IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, et al. Plaintiff, vs. DEBRA A. HAALAND, et al. Defendants, and STATE OF LOUISIANA, et al. Defendant-Intervenors.	No. 1:21-cv-02317-RC Judge Rudolph Contreras **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Executive Order 14,008 directed the Department of the Interior to undertake a comprehensive review of oil and gas leasing and, to the extent consistent with applicable law, to pause new lease sales while that review was underway. *See* Exec. Order No. 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619 (Jan. 27, 2021). The Bureau of Ocean Energy Management ("BOEM") thus initially deferred holding Lease Sale 257. Following BOEM's announcement of that deferral, a court in the Western District of Louisiana enjoined Interior from implementing the pause directive in the Executive Order. That court specifically commented that Lease Sale 257—in its view—had been unlawfully rescinded. BOEM accordingly moved forward with Lease Sale 257 on November 17, 2021.

BOEM's decision complied with the legal requirements of the National Environmental Policy Act ("NEPA"). As in their opening brief, Plaintiffs take no issue with the large majority of BOEM's NEPA analysis. They do not challenge that BOEM fully considered the lifecycle greenhouse gas ("GHG") emissions of Lease Sale 257, which consist of (1) emissions from oil and gas exploration, development, production, and transport from any leased parcels to shore; (2) emissions from the processing, storage, and distribution of that oil and gas; and (3) emissions from the downstream consumption of that oil and gas. Instead, Plaintiffs narrowly argue that BOEM did not sufficiently forecast—using Plaintiffs' preferred methodology—the degree to which proceeding with Lease Sale 257 might affect foreign energy markets and their associated GHG emissions.

Plaintiffs lean heavily in their opposition on the fact that BOEM has proposed a new methodology for a lease sale in Alaska, *viz.*, Lease Sale 258. But that methodology is new; it was developed in the context of preparing for the Alaska lease sale. And BOEM's maiden

application of that methodology was issued for public comment with the goal of receiving and considering feedback in order to further refine it. Plaintiffs have no basis at this time for concluding, as they appear to, that the new methodology is the only acceptable way to approach foreign markets emissions analysis. BOEM's development of the proposed new methodology for Lease Sale 258, moreover, in no way undermines BOEM's analysis for Lease Sale 257. The proposed new methodology makes general assumptions about foreign energy markets in order to bridge the identified data differences, including by using a single "generic emissions factor" to quantify emissions associated with the change in foreign oil consumption. BOEM reasonably decided to take a different approach in its analysis here. The mere fact that BOEM is considering a different approach for Lease Sale 258 does not render its existing analysis for Lease Sale 257 invalid under NEPA.

Plaintiffs also assert that new information submitted with their briefing requires the preparation of a supplemental environmental impact statement ("SEIS"). They have failed to show, however, that any of the information they cite demonstrates that the potential environmental impacts from BOEM's leasing decision will be significantly different from the impacts that have already been analyzed. For all of these reasons, summary judgment should be granted to Defendants on all claims.

ARGUMENT

I. BOEM'S Analysis of Greenhouse Gas Emissions Complied With NEPA

A. BOEM Appropriately Explained That It Lacked Sufficient Information to Quantitatively Analyze the Change in Foreign Oil and Gas Emissions From Conducting the Lease Sale

As demonstrated in Defendants' opening brief, BOEM fully analyzed GHG lifecycle emissions associated with Lease Sale 257, and also appropriately analyzed the degree to which proceeding with Lease Sale 257 would impact GHG emissions pertaining to the global energy

markets. Plaintiffs rely on the Ninth Circuit's *Liberty* decision, *Center for Biological Diversity v. Bernhardt* ("*Liberty*"), 982 F.3d 723 (9th Cir. 2020), which required BOEM to either provide a quantitative analysis of GHG emissions associated with a decrease in foreign consumption or explain why it could not do so. *See Liberty*, 982 F.3d at 740. But the *Liberty* decision is not binding here. Even to the extent this Court were to find it persuasive, BOEM provided a reasonable explanation of why it could not model GHG emissions pertaining to changes in foreign markets and instead relied on a qualitative consideration of the change in foreign emissions.

Plaintiffs' contrary argument fails. First, Plaintiffs argue that the record does not support BOEM's determination that it lacked the requisite data to quantitatively analyze the reduction in foreign emissions. *See* Pls.' Combined Opp. and Reply in Supp. of Their Mot. for Summ. J. ("Pls.' Opp.") at 6, ECF No. 52. But BOEM did not merely explain that it lacked the necessary information on one page, as Plaintiffs claim. *See id.* Instead, it prepared the Determination of NEPA Adequacy ("DNA") Addendum for that purpose, AR0029962-68, thus distinguishing this case from the circumstances presented in *Liberty* or *Sovereign Inupiat for a Living Arctic v. Bureau of Land Management* ("*Willow*"), Nos. 3:20-cv-00290, 3:20-cv-00308-SLG, 2021 WL 3667986 (D. Alaska, Aug. 18, 2021), where no similar DNA was prepared. The DNA Addendum explains that BOEM lacked information necessary to conduct a detailed analysis of the GHG emissions associated with a decrease in foreign consumption, in particular data regarding the energy substitutes that countries might use if oil from Lease Sale 257 were unavailable. AR0029965-66. Crucially, Plaintiffs do not argue that such information *was* available. Indeed, they do not contest BOEM's assertion that it did not have "information about

changes in energy substitutes that might occur as a result of changes in foreign consumption." Pls.' Opp. at 6-7.

Second, Plaintiffs argue that Defendants have inappropriately minimized the potential impacts of changes in foreign consumption on global GHG emissions. *See* Pls.' Opp. at 7. That is incorrect. Relevant here, the potential for a reduction in foreign consumption, and the potential implications for corresponding GHG emissions, are disclosed in the Wolvovsky and Anderson Report, AR0014220, the Programmatic Environmental Impact Statement ("EIS"), AR0014381, and the DNA Addendum, AR0029964-67.

Third, Plaintiffs rely upon *Sierra Club v. Federal Energy Regulatory Commission* ("*Sierra Club II*"), 867 F.3d 1357 (D.C. Cir. 2017), for the proposition that "quantification [is] important" and erroneously imply that the D.C. Circuit required the quantification of the change in GHG emissions associated with a decrease in foreign consumption. Pls.' Opp. at 7. That is not the case. In *Sierra Club II*, the D.C Circuit held that the agency was required to "either quantify and consider the project's downstream emissions or explain in more detail why it cannot do so." 867 F.3d at 1375. Here, BOEM *has* analyzed the downstream GHG emissions as part of its expansive lifecycle analysis, AR0014378-83, and Plaintiffs have declined to challenge any aspect of that analysis. Thus, contrary to Plaintiffs' apparent belief, the D.C. Circuit's holdings in *Sierra Club II* do not align with the Ninth Circuit's holding in *Liberty*. In *Liberty,* the Ninth Circuit went beyond requiring an analysis of downstream GHG emissions to require further explanation of global economic impacts and the potential global reduction in GHG emissions associated with the incremental change in foreign *demand* for oil. *See Liberty*, 982 F.3d at 736 (explaining that if the project at issue were approved, the global supply of oil would increase, the price of oil would drop, and "foreign consumers will buy and consume more oil"). Unlike

Liberty, Sierra Club II focused on the lifecycle emissions of project-related fossil fuels; plaintiffs do not contest that the BOEM adequately addressed those emissions here.

Unlike *Liberty*, the D.C. Circuit's opinion in *Sierra Club v. U.S. Department of Energy* ("*Sierra Club I*"), 867 F.3d 189 (D.C. Cir. 2017), is directly on point and contradicts Plaintiffs' position that BOEM was required to quantify the change in GHG emissions associated with a reduction in foreign consumption of oil where reliable data was unavailable. *Sierra Club I* involved an agency's analysis of GHG emissions where the agency, as here, prepared a full lifecycle analysis of those emissions. *Id.* at 201-02. As in this case, the plaintiffs in *Sierra Club I* contended that the agency should have gone further and analyzed the potential for LNG exports to compete with renewable energy in foreign markets. *Id.* at 202. And as in this case, the government explained that the analysis plaintiffs demanded would require projections of how the proposed action would affect each potentially substituted fuel source (nuclear, renewable, etc.) in each relevant foreign nation. *Id.* The D.C. Circuit credited the agency's conclusion that such an analysis would be too speculative to meaningfully inform agency decisionmaking due to "the many uncertainties in modeling such market dynamics," and it concluded that there was nothing arbitrary about the agency's decision. *Id.* So too here. As BOEM has reasonably explained, it could not do so because it lacked sufficient data on the energy substitutes (such as coal or nuclear power) likely to be used in other countries, and it could not reliably forecast potential changes in GHG emissions from those foreign markets using the MarketSim model without first obtaining that data. AR0029965-66.

Fourth, Plaintiffs' arguments find no support in the Court's prior ruling in *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2013). *See* Pls.' Opp. at 13. The Court determined in *WildEarth Guardians* that resting on a purely qualitative discussion of GHG

emissions "was not reasonable given the data available to [the agency]." *WildEarth Guardians*, 368 F. Supp. 3d at 70-71. In that case, however, the agency had conducted no quantitative analysis of GHG emissions whatsoever. 368 F. Supp. 3d at 68-69. The Court found this unreasonable because it concluded that the agency had sufficient information in its possession to conduct a meaningful quantification of emissions. This information included "estimates of (1) the number of wells to be developed; (2) the GHG emissions produced by each well; (3) the GHG emissions produced by all wells overseen by certain field offices; and (4) the GHG emissions produced by all wells in the state." *Id.* at 69. The circumstances in this case are not comparable because BOEM appropriately used the data available to it to conduct a robust quantitative analysis of lifecycle emissions. The fact that BOEM also recognized limitations in its ability to model certain foreign emissions, based on limitations in the available source data, in no way conflicts with this Court's holdings in *WildEarth Guardians*.

Fifth, Plaintiffs incorrectly argue that BOEM is not entitled to deference regarding its economic analysis of foreign emissions. *See* Pls.' Opp. at 8. Such deference is not owed, Plaintiffs argue, because BOEM's area of expertise is limited to energy-related functions, not economic analysis. *See id.* (citing *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1982)). This too is incorrect. Many of BOEM's decisions involve economic analyses, and BOEM must be permitted to rely on the analyses of its own experts. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive."). The Administrative Procedure Act thus charges this Court with reviewing BOEM's decision under a deferential, arbitrary-or-capricious standard of review. 5 U.S.C. § 706. Notably, the court in

Sierra Club I cited *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976), in upholding the agency's economic analysis. *See Sierra Club I*, 867 F.3d at 202. *Kleppe* stands for the proposition that certain tasks are "assigned to the special competency of the appropriate agencies." 427 U.S. at 414. As with the agency in *Sierra Club I*, BOEM's analyses of GHG emissions—including its choice of methodology—is entitled to deference, and this Court should defer to BOEM's conclusion that it lacked sufficient data on foreign energy markets to conduct a quantitative analysis of associated GHG emissions. *See Sierra Club I*, 867 F.3d at 202.

Finally, Plaintiffs argue that BOEM's analysis should be overturned because it made "false and irrational assumptions about [GHG] emissions." Pls.' Opp. at 8. Plaintiffs fail, however, to identify any "assumption" in BOEM's analysis that is not fairly and accurately disclosed and explained. And, insofar as Plaintiffs take issue with the assumption in BOEM's MarketSim model—that foreign consumption would remain constant—the Wolvovsky and Anderson report adequately disclosed the limitations in the analysis. Specifically, the report explained that foreign consumption would *not* remain constant and provided estimates of the range in potential reduction in oil consumption. AR0014220. But it further explained that, given the vast differences in global oil consumption patterns, BOEM lacked information regarding the global consumption patterns which would allow it to convert the change in consumption to a change in GHG emissions and to determine how the additional oil consumption would impact demand for other fuel sources. *Id.* Thus, the model could not accurately quantify how the increased global oil consumption and resulting fuel switching would affect GHG emissions. *Id.*; *see also* AR0014381 (Programmatic EIS); AR0029964-67 (DNA Addendum). Because BOEM lacked data necessary to accurately quantify the GHG emissions corresponding to a reduction in

foreign emissions, BOEM's analysis was not irrational and should be upheld. *See Sierra Club I*, 867 F.3d at 202.

B. BOEM's Analysis of Greenhouse Gas Emissions in Connection with Lease Sale 258 Does Not Demonstrate that the Agency's Analysis for Lease Sale 257 Violated NEPA

Plaintiffs rely heavily in their opposition on the fact that BOEM has developed and proposed a new methodology for Lease Sale 258. But BOEM's analysis of GHG emissions in connection with proposed Lease Sale 258 does not render the analysis of GHG emissions for Lease Sale 257 invalid. As noted above, BOEM adequately explained that it lacked sufficient information to model the potential change in GHG emissions caused by a reduction in foreign consumption. BOEM, therefore, reasonably opted to analyze those potential changes qualitatively.

Plaintiffs are correct that BOEM is now attempting the quantitative analysis in connection with Lease Sale 258 that it reasonably determined not to conduct for Lease Sale 257 given the late stage of the process for that sale. That BOEM is trying a different approach does not suggest that either approach is unreasonable. BOEM was able to undertake this analysis by making "simplifying assumptions that allow for use of a broad foreign oil consumption estimate," and by utilizing a "generic emissions factor" in place of specific emissions factors for different types of petroleum products. *See* Cook Inlet Planning Area Draft EIS ("LS 258 DEIS") (excerpt) at 43, 46, Ex. 1. BOEM made these additional assumptions to address the different data available for domestic versus foreign markets. The fact that BOEM has proposed a new quantitative methodology using a generic factor to bridge the gap in foreign data for Lease Sale 258 does not mean BOEM's analysis for Lease Sale 257 using a different methodology was arbitrary and capricious. *See Theodore Roosevelt Conservation P'Ship v. Salazar*, 616 F.3d 497, 510-12 (D.C. Cir. 2010) (finding that it was not arbitrary and capricious for the Bureau of Land

Management ("BLM") to analyze ozone concentrations using an older methodology while at the same time developing a new methodology for analyzing such impacts). When an agency develops a new methodology, it should have the discretion as to when to deploy that new methodology. The Lease Sale 257 process was already far along when BOEM developed this new methodology—indeed, comment periods by the states on coastal consistency and the Governors under OCSLA had long since passed, and a record of decision had previously issued and then been withdrawn. *See* Defs.' Mem. at 7-8. Given how far along BOEM was in its process, it was not unreasonable for the agency to use the existing methodology rather than delay its decision regarding the lease sale. *See Theodore Roosevelt Cons. P'Ship*, 616 F.3d at 510 (upholding the agency's reliance on an older model when applying a new one "would have delayed the [project] schedule").

First, it is undisputed that BOEM still lacks the precise information on foreign markets necessary to estimate the change in GHG emissions corresponding to a reduction in foreign consumption using the methodology employed to quantify emissions for Lease Sale 257. *See* Pls.' Opp. at 11. Insofar as Plaintiffs insist that BOEM did have sufficient information to model GHG emissions associated foreign market trends, *see* Pls.' Opp. at 11-12, these arguments are based on the Stockholm Study and are fully addressed in Defendant's opening brief. *See* Defs.' Mot. for Summ. J. and Mem. in Supp. and Opp. to Pls.' Mot. for Summ. J. ("Defs.' Mem.") at 22-24, ECF No. 45. The Stockholm Study, in short, is not persuasive because it relied on unrealistic assumptions about alternative fuel sources and did not evaluate energy substitutes across all sectors of the economy. *See id.* Plaintiffs attempt to bolster their arguments by reference to the Lease Sale 258 DEIS, where BOEM stated it "agrees with the primary contention" of the Stockholm Study, *see* Pls.' Opp. at 12 (quoting LS 258 DEIS at 12), but that

statement in the DEIS is taken out of context. As the DEIS explains, BOEM agrees with the contention that "a reduction in domestic production leads to less foreign consumption and subsequently lower foreign emissions." LS 258 DEIS at 47. The proposition that a reduction in domestic production would result in a reduction in foreign consumption has never been in dispute—BOEM recognized in the Wolvovsky and Anderson Report and the Programmatic EIS that such a reduction was likely to occur. AR0014220; AR0014381. This finding was also discussed in the Lease Sale 257 DNA Addendum. AR0029964-67. But BOEM simply did not have the data needed to quantify the change in GHG emissions that would result from such a reduction in demand for Lease Sale 257. And it was only able to quantify that reduction estimate for Lease Sale 258, again, because it chose to adopt a different, reasonable approach, using a generic emissions factor and making general assumptions about foreign markets in order to bridge identified data gaps. LS 258 DEIS at 43, 46.

Second, while BOEM developed a new methodology for its analysis of Lease Sale 258, that analysis is still in draft form. BOEM anticipates comments on the draft EIS for Lease Sale 258, including with respect to its new methodology. BOEM explicitly cautioned that it expects to refine the analysis following consideration of those comments:

> Given that this analysis is the first of its kind for BOEM and offshore oil and gas leasing, BOEM expects to make refinements to its analysis for the Final EIS for LS 258 based on comments received on this draft, and future refinements or decisions regarding its relevance for other upcoming [Outer Continental Shelf] lease sales will be likely in the future.

LS 258 DEIS at 46. Thus, it is far too early for anyone to conclude—as Plaintiffs appear to—that the new methodology BOEM has developed for Lease Sale 258 is the only acceptable standard for foreign markets emission analysis. That is especially so given BOEM's efforts to develop a new quantitative methodology for Lease Sale 258 in light of the decisions emanating

from the Ninth Circuit in *Liberty* and *Willow*, *see* LS 258 DEIS at 42, neither of which are binding here.

C. BOEM's Use of the Addendum, Which Further Explained Why the Modeling Plaintiffs Demand Was Not Feasible, Was Consistent with NEPA

BOEM's use of the DNA Addendum to explain why it could not quantify the change in GHG emissions associated with a reduction in foreign demand for oil was not procedurally improper. Plaintiffs do not dispute that, pursuant to the Department of the Interior's NEPA regulations, a DNA is an appropriate mechanism for an agency to determine whether its existing analysis is sufficient. 43 C.F.R. § 46.120(c). And while they rely on *Great Basin Resource Watch v. U.S. Bureau of Land Management*, 844 F.3d 1095 (9th Cir. 2016), for the proposition that an agency may not use a non-NEPA document to bolster its analysis in an EIS, BOEM did not use the DNA Addendum for that purpose. Instead, the purpose of the DNA Addendum was to assess whether any significant information had come to light since the prior EISs had been prepared that would warrant the preparation of a supplemental EIS. AR0029803. BOEM, moreover, was not required to circulate a draft of the DNA Addendum to the public for review before it was finalized. *See* 43 C.F.R. § 46.120. Although an agency may choose to circulate a draft DNA for public comment, as BLM did in *Friends of Animals v. U.S. Bureau of Land Management*, 232 F. Supp. 3d 53, 59 (D.D.C. 2017), there is no requirement to do so.

Plaintiffs also assert that the DNA Addendum is substantively flawed for the reasons expressed in the *Liberty* and *Willow* cases, but these arguments similarly fail. *See* Pls.' Opp. at 16-18. First, they insist again that BOEM acted arbitrarily or capriciously because it could have modeled GHG emissions from foreign consumption despite BOEM lacking the data it explained it needed. This argument is wrong for the reasons discussed above, *see* sections I.A.-B., *supra*; *see also* Defs.' Mem. at 15-18. Second, Plaintiffs rely on *Willow* for the broad proposition that

an agency may not deem an error in its NEPA analysis insignificant merely because the associated GHG emissions would have a negligible impact on overall global GHG emissions. The argument misses the mark because there was no error here. But it is also significant that the DNA Addendum is not itself a NEPA analysis, but rather is a tool for determining whether a supplemental EIS is required pursuant to 40 C.F.R. § 1502.9(d). *Willow* establishes no standards for assessing the adequacy of a DNA, and thus does not undermine the conclusion in the DNA that a quantitative analysis of foreign consumption trends would not meaningfully change BOEM's analysis with respect to Lease Sale 257.

Plaintiffs also argue that it does not matter whether the agency's explanation for not modeling foreign emissions appeared in a response to comments, as in *Willow*, or in a DNA Addendum, as occurred here. Pls.' Opp. at 17. But that is not Defendants' argument. The point is that the substance of the explanation matters, and here, BOEM provided its explanation in a seven-page DNA Addendum, and in a much more robust fashion than was provided in *Willow*. *See Willow*, 2021 WL 3667986, at *12 n.126 (referring to the explanation provided by BLM). Finally, Plaintiffs also argue that the qualitative analysis regarding the reduction in foreign consumption and potential impact on GHG emissions was not sufficient. *See* Pls. Reply at 17. But the qualitative analysis distinguishes this case from *Liberty* and *Willow*, in which no such analysis was provided.

* * *

Defendants have not arbitrarily and capriciously failed to analyze GHG emissions associated with Lease Sale 257. BOEM analyzed the lifecycle GHG emissions, disclosed the assumptions in its analysis, and provided a qualitative analysis where it could not provide a quantitative analysis. NEPA requires no more.

II. BOEM Was Not Required to Prepare a Supplemental NEPA Analysis

BOEM was not required to prepare a supplemental NEPA analysis addressing new information that came to light after BOEM prepared EISs supporting the lease sale. A supplemental NEPA analysis need only be prepared when the agency makes substantial changes to its proposed action or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1) (2019). An agency "need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh*, 490 U.S. at 373. "Only changes 'that cause effects which are significantly different from those already studied require supplemental consideration.'" *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 117 (D.D.C. 2016) (quoting *Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000)).

A. Climate Change Information

Plaintiffs have presented no significant new information bearing on the potential impacts of the lease sale on climate change. Contrary to their assertion, the studies and reports attached to their motion do not paint "a seriously different picture of the environmental landscape." Pls.' Opp. at 20 (quoting *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004)). They again point to two studies referenced in the DNA—the 2021 Intergovernmental Panel on Climate Change ("IPCC") Report and the Merrill study. Pls.' Opp. at 20. As already demonstrated, those studies discussed climate change, but they did not significantly affect BOEM's analysis of the potential impacts of the 2017-2022 Five-Year Program on climate change. Defs.' Mem. at 31.

Contrary to Plaintiffs' assertions, Pls.' Opp. at 23, BOEM did not dismiss the information in the IPCC Report and the Merrill study. In the discussion in the DNA on climate change, BOEM stated, "[i]n August 2021, the [IPCC] unveiled its most recent assessment, the Sixth

Assessment Report . . . addressing the most up-to-date physical understanding of Earth climate system and climate change." AR0029849. Not every report requires BOEM to conduct additional NEPA analysis. *See Marsh*, 490 U.S. at 373. Further, BOEM explained that this report and other new information that it reviewed did not change its analysis of how its own action—the 2017-2022 Five Year Program—would impact climate change. AR0029849-50. Plaintiffs' criticisms of the GHG emissions analysis aside, BOEM has complied with the requirements of this Circuit to analyze the GHG emissions associated with its leasing decision as a proxy for climate change impacts. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013). The information that Plaintiffs have provided does not bear on that analysis in a manner that would require supplementation.

Further, Plaintiffs argue that BOEM ignored information about climate change, particularly fifteen studies submitted with their opening brief. *See* Pls.' Opp. at 20-21. Of these, Plaintiffs discuss one—a United Nations report entitled Emissions Gap Report 2019, ECF No. 34-23. This report discusses world GHG emissions, emissions targets set by various countries, and potential ways to reduce GHG emissions. *See generally id.* Plaintiffs do not explain how the information in this report could have been used by BOEM to analyze GHG emissions from its 2017-2022 Five-Year Program, much less show that the information in the report was so significant that a supplemental NEPA analysis was required for Lease Sale 257.

Plaintiffs argue that it is not their duty to show the existence of significant new information regarding environmental impacts, and instead it is the Defendants' burden to show that such information does not exist. *See* Pls.' Opp. at 22. But Defendants are not obligated to prove a negative, and Plaintiffs may not shift the burden of proving their case to Defendants. *See Nat'l Parks Conservation Ass'n v. Jewell*, 965 F. Supp. 2d 67, 79 (D.D.C. 2013) ("The plaintiffs

have not met their burden of showing that the new information is significant enough to require [the agency] to prepare a supplemental EIS."). Further, their assertion that they need only show "that the new information may reflect significant impact" is not consistent with the law of this Circuit. Pls.' Opp. at 22 (citing *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997)). In the D.C. Circuit, they must show that there is new information that paints "a *seriously* different picture of the environmental landscape." *Nat'l Comm. for the New River*, 373 F.3d at 1330 (citation omitted).

In sum, although Plaintiffs have submitted several reports and studies regarding climate change in support of their arguments, they have not shown that the information in those reports shows potential impacts that are "significantly different from those already studied." *Davis*, 202 F.3d at 369. Therefore, their claim that a supplemental NEPA analysis of climate change was required should be rejected.

B. Impacts of Drilling in Deepwater

Information about the impacts of drilling in deepwater also does not require a supplemental EIS. In the 2018 Supplemental EIS, BOEM analyzed a full range of exploration and production scenarios. AR0015580-92. Plaintiffs cite the Supplemental EIS for the proposition that "most exploration drilling activity is expected to occur on the continental shelf [in water up to 656 feet in depth]." AR0015585. But Plaintiffs present only part of the picture. The Supplemental EIS analyzes various exploration and drilling scenarios, and it also states that, with respect to development and production drilling, "[i]n the low production scenario, development and production activity is expected to occur fairly evenly spread between the continental shelf [up to 656 feet] and deeper water depths [up to 5,249 feet]." AR0015589.

Plaintiffs are also incorrect that BSEE's data on drilling activities shows significantly more drilling in deepwater than BOEM analyzed. The projected numbers of development and production wells in waters of varying depths provided in the Supplemental EIS, AR0015583, and DNA, AR0029808, are comparable to the numbers that Plaintiffs cite from BSEE's website. The 2018 SEIS projected up to 221 total development and production wells in deepwater from just one lease sale, AR0015583, and multiple sales are held as part of 2017-2022 Five Year Program. In comparison, BSEE's data show 54 new wells in deepwater in 2020 and 270 over the last five years. *See* Status of Gulf of Mexico Well Permits, Ex. 2.[1] Thus, the figures for deepwater wells provided by BSEE are accounted for in the 2018 SEIS.

Plaintiffs' arguments to the contrary, which focus on *the ratio* of shallow to deep water permits, *see* Pls.' Opp. at 25, are of questionable relevance; what matters here is whether the existing NEPA documents reasonably forecast the level of deepwater drilling, and they do for the reasons explained above. But Plaintiff's arguments also misinterpret the relevant data. Relying on data from the Bureau of Safety and Environmental Enforcement ("BSEE") website, they assert that in 2020 BSEE approved 464 new wells or revised new wells in deepwater, and on that basis conclude that BSEE approved "*thirteen times* the number of drilling permits in deeper water." Pls.' Opp at 25 (emphasis in original). But only 54 of those wells were actual new wells, as opposed to "revised new wells," *see id.*, and only "new wells" are representative of new drilling activity. *See* Status of Gulf of Mexico Well Permits. A new well involves the "drilling of an original wellbore hole in the seafloor," *see* BSEE Definitions, Ex. 3,[2] whereas a revised

[1] The data are available at: https://www.bsee.gov/stats-facts/offshore-information/status-of-gulf-of-mexico-well-permits (last visited Dec. 14, 2021).

[2] https://www.bsee.gov/stats-facts/offshore-information/status-of-gulf-of-mexico-well-permits/drilling-permit-definitions (last visited Dec. 14, 2021).

new well does not. A revised new well permit instead authorizes "a change to the [previously authorized] drilling of [a] new well, which may be necessary for safety purposes, such as if an operator determines it necessary to set a liner deeper in the wellbore due to results from a formation integrity test." *Id.* Thus, Plaintiffs' reliance on "revised new wells" as a proxy for new drilling activity in deep versus shallow water is inaccurate. Further, the trend towards deepwater drilling is not as clear as Plaintiffs make it appear. According to the same BSEE data Plaintiffs reference, new well permits for shallow water nearly doubled from 2020 to 2021, whereas new well permits for deep water declined by 17% (from 54 to 37 wells) during the same period. *See* Status of Gulf of Mexico Well Permits.

Finally, it is relevant that BOEM retains the authority to require additional mitigation when it approves a development plan and will conduct an additional NEPA analysis to determine whether such a plan should be approved and if additional mitigation would be appropriate. AR0029809. Defendants acknowledge that *Michigan Gambling Opposition v. Kempthorne,* 525 F.3d 23, 29 (D.C. Cir. 2008), where the court upheld the agency's finding of no significant impact based on the availability of mitigation, is not on all fours with this case because supplementation was not an issue there. Nonetheless, the holding in *Michigan Gambling Opposition* is relevant here because, if BOEM determines that a proposed plan of development would pose potential impacts that have not already been analyzed and addressed, it may "require additional mitigation measures to reduce impacts from projected activities or to disapprove the plan if impacts cannot be adequately reduced." AR0029809. Thus, no additional analysis is required at this time to address such a potential scenario.

C. Pipeline Safety and Spill Risks

No supplemental analysis of pipeline safety and spill risks was necessary. Plaintiffs acknowledge that BOEM previously analyzed the risks of leaks and spills in the prior EISs. *See*

Pls.' Opp. at 27-28; *see also* AR0008401-02 (analyzing the risks posed by damage to pipelines); AR0008598-605 (analyzing potential impacts of oil spills); AR0015601-12, 15659-60 (2018 Supplemental EIS). Their arguments that a supplemental analysis is required is based on a report issued by the U.S. Government Accountability Office ("GAO"), ECF No. 34-21. The report indicates that BSEE's regulations are outdated and recommends that BSEE promulgate new regulations. *Id.* at 2. The report also finds that "BSEE does not have a robust process to address the environmental and safety risks posed by leaving decommissioned pipelines in place on the seafloor . . . ." *Id.* But these issues are not new and were identified as far back as 2007, when BSEE previously proposed an amendment to its regulations. *Id.*

Further, the GAO report does not provide any different information regarding the frequency or size of potential oil spills. Instead, the report contains a general discussion about BSEE's efforts to work with the oil industry on leak detection technologies, updating leak detection standards, the process for decommissioning oil pipelines, and ensuring that operators meet decommissioning standards. *See generally id.* Plaintiffs claim that the report shows BOEM "underestimated the magnitude of the risk" associated with pipeline spills. Pls.' Opp. at 29. But it does not—there is no data in the report regarding the magnitude of oil spills. Therefore, Plaintiffs have not shown there is significant new information bearing on pipeline safety and spill risks and thus no supplemental EIS was required. *Nat'l Comm. for the New River*, 373 F.3d at 1330.

D. Impacts on Gulf of Mexico Bryde's Whales

There is no significant new information regarding the Gulf of Mexico Bryde's whale[3] requiring the preparation of a supplemental EIS. In their opening brief, Plaintiffs argued that the listing of the Bryde's whale as an endangered species under the Endangered Species Act ("ESA") in 2019 and its subsequent designation as a distinct species required the preparation of a supplemental EIS. *See* Pls.' Mem. in Supp. of Mot. for Summ. J. ("Pls.' Mem.") at 19-21, 41-42, ECF No. 34-1; *see also* Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde's Whale, 84 Fed. Reg. 15,446 (Apr. 15, 2019) (listing decision); Endangered and Threatened Wildlife and Plants; Technical Corrections for the Bryde's Whale (Gulf of Mexico Subspecies), 86 Fed. Reg. 47,022 (Aug. 23, 2021) (designation as a separate species). As Defendants have shown, the later designation was technical in nature and did not provide any additional information about potential impacts to the species, *see* Defs.' Mem. at 36-37, and Plaintiffs make no further arguments on this point. They do, however, argue that the issuance of the 2019 listing decision and associated biological opinion require supplementation. As discussed below, Plaintiffs' arguments lack merit.

First, as Plaintiffs now concede, BOEM correctly stated in the DNA that, with the implementation of the reasonable and prudent alternative ("RPA") in the biological opinion, the National Marine Fisheries Service ("NMFS") concluded that BOEM's planned oil and gas related activities would *not* jeopardize the continued existence of the Bryde's whale. AR0029936 (DNA); *see also* AR0037491 (biological opinion). After BOEM accepted the RPA, NMFS issued an amended incidental take statement ("ITS"), which stated that BOEM's planned

[3] As in their opening brief, Defendants refer to the Gulf of Mexico Bryde's whale (which was later designated as the Rice's whale) simply as the Bryde's whale.

activities were "not likely to jeopardize the continued existence of any ESA-listed species or result in the destruction or adverse modification of designated critical habitat, when the RPA is implemented." AR0034712. Therefore, Plaintiffs' prior assertion that NMFS has determined that BOEM's activities "will likely jeopardize" the continued existence of the Bryde's whale, Pls.' Mem. at 41, is incorrect.

Second, Plaintiffs argue that the RPA only addresses vessel strikes, not other potential impacts to the Bryde's whale. Pls.' Opp. at 31-32. Although the RPA focuses on mitigation to avoid impacts from vessel strikes, *see* AR0037488-89, the biological opinion and amended take statement also contain reasonable and prudent measures to minimize other types of impacts. AR0037492-93; AR0034712-13. These measures are mandatory. They include measures to minimize impacts from seismic surveys, geophysical surveys, marine debris, pile driving activities, and other potential stressors. AR0034713-29; *see also* AR0036978-85 (project design criteria in the biological opinion). Moreover, it is irrelevant whether Plaintiffs believe that the measures in the biological opinion, including the RPA, are sufficiently protective. NMFS has concluded that BOEM's activities are not likely to jeopardize the continued existence of the Bryde's whale. AR0037491; AR0034712. NMFS is the expert agency charged with the implementation of the ESA for the protection of listed marine mammals, and BOEM was entitled to rely on NMFS's determination, which Plaintiffs have not challenged here. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1221 (11th Cir. 2002) (finding that it was not arbitrary and capricious for the Corps to rely on the Fish and Wildlife Service's no jeopardy determination—"a matter firmly within that agency's area of expertise").

Third, Plaintiffs claim that the listing determination provided new information that the area of Bryde's whale habitat is larger than previously thought and extends into the lease area.

See Pls.' Opp. at 32. The record does not support that claim. The listing decision states that the "Bryde's whale has been consistently located over the past 25 years along a very narrow depth corridor in the Northeastern Gulf of Mexico," which is recognized as the Bryde's whale biologically important area ("BIA"). 84 Fed. Reg. at 15,473. This area is shown in the biological opinion. AR0037057. As previously explained, this area is largely excluded from the lease sale because the same area is subject to a congressional moratorium on leasing, pursuant to the Gulf of Mexico Energy Security Act ("GOMESA"). AR0029936; *see also* Defs.' Mem. at 35-36. There are no parcels in the lease sale in the areas where the Bryde's whale is known to inhabit. AR0029936; *see also* AR0029789 (excluding areas not available for leasing under the GOMESA); AR0034754 (showing Bryde's whale core area).

Finally, Plaintiffs incorrectly argue that BOEM was required to prepare a supplemental EIS because, even if BOEM's activities will not cause jeopardy, they may still cause significant impacts to the Bryde's whale. *See* Pls.' Opp. at 33-34. The cases they rely on are instances where an agency has prepared an environmental assessment ("EA") and concluded that the proposed action will have no significant impacts on the environment. *See*, *e.g.*, *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) (preliminarily rejecting the Army's reliance on an EA based on its determination that its planned training exercises would not have significant impacts on the environment, including endangered species). These cases are

inapposite because BOEM did not determine that its proposed action would not have significant impacts; it instead prepared three EISs analyzing such impacts.[4] *See* Defs.' Mem. at 35-36.

E. Fracking Discharges

Plaintiffs have not demonstrated that there is significant new information regarding fracking discharges that would require the preparation of a supplemental EIS. They again point to a report prepared by the Center for Biological Diversity ("CBD"), *see* Pls.' Opp. at 34, but they fail to demonstrate that it contains significant new information about potential environmental impacts. The impacts of discharges from drilling activities, including hydraulic fracturing, were analyzed in the Multisale EIS and 2018 Supplemental EIS. AR0008298, 8325-43, 8404-05 (Multisale EIS); AR0015594-602, 15610-12, 15684-88 (2018 Supplemental EIS). The CBD report discusses drilling activities over the past ten years, the chemical nature of the fracking fluids, the fracking process, and potential environmental and health impacts. *See* ECF No. 34-31 at 2-6. While some of this information may be new, the information in the report does not show that the environment will be affected "in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374.

Similarly, although an industry report submitted by Plaintiffs, *see* ECF No. 34-39, discusses the discharges from oil and gas wells, it does not show that there are significant new environmental impacts that were not already analyzed. The report they cite was an interim report, and the final report was released on September 23, 2021. *See* Final Report on the Joint

[4] Although BOEM analyzed the impacts to the Bryde's whale in an EIS and therefore is not defending a finding of no significant impact, Defendants note that BOEM found in that analysis that impacts to protected marine mammal species, including the Bryde's whale, would be negligible to moderate even before the implementation of terms and conditions and the reasonable and prudent alternative measures from the biological opinion which further reduce impacts. AR0015741-45 (2018 SEIS).

Industry Project Study of Well Treatment, Completion, and Workover Effluents, Ex. 4. The cover letter summarizing the report states that Treatment, Completion, and Workover ("TCW") "discharges were brief in duration and small in volume" and "the total volume of TCW discharges during 2019-2020 amounted to 0.01% of the volume of produced water discharges." *Id.* at 1. The report also concluded, "Considering the brief duration and small volume of TCW discharges, this suggests that TCW discharges are not likely to pose a greater environmental risk that produced water discharges." *Id.* at 2. Such TCW discharges are analyzed in the Multisale EIS. AR00008336-38, 8572-78. In short, the report does not contain new information about environmental impacts that is significantly different from the impacts that were already analyzed.

III. If the Court Finds a Legal Error, It Should Permit the Parties to Submit Briefs Regarding the Appropriate Remedy

As is typical in challenges to agency action, if the Court finds that the agency committed a statutory violation in reaching its decision regarding Lease Sale 257, it should allow the parties an opportunity to submit briefs regarding the appropriate remedy. Plaintiffs argue that the Court should forgo a remedy phase because they will be prejudiced if the Court does not rule before any leases issued as a result of Lease Sale 257 become effective. *See* Pls.' Opp. at 47-49. As Defendants informed the Court last week, because the lease sale did not occur until November 17, 2021, any leases issued as a result of the lease sale will not become effective until February 1, 2021. *See* Second Decl. of Bernadette S. Thomas ¶ 9, ECF No. 58-1. Therefore, there is still time for the Court to issue a merits ruling and for the parties to provide remedy briefing, if necessary, prior to February 1, 2022. Moreover, even if the Court does not issue a ruling until after February 1, 2022, the Court may issue an appropriate remedy, up to and including vacatur of BOEM's leasing decision and any leases that issued as a result of the lease sale. *See WildEarth Guardians*, 368 F. Supp. 3d at 84-85 (setting forth the standards for vacatur).

CONCLUSION

For the reasons set forth above and in Defendants' opening brief, summary judgment should be granted to Defendants on all claims.

Respectfully submitted this 16th day of December, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2021, I filed the above pleading with the Court's CM/ECF system, which provided notice of this filing by e-mail to all counsel of record.

/s/ *Luther L. Hajek*
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