IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, et al.,
Plaintiffs,

v.

DEBRA A. HAALAND, et al.,
Defendants,
and

STATE OF LOUISIANA,
Intervenor-Defendant.

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

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

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INTRODUCTION

Plaintiffs' NEPA claims are unripe, and they simply cannot cure that fundamental flaw. Instead, they ask this Court to overturn decades of precedent holding that agencies need not consider downstream effects from oil and gas production at the lease-sale stage. This Court should decline that invitation. For whether on jurisdiction or the merits, OCSLA and NEPA require BOEM to consider only the environmental effects *of the lease sale itself* at the lease sale stage. That is enough to dismiss Plaintiffs' first NEPA claim. The remainder of Plaintiffs' NEPA claims are nothing more than flyspecking attempts to present policy preferences as new facts justifying supplementation of the extensive and updated EISs that BOEM prepared for Lease Sale 257. Finally, even if this Court determines that BOEM's NEPA analysis is deficient, the Court should remand without vacatur to allow BOEM to remedy any problems without causing massive disruptive consequences; Plaintiffs have not shown that any other remedy would be appropriate.

ARGUMENT

I. PLAINTIFFS' NEPA CLAIMS ARE NOT RIPE.

Plaintiffs brush aside (at 35-37) the weighty constitutional ripeness issues their challenge raises by simply declaring that they have standing and thus their claims are ripe. That is not how Article III ripeness works. Instead, Plaintiffs bear the burden of demonstrating that their claim does not "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Nevada v. Dep't of Energy*, 457 F.3d 78, 85 (D.C. Cir. 2006). Indeed, this Court just recently dismissed a NEPA challenge to an OCSLA lease sale on *jurisdictional* ripeness grounds. *Fisheries Survival Fund v. Haaland*, No. 16-CV-2409 (TSC), 2018 WL 4705795, at *4 (D.D.C. Sept. 30, 2018), *aff'd sub nom.* 858 F. App'x 371 (D.C. Cir. 2021) ("The parties also raise issues

of standing and constitutional ripeness. [] As these latter issues present jurisdictional questions, this court will address them at the threshold.").[1]

Plaintiffs ask the Court to ignore clear holdings of this Court and the D.C. Circuit that premature NEPA challenges are not constitutionally ripe. *See Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 599 (D.C. Cir. 2015) (affirming dismissal for lack of jurisdiction of unripe NEPA claim); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009) (same); *Fisheries Survival Fund*, 2018 WL 4705795, at *4, *aff'd sub nom.* 858 F. App'x (same). Those OCSLA cases all applied the *Wyoming Outdoor Council v. U.S. Forest Service* framework, which is explicitly jurisdictional. 165 F.3d 43, 49 (D.C. Cir. 1999).

Under *Wyoming Outdoor Council* and *Sierra Club v. Peterson*, a claim is constitutionally ripe only when the agency "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.'" *Wyo. Outdoor Council*, 165 F.3d at 49 (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)). "[I]n the oil and gas context," this means a NEPA claim is ripe when the agency "no longer retain[s] the authority to preclude all surface disturbing activities subsequent to issuing an oil and gas lease." *Fisheries Survival Fund*, 2018 WL 4705795, at *7 (quoting *Wyoming Outdoor Council*, 165 F.3d at 49). Plaintiffs' assertion that the lease sale is the critical stage is based on a misreading of BOEM's regulations and the lease terms.

[1] Plaintiffs assert (at 35-36) that they have brought an independent procedural claim. But that is not true—their only claims are NEPA claims. A claim that an agency has violated NEPA is not the sort of stand-alone procedural injury referred to in *Lujan*. *Wyoming Outdoor Council* demonstrates the difference in those types of claims. There, the D.C. Circuit dismissed NEPA claims for lack of ripeness but allowed stand-alone claims based on violation of agency procedures to proceed. *See Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999).

After a lease sale and issuance of leases, BOEM retains full authority to preclude all surface disturbing activities. Issuance of a lease allows a lessee to perform certain "preliminary" and "ancillary" activities including conducting geological and geophysical explorations, drilling water wells, and constructing other devices to aid in exploration. 30 C.F.R. §550.207; Form BOEM-2005 (February 2017). But Plaintiffs omit to note that BOEM must approve those activities before a lessee can perform them. Lessees must first provide notice of ancillary activities and "[d]escribe the potential adverse environmental effects of the proposed activity and any mitigation to eliminate or minimize these effects on the marine, coastal, and human environment." 30 C.F.R. §550.208(a)(4). BOEM will then review the notice to "ensure it complies with" performance standards, 30 C.F.R. §550.209, which include compliance "with Outer Continental Shelf Lands Act as amended (Act), applicable implementing regulations, lease provisions and stipulations, and other Federal laws"; "safe[ty]"; conformity "to sound conservation practices"; and ensuring that the activity "[d]oes not cause undue or serious harm or damage to the human, marine, or coastal environment," 30 C.F.R. §550.202(a), (b), (c), (e). If BOEM determines that an ancillary-activities notice does not comply with those standards, the lessee "may not start [its ancillary activity" until BOEM approves a full exploration or development plan. 30 C.F.R. §550.209. And Form BOEM–2005 explicitly conditions preliminary activities on compliance with "applicable regulations," which include the §550 approval process, and specifically conditions drilling water wells on "the condition that the drilling is conducted in accordance with procedures approved by the Secretary of the Interior or the Secretary's delegate." Because BOEM retains authority to prevent surface-

disturbing activities, the holding of the lease sale and issuance of leases is not an "irreversible and irretrievable commitment[] of resources." *Center for Biological*, 563 F.3d at 480.[2]

Because BOEM retains unquestioned authority to prevent surface-disturbing activities, Plaintiffs (at 45-46) resort to creating a new "unfettered discretion" standard in which the existence of any guideposts for BOEM's use of its discretion renders a NEPA claim ripe. But this Court rejected precisely that standard in *Fisheries Survival Fund* when it dismissed Plaintiffs' NEPA claims as unripe because "the applicable regulations and the terms of the lease preclude" the lessee "from engaging in any construction activities, and vest complete authority in BOEM to preclude such activity in the leased area before the Construction and Operations Plan is approved. Therefore, issuing the lease does not constitute an irreversible and irretrievable commitment of resources." 2018 WL 4705795, at *7. This Court made clear that maintaining "absolute authority" to prevent surface disturbing activities does not mean that the presence of regulatory "'conditions' ... transform[s] the lease into an irretrievable commitment of resources." Instead, what matters is that BOEM maintains authority to disapprove surface disturbing activities:

> Though it is true that the criteria may be "conditions" in the sense that BOEM must make certain findings—after notice and an opportunity for a hearing—before disapproving a Construction and Operations Plan and/or cancelling a lease, it does not necessarily follow that "BOEM's own regulations preclude BOEM from changing its mind unilaterally." [] That is because none of the "conditions" at issue involve or presuppose any transfer of authority to prevent lease activities out of BOEM's hands[.]

[2] This framework of regulatory approval demonstrates the fundamental difference between NEPA ripeness under the Mineral Lands Act and OCSLA. Whereas a MLA lease confers immediate rights to drill without further approval, an OCSLA lease is just the opening step of a phased process including several preliminary and final plans required before conducting *any* preliminary, exploration, development, or production activities.

Id. at *8. Accordingly, as this Court has found in substantively indistinguishable OCSLA circumstances and applying oil and gas precedents, "[a]gainst this background, the lease sale does not represent the final word on anything, nor does it commit any resources, even putting aside the question of whether it does so irretrievably." *Id.* at *9.[3]

Plaintiffs (at 43-48) seek to avoid this inevitable conclusion by pulling quotes out of context to establish the lease sale as the time when NEPA claims ripen. Specifically, Plaintiffs point to the D.C. Circuit's statement in *Center for Biological Diversity* that because "[n]o lease sales had yet occurred" the leasing program had not irretrievably committed resources. 563 F.3d at 480. But, with reasoning worth quoting at length, this Court has already thoroughly examined and rejected this same argument as a "misleading" reading of the same cases Plaintiffs rely upon:

> Plaintiffs also note in passing that several of the cases addressing ripeness in the context of multistage leasing programs identified lease issuance as the point when NEPA claims ripen. ECF No. 48 at 10–11 & n.8; *see also, e.g.*, *CBD*, 563 F.3d at 480 (identifying specific lease sales as point of irreversible and irretrievable commitment). But this interpretation is misleading. *Wyoming Outdoor Council II*—the case upon which more recent cases such as CBD and CSE relied—described lease issuance as the critical stage for ripeness only as part of an explicit application of the *Peterson* rule. *See Wyoming Outdoor Council II*, 165 F.3d at 49. As this court has already discussed, the heart of the *Peterson* rule is the question of whether the agency retains the authority to preclude all surface disturbing activity. *Peterson*, 717 F.2d at 1414-15; *see also Wyoming Outdoor Council v. Bosworth*, 284 F. Supp. 2d 81, 92–93 (D.D.C. 2003) (noting that *Wyoming II* "based its irreversible commitment finding on the fact that the agency had chosen not to retain its authority to preclude all surface-disturbing activities after lease issuance," that the NEPA claim in the case before it was unripe where lease issuance did not involve relinquishment of preclusive authority or resolution of development contingency, and that ripeness is a "flexible" doctrine, not "a per se rule"). In *Wyoming II*, *CBD*, and *CSE*, the agency could not have relinquished its preclusive authority because it had yet to take any specific action under the leasing program. *See CBD*, 563 F.3d

[3] *Fisheries Survival Fund* cannot be distinguished on the basis that it applies to wind projects because the Court was clear that it was applying the OCSLA oil-and-gas framework. *Fisheries Survival Fund*, 2018 WL 4705795, at *7 n.4 (Plaintiffs "do not offer any argument as to why the court should decline to apply that standard, and do not offer any alternative standard, instead opting to argue their position from within the oil and gas lease legal framework, which the court finds analogous and appropriate").

> at 480 (noting that agency "had only approved the Leasing Program at issue," and that "[n]o lease-sales had yet occurred"); *CSE*, 779 F.3d at 599–600 (same); *Wyo. Outdoor Council II*, 165 F.3d at 49–50 (same). In *Peterson* and *Conner*, ripeness turned on lease issuance because the agency relinquished authority by the terms of the leases. *Peterson*, 717 F.2d at 1414 (noting that since the "decision to allow surface disturbing activities" was made "at the leasing stage," NEPA obligations attached at that point) (emphasis in original). But in this case—as in *Bosworth*—the lease does not relinquish preclusive authority. *See* 284 F. Supp. 2d at 93.

Fisheries Survival Fund, 2018 WL 4705795, at *9 n.7. In short, the fundamental standard is whether BOEM retains authority to reject surface disturbing activities. *Id.* It does. *See supra*. And as this Court noted, the fundamental difference between the MLA—which allows for immediate drilling upon lease issuance—and the OCSLA tiered process demonstrates that while the leasing stage may involve an irreversible commitment under the MLA, it does not under OCSLA.

Plaintiffs' two-pronged attempt (at 44-45) to distinguish *Fisheries Survival Fund* fails. First, Plaintiffs assert that *Fisheries Survival Fund* relied upon the fact that BOEM would have to prepare an EIS at a later stage in the wind context. But this reasoning is absent from the Court's opinion. It is also absent from the D.C. Circuit's affirmance. Indeed, the Court explicitly applied the *oil and gas* OCSLA leasing framework to determine that an EIS is not necessary before lease issuance. *Fisheries Survival Fund*, 2018 WL 4705795, at *7 n.4. Second, Plaintiffs assert that the lease at issue in *Fisheries Survival Fund* reserved BOEM's discretion to prevent surface-disturbing activities, but the leases here do not. But as discussed, under the applicable regulations and lease conditions at issue here, BOEM—as in *Fisheries Survival Fund*—retains authority to prohibit surface-disturbing activities. Just as in *Fisheries Survival Fund*, the lease here and BOEM's regulations reserve BOEM's right to preclude the lessee from engaging in "any activities pending submission of site-specific proposals." 858 F. App'x at 372. *Fisheries Survival Fund* is an indistinguishable and correct application of longstanding ripeness precedent to the OCSLA lease-sale stage. This Court should follow its holding and dismiss Plaintiffs' claims as unripe.

II. THE GOVERNMENT COMPLIED WITH NEPA'S REQUIREMENTS.

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

Even if Plaintiffs' claims are constitutionally ripe, they fail on the merits because NEPA imposes no requirement on BOEM to consider downstream climate effects at the lease-sale stage. Plaintiffs ask this Court to ignore the fundamental principle of NEPA review that different levels of detail are required at different stages of tiered-development programs. Specifically, Plaintiffs ask this Court to ignore consistent holdings in the OCSLA context that downstream effects do not need to be considered at the lease-sale stage. Plaintiffs' contrary theory would require BOEM to consider full downstream effects at the lease sale stage—an approach inherently inconsistent with the principle of tiered NEPA review in multi-stage programs (and longstanding precedent).

The fundamental principle of NEPA review of multistage programs is that "the amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA's stages." *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1191-92 (9th Cir. 1988) (citing *Secretary of the Interior v. California*, 464 U.S. 312 (1984); *Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir.1977); *Sierra Club v. Morton*, 510 F.2d 813, 828 (5th Cir.1975)); *accord N. Slope Borough v. Andrus*, 642 F.2d 589, 606 (D.C. Cir. 1980). By requiring full analysis of the downstream effects of greenhouse gas emissions occurring after the final stage of the OCSLA process, Plaintiffs would collapse OCSLA's tiered structure into one stage requiring consideration of all emissions effects in one EIS. This is not how NEPA review works under OCSLA.

Plaintiffs make a three-pronged attempt to avoid the longstanding and binding rule that the proper focus of NEPA review at the lease-sale stage is "the limited preliminary activities permitted to the lessees during the lease sale phase" rather than downstream climate effects. *N. Slope Borough*, 642 F.2d at 606. Not one of their arguments is persuasive.

First, Plaintiffs misleadingly rely on the fact that a full EIS is not required at the exploration and development stages. The dispositive factor in cases applying NEPA to OCSLA lease sales is not the possibility of a future EIS, but the statutorily required environmental reviews at each stage of the leasing process. That is why the D.C. Circuit in *North Slope* focused not on a potential second EIS but instead on the inherent futility of projecting the effects of the drilling and development stages during the lease sale stage:

> Drilling for commercial quantities of oil is in all likelihood at least two years away, even under a turn of events most favorable to the government and the oil companies. Uncertainty over remote hazards can be rectified as more information is collected: where the oil is discovered and how much of it there is are crucial factors that will instruct the Secretary in his developing view of costs and benefits. It is more logical and efficient to ask certain questions when the truth of their premises is unveiled. It may eventuate that exploratory drilling is disappointing, or that severe environmental hazards become more clearly perceived. This perspective comports with the multistage approach mandated by Congress for this kind of oil and gas development.

Id. at 605-06. Those concerns are even greater here. Plaintiffs' complaint about the possibility of emissions (and any effect of those emissions on the climate) reach much further into the future than a potential transport-stage spill addressed in *North Slope*. And *North Slope* has been consistently interpreted as holding that review of downstream effects is not necessary at the lease-sale stage because of OCSLA's required future environmental reviews and the uncertainty of predicting downstream effects so early in the process. *See, e.g.*, *Wilderness Soc. v. Salazar*, 603 F. Supp. 2d 52, 60 (D.D.C. 2009) ("[I]n the context of [OCSLA] leasing, courts have acknowledged that the limited information available at the leasing stage necessarily limits the scope of the environmental analysis."); *Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., Regul., Enf't*, 871 F. Supp. 2d 1312, 1336 (S.D. Ala. 2012).

Second, contrary to Plaintiffs' representation (at 40-42), BOEM's implementing regulations continue to expressly require environmental reviews before each lease stage in the Gulf

of Mexico. It is not true that BOEM no longer conducts environmental review throughout the leasing process. *Defs. of Wildlife*, 871 F. Supp. 2d at 1336 ("Congress has clearly expressed its intent to require stage-specific environmental review for OCLSA projects."). Indeed, OCSLA expressly envisions such review, including for Gulf of Mexico lease development. As discussed, at the preliminary stage, ancillary activities require BOEM approval. *See supra*; *see also Defs. of Wildlife*, 871 F. Supp. 2d at 1337 ("[I]t is simply not accurate that upon issuing leases, BOEM is bound to allow lessees to conduct unfettered full-scale drilling operations at those locations."). Before conducting any exploration activities, a lessee must submit an exploration plan, which requires conformity with federal law and specifically "[d]oes not cause undue or serious harm or damage to the human, marine, or coastal environment." 30 C.F.R. §§550.201-02; *see also Defs. of Wildlife*, 871 F. Supp. 2d at 1327 ("Plaintiff has not demonstrated that BOEM's approval of leases in Lease Sale 213 irretrievably committed that agency to approve exploration plans and issue drilling permits for all blocks, or irreversibly authorized lessees to spend lavish sums on drilling at those locations. The law is otherwise.") (citing 43 U.S.C. §1334(a)(1)(B); 30 C.F.R. §250.172(b)). Similarly, at the development and production stages, lessees must submit detailed plans and BOEM must review plans for compliance with federal law and specific environmental concerns. *See* 30 C.F.R. §§550.201-02; *Defs. of Wildlife*, 871 F. Supp. 2d 1312, 1329 (S.D. Ala. 2012) ("Those activities may not begin until separate federal approval has been obtained, and approval may be denied on several grounds.").

Third, as discussed, *supra* Sec. I, Plaintiffs (at 42-43) are incorrect that BOEM lacks power to prevent ancillary activities. *See supra*; *see also Defs. of Wildlife*, 871 F. Supp. 2d at 1335 ("BOEM did not need additional information about environmental effects of drilling to make a

determination as to the environmental consequences of issuing leases, subject to the myriad limitations and retention of agency discretion under OCSLA, as of spring 2010.").

More fundamentally, Plaintiffs mischaracterize OCSLA precedents as focusing on the possibility of a future EIS rather than on OCSLA's statutory structure and explicit provision for future environmental reviews—all of which remain in full force. It is because OCSLA and BOEM's implementing regulations specifically require environmental analysis and compliance with federal law at each stage—*not* because a separate EIS is required at each stage—that courts have consistently held that only the effects of the lease sale *itself* rather than future production and emissions must be considered at the lease-sale stage. *Defs. of Wildlife*, 871 F. Supp. 2d at 1337 ("Applicable case law, statutes and regulations all undermine plaintiff's position that exploration, development and production are a fait accompli once a lessee receives an OCLSA lease.").

Because of OCSLA's tiered structure, contra Plaintiffs (at 46), this situation is a far cry from *WildEarth Guardians v. Zinke*, which was an MLA case where lessees took immediate rights to drill upon issuance of the lease. 368 F.Supp.3d 41, 70 (D.D.C. 2019). Nor does *Native Village of Point Hope v. Jewell*, which Plaintiffs cite (at 47), apply here; that case involved a blatantly erroneous estimate of potential oil production levels, a matter Plaintiffs do not challenge in this case. 740 F.3d 489, 502-04 (9th Cir. 2014). And to the extent *Point Hope* requires analysis of "overall risk of oil spills and the effects of the sale on climate change," *id.* at 504, it contradicts the D.C. Circuit's holding in *North Slope* that the risks of an oil spill—far more proximate than climate-change risks—need not be considered at the lease sale stage. 642 F.2d at 605-06 (D.C. Cir. 1980) ("The lease sale phase of the OCS project here under review presents a record of facts and doubts that have not yet fully matured. The awful prospect of a major oil spill-the worst case-is far removed from categorical relevance at this stage. Drilling for commercial quantities of oil is in all

likelihood at least two years away, even under a turn of events most favorable to the government and the oil companies. Uncertainty over remote hazards can be rectified as more information is collected: where the oil is discovered and how much of it there is are crucial factors that will instruct the Secretary in his developing view of costs and benefits. It is more logical and efficient to ask certain questions when the truth of their premises is unveiled.").

Finally, Plaintiffs try (at 45-46) to distinguish *North Slope* and other cases clearly holding that downstream effects need not be considered at the lease-sale stage by arguing that those cases involved sales outside of the Gulf of Mexico. But another court already has specifically rebuffed that purported distinction. In *Defenders of Wildlife v. Bureau of Ocean Energy Management*, the Southern District of Alabama considered a NEPA challenge to GOM Lease Sale 213 alleging that BOEM failed to sufficiently consider the "risks of deepwater drilling in the Gulf." 871 F. Supp. 2d at 1334. The court explicitly applied the "compartmentalized, stage-specific analysis" of OCSLA sales set out in cases like *North Slope*. *Id.* at 1335 (collecting cases). The court also highlighted that, as here, Plaintiffs brought "no claims or causes of actions ... alleging NEPA non-compliance in connection with the exploration, development or production phases of the OCSLA process." *Id.* at 1336. Accordingly, the court held that concerns about "environmental effects of subsequent stages" need not be considered at the lease-sale stage. *Id.*

The *Defenders of Wildlife* court rejected the central argument, identical to Plaintiffs' here, "that '[l]easing and drilling are intertwined for NEPA purposes and cannot be viewed in isolation." *Id.* at 1337-38. The court found "no authority" to support this argument, which it found "difficult to reconcile with [] well-reasoned appellate decisions" such as *North Slope*. *Id.* And the court also observed that "it is simply not accurate that upon issuing leases, BOEM is bound to allow lessees to conduct unfettered full-scale drilling operations." *Id.* at 1337. Finally, in the same oil-and-gas

OCSLA Gulf of Mexico lease-sale stage at issue here, the court rejected Plaintiffs' central argument "that BOEM's promises of careful NEPA review are an empty charade that effectively kicks the can down the street until a nonexistent day of reckoning" as nothing more than the plaintiffs' personal "belief that BOEM will never perform a meaningful NEPA analysis once it issues leases." *Id.* at 1338. That unsubstantiated personal belief contradicts Congress's "express directive that courts conduct environmental review on a stage-by-stage basis for OCSLA purposes." *Id.* And when the "relevant" stage "is the lease sale stage" instead of "the exploration stage" or "the production stage" or "any other drilling stage," courts must honor the "fine" "distinction between a sale of a lease and the issuance of a permit to explore for, produce, or develop oil or gas," for "it is a distinction that Congress has codified with great care." *Id.* (internal quotation marks omitted).

Plaintiffs' challenge is indistinguishable from that rejected in *Defenders of Wildlife*. This court should similarly reject Plaintiffs' attempt to short-circuit the specific environmental review process set out in OCSLA. After all, "[t]he staged environmental review process that Congress carefully implemented via OCSLA (as federal appeals courts have recognized and enforced) would mean nothing if, as plaintiff suggests, BOEM is irrevocably committed to allow oil/gas exploration to proceed once it issues a lease." *Id.* at 1337.

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

If BOEM is required to consider downstream climate effects, its analysis was more than sufficient. First, Plaintiffs' claim (at 18) centers around BOEM's "failure to quantify the impact on foreign GHG emissions." But Plaintiffs continue to have no answer for this Court's holding that an agency need not "identify any past, present, or reasonably foreseeable GHG-emitting projects *worldwide*." *Wildearth Guardians v. Zinke*, 368 F.Supp.3d 41, 77 (D.D.C. 2019). Instead,

this Court has been clear that an agency "would satisfy NEPA's hard look requirement" by quantitatively and qualitatively analyzing only "*local*, *regional*, and *national* climate change." *Id.* (emphasis added). By quantitatively and qualitatively analyzing domestic GHG emissions and qualitatively analyzing global GHG emissions and "thoroughly explain[ing]" why quantification of global emissions "is not possible or helpful," BOEM has complied with this Court's guidance. *Id.* Accordingly, just as in *WildEarth*, Plaintiffs' demand that BOEM quantify global emissions is "of the flyspecking variety" and "does not rise to the level of a NEPA violation." 368 F. Supp. 3d at 78. That suffices to reject Plaintiffs' NEPA claim.

In any event, BOEM specifically addressed Plaintiffs' concerns in its Determination of NEPA Adequacy Supplement. AR0029963. As the Government explains (at 27), the Determination may be considered under the Council on Environmental Quality's binding NEPA implementing regulations. *See* 43 C.F.R. §46.120(c). Contrary to Plaintiffs' assertion (at 15), BOEM was under no obligation to publish a DNA for public comment. *Id.*

In the Determination, BOEM walks through each of Plaintiffs' concerns and rejects them. For example, BOEM reiterates its conclusion that it is "simply not possible at this time to calculate quantitative estimates [of global GHG impact] with the necessary credibility or scientific rigor." AR0029965. This complies with the binding NEPA regulations by "identif[ying] that there is incomplete and unavailable information under 40 C.F.R. §1502.22 (2019 ed.) regarding the degree to which different countries would be impacted by a small drop in oil prices resulting from OCS production." By conducting a quantitative domestic analysis and qualitative foreign analysis, BOEM easily satisfied its obligation to conduct "a robust qualitative discussion of local, regional, and national climate change" and easily "satisf[ied] NEPA's hard look requirement." *WildEarth Guardians*, 368 F. Supp. 3d at 77.

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

A. Climate.

Plaintiffs (at 20-24) continue to clothe policy recommendations as "new science." For example, Plaintiffs highlight (at 21) a United Nations recommendation to "immediately halt[] all new fossil fuel infrastructure projects to preserve a livable planet." This is a policy proposal, not "new evidence." Worse yet, it is a policy proposal directly contrary to OCSLA's "overriding policy of expeditious development." *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 339 (E.D. La. 2011). No court has authority to impose policy recommendations upon the Executive Branch. And BOEM was not required to examine the cited studies because doing so "would serve 'no purpose'"—BOEM lacks power to unilaterally adopt recommendations inconsistent with federal law and federal policy. *See Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768, 124 S. Ct. 2204, 2216, 159 L. Ed. 2d 60 (2004) ("Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS."). Accordingly, policy recommendations seeking to impose a 1.5ºC global warming target, or halt oil and gas production all together, are not relevant new information requiring supplemental environmental analysis.

B. Deepwater Drilling.

Plaintiffs continue to insist (at 25-27) that BOEM was required to supplement based on supposedly new information about deepwater drilling. But Plaintiffs do not even try to distinguish this Court's holding in *Oceana* specifically rejecting this same argument. In that case this Court upheld a BOEM conclusion that dangers arising from deepwater drilling "are postlease operational issues that cannot be reasonably predicted at the lease stage without site-specific information."

Oceana, 37 F. Supp. 3d at 166-67. And as BOEM explained, "'[i]n the postlease stage, applicants submit site-specific data on conditions, and BOEM technical staff reviews this data to determine whether conditions on approval, based on well data are appropriate.'" *Id.* Accordingly, this Court held that this approach to the hazards of deepwater drilling "is 'consistent with the staged environmental review dictated by the structure of offshore leasing under the OCSLA.'" *Id.*

Plaintiffs have no answer. Here, as in *Oceana*, Plaintiffs have presented no evidence of a "trend indicating" an "increased risk of oil spills in deepwater," *id.*, to undermine BOEM's extensive analysis of the deepwater issue in the three EISs it has prepared, *see, e.g.*, AR0009792 (addressing comment raising issue of "significant spike in ultra-deepwater drilling"); *see generally* AR0009227 (Appendix A to Multisale EIS extensively discussing deepwater drilling). Accordingly, "it is evident that BOEM did take a hard look at the risks of deepwater spills." *Oceana*, 37 F. Supp. 3d at 167.

C. Pipeline Safety.

Plaintiffs' only response (at 30 n.8) to this Court's directly on point holding in *Gulf Restoration Network*, 456 F. Supp. 3d 81, 101-02 (D.D.C. 2020), is to draw a distinction with no legal difference: "The 2017 Report [at issue in *Gulf Restoration Network*] was about other serious enforcement shortcomings at BSEE, not specifically addressing pipeline enforcement." This distinction is not relevant to the principle of law stated in *Gulf Restoration Network*: "an agency may properly base its evaluation of environmental impacts on the assumption that other specialized agencies with jurisdiction will enforce permits and related mitigation measures according to the law." *Id.* at 101.

Plaintiffs' argument collapses under this holding. As in *Gulf Restoration Network*, "simply because the GAO report identified areas for needed improvement within the BSEE does not render the BOEM's underlying assumption when it relied on the BSEE's rules that the BSEE would

perform its duties to be 'demonstrably incorrect[,]' ... and 'even given the [BSEE's] past [enforcement] failures, this Court will not presume that the [BSEE] would have necessarily failed to comply with [ ] [enforcement] requirements for future projects." *Id.* at 100-02 (D.D.C. 2020). BOEM acted reasonably in assuming that BSEE will properly enforce pipeline safety regulations. Thus, even if the GAO report contained relevant "new information" (which it did not, *see* Fed. Br. 34-35), it would thus not be relevant to BOEM's assessment of Lease Sale 257.

D. Bryde's/Rice's Whale.

Plaintiffs cannot avoid two simple facts that demonstrate no new relevant information has arisen regarding Bryde's[4] whale. First, the whale's primary habitat is the Eastern Planning Area. This has not changed. Second, the Eastern Planning Area is not included in Lease Sale 257. This has not changed. BOEM has thoroughly analyzed the effect of the Lease Sale on Bryde's whale and concluded that it will have no significant impact on the whale because of the two fundamental facts listed above. Nothing has changed and there is thus no need to supplement the EIS.

In any event, Plaintiffs continue to ignore the importance of the Biological Opinion's conclusion that reasonably prudent alternatives would address jeopardy to the Bryde's whale. BOEM has acted on this conclusion by adopting Stipulation 4 for all Lease Sale 257 leases and conditions of approval on post-lease activities. For this reason, the National Marine Fisheries Service expressly found that BOEM's actions removes the jeopardy to the Bryde's whale. Thus the purportedly relevant new information—NFMS's Biological Opinion—has been acted on by BOEM to the satisfaction of NFMS itself.

[4] As Federal Defendants note (at 35-37), NFMS's designation of Rice's whale as a distinct species has no effect because it was merely taxonomical. 86 Fed. Reg. 47022, 47023 (Aug. 23, 2021) ("This rule does not change the listing status of the species under the ESA and does not alter any protections afforded the species or any other legal requirements arising from the species' listing under the ESA.").

E. Fracking & Wind Projects.

Plaintiffs' passing mention of fracking and wind projects (at 34-35) does not fix their failure to adequately raise the issue in their opening brief. *Stand Up for California! v. U.S. Dep't of Interior*, 410 F. Supp. 3d 39, 58 (D.D.C. 2019), *aff'd sub nom.* 994 F.3d 616 (D.C. Cir. 2021) (in the NEPA context, parties "cannot raise ... issues in a passing fashion and expect the Court to invalidate the [agency's] entire review"). In any event, Plaintiffs continue to fail to make any argument as to exactly why purportedly new information about fracking was relevant to Lease Sale 257. And mere policy recommendations do not count as new information. Similarly, Plaintiffs' passing mention of wind projects does nothing to alter the landscape BOEM faced in issuing the initial EISs. *See id.* at 58. In sum, Plaintiffs' "'laundry list' of other complaints [] fails to paint a '*seriously* different picture of the environmental landscape' that would require a supplemental EIS." *Id.*

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

Plaintiffs argue (at 50-51) that a NEPA violation automatically fails the first *Allied-Signal* prong. Not so. In the NEPA context, just as in other regulatory challenges, "this Court must determine whether there is 'at least a serious possibility that the [agency] will be able to substantiate its decision on remand.'" *WildEarth Guardians*, 368 F. Supp. 3d at 84; *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F. Supp. 3d 91, 98 (D.D.C. 2017) ("The Court therefore must assess the likelihood that, on remand, the Corps will be able to justify its prior decision to issue an EA and FONSI, rather than preparing a full EIS. Such assessment looks at each issue in turn.").

Contrary to Plaintiffs' representations, *Standing Rock Sioux Tribe v. Army Corps of Engineers* does not establish a new rule that a NEPA violation must be vacated in all

circumstances. Indeed, *Standing Rock Sioux Tribe* demonstrates precisely the opposite. In that case, this Court held that "courts have discretion to depart from that presumptive remedy and decide not to vacate an EA, FONSI, and corresponding authorizations pending NEPA compliance." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 147 (D.D.C. 2017). And the Court held that although "gaps in the" Army Corps of Engineers' analysis—including the failure to consider the effects of an oil spill—"were improper under NEPA," vacatur was not appropriate because the NEPA violation was "far from incurable." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F. Supp. 3d 91, 99 (D.D.C. 2017); *see also id.* at 101 ("Although the Corps must provide a more robust analysis on remand, there is reason to think that, in doing so, it has a substantial possibility of validating its prior conclusion."). It was only after the agency failed to fix the NEPA deficiencies on remand that the district court, affirmed by the D.C. Circuit, rejected a second remand without vacatur. *See Standing Rock Sioux Tribe*, 985 F.3d at 1051 ("As to the first factor, the district court concluded that the Corps was unlikely to resolve the controversies on remand because the court had previously remanded without vacatur for just that purpose and the Corps had nonetheless failed to resolve them.").

Far from supporting Plaintiffs' position, *Standing Rock Sioux Tribe* demonstrates that remand without vacatur is the appropriate remedy. As in that case and in *WildEarth Guardians*, BOEM's alleged "NEPA violation consists merely of a failure to fully discuss the environmental effects of [oil and gas] lease sales; nothing in the record indicates that on remand the agency will necessarily fail to justify its decisions to issue EAs and FONSIs." 368 F. Supp. 3d at 84. Indeed, BOEM has a greater chance of remedying the purported violations here because it has already conducted extensive environmental analysis and produced three separate EISs. In *WildEarth Guardians* and *Standing Rock Sioux Tribe*, the agencies had produced only FONSIs and EAs and

forwent producing EISs. BOEM's extensive existing analysis provides it with a far greater possibility of remedying any NEPA flaws than the agencies had in those cases where remand without vacatur was granted. So "the probability that [BOEM] will be able to justify retaining [its prior leasing decisions] is sufficiently high that vacatur ... is not appropriate." *Id.* (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002)).

Vacatur would also cause significant disruptive consequences. Plaintiffs can avoid this inevitable conclusion only by baldly asserting (at 51-52) that neither Louisiana nor any other entity has significant interests in Lease Sale 257. This is not true. Section 8(g) of OCSLA provides that coastal states receive 27 percent of bonus bids, ground rent, and production royalties from OCS oil-and-gas lease sales such as Lease Sale 257. 43 U.S.C. §1337(g)(2). Beyond that, Louisiana is entitled to 37.5 percent of OCS revenues from selected areas of the Gulf of Mexico under the Gulf of Mexico Energy Security Act of 2006. *See* P.L. 109-432, 120 Stat. 3000, 43 U.S.C. §1331 note. Vacating Lease Sale 257 and preventing lease issuance would imperil Louisiana's vital interests in this statutorily-provided revenue. *See Louisiana v. Biden*, 2021 WL 2446010, at *21 (W.D. La. June 15, 2021) ("[J]ust with the loss of proceeds from Lease Sale 257, which would have been already completed, Plaintiff States would have been entitled to ground rents and bonuses that they will not receive."). Finally, as Chevron extensively details, Doc. 55-1, vacatur would significantly disrupt the investments of private industry taken in reliance on Lease Sale 257. These are textbook disruptive consequences that justify remand without vacatur.

CONCLUSION

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

Respectfully submitted,

Dated: December 16, 2021

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CERTIFICATE OF SERVICE

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

Dated: December 16, 2021 */s/ Elizabeth B. Murrill*