ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-5036 & 22-5037

IN THE

United States Court of Appeals for the District of Columbia Circuit

FRIENDS OF THE EARTH, *et al.*,

Plaintiffs-Appellees,

v.

DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, *et al.*,

Defendants-Appellees,

AMERICAN PETROLEUM INSTITUTE and STATE OF LOUISIANA,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-02317-RC
District Judge Rudolph Contreras

BRIEF FOR APPELLANT AMERICAN PETROLEUM INSTITUTE

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June 6, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

1. The following were parties in the District Court:

a. Plaintiffs-Appellees: Friends of the Earth; Healthy Gulf; Sierra Club; and Center for Biological Diversity.

c. Defendants-Appellees: Debra Haaland, in her official capacity as Secretary of the Interior; Laura Daniel-Davis, in her official capacity as Assistant Secretary of the Interior for Land and Minerals Management; U.S. Department of Interior; and Bureau of Ocean Energy Management.

c. Intervenor-Defendants-Appellants: American Petroleum Institute and State of Louisiana.

d. Amici Curiae: Chevron U.S.A. Inc. and Representatives Alan Lowenthal, Raúl Grijalva, and Jared Huffman.

2. The American Petroleum Institute (API) is a not-for-profit corporation that is the primary national trade association for the oil and gas industry, representing more than 600 companies involved in all aspects of that industry, including the exploration, production, shipping, transportation, and refining of crude oil. API has no parent corporation, and no corporations hold any stock in API.

B. RULINGS UNDER REVIEW

API appeals the District Court's January 27, 2022 order vacating the Record of Decision for Interior's Lease Sale 257 and actions taken in reliance on it. *Friends of the Earth v. Haaland*, __ F. Supp. 3d __, 2022 WL 254526 (D.D.C. Jan. 27, 2022) (Contreras, J.).

C. RELATED CASES

Counsel is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C). However, *Louisiana v. Biden*, No. 2:21-cv-00778-TAD-KK (W.D. La. Mar. 24, 2021), involves the same Lease Sale 257 at issue in this appeal and *American Petroleum Institute v. U.S. Department of Interior*, No. 2:21-cv-02506-TAD-KK (W.D. La. Aug. 16, 2021) involves a challenge to a *de facto* moratorium on offshore leasing.

/s/ Catherine E. Stetson
Catherine E. Stetson

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GLOSSARY

APA:	Administrative Procedure Act
API:	American Petroleum Institute
EIS:	Environmental Impact Statement
FERC:	Federal Energy Regulatory Commission
Interior:	U.S. Department of the Interior
NEPA:	National Environmental Policy Act
OCS:	Outer Continental Shelf
OCSLA:	Outer Continental Shelf Lands Act

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BRIEF FOR APPELLANT AMERICAN PETROLEUM INSTITUTE

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331. The District Court entered judgment on January 27, 2022. JA__-__ [Order]. The American Petroleum Institute timely appealed on February 8, 2022. JA__ [API

Notice of Appeal]. This Court has jurisdiction under 28 U.S.C. § 1291. *Infra* pp. 15-19.

INTRODUCTION

In November 2021, the Department of Interior held Lease Sale 257, a statutorily mandated bidding process through which the agency issues oil and gas leases for acreage on the Outer Continental Shelf. Thirty-three companies bid $198 million on 1.7 million acres in Gulf of Mexico waters. The companies had spent years preparing with teams of experts and spent millions of dollars to acquire and process seismic data. They did all of this to develop highly confidential valuations on the acreage available for lease—valuations that became public after the sale.

Before moving forward with Lease Sale 257, Interior likewise spent years studying and predicting how the sale would affect the Nation and the world. The agency conducted a comprehensive environmental analysis. It used complex market simulations to predict how the lease sale would affect American energy emissions. It accounted for variables in four market sectors and predicted how the lease sale would impact consumption abroad.

The District Court nonetheless vacated Lease Sale 257, finding that Interior's thorough environmental analysis was not thorough enough. The National Environmental Policy Act (NEPA), the District Court believed, required

Interior to calculate how the sale—or lack of sale—might affect downstream greenhouse emissions across the globe.

The District Court's holding is contrary to this Court's cases. It also asks too much. Any downstream emissions are years away, at best. The leases bid on last November do not authorize extraction, production, or development of oil or gas. Rather, they grant lessees a right to ask Interior for permission to *search* for oil and gas. So, at this point, Interior does not know how much—if any—oil or gas the sale will yield, when that oil and gas might be discovered, or where it might be extracted.

That is just the beginning. Even if Interior knew all of that, reliably predicting how Lease Sale 257 would affect any given country's emissions requires Interior to predict how much oil that country would use, how the use of that oil would affect the use of other energy sources, and how those other energy sources will themselves impact emissions. Interior's analysis took into account American emissions, using its extensive information about the American energy market. But the District Court's order effectively requires Interior to do that analysis for *every country on Earth*. It does so even though this Court has already recognized that the "many uncertainties in modeling" the "dynamics of all [foreign] energy markets" renders that kind of analysis too "speculative" to be useful. *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 202 (D.C. Cir. 2017)

(*Flex*). And even if Interior had performed that speculative analysis, it could not do anything with it, anyway. Interior is statutorily barred from forgoing a lease sale based on global environmental impacts. *See Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 485 (D.C. Cir. 2009) (*CBD*). So even if Interior compiled all the data and analysis that Plaintiffs ask for, it would be substantively useless.

Worst of all, the District Court *vacated* Lease Sale 257 rather than merely remanding. Interior has shown it *can* perform the analysis the District Court demanded; although it produces predictions too speculative to be useful, Interior nonetheless drafted the analysis Plaintiffs sought for Lease Sale 258. And vacatur means that the Lease Sale 257 acreage will need to be re-auctioned with *new* bids—but with every participant knowing the others' valuations, the statutorily-mandated fair sealed-bidding process will be impossible.

The Court should reverse.

ISSUES PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction over API's appeal.

2. Whether Plaintiffs' NEPA claims are ripe where Interior has reserved the right to forbid any activities under leases issued as part of Lease Sale 257 until the lessee submits and Interior approves plans for site-specific operations.

3. Whether Interior reasonably analyzed the foreign downstream emission impacts of Lease Sale 257.

4. Whether the District Court abused its discretion in vacating Interior's Record of Decision where vacatur would lead to Lease Sale 257's bids being thrown out and prevent a fair and competitive sealed-bid auction for the acreage auctioned at Lease Sale 257.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in the Addendum.

STATEMENT OF THE CASE

The Outer Continental Shelf Land Act. In 1978, Congress amended the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. §§ 1301-1356, to "expedite exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." *Id.* § 1802(1). Congress directed Interior to "make [OCS] resources available to meet the Nation's energy needs as rapidly as possible," *id.* § 1802(2)(A), through "orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs," *id.* § 1332(3).

OCSLA leasing involves a four-step process that is "pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981) (per curiam). First, Interior develops a "five-year program," which is a schedule of proposed OCS oil-and-gas lease sales over a five-year period. 43 U.S.C. § 1344. Next is the lease sale—the step at issue in this case—which must be done by "sealed bid." 43 U.S.C. § 1337(a)(1). Leases are awarded to the "highest responsible qualified bidder," *id.*, but "[a] lessee does not . . . acquire an immediate or absolute right to explore for, develop, or produce oil or gas" as a result of being awarded a lease. *Secretary of Interior v. California*, 464 U.S. 312, 317 (1984).

At the third step, the exploration phase, "Interior reviews and determines whether to approve the lessees' more extensive exploration plans." *CBD*, 563 F.3d at 473. Interior "shall disapprove such plan if [it] determines that (A) any proposed activity under such plan would result in" serious harm or damage to life, including fish or other aquatic life, to property, to any mineral, to the national security or defense, or to the marine, coastal, or human environment, "and (B) such proposed activity cannot be modified to avoid such condition." 43 U.S.C. § 1340(c); *see also id.* § 1334(a)(2)(A)(i).

Finally, at the development-and-production stage, Interior, along with the relevant state and local governments, reviews an additional and more-detailed plan from the lessee. *Id.* § 1351. Interior "shall disapprove a plan" if it determines that "implementation of the plan would probably cause serious harm or damage to life . . . , to property, to any mineral deposits . . . , to the national security or defense, or to the marine, coastal or human environments." *Id.* § 1351(h)(1)(D)(i).

Given the many steps between the five-year plan and actual drilling, Interior may "conduct a tiered approach to preparing" the environmental review NEPA requires. *CBD*, 563 F.3d at 474. That is, Interior may "issue a broader EIS at the earlier . . . stage[s] of a program, and issue subsequent, more detailed environmental impact statements at the program's later stages." *Id.*

The 2017-2022 Five-Year Lease Plan and Lease Sale 257. For its 2017-2022 Five-Year Lease Plan, Interior prepared a "Programmatic Environmental Impact Statement." JA__ [AR14242]. The Programmatic EIS "addresses potential environmental impacts that could result if activities occur under leases issued from the schedule of lease sales for 2017-2022" and explored potential alternatives. JA__ [AR14248]; *see also* JA__ [AR8200].

Interior approved the 2017-2022 Five-Year Lease Sale Program in January 2017 after extensive analysis. *See* JA__-__ [AR15453-55]. Interior recognized that not approving a Five-Year Lease Sale Program would be the "environmentally

preferable alternative," but rejected that short-sighted approach because it would "leave[] a void in planning for national energy needs." JA__ [AR15454].

Interior next prepared a "Multisale EIS" for the Gulf of Mexico lease sales included in the Program. *See* JA__ [AR8116]. The Multisale EIS evaluates a single lease sale scenario, and Interior announced that it would use the Multisale EIS's generic findings to inform later lease sales. JA__ [AR8201]. Interior also later prepared a "Supplemental EIS" that considered additional and site-specific environmental impacts. *See* JA__, __ [AR15471, AR15479].

In November 2020, Interior published a proposed notice of sale for Lease Sale 257. Notice of Availability of the Proposed Notice of Sale for Gulf of Mexico Outer Continental Shelf Region-Wide Oil and Gas Lease Sale 257, 85 Fed. Reg. 73,508 (Nov. 18, 2020). And in January 2021, Interior issued a Record of Decision reflecting its decision to hold Lease Sale 257. JA__-__ [AR29946-60].

A week later, the President issued Executive Order 14008 calling for Interior to "pause" new oil and natural gas leases in offshore waters. Exec. Order No. 14,088, 86 Fed. Reg. 7619, 7624 (Jan. 27, 2021). A coalition of States led by Louisiana sued to compel Interior to comply with the OCSLA and hold Lease Sale 257. *See* Complaint, *Louisiana v. Biden*, No. 2:21-cv-00778 (W.D. La. Mar. 24, 2021). The Western District of Louisiana preliminarily enjoined the pause with respect to Lease Sale 257. *Louisiana v. Biden*, 543 F. Supp. 3d 388, 419 (W.D. La.

2021), *appeal docketed*, *Louisiana v. Biden*, No. 21-30505 (5th Cir. Aug. 17, 2021). Following the injunction, Interior published a new Record of Decision for Lease Sale 257. JA__-__ [AR29788-800].

Plaintiffs' Suit. Plaintiffs filed this suit the same day the Record of Decision was published, alleging that Interior's analysis of climate impacts in its EISs was insufficient under NEPA. *See* JA__-__ [Complaint]. Plaintiffs asked the District Court to vacate the Record of Decision to hold Lease Sale 257. *See* JA__-__ [Complaint 51-52]. API and Louisiana intervened in support of Interior.

While the case was pending, on November 17, 2021, Interior held Lease Sale 257, unsealing and publicly announcing the 317 submitted bids. *See Lease Sale 257*, U.S. Dep't of Interior, Bureau of Ocean Energy Mgmt., https://tinyurl.com/yc34mjw8 (last visited June 6, 2022). Thirty-three companies bid over $198 million for 308 tracts covering 1.7 million acres in Gulf of Mexico waters. *See* Press Release, U.S. Dep't of Interior, Bureau of Ocean Energy Mgmt., Gulf of Mexico Lease Sale Results Announced (Nov. 17, 2021) ("Lease Sale 257 Press Release"), https://tinyurl.com/54wknxkc.

In light of the sale, the District Court asked whether, if the Court remanded the Record of Decision and if Interior thereafter decided to move forward with Lease Sale 257 after satisfying its NEPA obligations, Interior would have to re-start with a new sealed-bidding process. JA__ [1/19/22 Minute Order]. The

District Court also asked to what extent Interior's discretion would be impacted by whether the remand was with or without vacatur. *Id.*

Interior explained that if the District Court were to remand without vacatur, Interior could issue leases to the high bidders and then suspend them while further NEPA review took place. JA__-__ [Dkt. No. 74 at 3-4]. No further bidding process would be required. JA__ [*Id.* at 4]. Interior further explained that a remand *with* vacatur "would entirely negate the sale." *Id.* Interior would not be able to "use the same bidding process even if it were to re-offer the sale at a later date, because vacatur would require any new sale to have a new bidding process." *Id.* And "if Lease Sale 257 were vacated, it is unlikely that it could be held again," because the 2017-2022 Five-Year Leasing Program will expire at the end of June 2022. *Id.* Plaintiffs agreed with Interior. JA__-__ [Dkt. No. 76].

API, for its part, explained that vacating Lease Sale 257 and throwing out the high bids would be disruptive and undermine the congressionally mandated system of sealed bids for offshore lease sales. API members explained that their bids were based on information developed over years by teams that included geoscientists, engineers, land professionals, regulatory experts, finance experts, and executives, and relied on seismic data that cost millions to acquire and process. JA__, __, __, __ [Brinkley Decl. ¶ 5(d); Gallman Second Decl. ¶ 7; DiTommaso Decl. ¶ 5(e); Gonsalves Decl. ¶ 5(e)]. API's members also explained that if Lease

Sale 257 were thrown out, their valuations would be known to their competitors before any new auction and they would irretrievably lose the time and resources they had poured into preparations for Lease Sale 257. JA__, __, __, __-__ [Brinkley Decl. ¶ 8; Gallman Second Decl. ¶ 11; DiTommaso Decl. ¶ 8; Gonsalves Decl. ¶ 8].

The District Court's Opinion and Order. The District Court held that Interior's NEPA analysis was insufficient, vacated Interior's Record of Decision and Lease Sale 257, and remanded to Interior. JA__-__ [Op. 67-68]. The District Court first held that Plaintiffs' claims were ripe, determining that the lease sale was "the point of no return for at least some environmental consequences." JA__ [Op. 22]. On the merits, the District Court held that Interior violated NEPA in failing to quantify the effect on foreign greenhouse gas emissions, and thus "fail[ing] to consider an important aspect of the problem that it had . . . identified." JA__ [Op. 31] (internal quotation marks and citation omitted).

API's appeal followed.

SUMMARY OF ARGUMENT

1. The District Court's judgment is final. By vacating the Record of Decision and Lease Sale 257, the order disposed of all claims against all parties. And although Plaintiffs have invoked this Court's administrative-remand rule, that rule generally applies when a district court expects the agency on remand to correct

its errors. That is not this case. In addition, a non-final remand order may still be appealed where the appellant would not have an opportunity to appeal the district court's ruling after remand proceedings. If API cannot appeal now, it can never appeal the District Court's vacatur. API can therefore appeal now.

2. The District Court erred in concluding that Plaintiffs' claims are ripe. NEPA claims remain unripe as long as the agency retains the authority to preclude surface-disturbing activity on the leased tracts. Interior here retains that authority. Plaintiffs' claims are therefore not fit for judicial review because Interior can continue to refine its NEPA analysis before approving surface-disturbing activities that affect the environment. The District Court noted that the leases here purportedly authorize lessees to engage in "ancillary activities," but Interior retains the authority to preclude those activities as well. The District Court's contrary holding confuses ripeness with the merits.

3. Interior did not violate NEPA for three reasons.

First, in OCSLA cases, NEPA requires Interior to consider only the hazards associated with the activities permitted in the stage at which Interior is acting. Interior here has not proceeded beyond the lease-sale phase, and global greenhouse gas emissions will occur—if at all—after discretionary federal approvals at later stages.

Second, NEPA does not require an agency to consider environmental information it cannot act on. Interior here is statutorily barred from considering global emissions in declining to hold a lease sale: OCSLA permits Interior to make leasing decisions based only on the local environmental impact of leasing activities on the OCS.

Third, in any event, Interior's emissions analysis complied with NEPA. Interior's EIS set out to calculate how leasing decisions related to the 2017-2022 Leasing Program would affect *American* emissions. The District Court held that NEPA also requires Interior to conduct the same analysis for *foreign* emissions. But Interior has insufficient data to reliably make that calculation. Interior never claimed to calculate global emissions, like the District Court believed. And while the District Court pointed to a recent working paper to suggest that the market information needed to calculate foreign emissions is purportedly available, the paper actually confirms Interior's reliability concerns.

4. Even if this Court believes that Interior violated NEPA, Lease Sale 257 should not be vacated.

First, any NEPA deficiency here is not so serious to warrant vacatur. Interior can provide any missing emissions analysis on remand. Though doubting its reliability, Interior already drafted the necessary analysis in its EIS for Lease Sale 258 before that lease sale's cancellation. Interior could also arrive at the same

decision to move forward with the lease sale after conducting that analysis. An entire five-year leasing program accounts for less than one-quarter of one percent of the global oil market, and any individual lease sale accounts for a fraction of that fraction.

Second, vacatur would cause substantial disruptive consequences. Vacatur cannot restore the status quo. Lease Sale 257 has already happened, and API members' closely guarded and highly valuable bids—which cost millions to develop—are now public. What is more, vacatur would also disrupt Interior's ability to comply with OCSLA's mandated sealed-bidding process. And while the District Court dismissed these consequences as part of doing business "in an area fraught with bureaucracy and litigation," JA__ [Op. 62], that rule would make remand without vacatur a dead letter because *every* agency case involves an area fraught with bureaucracy and litigation.

The Court should reverse.

STANDARDS OF REVIEW

1. This Court reviews a district court's ripeness determination de novo. *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 52 (D.C. Cir. 2015).

2. "When a district court reviews agency action under the APA," this Court "review[s] the district court's decision de novo." *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56, 61 (D.C. Cir. 2020). An agency action under the APA may

only be set aside when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

3. This Court reviews a district court's remedial order in an APA action for abuse of discretion. *See American Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 518-519 (D.C. Cir. 2020).

ARGUMENT

I. THE COURT HAS JURISDICTION OVER API'S APPEAL BECAUSE THE DISTRICT COURT'S VACATUR ORDER ENDS THE CASE AND IF API DOES NOT APPEAL NOW, IT NEVER CAN.

The District Court's judgment is final and appealable. 28 U.S.C. § 1291 grants the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States." In turn, "[a] 'final decision' is one 'by which a district court disassociates itself from a case.' " *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408-409 (2015) (citation omitted). This Court asks "whether the district court intended the judgment to represent the final decision in the case," *North Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1253 (D.C. Cir. 2020) (citation omitted), and whether the district court's judgment "dispose[s] of all claims against all parties." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 221 (D.C. Cir. 2011). And if an order "terminate[s] an action," rather than leaving "the core dispute unresolved," the order is final. *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 385 (D.C. Cir. 2017) (Kavanaugh, J.) (citations omitted).

The District Court's judgment is final by all these measures. By granting Plaintiffs their requested relief—vacatur of the Record of Decision and Lease Sale 257—the order resolved the "core dispute," *Limnia*, 857 F.3d at 385 (citation omitted), and "disposed of all claims against all parties," *Capitol Sprinkler*, 630 F.3d at 221. And by vacating, the district court "disassociate[d] itself" from the case, *Gelboim*, 574 U.S. at 408-409 (citation omitted), by "annul[ing]" the lease sale and "mak[ing] [it] of no authority or validity." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam) (citation omitted).

Plaintiffs have invoked this Court's administrative-remand rule, which states that a private party usually "may not appeal a district court's order remanding to an agency because it is not final." *Northern Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 857 (D.C. Cir. 2012). But Plaintiffs take the rule out of context; it generally applies when a district court expects the agency on remand to correct its errors with respect to the same agency action, such as when a district court remands without vacatur. *See Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013) (district court "concluded that there was no need to vacate"); *North Carolina Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 18 (D.C. Cir. 2008) ("The district court, relying on our precedent, declined to vacate Amendment 13C . . . ." (internal citation omitted)); *American Hawaii Cruises v. Skinner*, 893 F.2d 1400,

1402 (D.C. Cir. 1990) (per curiam) (district court declined to revoke ship's Coast Guard-issued license). But this case is different: the District Court did not order Interior to do anything with respect to Lease Sale 257—Interior could abandon the lease sale altogether and the District Court would have nothing to say about it.

To be sure, the order used the word "remand." JA__ [Op. 67]. But that merely reflects the principle that "when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995). As Judge Randolph has explained, administrative-law remedies generally fall into two categories: "vacate and remand" or "simply remand." *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (Randolph, J., concurring). When a court vacates and remands, it nullifies the agency's action. By contrast, when a court simply remands, it does not pass final judgment and instead directs the agency to remedy any issues by, for example, providing additional explanation or responding to objections. It is "[i]f a district court merely remands a case to an agency" that this Court "hold[s] that there is no final judgment to appeal." *Id.* at 1264. When a district court vacates and remands, as it did here, there is.

We could find only one case in which this Court applied the administrative-remand rule where the district court *vacated* the agency action: *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 879-881 (D.C. Cir. 2000). But there, the Court mentioned vacatur only in passing in the background section, and the appellant does not appear to have argued for finality based on vacatur. *See id.*; *see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 699 n.17 (10th Cir. 2009) (distinguishing a case applying the administrative-remand rule because the appellant "did not argue that the order below was final, but only that an exception to the finality rule applied"). Moreover, *Pueblo of Sandia* seemed to rest on the Court's assumption that the district court's order required the agency to correct its error on remand, s*ee* 231 F.3d at 881, and the District Court's order here does not.

Plaintiffs' rule also conflicts with settled intervention law. "An intervenor . . . normally has the right to appeal an adverse final judgment by a trial court." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-376 (1987). If orders remanding with and without vacatur are both not appealable, then private intervenor defendants can never appeal an adverse District Court decision. In other words, "every victory by a plaintiff in a case brought pursuant to the APA would necessarily be a non-final 'remand' order." *Richardson*, 565 F.3d at 699 (cleaned up). "Had Congress wished to allow appeal under the APA only when an

agency prevails on all claims in the district court, it could have done so explicitly." *Id.* Congress did not.

Finally, even if the Court finds that the District Court's order is not final, it should still hold that API may appeal. A non-final remand order may still be appealed where the appellant "would not have an opportunity to appeal the district court's legal ruling after the proceedings on remand." *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 331 (D.C. Cir. 1989).

That exception "is not normally available to a private party," *North Carolina Fisheries Ass'n*, 550 F.3d at 20, but "normally" is not "never." *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014) (administrative-remand rule is "not absolute"). Interior told the District Court that vacatur would prevent it from conducting Lease Sale 257 again, even with new bids, because Interior "is not legally permitted to hold any lease sales under the 2017-2022 five-year program" after June 30, 2022. JA__-__ [D. Ct. Dkt. No. 74 at 4-5]. If API cannot appeal now, it can never appeal the District Court's decision vacating Lease Sale 257. "In these unusual circumstances, treating the district court's remand order as unappealable would 'effectively preclude' [API] from ever challenging the district court's decision[]." *Long-Distance Tel. Serv.*, 751 F.3d at 633 (brackets and citations omitted). That means API can appeal now. *See Occidental Petroleum*, 873 F.2d at 331-332.

II. PLAINTIFFS' CLAIMS ARE NOT RIPE BECAUSE INTERIOR STILL HAS THE AUTHORITY TO PRECLUDE ALL ACTIVITY ON THE ACREAGE AUCTIONED IN LEASE SALE 257.

The District Court was wrong that Plaintiffs' claims are ripe. JA__-__ [Op. 11-22]. The prudential prong of the ripeness doctrine is "designed 'to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " *National Park Hosp. Ass'n v. Department of Interior*, 538 U.S. 803, 807-808 (2003) (citation omitted).

NEPA claims ripen "only once [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." *CBD*, 563 F.3d at 480 (internal quotation marks and citation omitted). A NEPA claim challenging an energy lease remains unripe as long as Interior retains "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." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphases omitted). In other words, NEPA claims ripen only when Interior relinquishes the "authority to preclude surface disturbing activities," like drilling or excavation. *Id.*; *see also Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d

43, 49 (D.C. Cir. 1999). Courts draw this line because, before initial surface-disturbing activities occur, the environment remains unharmed and plaintiffs suing to vindicate environmental injuries "suffer[] little." *Center for Sustainable Econ. v. Jewell*, 779 F.3d 588, 600 (D.C. Cir. 2015) (citation omitted). As long as the agency retains authority to prevent surface-disturbing activities at the leased site, there is no guarantee that environmental harm will ever occur. *Id.*

Plaintiffs' NEPA claims here are not ripe because Interior retains the authority to preclude lessees from engaging in activity on the acreage leased in Lease Sale 257. Interior retains preclusion authority pending the lessee's "submission of site-specific proposals." *Peterson*, 717 F.2d at 1415. OCSLA bars a lessee from drilling, developing, or producing oil before it submits to Interior a site-specific "exploration plan" or "development and production plan" and Interior "approv[es]" that plan. 43 U.S.C. §§ 1340 & 1351(a)(1). And under Interior's regulations, a lessee is barred from "conduct[ing] *any* activities" on leased land without further Interior approval. 30 C.F.R. § 550.201 (emphasis added). In addition, Interior retains authority to prevent the lessee's proposed activities if it finds the environmental consequences "unacceptable." *Peterson*, 717 F.2d at 1415. Interior may reject any proposed development plan if it decides that "the plan would probably cause serious harm . . . to the [Continental Shelf's] marine, coastal or human environments." 43 U.S.C. § 1351(h)(1)(D). All told, the lease

by itself does little beyond give a lessee the "opportunity to try to obtain exploration and development rights." *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 620 (2000) (emphasis omitted).

In a similar case, this Court held that a NEPA claim was not ripe even after Interior issued an OCSLA lease because Interior retained the authority to preclude the lessees from conducting activities on the leased land. *Fisheries Survival Fund v. Haaland*, 858 F. App'x 371, 372 (D.C. Cir. 2021) (per curiam). In *Fisheries*, Interior issued an OCSLA windfarm lease to an energy company. *Id.* at 371-372. Before Interior approved any development or production plans, several environmental groups sued Interior, alleging that it violated NEPA. *Id.* This Court held the claim unripe because, first, Interior could preclude activity on the leased land before the company submitted a proposed construction plan, and second, Interior could reject any plan the energy company submitted to avoid environmental harm. *Id.* The same is true here.

The District Court thought *Fisheries* was distinguishable. JA__-__ [Op. 20-21]. The court noted that the lease in *Fisheries* "did not 'authorize any activity within the leased area,' " while the lease here grants drilling and development rights "subject to" OCSLA and the "regulations promulgated pursuant thereto." *Id.* (quoting *Fisheries*, 858 F. App'x at 372); Form BOEM-2005, *supra*, at Sec. 1. But although the two leases are not syntactically identical, they are functionally the

same. The lease here nominally promises exclusive drilling and development rights, but the rights it grants are "subject to" OCSLA and its regulations, and OCSLA and its regulations bar a lessee from drilling, developing, or producing oil without site-specific Interior approval. 43 U.S.C. § 1351(a)(1). Just as the *Fisheries* lease barred "any activity within the leased area," *Fisheries*, 858 F. App'x at 372 (citation omitted), OCSLA regulations bar "conduct[ing] any activities" on leased land without Interior's permission. 30 C.F.R. § 550.201. Ripeness turns on whether an agency retains the authority to preclude environmentally damaging activities, not the form the preclusion takes.

The District Court reasoned that the lease sale was an "irretrievable commitment of resources" because under OCSLA, Interior must wait five years before unilaterally cancelling an issued lease and must pay the lessee compensation if it does. JA__[Op. 21]. But because the lease itself does not permit environmental damage, any perceived roadblock to cancelling the lease is irrelevant to ripeness. Whether Interior cancels the lease or lets it run to conclusion, the environment will remain unaffected absent further approval.

The District Court also held that Plaintiffs' claims were ripe because, by issuing leases, Interior purportedly authorizes lessees to engage in "ancillary activities" that themselves "impact the environment," such as creating water wells and conducting geographical surveys. JA__-__ [Op. 16-17]. But these ancillary

activities have nothing to do with Interior's allegedly faulty emissions calculations. And even if ancillary surveying is sufficiently "surface-disturbing," Interior retains the authority to preclude this activity as well. The lease subjects the lessee's right to conduct ancillary activities on compliance with OCSLA's notice-and-approval process. U.S. Dep't of Interior, Bureau of Ocean Energy Mgmt., Form BOEM-2005, Oil and Gas Lease of Submerged Lands Under the OCS Lands Act, at Sec. 9 (Feb. 2017) ("Form BOEM-2005"). That process requires a lessee to notify Interior before engaging in ancillary activity, and allows Interior to bar the activity if it causes "harm or damage to the human, marine, or coastal environment." 30 C.F.R. §§ 550.208, 550.209, 550.202(e). Even if the notice-and-approval process is less comprehensive than an EIS review, JA__-__ [Op. 17-19], ripeness hinges on whether an agency retains the authority to preclude. The District Court's contrary finding confuses ripeness—whether Interior's action is fit for judicial review—with the merits—whether Interior's process complies with NEPA.

This Court's ripeness cases do not exempt Interior from conducting required NEPA analysis at earlier OCSLA phases. Once a suit ripens, plaintiffs can bring a claim challenging the NEPA analysis that Interior conducted "at an earlier stage." *Wyoming Outdoor Council*, 165 F.3d at 49. But until Interior relinquishes preclusion authority, it can continue to revise, correct, and modify its NEPA

analysis. It is therefore "not logical" to find Plaintiffs' claims ripe because Interior's ability to preclude and revise means that litigation "might ultimately prove unnecessary." *Id.* And these principles apply with particular force here, where Plaintiffs challenge only Interior's emissions analysis, not any near-term environmental effects.

Finally, the District Court reasoned that Plaintiffs' claims are ripe because "the lease sale stage is the last point at which [Interior] is definitively required to conduct an EIS for leases in the Gulf of Mexico." JA__ [Op. 18]. That again confuses ripeness with the merits. And it is not necessarily true. Although Interior's Department Manual states that the agency believes it need not publish an EIS before approving a production plan in the Gulf of Mexico, that manual does not exempt Interior from complying with NEPA. So if Interior later decides to approve an oil production plan for acreage auctioned in Lease Sale 257, and if that approval occurs without adequate NEPA review, then Plaintiffs can make the same NEPA arguments they make now plus any production-plan-specific NEPA arguments they might have. And if Interior instead undertakes additional environmental reviews before approving drilling, then the court will have the benefit of an administrative record containing agency reasoning that more concretely relates to the actions causing the Plaintiffs' harms. Either way,

uncertainty over whether Interior will write a supplemental EIS in the future does not make Plaintiffs' premature claims ripe today.

III. INTERIOR SATISFIED ITS NEPA OBLIGATIONS EVEN THOUGH IT DID NOT QUANTIFY FOREIGN EMISSIONS FROM LEASE SALE 257.

Even if Plaintiffs' NEPA claims are ripe, Interior did not violate NEPA. NEPA does not require an agency's EIS to analyze every effect for which an agency action may "conceivably be a but-for cause." *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (*Freeport*). Rather, it merely requires an agency to analyze the effects that have a "reasonably close causal relationship" with agency action. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (citation omitted).

The District Court held that Interior violated NEPA by failing to quantify how Lease Sale 257 would affect foreign downstream greenhouse-gas emissions. JA__ [Op. 27-34]. That holding should be reversed because (1) NEPA does not require Interior to analyze downstream emissions at the OCSLA lease sale stage, (2) Interior lacks statutory authority to forego a lease sale because of global emissions, and (3) even if NEPA required Interior to attempt a global emissions analysis, Interior satisfied the statute by quantifying American emissions and disclosing its lack of adequate data on global emissions.

A. NEPA does not require Interior to quantify global emissions in its lease sale EIS because emissions are not caused by any of the activities permitted at the lease-sale phase.

In OCSLA cases, NEPA requires Interior to consider only the "hazards associated with the . . . activities permitted" in the stage at which Interior is acting. *North Slope Borough v. Andrus*, 642 F.2d 589, 606 (D.C. Cir. 1980). Otherwise NEPA plaintiffs could subvert OCSLA's multi-tiered approach by requiring Interior to "divert too many of its resources at too early a stage in the decision-making process," *CBD*, 563 F.3d at 480-481, and forcing precisely the "premature litigation" that Congress sought to prevent. *Id.* at 473. When plaintiffs challenge a lease sale, "[t]he particular stage that is relevant . . . is the lease sale stage. Not the exploration stage. Not the production stage. Not any other drilling stage." *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regul., & Enf't*, 871 F. Supp. 2d 1312, 1338 (S.D. Ala. 2012).

Interior here has not proceeded beyond the lease-sale phase. So NEPA merely requires it to consider the "hazards associated with the limited preliminary activities permitted . . . during the lease sale phase." *Andrus*, 642 F.2d at 606. But the potential changes in global emissions the District Court faulted are not a "hazard[] associated with" the activities permitted at the lease sale phase. *See* JA__-__ [Op. 27-28]. Global emissions result from activities at later stages in the OCSLA process.

In *Andrus*, this Court held that NEPA does not require Interior's lease-sale EIS to analyze the environmental dangers caused by activities at later OCSLA phases. Plaintiffs alleged that Interior violated NEPA because its lease-sale EIS insufficiently analyzed potential oil spills. *See Andrus*, 642 F.2d at 591, 597-598, 605-606. Heeding the "multistage approach mandated by Congress," the Court held that Interior's lease-sale EIS need not consider oil spills. *Id.* at 605-606. Because none of the surveying activities at the lease sale phase could cause oil spills, oil spills were "removed from categorical relevance" at the lease-sale phase. *Id.* at 605. The same logic applies here: global emissions cannot result from the activities permitted at the lease-sale phase. The emissions are therefore categorically irrelevant. *Id.* at 605-606.

Although the District Court muddled the OCSLA ripeness and NEPA merits issues, the two are distinct. In OCSLA cases, ripeness has nothing to do with possibility of downstream emissions—rather, it turns on whether "surface-disturbing" activities can commence without further Interior approval. *Wyoming Outdoor*, 165 F.3d at 49 (citation omitted). Even if this Court believes that an OCSLA lease permits surface-disturbing activities, all agree that the lease-sale process does not by itself cause downstream emissions. Those emissions will only occur after extraction, development, and production of oil—all of which require further approval.

OCSLA's multistage approach renders inapplicable *Liberty* and *Willow*—the two cases on which the District Court's holding heavily relied. *See Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) (*Liberty*); *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739 (D. Alaska 2021) (*Willow*). Indeed, neither case involved a NEPA challenge to a Lease Sale EIS. *Liberty* involved a challenge at the different—and much later—development phase, with the Ninth Circuit holding that NEPA required Interior to analyze global emissions before allowing drilling, because such emissions were "a 'reasonably foreseeable' indirect effect of *drilling at Liberty*." 982 F.3d at 731, 738 (emphasis added). And *Willow* is even further afield; it involved an agency's decision to issue a permit under the Clean Water Act, a statute that shares neither OCSLA's multi-tier approach nor its statutory command to "expeditiously" excavate oil and gas. *See* 555 F. Supp. 3d at 753, 784. What is more, even the *Willow* court noted in that separate legal context the critical "distinction between the leasing stage and exploration, development, and production stages[,]" *id.* at 761, explaining that "for the Willow Project, the leasing stage . . . is long past." *Id.* at 757 n.73.

The District Court thought that *Andrus* was inapplicable because, unlike the risk of oil spills, the possibility of global emissions would be just as speculative at later stages. JA__-__ [Op. 27-28]. Not necessarily. Right now, Interior does not

know precisely how much oil will be extracted from the blocks in Lease Sale 257. Nor does it know how lessees specifically plan to explore, drill for, and excavate that oil. So it cannot know how much—if any—oil this lease sale will yield. And if it cannot know how many barrels will be produced, it cannot be certain about how many barrels will be consumed or how that oil will affect global prices and demand. All of that will become clearer at *later* stages in the OCSLA process.

Finally, relying on *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Southeast Market*), the District Court reasoned that "agencies may sometimes need to make educated assumptions about an uncertain future," and thus Interior "should have . . . given a quantitative estimate of the downstream greenhouse emissions." JA__ [Op. 34] (quoting *Southeast Market*, 867 F.3d at 1373-74). But in *Southeast Market*, the Federal Energy Regulatory Commission (FERC) immediately greenlit the construction of three pipelines. *Id.* at 1364. That is nothing like the phased, multi-step process Interior undertakes for OCSLA exploration and production, and the District Court erred in holding that emissions forecasting is required at the lease-sale phase.

B. NEPA does not require Interior to quantify global emissions because OCSLA bars Interior from foregoing a lease sale based on them, and NEPA does not require an agency to consider information on which it cannot act.

NEPA does not require an agency to "gather or consider environmental information if it has no statutory authority to act on that information." *Southeast*

Market, 867 F.3d at 1372 (emphasis omitted). NEPA is a procedural statute only. It does not mandate any substantive result and it is governed by a "rule of reason," meaning that an agency does not have to do analysis that would serve "no purpose in light of NEPA's regulatory scheme as a whole." *Public Citizen*, 541 U.S. at 767-768 (internal quotation marks omitted).

Interior lacks the statutory authority to consider global emissions when deciding to forego an OCS lease sale. Under OCSLA, when Interior makes leasing decisions, it "shall" consider the value of resources "contained in the outer Continental Shelf," as well as "the potential impact of oil and gas exploration on other resource values of the [Shelf] and the [Shelf's] marine, coastal, and human environments." 43 U.S.C. § 1344(a)(1). OCSLA likewise instructs Interior to consider "the geographical, geological, and ecological characteristics of [the Shelf]," "the relative environmental sensitivity and marine productivity of . . . the outer Continental Shelf," and "environmental and predictive information for different areas of the outer Continental Shelf." *Id.* § 1344(a)(2)(A), (G)-(H).

As this Court put it, OCSLA permits Interior to make leasing decisions based only on "the *local* environmental impact of leasing activities in the" OCS, rather than the *global* impact of drilling, excavation, and consumption. *CBD*, 563 F.3d at 485 (emphasis added). Thus, when making a leasing decision, Interior is "not authorize[d] . . . to consider" the environmental impact of oil consumption on

"the world at large," or the "derivative impact of global fossil fuel consumption." *Id.* Just so here.

For its part, the District Court acknowledged that OCSLA does not require Interior to consider global emissions. JA__ [Op. 5]. But the court held that Interior should have quantified such emissions anyway, reasoning that NEPA "authorize[s] the agency to make decisions based on environmental factors not expressly identified in the agency's underlying statute." JA__ [Op. 6] (citation omitted).

That logic misunderstands OCSLA. OCSLA does not simply render global environmental impact an optional consideration. Rather, by affirmatively instructing Interior to consider *only* local environmental harms, OCSLA takes global considerations off the table entirely in deciding whether to forego a lease sale. The statute "does not authorize . . . Interior to consider the environmental impact of post-exploration activities such as consuming fossil fuels on either the world at large, or the derivative impact of global fossil fuel consumption." *CBD*, 563 F.3d at 485. And because Interior is statutorily barred from considering global emissions, Interior would violate the APA if it forwent a lease sale because of those emissions. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily and capriciously when it considers a factor Congress made irrelevant). The District Court's holding

would therefore require Interior to "generate paperwork" it cannot use in its final decision. *Public Citizen*, 541 U.S. at 768-769 (citation omitted).

Finally, the District Court held that NEPA requires Interior to quantify global emissions because the agency "already estimated" a quantitative change in foreign consumption, so it should have taken the extra step to "translate those [consumption] numbers into emissions" numbers. JA__ [Op. 34]. But since Interior is "not authorize[d]" to forego a lease sale based on either "global . . . consumption" or the "derivative impact" of that consumption, *CBD*, 563 F.3d at 485, the agency was likewise not required to analyze either factor in its EIS. *Southeast Market*, 867 F.3d at 1372-73. All told, Interior's decision to estimate foreign consumption reflects no more than its intent to "go above and beyond" NEPA's requirements—something that an agency may do without violating NEPA by not going further than it did. *See Citizens for Smart Growth v. Peters*, 716 F. Supp. 2d 1215, 1230 (S.D. Fla. 2010).

C. Interior satisfied NEPA by quantifying the Lease Sale's impact on American emissions and disclosing that it lacked the data to quantify global emissions.

In all events, Interior's emissions analysis complied with NEPA. This Court does not "flyspeck" an agency's "environmental analysis for any deficiency no matter how minor." *Flex*, 867 F.3d at 196 (internal quotation marks and citation omitted). Rather, it "ensure[s] that the agency has adequately considered

and disclosed the environmental impact of its actions." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (citation omitted). And when reviewing analysis of an issue that requires "a high level of technical expertise"—such as "greenhouse gas emissions"—this Court "defer[s] to the [agency's] informed discretion." *Flex*, 867 F.3d at 196 (citation omitted).

Interior's EIS set out to calculate how leasing decisions related to the 2017-2022 Lease Sale Program would affect American emissions. JA__ [AR14188]. Interior quantitatively predicted the American emissions that would occur if the lease sale went forward and if it did not. JA__ [AR14202-31]. Predicting this second, no-action, scenario involved forecasting the energy sources Americans would consume to replace oil and gas from the lease sale, and, in turn, the emissions each of those energy sources would produce. JA__ [AR14207]. Interior thus ultimately concluded that, while not holding the lease sale would reduce American energy consumption, it would likely increase consumption of greater-emitting fuel sources, and so the no-action scenario would either have "little [e]ffect[]" on American emissions or would cause those emissions to "increase slightly." JA__ [AR14188].

The District Court found no flaw in any of that analysis. Rather, it held that NEPA also requires Interior to conduct the same analysis for *foreign* emissions—that is, the emissions caused by foreign energy consumption. *See* JA__-__ [Op.

28-34]. But as Interior explained, it has "insufficient data" to reliably make that calculation. JA__, __ [AR14202; AR14220]. Sure, Interior could do *some* analysis of foreign energy consumption; for example, it calculated that cancelling the lease sale would cause foreign oil consumption to slightly decrease. JA__ [AR14220]. But foreign consumers using less oil does not necessarily mean they would emit less. JA__ [AR29965]. They instead would turn to other energy sources, and those alternate sources would, in turn, emit with varying intensity. *Id.* And Interior would have to make those predictions for the national energy market of *every country in the world*. JA__ [AR29966]. Interior had sufficient data to reliably forecast the American energy market, but it did not have the data needed reliably forecast the energy market in every country on Earth. *See id.*

In a similar case, this Court held that NEPA does not require an agency to make uncertain predictions about foreign energy markets. In *Flex*, the Department of Energy authorized the export of liquified natural gas to several foreign nations. 867 F.3d at 193-193. The petitioners argued that NEPA required the Department to predict the exports' impact on "global [greenhouse-gas] emissions" by analyzing how the exported natural gas would "compete with" renewable energy sources in foreign markets. *Id.* at 202 (citation omitted). This Court disagreed, explaining that the "many uncertainties in modeling" "the dynamics of all energy markets" in

the nations receiving the exports made it "too speculative to inform the public interest determination." *Id.* (citation omitted). The same is true here.

The District Court's contrary conclusion appeared to misunderstand the record. The District Court believed that Interior had claimed that the lease sale would reduce global emissions. JA__ [Op. 23]. So while the District Court acknowledged that Interior need not "quantitatively assess potential consequences that are too . . . speculative," JA__ [Op. 27], it concluded that Interior violated NEPA because it surreptitiously "zero[ed] out a key variable in the quantitative analysis it chose to conduct." JA__ [Op. 31] (internal quotation marks and citation omitted).

The District Court's premise was wrong: Interior never claimed to calculate "total" or global emissions; it only ever sought to quantify the lease sale's effect on *American* emissions, while qualitatively disclosing whatever reliable predictions it could make about foreign consumption. *See* JA__ [AR14188]. In other words, Interior conducted exactly the calculation it said it would conduct: changes in U.S. emissions.

The District Court thought that Interior should have calculated foreign emissions because the market information needed to make that calculation was available, JA__-__, __ [Op. 31-34, 36], pointing to a working paper from the Stockholm Environment Institute. *See* JA__ [AR26911-58]. But the Stockholm

Paper reinforces Interior's reliability concerns. The Paper contains no country-specific data about how foreign consumers substitute alternate energy sources for OCS oil. The Paper limits its findings about oil emissions to transportation-sector oil, *see* JA__-__ [AR26935-37], and concedes that "little information exists on the long-term elasticities of substitution between oil and . . . other transport fuels." JA__ [AR26936]. The Paper instead substitutes several assumptions to reach its conclusions, such as how widely replacement biofuels would be used and their carbon intensity. *See* JA__-__, __-__ [AR26936-37, AR26948-49].

The District Court reasoned that Interior waived any right to criticize the Stockholm Paper in litigation because the EIS does not specifically address the Paper. JA__ [Op. 32 n.18]. But Interior canvassed "[a] survey of relevant studies and literature," and concluded that "reliable and uniform global data are not reasonably available" as "needed to calculate [a] change in foreign [greenhouse-gas] emissions." JA__ [AR_0029965]. Interior made clear that *none* of the available scientific literature contained the data it needed, including the Stockholm Paper. And when an agency determines that an "economic model" is "far too speculative to be useful," this Court defers to the agency's "expertise in energy markets." *Flex*, 567 F. 3d at 199.

The District Court acknowledged that Interior need not adopt the Stockholm Paper. *See* JA__ [Op. 34]. But it held that, because Interior did not "grapple[]

with" that Paper's findings in its EIS, Interior violated 40 C.F.R. § 1502.22, which required an agency to provide "a summary of existing credible scientific evidence which is relevant to evaluating" any "reasonably foreseeable significant adverse impacts" for which the underlying information "cannot be obtained." JA__ [Op. 36] (quoting 40 C.F.R. § 1502.22(b)(3)-(4) (2019)); *see also* 40 C.F.R. § 1502.21.

For starters, § 1502.22 applies only when an agency lacks the information to calculate "reasonably foreseeable" environmental impacts. Foreign emissions based on "speculative" analysis about foreign markets are not reasonably foreseeable, so § 1502.22 is never triggered. *See Flex*, 867 F.3d at 202 (citation omitted). Even if § 1502.22 applies, it does not create an obligation to grapple with every report, study, and working paper in the literature. Section 1502.22 requires an agency to explain only which "information is . . . unavailable," explain why that information is "relevan[t]," summarize related "credible scientific evidence", and evaluate the missing information using "generally accepted" "theoretical approaches." 40 C.F.R. § 1502.22(b) (2019). Interior did all of that; even the District Court admitted that Interior "provided the four-part explanation required by" § 1502.22. JA__ [Op. 35].

To be sure, Interior's draft EIS for Lease Sale 258 adopts a method for calculating foreign emissions based on estimates about foreign consumption. The District Court believed the draft EIS "demonstrate[d] that it was *possible*" for

Interior to have calculated foreign emissions all along. JA__-__ [Op. 36-37] (emphasis in original). Of course, before Interior cancelled Lease Sale 258, the draft EIS was subject to public input that may well have caused Interior to reconsider its reliability. And in any case, an agency does not violate NEPA by foregoing analysis that is possible but still "too speculative to inform the public interest determination." *Flex*, 867 F.3d at 202 (citation omitted). Interior never claimed that it was impossible to produce speculative predictions about foreign emissions; rather, it has consistently maintained that it cannot *reliably* make those calculations.

It is unsurprising that Interior attempted that calculation for Lease Sale 258. The agency is currently under a court order requiring it to go forward with OCS leasing, *see Louisiana*, 543 F. Supp. 3d at 418-419, and *Liberty* and *Willow* suggest that Interior risks further NEPA litigation if it does not produce foreign emissions numbers before making future leasing decisions—whether those numbers will be reliable or not. *Liberty*, 982 F.3d at 740; *Willow*, 555 F. Supp. 3d at 753, 784. Interior's NEPA analysis for Lease Sale 257 was adequate.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN VACATING BECAUSE OF THE HARMS TO LEASE SALE 257 HIGH BIDDERS AND THE INTEGRITY OF THE CONGRESSIONALLY MANDATED SEALED-BID SYSTEM.

Even if this Court believes that Interior violated NEPA, Lease Sale 257 "need not necessarily be vacated." *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*,

988 F.2d 146, 150 (D.C. Cir. 1993). Courts, after all, "commonly remand[] without vacat[ur]" when equity requires it. *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 51 (D.D.C. 2020) (Brown Jackson, J.) (quoting *International Union, United Mine Workers of Am. v. Federal Mine Safety & Health Admin.*, 920 F.2d 960, 966 (D.C. Cir. 1990)).

The decision whether to vacate turns on two factors: (1) "the seriousness of the order's deficiencies," and (2) "the disruptive consequences" that vacatur may cause. *Allied-Signal*, 988 F.2d at 150-151 (quotation omitted). Both favor remand and the District Court abused its discretion in ordering vacatur.

A. The Record of Decision should not be vacated because any NEPA deficiencies can be fixed on remand.

Even if NEPA requires Interior to calculate global emissions, that deficiency is not so serious to warrant vacatur. To evaluate the seriousness of an order's deficiencies, this Court considers "the likelihood that [those deficiencies] can be redressed on remand, even if the agency reaches the same result." *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D.C. Cir. 2021) (citation omitted). Thus, when an agency's NEPA analysis is deficient for failing to fully consider greenhouse gas emissions, remand without vacatur is appropriate when the agency "could arrive at the same finding" "after adequately accounting for [those] emissions" on remand. *Food & Water Watch v. FERC*, 28 F.4th 277, 292 (D.C. Cir. 2022).

Interior here can provide any missing, albeit speculative, emissions analysis on remand because it has already done the analysis in its draft for Lease Sale 258. *See supra* pp. 38-39. Interior can apply the same methodology to Lease Sale 257, and remand without vacatur is appropriate when an agency can fix any errors "easily and quickly." *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 343 (D.D.C. 2016).

Interior could also "arrive at the same finding" to hold Lease Sale 257 after performing that analysis. *Food & Water Watch*, 28 F.4th at 292. An entire five-year leasing program accounts for less than one-quarter of one percent of the global oil market, and any individual lease sale accounts for a fraction of that fraction. JA__ [AR29965]. So even if Interior concluded that Lease Sale 257 would increase global emissions, the increase would be at most a drop in the bucket. It is therefore at least *conceivable* that Interior would decide to again hold the sale after accounting for foreign emissions—and that is enough to warrant remand without vacatur. *Allied-Signal*, 988 F.2d at 151.

The District Court admitted that Interior has already drafted the foreign emissions analysis that Plaintiffs ask for. JA__ [Op. 62]. The District Court reasoned, however, that "the relevant [vacatur] question" is not whether Interior can provide the missing analysis on remand, but rather whether Interior can

successfully explain why it "failed to consider" that analysis in the first place. JA__-__ [Op. 59-60] (citation omitted).

That reasoning is at odds with this Court's cases. The first *Allied-Signal* prong asks whether an agency can justify its original decision through new reasoning, not whether the agency can justify its old reasoning. *See, e.g.*, *Clean Wisconsin v. EPA*, 964 F.3d 1145, 1177 (D.C. Cir. 2020) (per curiam) (remanding without vacatur because the agency could "substantiate" its original action); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding without vacatur because the agency could "redress its failure of explanation on remand"). In *Allied-Signal* itself, the Court remanded without vacatur in part because it was "conceivable" that the agency could provide a "reasoned explanation" to "justify the [r]ule" it already implemented, not because the agency could rationalize why it omitted the explanation to begin with. 988 F.2d at 151.

And while the district court believed that a NEPA violation changes the vacatur inquiry, JA__ [Op. 57], this Court has applied the standard *Allied-Signal* analysis to NEPA cases. Just this year, this Court held that an agency violated NEPA because it greenlit construction of a pipeline without calculating the pipeline's downstream emissions, yet remanded without vacatur because the agency "could arrive at the same finding" after "adequately accounting for

foreseeable downstream greenhouse-gas emissions." *Food & Water Watch*, 28 F.4th at 292.

The District Court's only contrary case was *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021), where the Court vacated an agency action because it believed that the agency could not adequately explain on remand why it failed to prepare an EIS. *Id.* at 1051-53. But the agency in *Standing Rock* greenlit the construction of a pipeline without preparing an EIS at all, and intervenors argued that vacatur was unwarranted because the agency could write the EIS on remand. *Id.* at 1051. This Court held that "declin[ing] to prepare an EIS" altogether is a "major procedural [mis]step," like when an agency "bypass[es] required notice and comment rulemaking." *Id.* at 1052. To deter agencies from "declin[ing] to prepare an EIS before approving a project," the Court held that "whe[re] an agency bypasses a fundamental procedural step, the vacatur inquiry" should ask "not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step." *Id.*

Interior here *did* write an EIS; the only dispute is whether that EIS was adequate. The District Court itself acknowledged that this is not a case "in which an agency bypassed a fundamental procedural step." JA__ [Op. 59] (cleaned up). The District Court therefore misapplied this Court's precedents—and abused its

discretion—in applying *Standing Rock*'s narrow rule. *See Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 725 (D.C. Cir. 2012) (district court abuses its discretion by "misapprehend[ing] the underlying substantive law") (citation omitted); *Thomas v. Albright*, 139 F.3d 227, 236 (D.C. Cir. 1998) (district court abused its discretion because it "erred in its application" of precedent).

B. Vacatur would cause disruptive consequences for API's members and undermine OCSLA's sealed-bidding requirement.

Vacatur is also unwarranted because it would cause substantial "disruptive consequences" for API's members. *Allied-Signal*, 988 F.2d at 150-151 (citation omitted). In evaluating the disruptive-consequences prong, this Court considers the interests of parties that "reasonably relied" on an agency's deficient action. *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018). Vacatur is thus unwarranted when it would not restore the status quo, but rather impose "social and economic costs" on regulated parties, *Public Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (citation omitted), or "unravel . . . past transaction[s]." *American Great Lakes*, 962 F.3d at 519.

Vacatur cannot restore the status quo here. Lease Sale 257 has already happened—33 companies bid over $198 million for 308 tracts covering 1.7 million acres in Gulf of Mexico waters. Lease Sale 257 Press Release, *supra.* Those bids were based on information developed over years by teams of experts and on seismic data that cost millions to process. JA__, __, __, __ [Brinkley Decl. ¶ 5(d);

Gallman Second Decl. ¶ 7; DiTommaso Decl. ¶ 5(e); Gonsalves Decl. ¶ 5(e)]. API members not only spent years and millions to decide which leases to bid on and how much to offer to pay for them, they kept that information closely held even within their own companies. JA__, __, __, __ [Brinkley Decl. ¶ 5(e); Gallman Second Decl. ¶ 8; DiTommasso Decl. ¶ 5(f); Gonsalves Decl. ¶ 5(f)]. Vacatur means that investment is for naught. *See National Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 103 (D.D.C. 2019) (remanding without vacatur because vacatur could force litigants to "waste" "large sums of money").

Vacatur would also disrupt Interior's ability to comply with OCSLA's mandated sealed bidding process. Under OCSLA, lease bidding "shall be by sealed bid." 43 U.S.C. § 1337(a)(1). This rule ensures that the bidding process remains "competitive" and that the "highest responsible qualified bidder" wins. *Id.* But a do-over Lease Sale would allow a company to bid on tracts while knowing precisely how its competitors value those tracts. As the Federal Circuit has explained, "cancelling a sale after the opening of sealed bids is unfair to the highest bidder as it reveals the bidder's prices and bidding approach to the other bidders." *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 912 (Fed. Cir. 1988). A "post-auction cancellation and reoffering gives the other bidders the chance and the time to analyze the prior bidding, including the successful bidder's bidding strategy, and change their strategies." *Id.* Vacatur would do serious harm to the

integrity of the congressionally mandated sealed bidding process and disrupt bidders' reliance on their prior strategies. Worse still, if vacatur is upheld, Interior cannot re-run Lease Sale 257 at all. *Supra* p. 10.

The District Court dismissed these consequences as part of the "the nature of doing business, especially in an area fraught with bureaucracy and litigation." JA__ [Op. 61-62] (citation omitted). But this Court has never recognized a cost-of-doing-business exception to the disruptive-consequences prong. And the District Court's reasoning would make remand without vacatur a dead letter. After all, remand without vacatur is a remedy applied only in agency litigation; *every* case, by definition, involves parties doing business in areas fraught with bureaucracy and litigation. If any disruptive consequence could be dismissed as the risk one takes doing business with the Government in a regulated field, then *no* flawed agency action could escape vacatur. Yet this Court has routinely remanded without vacatur in highly regulated fields. *See*, *e.g.*, *Oglala Sioux Tribe*, 896 F.3d at 524, 538-39 (mining firm regulated by Nuclear Regulatory Commission); *Allied-Signal*, 988 F.2d at 148, 151, 153-154 (engineering firms regulated by Nuclear Regulatory Commission); *Black Oak Energy*, 725 F.3d at 232-233, 244 (electricity traders regulated by FERC). By applying a too-strict rule foreclosed by this Court's precedents, the District Court abused its discretion. *Standley v. Edmonds-Leach*, 783 F.3d 1276, 1284 (D.C. Cir. 2015) (district court abused its discretion

because its analysis was "guided by erroneous legal conclusions") (citation omitted).

CONCLUSION

The District Court's judgment should be reversed.

Respectfully submitted,

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June 6, 2022

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of this Court's May 9, 2022 order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 10,441 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman.

/s/ Catherine E. Stetson
Catherine E. Stetson

ADDENDUM

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43 U.S.C. § 1344

§ 1344. Outer Continental Shelf leasing program

(a) Schedule of proposed oil and gas lease sales

The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter. The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval. Such leasing program shall be prepared and maintained in a manner consistent with the following principles:

(1) Management of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.

(2) Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of--

(A) existing information concerning the geographical, geological, and ecological characteristics of such regions;

(B) an equitable sharing of developmental benefits and environmental risks among the various regions;

(C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;

(D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;

(E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;

(F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;

(G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and

(H) relevant environmental and predictive information for different areas of the outer Continental Shelf.

* * *

43 U.S.C. § 1351

§ 1351. Oil and gas development and production

(a) Development and production plans; submission to Secretary; statement of facilities and operation; submission to Governors of affected States and local governments

(1) Prior to development and production pursuant to an oil and gas lease issued after September 18, 1978, in any area of the outer Continental Shelf, other than the Gulf of Mexico, or issued or maintained prior to September 18, 1978, in any area of the outer Continental Shelf, other than the Gulf of Mexico, with respect to which no oil or gas has been discovered in paying quantities prior to September 18, 1978, the lessee shall submit a development and production plan (hereinafter in this section referred to as a "plan") to the Secretary, for approval pursuant to this section.

(2) A plan shall be accompanied by a statement describing all facilities and operations, other than those on the outer Continental Shelf, proposed by the lessee and known by him (whether or not owned or operated by such lessee) which will be constructed or utilized in the development and production of oil or gas from the lease area, including the location and site of such facilities and operations, the land, labor, material, and energy requirements associated with such facilities and operations, and all environmental and safety safeguards to be implemented.

(3) Except for any privileged or proprietary information (as such term is defined in regulations issued by the Secretary), the Secretary, within ten days after receipt of a plan and statement, shall (A) submit such plan and statement to the Governor of any affected State, and, upon request to the executive of any affected local government, and (B) make such plan and statement available to any appropriate interstate regional entity and the public.

(b) Development and production activities in accordance with plan as lease requirement

After September 18, 1978, no oil and gas lease may be issued pursuant to this subchapter in any region of the outer Continental Shelf, other than the Gulf of Mexico, unless such lease requires that development and production activities be carried out in accordance with a plan which complies with the requirements of this section.

(c) Scope and contents of plan

A plan may apply to more than one oil and gas lease, and shall set forth, in the degree of detail established by regulations issued by the Secretary--

(1) the specific work to be performed;

(2) a description of all facilities and operations located on the outer Continental Shelf which are proposed by the lessee or known by him (whether or not owned or operated by such lessee) to be directly related to the proposed development, including the location and size of such facilities and operations, and the land, labor, material, and energy requirements associated with such facilities and operations;

(3) the environmental safeguards to be implemented on the outer Continental Shelf and how such safeguards are to be implemented;

(4) all safety standards to be met and how such standards are to be met;

(5) an expected rate of development and production and a time schedule for performance; and

(6) such other relevant information as the Secretary may by regulation require.

* * *

(h) Approval, disapproval or modification of plan; reapplication; periodic review

(1) After reviewing the record of any public hearing held with respect to the approval of a plan pursuant to the National Environmental Policy Act of 1969 or the comments and recommendations submitted under subsection (g) of this section, the Secretary shall, within sixty days after the release of the final environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 in accordance with subsection (e) of this section, or sixty days after the period provided for comment under subsection (g) of this section, approve, disapprove, or require modifications of the plan. The Secretary shall require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe operations on the lease area or for protection of the human, marine, or coastal environment, including compliance with the regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title. Any modification required by the

Secretary which involves activities for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) must receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act unless the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such Act. The Secretary shall disapprove a plan--

(A) if the lessee fails to demonstrate that he can comply with the requirements of this subchapter or other applicable Federal law, including the regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title;

(B) if any of the activities described in detail in the plan for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act and the Secretary of Commerce does not make the finding authorized by section 307(c)(3)(B)(iii) of such Act;

(C) if operations threaten national security or national defense; or

(D) if the Secretary determines, because of exceptional geological conditions in the lease areas, exceptional resource values in the marine or coastal environment, or other exceptional circumstances, that (i) implementation of the plan would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), to the national security or defense, or to the marine, coastal or human environments, (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 disapproving the plan outweigh the advantages of development and production.

* * *

CERTIFICATE OF SERVICE

I certify that on June 6, 2022, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Catherine E. Stetson
Catherine E. Stetson