No. 22-5036, 22-5037
(consolidated)

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

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

AMICI CURIAE BRIEF BY ENERGEO ALLIANCE AND NATIONAL OCEAN INDUSTRIES ASSOCIATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*. Except for the *Amici Curiae* listed in this brief, EnerGeo Alliance ("EnerGeo") and National Ocean Industries Association ("NOIA"), all parties, intervenors, and *Amici* appearing before the district court are listed in Appellants' Opening Briefs.

B. Rulings Under Review. References to the rulings at issue appear in Appellants' Opening Briefs. The decision at issue appears at *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). *Louisiana v. Biden*, 543 F. Supp. 3d 388 (W.D. La. 2021), and *American Petroleum Institute, et al. v. U.S. Dep't of the Interior, et al.*, No. 2:21-cv-02506-TAD-KK (W.D. La. filed Aug. 16, 2021), however, involve the same Lease Sale 257 at issue in this appeal.

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INTEREST OF AMICI CURIAE AND RULE 26.1 DISCLOSURE STATEMENT

EnerGeo is a private non-profit trade association that represents approximately 50 members from all segments of the geoscience and exploration industry. EnerGeo engages governments and stakeholders worldwide on issues central to geoscience operations and exploration access. EnerGeo's mission is to optimize the business and regulatory climate for its members, enhance public understanding of the energy geoscience industry, and ensure a strong, viable geophysical and exploration industry. EnerGeo has existed for 50 years and is the only global trade organization solely dedicated to the energy geoscience industry.

EnerGeo works vigorously on behalf of its members on issues of common interest and industry-wide topics and initiatives that support the continued vitality of the energy geoscience and exploration industry. Through advocacy, outreach, and development of industry guidelines, EnerGeo focuses on issues that affect the core businesses of the energy geoscience and exploration industries, including issues involving the ability of its members to conduct exploratory activities on the Outer Continental Shelf ("OCS") and onshore federal lands. For example, EnerGeo (i) engages government and regulatory entities with credible scientific, technical, and legal analyses to both protect the environment and develop essential energy supplies; (ii) educates its members on regulatory initiatives and policies affecting the energy geoscience industry; (iii) organizes consistent industry positions on

emerging policy and regulatory issues; (iv) participates in regulatory proceedings affecting its members and the energy geoscience industry; and (v) when necessary, engages in litigation on matters that affect its members and the energy geoscience industry.

NOIA is a national trade organization that represents and advances a dynamic and growing offshore energy industry, including federal oil and gas and wind lessees. NOIA's members include lessees and bidders in offshore federal lease sales. NOIA's members also include small and large operators, drilling contractors, service companies, marine vessel transport companies, geological and geophysical contractors, equipment suppliers, environmental consultants, and many other contractors critical to development of domestic offshore energy leases. NOIA and its members provide solutions that support communities and protect workers, the public, and the environment. For nearly 50 years, NOIA has been committed to ensuring a strong, viable U.S. offshore energy industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner.

No counsel for any party in this case authored this brief in whole or in part. No party, party's counsel, or any person other than *Amici* and their members has contributed funds to the preparation or submission of this brief.

Appellants, Defendants-Appellees, and Plaintiffs-Appellees consented to the filing of this brief on or before June 10, 2022.

I. INTRODUCTION

The Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331–1356, directs the Secretary of the Interior to issue oil and gas leases in the Gulf of Mexico through a competitive, and necessarily confidential, bid process. *Id.* § 1337(a)(1) ("bidding shall be by sealed bid"). The Secretary, through the Bureau of Ocean Energy Management ("BOEM"), did just that via Lease Sale 257. Plaintiffs-Appellees brought this challenge to the lease sale, and the district court ordered the unprecedented vacatur of Lease Sale 257 based upon its determination that BOEM committed a single, narrow error under the National Environmental Policy Act ("NEPA").

Amici join the arguments of Appellants and firmly agree that the district court erred both in ruling against BOEM on the merits and in vacating Lease Sale 257. *Amici* write separately to provide a broader context for the novel and disruptive consequences of the vacatur of Lease Sale 257 and to describe the impacts of vacatur on their members and the industries they comprise. Indeed, *no prior court* has ever vacated an OCS lease sale, for good reasons now exhibited here. The ordered vacatur is particularly problematic here due to the upcoming expiration of the underlying requisite five-year leasing program and public revealing of confidential bidding information.

In vacating Lease Sale 257, the district court unraveled years of detailed analyses and substantial investments made in preparation for the sale, and caused commercial, regulatory, and economic disruptions that ripple far beyond the companies who bid upon leases. For example, by vacating Lease Sale 257, the district court disrupted entire industries—as represented by EnerGeo and NOIA and their respective members—that provide geophysical data services and support services to the oil and gas industry, both pre-lease and post-lease. As described below, these disruptions, along with the significant harm suffered by lease bidders as a result of the disclosure of their bids, are exactly the type of consequences that warrant remand without vacatur, in the event the agency committed any error.

Amici respectfully request that this Court reverse the district court's decision finding a violation of NEPA. If this Court upholds the district court's decision on the merits, *Amici* respectfully request that this Court find that the district court erred in vacating Lease Sale 257 and remand that portion of the district court's opinion with instructions to remand Lease Sale 257 to the agency without vacatur.

II. ARGUMENT

This Court reviews the district court's "decision to vacate … for abuse of discretion." *Neb. Dep't of Health & Hum. Servs. v. Dep't of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006). A district court abuses its discretion when it "makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996), fails to

consider a relevant factor, relies on an improper factor, or gives reasons that do not reasonably support the conclusion, *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995).

"An inadequately supported [agency action] … need not necessarily be vacated." *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). To determine whether an agency action should be vacated or remanded, the court must analyze "'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Id.* (*quoting Int'l Union, UMW v. FMSHA*, 920 F.2d 960, 966–67 (D.C. Cir. 1990)). Here, the district court cited the correct *Allied-Signal* standard, but erred in its analysis of both prongs. Either prong supports remand rather than vacatur.

A. The District Court Misapprehended Applicable Law in Concluding the NEPA Error It Found Was So Serious as to Require Vacatur.

The district court abused its discretion in finding that BOEM's failure to analyze greenhouse gas emissions from foreign consumption of oil under its NEPA alternatives was a serious deficiency. The "'seriousness' of a deficiency … is determined at least in part by whether there is a 'significant possibility that the [agency] may find an adequate explanation for its actions' on remand." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1051 (D.C. Cir. 2021) (brackets in original) (*quoting Williston Basin Interstate Pipeline Co. v.*

FERC, 519 F.3d 497, 504 (D.C. Cir. 2008)). To support its conclusion that a single element of the comprehensive Environmental Impact Statement warranted vacatur, the district court relied solely on *Standing Rock Sioux* and *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) ("*Liberty*"). However, for the reasons described by Appellants, both of these cases are distinguishable (and non-binding, in the case of *Liberty*), and the district court ignored a wealth of applicable precedent from this Court that counsels against vacatur.

This Court has repeatedly held that when, as here, an agency commits an isolated error under NEPA, the action should be remanded instead of vacated. *See Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 319 (D.C. Cir. 1988) (remanding OCS five-year leasing program based on failure to consider cumulative effects to migratory species and declining to vacate leases issued under program); *Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016) (declining to vacate offshore wind lease and regulatory approvals despite having found NEPA and Endangered Species Act violations); *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018) (remanding NRC order despite order being inconsistent with NEPA); *see also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 83–85 (D.D.C. 2019).

Most recently, in *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022), this Court held that the Federal Energy Regulatory Commission ("FERC")

violated NEPA by failing to examine downstream effects—greenhouse gas emissions—of a natural gas pipeline. Despite the agency's failure to analyze downstream effects and prepare an EIS, this Court remanded FERC's order, without vacatur, stating that "after adequately accounting for foreseeable downstream greenhouse-gas emissions, [FERC] could arrive at the same finding of no significant impact." *Id.* at 292.

These cases demonstrate that an error in a discrete portion of an agency's otherwise-comprehensive (and lawful) NEPA analysis is not the type of serious deficiency that warrants vacatur. Just as this Court held in *Food & Water Watch*, BOEM could justify its decision to conduct Lease Sale 257 after correcting the alleged errors in its NEPA analysis.

That is particularly true here given the extreme narrowness of the alleged NEPA error. The district court rejected nearly every NEPA argument raised by Plaintiffs, yet flyspecked the record to find a single basis to rule in their favor. The district court's conclusion that "there is little doubt that a more complete consideration of total greenhouse gas emissions would have significantly informed BOEM's decision" is devoid of support and squarely contradicts the court's admission of "the fact that the sale would have a relatively small marginal impact on global oil consumption, and thus greenhouse gases." Op. at 29, 38. Indeed, the entire 2017-2022 program of OCS lease sales, of which Lease Sale 257 is just one,

was estimated to satisfy approximately 0.1 percent of global demand absent those sales. *Id.* at 38. The district court did not dispute that greenhouse gas emissions "would be similar" with or without Lease Sale 257, even if it were "slightly" lower or "slightly" higher, and thus unlikely to materially affect the leasing decision. Moreover, the seriousness of the alleged NEPA error for Lease Sale 257 is at least one step removed from the project-specific approvals at issue in the cases cited by the district court, including *Liberty* and *Willow*,[1] *id.* at 59, because Lease Sale 257 itself neither creates nor irretrievably and irrevocably commits BOEM to additional oil and gas production or greenhouse gas emissions. Accordingly, the district court abused its discretion by failing to address applicable precedent from this circuit and in finding that BOEM's isolated NEPA violation constituted a serious deficiency.

B. Vacatur of Lease Sale 257 Has Extremely Disruptive Consequences Far Disproportionate to the NEPA Error Found by the District Court.

Regardless of the found NEPA error's insignificance, the district court abused its discretion by glossing over the disruptive consequences of vacating Lease Sale 257. The district court readily could have remanded the lease sale and ensured no interim leaseholding activities took place during curative NEPA review. Despite being fully apprised of the competitive bidding requirements of

[1] The district court referred to *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 751 (D. Alaska 2021) as "*Willow*".

OCSLA and the effects of the sealed bids being disclosed, the district court suggested that BOEM would be able to hold another *competitive* lease sale after Lease Sale 257 is vacated. But the district court provided no rationale for how a fairly conducted replacement lease sale could possibly occur after the bids have been disclosed (and indeed it cannot). Relatedly, the district court failed to genuinely consider the significant commercial, economic, and regulatory disruptions that result from vacatur of the lease sale.

There are entire service industries—as represented by EnerGeo's and NOIA's members—that assist potential lease bidders in evaluating the economic and commercial viability of tracts that are made available for bid in a lease sale. This information is collected through cutting-edge geological and geophysical surveys of the ocean floor and subsurface. Those surveys produce data that is then analyzed by engineers and other professionals using sophisticated modeling and analytical techniques. These surveys and related analyses are prepared under multi-million dollar licensing contracts that often take years to perform and complete. The information produced under these contracts is highly confidential and extremely valuable.

Beginning one year prior to a lease sale, potential bidders begin licensing highly detailed data from EnerGeo's and NOIA's members for specific OCS lease blocks. These data are used by bidders to determine the economically viable bid

price for a particular block and inform each bidder's bid strategy. A single license for these detailed data can cost over $1 million. Lease bidders expend significant resources prior to each lease sale to obtain high-quality, proprietary, geological and geophysical data for lease blocks in the lease sale. These data allow the leasing process to occur in a truly competitive and informed manner, which, in turn, fosters the smart, efficient, and safe development of oil and gas resources in the Gulf of Mexico OCS.

Once the bids are opened, each bidder's pricing strategy and understanding of the quality of the hydrocarbon resource underlying the particular tract is disclosed. Years of work by multiple companies are effectively disclosed with each bid. Once that disclosure occurs, the "egg has been scrambled and there is no apparent way to restore the status quo ante." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002); *see Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) ("Under our precedents, a quintessential disruptive consequence arises when an agency cannot easily unravel a past transaction in order to impose a new outcome."). If the bids are not awarded, it is simply impossible to recreate the extensive pre-leasing level playing field and again offer the same tracts for lease in the competitive manner required by OCSLA.

Additionally, after the lease sale occurs, EnerGeo and NOIA members work with the successful bidders to refine the geological and geophysical data already acquired, and acquire new data, in support of safe and economic recovery of oil and gas from the particular tracts leased in the sale. This work includes the acquisition of very specific data using sophisticated survey technology and is also conducted under multi-million dollar licensing contracts. New data acquisition and reprocessing of existing data typically take a year or more to complete through multiple licensing rounds. The exploration surveys used to collect this data are separately permitted under OCSLA (the third, "exploration" stage) and are subject to NEPA review. 30 C.F.R. §§ 550.201, .207, .211-.228.

EnerGeo's and NOIA's members have already been directly harmed by the district court's decision to vacate Lease Sale 257. Many of EnerGeo's and NOIA's members license their geological and geophysical data to successful lease sale bidders and contract with the bidders to further refine and reprocess the data on particular lease tracts. However, with vacatur of the lease sale, the successful bidders have no reason to license existing information held by EnerGeo's and NOIA's members or to contract with those members for the reprocessing or collection of data.

If leases bid upon in Lease Sale 257 are not awarded, then EnerGeo's and NOIA's members will lose out on all of the data acquisition, reprocessing, and

licensing work they would otherwise have performed for lessees. Those contracts and the licensing revenue they generate are worth millions of dollars, all of which is lost with vacatur. This Court has recognized that economic impacts to third parties is the type of disruptive consequence that warrants remanding an agency action without vacatur. *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013).

Critically, as Appellants warned the district court, BOEM's five-year leasing program will expire after June 30, 2022, without any further OCS oil and gas leasing, thus ensuring no additional OCS lease sales for the foreseeable future. Though the district court expressed blind optimism that BOEM could quickly cure its found NEPA violation, BOEM predictably has not done so in the several ensuing months given the district court's vacatur. Moreover, BOEM has cancelled all other lease sales under its current five-year leasing program, and no new leasing program is imminent.[2] That inaction is consistent with BOEM's initial cancellation of Lease Sale 257 until preliminarily enjoined to continue lease sales. Therefore,

[2] *See* BOEM, 2017-2022 Lease Sale Schedule, https://www.boem.gov/2017-2022-lease-sale-schedule; *see also* Rebecca Falconer, *Biden administration cancels 3 major offshore lease sales*, Axios (May 11, 2022), https://bit.ly/3MoTdMp; U.S. Dep't of the Interior, *Secretary Haaland Provides Updates on Offshore Leasing Program During Senate Testimony*, Press Release (May 19, 2022), https://doi.gov/pressreleases/secretary-haaland-provides-updates-offshore-leasing-program-during-senate-testimony.

reversal of the vacatur of Lease Sale 257 is essential to ensuring issuance of any near-term OCS leases. *See* 43 U.S.C. § 1344(a).

Lastly, the disruptive consequences of the district court's vacatur are not limited to oil and gas. As noted above, EnerGeo's and NOIA's members actively support the nascent but quickly growing development of offshore wind. Federal offshore wind leases are likewise issued under OCSLA, and via a similarly competitive bidding process. 43 U.S.C. § 1337(p). Like OCS oil and gas leases, OCS wind leases and approvals are routinely challenged by project opponents. Though unavailingly attempting to distinguish OCS wind leases—and properly rejecting Plaintiffs' arguments regarding the compatibility of OCS oil and gas and wind leasing—the district court identified no material ground to prevent the undue expansion of vacatur as a remedy in litigation of not only OCS oil and gas leases but also wind leases.[3] Op. at 55-56. For this reason, too, this Court should reverse vacatur.

In sum, it is an extreme remedy to vacate a federal lease sale. It is even more extreme to do so on the OCS, given the unique strictures and mandates of OCSLA. To be sure, the only prior court to identify a NEPA violation for an OCS lease sale

[3] As Appellants explained, the district court overstated the rights conveyed by an OCS oil and gas lease. Moreover, the district court's contention that the government "must pay a penalty" to end an OCS lease is wrong. Op. at 21. Even absent affirmative "cancellation," a lease may terminate by its own terms absent timely commencement of leaseholding activities after lease issuance.

rejected plaintiffs' request for vacatur and instead twice ordered remand without vacatur and interim directed suspensions barring physical activities on the leases during remand. *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 495 (9th Cir. 2014). That court, like the district court here, found only a single NEPA violation and rejected various other arguments by plaintiffs. Ultimately, BOEM cured its NEPA violation and affirmed its lease sale. This Court should afford BOEM the opportunity to do the same here by reversing vacatur of Lease Sale 257.

III. CONCLUSION

For all of the reasons discussed above and in Appellants' opening brief, *Amici* respectfully request that this Court reverse the judgment of the district court. If this Court upholds the district court's decision on the merits, *Amici* respectfully request that this Court reverse the district court's order vacating Lease Sale 257 and remand to the district court with instructions to remand Lease Sale 257 to BOEM. Vacatur will be extremely disruptive and unfair not only to the participants in the lease sale but also to related industries, the members of which have reasonably relied on the completion of Lease Sale 257.

DATED: June 13, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,798 words. This brief also 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 in 14 point Times New Roman font.

/s/ Ryan P. Steen
Ryan P. Steen

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in this Case No. 22-5036 and Case No. 22-5037; who are registered CM/ECF users will be served by the CM/ECF system.

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