Nos. 22-5036 & 22-5037

In the United States Court of Appeals for the District of Columbia Circuit

FRIENDS OF THE EARTH; HEALTHY GULF; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiffs-Appellees,

v.

DEBRA A. 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 THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT,
Defendants-Appellees,

AMERICAN PETROLEUM INSTITUTE and STATE OF LOUISIANA,
Intervenors-Defendants-Appellants.

On Appeal from the U.S. District Court for District of Columbia
Case No. 1:21-cv-02317-RC (Hon. Rudolph Contreras)

BRIEF OF AMICUS CURIAE BP EXPLORATION & PRODUCTION INC. SUPPORTING INTERVENORS-DEFENDANTS-APPELLANTS

Allon Kedem
John P. Elwood
Dirk C. Phillips
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 952-5000
allon.kedem@arnoldporter.com

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant American Petroleum Institute and the Brief for the State of Louisiana:

Amici Curiae: Shell Offshore Inc.

EnerGeo Alliance

National Ocean Industries Association

The Chamber of Commerce of the United States of America

BP Exploration & Production Inc.

B. Ruling Under Review. References to the ruling at issue appear in the Brief for Appellant American Petroleum Institute and the Brief for the State of Louisiana.

C. Related Cases. This case has not been before this Court or any other court (besides the district court), and counsel is not aware of any related cases, as that term is defined by Circuit Rule 28(a)(1)(C), that are currently pending before this or any other Court.

DISCOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

BP Exploration & Production Inc. is a nongovernmental corporation and leading energy provider. BP Exploration & Production is an indirect wholly owned subsidiary of BP p.l.c., a company incorporated under the laws of England and Wales.

/s/ Allon Kedem
Allon Kedem

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this amicus brief. Amicus filed its notice of intent to participate in this case on June 13, 2022. Pursuant to Circuit Rule 29(d), counsel for BP Exploration & Production Inc. represents that the submission of a separate brief is necessary to offer a unique perspective not developed by the parties or any other amici with respect to the issue of ripeness. With respect to the remedy—an issue on which amici are aligned—BP has elected to endorse the separate brief filed by Chevron U.S.A. Inc., rather than to address that argument in a duplicative manner

/s/ Allon Kedem
Allon Kedem

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than amicus, contribute money that was intended to fund preparing or submitting this brief.

/s/ Allon Kedem
Allon Kedem

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GLOSSARY

BP	BP Exploration & Production Inc.
NEPA	National Environmental Policy Act
OCSLA	Outer Continental Shelf Lands Act

INTEREST OF AMICUS CURIAE

BP Exploration & Production Inc. (BP) is a leading energy provider, with a commitment to the United States that dates back more than 150 years. BP was the apparent high bidder on 46 of the tracts offered in Gulf of Mexico Lease Sale 257. If BP's bids are approved by the U.S. Department of the Interior in the post-sale review process—which is currently on hold as a result of this litigation—the agency will issue leases for those tracts to BP. But if the agency is required to re-bid tracts from the Lease Sale, despite the fact that winning bids (including BP's) have already been publicly disclosed, BP would be left at a significant competitive disadvantage.

BP's interest in this case, however, is not limited to its financial stake in the leases. BP has set an ambitious goal to reach net zero carbon emissions by mid-century—and to help the world get there, too. Consistent with that goal, BP "strongly supports the inclusion of sound greenhouse gas . . . and climate change analysis as part of the review of federal agency actions under [the National Environmental Policy Act (NEPA)]. Such analysis is crucial not only to ensure that policy makers and the public are well-informed about the implications of agency

decisions for the energy transition and for climate change, but also to facilitate the permitting of projects that will help the United States, and the world, achieve net zero."[1]

BP thus offers a unique perspective not developed by the parties or any other amici. BP believes that the agency is required to conduct an environmental analysis in connection with the Lease Sale, and that a NEPA challenge based on the environmental effects of the sale could presently be ripe for judicial review. But unlike Plaintiffs, BP believes that the appropriate analysis must focus solely on the consequences of the Lease Sale itself. The environmental effects of future oil and gas production, including "downstream" greenhouse gas emissions that may result from foreign consumption, will properly be considered when the agency decides—at a later stage—whether to approve such production.

BP respectfully submits that the Court will benefit from its unique views on these issues. In light of the Court's preference for amici curiae on the same side joining a single brief when practicable, *see* D.C. Cir. R. 29(d),

[1] Letter from Downey Magallanes, Head of Pol'y & Fed. Gov't Affs., US, BP America, Inc., to Brenda Mallory, Chair, Council on Env't Quality, *Re: Comments on the National Environmental Policy Act Implementing Regulations (Phase 1)* at 2 (Nov. 22, 2021), at https://tinyurl.com/2p8a5ys2.

BP has consulted with other amici to confirm that the argument made in this brief does not duplicate their views. But with respect to the remedy—an issue on which amici are aligned—BP has elected to endorse the separate brief filed by Chevron U.S.A. Inc., rather than to address that argument in a duplicative manner. *See infra* Part II.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Environmental Policy Act (NEPA) requires an agency, before undertaking "major Federal actions significantly affecting the quality of the human environment," to analyze "the environmental impact *of the proposed action*," including adverse effects "which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(i)-(ii) (emphasis added). To comply with that statutory command, an agency must first identify the relevant "Federal action[]," and then must consider any significant environmental effects "of the proposed action" itself.

That careful focus on associated consequences is particularly important where the agency decision is only one stage of a multi-tiered decision-making scheme, like the Outer Continental Shelf Lands Act (OCSLA). Since successive stages involve new "Federal actions," NEPA requires consideration at each stage only of the potential environmental

consequences of *that* action—not the consequences of future actions that may or may not occur at later stages. Associated ripeness principles similarly require a court evaluating a multi-tiered project to confine its review to the particular "critical stage of a decision" that is then before the agency. The question in such cases is not *whether* the agency must evaluate the environmental consequences of major actions taken at future stages, but *when* it must do so.

In this case, the district court determined that Plaintiffs' challenges to Lease Sale 257 were ripe because the sale also authorizes "ancillary activities" to be conducted in the leased areas. BP agrees that, insofar as the environmental effects of those activities "cannot be avoided should the [sale] be implemented," 42 U.S.C. § 4332(2)(C)(ii), a NEPA challenge based on those activities would be ripe for judicial review. At the same time, however, the *scope* of the environmental analysis must remain focused on the effects of the activities themselves, not on effects that could result from decisions made at later stages of the OCSLA process.

The district court faulted the agency for failing to consider the environmental effects of future oil and gas production, including "downstream" greenhouse gas emissions that may result from foreign

consumption. But consideration of environmental effects from production will become appropriate if and when the agency contemplates whether to authorize such production. By requiring them to be considered now, the district court engaged in improper bootstrapping: It imposed a NEPA analysis based on the "ancillary activities" associated with the current Lease Sale, only to broaden the scope of that analysis to include effects associated with future production at a later stage.

The district court's decision also contravenes ripeness principles. When environmental effects of an agency action are considered alongside the stage in which that action is authorized, the parties and the courts all benefit. It enables the adequacy of an agency's response to be judged in the context of a concrete factual setting. Here, for instance, there are several additional steps—involving decision-making by the agency, as well as by lease-holders—before it can even be known *whether* a winning bidder will produce oil and gas from its leases (or some of them). And the *amount* of such production is even harder to predict at this time, but will become clear later on.

Nor will Plaintiffs in this case suffer any hardship from postponing that portion of the NEPA analysis. The Lease Sale does not itself

authorize any production, and Plaintiffs will have ample opportunity to consider the downstream environmental effects of any future production before such production is authorized—particularly since the agency has committed to updating its environmental analysis at least annually. For the same reasons, the judiciary will have its chance to ensure that the agency takes the requisite "hard look" at the environmental consequences of production. But it will only have to do so *once*, at the moment when the record is fully developed, the issues have been pared down, and the agency decision is ripe for review.

Finally, should this Court determine that the agency violated NEPA, BP agrees with and endorses the argument regarding remedy that Chevron U.S.A. Inc. has advanced in its separate amicus brief. BP has made a substantial investment of personnel and resources in reliance on the Lease Sale, and BP would be left at a significant competitive disadvantage if the bidding process were re-run now that the winning bids (including BP's) have already been publicly disclosed.

ARGUMENT

I. The District Court Conflated the Environmental Effects of Ancillary Activities at Stage Two with the Effects of Production at Stage Four

OCSLA provides for a "pyramidic" four-stage process that "proceed[s] from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *Ctr. for Biological Diversity v. Dep't of the Interior*, 563 F.3d 466, 473 (D.C. Cir. 2009) (citation omitted). "This multi-tiered approach was designed to forestall premature litigation regarding adverse environmental effects that will flow, if at all, only from the latter stages of [Outer Continental Shelf] exploration and production." *Id.* (ellipsis and quotation marks omitted).

A. Statutory and Ripeness Principles Require Agencies to Analyze the Environmental Effects Only of "Proposed Actions"

Before an agency undertakes "major Federal actions significantly affecting the quality of the human environment," NEPA requires the agency to produce a detailed statement analyzing:

> (i) the environmental impact *of the proposed action*,
>
> (ii) any adverse environmental effects *which cannot be avoided should the proposal be implemented*,
>
> (iii) alternatives to *the proposed action*,

> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any *irreversible and irretrievable commitments of resources which would be involved in the proposed action* should it be implemented.

42 U.S.C. § 4332(2)(C) (emphases added). As the italicized language makes clear, the statute focuses on consequences flowing from "the proposed action" itself: environmental harm "which cannot be avoided" if the action is taken, as well as the "irreversible and irretrievable" commitment of resources to the project. Indeed, the trigger for the law's coverage—"major Federal *actions* significantly *affecting* the quality of the human environment"—expressly connects the pertinent "[e]ffect[s]" to be considered with the specific "actions" under consideration. *Id.* (emphasis added). Identifying the relevant agency "action" is accordingly key to determining the proper scope of analysis.

Well-established principles of ripeness reinforce the statutory focus on effects of the "proposed action." The doctrine of ripeness—in both its constitutional and "prudential" aspects—speaks to "when a federal court can or should decide a case." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012). At base, it is a doctrine of judicial modesty: Among

other things, "letting the administrative process run its course before binding parties to a judicial decision prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and protects the agencies from judicial interference' in an ongoing decision-making process." *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)) (alterations omitted). "Postponing review can also conserve judicial resources, and it comports with [courts'] theoretical role as the governmental branch of last resort." *Id.* at 386-87 (citation and quotation marks omitted). In sum, "the doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Id.* at 387.

In view of these statutory and ripeness principles, this Court has been careful, when evaluating multi-tiered projects, to confine its review to the particular "critical stage of a decision" that is then before the agency. *Fisheries Survival Fund v. Haaland*, 858 Fed. Appx. 371, 372 (D.C. Cir. 2021) (quoting *Ctr. for Biological Diversity v. Dep't of the Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009)). The question in such cases is not *whether* the agency must evaluate the environmental consequences of major actions taken at future stages, but *when* it must do so.

In *Fisheries Survival Fund*, for instance, the plaintiffs objected that the Bureau had issued an offshore lease for a windfarm without conducting a NEPA analysis, but this Court disagreed. *Id.* No analysis was required at the lease-approval stage because the lease "d[id] not, by itself, authorize any activity within the leased area," but merely granted the lessee permission to develop and submit plans for future development. *Id.* (citation and italics omitted). In considering such a plan, moreover, the agency "retain[ed] the right to disapprove" permission for "proposed activities [that] would have unacceptable environmental consequences." *Id.* (citation and italics omitted). Although some private entities and States—and even the agency itself—anticipated the windfarm's "eventual approval," such expectations did not "constitute [the] 'irreversible and irretrievable commitment of resources,' the critical issue for NEPA ripeness purposes." *Id.* at 373 (quoting *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999)).

In sum, both statutory and ripeness principles require an agency applying NEPA to focus with precision on the "proposed action" then before the agency and its associated consequences, not on *future* "proposed action[s]" and *their* consequences that may (or may not) follow. As this

Court explained with regard to another process-based environmental statute: "Given the multi-stage nature of leasing programs under OCSLA, we must consider any environmental effects of a leasing program on a stage-by-stage basis, and correspondingly evaluate [the agency's legal] obligations with respect to each particular stage of the program." *Ctr. for Biological Diversity*, 563 F.3d at 483.

B. NEPA Requires the Agency to Consider the Environmental Effects of Ancillary Activities Authorized at Stage Two

The district court determined that the agency was required to undertake a NEPA analysis of the Lease Sale because the sale is "the point of no return for at least some environmental consequences." Op. at 22. BP agrees that a challenge based on the ancillary consequences unavoidably authorized by the sale could now be ripe for judicial review.

OCSLA's second stage involves a competitive bidding process, under which the Secretary is authorized to award "oil and gas lease[s] on submerged lands" to winning bidders. 43 U.S.C. § 1337(a)(1). Once a lease is awarded, the lessee may "conduct ancillary activities" within the lease area, unless the agency precludes any of these activities after

reviewing additional submissions from the lessee. 30 C.F.R. § 550.207 (2011). Those ancillary activities include:

> (a) Geological and geophysical (G&G) explorations and development G&G activities;
>
> (b) Geological and high-resolution geophysical, geotechnical, archaeological, biological, physical oceanographic, meteorological, socioeconomic, or other surveys; or
>
> (c) Studies that model potential oil and hazardous substance spills, drilling muds and cuttings discharges, projected air emissions, or potential hydrogen sulfide (H_2S) releases.

Id. As the district court noted, these ancillary activities, "while perhaps minor in comparison to the total potential exploration and drilling that may occur at later stages, does itself impact the environment." Op. at 17.

When judged against statutory and ripeness requirements, therefore, the Lease Sale requires the agency to conduct an environmental analysis. In the words of the statute, the agency's "proposed action" (the sale) may result in "environmental impact" and "effects which cannot be avoided" (ancillary activities). 42 U.S.C. § 4332(2)(C)(i)-(ii). Although the lessee must provide the agency with thirty days' advance notice and the opportunity to object before engaging in exploratory and developmental activities, 30 C.F.R. § 550.208 (2011), they are presumptively authorized as part of a valid lease sale. *See id.* § 550.207 (lessee

may conduct ancillary activities "[b]efore or after" submitting an exploration plan or development and production plan). The agency must accordingly consider the environmental impact of such activities before the sale occurs.

C. NEPA Does Not Require the Agency, at Stage Two, to Consider Downstream Effects of Potential Future Oil and Gas Production at Stage Four

While the district court correctly determined that a NEPA analysis could be required based on "ancillary activities" authorized by the Lease Sale, Op. at 11-22, the court erred in defining its breadth. Just as the *need for* an environmental analysis was triggered by the agency's authorization of ancillary activities, so must the *scope of* that analysis be focused on the effects of the activities under consideration. In order to proceed at Stage Two, therefore, NEPA did not require the agency to consider the potential environmental effects of future oil and gas production at Stage Four. Plaintiffs may present any arguments relating to such downstream effects at later stages of the process, when all parties—as well as the Court—will benefit from the ability to consider the issue in the concrete context of information gathered during exploration of the leased areas.

1. The Statute Requires Consideration of the Environmental Consequences of the "Proposed Action" Only

As just explained, the "proposed action" under review is the Lease Sale itself. 42 U.S.C. § 4332(2)(C). Insofar as the sale presumptively authorizes the lessee to engage in ancillary activities—but no other conduct within the lease area—the effects of those activities are the only "environmental effects which cannot be avoided" as a consequence of going forward with the sale. *Id.* § 4332(2)(C)(ii). NEPA would thus require the agency to consider those effects.

The district court held, however, that NEPA *also* requires the agency to consider the effects of potential future oil and gas production, including "downstream emissions" that may result from foreign consumption. Op. at 22-23. Although any production could not occur until Stage Four of OCSLA, the court determined, the amount of anticipated future production from the Lease Sale area is "both foreseeable and quantifiable" even now. *Id.* at 31. The agency must accordingly consider emissions downstream from production, in the court's view, to accurately assess the "collective impacts of the leases together, something the agency is required to consider under NEPA." *Id.* at 19 (citing 40 C.F.R. § 1508.7

(2019)); *see id.* at 20 (agency must "consider cumulative effects of the lease sale on the environment") (citation omitted).

The district court's reasoning skips a crucial step. Although NEPA does indeed require agency consideration of cumulative environmental impacts, the relevant effects are still those "of the proposed action." 42 U.S.C. § 4332(2)(C)(i). Here, for instance, the analysis of the Lease Sale would properly take into account the combined effect of *all* ancillary activities authorized in *all* leased areas, including the possibility that "the cumulative impact of simultaneous [ancillary exploration] will be greater than the sum of [such exploration] in each area considered separately." *Nat. Res. Defense Council, Inc. v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988). But the effects of *other* "major Federal actions" will properly be considered at the time the agency considers authorizing them; it would be premature to consider them now. 42 U.S.C. § 4332(2)(C).

The district court's failure to focus on the "proposed action" led it to engage in bootstrapping. The court deemed the Lease Sale a "critical stage of a decision" based on the anticipated "environmental consequences" of that decision (ancillary activities at Stage Two), but then it faulted the agency for failing to consider the effects of as-yet-unmade

decisions at a different "critical stage of a decision" (production at Stage Four). Op. at 22 (quotation marks omitted). The statute does not authorize that analytical leap. If the Lease Sale requires a NEPA analysis because ancillary activities are "the point of no return for at least some environmental consequences," *id.*, then *those* are the consequences that should be considered.

2. Downstream Climate Effects of Potential Future Production Are Not Ripe for Consideration at Stage Two

Ripeness principles point in the same direction as NEPA's text. In assessing ripeness, this Court "focus[es] on two aspects: the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" *Am. Petroleum Inst.*, 683 F.3d at 387 (quoting *Abbott Labs.*, 387 U.S. at 149). Here, both factors indicate that the appropriate time for considering the downstream climate effects of oil and gas production will be Stage Four, when the agency decides whether to authorize such production.

a. Fitness for review

"The fitness requirement is primarily meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and

in deciding issues in a concrete setting." *Id.* at 387 (citation and quotation marks omitted). Immediate judicial consideration may be appropriate for issues that are "purely legal," but not for issues grounded in fact or expertise that "would benefit from a more concrete setting." *Id.* Here, the question that Plaintiffs ask this Court to answer—What downstream environmental effects of oil and gas production, if any, are quantifiable and foreseeably likely to result from development at Stage Four?—is far from a purely legal question. It would also benefit from further factual development, including information gleaned from real-world exploratory activities. The question is accordingly unfit for review now.

In the present posture, any downstream environmental effects from production depend on a string of contingencies, as the following abbreviated account makes clear.

- At Stage Two, a lessee is presumptively authorized to engage in ancillary activities within the lease area, the environmental effects of which can be assessed with reasonable certainty. But what happens *after* that is uncertain. Among other things, the lessee may choose not to proceed further: The initial exploration may show that the lease area is not as productive as anticipated, for instance, or that the physical environment would make production too difficult or costly.

- If the lessee chooses to proceed to Stage Three, it must submit a more-detailed exploration plan, which the agency may approve only if exploration "will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance." 43 U.S.C. § 1340(g)(3).

- If the Stage Three plan is approved, the lessee will conduct further exploration within the lease area—subject again to the same uncertainties regarding what might or might not be found there.

- At Stage Four, the lessee must submit an even-more-detailed production plan for review by the agency and by affected state and local governments. 43 U.S.C. § 1351. The agency may "require modifications of the plan," including where the plan fails to provide adequately for the "protection of the human, marine, or coastal environment," *id.* § 1351(h)(1); or the agency may reject outright any plan it believes would "probably cause serious harm or damage," *id.* § 1351(h)(1)(D)(i).

- If the plan is ultimately approved, only then—after all these steps are complete—may production begin.

As this litany makes clear, there may never be a reason for a court to consider the downstream environmental effects of production with respect to any of the leases—much less all of them. The multi-stage process

may be abandoned by a lessee or terminated by the agency prior to completion at any of several statutory and regulatory steps. These off-ramps are not peripheral to OCSLA; they are intentional, built-in features of the tiered statutory scheme. To delay judicial consideration of the effects of production at Stage Four until the project reaches that stage thus "ensures that Article III courts make decisions only when they have to." *Am. Petroleum Inst.*, 683 F.3d at 387.

Even if the process continues through the end, moreover, the *amount* of anticipated production will become significantly clearer as it progresses. Most crucially, the amount will depend on whether the lease areas—or some of them—prove themselves financially viable. The corresponding effects of production, including downstream consumption, will be similarly contingent. "[P]ermitting the administrative process to reach its end" before evaluating downstream effects thus will "solidify or simplify the factual context and narrow the legal issues at play, allowing for more intelligent resolution of any remaining claims and avoiding inefficient and unnecessary piecemeal review." *Id.* (citation and quotation marks omitted).

b. Hardship to the parties

In order to outweigh the "institutional interests in the deferral of review, any hardship caused by that deferral must be immediate and significant." *Id.* at 389 (citation and quotation marks omitted). No such immediate or significant hardship exists here.

Plaintiffs will suffer no cognizable harm as the result of postponing the analysis of the effects of oil and gas production. No production occurs at Stage Two, and there will be ample opportunity to consider the downstream environmental effects of any future production before such production is authorized. NEPA requires agencies to analyze all "major federal actions," 42 U.S.C. § 4332(2)(C), as well as to prepare supplemental environmental reviews whenever "[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(d)(1)(ii) (2019). The agency's decision whether to authorize production qualifies under those provisions. Indeed, the district court itself recognized that any environmental effects at Stage Two are "minor in comparison to the total potential exploration and drilling that may occur at later stages." Op. at 17. The agency has also made clear that it expects to supplement its

NEPA analysis "on a regular basis." AR 8202; *see* Def's. Mot. for Summ. J., *Friends of the Earth v. Haaland*, No. 21-cv-2317-RC (D.D.C. Nov. 10, 2021), ECF 45 at 4 (agency "typically prepares a programmatic NEPA analysis for the five-year program and then prepares additional NEPA analyses at each OCSLA stage requiring federal action."). There is accordingly no reason to doubt that the agency can and will adequately consider the effects of production at Stage Four.[2]

Nor may Plaintiffs insist that the agency must analyze downstream effects at Stage Two based on their fear that the Lease Sale constitutes "a *de facto* commitment to allowing [production], even if [the agency] retains the legal authority to block any development." *Fisheries Survival Fund*, 858 Fed. Appx. at 373. This Court rejected precisely that argument in *Fisheries Survival Fund*, explaining that "[f]ederal agencies . . . receive a 'presumption of regularity' in their dealings." *Id.* (citing *Citizens to*

[2] The district court noted that "challenges to the third and fourth stages of OCSLA can only be brought in a U.S. Court of Appeals," and it asserted that an appellate forum "limits the scope of inquiry at that stage." Op. at 21-22 n.11 (citing 43 U.S.C. § 1349(c)(2)). There is no valid reason that an agency's NEPA obligations should depend on which court might later hear a related legal challenge, nor is there a legitimate basis to believe that appellate review would be any less robust or effective than review by a district court.

Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971)). The agency has a continuing obligation to evaluate the environmental impacts of the project, including before deciding whether to approve a production plan at Stage Four. The agency's failure to prejudge the question now cannot harm Plaintiffs. *See Ctr. for Biological Diversity*, 563 F.3d at 481 n.1 (rejecting challenge as unripe where allegedly harmful activities could not "be conducted without being separately authorized by the Secretary of the Interior").

The Federal Defendants likewise will suffer no hardship—and will in fact benefit—from considering the downstream environmental effects of production on a developed record that includes information generated at the exploratory stages. The agency's decision whether to authorize production will be more "fully informed and well-considered" at that time. *Friends of the Capital Crescent Trail v. Federal Transit Admin.*, 877 F.3d 1051, 1055 (D.C. Cir. 2017) (citation omitted). Indeed, NEPA's purpose is to "ensure that [federal agencies] will not act on incomplete information," *id.* (brackets omitted), a consideration that is consistent with waiting until development of the relevant facts.

This Court has also emphasized the litigation burden on agencies that administer segmented programs such as OCSLA, including the potential for mid-process judicial review to impose "onerous . . . obligation[s]" and "require an agency to divert too many of its resources at too early a stage in the decision-making process." *Ctr. for Biological Diversity*, 563 F.3d at 481. That is what Plaintiffs ask for here. The Federal Defendants need not be put to the task of defending their analysis of the downstream effects of any potential oil and gas production when no exploration has yet occurred and no production has yet been authorized.

Finally, delaying the consideration of downstream effects will benefit the courts as well. The ripeness doctrine "ensures that Article III courts make decisions only when they have to, and then, only once." *Am. Petroleum Inst.*, 683 F.3d at 387. Allowing challenge at Stage Two based on the anticipated downstream effects of future production may well result in the waste or duplication of judicial effort. Plaintiffs' challenge may be rejected now, for example, but they may nevertheless seek to challenge a further environmental review conducted at Stage Three or Four. The latter challenge could involve the same central issue—the downstream

effects of production—but would be informed by any data developed during the intervening exploratory activities.

II. BP Agrees With the Remedy Sought By Chevron

Should this Court determine that the agency violated NEPA, BP endorses the argument with regard to remedy advanced by Chevron U.S.A. Inc. in its separate amicus brief. As BP explained in a declaration filed in the district court, the Lease Sale (and other similar sales in the Gulf of Mexico) constitute a "critical aspect" of BP's business, and the associated leases "collectively constitute a core set of BP's producing assets."[3] BP developed its sealed bids for the Lease Sale through the efforts of a team of interdisciplinary personnel (scientists, regulatory experts, finance professionals, and executives), and spent millions of dollars developing seismic data and other proprietary information for use in connection with the bids. If this litigation results in the agency not issuing leases, BP "will lose (among other things) the competitive advantages of

[3] Decl. of Aimee DiTommaso, *Friends of the Earth v. Haaland*, No. 21-cv-2317-RC (D.D.C. Jan. 24, 2022), ECF No. Dkt. 73-1 at 8 ¶ 5.b.

its confidential and proprietary process," such that the Lease Sale can never be "'re-held' in a fair and competitive manner."[4]

CONCLUSION

For the foregoing reasons, this Court should hold that an environmental analysis in connection with the Lease Sale would need to focus solely on the consequences of the sale itself, not on the effects of future oil and gas production that may occur at later stages.

Dated: June 13, 2022

Respectfully submitted,

/s/ Allon Kedem
Allon Kedem
John P. Elwood
Dirk C. Phillips
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 942-5000
Facsimile: (202) 942-5999
E-mail: allon.kedem@arnoldporter.com

Counsel for Amicus Curiae BP Exploration & Production Inc.

[4] *Id.* at 9 ¶ 8.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4837 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief 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 the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

/s/ Allon Kedem
Allon Kedem

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on June 13, 2022, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Allon Kedem
Allon Kedem