No. 18-60102

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK; LOUISIANA BUCKET BRIGADE,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, Acting Administrator, United States Environmental Protection Agency;
ANNE IDSAL, Region 6 Administrator,
Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Interested persons and entities and their counsel:

1. Petitioners:

Center for Biological Diversity, a nonprofit organization with no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public.

Gulf Restoration Network, a nonprofit organization with no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public.

Louisiana Bucket Brigade, a nonprofit organization with no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public.

2. Respondents:

U.S. Environmental Protection Agency, Respondent

Scott Pruitt, Administrator of the U.S. Environmental Protection Agency, Respondent

Anne Idsal, Region 6 Administrator of the U.S. Environmental Protection Agency, Respondent

American Petroleum Institute, Intervenor-Respondent

3. Attorneys:

Kristen Monsell, Center for Biological Diversity, Counsel for Petitioner

Cari Miyoko Sakashita, Center for Biological Diversity, Counsel for Petitioners

Samara Michelle Spence, United States Department of Justice, Counsel for

Respondents Steven J. Rosenbaum, Covington & Burling, LLP, Counsel for Applicant for Intervention American Petroleum Institute

Bradley K. Ervin, Covington & Burling, LLP, Counsel for Applicant for Intervention American Petroleum Institute

Dated: August 22, 2018

/s/ J. Scott Janoe
J. Scott Janoe
Counsel for Amici Curiae Chamber of Commerce of the United States of America and the National Association of Manufacturers

In accordance with Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America and the National Association of Manufacturers (Proposed *Amici*) respectfully request permission to file the proposed *amicus curiae* brief accompanying this motion in support of Respondents. This motion and the accompanying proposed *amicus curiae* brief are timely, having been filed within seven days after Respondents filed their brief on August 15, 2018. Fed. R. App. P. 29(6). Respondent United States Environmental Protection Agency and Intervenor American Petroleum Institute have consented to the filing of the proposed *amicus curiae* brief. *See* Fed. R. App. P. 29(a)(2). Petitioners indicated that they took no position.

Proposed *Amici* should be allowed to participate as *amici curiae* in this case because their members' interests will be directly and indirectly impacted by the outcome of this litigation. The Chamber is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector and geographical region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in

cases that raise issues of concern to the Nation's business community, including cases involving the National Environmental Policy Act (NEPA).

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Proposed *Amici* have a substantial interest in this case. Their members include companies engaged in and dependent on offshore oil and gas production in the Gulf of Mexico that would be harmed by an unfavorable ruling in this case. Their members also include other companies that regularly invest in capital-intensive projects that depend on federal authorizations requiring review under NEPA. The NEPA process and associated litigation is costly and time-consuming. Proposed *Amici*'s members therefore rely on the proper application of NEPA, which includes agencies using available regulatory procedures to eliminate redundancy and reduce delays. An unfavorable ruling in this case, where the United States Environmental

Protection Agency has properly applied NEPA regulations to adopt another agency's environmental impact statement, would create negative precedent that could have broader effects on Proposed *Amici*'s members.

Proposed *Amici* are familiar with the practical effect NEPA has on American businesses, which is why they have submitted *amicus curiae* briefs in other cases involving NEPA issues. Proposed *Amici* believe that their participation as *amici curiae* in this case would benefit the Court by providing a broader perspective on the NEPA process and explaining why the proper application of NEPA is important for the United States' economy and energy security. As organizations that advocate for the interests of many businesses that regularly participate in the NEPA process, Proposed *Amici* believe they are uniquely situated to provide this needed perspective and context. Proposed *Amici* therefore respectfully requests leave to file the accompanying proposed *amicus curiae* brief.

DATED: August 22, 2018

Respectfully submitted,

By: /s/ J. Scott Janoe

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 22nd day of August 2018.

/s/ J. Scott Janoe
J. Scott Janoe
Counsel for Amici Curiae Chamber of Commerce of the United States of America and the National Association of Manufacturers

CERTIFICATE OF COMPLIANCE WITH RULES 27 & 32(a)

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 590 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word 2016 word processing software in 14-point Times New Roman type style.

The undersigned counsel further certify that no privacy redactions are required, 5th Cir. R. 25.2.13; the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: August 22, 2018

/s/ J. Scott Janoe
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Counsel for Amici Curiae
Chamber of Commerce of the
United States of America and the
National Association of
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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector and geographical region of the country.[1] An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the National Environmental Policy Act (NEPA).

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* affirm that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than *amici curiae*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici have a substantial interest in this case. *Amici*'s members include companies engaged in and dependent on offshore oil and gas production in the Gulf of Mexico that would be harmed by an unfavorable ruling in this case. *Amici*'s members also include other companies that regularly invest in capital-intensive projects that depend on federal authorizations requiring review under NEPA. The NEPA process and associated litigation is costly and time-consuming. *Amici*'s members therefore rely on the proper application of NEPA, which includes agencies using available regulatory procedures to eliminate redundancy and reduce delays. An unfavorable ruling in this case, where the United States Environmental Protection Agency (EPA) has properly applied NEPA regulations to adopt another agency's environmental impact statement, would create negative precedent that could have broader effects on the *amici*'s members. Accordingly, *amici* respectfully submit this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Petitioners seek to disrupt well-established NEPA practices and offshore oil and gas production in the Gulf to the detriment of national economic and energy security. The petition does so by challenging the environmental review underlying EPA's *reissuance* of its NPDES General Permit that has provided coverage of discharges from offshore oil and gas production in the Gulf for over 30 years. The Petitioners primarily fault EPA for applying the Council on Environmental Quality's (CEQ's) NEPA regulations to adopt the Bureau of Ocean Energy Management's (BOEM's) final environmental impact statement (FEIS) for planned oil and gas lease sales. EPA's adoption of the FEIS, which is consistent with its past practice, is not only lawful, but especially appropriate given applicable regulatory requirements and presidential mandates to eliminate redundant and excessive analyses from the NEPA process.

Relying on hyper-technical arguments and implicitly questioning the CEQ regulations allowing for adoption, Petitioners ask this Court to conclude that EPA's NEPA review was deficient and to order a remand. These claims, implicating hundreds of billions of dollars of infrastructure and revenue and millions of American jobs, should be rejected.[2]

[2] Although the *amici*'s arguments contained in this *amicus curiae* brief are limited to NEPA claims, *amici* support EPA's position with respect to all of Petitioners' claims.

ARGUMENT

I. Offshore Oil and Gas Development in the Gulf of Mexico Is Crucial to National Economic and Energy Security

Uninterrupted offshore oil and gas production is imperative for ensuring a strong national economy and energy security. *See* Exec. Order No. 13,840, 83 Fed. Reg, 29,431, *Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States* (June 19, 2018) ("The ocean, coastal, and Great Lakes waters of the United States are foundational to the economy, security, global competitiveness, and well-being of the United States.").[3] The Gulf plays a pivotal role in this production as one of the world's most prolific hydrocarbon basins, providing 17 percent of U.S. oil production and five percent of U.S. natural gas production. *See* BOEM, *U.S. Outer Continental Shelf Gulf of Mexico Region Oil and Gas Production Forecast: 2018-2027* at iii (Dec. 2017).[4] The Gulf also provides approximately *97 percent* of our nation's total offshore oil and gas production. *See* BOEM OCS Report, *Deepwater Gulf of Mexico* at ii (Dec. 31, 2014).[5] Estimates of undiscovered technical recoverable resources in the Gulf range from 39.48 to 58.53 billion barrels of oil and 124.01 to 159.63 trillion cubic

[3] https://www.whitehouse.gov/presidential-actions/executive-order-regarding-ocean-policy-advance-economic-security-environmental-interests-united-states/.
[4] https://www.boem.gov/BOEM-2017-082/.
[5] https://www.boem.gov/Deepwater-Gulf-of-Mexico-Report-2014/.

feet of gas. *U.S. Outer Continental Shelf Gulf of Mexico Region Oil and Gas Production Forecast: 2018-2027*.

The economic benefits of offshore oil and gas development are considerable. In 2016, for example, the offshore oil and gas industry contributed approximately 315,000 jobs and $30 billion to the U.S. economy, $2.7 billion to the U.S. Treasury, and 592 million barrels of oil. *See* BOEM, *Offshore Oil and Gas Economic Contributions* at 1-2.[6] In 2017, the federal government collected more than $3.7 billion in royalties, rents, bonuses, and other fees from oil and gas activity in the Gulf. *See* Department of the Interior, *Natural Resources Revenue Data: Gulf of Mexico*.[7] A significant portion of this revenue is used by federal agencies like the Land and Water Conservation Fund and the Historic Preservation Fund to safeguard natural areas, water resources, and cultural heritage throughout the country. *Offshore Oil and Gas Economic Contributions* at 2.

The oil and gas industry generates and sustains employment across multiple related industries, "including oil and natural gas machinery, air and marine transport, legal and insurance services," among others. *See* Quest Offshore, *United States Gulf of Mexico Oil and Natural Gas Industry Economic Impact Analysis* at 1 (June 2011).[8] Most recently, the increased production of oil and gas in the Gulf enabled

[6] https://www.boem.gov/NP-Economic-Benefits/.
[7] https://revenuedata.doi.gov/explore/offshore-gulf/.
[8] https://www.eenews.net/assets/2011/07/11/document_pm_02.pdf.

by new technologies like horizontal drilling and hydraulic fracturing, has led to a burgeoning refining and chemical manufacturing sector, which is a "crucial economic driver" in states like Louisiana and Texas. *See* Center for Energy Studies, Louisiana State University, *Gulf Coast Energy Outlook* at 6 (2017).[9] The creation of this additional income and employment boosts employee spending, which generates significant multiplier effects throughout the local economy. *See Offshore Oil and Gas Economic Contributions* at 2. Accounting for these multipliers, one study found that oil and gas and its related sectors (including refineries and chemical manufacturing) "supported 8 percent of all jobs in the Gulf South region or 2.2 million workers in 2015." *Gulf Coast Energy Outlook* at 10. These satellite industries provide important tax revenues for federal, state, and local governments.

Maintaining these economic benefits requires substantial private investment. Oil and gas development in the Gulf involves tens of billions of dollars of annual investment and is "one of the most capital intensive industries in the economy." *United States Gulf of Mexico Oil and Natural Gas Industry Economic Impact Analysis* at 24. As of 2017, $240 billion in capital expenditures had either been completed or announced in the Gulf region. *Gulf Coast Energy Outlook* at 6. The vast majority of this spending is reinvested in the U.S. economy. From 2008 to 2010, 98 percent of total spending in the oil and gas industry for the Gulf was

[9] https://www.lsu.edu/ces/publications/2017/GCEO2017.pdf.

domestic with an average of only 2 percent occurring overseas. *United States Gulf of Mexico Oil and Natural Gas Industry Economic Impact Analysis* at 30.

Offshore energy production is also "foundational" to national energy independence and global competitiveness. *See* Exec. Order No. 13,840. By producing over one million barrels of oil per day, the offshore oil and gas industry in the Gulf fortifies our nation's energy security. *See id.*; U.S. Energy Information Administration, *Federal Offshore—Gulf of Mexico Field Production of Crude Oil* (June 29, 2018).[10] And because oil and natural gas account for over 60 percent of U.S. primary energy consumption, the continued, unimpeded exploration and development of new reserves will be crucial to preserving national energy security. Quest Offshore, *The Economic Benefits of Increasing U.S. Access to Offshore Oil and Natural Gas Resources in the Pacific* at 16 (Nov. 2014).[11]

The General Permit at issue here is an important step in ensuring that the United States can maintain its economic and energy security.

[10] https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFP3FM2&f =M.

[11] http://www.noia.org/wp-content/uploads/2014/11/The-Economic-Benefits-of-Increasing-U.S.-Access-to-Offshore-Oil-and-Natural-Gas-Resources-in-the-Pacific.pdf.

II. EPA's Adoption of BOEM'S FEIS Is Lawful, Appropriate, and Consistent with its Past Practice

Petitioners' contention that EPA took an impermissible shortcut by following its past practice of adopting BOEM's FEIS is meritless. Both common sense and the law support EPA's approach. BOEM's FEIS for its planned lease sales in the Gulf encompassed oil and gas activities and considered their impacts, including those related to operational discharges and wastes. *See, e.g.*, GMG0000358-60, GMG0000466-75. Stated differently, BOEM's FEIS anticipated and evaluated the environmental impacts associated with EPA's reissuance of the General Permit. *Id*. Were EPA to have produced an independent EIS, it would have duplicated BOEM's (and its own) efforts and analysis in contravention of CEQ's NEPA regulations. Petitioners provide no warrant for needlessly interrupting offshore oil and gas production in the Gulf, and the Court should therefore deny the petition.

A. NEPA regulations effectively required EPA to adopt BOEM's FEIS

CEQ regulations not only authorized EPA to adopt BOEM's FEIS, *see* 40 C.F.R. § 1506.3, they essentially required that EPA do so. The regulations provide that "[a]gencies *shall* . . . us[e] program, policy, or plan environmental impact statements and tiering from statements . . . *to eliminate repetitive discussions of the*

same issues."[12] *Id.* § 1500.4(i) (emphases added). The regulations further mandate that "agencies shall reduce excessive paperwork" and "reduce delay by . . . [e]liminating duplication" and "[c]ombining environmental documents." *Id.* §§ 1504.4, 1504.5(h), (i). "Adoption" is one of several methods CEQ prescribed for fulfilling these requirements.[13] *Id.* § 1506.3. Accordingly, these mutually reinforcing mandates to eliminate redundancy and reduce delay instruct agencies to adopt another agency's applicable FEIS whenever possible. That is exactly what EPA has done here.

[12] Agencies must also incorporate material by reference "into an environmental impact statement . . . when the effect will be to cut down on bulk without impeding agency and public review of the action." 40 C.F.R. § 1502.21.

[13] Agencies may adopt another agency's EIS if it "meets the standards for an adequate statement under these regulations." *Id.* § 1506.3(a); *see also id.* § 1500.4(n). Further, "[a] cooperating agency may adopt without recirculating the [EIS] of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." *Id.* § 1506.3(c). A "cooperating agency" is "any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment." *Id.* § 1508.5.

B. EPA properly adopted and reasonably relied on BOEM's FEIS when reissuing the general permit

1. EPA complied with CEQ regulations when adopting BOEM's FEIS

EPA's adoption of BOEM's FEIS was procedurally proper. In its Record of Decision, EPA stated that, pursuant to a memorandum of agreement between the two agencies, EPA was a cooperating agency with BOEM for purposes of the latter's FEIS. *Compare* 40 C.F.R. § 1506.3(a), (c) *with* GMG0003079. EPA also explained that it conducted the requisite independent review and evaluation of BOEM's FEIS and found the statement adequate for purposes of NEPA. *Compare* 40 C.F.R. § 1506.3(a), (c) *with* GMG0003079-83.

EPA's adoption of BOEM's EIS was no surprise. As discussed below, EPA previously took this approach when reissuing the General Permit. What is more, the FEIS expressly anticipated EPA's reissuance of the General Permit and discussed the General Permit in relation to discharge regulations and general toxicity limits. GMG0000222-27. Petitioners were certainly aware that this adoption was coming when they reviewed and commented on BOEM's FEIS. *See, e.g.*, GMG0001621-24.

2. BOEM's FEIS complied with NEPA and adequately supported EPA's reissuance of the General Permit

Contrary to Petitioners' arguments, EPA reasonably relied on BOEM's FEIS and did not act arbitrarily or capriciously. *Compare* 40 C.F.R. § 1506.3 *with* Pet'rs'

Opening Br. at 29-37 (alleging EPA "failed to examine any alternative that would reduce the volume or types of dangerous pollutants discharged"). CEQ regulations not only authorize but encourage agencies to adopt other agencies' EISs to, among other things, minimize redundancy, avoid delay, and eliminate unnecessary paperwork. EPA acted reasonably in doing just that. *See Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1220 (11th Cir. 2002) (upholding Corps' NEPA review where the agency "acted both efficiently and consistently with NEPA regulations by incorporating the previous studies into its current analysis"); *North Carolina v. F.A.A.*, 957 F.2d 1125, 1127-28, 1131 (4th Cir. 1992) ("Courts should not require wasteful duplication of effort.").

The regulations' mandate to minimize redundancy, avoid delay, and eliminate needless paperwork necessarily means that an adopting agency will not be required to delineate a new set of alternatives when the action the adopting agency takes is a subset of (*i.e.*, narrower than) the action taken by the agency that produced the original EIS. Case law supports this principle.

In *North Carolina v. FAA*, for example, the state filed a NEPA challenge against an FAA order revoking, realigning, and establishing restricted air space over eastern North Carolina at the Navy's request. 957 F.2d at 1127-28. In promulgating a final rule, the FAA reviewed and adopted the Navy's environmental assessment (EA). *Id.* at 1130. Much like Petitioners here, North

Carolina faulted the FAA for not preparing an independent EIS and for failing to consider several specified alternatives. *Id.* at 1134. The court examined the alternatives considered by the Navy in its EA, recognized "that an agency has substantial discretion in its evaluation of alternatives," and concluded that the Navy's discussion of alternatives was sufficient to sustain the FAA's independent action. *Id.* at 1134-35. Petitioners' identical arguments should be rejected.

Like Petitioners, North Carolina also argued that the FAA was required to prepare "an independent assessment of environmental impact" and "an environmental impact statement." *Id.* at 1128. In holding that the adopted EA was sufficient, the court noted that the Navy adequately responded to the concerns and comments related to the rule's environmental impact. *Id.* at 1131. Similarly, here, BOEM bolstered its existing FEIS analysis regarding operational discharges and wastes from hydraulic fracturing in response to comments from Petitioners. GMG0001621. Moreover, EPA itself also provided detailed responses to Petitioners' 22 distinct comments. *See* GMG0003132-144. Accordingly, this Court should afford EPA proper deference and reject Petitioners' flyspecking arguments. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (It is not the court's role "to flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor." (quotation marks omitted)); *see also Sierra Club*, 295 F.3d at 1222 (affirming the Corps' adoption of aspects of another agency's EIS).

To be sure, there are instances where adoption would be improper, but they are far afield from the rational and consistent approach taken by EPA here. In *Sierra Club v. U.S. Army Corps of Engineers*, for example, the Second Circuit determined that the Corps' NEPA review was arbitrary where it adopted another agency's EIS. 701 F.2d 1011 (2d Cir. 1983). In that case, "the record disclose[d] that at every level of review the Corps simply ignored the views of sister agencies that were, by law, to be accorded 'great weight.'" *Id.* at 1032. Further, "the Corps never made a serious attempt to discover, or to make a decision based on, reliable fisheries information" needed to assess the aquatic impacts of the agency action (there, permitting a landfill). *Id.* at 1033. The Corps also issued a permit knowing that a relevant EPA study was on the verge of being completed. *Id.* at 1032-1033. The court correctly rejected the Corps' adoption in *Sierra Club*, but that case is nothing like this one.

These cases confirm that Petitioners' arguments lack merit. Federal agencies' practical reliance on thorough environmental impact statements developed by other agencies for distinct but related authorizations is a bedrock principle of NEPA practice. *Amici*'s members depend on agencies continuing to apply this principle to facilitate efficient NEPA reviews of their projects and operations.[14] Accepting

[14] Petitioners should applaud EPA's adoption of BOEM's FEIS because it reflects that BOEM sufficiently considered the relevant environmental impacts at the earliest possible stage. *See* 40 C.F.R. § 1501.2. Environmental organizations, including

Petitioners' arguments would frustrate this principle and provide no meaningful benefit to the NEPA process.

C. EPA's adoption of BOEM's FEIS when reissuing the General Permit is consistent with the agency's past practice

EPA has a well-established practice of adopting BOEM's FEIS to comply with NEPA when reissuing general permits for offshore oil and gas operations in the Gulf. For example, during the last presidential administration, EPA explained that BOEM, "[i]n connection with its oil and gas leasing programs under the Outer Continental Shelf Lands Act," prepared an "environmental impact statement[] on potential impacts of oil and gas operations in the Central and Western Gulf of Mexico for the 2012-2017 period." 77 Fed. Reg. 13,601, 13,602 (Mar. 7, 2012) (proposed rule). EPA then stated that it was "a cooperating agency on BOEM's EIS" and would "use that EIS to fulfill the National Environmental Policy Act obligations" for issuing a general permit. *Id.* at 13,602-03; 77 Fed. Reg. 61,605 (Oct. 10, 2012) (final rule).

CBD, regularly contend that agency actions must consider environmental impacts at the broader planning stage. *See* https://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/pdfs/Colorado-oil-and-gas-complaint-4-26-2018.pdf ¶ 15 (CBD claiming that BLM was required to consider unknown site-specific impacts "at both the land-use planning stage and leasing stage" and that the agency's refusal to do so was a "'shell game,' the end result of which is complete avoidance of disclosure of significant environmental impacts at the earliest possible stage"). BOEM's adherence to CBD's preferred procedure enabled EPA to adopt BOEM's FEIS.

EPA employed the same approach with earlier general permits. *See* 72 Fed. Reg. 31,575, 31,577 (June 7, 2007) (final rule) (explaining that EPA was a cooperating agency with the Minerals and Management Service and relying on its EIS to reissue the general permit).[15] Although EPA prepared a supplemental EA when it adopted an EIS and reissued the general permit in 2004, EPA determined that there would be "no significant impacts other than those considered in the MMS EIS." 71 Fed. Reg. 76,667, 76,669 (Dec. 21, 2006).

EPA's unchallenged, decade-long practice of adopting BOEM's EISs when reissuing the General Permit supports EPA's position that it has acted lawfully here.

III. Ruling Against EPA Would Increase the Regulatory Burdens of NEPA

NEPA was originally understood to be a concise, timely, and cost-efficient process through which federal agencies considered environmental consequences in reasonable proportions before acting. But no more. NEPA has been forged into something unrecognizable and replete with uncertainty. Burdensome litigation and nebulous standards for reviewing agency action under NEPA have caused agencies and project applicants to cram NEPA review documents with superfluous analysis that over time has become the norm. This practice compounded over time has

[15] BOEM emerged from the division and reorganization of the Minerals and Management Service. *See* BOEM, *The Reorganization of the Former MMS*, https://www.boem.gov/Reorganization/.

resulted in an average five-year slog, costing millions of dollars, that undermines effective governance and economic development. Upholding EPA's adoption of BOEM's FEIS would be a positive step in addressing the problems of the modern NEPA process.

A. Notwithstanding modern trends, NEPA regulations require agencies to provide concise analyses and to reduce delay

Congress created the CEQ to, *inter alia*, adopt regulations that would effectuate Congress's intent in enacting NEPA. *See* 42 U.S.C. § 4332(B) (explaining that the CEQ "will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations"). To that end, the CEQ adopted regulations delineating what NEPA's "detailed statement" (i.e., EIS) requirement entails. 42 U.S.C. § 4332(C); 40 C.F.R. pts. 1500-1508. These regulations provide that detailed statements are *not* to be "encyclopedic" and "shall normally be less than 150 pages," except "for proposals of unusual scope or complexity [which] shall normally be less than 300 pages." 40 C.F.R. §§ 1500.4(b); 1502.7.

These page limits, adopted in 1978, implicitly set forth the level of detail and analysis required under NEPA and show that NEPA review was not intended to substantially delay agency action. Even before the CEQ promulgated this regulation, courts understood that NEPA review should not greatly inhibit efficient

and timely agency action. For instance, in 1973, the Ninth Circuit upheld an EIS prepared by the FAA for a new runway at Honolulu International Airport, even though the entire document *totaled only 46 pages*. *See Life of the Land v. Brinegar*, 485 F.2d 460, 467, 470 (9th Cir. 1973), *cert. denied* 416 U.S. 961 (1974). By comparison, the FAA's 2005 EIS prepared for several new runways at O'Hare International Airport *spanned over 10,000 pages*.[16] The 2005 EIS contained over 200 times more information and analysis than the 1973 EIS, a factor that presumably applied to the costs and time to produce the EISs.[17]

Unsurprisingly, including deeper and broader analyses in EISs leads to greater costs and delays in the NEPA review process. Available data shows that completing an EIS is an increasingly costly and time-consuming endeavor. For the Department of Energy (DOE), the average cost of an EIS between 2003 and 2012 was $6.6 million, ranging between $60,000 and $85 million. Government Accountability Office, *Little Information Exists on NEPA Analyses* at 12 (April 2014).[18] A more recent report from the DOE found that the preparation of an EA took, on average, 21 months and cost $324,000 and the preparation of an EIS took 46 months and cost $6.06 million. U.S. Dep't of Energy, *National Environmental Policy Act, Lessons*

[16] O'Hare Modernization Final Environmental Impact Statement, https://www.faa.gov/airports/airport_development/omp/eis/feis/.
[17] One only can wonder whether there will be another 200-fold increase over the next 30 years such that an EIS will contain 2,000,000 pages of information.
[18] https://www.gao.gov/assets/670/662543.pdf.

Learned at 23 (Dec. 2, 2016).[19] The Federal Highway Administration similarly reports that the time required to prepare an EIS has been increasing steadily, growing from an average 2.2 years in the 1970s, to 4.4 years in the 1980s, and 5.0 years in the 1990s.[20] Trends indicate that the EIS process will only continue to lengthen. *See Little Information Exists on NEPA Analyses* at 13-14 (explaining that from 2000 through 2012, "the total annual average governmentwide EIS preparation time increased at an average rate of 34.2 days per year.").

Reprimanding agencies like EPA for appropriately using regulations to curtail these problems would be counterproductive, wasting public resources and unnecessarily burdening businesses. The Court should therefore uphold EPA's adoption of BOEM's FEIS.

B. Dilatory litigation has substantially slowed the NEPA process

One major cause of the modern NEPA process is routine dilatory litigation by project opponents.[21] For agencies and project applicants alike, the threat of NEPA litigation (and of a possible remand) instills fear of crippling additional costs and delays.[22] One scholar describes why and how litigants abuse NEPA:

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[19] https://www.energy.gov/sites/prod/files/2016/12/f34/LLQR_2016_Q4.pdf.

[20] https://www.everycrsreport.com/files/20030313_RS20841_87f3254670e4326d83cdc4372598f1cf26551ff7.pdf.

[21] The oil and gas industry, in particular, has become accustomed to seeing its federal authorizations challenged under NEPA.

[22] Filing lawsuits to delay a project is facile. Given the ambiguities in NEPA's requirements, project opponents can readily develop claims alleging NEPA

> Delay buys time, which opponents can use to build popular and political opposition to the project. New information may develop, partially through the disclosures of the NEPA statement. Inflationary pressures, and other costs, could economically doom the project during the delay. NEPA thereby became an important means to the end: stopping the project.

Denis Binder, *NEPA, NIMBYs and New Technology*, 25 Land and Water Law Review 11, 17 (1990). As the CEQ has aptly explained, the threat of litigation results in an unhelpful NEPA process that "takes too long and costs too much" and that produces documents that "are too long and technical for many people to use." *See* Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years* at 7 (January 1997);[23] *see also* Linda Luther, CRS Report for Congress, *The National Environmental Policy Act: Streamlining NEPA* at 10 (updated Jan. 9, 2007) (acknowledging "that the threat of [NEPA] litigation may lead to the generation of wasteful documentation and analysis that does not add value to . . . the decision-making process").[24]

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violations, even if for the sole purpose of delay, without fear of sanctions. Indeed, an organization need only allege that the agency did not provide enough detail in its analysis (*i.e.*, the agency did not take the requisite "hard look") or did not consider all reasonable alternatives. Because an agency can always provide greater detail and additional consideration to reasonable alternatives, meaningful checks against this litigation are lacking. The ease with which an organization can manufacture a NEPA claim incentivizes agencies to provide increasingly detailed (and unnecessary) information and analyses in their NEPA review documents.

[23] https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.

[24] https://fas.org/sgp/crs/misc/RL33267.pdf.

To protect against the harms of dilatory NEPA litigation, courts should skeptically review litigation that potentially falls into this category and defer to agencies' reasonable efforts to streamline the NEPA process. *Amici* therefore urge the Court to reject Petitioners' NEPA claims in this case.

C. Presidential administrations have consistently directed federal agencies to implement NEPA's requirements more efficiently

Recent presidential administrations, both Republican and Democrat, have recognized the modern NEPA crisis and directed federal agencies to streamline the NEPA process. For instance, President Trump recently issued an executive order instructing agencies to adopt and employ specific NEPA "process enhancements," including the "One Federal Decision" policy, aimed at protecting the environment while reducing administrative burdens and ensuring timely results. Exec. Order No. 13,807, 82 Fed. Reg. 40,463, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure* (Aug. 15, 2017).

President Obama issued a similar mandate during his tenure, ordering agencies "to significantly reduce the aggregate time required to make decisions in the permitting and review of infrastructure projects by the Federal Government, while improving environmental and community outcomes." Exec. Order No. 13,604, 77 Fed. Reg. 18,885, *Improving Performance of Federal Permitting and Review of Infrastructure Projects* (Mar. 22, 2012). This order expressly recognized

that the proper and efficient implementation of NEPA is necessary to "maintain our Nation's competitive edge and ensure an economy built to last." *Id.*

President George W. Bush, too, directed agencies to streamline the NEPA review process by "tak[ing] appropriate actions . . . to promote environmental stewardship in the Nation's transportation system and expedite environmental reviews of high-priority transportation infrastructure." Exec. Order No, 13,274, 67 Fed. Reg. 59,449, *Environmental Stewardship and Transportation Infrastructure Project Reviews* (Sept. 18, 2002).

Agencies should be commended for adhering to these executive orders, conducting efficient and sufficient NEPA review in compliance with the statute and regulations, and saving taxpayer dollars. That is exactly what EPA has done in this case.

CONCLUSION

Amici respectfully requests that the Court deny the petition for review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 22nd day of August 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limit,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,578 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word 2016 word processing software in 14-point Times New Roman type style.

The undersigned counsel further certify that no privacy redactions are required, 5th Cir. R. 25.2.13; the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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