categorically excluded exploration and development and production plan approvals in the Gulf from NEPA review. *See* Interior NEPA Manual, Pt. 516,

Ch. 15.4(C)(10)[11] (categorically excluding "[a]pproval of an offshore lease or unit exploration, development/production plan or a Development Operation Coordination Document in the central or western Gulf of Mexico" from NEPA requirements with limited exceptions);[12] *See also id.* at Ch. 15.4(C)(12) (similarly excluding, without exception, approval of Application for Permit to Drill). Moreover, as with the statute and regulations, the Bureau's manual identifies only three stages that constitute "Major Actions Normally Requiring an EIS: "(1) Approval of a 5-year offshore oil and gas leasing program. (2) Approval of offshore lease sales. (3) Approval of an offshore oil and gas development and production plan in any area or region of the offshore, ***other than the central or western Gulf of Mexico*** …." *Id.* at Ch. 15.4(A).[13] According to the Bureau's own guidance, then, the decision to hold a lease sale is the final time the Bureau will prepare an EIS. Intervenors simply cannot explain how a regulatory system for post-lease-sale activities in the Gulf that minimizes opportunities for additional NEPA compliance can somehow guarantee a future EIS of the same scope and depth of the one at issue in this case.

2. The Bureau has limited discretion at later points in the process.

The lease sale stage is also an irretrievable commitment of resources because the Bureau's authority to completely prevent further activity in any subsequent decisions is limited. For example, OCSLA requires approval of an exploration plan within 30 days if the Secretary finds it to be consistent with applicable regulations, 43 U.S.C. § 1340(c)(1), and provides for disapproval only if the plan "would probably cause serious harm or damage to life (including

[11] https://www.doi.gov/sites/doi.gov/files/elips/documents/516-dm-15.pdf.
[12] The Council on Environmental Quality (CEQ) defines "categorical exclusion" as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations." 40 C.F.R. § 1508.4 (2019).
[13] Among many other things, the Bureau's different application of NEPA in later steps of the drilling process in the Gulf of Mexico renders irrelevant Intervenors' reliance on language from decades-old cases involving offshore drilling in Alaska. *See infra* at 46–47.

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," *id*. at §§ 1334(a)(2)(A)(i), 1340(c)(1), that "cannot be modified to avoid such condition" *id*. at § 1340(c)(1)(B). Disapproval of a development plan is similarly subject to specific conditions. *Id*. at § 1351(h)(1) ("The Secretary shall disapprove a plan" if the lessee does not comply with statutory and regulatory requirements, if the lessee does receive concurrence under the Coastal Zone Management Act, "if operations threaten national security or national defense" or if the Secretary determines there are "exceptional resource values" or other "exceptional circumstances."). The Bureau's discretion at the lease sale stage is comparably unfettered, underscoring the need for it to understand all potential impacts of its action in order to make a decision about whether and how to hold the lease sale. AR0048553 (for each lease sale, the Bureau "makes individual decisions on *whether and how* to proceed." (emphasis added)). *See also Point Hope*, 740 F.3d at 504 (lease sale stage is the time for the agency to consider overall risks relevant to "deciding which parcels to offer for lease").

The conditions under which the Bureau can cancel a lease are also limited to instances where, after a hearing, the Secretary determines that "(i) continued activity pursuant to such lease … would probably cause 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; (ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and (iii) the advantages of cancellation outweigh the advantages of continuing such lease." 43 U.S.C. § 1334(a)(2)(A). Even if the Secretary makes such a determination, a lease cannot be cancelled "unless and until operations under such lease … shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five

years." *Id.* § 1334(a)(2)(B). Cancellation of a lease also entitles the lessee to compensation, *id.* § 1334(a)(2)(C), underscoring that the lease is a "critical agency decision" resulting in "irreversible and irretrievable commitments of resources" and triggering NEPA. *Peterson*, 717 F.2d at 1414–15.

The Ninth Circuit reviewed these lease cancellation provisions in 43 U.S.C. § 1334(a)(2)(A) and considered them restrictive. *See Vill. of False Pass,* 733 F.2d at 614 ("some of the statutory terms for suspension or cancellation of a lease seem to specify conditions more specific than the discretion the Secretary might have to grant a lease"). However, the Ninth Circuit went on to note that section 1334(a) grants the agency the authority to expand its discretion through regulations, and found that the agency exercised that discretion by adopting regulations allowing it to suspend any activity for any purpose necessary to implement NEPA and to "relax[] the constraints on cancellation" that allow cancellation "anytime" for broad environmental reasons. *Id.* at 615 (citing 30 C.F.R. § 250.12 (1982)). *See also N. Slope Borough v. Andrus*, 642 F.2d 589, 606 & n.103 (D.C. Cir. 1980) (citing same as "regulations providing for the suspension or cancellation of leases when necessary to protect the environment"). Significantly, those cited regulations are ***no longer in effect*** and the Bureau's current regulations do not expand its discretion beyond the statutory terms in section 1334. *See* 30 C.F.R. §§ 550.181, .182, .183 (replicating statutory terms). *See also* 30 C.F.R. § 550.271.

3. Gulf leases grant the right to immediately begin ancillary activity.

Intervenors' contention that the Lease Sale is not an irretrievable commitment of resources also fails on the facts. The oil and gas leases that the Bureau issues in the Gulf of Mexico do not preclude ***all*** activity. Just the opposite: they permit the lessee to immediately begin "ancillary" activities without any further approvals. AR0008199 ("certain ancillary activities are actually authorized by the lease"). Indeed, Form BOEM–2005 (February 2017),

which the Bureau uses to convey leases resulting from Lease Sale 257, API Br. 18 n.11, explicitly grants the lessee the right to conduct geological and geophysical explorations; the right to drill water wells; and the right to construct and maintain artificial islands, installations, and other devices permanently or temporarily attached to the seabed. *Id*. at 2. *See also N. Slope Borough*, 642 F.2d at 594 (lessees are permitted to engage in "'preliminary activities' [that] fall under the broad rubric of 'testing,'" such as "geological, geophysical, and other surveys necessary to develop a comprehensive exploration plan.") (citing 44 Fed. Reg. 70238 (Dec. 6, 1979)). Thus, Intervenors are simply wrong to suggest that "holding a lease confers no right to perform any surface disturbing activity," La. Br. 9, or that Lease Sale 257 "does not 'itself authorize' any activity that could impact the environment," API Br. 18.

B. Intervenors Misinterpret the Case Law.

Intervenors' arguments are based not on the governing statutes, regulations, or facts that apply here, but on a handful of selected out-of-context quotes and mischaracterizations of the case law. Intervenors rely mainly on three D.C. Circuit cases: *Center for Biological Diversity v. U.S. Department of Interior*, *Center for Sustainable Economy v. Jewell,* and *Fisheries Survival Fund v. Jewell*. *See e.g.,* La. Br. 8–10; API Br. 16–18. None of those cases support their position. Two of those cases entailed challenges to Interior's five-year program under OCSLA. While both determined a NEPA challenge to a five-year leasing program was not ripe, they both indicated that the leasing stage is the point at which irretrievable resources are committed. In *Center for Biological Diversity*, the D.C. Circuit held that because "[n]o lease-sales had yet occurred" the leasing program had not yet "reached that critical stage." 563 F.3d at 480. The Circuit held that the plaintiffs' claims were not yet ripe because "Interior … has not yet begun

the leasing stage." *Id.* at 482.[14] Indeed, in the context of a previous lease sale, this court affirmed that *Center for Biological Diversity* "found that the lease sale stage was the 'critical stage where an irreversible and irretrievable commitment of resources' occurs" for purposes of NEPA. *Oceana*, 37 F.Supp.3d at 176 n.27.[15] In *Center for Sustainable Economy,* the D.C. Circuit likewise found that the lease sale stage was the appropriate time to bring programmatic-type NEPA challenges, suggesting petitioners would have a chance to bring their claims at the lease sale stage. 779 F.3d at 600 ("A petitioner 'suffers little by having to wait until the leasing stage has commenced in order to receive the information it requires.'" (citation omitted)). The Circuit indicated that the petitioners would "have an opportunity to raise its NEPA claims, including its cost-benefit claims, in response to specific lease sales." *Id.*

Fisheries Survival Fund v. Jewell, Case No. 16-cv-2409 (TSC), 2018 WL 4705795 (D.D.C. Sept. 30, 2018), *aff'd sub nom*. 858 F. App'x 371 (D.C. Cir. 2021), is also distinguishable because the approval process for offshore wind leases differs from the process

[14] Louisiana further mischaracterizes this case to suggest that a lease sale challenge is not ripe until "leases are issued." La. Br. 9–10. *But see id*. at 10 n.5 (suggesting claims still not ripe even after leases are issued). But that assertion not only ignores the holding, it makes little sense given that the Bureau does not perform any NEPA analysis when it awards leases. Rather, NEPA review was complete when the Bureau signed its ROD to hold the Lease Sale. AR0029804 ("[T]he 2017-2022 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."). There are no further substantive steps. Thomas Decl. ¶¶ 6–9, ECF No. 19-1 (detailing ministerial steps to award final leases). NEPA obligations cannot mature at a point when there is nothing to review.

[15] The court made this finding in the context of distinguishing NEPA from the Endangered Species Act ("ESA"). Based on the record in that case, the court declined to find that the lease sale was an irreversible or irretrievable commitment of resources under the ESA because the Secretary would later review site-specific activities and could "suspend any and all activity in the OCS at any time if she determines that endangered species are at risk." *Oceana*, 37 F.Supp.3d at 177–78. *See also id.* at 176 n.27 (citing record document stating that agency can cancel lease if there will be jeopardy to an ESA-listed species). As detailed above, there is no analogous detailed NEPA review for subsequent actions and no similar reservation of broad authority here. The D.C. Circuit's determination that NEPA claims are ripe at the lease sale stage controls.

for oil and gas leases in at least two significant respects. First, in wind leasing, unlike with oil and gas, the Bureau typically does not complete an EIS until after it issues a lease and the lessee submits a Site Assessment Plan and a Construction and Operations Plan. *Fisheries Survival Fund*, 2018 WL 4705795, at *2. Indeed, in *Fisheries Survival Fund*, the Bureau expressly stated it would "conduct a separate site and project-specific [NEPA] analysis, likely an [EIS], and would provide additional opportunities for public involvement" at this later stage. 2018 WL 4705795, at *3 (citation omitted). For Gulf oil and gas leases, the Bureau does not prepare an EIS at the exploration and development stages. *See supra* Section III.A.1. Moreover, the Bureau has broad authority to accept or reject a wind lessee's Site Assessment or Construction and Operations Plan. *Fisheries Survival Fund*, 2018 WL 4705795, at *3; 30 C.F.R. §§ 585.613, 585.628. As explained above, it does not have the same unfettered authority to reject oil and gas exploration or development plans. 43 U.S.C. § 1334(a)(2)(A); *see supra* Section III.A.2.

Second, the language in the wind lease at issue in *Fisheries Survival Fund* explicitly "reserves both the authority to preclude all activities pending submission of site-specific proposals." 858 Fed. App'x at 372 (citing *Peterson*, 717 F.2d at 1415). The wind lease stated: (1) "the lease does not, by itself, *authorize any activity* within the leased area," *Fisheries Survival Fund*, 2018 WL 4705795, at *8 (citation omitted); and (2) the Bureau "'retains the right to disapprove a [subsequent Site Assessment Plan] or [Construction and Operations Plan] based on the Lessor's determination that the proposed activities would have unacceptable environmental consequences [or] would conflict with one or more of the requirements set forth in' OCSLA or applicable regulations," *Fisheries Survival Fund*, 858 Fed. App'x at 372 (citation omitted). Accordingly, the Bureau retains full discretion to say "no" at later steps based on its NEPA review. In contrast, the lease forms that the Bureau uses for oil and gas leases do not reserve such unfettered authority to disapprove future exploration or development plans. *See supra* at 42–43.

As these cases indicate, the question of when NEPA obligations mature in this context is relatively straightforward: either the Bureau reserves unfettered discretion to prevent all activity and to disapprove future development (as in wind leasing) or it does not. The Court need not speculate about the precise boundaries of the agency's discretion going forward or engage with hypotheticals about how it may manifest in future decisions. Where, as here, the agency does not maintain complete discretion to prevent all activities and effects, its NEPA obligations are ripe for review. This is especially true here, where Plaintiffs challenge the Bureau's failure to properly assess the effects of climate change and other wide ranging-effects from the Lease Sale. Contrary to API's assertion, API Br. 18, n.12, the Bureau's more limited discretion and the lack of additional meaningful NEPA review is exactly like the situation in *Zinke*, 368 F.Supp.3d 41. In *Zinke*, this district underscored the need to review GHG emissions at the lease sale stage because the agency "cannot fully prevent GHG emissions from oil and gas drilling once leases have been issued," *id*. at 64, and the agency did not "reserve[] both the authority to preclude all activities" nor the unfettered authority to halt future activities. *Id*. at 65. The Court found that while the agency could "impose conditions to *limit* and *mitigate* GHG emissions and other environmental impacts, ... the leasing stage is the point of no return with respect to emissions. Thus, in issuing the leases BLM 'made an irrevocable commitment to allow *some*' GHG emissions." *Id.* at 66 (citing *Peterson*, 717 F.2d at 1414). The same is true here.

Intervenors' reliance on cases evaluating lease sale challenges in Alaska is similarly misplaced. *E.g.*, La. Br. 11, 12; API Br. 7, 23, 31. In Alaska, the Bureau is required to prepare an EIS at later stages, unlike in the Gulf region. In *False Pass*, *North Slope*, and *Hodel*, the courts reviewed lease sales scheduled in Alaska and determined the agency could delay review of certain analyses because it was likely to prepare an EIS at the later stages. *N. Slope Borough*, 642 F.2d at 606 (noting that "a second EIS is required by the OCSLA covering the development and

production stage of an OCS project"); *Vill. of False Pass*, 733 F.2d at 614 (noting that there would be a better argument "if that were the only time the Secretary could review the potential environmental impacts of those leases"); *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1988) (noting that "additional [EISs] will be required at the later exploration, production, and development stages"). None of this is true for the Gulf region. *See supra* Section III.A.1. Moreover, as detailed above, the courts in these cases relied on regulations that no longer exist to find that the Bureau has wide discretion to cancel or suspend a lease sale for environmental reasons at a later stage. *See supra* at 42. And a more recent decision clarified the holdings in these cases, concluding that the Bureau "is required to take into account the full environmental effects of its actions" at the lease sale stage. *Point Hope*, 740 F.3d at 504. "It is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale on the environment, including the overall risk of oil spills and the effects of the sale on climate change." *Id*. While it may be appropriate to defer full consideration of effects that are "site-specific" in nature (e.g., harm to wildlife in a specific location) to a later analysis, *see id.* at 498–99, "[a] later project or site-specific environmental analysis is an inadequate substitute" for analyzing systemic or cumulative effects at the lease sale stage. *Id*. at 504.

The Court need not credit Intervenors' attempts to draw meaning from unrelated statements and *dicta* in several cases that did not address ripeness nor NEPA analyses. For example, *Mobil Oil Exploration & Producing Southeast, Inc. v. United States* involved a breach of contract suit against the government after it suspended several offshore leases near North Carolina after the State objected to development. 530 U.S. 604, 607 (2000). In finding a breach, the Court determined that even though the leases did not themselves authorize drilling, the companies had rights to develop if they met other OCSLA requirements. *Id.* at 621. Because the companies were in the process of meeting those requirements, the Bureau's suspension of the

lease was a breach of those rights.[16] If anything, this decision highlights the limits of the Bureau's ability to suspend leases after they are issued and underscores that a decision to hold a lease sale is an irretrievable commitment of resources. In *Secretary of the Interior v. California*, the Court interpreted application of the Coastal Zone Management Act (CZMA) to offshore lease issuance and noted that CZMA review would apply at later stages of development. 464 U.S. 312, 340 (1984). Here, of course, those later stages will not be subject to an EIS of similar review.

As multiple court decisions confirm, the Bureau's failure to consider the effects of Lease Sale 257 on climate change, wildlife, and the Gulf environment were ripe when it relied on its previous, flawed EISs to hold Lease Sale 257. The Court should reject Intervenors' ripeness arguments and decide the Bureau's NEPA violations.

IV. The Court Should Vacate the Bureau's Action

The Bureau's Record of Decision for Lease Sale 257 constitutes unlawful "agency action" under the APA, 5 U.S.C. § 551(13), which should be held "unlawful and set aside." 5 U.S.C. § 706(2). The Bureau does not oppose Plaintiffs' requested relief in their opposition and cross-motion. However, Intervenors oppose this statutory remedy and ask this Court to remand the decision without vacatur. API Br. 41–55; La. Br. 21–22. As detailed below, departures from the default APA remedy of vacatur apply only in "rare cases." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). *See also* Pls. Br. 43–45. The facts here do not warrant departing from the normal statutory remedy.

As an initial matter, although the Bureau provides no position on remedy, it requests additional briefing on the issue. Fed Br. 38. Plaintiffs oppose that request because it is not provided for in the briefing schedule that the parties negotiated with the express purpose of

[16] And of course, because this was outside the Gulf, those steps would be subject to further NEPA compliance. *See supra* Section III.A.1.

allowing resolution of this case *before* leases are finalized and issued on January 1, 2022. *See* Joint Status R. 1, ECF No. 22; Pls.' Req. Pre-Mot. Conf. 5–6, ECF 11 (explaining that good cause exists for expedited consideration in part because "[o]nce leases are issued, procedural hurdles make it more complicated for the Bureau to voluntarily cancel the leases"). Indeed, the schedule in this case was established based on an extended discussion of the need to resolve the case before leases were issued to avoid complicating any issues about remedy. *See* Pre-Mot. Conf. Tr. 12–15, 26–28, ECF 18 (Court and parties discussing expedited schedule and need for prompt resolution based on the interval between the Lease Sale and final issuance of leases); *id*. at 15 ("The Court: Is the Government willing to represent that it would not argue in any subsequent briefing that the award of the lease is anything the Court should take into consideration in deciding on remedy or whether there was a violation? Mr. Hajek: The Government is not prepared to concede any issues that it might argue later."); *id*. at 16 (Court asking, "Before there are vested interests like that where it could affect the Court's consideration of the case, why not just decide the case?"); *id*. at 17 (Court concluding that "it sounds to me like you can't tell me that delay would not prejudice the plaintiffs, it might. We just don't know as we sit here today. A delay might prejudice one side versus the other side in the case. Even if it means that people have to work long hours, why shouldn't I just direct that the administrative record be prepared forthwith and that we proceed with summary judgment quickly?"). In accordance with this discussion, the parties proposed—and the Court adopted—the expedited schedule that governs these proceedings. Order 4, ECF No. 24 (order entering schedule). Additional briefing on remedy would result in precisely the delay and prejudice to Plaintiffs that an expedited schedule was entered to avoid. In accordance with the schedule, Plaintiffs briefed remedy in their motion for summary judgment. The facts and the law relevant to remedy are straightforward. And as Intervenors' responses illustrate, the issue is sufficiently developed and

presented by the parties in these cross-motions for summary judgment. The Court should deny any request to prolong briefing.

There is no reason to depart from the default remedy of vacatur in this case, as Intervenors suggest. *First*, the deficiencies are serious and create substantial doubt as to "whether the agency chose correctly." *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). The Bureau failed to take a hard look at the indirect climate impacts associated with the sale and ignored significant new information about environmental impacts before it reached its decision to hold Lease Sale 257. If it had taken a "hard look" at the environmental effects of its actions based on accurate information about climate change, drilling safety, location, and effects to wildlife, the Bureau may have chosen to hold a smaller lease sale or "to reject altogether a lease sale" in the Gulf. *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978), *vacated in part on other grounds*, 439 U.S. 922 (1978). *See Liberty*, 982 F.3d at 740 (indicating a proper comparison of the no action alternative may well "lead the agency to … deny the lease altogether"). In this way, vacatur advances the mandates of NEPA and OCSLA by preserving decisionmakers' opportunity to choose among policy alternatives and ensuring "orderly" offshore development "subject to environmental safeguards." 43 U.S.C. § 1332(3).

Louisiana's assertion that vacatur is not warranted because the Bureau can "certainly" remedy its violation on remand was squarely rejected in *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021). Whether the Bureau can substantiate the very same decision is not the issue in NEPA cases. "[W]here an agency's NEPA review suffers from 'a significant deficiency,' refusing to vacate the corresponding agency action would 'vitiate' the statute" because of its crucial action-forcing purposes. *Id*. (citation omitted). The purpose of NEPA is to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*,

490 U.S. at 349. "[T]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed." *Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016). Merely requiring the Bureau to backfill its analysis at this point is meaningless. *See Standing Rock*, 985 F.3d at 1052. If the Court allowed remand without vacatur in this case, it would invite the Bureau to treat NEPA as a mere formality. *See, e.g.*, *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) ("[E]xperience suggests that [remand without vacatur] sometimes invites agency indifference." (citation omitted)). Indeed, in closely related circumstances, this Circuit vacated the 2007-2012 Five-Year Leasing Program because of Interior's failure to do an adequate environmental review. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d at 489.

Second, the "disruptive consequences" from vacatur that Intervenors allege ring especially hollow in the context of this case. La. Br. 22; *see also* API Br. 41. Plaintiffs filed this lawsuit the same day the Bureau issued the Record of Decision—eleven weeks before Lease Sale 257 took place—and have consistently pressed to resolve it *before* any leases are issued and there is a risk of reliance interests. And the parties and the Court have recognized the importance of doing so. *See supra* at 49; Pre-Mot. Conf. Tr. 16 (discussion of resolving the cases before there are "vested interests"); Joint Status R. 1 (joint schedule based on providing "an opportunity for the Court to make a decision on the merits before January 1, 2022, which is the Bureau's best estimate of the earliest date a lease would be issued and effective after Lease Sale 257."). *See also* API's Mot. Intervene 11, ECF No. 31 (API's commitment to follow schedule). Given that no leases have been issued to date—and this Court retains the ability to rule before that may happen—there are no reliance or other interests that may be "disrupted" by vacatur.

Intervenors' focus on the process of offering the Lease Sale and the vague assertion that

vacating the ROD would disrupt a "massive undertaking," La. Br. 22, *see also* API Br. 44, fails to distinguish this case from any other in which a federal agency makes a decision that the court sets aside. Moreover, Louisiana's assumption that the Bureau would be able to justify its existing decision on remand, La. Br. 22 (citing *Zinke*, 368 F.Supp.3d at 84), contradicts *Standing Rock* and other Circuit case law emphasizing NEPA's animating purpose to inform decisionmakers to choose whether and how to pursue an action. *See Standing Rock*, 985 F.3d at 1052. That purpose is of even greater importance when there are NEPA violations, "[o]therwise, agencies would potentially be incentivized to invest heavily in potentially-illegal projects upfront, only to claim later that the economic consequences in setting aside those projects would be too massive to unwind." *W. Watersheds Project v. Zinke*, 441 F.Supp.3d 1042, 1086–89 (D. Idaho 2020). Any assumption that the Bureau would simply make the exact same decision ignores that "[t]he agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result." *Food Mktg. Inst. v. I.C.C.*, 587 F.2d 1285, 1290 (D.C. Cir. 1978) (cautioning against the "danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues.").

Nor should the Court credit API's related complaint that its members may be adversely affected because their lease sale bids are public information. API Br. 44. This alleged harm is entirely self-inflicted. API's members entered their bids with full knowledge of this case, Plaintiffs' request for vacatur, and based on their own calculation of the risks and benefits. The Court should not reward companies for manufacturing "disruption" by knowingly engaging in a risky activity. As this district has noted, the risk of disruption is inherent in the "nature of doing business, especially in an area fraught with bureaucracy and litigation." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F.Supp.3d 91, 104 (D.D.C. 2017); *see also Standing Rock*, 985 F.3d at 1051, 1053 (upholding vacatur despite economic disruptions). The Court

should similarly decline to speculate about the future of oil and gas leasing in the Gulf of Mexico. That is far beyond the scope of the NEPA violations at issue in this case. Moreover, because the waters of the Gulf of Mexico are a shared public resource, decisions about its future are made in the context of the broad national interest, including environmental protection. *See supra* at 9, n.4.

Finally, the Court should decline API's invitation to conflate the test for injunctive relief with consideration of vacatur. API Br. 42–44. In APA review, the focus is on the agency and its action—not the plaintiff—and as such, Congress specified the remedy of vacatur without regard to plaintiffs' interests. *See* 5 U.S.C. § 706(2); Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1138 (2020). Even in equitable departures from the statutory remedy, the relevant questions have to do with the agency and its action, not the plaintiff, *see Allied-Signal*, 988 F.2d at 150–51, and it is the agency that "bear[s] the burden to prove that vacatur is unnecessary." *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F.Supp.3d 92, 99 (D.D.C. 2019) (holding "vacatur is the default remedy"). The Court should reject this misguided effort to change the law. Congress' stated remedy of vacatur for flawed agency actions not only is clear from the plain text of the APA, but also makes sense in the context of judicial oversight of administrative agencies, where courts are given "broad remedial" powers to enforce procedural requirements placed upon those agencies. *See, e.g.*, Sohoni, *supra*, at 1138.

Statutory remedy analysis under the APA is entirely different from the injunction standard even though both may sometimes be applied in the same case as two steps. The traditional injunction standard only is relevant in APA cases if a plaintiff requests additional relief beyond vacatur. *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 16–20 (2008) (specific preliminary injunction requested by plaintiffs); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010) (district court's injunction was "additional" relief beyond

vacatur); *Standing Rock*, 985 F.3d at 1050–54 (analyzing vacatur under APA and *Allied-Signal*, then analyzing additional injunctive relief entered by district court under the common-law standard); *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 535 (D.C. Cir. 2018) (reiterating that injunction test "is not the standard" for the default remedy of vacatur).

Here, Plaintiffs seek the statutory remedy of vacatur, and do not request any freestanding relief beyond vacatur. Pls. Br. 43–45. In *Standing Rock*, this district distinguished situations where activity has begun (and additional injunctive relief may be required) from situations when activity has yet to begin (and vacatur would remedy the violation). 985 F.3d at 1054 (explaining that "vacating a construction permit … naturally implie[s] an end to construction," while vacating a pipeline authorization with oil flowing leaves "the precise consequences of vacatur uncertain."). The posture here is far different than *Standing Rock*. As detailed above, the expedited schedule for briefing and consideration of this case was specifically intended to resolve the merits before the leases are even finalized, and thus before any activities could take place. *See supra* at 49. In this context, the consequences of vacatur are certain—no future activities can take place. Even if final leases are issued before a decision from this Court, how or on what terms the Bureau will enforce its rights over those leases is a matter for it to decide in the first instance. *See Standing Rock*, 985 F.3d at 1054. But those future events and decisions have no bearing on vacatur at this stage.

In sum, this Court should follow Congress's instructions and vacate the Bureau's action, as other courts have done in similar situations. *See, e.g.*, *Diné CARE v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) (instructing district court to vacate drilling permits for NEPA violations); *W. Watersheds*, 441 F.Supp.3d at 1086–89 (vacating oil and gas leases and lease sale for NEPA violations); *WildEarth Guardians v. U.S. BLM*, 457 F.Supp.3d 880, 897 (D. Mont. 2020) (similar).

CONCLUSION

For the foregoing reasons, the Court should declare Lease Sales 257 along with the three related EISs unlawful, arbitrary, capricious, an abuse of discretion, and otherwise contrary to NEPA and the APA. The Court should vacate the Bureau's decision to hold Lease Sale 257 and remand the EISs to the Bureau with instructions to prepare new, legally compliant EISs.

Respectfully submitted this 24th day of November, 2021.

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