



Via regulations.gov

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Re: Notice; Request for Comments; Bureau of Ocean Energy Management; 2023-2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program and Draft Programmatic Environmental Impact Statement; 87 Fed. Reg. 40859; Docket No. 2022-14524 (July 8th, 2022)

Ms. Hammerle:

The Global Energy Institute (Energy Institute) appreciates the opportunity to comment on the Bureau of Ocean Energy Management's (BOEM's) Proposed Program for the 2023-2028 National Outer Continental Shelf Oil and Gas Leasing Program (Proposed Program), as well as the Draft Programmatic Environmental Impact Statement for the 2023-2028 Program (Draft PEIS).

The mission of the Energy Institute, a division of the U.S. Chamber of Commerce (Chamber), is to unify policymakers, regulators, business leaders, and the American public behind a commonsense energy strategy to help keep America secure, prosperous, and clean. The Energy Institute believes that domestically produced oil and natural gas is, and will remain, essential to America's economy, security, and global competitiveness.

The Chamber's members are directly and indirectly affected by BOEM's Outer Continental Shelf (OCS) leasing program due to the myriad of impacts that these leases and the resulting oil and natural gas production have on the national economy and our energy security. If finalized in its current form, the Proposed Program would result in the loss of jobs and revenue for our members, cause them to pay more to meet their energy needs, hinder their ability to receive the reliable and affordable energy they need to operate, and lead to increased emissions. The Proposed Program would also directly harm members who wish to lease OCS areas that have not been proposed for lease as part of the Program, as well as our members who would like to provide supporting services to those leasing such areas. Given that Congress has expressly linked oil and natural gas leasing on the OCS to wind development on the OCS through the Inflation Reduction Act of 2022 (IRA), the Proposed Program would also harm our members

interested in offshore wind development by limiting their ability to enter into OCS leases as well.

BOEM's Proposed Program would unjustifiably curtail OCS oil and natural gas production by limiting lease sales in a way that will *not* best meet America's energy needs in the five years following its approval as required by OCSLA. A plan that *best* meets energy needs is one that provides energy reliability, ensures our energy security, and does not rely on unproven assumptions dependent upon rigid timelines for the energy transition or availability of alternative forms of energy for which there is currently a wholly insufficient scale of storage and transmission infrastructure. Indeed, the push to alter our America's energy mix makes a reliable source of domestic oil and natural gas production more critical than ever to ensure that our economy can continue to function smoothly as new forms of energy are developed and brought online at adequate levels to meet our national energy needs. Current events in Europe highlight why a robust OCS leasing program is critical to ensuring our future energy needs, as reliance on global markets is fraught with risks that affect not only energy prices but our domestic industries and job security.¹ We must not be in a position where we are reliant on other countries for both hydrocarbon fuels and the critical minerals needed to develop domestic renewable energy. Such a position would increase our vulnerability to geopolitical forces. Put simply, it is not possible for a program to "best" meet the United States' energy needs if that program cannot even ensure that our energy needs *are* met.

BOEM's own projections indicate that oil and natural gas will continue to make up the majority of U.S. energy consumption through 2050.² In addition, the U.S. Energy Information Administration (EIA) projects that U.S. petroleum and liquids consumption will grow by 15% between 2021 and 2050.³ Rather than taking this data into account and concluding that such energy needs dictate a need for increased oil and natural gas production on the OCS during this indeterminate transitional phase, BOEM has instead irrationally concluded that it should ratchet down OCS leasing in order to reach a net-zero policy goal.⁴ This approach is arbitrary and capricious and unsupportable in the

¹ Ewa Krukowska & Lenka Ponikelska, *EU to Propose Mandatory Power-Demand Cut and Levy on Profits*, BLOOMBERG (Sept. 12, 2022), <https://bloom.bg/3CoYscr>; David Uberti, *High Natural-Gas Prices Push European Manufacturers to Shift to the U.S.*, WALL ST. J. (Sept. 21, 2022), <https://on.wsj.com/3UQKwPv>.

² BOEM, *2023-2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program*, pt. II, at 1-7 (2022) [hereinafter "Proposed Program Analysis"].

³ U.S. Energy Information Administration (EIA), *Annual Energy Outlook 2022* (Mar. 3, 2022), <https://bit.ly/3COYi9v>.

⁴ Proposed Program Analysis at 1-8 to 1-9.

law and would likely shift production away from lower methane emitting OCS production to higher emitting methane production from other countries.⁵

OCS leasing and the transition to a lower carbon economy is not an “either/or” proposition. Indeed, oil and natural gas will fuel the transition by (1) providing a lower-carbon form of electric generation than is currently available; (2) providing the feedstocks for petrochemical products that are necessary components of wind turbines, solar panels, and other equipment that is critical to the transition towards renewable energy; (3) providing an affordable and secure source of baseload energy necessary to support intermittent generation by renewable sources; and (4) allowing for critical wind energy leasing opportunities on the OCS over the next decade, consistent with the requirements established under the newly adopted IRA. Revenues from OCS production also directly contribute to funding environmentally beneficial projects, including the National Park Service and projects that can help mitigate impacts from climate change in coastal regions.⁶ To the extent that BOEM believes that our America’s energy needs are “best met” through renewables as it pursues a net-zero policy goal, that goal can be achieved only through a final plan that allows for markedly more expansive oil and natural gas production on the OCS than what is currently proposed.

For the reasons explained further below, the Energy Institute specifically recommends:

- Opening up additional areas on the OCS for lease sales;
- Holding additional OCS lease sales and offering more acreage for lease each year from 2023-2028; and
- Ensuring that the areas offered for lease sales represent those areas most likely to result in meaningful volumes of oil and natural gas production.

The Energy Institute has further detailed its concerns with the Proposed Program below and included with these comments a set of materials relevant to the issues discussed in this letter.

I. A robust OCS leasing program is vital to the U.S. economy and our energy security.

A. OCS production is an essential piece of our energy security puzzle.

⁵ Dan Byers, *Greater U.S. Energy Production Is Needed to Reduce Reliance on Authoritarian Regimes*, GLOBAL ENERGY INSTITUTE (Apr. 5, 2022), <https://bit.ly/3BXWSg4>.

⁶ Great American Outdoors Act, Pub. L. No. 116-152, § 200402(b), 134 Stat. 682, 683 (2020).

Energy security is “the uninterrupted availability of energy sources at an affordable price.”⁷ Energy security plays a key role in our America’s economic success, and a robust offshore oil and natural gas national leasing program in turn plays an important role in our energy security. Both long-term energy security (timely investments to supply energy in line with economic developments and environmental needs) and short-term energy security (the ability of the energy system to react promptly to sudden shifts in the supply-demand balance) are crucial to our economy’s ability to function. The Outer Continental Shelf Lands Act (OCSLA) is designed to further these goals: Congress’s 1978 revisions to OCSLA aimed to “expedite[] exploration and development of [offshore lands] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.”⁸

America’s OCS is one of its greatest single strategic physical assets, and energy development on the OCS serves as a stable and predictable backbone for America’s energy security. The stability of our offshore production has helped to insulate the U.S. economy against energy supply disruptions and helped to ensure affordable domestic energy prices even when the global energy markets have become volatile. In 2019, the U.S. enjoyed its best position of energy security since 1970.⁹ One factor in this determination is that domestic crude oil output rose 11.3%, from 10.99 million barrels per day (bbl/d) in 2018 to 12.23 million bbl/d in 2019.¹⁰ The volume produced in 2019 was the highest in U.S. history and made the U.S. the world’s largest producer of crude oil for the first time in two decades.¹¹ The Gulf of Mexico contributed 138,000 bbl/d to this 2019 annual amount.¹² In 2021, federal offshore production accounted for more than 622 million barrels of crude oil production and more than 791 million cubic feet of natural gas.¹³ “In 2022, combined Gulf of Mexico oil and natural gas production is projected to be around 2.1 million barrels of oil equivalent per day.”¹⁴ Further, “[o]il and

⁷ Int’l Energy Agency (IEA), *Energy Security; Reliable, Affordable Access to all Fuels and Energy Sources*, <https://bit.ly/3CIXP3i> (last visited Sept. 14, 2022).

⁸ 43 U.S.C. § 1802(1).

⁹ Global Energy Inst., U.S. Chamber of Commerce, *Index of U.S. Energy Security Risk* 4 (2020), <https://bit.ly/3E6w2VE>.

¹⁰ EIA, *U.S. Crude Oil Production Grew 11% in 2019, Surpassing 12 Million Barrels Per Day* (Mar. 2, 2020), <https://bit.ly/3dXAaNa>.

¹¹ EIA, *The United States Is Now the Largest Global Crude Oil Producer* (Sept. 12, 2018), <https://bit.ly/2CPaNcX> (the U.S. became the largest crude oil producer, on a monthly basis, in late 2018).

¹² Global Energy Inst., *supra* note 9, at 5.

¹³ Proposed Program Analysis at 5-17 tbl. 5-4; *see also* EIA, *Annual Energy Outlook 2022*, <https://bit.ly/3RvLkq2> (last visited Oct. 1, 2022).

¹⁴ Energy & Indus. Advisory Partners, *The Economic Impacts of a 5-Year Leasing Program Delay for the Gulf of Mexico Oil and Natural Gas Industry*, at 4 (2022) [hereinafter “EIAP”], <https://bit.ly/3BS3MDq>.

natural gas production from the Gulf of Mexico is projected to average around 2.6 million barrels of oil equivalent per day over the 2022 to 2040 forecast period.”¹⁵

Although the OCS is responsible for only 2% of domestic natural gas production, the undiscovered economically recoverable resources (UERR) metric for natural gas in the OCS is estimated to be 327.49 trillion cubic feet, which is roughly equivalent to ten years’ worth of supply based on our 2021 consumption.¹⁶ This UERR metric is important in gauging the United States’ long-term energy security because it represents our current estimation of future production potential. Despite increased development of natural gas in the OCS, the buffer between actual production and apparent supply continues to grow.¹⁷ This is due in part to the continued development of the OCS and prior, robust leasing programs which have spurred exploration. It is also partly due to technological advances that improve hydrocarbon recovery rates and improve the viability of reserves that were previously unmarketable. A national program that discredits the value of the OCS resources would disinherit the United States not only of the produced resource, but of this important advancement in national energy security through improved capture technologies and increases in the recoverable reserves.

We are fortunate to presently have a surplus supply of domestic oil and natural gas production, but this production largely comes from private and state lands. In April 2014, the Congressional Research Service released an updated study quantifying natural gas and oil production on federal and non-federal lands over the previous 4 years. The report found that since 2009, federal offshore production of natural gas has decreased nearly 50% and oil production has decreased 13%. If not for production increases on private and state lands of 33% for natural gas and 61% for oil, the U.S. would have continued the decades-long trend of declining domestic production and increasing imports.¹⁸ We risk losing our current surplus supply if we fail to promote the development of available resources. Crude oil production on the OCS has generally improved since 2012, but recently began a new decline that would be exacerbated by a

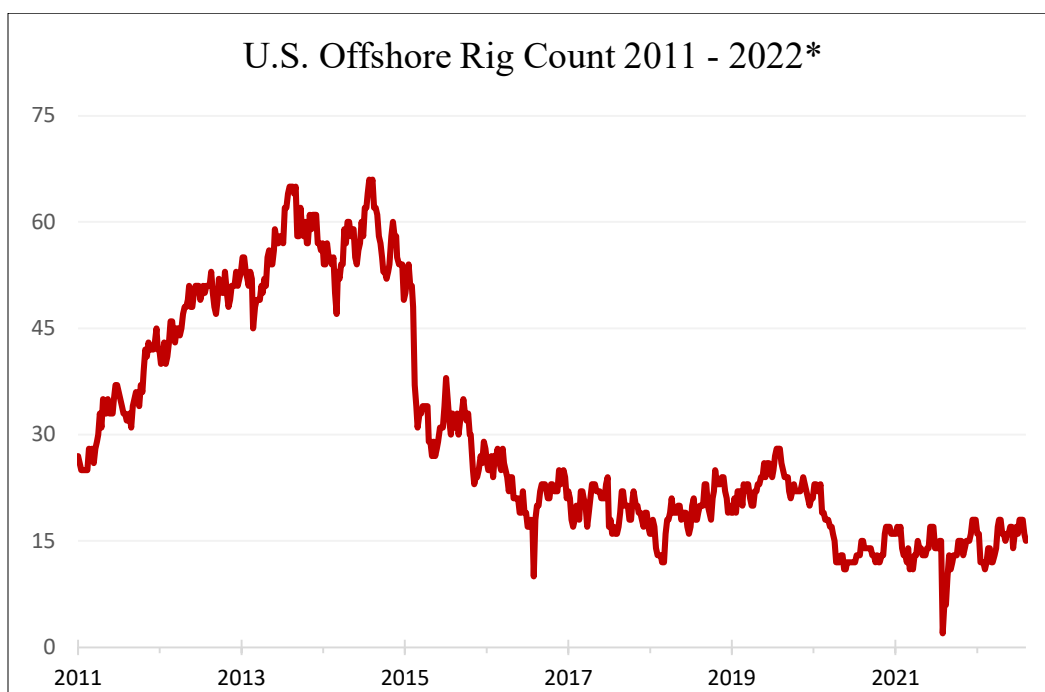
¹⁵ *Id.*

¹⁶ Outer Cont’l Shelf Governors Coal., *OCS 101*, ocsgovernors.org/ocs101/ (last visited Oct. 3, 2022); EIA, *Natural Gas Explained: Use of Natural Gas* (May 24, 2022), <https://bit.ly/3C282jN> (the U.S. consumed approximately 30.28 trillion cubic feet of natural gas in 2021).

¹⁷ At the time of the 1978 revisions to OCSLA, OCS natural gas accounted for 15% of the total domestic production and, at the time, the projected natural gas reserves in the OCS were only 109 trillion cubic feet.

¹⁸ Inst. for 21st Century Energy, U.S. Chamber of Commerce, Comments to DOI re: Request for Information and Comments on the Preparation of the 2017-2022 Outer Continental Shelf (OCS) Oil and Gas Leasing Programs 2-3, GLOBAL ENERGY INSTITUTE (Aug. 15, 2014), <https://bit.ly/3SPCHYn> (referring to Marc Humphries, Cong. Research Serv., R42432, *U.S. Crude Oil and Natural Gas Production in Federal and Non-Federal Areas* (2014), <https://bit.ly/3fy6ZAT>).

leasing program, like the Proposed Plan, that limits leasing options.¹⁹ The market effects of COVID-19 have also contributed to instability in the monthly OCS production totals.²⁰ Natural gas production in the OCS has been on a steady decline over the same time period, with 2022 volumes roughly half of what they were a decade ago.²¹ Onshore production of natural gas has made up the difference in recent years, but we should expect significant demands for natural gas around the globe to continue to affect domestic users in the years to come. In addition to declines in production, active rig counts in the OCS have also posted significant declines year-on-year, suggesting that even current production levels will not be sustained in the near and long term. This must change so that we do not lose production on the OCS. We can, and should, do more to increase domestic production of our abundant OCS resources.



*BakerHughes Rig Count, <https://rigcount.bakerhughes.com/>.

B. OCS production insulates the U.S. economy from global and domestic energy disruptions.

As the energy market has become increasingly global, the U.S. economy has grown more vulnerable to foreign actions that interrupt the market.²² Producing

¹⁹ EIA, *Monthly Crude Oil and Natural Gas Production* (Sept. 30, 2022), <https://bit.ly/2jkTaoW>.

²⁰ *See id.*

²¹ EIA, *Monthly Crude Oil and Natural Gas Production* (Sept. 30, 2022), <https://bit.ly/3V4lrkm>.

²² U.S. Dep't of Energy, *Valuation of Energy Security for the United States: Report to Congress 2*, 12 (Jan. 2017), <https://bit.ly/3JtSEil> [hereinafter "Valuation of Energy Security"].

additional domestic barrels corresponds to hundreds of millions of barrels per day that the U.S. has not had to competitively purchase and import on the global market. Indeed, with the recent surge in production, the U.S. has become a net exporter of oil and natural gas, and this new spare capacity of oil supply has helped meet the entire global energy market to weather the volatility of any one country's production that might be jeopardized by conflict or political disturbances.²³

Increasing OCS production also improves our energy security by helping to diversify the domestic sources of energy that are available.²⁴ Supply diversity “reduces the likelihood that disruptions to supply or threats to production areas, trade, or distribution routes—whether caused by weather, terrorism, or geopolitics—significantly disrupt U.S. access to physical energy supplies.”²⁵ In addition to global geopolitical events, domestic disturbances can hinder the ability to get energy to consumers. BOEM's Proposed Program should recognize that this could become increasingly true if climate change causes more intense weather events in the years following the Plan's completion. Localized weather events could cause certain sources of energy to be taken offline for periods of time, meaning that redundancy in the availability of energy sources will be all the more important to ensuring that our economy is able to continue to function smoothly. In addition, heat waves and winter freezes can result in short term and localized spikes in energy demand. As BOEM recognizes in the Proposed Program, there are regions of our country that are particularly vulnerable to these disruptions because of concentrations of supply or transportation issues.²⁶ In terms of preparing for an energy disruption, oil and natural gas have another advantage over many renewables: the ability to be strategically stored. Unlike intermittent sources of energy like wind or solar which must rely on batteries for storage, oil and natural gas can be readily stored in United States' existing storage infrastructure.²⁷

Luckily, the U.S. oil and natural gas industry is already “highly diversified because it is comprised of many privately held businesses that respond to market forces to increase or decrease production of oil and natural gas.”²⁸ The Department of Energy has found that increased production of oil and natural gas has “improved domestic, and

²³ Mark Green, *U.S. LNG Exports Are Meeting the Moment in Europe*, API (June 13, 2022), <https://bit.ly/3Rx4TYi>.

²⁴ Valuation of Energy Security, *supra* note 22, at 12.

²⁵ *Id.* at 44.

²⁶ See Proposed Program Analysis at 6-20.

²⁷ EIA, *Petroleum & Other Liquids: Working and Net Available Shell Storage Capacity* (May 31, 2022), <https://bit.ly/3dZYtKk> (showing year-to-year storage capacity for oil, natural gas, and various refined products to be consistently below 75% available capacity, indicating on a macro level that the ordinary national storage capacity is sufficient to meet ordinary national demand).

²⁸ Valuation of Energy Security, *supra* note 22, at 12.

thus global, energy security in a variety of ways” and has repeatedly prevented spikes in energy prices that could threaten both the U.S. and global economy.²⁹ As a result, even if we could meet our upcoming energy needs through sources outside of OCS oil and natural gas production, a program that best meets America’s energy needs is one that ensures diverse and redundant forms of readily available energy.

America’s households and industrial consumers benefit greatly from our current energy surplus. Domestic oil and natural gas supplies are critical for allowing Americans to affordably power the vehicles that deliver their products or allow them to commute to work (and represent the vast majority of energy consumed for these transportation purposes).³⁰ Oil and natural gas supplies are equally important to providing reliable and affordable electricity. Electricity prices are closely linked to the cost of natural gas, so an ample supply of natural gas is critical to ensuring that businesses and consumers can heat and cool their homes and businesses. This is, in part, because natural gas is the largest source of energy for electric generation, accounting for almost 40% of domestic generation.³¹ Since 2000, the use of natural gas to generate electricity has more than doubled, and is expected to continue to increase.³² During this same time period, consumption of electricity has increased 93%.³³ When the demand for electricity outstrips the available supply, consumers face higher prices—or worse, brownouts or blackouts in areas where the energy needed is unavailable. As a result, the reliability and resiliency of America’s electrical system is “increasingly linked to the performance and capabilities of the natural gas delivery system.”³⁴ Indeed, “it will be difficult to maintain adequate fuel availability to meet that demand when more coal and nuclear resources are lost.”³⁵ Such shortages have implications for the energy transition as well. As recent events in California have highlighted, consumers will be unable to affordably charge and operate their electric vehicles without a reliable supply of electricity.³⁶

²⁹ *Id.*

³⁰ BOEM notes that energy expenditures represent more than 5% of GDP and that 70% of those expenditures are on natural gas and petroleum. Proposed Program Analysis at 1-4. BOEM also recognizes that petroleum will continue to represent more than 90% of the transportation energy market through 2050. Proposed Program Analysis at 1-5.

³¹ See EIA, *Electricity Explained: Electricity in the United States* (July 15, 2022), <https://bit.ly/3J2rVZB>.

³² See Proposed Program Analysis at 1-7; EIA, *Natural Gas Explained*, *supra* note 16.

³³ Proposed Program Analysis at 1-5.

³⁴ Nat’l Energy Tech. Lab’y, U.S. Dep’t of Energy, *Additional Pipeline Capacity and Baseload Power Generation Needed to Secure Electric Grid* (Feb. 20, 2020), <https://bit.ly/3lq1soo>.

³⁵ *Id.*

³⁶ Livia Albeck-Ripka, *Amid Heat Wave, California Asks Electric Vehicle Owners to Limit Charging*, N.Y. TIMES (Sept. 1, 2022), <https://nyti.ms/3LWmZIK>.

Energy costs also represent a sizable portion of consumer budgets, whether in the form of home use or fuel for transportation.³⁷ As BOEM recognizes, projections out to 2050 show that petroleum and other liquids will continue to represent 92% of the transportation energy market.³⁸ “[T]ransportation is the second-largest expense in [consumer’s] annual budgets, costing as much as 20 to 25 percent of their annual income” and “consumers are unable to make many accommodations over the short term in response to changes in transportation fuel prices.”³⁹ Half of all American households also use natural gas for heating their homes and water, cooking, and drying clothes.⁴⁰ Because “[c]onsumers can’t easily cut consumption on short notice, as they can with discretionary purchases, . . . higher prices act as a tax, draining the money they have available to spend on other goods and services.”⁴¹ For example, customers in New England pay significantly more for natural gas due to repeated opposition to new pipeline projects, which has limited capacity and has forced the region to rely on imported natural gas subject to international pricing.⁴² Unreliable or unaffordable energy sources also have a disproportionately high impact on poor, minority, and environmental justice communities. Consistent with Executive Order 12898, BOEM should therefore take those impacts into account, as appropriate, when finalizing the Proposed Program, and ensure that there are sufficient supplies of domestic oil and natural gas production from the OCS to support lower energy prices and reduce impacts on these communities.⁴³

When consumers have less disposable income, they reduce spending. That reduction in spending carries negative consequences for the economy and helps explain why “high energy prices have often preceded recessions.”⁴⁴

When crude oil prices increase, households and businesses pay more for transportation fuels and the other inputs that depend on transportation, all of which constitute the direct costs. As a result of those higher input prices, households and businesses are able to spend less on other goods

³⁷ See Josh Mitchell, *Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy*, WALL ST. J. (Oct. 10, 2021), <https://on.wsj.com/3N57qPq>.

³⁸ Proposed Program Analysis at 1-5.

³⁹ Valuation of Energy Security, *supra* note 22, at 33.

⁴⁰ EIA, *Natural Gas Explained*, *supra* note 16.

⁴¹ Mitchell, *supra* note 37; see also Valuation of Energy Security, *supra* note 22, at 32.

⁴² See Letter from EQT to Hon. Jennifer Granholm, Secretary, U.S. Dep’t of Energy, 1-2 (Feb. 16, 2022), <https://bit.ly/3Clidl4>.

⁴³ Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

⁴⁴ Josh Mitchell, *supra* note 37.

and services and invest less. Those decisions create indirect cost, on the economy, with effects that can last for several quarters.⁴⁵

These concerns will only grow in the five years following the approval of the Proposed Program because the need for domestic natural gas production is increasing: “Since 2005, annual consumption of natural gas” has grown by “nearly 41 percent or 9 trillion cubic feet (Tcf). Electric power (up 60 percent) and industrial sector use (up 28 percent) comprise nearly 90 percent of the increase.”⁴⁶ Natural gas has displaced other power generation sources to become the primary fuel for electric power generation over the past 10 years,⁴⁷ resulting in substantial reductions in national GHG emissions reductions since 2005.⁴⁸ Natural gas also now provides almost one-third of the energy to the U.S. industrial sector.⁴⁹ “It is used for on-site electricity generation (fueling boilers and turbines); for process heat to melt glass, process food, preheat metals, and dry various products; and for combined heat and power . . . systems.”⁵⁰ This is in part due to the low cost of production of natural gas driven by the shale revolution, and it is also bolstered by the significant quantities of natural gas produced on the OCS.⁵¹

The impact that energy shortages and reliance on foreign energy sources can have on the economy have been highlighted by recent events. In contrast to the U.S., which has a surplus of natural gas, Europe imports much of its natural gas supply, and is therefore far more vulnerable to geopolitical disruptions. Historically, we have paid significantly less than counterparts in Europe and other industrialized nations.⁵² This has only become more true as a result of Russia’s invasion of Ukraine and the resulting shortage of natural gas supplies.⁵³ Europe is now facing a devastating energy crisis.⁵⁴ European natural gas prices are more than ten times higher than this same time last year, resulting in significantly higher electricity prices—roughly five times higher than

⁴⁵ Valuation of Energy Security, *supra* note 22, at 32.

⁴⁶ Center for Climate and Energy Solutions (C2ES), *Climate Solutions: Technology Solutions: Natural Gas*, <https://bit.ly/2Ty38TM> (last visited Sept. 14, 2022).

⁴⁷ *Id.*

⁴⁸ See U.S. EPA, EPA 430-R-21-005, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2019* at ES-11, 2-13 (2021), <https://bit.ly/3CnGbfl>.

⁴⁹ C2ES, *supra* note 46.

⁵⁰ See *id.*; see also EIA, *Natural Gas: Data: Natural Gas Consumption by End Use* (Sept. 30, 2022), <https://bit.ly/3rjvYKP>.

⁵¹ See Daniel Byers, *More Gold Medals for America’s Energy Producers*, GLOBAL ENERGY INST. (July 28, 2021), <https://bit.ly/3BR4TDy>.

⁵² See Daniel Byers, *U.S. Natural Gas Exports Deliver More Than Just Energy*, GLOBAL ENERGY INST. (Jan. 27, 2022), <https://bit.ly/3RojM5X>.

⁵³ Stanley Reed, *Why Europe’s Electricity Prices Are Soaring*, N.Y. TIMES (Aug. 25, 2022), <https://nyti.ms/3LVh8nh>.

⁵⁴ Liz Alderman, *‘Crippling’ Energy Bills Force Europe’s Factories to Go Dark*, N.Y. TIMES (Sept. 19, 2022), <https://nyti.ms/3RuhfY1>.

the previous year.⁵⁵ Indeed, governments are intervening as many families in Europe and the UK are facing crushing energy prices.⁵⁶ The impact of limited natural gas supplies from Russia is reverberating through European economies: “The IMF calculated in mid-July that for Hungary, Slovakia, and the Czech Republic a full cut off of natural gas from Russia could drop GDPs by up to 6%. Global economic growth would drop by 2.6% in 2022 and another 2% in 2023. On a human level, some people will not have heating this winter; others will have to choose between warmth and food.”⁵⁷

While this particular crisis cannot be solved by future leasing on the OCS, it highlights the consequences of an inadequate domestic supply of oil and natural gas. Russia is not unique; many of the nations and regions where oil and natural gas production takes place are not politically stable, and their interests do not always align with those of the U.S. or our allies. By limiting the areas and availability of oil and natural gas production on the OCS, BOEM opens our citizens and businesses up to the vulnerabilities now faced by Europe. Moreover, if the U.S. decides to provide supplies of oil and natural gas to Europe to mitigate a humanitarian crisis in 2023 or beyond, then our own citizens could incur direct and indirect consequences as a result, as there is only a finite amount of current production, and a failure to increase oil and natural gas production in the OCS would only serve to exacerbate such economic conditions domestically. Based on BOEM’s own analysis, the vast majority of the energy substitution from not leasing in the OCS would come from oil imports, and reduced consumption and production from existing OCS leases would only make up less than 10% of the energy substitutions.⁵⁸ BOEM’s own analysis thus indicates that a lack of OCS oil and natural gas leasing would make the U.S. increasingly vulnerable to geopolitical instability and energy price spikes. As a result, the Proposed Program does not best meet America’s energy needs, as required by OCSLA.

⁵⁵ *Id.*

⁵⁶ Keith Anderson, ScottishPower, *Grasping the Nettle of the Energy Affordability Crisis* (Aug. 14, 2022), <https://bit.ly/3fy7D1h>; David Blackmon, *The EU Vows To Solve Energy Price Problem It Helped To Create*, FORBES (Aug. 30, 2022), <https://bit.ly/3SOgZEc>; Suriya Jayanti, *Europe's Energy Crisis Is Going to Get Worse. The World Will Bear the Cost*, TIME (Aug. 30, 2022), <https://bit.ly/3BZArr1>.

⁵⁷ Jayanti, *supra* note 56.

⁵⁸ Proposed Program Analysis at 5-50 fig. 5-15, 5-54 fig. 5-16.

C. *OCS leasing will become increasingly important to our energy security during any upcoming energy transition.*

BOEM also considered several “net-zero” scenarios under which the United States attempts to transition to a net-zero economy by 2050. As BOEM acknowledges, “[i]n the transition to a net-zero emissions future, consumption of natural gas and oil would not entirely disappear”⁵⁹ and “[t]he decision of whether to include a specific area in a leasing program does not result in major changes to U.S. demand. Instead, the decision to have leasing in an area affects prices.”⁶⁰ As BOEM further acknowledges, America’s “energy outlook has changed several times, prices have dramatically varied, and technology has advanced.”⁶¹ It is clear, even from BOEM’s own statements, that it cannot manufacture a net-zero outcome or alter the United States’ energy usage by reducing oil and natural gas leasing on the OCS—and any attempt to do so would far exceed its statutory authority under OCSLA.⁶²

BOEM cannot base the Proposed Program on untested assumptions about our ability to transition to new energy sources. Unanticipated changes in geopolitical events and domestic use patterns will continue into the years following the approval of the Proposed Program. Given the practical reality that our energy needs will remain uncertain during that time period, and uncertainties over development and transmission of renewable sources of energy at scaled levels persist, the plan that best meets our energy needs, and thus fulfills BOEM’s obligations under OCSLA, is one that does not presume a rapid and smooth energy transition or that relations with other nations will remain amicable and allow for the U.S. to affordably obtain the energy that it needs. Such a prudent, responsible approach requires BOEM to open additional OCS areas up for potential lease and to hold additional lease sales during the Program period.

The potential impact of geopolitical events on America’s energy needs is not limited to the global oil and natural gas markets, and the ability to make a timely and smooth transition to other forms of energy is equally linked to geopolitical events. For example, certain rare earth metals and critical minerals are necessary components for batteries, electric vehicles, solar panels, and wind turbines.⁶³ The vast majority of these

⁵⁹ Proposed Program Analysis at 5-53.

⁶⁰ Proposed Program Analysis at 5-27 (emphasis added).

⁶¹ Proposed Program Analysis at 1-2.

⁶² *West Virginia v. EPA*, 142 S. Ct. 2587, 2615-16 (2022); see *infra* Section VI.

⁶³ IEA, *The Role of Critical Minerals in Clean Energy Transitions: World Energy Outlook Special Report* (Mar. 2022), <https://bit.ly/3LVwKqE>.

metals and minerals are located outside of the U.S., primarily in China.⁶⁴ As a result, a Program that assumes that the U.S. can transition its energy needs to renewables also presumes that the materials necessary to do so will be reasonably available at an affordable price from foreign trade partners. In contrast to our readily available supplies of domestic oil and natural gas, according to the Proposed Program, transition to renewable energy sources will require not only additional regulatory support, but “global commitment and dynamic shifts in supply-chains.”⁶⁵ Securing our energy future includes adequate raw materials, domestic production of critical components, and secure and circular supply-chains that address the full lifecycle of the components from production to disposal. As all agree, these essential conditions to a full transition to renewable energy are simply not present at this time. In the context of many renewable energy sources, a revolving door of production and recycling is required due to the relatively limited lifespan of some technologies and a scarcity of materials.⁶⁶

A variety of other complications still present short- and medium-term roadblocks to the full and robust deployment of renewable generators at the scale necessary to meet all of America’s energy needs. Those roadblocks include, among others, permitting complications and an absence of investment in an amount necessary to rapidly phase in an extraordinarily large amount of renewable generation.⁶⁷ These new renewable projects will be subject to the same federal permitting regimes as many traditional energy infrastructure projects. Projects subject to these requirements are routinely delayed by complications in the permitting process, including litigation concerning whether the federal agency issuing the permit conducted sufficient environmental reviews before doing so. The permitting process could therefore cause meaningful delays in the timelines for projects, or cause these projects to run out of funds and therefore never be completed.⁶⁸ There are additional legal and practical

⁶⁴ Daniel J. Cordier, U.S. Geological Survey, *Rare Earths 2* (Jan. 2022), <https://on.doi.gov/3V5RWib> (noting that China mined more than half of the total rare earths mined worldwide in 2021 and that China has more than one third of the total worldwide reserves of rare earth minerals).

⁶⁵ Proposed Program Analysis at 1-12.

⁶⁶ See Dieter Holger, *The Solar Boom Will Create Millions of Tons of Junk Panels*, WALL ST. J. (May 5, 2022), <https://on.wsj.com/3fysL7w>; Pu Liu & Claire Barlow, Univ. of Cambridge, *An Update for Wind Turbine Blade Waste Inventory* (Nov. 2015), <https://bit.ly/3E7Y6be>; Chris Martin, *Wind Turbine Blades Can’t Be Recycled, So They’re Piling Up in Landfills*, BLOOMBERG (Feb. 5, 2020), <https://bloom.bg/3y9vNpg>.

⁶⁷ See Michael Wigmore et al., *Feds May Need Power To Take State Lands For New Grid*, LAW360 (Oct. 20, 2021), <https://bit.ly/3roCP5M>; DJ Gribbin, *Environmental Permitting Might Block Biden’s Clean Energy Targets*, BROOKINGS INST. (May 13, 2021), <https://brook.gs/3RrS0FG>.

⁶⁸ See, e.g., *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837 (2020); *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, prnewswire.com (July 5, 2020), <https://prn.to/3JoLgFt>; *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021); PennEast Company, LLC Response to FERC Nov. 23, 2021 Letter Requesting Status of the PennEast Pipeline Project, Docket Nos. CP15-558-000 and CP20-47-000 (Accession No. 20211130-5187) (Nov. 30, 2021).

hurdles, such as the Jones Act, which limits the transportation of “merchandise” between two U.S. points to vessels that are built and registered in the United States, are owned by a U.S. citizen and are manned by U.S. citizens.⁶⁹ Building offshore wind capacity requires offshore wind turbine installation vessels (WTIVs), and there currently are no WTIVs that are Jones Act-qualified, and the use of existing, foreign-flagged/owned WTIVs to deliver component parts from U.S. ports to offshore installation worksites within the U.S. is not permitted. This has resulted in complex logistical workarounds, slowing offshore wind development.⁷⁰ While the IRA includes incentives to build such vessels, it will take years to do so.⁷¹

In addition, the U.S. is still in the process of developing the technical expertise necessary to successfully transition to alternative energy sources, and is still developing the technologies that might make such a transition possible.⁷² Beyond technical expertise, the energy transition will be constrained by workforce demands, especially with respect to shortages in appropriate experience, training, and skills.⁷³ The absence of available land is also a major barrier to implementation of large-scale solar and wind projects. Gasoline is approximately ten quadrillion times more energy-dense than solar radiation, and so solar plants require substantially more space—and energy—to capture the same amount of power that is contained in fossil fuels.⁷⁴ The Chamber and its members are supportive of policy efforts to remove these roadblocks—in particular, unwarranted permitting complications which stall innovation and visit costs on small businesses. Unless and until policymakers can implement corrections to the issues discussed above, at least some amount of fossil fuels will need to be included in America’s generation mix.

The Proposed Program also ignores the fact that the transition to renewable generators itself requires at least some amount of fossil fuels. That is so because petrochemicals and other petroleum products are important base materials that are

⁶⁹ Teresa Carey, *The Jones Act, Explained (and What Waiving It Means for Puerto Rico)*, PBS (Sept. 29, 2017), <https://to.pbs.org/3RwlwtR>.

⁷⁰ See, e.g., John Michael et. al, *Regulatory Hurdles for Offshore Wind Remain High Even With the New Clean Energy Law*, RENEWABLE ENERGY WORLD, (Sept. 14, 2022), <https://bit.ly/3C6QPWu>.

⁷¹ The first, and currently only, Jones Act compliant WTIV began construction in 2020 and is scheduled to be placed in service in 2023. *Keppel Begins Construction on First Jones Act-Compliant Offshore Wind Turbine Installation Vessel*, J. PETROLEUM TECH. (Dec. 18, 2020), <https://bit.ly/3CuLdXD>.

⁷² Camilla Naschert, *Skills Shortage Imperils Global Energy Transition*, S&P GLOBAL (Sept. 12, 2022), <https://bit.ly/3fvXiCQ> (“[W]orkforces will soon struggle to keep up as installations targets grow.”).

⁷³ See IREC, *National Solar Jobs Census 2021* at 11 (July 2022), <https://bit.ly/3RIWofO> (89% of solar firms surveyed in 2021 reported difficulty finding qualified applicants due to the labor market, lack of experience, training, or technical skills).

⁷⁴ See, e.g., Dan Eberhart, *It's Harder Than You Think to Stop Using Fossil Fuels*, FORBES (Aug. 3, 2020), <https://bit.ly/3x5ijKp>.

necessary to construct renewable infrastructure.⁷⁵ For example, most photovoltaics in solar panels are situated between layers of copolymers that are produced from oil and natural gas.⁷⁶ Similarly, for wind installations, petrochemicals are used as the building blocks for the wide-ranging composite materials and lamination epoxies used in the turbine blades.⁷⁷ Eleven to sixteen percent of wind turbine mass is made of plastic, resin or fiberglass, depending on manufacturer.⁷⁸ Perhaps most importantly, electric vehicles, weighted down by heavy batteries, rely on plastics to reduce mass, which is necessary to increase driving range on equivalent amounts of charge power. The global electric vehicle plastics market is expected to grow over 30% between 2022 and 2028, slowed mainly by the slow rate of adoption of electric vehicles.⁷⁹ Some of these materials can be synthesized without the use of hydrocarbons, or under a net-zero emission arrangement, but such a transition will require more than three-quarters of a trillion dollars by one estimate.⁸⁰ In many ways, the affordability and plentiful supply of oil and natural gas are making the energy transition possible. Thus, a large-scale transition to renewable generation requires a stable and cheap supply of petroleum products, at least in its early and foreseeable stages.

Also relevant for any nation-scale energy transition to be successful will be the supply chain, transportation, and construction activities that will drive that energy transition—all of which rely on affordable and plentiful oil and natural gas. Many of the cranes, heavy duty trucks, container ships and supply boats, trains, and other industrial transport and construction vehicles that are needed do not have fully electric commercial alternatives; all require energy-dense hydrocarbon fuel.

In addition, many renewable generators—such as photovoltaic solar panels and wind turbines—are weather-dependent and therefore produce electricity only

⁷⁵ IEA, *Petrochemicals Set to Be the Largest Driver of World Oil Demand, Latest IEA Analysis Finds* (Oct. 5, 2018), <https://bit.ly/3ULLwrl>.

⁷⁶ *Renewable Energies Rely on Petrochemicals from Oil and Natural Gas*, AFPM (Mar. 4, 2019), <https://bit.ly/3D78eAs>.

⁷⁷ Leon Mishnaevsky, Jr. et al., *Materials for Wind Turbine Blades: An Overview*, MATERIALS (Nov. 2017), <https://bit.ly/2WuyigE>.

⁷⁸ Christopher Mone et al., Nat'l Renewable Energy Lab'y, *2015 Cost of Wind Energy Review* 65 (May 2017), <https://bit.ly/3rts9ma>.

⁷⁹ *Global Electric Vehicle Plastics Market Report 2022-2028 - Increasing Significance of High-Performance Plastic to Assure Safety and Security*, BUSINESSWIRE (Apr. 21, 2022), <https://bwnnews.pr/3rtsTaW>.

⁸⁰ See BloombergNEF, *\$759 Billion Required for a Net-Zero Petrochemicals Sector by 2050* (May 24, 2022), <https://bit.ly/3fvXDW8> (“Bioplastics . . . [will] capture only 2.5% of the market by 2050, due to high costs and a lack of sustainable biomass.”).

intermittently.⁸¹ Data collected from in-use renewable generation projects have demonstrated that the actual median useful operating capacity of utility-scale projects (i.e., “capacity factor”) is significantly lower than the nameplate outputs, with photovoltaic solar at only 25.8% realized capacity and wind at 32.2%.⁸² Because of this, renewable generation cannot be compared to hydrocarbon power generation in a one-to-one manner. Instead, as renewables capture increasing amounts of market share, the amount of renewable energy needed to offset hydrocarbon energy will increase. Based on the energy capacities, the expectation would be that three times as much wind power would be needed to offset the equivalent amount of hydrocarbon power; for solar, the amount grows to nearly four times the hydrocarbon equivalent. Experts have determined that we do not have enough sunlight and wind resources to power the country without having to overbuild the system or employ massive amounts of battery storage.⁸³ Although the Energy Institute supports expansion of renewable generation, the fact remains that—at present—America’s energy needs cannot be met entirely via intermittent renewable generators.

Given current technological limitations and the relatively scarce deployment of batteries on the grid, generators that combust fossil fuels are necessary to ensure that there will not be blackouts, or at least brownouts, during periods where weather conditions complicate the operations of wind and solar farms. Natural gas-, oil-, and coal-fired plants are important providers of “capacity,” which refers to the capability to produce energy on demand (as opposed to the term “energy,” which refers to electricity actually produced). Moreover, all generation fleets require at least some amount of so-called “peaking plants” or “peakers”—i.e., generators that can run on demand during periods of high demand (such as natural gas-fired plants). In addition, costs that consumers would pay for renewable energy are not represented in many of the projected costs for solar and wind deployment, because they are often bundled with transmission costs. In reality, a transition to intermittent power supply will require a complete revamping of the electric grid, bringing with it significantly higher costs than

⁸¹ See NOAA, *Atmospheric Science for Renewable Energy Challenges*, <https://bit.ly/3SvdFhu> (last visited Sept. 15, 2022) (discussing weather forecasting technologies that must be optimized and developed to help forecast renewable energy generation).

⁸² Landon Stevens, Strata, *The Footprint of Energy: Land Use of U.S. Electricity Production* 16, 18 (June 2017), <https://bit.ly/3E8sylv>.

⁸³ Dan Tong et al., *Geophysical Constraints on the Reliability of Solar and Wind Power Worldwide*, NATURE COMM’NS (Oct. 2021), <https://bit.ly/3CoyfKT> (even without consideration of electric transmission hurdles and associated losses, reliability of the electric grid during a transition to renewables will require either “overbuilding,” the introduction of large-scale energy storage, or aggregating resources across multinational regions).

the advertised cost per kWh.⁸⁴ Although there may come a time when America's energy needs can truly be met without the need for fossil-fuel plants, America is not yet there. And until that time, OCS leases will remain a necessary and important part of the system that produces inputs for the types of generators that are necessary to keep America's lights on.

Making assumptions about the pace of an energy transition—without a safety net in place to ensure we can still meet our domestic energy needs if required minerals and materials become scarce or unavailable—leaves America vulnerable to decisions by trade partners. That is so in part because many of the resources we need (such as rare earth metals) are largely controlled by foreign state-owned entities whose own interests do not cleanly align with those of the U.S., and meaning that these foreign actors can use their pricing or availability for political bargaining. This is yet another reason why a Program that best meets America's energy needs is not one that presumes a shift to alternative domestic energy sources, even if domestic policies are encouraging such a shift. Instead, BOEM should expand both the areas available for leasing and number of lease sales to “achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade” as OCSLA intended.⁸⁵

Transitioning to renewable energy will require the United States to become less independent and more reliant on international supply chains to secure its energy needs. Notably, this is directly opposite to a central policy objective of OCSLA, and a distinctly different outcome as compared to oil and natural gas development on the OCS. Accordingly, even as the United States transitions to greater use of renewable energy, development of hydrocarbon resources on the OCS will continue to be an important contributory part of the total energy equation, ensuring that we are able to maintain energy security in the face of transition.

D. OCS production supports our national economy.

As discussed further in Section II, OCSLA requires BOEM to manage the OCS in a manner which considers the economic value of the renewable and nonrenewable resources contained in the OCS.⁸⁶ In addition to the benefits stemming from providing affordable and reliable energy, OCS oil and natural gas leasing would support the U.S. economy in additional ways. The upstream and midstream oil and natural gas sectors

⁸⁴ See Stephen Brick & Samuel Thernstrom, *Renewables and Decarbonization: Studies of California, Wisconsin and Germany*, 29 ELEC. J. 6, 9 (Apr. 2016), <https://bit.ly/2KNQ77e> (“Claims that renewables are at ‘grid parity’ obscure significant engineering and economic questions.”).

⁸⁵ 43 U.S.C. § 1802(1).

⁸⁶ *California ex rel. Brown v. Watt*, 668 F.2d 1290, 1297-98 (D.C. Cir. 1981) (“*Watt I*”).

support 9.8 million jobs in the U.S., 5.6 percent of total U.S. employment.⁸⁷ “In 2022, the Gulf of Mexico offshore oil and natural gas industry spending is projected at an estimated \$30.3 billion” and is projected to increase around \$30.6 billion per year from 2022 to 2040.⁸⁸ During the same time period, the Gulf of Mexico offshore oil and natural gas industry is projected to support an estimated 372,000 jobs ranging from technology to engineering to manual labor. In addition to the jobs directly created in the oil and natural gas industry, many other industries have also benefitted from production in the Gulf of Mexico. For example, the chemical industry has seen dramatic increases in domestic manufacturing investments as a result of ample supplies of affordable natural gas, and has been projected to exceed \$200 billion across nearly 350 projects, supporting nearly 800,000 jobs.⁸⁹

Moreover, domestic supplies of affordable natural gas have created a competitive advantage for U.S. chemical manufacturing, and particularly for the production of petrochemicals.⁹⁰ “The U.S. is home to around 40% of the global capacity to produce ethane-based petrochemicals.”⁹¹ Petrochemical facilities use oil and natural gas feedstocks to create plastics, rubbers, resins, synthetic fibers, adhesives, dyes, detergents, pesticides, petroleum-derived paints and coatings, and many other products.⁹² Indeed, petrochemicals can be found in everything from food packaging and diapers to clothing, paper, detergent, and housewares.⁹³ “Chemicals produced from oil and [natural] gas make up around 90% of all raw materials” in petrochemicals, and petrochemicals are anticipated to account for more than one third of the growth in oil demand to 2030 and nearly half of the growth in demand to 2050.⁹⁴ By 2030, petrochemical production is also anticipated to need an additional 56 billion cubic meters (bcm) of natural gas, which is the equivalent to about half of Canada’s total natural gas consumption today.⁹⁵

⁸⁷ Am. Petroleum Inst., *How Many Jobs Has the Oil and Natural Gas Industry Created*, <https://bit.ly/3y763Kd> (last visited Sept. 15, 2022).

⁸⁸ EIAP, *supra* note 14, at 5.

⁸⁹ Am. Chem. Council, *Shale Gas Is Driving New Chemical Industry Investment in the U.S.* (Aug. 11, 2022), <https://bit.ly/3EbZGZI>.

⁹⁰ *Id.*

⁹¹ IEA, *The Future of Petrochemicals: Towards More Sustainable Plastics and Fertilisers* 12 (2018), <https://bit.ly/3Ruwlat>.

⁹² See Canada Energy Regulator, *Market Snapshot: Petrochemical Products in Everyday Life* (Oct. 17, 2018), <https://bit.ly/3ueevEq>.

⁹³ U.S. Dep’t of Energy, *Ethane Storage and Distribution Hub in the United States: Report to Congress* 48 fig. 15 (Nov. 2018), <https://bit.ly/3N4wmq7>; see also Zhou Peng et al., *Petrochemicals 2020: A Year of Resilience and the Road to Recovery*, MCKINSEY & CO. (May 21, 2021), <https://mck.co/3lj8Z8N>.

⁹⁴ IEA, *Future of Petrochemicals*, *supra* note 92, at 11.

⁹⁵ *Id.*

As a result, a robust OCS oil and natural gas national leasing program has the potential to support the American economy by assisting in the growth of our petrochemical capacity, and also by ensuring that the consumer goods produced with these feedstocks are affordable and readily available. This connection between petrochemicals and everyday items also means that the negative practical effects of limiting OCS leasing opportunities would also flow down to manufacturers who need natural gas as a feedstock or as a fuel for production, and reverberate through their supply chains. Because these petrochemicals are necessary to produce so many everyday consumer goods, increased costs for oil and natural gas will result in higher prices for a broad range of products that Americans rely on, increasing future risks of supply chain issues and inflation. As recent experience has shown, these problems can have a significant negative effect on the U.S. economy.

These same petrochemicals also play a critical role in the energy transition, further linking a robust OCS oil and natural gas national leasing program to the development of alternative domestic energy sources. Affordable, reliable supplies of oil and natural gas production are crucial to providing the feedstocks necessary for components used in solar panels, wind turbine blades, batteries, thermal insulation for buildings, and electric vehicle parts.⁹⁶ There will be an increased demand for the feedstocks necessary to build these components in the upcoming years, which could result in price spikes and make alternative energy sources less economically competitive. While the U.S. currently has a feedstock advantage due to our present natural gas production,⁹⁷ BOEM should not allow this advantage to be lost by unjustifiably curtailing lease sales in the OCS. A Program that best meets America's energy needs is one that provides sufficient oil and natural gas production to meet our petrochemical needs so that we can also further our domestic investment in new forms of energy.

OCS production also supports the local economies surrounding production areas, and opening up additional areas for lease will therefore increase economic opportunities in those regions. For example, the "Gulf of Mexico offshore oil and natural gas industry supports significant GDP in the Gulf Coast states and the overall U.S. In 2022, the industry is projected to support around \$6.8 billion of U.S. GDP."⁹⁸ From "2022 to 2040, [the industry's] contributions to GDP are projected to average just over \$7.4 billion per year."⁹⁹ Gulf of Mexico offshore oil and natural gas activity also contributes to government revenues in the form of "royalties paid on produced oil and natural gas, bonus bids paid to acquire blocks in lease sales, and rents for blocks leased

⁹⁶ *Id.*

⁹⁷ *Id.* at 11-12.

⁹⁸ EIAP, *supra* note 14, at 25.

⁹⁹ *Id.*

by operators.”¹⁰⁰ From 2022 to 2040, average royalty revenues are projected to be over \$6.9 billion per year.¹⁰¹ “In 2006, Congress passed the Gulf of Mexico Energy Security Act (GOMESA) which created revenue-sharing provisions for the four Gulf oil and natural gas producing States (Alabama, Louisiana, Mississippi, and Texas) and their coastal political subdivisions.”¹⁰² “In 2022, the Gulf of Mexico oil and natural gas producing states are projected to receive around \$375 million due to revenue sharing.”¹⁰³

The Proposed Program only offers one lease sale outside of the Gulf of Mexico, and does not make many additional areas available for lease. By limiting the available lease areas and lease sales, BOEM has prevented other areas of our country from enjoying the same economic benefits that the Gulf of Mexico States have seen from OCS production. As discussed in our prior letter, oil and natural gas lease sales in the Atlantic OCS would have a meaningful impact on regional economies.¹⁰⁴ One study indicated that such leases could add \$200 billion to the economy, generate more than \$51 billion in government revenue, and create 280,000 jobs by 2035.¹⁰⁵ As the United States continues to struggle with economic growth and job creation, a robust and expanded OCS leasing program would generate hundreds of billions of dollars of economic activity and create hundreds of thousands of jobs. By refusing to open up the Atlantic OCS to potential leasing, the Proposed Program also makes the region more vulnerable to energy price spikes or disruption. As BOEM notes in the Proposed Program,

The concentration of all transit through two major pipelines and from the Gulf Coast leaves the Atlantic region vulnerable to supply disruptions should anything happen to the pipelines, inclement weather, or other events hindering the transport of oil (EIA 2016). LNG terminals in New England were found to help reduce price spikes during the winter months for 2018–2019 (EIA 2019). New England is forced to rely on LNG imports, largely from Russia, as there is limited pipeline capacity available to link the ample supply of domestic natural gas to the Northeast.¹⁰⁶

¹⁰⁰ *Id.* at 26.

¹⁰¹ *Id.*

¹⁰² *Id.* at 27.

¹⁰³ *Id.*

¹⁰⁴ Letter from Karen A. Harbert, Institute for 21st Century Energy, U.S. Chamber of Commerce, to Kelly Hammerle, BOEM (Mar.30, 2015), <https://bit.ly/3RC1xKg>.

¹⁰⁵ *See* API & NOIA, *The Economic Benefits of Increasing U.S. Access to Offshore Oil and Natural Gas Resources in the Atlantic* (Dec. 2013).

¹⁰⁶ Proposed Program Analysis at 6-20 (internal citation omitted).

Needless to say, proposed policy decisions that would continue or exacerbate Americans' reliance (in *any* region in the United States) on LNG imports from Russia or other foreign sources are not consistent with OCSLA's mandate and do not serve OCSLA's goals.

In addition, by limiting the areas available within the Gulf of Mexico for oil and natural gas leasing, and the number of lease sales, BOEM has unjustifiably hindered future economic activity in a region that already has a thriving oil and natural gas industry that would benefit greatly from continued lease sales and production in the Gulf of Mexico. Without sufficient leasing opportunities, jobs will be lost in these communities and the local economies and governments will suffer as a result.

E. OCS leasing has a number of climate and environmental benefits and plays an important role in the energy transition.

As discussed further in Section II, OCSLA also requires BOEM to manage the OCS “in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the [OCS].”¹⁰⁷ A robust program that allows for ample OCS oil and natural gas leasing opportunities also has direct and indirect environmental benefits. The National Environmental Policy Act (NEPA) also requires BOEM to consider the environmental impacts of its action.¹⁰⁸ To comply with NEPA and the Administrative Procedure Act (APA), the PEIS for the Plan must acknowledge and consider the negative environmental impacts that will flow from limiting leasing in the OCS, including the impact on climate and the development of renewable energy, and related impacts on protected species. For example, an addition to provisions for revenue sharing with the Gulf of Mexico producing States, GOMESA also included a provision for distributions to the Land and Water Conservation Fund (LWCF). The LWCF “supports the protection of federal public lands and waters – including national parks, forests, wildlife refuges, and recreation areas – and voluntary conservation on private land. LWCF investments secure public access, improve recreational opportunities, and preserve ecosystem benefits for local communities.”¹⁰⁹ The LWCF also receives significant funding due to offshore oil and natural gas activities beyond the contributions from GOMESA.¹¹⁰ Distributions to the LWCF due to GOMESA revenue sharing have been projected to be around \$125 million annually from 2022

¹⁰⁷ *Watt I*, 668 F.2d at 1297-98.

¹⁰⁸ 42 U.S.C. § 4332; 40 C.F.R. § 1508.18 (2010) (defining “major federal action” to include “[a]pproval of specific projects, such as construction or management activities located in a defined geographic area”).

¹⁰⁹ EIAP, *supra* note 14, at 28 (quoting Land and Water Conservation Fund, U.S. Department of the Interior).

¹¹⁰ *Id.*

through 2040.¹¹¹ By restricting lease sales in the OCS, the Proposed Program also potentially curbs the funds available to support these ecological resources. BOEM should carefully consider whether and (if so) to what extent NEPA may be deemed to require analysis of such impacts or potential impacts, with attention to the question whether and (if so) to what extent such impacts or potential impacts are reasonably foreseeable and would bear a reasonably close causal relationship to the Plan.

As BOEM itself acknowledges in its analysis, obtaining oil and natural gas from the OCS has a lower carbon footprint than many alternative forms of energy production, and thus has a net positive impact on climate change.¹¹² Specifically, BOEM correctly determined that the “fossil fuel energy sources that substitute for OCS oil and [natural] gas have higher GHG intensities. Imports result in additional emissions during transport to the U.S. and because there are less restrictive emissions standards in the producing countries.”¹¹³ Given that BOEM has projected that the majority of the alternative energy that would replace OCS oil and natural gas production under a “no lease” scenario would come from foreign oil and natural gas production with higher GHG production intensity, a robust leasing program has meaningful climate benefits. Moreover, BOEM’s analysis indicates that increased GHG emissions are not the only environmental harm that would result from a no lease scenario. BOEM also concludes that, under a leasing ban, “emissions from the alternative energy sources that could replace OCS production [would] have a greater detrimental effect on human health than air emissions generated by OCS production often many miles offshore.”¹¹⁴ BOEM estimates that the monetized costs from these negative air quality impacts under the “no sale” option total approximately \$12 billion.¹¹⁵ Without taking a position here on whether all aspects of this estimate are accurate and sound, we respectfully submit that, given BOEM’s own analysis, BOEM must accord considerable weight to the air quality impacts of the projected consequences of curtailing leasing—in particular, to the localized and regional impacts of taking such a step, as required by the text of OCSLA.

Congress recently reaffirmed the vital role that OCS oil and natural gas leasing is intended to play in meeting our upcoming domestic energy needs, and in the overall energy transition, by explicitly stating in the IRA that (i) oil and natural gas leases conveyed in a lease sale in November 2021 under the 2017-2022 national oil and natural gas leasing program but subsequently invalidated must be effectively reinstated; and (ii) canceled lease sale Nos. 258, 259 and 261 must be auctioned, in each case, by

¹¹¹ *Id.*

¹¹² Proposed Program Analysis at 5-44.

¹¹³ *Id.*

¹¹⁴ *Id.* at 5-43.

¹¹⁵ *Id.* (see tbl. 5-12).

specified deadlines. Congress likewise reaffirmed the continuing role that a robust OCS oil and natural gas leasing program should play in the energy transition by expressly providing that BOEM may not issue a lease for offshore wind development of the OCS unless it has offered 60,000,000 or more acres in OCS oil and natural gas lease sales during the prior 1-year period.¹¹⁶ Congress has thus made clear not only that it wants OCS oil and natural gas production to continue, but that it wants to encourage expansive leasing and production in the upcoming decade as part of the energy transition. As the Supreme Court recently emphasized in *West Virginia v. EPA*, it is not appropriate for a federal agency to attempt to reengineer our nation’s energy generation mix in light of climate change without explicit authorization from Congress to do so.¹¹⁷ BOEM must respect the role that Congress intends oil and natural gas leasing on the OCS to continue to play in meeting our nation’s energy mix.

This direct tie between offshore wind development and oil and natural gas leasing means that BOEM must include additional areas for oil and natural gas lease and offer additional lease sales for oil and natural gas development if it wants to further investment in, and development of, offshore wind energy, which is expected to play an important role in the energy transition. As the D.C. Circuit has recognized, “[t]he Program also creates important reliance interests. Federal, state, and local governments, and the companies that participate in national and international energy markets, form long-term plans on the basis of the leasing program. The leasing schedule is therefore ‘extremely important to the expeditious but orderly exploitation of OCS resources.’”¹¹⁸ Given that Congress has linked the development of wind energy to oil and natural gas leasing on the OCS, this statement now holds true for wind as well: In order to incentivize the major investments required to develop offshore wind farms and the supporting infrastructure to bring such energy to markets, BOEM needs to propose a plan that provides for robust oil and natural gas lease sales, so that those potentially interested in investing in wind development know that they will be able to pursue leasing opportunities in the upcoming years.

To hold lease sales under the offshore wind development program on an annual basis over a 10-year period, BOEM will need to offer combined oil and natural gas lease sales that total at least 600 million acres, far exceeding the roughly 10.5 million acres currently under lease on the OCS. Notably, under the Proposed Program, all but one of the lease sales would occur in just one Gulf of Mexico planning area. The entire Gulf of Mexico contains only 160 million acres of OCS submerged land, of which approximately 95 million acres is found in the western and central planning areas of the Gulf of Mexico.

¹¹⁶ Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 50264-65.

¹¹⁷ *West Virginia*, 142 S. Ct. at 2613 (“The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself.”).

¹¹⁸ *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 595 (D.C. Cir. 2015) (quoting *Watt I*, 668 F.2d at 1299).

As a result, BOEM's current restrictive approach would limit the wind development leases that BOEM will be able to offer in the upcoming years, and therefore be counterproductive to the energy transition.

The benefits of expanded oil and natural gas lease sales can be realized without unduly risking harm to our OCS environmental resources. OCS drilling is now safer and more environmentally friendly than ever before, and BOEM should capitalize on the industry's far-ranging improvements since the Deepwater Horizon incident spurred new innovation and regulation of offshore drilling practices. The offshore industry has made wholesale changes that have significantly reduced the risks posed by offshore energy development. Industry standards were changed, revised, and added to ensure that lessons learned would be incorporated. The industry also formed the Center for Offshore Safety to help improve the safety performance of America's offshore oil and natural gas industry and it continues to work with companies and regulators to engrain safety culture into day-to-day operations. Offshore operators created the Marine Well Containment Company and the Helix Well Containment Group to provide containment and response capabilities specifically designed to stop the uncontrolled flow of oil and natural gas and to capture any oil or natural gas that is released in the event of a spill.

Additionally, the Department of Interior reorganized its entire offshore energy regulatory structure and issued new or revised regulations to further reduce the risk of future incidents. Moreover, Interior is currently developing regulations specifically focused on arctic OCS development and also intends to develop requirements in the mid-2022 to early 2023 timeframe relating to supplemental bonding of offshore facilities; improving safety, environmental protections, and equipment reliability for offshore pipelines and associated rights-of-way; revising 2019 rules pertaining to blowout-preventer systems and well-control standards; and adopting requirements pertaining to offshore idle iron and reconsidering the approval process for allowing certain subsea structures to remain in place rather than having them removed.¹¹⁹

¹¹⁹ For example, in the Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, Interior lists proposed rulemaking initiatives, as follows:

- a) BOEM-Offshore financial assurance proposed rulemaking to modify the evaluation criteria for determining extent to which offshore lessees and grant holders would be required to provide supplemental financial assurance under 30 C.F.R. 550, 556. Publication is expected to be September 2022;
- b) BSSE-pipelines and ROW proposed rulemaking for improving safety, environmental protections, and equipment reliability under 30 C.F.R. 250, subpart J. Publication was expected to be July 2022;
- c) BSSE-Blowout Preventer Systems and Well Control Revisions proposed rulemaking that would revise the May 15, 2019 rulemaking (30 C.F.R. 250, subpart G). Publication was expected to be June 2022;

Because of the steps taken by industry and regulators, risks to human and marine health and the environment have been reduced substantially.

As explained further below, it is clear that BOEM's Proposed Program does not best meet America's energy needs and has not properly balanced the statutory factors under OCSLA.

II. BOEM must expand the leasing opportunities under the Proposed Program in order to comply with OCSLA.

A. *The Proposed Program does not "best meet" America's energy needs.*

"Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line."¹²⁰ Indeed, "an agency literally has no power to act . . . unless and until Congress confers power upon it."¹²¹ BOEM's authority over the OCS is set forth in the OCSLA, which provides the bounds and requirements of that authority, and also delineates the policy objectives underlying Congress's legislative action. As a result, BOEM can regulate only based on express criteria authorized in OCSLA. Otherwise, BOEM would be acting "in excess of statutory jurisdiction" in violation of both OCSLA and the APA.¹²²

OCSLA does not make a wholesale assignment of discretion to the Secretary as to all matters relating to the OCS and its submerged lands. Instead, OCSLA clearly and specifically sets forth the statutory obligations imposed upon the Secretary, including the relevant factors that she must consider in the process. Congress originally enacted OCSLA "to meet the urgent need for further exploration and development of the oil and gas deposits."¹²³ The Congressional declaration of purposes for the Act further provides that OCSLA is "intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade."¹²⁴ Understanding OCSLA's objectives is

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- d) BSEE-Decommissioning revisions proposed rulemaking regarding idle iron and approval process for allowing decommissioning in place of certain subsea structures (30 C.F.R. 250, subpart Q). Publication is expected to be April 2023.

¹²⁰ *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted).

¹²¹ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

¹²² 5 U.S.C. § 706(2)(C); *see also Michigan*, 268 F.3d at 1081.

¹²³ Outer Continental Shelf Lands Act, Pub. L. No. 83-212, § 8, 67 Stat. 462, 468 (1953).

¹²⁴ 43 U.S.C. § 1802(1).

necessary to determine what Congress has actually delegated to and required of BOEM. This is important because, as the D.C. Circuit has explained in evaluating a prior national leasing program, an “administrative interpretation of a statute which does not effectuate the intent of Congress must fall.”¹²⁵ Notably, all mineral and energy leases on the OCS are governed “*only* under the provisions of [the OCSLA],” meaning that other regulations, policy objectives, and statutory schemes have no relevance to the National OCS Leasing Program; instead, BOEM must singularly satisfy the requirements of OCSLA in the creation of the Program.¹²⁶

OCSLA’s last significant amendment followed the 1973 oil embargo, reflecting Congress’s concern with ensuring sufficient supplies of oil and natural gas on a going-forward basis.¹²⁷ OCSLA, as amended, describes a deliberate process for leasing oil and natural gas tracts within the OCS. Lease sales are made according to a National Oil and Gas Leasing Program (National Program or Program), proposed and executed by the Secretary. The National Program is described in OCSLA as mandating the development and implementation of a schedule of proposed lease sales that indicates the size, time, and location of each lease offering. The determinations of appropriate leases for each National Program are left to the Secretary, but OCSLA requires consideration and balancing of specific factors that Congress explicitly prescribed when it adopted the statute. Chief among the considerations are the development of the OCS resources, securing the national energy supply, and balancing the OCS and coastal environmental concerns. OCSLA does not allow BOEM to alter these policy considerations, nor to superimpose alternative policy considerations.

The Secretary must prepare a proposed leasing program that, in his or her judgment, “will best meet national energy needs for the five-year period following its

¹²⁵ *Watt I*, 668 F.2d at 1303.

¹²⁶ 43 U.S.C. § 1333(a)(1)(B) (emphasis added). The use of the word “only” has long been understood to imply that the thing specified is singular and exclusive—i.e., in the specific context here, that no provisions other than those of OCSLA are relevant. *Cf. Shell Oil Co. v. Manley Oil Corp.*, 124 F.2d 714, 715 (7th Cir. 1941) (noting that “[t]he word ‘only’ is a limiting and restrictive term which qualifies” the words it modifies and means “means ‘solely’ or the equivalent of the phrase ‘and nothing else’” (citation omitted)); *Leybourne v. Bd. of Immigr. Appeals*, 871 F.2d 1149, 1989 WL 1149, at *1 (D.C. Cir. 1989) (per curiam). When, as here, Congress has specified that that “only” certain statutory considerations are applicable, courts and agencies must honor Congress’s intent that the considerations referenced are exclusive of all others. *See Gov’t of Virgin Islands v. Parrilla*, 7 F.3d 1097, 1101 (3d Cir. 1993) (discussing the obligation to follow “statutory command[s]”); *see also Mittleman v. Postal Reg. Comm’n*, 757 F.3d 300 (D.C. Cir. 2014).

¹²⁷ Undersecretary of the Interior John C. Whitaker testified before the House Appropriations Subcommittee on Interior and Related Agencies in 1974, prior to the 1978 amendment. He emphasized three reasons to lessen dependence upon foreign energy: (1) a secure oil and natural gas supply strengthens the independence of our foreign policy and improves national security; (2) the need to avoid inflation produced by oil imports and trade imbalance; and (3) long term economics will be more favorable

approval or reapproval.” The statute instructs that, when deciding what program will “best meet” the nation’s energy needs, the Secretary should be guided four key “principles.”¹²⁸ First, the management of the OCS should consider the “economic, social, and environmental values” of the resources in the OCS, as well as “the potential impact of oil and gas exploration on other resource values of the Continental Shelf.”¹²⁹ Second, the “[t]iming and location of exploration, development, and production of oil and gas” in the OCS should be based on appropriate factors specific to the relevant region, including, among others, the geologic characteristics of those regions, the need for “equitable sharing” of benefits and risks, the location of those regions vis-a-vis the relative energy needs of regional and national energy markets, and “the interest of potential oil and gas producers” in development within that region.”¹³⁰ Third, the timing and location of leasing should reflect “a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.”¹³¹ And fourth, the “[l]easing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government.”¹³²

As the D.C. Circuit has explained:

Although section 18(a)(3) does not define the “proper balance” among these elements, some notion of its meaning can be derived from the policy and purposes of the Act. In passing the 1978 Amendments, Congress declared the policy of the United States to be that “the outer Continental Shelf is a vital national resource . . . which should be made available for orderly and expeditious development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.” [43 U.S.C. § 1332(3)]

Implicit in this statement of policy is both an end and a means. *The end is to develop the oil and natural gas resources of the OCS expeditiously.* The means includes an administrative scheme that permits “detailed planning” by the federal government and concerned states “to minimize the potential conflicts and adverse impacts of OCS activities.” [H.R. Rep.

for domestic production than importing oil and natural gas. *Outer Continental Shelf Leasing Program: Oct. 8, 1974 Hearing Before a Subcomm. of the H. Comm. of Appropriations*, 93rd Cong. 41 (1974) (statement of John C. Whitaker, Undersecretary of the Interior). See generally Fed. Energy Admin., *Project Independence Report* (1974).

¹²⁸ See 43 U.S.C. § 1344(a); see also *Watt I*, 668 F.2d at 1298.

¹²⁹ 43 U.S.C. § 1344(a)(1).

¹³⁰ *Id.* § 1344(a)(2).

¹³¹ *Id.* § 1344(a)(3).

¹³² *Id.* § 1344(a)(4).

No. 95-590, 95th Cong., 1st Sess. 106 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1513 (1978)]

*The congressional purposes also reflect this primary emphasis on expeditious development of the OCS, qualified by the recognition of a need for measures to alleviate or minimize its adverse impacts.*¹³³

Thus, in evaluating these four principles and reaching a decision, the Secretary must do so mindful that OCSLA encourages oil and natural gas production on the OCS. While OCSLA “does not mandate any particular balance,” the Secretary is to “weigh the elements so as to ‘best meet national energy needs.’”¹³⁴ The use of the adjective “best” in OCSLA is not accidental, and any Program that fails to meet this standard does not comply with the statute. The “weight of these elements may well shift with changes in technology, in environment, and in the nation’s energy needs, meaning that the proper balance for 1980-85 may differ from the proper balance for some subsequent five-year period,”¹³⁵ but, at the end of the day, Congress was clear that the Program must be one that *best* meets our nation’s energy needs.

While environmental considerations are included in the statutory factors, the D.C. Circuit has also been clear that Congress intended there to be a thumb on the scale in favor of oil and natural gas production on the OCS, even when there are environmental costs to doing so. Indeed,

an area should be included within the program for further consideration when its potential “benefits” exceed its potential “costs.” This is the view the Secretary urged upon Congress in his objections to those provisions in the bills preceding the 1978 Amendments which would have required that environmentally sensitive areas be leased last. These provisions were subsequently modified to the present language of section 18(a)(3), which is clearly consistent with the Secretary’s view.

Petitioners’ objection to this view is essentially that it allows even significant environmental costs and coastal zone impacts to be overridden [sic]. *Yet this is precisely what the Act intends, provided that the potential oil and gas benefits exceed those potential costs.*¹³⁶

¹³³ *Watt I*, 668 F.2d at 1315 (emphasis added); *see also California ex rel. Brown v. Watt*, 712 F.2d 584, 599 (D.C. Cir. 1983) (“*Watt II*”) (congressional intent to expedite offshore lease sales, particularly in frontier areas).

¹³⁴ *Watt I*, 668 F.2d at 1317 (quoting 43 U.S.C. § 1344(a)).

¹³⁵ *Id.*

¹³⁶ *Watt I*, 668 F.2d at 1318 (emphasis added).

As discussed in Section I, the Proposed Program does not meet the statutory goal of best meeting America's energy needs in the five years after it is finalized because it (1) does not ensure adequate, reliable, and diverse domestic supplies of energy; (2) leaves the U.S. vulnerable to price spikes from local and geopolitical energy shortages or disruptions; and (3) does not properly balance the statutory factors.

B. A National Program that further limits lease areas and lease sales would violate OCSLA.

BOEM alludes to the possibility of a Program with *no lease sales* multiple times in the Proposed Program and related press releases. A National Program that did not provide for any lease sales would not be consistent with OCSLA and would be contrary to congressional intent. OCSLA requires BOEM to hold at least two lease sales per program period: The statute provides that “the leasing program *shall* consist of a schedule of proposed lease *sales*” and that “[s]uch leasing program *shall* be prepared and maintained in a manner consistent with [OCSLA].”¹³⁷ The text uses the plural word “sales,” and ergo it is self-evident that there must, at a minimum, be *more than one* sale. Congress also directed that the program must consist of a “schedule” of proposed lease sales. A schedule is more than a simple notice or statement, which might be provided if the National Program only consisted of one or zero sales. The use of the term “schedule” indicates the presentation of *multiple* sales, necessitating a plan and organization for presentment.¹³⁸ Further, proposing a finalized Program without *any* lease sale would also require neither “preparation” of such a sales program, nor “maintenance” of the program—both directives that the Secretary is tasked with handling.¹³⁹ Indeed, the entire notion of a “program” that is being “maintained” presupposes that there are ongoing and continued lease sales. Interpreting OCSLA as anything but a directive to lease areas of the OCS for oil and natural gas development would be an unlawful overreach by the agency and an unheralded assertion of power to ignore the statutory mandate.¹⁴⁰

For much the same reason, reducing the potential lease sales to a bare minimum of sales violates OCSLA, and any final Program that offered for lease only areas that do not have meaningful opportunities for oil and natural gas development would likewise violate OCSLA. OCSLA requires BOEM to expeditiously foster the development of OCS

¹³⁷ 43 U.S.C. § 1344(a) (emphasis added).

¹³⁸ *Schedule*, *American Heritage Dictionary of the English Language* (5th ed. 2011) (defining “schedule” as a timetable; a plan for performing work or achieving an objective; or a printed or written list of items in tabular form).

¹³⁹ *See Maintain*, *American Heritage Dictionary of the English Language* (5th ed. 2011) (defining “maintain” as [t]o keep up or carry on”).

¹⁴⁰ *See* 5 U.S.C. § 706(2)(A)-(B), *see also West Virginia*, 142 S. Ct. at 2608.

oil and natural gas resources, consistent with the factors set forth in the Act, and, as the D.C. Circuit has emphasized, the overarching congressional purpose is to *best* meet America’s energy needs. Even if BOEM might wish to suggest that two lease sales could satisfy the letter of the law, the Act requires more than the mere performance of multiple sales; rather, the Act requires expeditious development of our OCS oil and natural gas resources. As explained in Section I, a National Program that best meets our nation’s energy needs must, at a minimum, *actually* meet our nation’s upcoming energy needs. At this time, that means taking into account the uncertainties surrounding the ability to meaningfully scale the development, generation, and transmission of alternative energy sources and ensuring that a sufficient supply of domestically produced oil and natural gas remains available until those alternative energy sources have been proven on the scale necessary to meet America’s energy needs. A finalized Program that allows only for minimal sales or sales in areas without meaningful opportunities for development because they lack sufficient oil and natural gas reserves would be inconsistent with the mandate of the Act to develop the OCS resources and would therefore be unlawful.

Likewise, BOEM’s Proposed Program ignores Congress’s direction by limiting the areas available to lease almost entirely to one portion of the Gulf of Mexico. In doing so, BOEM repeatedly emphasizes that many of the other areas for potential lease do not yet have the infrastructure in place to support such production.¹⁴¹ While existing infrastructure certainly makes it easier and likely more cost effective to produce oil and natural gas in certain areas, Congress sought to “*expedite* offshore lease sales, particularly in *frontier areas*.”¹⁴² Rather than prematurely limiting the areas available for potential lease at this phase, BOEM should instead let the markets inform where lease sales should take place by allowing those within the oil and natural gas industry to evaluate the data and participate in lease actions based on their assessment of the economics of developing various areas of the OCS. Moreover, BOEM retains the discretion at the lease sale phase to determine if there are statutorily-based reasons for excluding particular tracts within an area from leasing. However, by removing these areas from even the *possibility* of leasing at this phase, BOEM’s Proposed Program would undermine Congress’s intent, and Congress’s directive, to develop these frontier areas that do not yet have developed infrastructure in place from historic operations.

III. BOEM’s focus on net-zero and greenhouse gas (GHG) reduction goals, to the detriment of ensuring the nation’s energy needs are met, violates OCSLA.

The Proposed Program improperly ignores national energy needs in light of OCSLA’s express purpose and policy objectives. Rather than fulfilling its obligations

¹⁴¹ See, e.g., BOEM, *2023-2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program*, pt. I, at 8 (2022) [hereinafter “Proposed Program”]; Proposed Program Analysis at 5-22.

¹⁴² See *Watt II*, 712 F.2d at 599 (second emphasis added).

under OCSLA, BOEM has instead focused the Proposed Program and the justifications for the proposed lease sales on free-standing Executive Branch goals relating to global climate change and greenhouse gas emissions, especially meeting the administration’s goal of net-zero emissions by 2050.¹⁴³ Specifically, BOEM concluded that “no new investment in fossil fuel supply projects” is needed to meet this goal because, under the International Energy Agency’s “roadmap to net-zero emissions,” the “Nation’s energy needs would need to be met by sources other than new OCS leasing.”¹⁴⁴ According to BOEM, America’s future “energy needs could be met by . . . sources” other than oil and natural gas obtained from OCS leases, and thus the statute’s purposes can be achieved by authorizing very few—or even zero—offshore oil-and-natural gas leases for the period 2023-2028.¹⁴⁵ This is done at the expense of meeting national energy needs in the manner that the OCSLA prescribes. That is unlawful, because efforts to achieve Executive Branch policy goals (including heeding the guidance of bodies such as the International Energy Agency, however well-intentioned that guidance may be) cannot override clear statutory directives.¹⁴⁶

The statutory mandate under OCSLA cannot be made subservient to other policy goals, such as the administration’s GHG goals or emissions pledges, absent concurrence from Congress in the form of an amendment to the statutory requirements. Notably, OCSLA specifically emphasizes the public policy objective to expedite *oil and natural gas* development on the OCS, and does not contain any similar language for alternative forms of energy production.¹⁴⁷ This was no oversight, as OCSLA clearly anticipates the use and production of alternative forms of energy, specifically referencing geothermal resources on the OCS as well as the ability of the Secretary to grant easements and rights-of-way to other energy developments on the OCS, including for production, storage, and transmission of energy from other sources.¹⁴⁸ However, nothing in OCSLA *directs* the Secretary to advance these other energy sources on the OCS, and certainly there is nothing in the statute that commands the Secretary to place

¹⁴³ Proposed Program Analysis at 1-3.

¹⁴⁴ Proposed Program at 3.

¹⁴⁵ *See id.*

¹⁴⁶ *Cf.* Mem. Ruling, *Louisiana v. Biden*, No. 21-cv-778, 2022 WL 3570933, at *17 (W.D. La. Aug. 18, 2022) (“A command in an Executive Order does not exempt an agency from the APA’s reasoned decision-making requirement.” (citing *California v. Bernhardt*, 472 F. Supp. 3d 573, 600-01 (N.D. Cal. 2020))).

¹⁴⁷ *See* 43 U.S.C. § 1334 (discussing at length the administration of leasing on the OCS, wholly focused on the oil and natural natural gas resources, to the exclusion of all others, save mentioning sulphur and geothermal resources); *see also infra* note 177.

¹⁴⁸ 43 U.S.C. § 1337(p)(1)(C). OCSLA also anticipates specific non-energy uses of the OCS, such as sand, gravel, and shell mining, but does not give BOEM absolute jurisdiction to decide on all uses. 43 U.S.C. § 1337(k).

the development of renewable resources ahead of the statutory mandate to expeditiously develop oil and natural gas resources.

If Congress wanted to amend the requirements under OCSLA to discourage oil and natural gas production or to include more incentives to reduce carbon emissions or pursue similar objectives, Congress would have done so. Most recently, Congress was presented with an opportunity to implement any changes it desired to make to OCSLA when it considered—and passed—the IRA. Even though a primary topic of the IRA was the energy transition, Congress used the opportunity to double down on the existing OCSLA framework. As discussed in Section I, key provisions of the IRA require BOEM to carry out OCS lease sales that BOEM had previously canceled and “paused.” The IRA also restricts BOEM’s ability to lease areas of the OCS for wind production if certain levels of OCS oil and natural gas lease sales are not offered in the prior year.¹⁴⁹ Both actions by Congress present a rebuke of BOEM’s approach in the Proposed Program and provide a clear signal that Congress considers oil and natural gas production on the OCS to be an important part of the national energy equation, even in the context of a National Program designed to encourage an energy transition.

Finally, even assuming OCSLA does allow BOEM to consider the policy goals associated with lowering GHG emissions, the record indicates that such goals can be furthered only by a National Program that allows for more OCS leasing than is available under the Proposed Program. As explained in Section I, oil and natural gas (particularly from OCS production) are, and will remain, crucial to supporting goals to lower national GHG emissions.

IV. BOEM does not reasonably address how national energy needs for the five-year period following approval of the OCS oil and gas leasing program will be met.

OCSLA requires BOEM to consider the energy needs in the *five-year period* following its approval or reapproval.¹⁵⁰ Instead, the Proposed Program focuses on long-term climate change risks and the current Administration’s policy goal of reaching a national net-zero carbon emission level by 2050, which are not factors available for consideration under OCSLA.¹⁵¹ The Proposed Program states that the long-term nature of OCS oil and natural gas development makes consideration of future climate pathways relevant to the Secretary’s determinations with respect to how the OCS

¹⁴⁹ Inflation Reduction Act § 50265(b).

¹⁵⁰ 43 U.S.C. § 1344(a); Proposed Program at 3.

¹⁵¹ Proposed Program Analysis at 1-1, -3, -4, -8, -9.

leasing program best meets the United States' energy needs.¹⁵² However, at the same time, BOEM acknowledges that it has not completed the requisite research needed to fully appreciate the implications of potential net-zero emissions pathways for the National OCS Program, and BOEM's own reporting has shown that limitations on OCS leasing would *increase* GHG emissions due to the higher carbon intensity of imported oil and natural gas.¹⁵³

The Proposed Program also improperly focuses on energy consumption and energy composition predictions through the year 2050.¹⁵⁴ The Proposed Program presents long-term projections that renewable sources of electricity will nearly double from 21.3% in 2021 to 39.8% in 2050, and that electric use as a percentage of transportation energy will grow approximately 3% through 2050.¹⁵⁵ The timeframe and emphasis on net-zero goals that BOEM considered in making these speculative determinations is outside the scope of its delegated power. Rather than making up a wholly new "factor" of consideration for the National Program that is equated to, if not prioritized over, Congress's express, enumerated factors, BOEM should have resisted the temptation to stray out of bounds and should not have included these projections in its Proposed Program. Further, BOEM should not have placed any weight on the projections in the preparation of the Proposed Program, nor anticipated using them in the Final Program. Congress was intentional in setting the 5-year outlook requirement, which was added to the OCSLA during the 1978 amendment process and which was influenced by the then-recent oil embargo. Looking beyond that mark is clearly outside what Congress has empowered the agency to consider. While BOEM repeatedly emphasizes that development of the OCS does not lead to immediate increases in domestic oil and natural gas production, Congress no doubt knew this when setting the statutory time horizon that BOEM is required to consider when assessing America's energy needs (and even if not, Congress has since become aware of this phenomenon). Congress nonetheless selected a 5-year time horizon for BOEM to use, and it has never elected to adjust that time horizon in the intervening years.

Even if it were proper for BOEM to consider America's projected energy needs to 2050, the data only serves to show why BOEM's decision to limit the available leases and lease sales under the Proposed Program is arbitrary and capricious and is not

¹⁵² Proposed Program at 3 ("The long-term nature of OCS oil and gas development, . . . makes consideration of future climate pathways relevant to the Secretary's determinations"); Proposed Program Analysis at 1-16, 6-6 ("An important factor . . . is how the National OCS Program fits in with the future climate policies to aid in transitioning to a clean energy future.").

¹⁵³ BOEM, *Forward to OCS Oil and Natural Gas: Potential Lifecycle Greenhouse Gas Emissions and Social Cost of Carbon* (Nov. 2016), <https://bit.ly/3SLsIsB> ("The report concludes that America's GHG emissions . . . could, in fact, increase slightly in the absence of new OCS leasing.").

¹⁵⁴ Proposed Program Analysis at 1-4 to 1-10.

¹⁵⁵ *Id.* at 1-5 - 1-6.

supported by substantial evidence. The data upon which BOEM has relied indicates that the United States will likely remain reliant on hydrocarbons for a sizable portion of the nation's electric needs in the near and medium term, and will be almost absolutely dependent on petroleum for transportation fuel over the same time period.¹⁵⁶ Total national energy demands are also expected to continue rising during this period.¹⁵⁷ BOEM does not adequately address how reducing the total available lease sales is justified in light of the growing national energy demand and continued outsized dependence on oil and natural gas.

V. BOEM's restrictive approach to minimize or eliminate lease sales under the National Program is arbitrary and capricious in violation of OCSLA and the APA, as there are no safeguards that the requisite amount of future renewable energy (including OCS wind and solar energy) will adequately replace fossil fuels in a timely manner or that such renewable energy will be a reliable form of energy.

As explained in Section I, reliance on existing, yet dwindling, OCS oil and natural gas production to maintain America's energy needs without bolstering production through new OCS leasing will impair America's ability to meet its energy needs. Before scaling back or abandoning OCS oil and natural gas production objectives, it is paramount that adequate energy from other sources is actually available to the national economy and is not just theoretically possible to add in the future. This requires not only meeting OCS production levels with alternative sources, but exceeding those values in a way that compensates for growing energy demand as well as compensating for the variable nature of renewable sources, as already discussed.¹⁵⁸ It will not be enough for alternative sources to merely match output, without attention to other key considerations. Oil and natural gas are reliable, secure, and fungible sources of energy; any replacements must be similarly secure and affordable. In consideration of the congressional mandate in the OCSLA to manage the OCS in a way that secures national energy security, BOEM must consider the present and practical limitations on alternative energy sources that BOEM holds out as a potential replacement for oil and natural gas from the OCS.

Without adequate safeguards, merely hoping for satisfactory production and transmission of wind and solar energy at some ambiguous future date is an unnecessary

¹⁵⁶ The Proposed Program suggests a decline in "petroleum and other liquids" from 96% to 92% by the year 2050. Proposed Program Analysis at 1-5.

¹⁵⁷ EIA, *Annual Energy Outlook 2022*, Table: Table 1. Total Energy Supply, Disposition, and Price Summary (Total Energy: Use), <https://bit.ly/3Sr2iqN> (last visited Oct. 4, 2022) (showing total U.S. Energy consumption forecasted to increase more than 10% by 2050 with liquid fuels and natural gas as the predominant sources).

¹⁵⁸ *Supra* Section I.C.

gamble with our nation's energy needs and energy security, and is not allowed by OCSLA or the APA as a basis for agency decision-making. As explained in Section I, there are no guarantees that alternative energy sources will be developed at scale, completed, and then paired with adequate transmission infrastructure. There are significant limitations on siting, transmission, storage, reliability, and supply chains that could delay or impede such a transition.¹⁵⁹ Although solar and wind energy development have made significant progress in recent years and continue to capture market share, the issues addressed above still have not been resolved. In light of this reality and OCSLA's mandate, BOEM has only one option: It must expedite oil and natural gas development of the OCS. Until national energy needs can be met without OCS oil and natural gas, BOEM must pursue energy production from the OCS to ensure the national energy demand is met; to do otherwise would be against both OCSLA's mandate and the policy objectives set forth in OCSLA as established by the Congress and would be indefensible based on the underlying assumptions and information provided in the Proposed Program.

VI. Any final Program premised on shifting the U.S. economy to alternative energy sources rather than fulfilling OCSLA's stated purpose would implicate the major questions doctrine and would violate both OCSLA and the APA .

The Supreme Court has recently instructed that federal agencies cannot use climate change as a reason to overstep their statutory mandates and may not attempt to pick winners and losers in our national economy or to “substantially restructure the American energy market.”¹⁶⁰ In *West Virginia v. EPA*, the Supreme Court considered a provision of the Clean Air Act authorizing the Environmental Protection Agency (EPA) to set “standards of performance” that reflected the “best system of emission reduction” for each category of power plant.¹⁶¹ For more than 50 years, EPA exercised its authority under this statute by setting performance standards that “would reduce pollution by causing plants to operate more cleanly.”¹⁶² In 2015, however, EPA dramatically shifted course and promulgated “a new rule concluding that the ‘best system of emission reduction’ for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.”¹⁶³ The Supreme Court

¹⁵⁹ See Samantha Gross, *Renewables, Land Use, and Local Opposition in the United States* (Jan. 2020), <https://tinyurl.com/yh97nwwm>; U.S. Dep't of Energy, *America's Strategy to Secure the Supply Chain for a Robust Clean Energy Transition*, at ix (Feb. 24, 2022), <https://tinyurl.com/4yhznf53> (supply chain issues relating to the energy transition are “immense”).

¹⁶⁰ *West Virginia*, 142 S. Ct. at 2610.

¹⁶¹ 42 U.S.C. § 7411(a)(1), (b)(1), (d).

¹⁶² *West Virginia*, 142 S. Ct. at 2599.

¹⁶³ *Id.*

vacated the regulation, reasoning that EPA’s novel rule was beyond the scope of EPA’s enabling statute.

In doing so, the Supreme Court explained that, under the “major questions” doctrine, courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”¹⁶⁴ The Supreme Court explained that, in a specific class of statutory-interpretation cases, certain factors may “provide a ‘reason to hesitate’” before assuming that Congress meant to confer to an agency the power that the agency claims to have been exercising.¹⁶⁵ Those factors include whether the “breadth of the authority” that the agency has asserted is expansive;¹⁶⁶ whether the “economic and political significance” of the agency’s decision is considerable;¹⁶⁷ whether the agency’s interpretation of its statutory authority is novel, or instead finds precedent in prior actions;¹⁶⁸ whether Congress has previously declined to make the policy change adopted by the agency;¹⁶⁹ and whether the statutory text at issue is “modest,” “vague,” or “elliptical.”¹⁷⁰ In cases where the answers to some or all of these questions are “yes,” the “major questions” doctrine is triggered, and the agency will be found to have acted outside the scope of its authority unless it can “point to clear congressional authorization for the power it claims.”¹⁷¹ The Supreme Court held that *West Virginia v. EPA* was indeed “a major questions case” because EPA was claiming, based on vague language in a “long-extant” statute, a new power to “substantially restructure the American energy market.”¹⁷² After finding the absence of a “clear delegation” to authorize EPA’s new position, the Supreme Court determined that EPA had exceeded the scope of the agency’s powers.¹⁷³

BOEM’s approach under the Proposed Program poses similar legal problems. In the Proposed Program, BOEM attributed overriding significance to the role of climate change and the policy objective of a net-zero economy, in clear violation of *West Virginia v. EPA*’s instruction that agencies cannot use climate change as a reason to overstep their statutory mandates, to attempt to pick winners and losers in our economy, or to

¹⁶⁴ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (internal quotation marks omitted); see *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (similar).

¹⁶⁵ *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹⁶⁶ *Id.* (citation omitted).

¹⁶⁷ *Id.* (citation omitted); see also *id.* at 2620 (Gorsuch, J., concurring).

¹⁶⁸ *Id.* at 2608-09 (majority); see also *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, OSHA*, 142 S. Ct. 661, 665-66 (2022) (per curiam).

¹⁶⁹ *West Virginia*, 142 S. Ct. at 2610.

¹⁷⁰ *Id.* at 2609.

¹⁷¹ *Id.* (internal quotation marks omitted).

¹⁷² *Id.* at 2610.

¹⁷³ *Id.* at 2616.

substantially restructure the American energy market. In so doing, BOEM departed from the list of statutory factors that OCSLA instructs the agency to consider when developing a five-year national program, and even went so far as to suggest that it may be possible that *no* leases will be made available for the 2023-2028 period.

Indeed, all (or nearly all) of the “factors” that the Supreme Court has listed as probative when considering whether to apply the “major questions” doctrine are satisfied here. First, there can be no serious doubt that there is great “economic and political significance” to BOEM’s decisions, given the critical role of the offshore oil and natural gas exploration and production industries in America’s economy. Second, BOEM’s suggestion that it may allow no leases is both a massive assertion of regulatory and political authority *and* a position that differs markedly from all prior five-year plans, each of which has authorized lease sales.¹⁷⁴ Finally, Congress has repeatedly considered—and rejected—bills that would curtail OCS leasing due to climate-change concerns.¹⁷⁵ Indeed, in the IRA, Congress recently and expressly *encouraged* oil and natural gas leasing on the OCS by (i) providing that oil and natural gas leases conveyed in a lease sale in November 2021 under the 2017-2022 national oil and natural gas leasing program, but subsequently invalidated, must be effectively reinstated; (ii) instructing that canceled lease sale Nos. 258, 259, and 261 must be auctioned by specified deadlines; and (iii) expressly providing that BOEM may not issue a lease for offshore wind development of the OCS unless it has offered 60,000,000 or more acres in OCS oil and natural gas lease sales during the prior 1-year period.¹⁷⁶

As a result, BOEM’s Proposed Program—like *West Virginia v. EPA*—implicates the “major questions” doctrine. The Proposed Program would therefore only be lawful if there were a “clear statement” in OCSLA that authorizes BOEM to give climate-change

¹⁷⁴ See also Mem. Ruling, *Louisiana v. Biden*, 2022 WL 3570933, at *16 (“The Court finds the Stop is in violation of both the OCSLA and the MLA. Both statutes require Government Defendants’ agencies to sell oil and gas leases.”).

¹⁷⁵ C2ES, *Congress Climate History*, <https://tinyurl.com/yc3u9m6u> (last visited Oct. 4, 2022). For example, (a) in 1997 the U.S. Senate rejected the Kyoto pact on climate change: The Senate unanimously voted 95-0 on a resolution, dubbed the Byrd-Hagel resolution, declaring that the United States should not sign on to any protocol or treaty agreement that mandated new emission reduction commitments unless it also mandated commitments from developing countries or that would result in serious harm to the U.S. economy. S. Res. 98, 105th Cong. (as passed by the Senate, July 25, 1997). Congress also failed to pass cap-and-trade legislation in 2010. H.R. 2454, 111th Cong. (2009-2010). The bill would have set a nationwide limit on carbon emissions and let companies trade permits for the right to pollute, similar to a federal program used for other pollutants. And in 2021-2022 Congress considered, but did not pass, a number of climate measures as part of the Build Back Better Act, which was revised to become the Inflation Reduction Act of 2022. Build Back Better Act of 2021, H.R. 5376, 117th Cong. (as introduced in the House, Sept. 27, 2021).

¹⁷⁶ Inflation Reduction Act §§ 50264-65.

considerations a position of primacy in the development of five-year plans. There is no such statement. Instead, OCSLA specifically emphasizes the public-policy objective of *expediting oil and gas development on the OCS*, and does not contain any similar language with respect to alternative forms of energy production.¹⁷⁷ Nor is there any “clear statement” in the statute that would enable the agency to make *no* leases available. Indeed, as previously noted, the text instead indicates that BOEM *must* make multiple lease sales available during the plan period. Far from authorizing BOEM to restructure the American energy market, OCSLA is clear that BOEM should instead pursue and effectuate the expeditious production of oil and natural gas.

As a result, the Proposed Program, if finalized in its current form, would violate the major questions doctrine. This would be all the more true if BOEM’s final Program were to make few or no leases available. In either case, such a Program would be unlawful because it would violate OCSLA and the APA.¹⁷⁸ In lieu of exposing itself to significant risk on judicial review, BOEM should instead promulgate a five-year plan that makes more areas for lease and leases available, and await additional direction from Congress before proceeding with any plan that would dramatically curtail lease availability or would allow climate change to trump the other statutory factors listed in Section 18(a) of OCSLA.

VII. The Proposed Program fails to properly balance the factors listed in Section 18 of OCSLA.

BOEM’s decision to attribute dispositive significance to considerations related to climate change, while ignoring and improperly weighing the express statutory factors that Congress instructed it to consider, exacerbates the legal vulnerabilities of the proposed Program with respect to both the OCSLA and the APA. Among other things, the finalization of a Program that resembles the current proposal would be arbitrary and capricious,¹⁷⁹ “in excess of statutory jurisdiction . . . or limitations,”¹⁸⁰ and contrary to “procedure[s] required by law.”¹⁸¹

In Section 18(a) of OCSLA, Congress instructed BOEM to prepare an oil and natural gas leasing program in “a manner consistent with” certain specifically listed

¹⁷⁷ 43 U.S.C. § 1344. The focus of the Act is oil and natural gas leasing on the OCS, as described throughout these comments. The OCSLA, and by extension the National Program, is focused on producing these specific resources. By way of example, “oil” appears 98 times and “gas” appears 97 times in the Act, compared with “mineral” (35), “sulphur” (19), “renewable” (1), “greenhouse gas” (0), or “emission” (0).

¹⁷⁸ See 5 U.S.C. § 706(2)(A)–(C).

¹⁷⁹ *Id.* § 706(2)(A).

¹⁸⁰ *Id.* § 706(2)(C).

¹⁸¹ *Id.* § 706(2)(D).

“principles.”¹⁸² Congress then instructed that the agency should “consider[] economic, social, and environmental values”¹⁸³ and provided a list of eight specific factors on which the development of the leasing program “*shall* be based”.¹⁸⁴

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

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

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

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

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

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

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

(H) relevant environmental and predictive information for different areas of the outer Continental Shelf.¹⁸⁵

When, as here, Congress uses the word “shall,” it means to convey *mandatory* requirements.¹⁸⁶ When Congress provides a specific list of factors for an agency to consider, it expects that those factors—and only those factors—will be the ones that

¹⁸² 43 U.S.C. § 1344(a).

¹⁸³ *Id.* § 1344(a)(1).

¹⁸⁴ *Id.* § 1344(a)(2) (emphasis added).

¹⁸⁵ *Id.* § 1344(2)(A)-(H).

¹⁸⁶ *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (“The word ‘shall’ is ordinarily ‘the language of command.’” (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947))).

drive the agency's decision-making.¹⁸⁷ It would violate the APA, and fundamental administrative-law principles, for BOEM to base its decision on anything other than the factors that Congress commanded it to consider.¹⁸⁸

Yet that is exactly what BOEM has proposed to do here. The Proposed Program notes the existence of the eight factors, and properly concludes that those factors are indeed the ones that the agency “must consider” when developing the Program.¹⁸⁹ But, beyond simply listing those factors and making brief and highly generalized statements about how they “qualitatively” apply to the 2023-2028 leasing plan,¹⁹⁰ the Proposed Program says precious little about the Section 18(a) factors. Although Congress instructed that those factors should function as the organizing principle for the agency's analysis, BOEM instead chose to ignore those factors and base the Proposed Program largely—if not exclusively—on climate-change considerations. Tellingly, Section 18(a) of OCSLA is cited only half a dozen times in the 511-page Proposed Program, whereas the word “climate” is used 191 times and the word “emissions” is used 163 times.

It appears the Proposed Program's relatively sparse discussion of Section 18 is due to the fact none of the eight factors listed in that Section 18(a)(2) relate specifically to climate change. Instead, the environmental considerations that must be weighed under OCSLA focus primarily on localized or regional environmental concerns—predominantly, in and around the OCS. The factors have no obvious reference to *global* climate impacts, and cannot be read as allowing the agency to give consideration of such impacts the outsized role in the decision-making process that is contemplated in the Proposed Program. The same is true of Section 18(a)(3). That portion of the statute requires the agency to select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and natural gas, and the potential for adverse impact on the coastal zone. The policy considerations relevant to Section 18(a)(3) focus on ensuring operational safety and processes sufficient to prevent or minimize, but not eliminate, operational-resultant calamities (e.g., loss of well control, blowouts, spillage, physical obstruction to other users of the OCS, or “other occurrences” which may cause damage to the environment or endanger life) in the OCS. Nothing in Section 18(a)(3)—or in any other section of OCSLA—authorizes the Secretary to give dispositive significance to the potential global impacts of climate change in developing a leasing program.

¹⁸⁷ See *Mittleman*, 757 F.3d at 301.

¹⁸⁸ See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁸⁹ Proposed Program Analysis at 2-1.

¹⁹⁰ See *id.* at 2-1 to 2-5.

The eight-part test under Section 18(a)(2) is designed as a methodology for developing an actual, relevant schedule of offshore oil and natural gas lease sales to satisfy U.S. energy needs; it is not a process that would allow the elimination (or even the diminution) of such sales on the basis of worldwide considerations such as climate change. By “rel[ying] on factors which Congress has not intended it to consider,” the agency has violated OCSLA and the APA.¹⁹¹

VIII. The Proposed Program’s limited approach to leasing cannot be supported by substantial evidence in the record.

In addition, BOEM’s Proposed Program, if finalized in its current form, would violate OCSLA and APA on the ground that it cannot be supported by substantial evidence in the record. That is because the United States will continue to need oil and natural gas, including from offshore drilling, in the five-year period following the Plan’s approval, and beyond.¹⁹² As noted above, Section 18(a) of OCSLA provides that BOEM’s leasing program must “meet national energy needs for the five-year period following its approval or reapproval.”¹⁹³ In the Proposed Program, BOEM concluded that “no new investment in fossil fuel supply projects” is needed to meet this goal because, under the International Energy Agency’s “roadmap to net-zero emissions,” the “Nation’s energy needs would need to be met by sources other than new OCS leasing.”¹⁹⁴ According to BOEM, America’s future “energy needs could be met by . . . sources” other than oil and natural gas obtained from OCS leases, and therefore the statute’s purposes can be achieved by authorizing very few—or even zero—offshore oil-and-natural gas leases for the period 2023-2028.¹⁹⁵

That conclusion—which forms the basic factual predicate for the entire Proposed Program—is arbitrary, capricious, and unsupported by substantial evidence, and therefore would likely be set aside by a federal court.¹⁹⁶ Federal courts have not

¹⁹¹ *State Farm*, 463 U.S. at 43.

¹⁹² *See* 43 U.S.C. § 1349(c)(6); 5 U.S.C. § 706(2)(D).

¹⁹³ 43 U.S.C. § 1344(a); *see id.* § 1802(1) (stating that the OCS resource management purposes include “achiev[ing] national economic and energy policy goals” and “assur[ing] national security”); *see also* 30 C.F.R. § 556.200 (lease sales are intended to “best meet national energy needs”).

¹⁹⁴ Proposed Program at 3.

¹⁹⁵ *See id.*

¹⁹⁶ *See Watt I*, 668 F.2d at 1302 (“When reviewing findings of ascertainable fact made by the Secretary, the substantial evidence test guides our inquiry. When reviewing the policy judgments made by the Secretary, including those predictive and difficult judgmental calls the Secretary is called upon to make, we will subject them to searching scrutiny to ensure that they are neither arbitrary nor irrational—in other words, we must determine whether ‘the decision is based on a consideration of the relevant factors and

hesitated to set aside agency actions when, as here, the agency's factfinding reached a conclusion that was contrary to the evidence, ignored contrary evidence, failed to consider important aspects of the problem, or was otherwise unreasonable.¹⁹⁷ Here, the Proposed Program and its limited leasing areas and sales will not be supportable by "substantial evidence" under OCSLA because, as BOEM repeatedly acknowledges, oil and natural gas will continue to play a vital role in meeting America's energy needs in the five years following the approval of the Proposed Program.¹⁹⁸

BOEM has correctly assessed that the available evidence indicates that America will continue to need oil and natural gas—including resources from offshore drilling—to meet its energy needs during the 2023-2028 period and beyond.¹⁹⁹ As discussed in Section I, at least during the early part of the transition to a lower-carbon economy, access to affordable and reliable sources of petroleum products is necessary to enable a comprehensive and responsible approach to America's energy supply.

whether there has been a clear error of judgment." (citation omitted)]; 5 U.S.C. § 706(2)(A), (E); *see also Dickinson v. Zurko*, 527 U.S. 150, 157-58 (1999) (noting similarities between the "substantial evidence" and "arbitrary and capricious" standards for reviewing agency factfinding); *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (Scalia, J.) (in context of agency factfinding, finding no difference between the APA's "arbitrary and capricious" standard and its "substantial evidence" standard).

¹⁹⁷ *See State Farm*, 463 U.S. at 43; *Morall v. Drug Enf't Admin.*, 412 F.3d 165, 177 (D.C. Cir. 2005).

¹⁹⁸ *See* 43 U.S.C. § 1349(c)(6).

¹⁹⁹ Proposed Program Analysis at 1-13 to 1-16.

IX. The Proposed Program would violate the APA because BOEM’s new position is an unexplained and unacknowledged departure from its prior treatment of environmental issues in similar circumstances.

BOEM’s new focus on global climate change as a factor driving decisionmaking under OCSLA is also arbitrary for a different reason: The agency’s new position is an unexplained and unacknowledged departure from its prior treatment of environmental issues in similar circumstances. As the Supreme Court explained in *FCC v. Fox Television Stations, Inc.*, if an agency changes its position, it must both (1) “display awareness that it *is* changing [its] position” instead of “depart[ing] from a prior policy *sub silentio*,” and (2) provide sufficient evidence and reasoning to demonstrate that “there are good reasons for the new policy.”²⁰⁰ When, as here, an agency’s new policy “rests upon factual findings that contradict those which underlay its prior policy” or otherwise “engendered serious reliance interests,” the agency bears a higher burden.²⁰¹ In that class of cases, the agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” and must give a “reasoned explanation . . . for disregarding [the] facts and circumstances” that formed the basis of its prior policy.²⁰²

The Proposed Program runs afoul of *Fox Television*. When developing and promulgating its prior leasing programs, BOEM has acknowledged the pitfalls of affording climate change dispositive significance. For example, the agency’s final 2017-2022 Program explained that its net benefits analysis would not include the climate impacts of OCS oil and natural gas development because the costs and benefits of the leasing program “are appropriately assessed at the domestic or national level,” whereas “GHGs and their associated impacts occur on a global scale such that the resulting effects cannot appropriately be isolated for inclusion in the net benefits analysis.”²⁰³ The 2017-2022 Program also noted that “the emissions and associated social costs from the Proposed Program and the no action alternative [were] relatively similar, in large part due to the assumed substitution of more GHG-intensive oil and gas sources in the absence of a new OCS leasing program.”²⁰⁴ In the 2023-2028 Proposed Program, however, BOEM gave climate-change considerations a place of overriding primacy, despite the fact that the underlying factual circumstances had not changed since the development of the prior program. BOEM has not explained—or even acknowledged

²⁰⁰ 556 U.S. 502, 515 (2009).

²⁰¹ *Id.*

²⁰² *Id.* at 515-16.

²⁰³ BOEM, 2017-2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program, at 5-23 (Nov. 2016), <https://bit.ly/3yeKJct>.

²⁰⁴ *Id.* at 5-24.

that it is departing from—its own prior determination that robust OCS leasing is necessary to meet America’s energy needs and “increase[e] energy security.”²⁰⁵

It also bears mention that, if BOEM were to decide not to authorize any leases for the 2023-2028 period, that decision would also violate *Fox Television* and the APA. The agency has previously found that OCSLA leasing is in the best interest of the United States,²⁰⁶ and no prior Program has ever failed to authorize *any* leasing. Were the agency to do so now, it would be departing markedly from its own prior determination and reasoning, without any reasoned basis for doing so.

X. The Proposed Program and PEIS improperly rely on the social cost of GHGs.

The Proposed Program’s net benefits analysis included an analysis of the purported “social cost of . . . upstream GHG emissions” that are “associated with exploration and production” in the OCS.²⁰⁷ In order to perform that analysis, BOEM “use[d] the February 2021 Interagency Working Group’s [(IWG)] per-unit SC-GHG estimates to monetize the costs of th[ese] GHG emissions,” which estimated the “social cost” of CO₂ at \$54 per metric ton, the “social cost” of CH₄ at \$1,615 per metric ton, and the “social cost” of N₂O at \$19,722 per metric ton (all using a 3% discount rate).²⁰⁸ The PEIS for the Proposed Program also referenced the so-called social cost of greenhouse gases (SC-GHG) tool,²⁰⁹ although it states that, due to “pending litigation on the social cost of carbon,” certain parts of its SC-GHG analysis were “not being used for decision-making on the National OCS Program” but were instead being provided only for informational purposes.²¹⁰

The Chamber respectfully submits that it would be inappropriate for BOEM to rely in any way on SC-GHG estimates as BOEM finalizes the Proposed Program and its

²⁰⁵ *See id.* at 8-22.

²⁰⁵ *See id.* (“Additional domestic oil and gas production reduces the need to obtain oil and gas from other domestic and foreign markets, reducing environmental risks from onshore oil and gas activities, coal and other substitutes, and oil imported by tanker, as well as reducing the overall trade deficit and increasing energy security.”).

²⁰⁶ *See generally* Gulf of Mexico, Outer Continental Shelf (OCS), Oil and Gas Lease Sale 257, 86 Fed. Reg. 6365 (Jan. 21, 2021).

²⁰⁷ Proposed Program Analysis at 5-26; *see id.* at 5-36, 5-47 (tables showing draft proposed SCC estimates).

²⁰⁸ *Id.* at 5-26 to 5-27.

²⁰⁹ BOEM, 1 Draft Programmatic Environmental Impact Statement for the 2023-2028 Program 21-22 (2022), <https://bit.ly/3CbBAvL> (“PEIS”).

²¹⁰ *Id.* at 30 (emphasis omitted).

associated NEPA analysis. That is so because there are several serious legal and procedural problems with that metric.

The Chamber has an interest in the SC-GHG estimates and their application to this Proposed Program, its PEIS, and NEPA reviews generally. The SC-GHG estimates have been applied in certain NEPA reviews that have resulted in project delays or modifications and are anticipated to similarly impact critical infrastructure investments and clean energy projects that would advance the Biden Administration's priorities and benefit our environment. The Energy Institute has a direct and substantial interest in ensuring that any SC-GHG estimates are the product of a sound, transparent, and inclusive administrative process, and are not improperly applied in NEPA reviews. This interest has expanded as the Energy Institute and the Chamber's member companies face the potential for increasing reporting obligations and other requirements in connection with Environmental, Social, and Governance criteria.

The Chamber supports the appropriate consideration of GHG emissions as part of regulatory cost-benefit analyses required under the Executive Order (E.O.) 12866 process, where permissible under an agency's statutory authority. The Energy Institute also supports robust and appropriate NEPA reviews. However, the SC-GHG estimates are not useful for agency decision-making under NEPA, for the reasons explained below. Our comments complement, and incorporate by reference, the attached comments that many associations, including the Chamber, submitted in June 2021 in response to a May 2021 notice by IWG on the SC-GHG, which cautioned against an expanded application of the estimates to NEPA reviews and underscored the need for a robust and transparent IWG process, including notice and comment as well as proper peer review.²¹¹

Since the submission of those comments on the May 2021 notice, the Administration has acknowledged that a more complete and open process is required before the IWG issues any final SC-GHG estimates. Thus, we are encouraged by

²¹¹ Comments by the Aluminum Association, American Chemistry Council, American Exploration & Petroleum Council, American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, American Gas Association, American Highway Users Alliance, American Iron and Steel Institute, American Petroleum Institute, American Public Gas Association, American Public Power Association, Associated Builders and Contractors, Associated General Contractors of America, Council of Industrial Boiler Owners, The Fertilizer Institute, Independent Petroleum Association of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Lime Association, National Mining Association, National Rural Electric Cooperative Association, Portland Cement Association, and the U.S. Chamber of Commerce, to the Office of Mgmt. & Budget, RE: Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 21, 2021), <https://bit.ly/3RG92jn> ("June 2021 Coalition Comments").

planned updates to the IWG process, including additional public comment and peer review on the estimates, while also reserving judgment (until further details are provided) on the approach of such peer review, which is to be led by EPA.²¹² In addition, a February 2022 district court decision (now on appeal) issued a preliminary injunction against use of the interim SC-GHG estimates, relying in part on a number of concerns regarding the IWG process;²¹³ that injunction has since been stayed pending appeal by the Fifth Circuit.²¹⁴ These developments only serve to underscore the need for BOEM to reconsider its application of the estimates in the Proposed Program and PEIS.

The Chamber urges BOEM to refrain from applying the SC-GHG estimates in the Proposed Program and its PEIS given the concerns set forth in our June 2021 comments referenced above, including several limitations under NEPA and procedural shortcomings that the IWG has not addressed. First, the SC-GHG estimates were not designed for, nor evaluated for, any purpose beyond a regulatory cost-benefit analysis. Second, the SC-GHG estimates do not and cannot reflect a reasonably foreseeable effect of the proposed action. Third, the lack of consensus on discount rates used for the SC-GHG estimates can lead to misleading results. Fourth, the SC-GHG estimates have not been subject to a robust independent peer review and may not be considered a generally acceptable scientific method for evaluating effects of a proposed action under NEPA. Separate from these issues under NEPA, BOEM's use of the SC-GHG estimates at this time would be vulnerable under the APA, as the estimates fail to comply with relevant administrative procedural requirements, including proper notice and comment procedures and agency guidance on peer review and information quality.

Combating climate change requires citizens, governments, and businesses to work together. The Energy Institute continues to leverage the innovation and the strength of American business to find durable solutions that improve our environment, grow our economy, and leave the world better for generations to come. Thus, notwithstanding the limited usefulness of the SC-GHG estimates in the NEPA context, the Energy Institute welcomes the opportunity to engage with BOEM in efforts to

²¹² Defs.' Suppl. Br. at 23, *Louisiana v. Biden*, No. 21-cv-1074 (W.D. La. Jan. 21, 2022), ECF No. 90 (The IWG "intends to publish its proposed final estimates within the next two months. Upon publication of the proposed final estimates, there will then be an additional comment period, as well as a scientific peer-review process. Based on the public comments and the results of peer review, the [IWG] then intends to publish Final Estimates later in 2022 . . ."); *see also* Request for Nominations of Experts, 87 Fed. Reg. 3801 (Jan. 25, 2022).

²¹³ Mem. Ruling, *Louisiana v. Biden*, No. 21-cv-1074, 2022 WL 438313, at *14-19 (W.D. La. Feb. 11, 2022), *appeal docketed*, No. 22-30087 (5th Cir. Feb. 21, 2022).

²¹⁴ *Louisiana v. Biden*, No. 22-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022) (per curiam) (staying district court's decision pending appeal). An application to vacate the stay was filed before the U.S. Supreme Court. *Louisiana v. Biden*, No. 21A658 (U.S. Apr. 27, 2022). The Court denied the stay application on May 26, 2022.

appropriately address GHG emissions and climate issues consistent with applicable legal requirements.

- A. *BOEM should reconsider its application of the SC-GHG estimates to the Proposed Program and the PEIS because the estimates are not an appropriate tool for purposes of NEPA.*

NEPA is a purely procedural statute and “does not dictate particular decisional outcomes.”²¹⁵ Congress established the NEPA review process to provide “the public and agency decisionmakers the qualitative and quantitative tools they need[] to make an informed choice for themselves . . . [and] nothing more.”²¹⁶ These comments identify the limitations of the SC-GHG estimates under NEPA and ultimately urge BOEM to reconsider its application of the SC-GHG estimates in the Proposed Program and the PEIS.

- i. The SC-GHG estimates were not designed for, nor evaluated for, any purpose beyond a regulatory cost-benefit analyses.

The SC-GHG estimates were designed by the IWG for use in “regulatory impact analyses” (RIAs) under E.O. 12866—not for NEPA analyses.²¹⁷ While the SC-GHG estimates have fluctuated over the years, the underlying methodology and models remain unchanged and should not be applied beyond their designed use for regulatory cost-benefit-analysis. Indeed, E.O. 13990, signed by President Biden, told agencies to use the SC-GHG estimates to “determine the social benefits of reducing greenhouse gas emissions *when conducting cost-benefit analyses.*”²¹⁸

We recognize that E.O. 13990 directed the IWG to consider other applications of the SC-GHG estimates beyond regulatory cost-benefit analysis.²¹⁹ The IWG was supposed to provide recommendations for use of the SC-GHG estimates beyond regulatory cost-benefit analysis by September 1, 2021; however, a January 21, 2022, court filing revealed that the IWG had missed that deadline and planned to submit the recommendations “soon.”²²⁰ With this development in mind, we find BOEM’s proposed expansion of the use of the SC-GHG estimates in the Proposed Program and PEIS at a

²¹⁵ *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 37 (D.C. Cir. 2015).

²¹⁶ *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017).

²¹⁷ U.S. Gov’t Interagency Working Grp. on Soc. Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866* (Feb. 2010), <https://bit.ly/3V0ya7u>.

²¹⁸ Exec. Ord. 13,990 of Jan. 20, 2021, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037, 7040 (Jan. 25, 2021) (emphasis added).

²¹⁹ *Id.*

²²⁰ Defs.’ Suppl. Br., *supra* note 212, at 24-25.

minimum to be premature, if not inappropriate. An extended discussion of the limits of the SC-GHG estimates to regulatory cost-benefit analysis is included in the June 2021 comments to the IWG referenced above.

Regarding NEPA, BOEM need not conduct a regulatory cost-benefit analysis or use the SC-GHG estimates for purposes of the Proposed Program or PEIS. Neither NEPA nor the White House Council on Environmental Quality's (CEQ's) NEPA regulations require agencies to conduct a regulatory cost-benefit analysis for a proposed action or to use it for the purpose of comparing the potential environmental impacts of alternatives. Nor did CEQ's pre-2020 NEPA regulations require such analysis.²²¹ In fact, the regulations direct (and the pre-2020 version directed) agencies *not* to prepare a regulatory cost-benefit analysis to evaluate alternatives "when there are important qualitative considerations."²²²

Additionally, a NEPA analysis that focuses on SC-GHG estimates would distort the purpose of a complete and robust analysis. NEPA should inform the agency of the direct and foreseeable impacts of the action on the environment, including impacts to land, water, natural resources, and cultural resources. Using the SC-GHG estimates more narrowly focuses on GHG-related impacts without considering other potential impacts, and attempts to quantify the cost of a proposal solely in relation to GHG emissions. Such an approach is contrary to the purpose of NEPA, and it would be arbitrary to rely on the SC-GHG estimates to select a preferred alternative.

Reliance on SC-GHG estimates would also signal to the broader public that BOEM is elevating concerns regarding potential impacts from GHG emissions, which are not reasonably foreseeable, over other potential impacts that are not incorporated into either the cost or benefit of the Proposed Program. This is particularly true for indirect and cumulative impacts from GHG emissions that would be less reasonably foreseeable than direct impacts. Thus, use of the SC-GHG estimates would improperly skew BOEM's analysis in a manner that biases a choice among alternatives. This would be improper, as it would focus the NEPA review on a subset of issues whose effects are not reasonably foreseeable nor attributable to a single project or activity. Additionally, because GHG emissions and their attendant effects are global in nature, use of the SC-GHG estimates tasks the agency with analyzing matters that lie beyond the scope of its underlying legal authority for the action in question.

While some have suggested that a small number of judicial decisions support use of the SC-GHG estimates in a regulatory cost-benefit analysis under NEPA, those decisions did not mandate use of the estimates in NEPA reviews. Instead, these

²²¹ 40 C.F.R. § 1502.22 (previously § 1502.23).

²²² *Id.*

decisions, which were specific to the social cost of carbon (SCC) estimates, hinged on fact-specific details of the agency’s analysis and procedural missteps. Those cases are best read to suggest that if an agency decides to quantify benefits in an analysis, it should include both costs and benefits or should adequately explain why certain effects may not be monetized.²²³

- ii. The SC-GHG estimates are not meaningful for purposes of NEPA, as the estimates do not reflect a reasonably foreseeable effect of the proposed action.

The SC-GHG estimates do not provide a useful tool for assessing “significant” environmental impacts of a proposed project, as the SC-GHG estimates reflect a monetary value in an attempt to represent a suite of global socio-economic impacts that are far removed in time and space from the proposed project or program; the estimates cannot be used to assess a particular environmental impact. The CEQ implementing regulations require an agency to assess reasonably foreseeable changes to the human environment of a proposed action or alternative that are “caused by the action”²²⁴ or “result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions.”²²⁵ In determining these close causal effects, the Supreme Court put forth a “rule of reason” test for agencies to limit environmental information considered to that which is useful for the agency’s decision-making.²²⁶ Specifically, the Court stated that where an agency “has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions,” the agency need not consider those effects.²²⁷ Though CEQ codified this holding and clarified that such effects outside an agency’s control are not considered effects at all under NEPA in its 2020 regulatory amendments,²²⁸ CEQ subsequently revisited its

²²³ *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191, 1195-96 (D. Colo. 2014) (finding NEPA analysis to be arbitrary and capricious where agencies removed discussion of the costs of a proposal and included only the analysis of benefits); *Utah Physicians for a Healthy Env’t v. BLM*, 528 F. Supp. 3d 1222, 1232 (D. Utah 2021) (holding that “[t]he socioeconomic section may not lay out the economic benefits from the proposal without analyzing the socioeconomic costs of GHGs together with climate change”); *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185, 1195-96 (D. Mont. 2020) (noting that in previous decision, court had faulted agency for quantifying socioeconomic benefits of a mine expansion without also quantifying the costs), *rev’d in part on other grounds sub nom. 350 Montana v. Haaland*, 29 F.4th 1158, 1176 (9th Cir. 2022) (holding that although agency’s NEPA analysis was inadequate, agency was not required to use social cost of carbon metric); *see also 350 Montana v. Haaland*, 29 F.4th at 1185 (R. Nelson, J., dissenting) (SCC “was rejected by Interior, and both a skeptical district court and this panel unanimously have affirmed that conclusion”).

²²⁴ 40 C.F.R. § 1508.1(g)(1), (2) (definition of direct and indirect effects).

²²⁵ *Id.* § 1508.1(g)(3) (definition of cumulative effects).

²²⁶ *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767-70 (2004).

²²⁷ *Id.* at 770.

²²⁸ 40 C.F.R. § 1508.1(g).

interpretation in the 2022 regulatory amendments.²²⁹ We disagree with CEQ’s strained reading of *Public Citizen* in the regulatory preamble, wherein CEQ suggests agencies should consider a broader set of effects than those with a “reasonably close causal relationship” to the proposed action or those which the agency lacks authority to prevent. CEQ’s prior interpretation was the correct approach under both NEPA and Supreme Court precedent. Under either interpretation, however, use of SC-GHG estimates does not inform an agency of the reasonably foreseeable environmental changes that could result from a federal action, nor is such an analysis a helpful decision-making aid where an agency lacks authority to prevent global climate change.

Regarding the first prong, as the SC-GHG estimates provide a dollar figure that reflects the monetized socioeconomic costs of “all climate change impacts” across the globe projected through year 2300, the estimates do not reflect the incremental physical environmental impact of the GHG emissions caused by the proposed action.²³⁰ Estimates of such impacts, based as they are on modeling predictions that extend *nearly 300 years into the future*, present significant uncertainties that surely break the causal chain of the effect of a proposed action under NEPA and thus flunk the requirement of reasonable foreseeability.²³¹ The Energy Institute acknowledges that GHG emissions are well-mixed in the atmosphere and contribute to global climate change. At the same time, there is no standard methodology for specifying the likely physical impacts of a particular project or program’s GHG emissions. Courts have upheld this rationale, in combination with other reasons, for an agency’s decision not to use the SC-GHG estimates in a NEPA analysis.²³²

Additionally, NEPA does not identify the analytical methods to be used in assessing environmental impacts of proposed actions and alternatives, nor does the statute create special tests or standards for GHG emissions or climate change impacts as compared with other environmental impacts or sources of impacts.

As noted above, the SC-GHG estimates attempt to represent a suite of effects from global climate change, including those which would not otherwise be considered “significant” for purposes of NEPA. CEQ’s NEPA regulations define “significance” as

²²⁹ 87 Fed. Reg. 23,453, 23,465 (Apr. 20, 2022).

²³⁰ U.S. Gov’t Interagency Working Grp. on Soc. Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane and Nitrous Oxide Interim Estimates under Executive Order 13990* 2 (Feb. 2021), <https://bit.ly/3RwbwRn> (“2021 TSD”).

²³¹ Update to the Regulations Implementing Procedural Provisions of NEPA, 85 Fed. Reg. 43,304, 43,343-44 (July 16, 2020); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (effects would fall outside of NEPA if “the casual chain is too attenuated”).

²³² *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016).

“usually depend[ing] upon the effects in the locale rather than in the world as a whole.”²³³ Moreover, extraterritorial effects are not covered by NEPA.²³⁴ Yet, the SC-GHG estimates attempt to account for global effects, not those only in the U.S. or the local area of a project under consideration. Additionally, there is no established threshold for “significant” impacts of a particular project on global climate change. In fact, across Democratic and Republican Administrations, the CEQ has declined to establish a GHG emissions “significance” test.²³⁵ Thus, as a practical matter, BOEM has no accurate methods of identifying “significant” impacts of global climate change underlying the SC-GHG estimates.

Similarly, there are no established criteria for what cost is to be considered “significant” for NEPA purposes. In *High Country Conservation Advocates v. U.S. Forest Service*, the Plaintiffs claimed that, using the SCC, the action at issue would have caused between \$248 million and \$3.4 billion in future impacts, a claim that the court did not address in its decision.²³⁶ However, in *WildEarth Guardians v. Zinke*, the court found that an agency provided a reasoned explanation of why the SCC was highly speculative, noting that the impacts calculated with the SCC would be between \$18 and \$177 billion per year, which was such a range of difference that it would not be useful to the public.²³⁷ There is no discernible method for a federal agency to pick the high end, the low end, or some mid-range number and to determine whether or not that monetary value represents a “significant” impact on the environment for purposes of NEPA.

Moreover, BOEM has no legal authority to use this particular proposed action to prevent the effects of global climate change. As NEPA is a procedural and not a

²³³ 40 C.F.R. § 1508.27(a).

²³⁴ *Id.* § 1508.1(q)(1)(i).

²³⁵ See CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 11, 13 (Aug. 1, 2016) (“When considering GHG emissions and their significance, agencies should use appropriate tools and methodologies for quantifying GHG emissions and comparing GHG quantities across alternative scenarios. . . . The determination of the potential significance of a proposed action remains subject to agency practice for the consideration of context and intensity, as set forth in the CEQ Regulations.”); see also CEQ, Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097 (June 26, 2019) (rescinded 86 Fed. Reg. 10,252 Feb. 19, 2021) (not addressing significance); CEQ, Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77,802, 77,828 (Dec. 24, 2014) (clarifying that the proposed and later abandoned 25,000 MT CO₂e/year reference point for quantitative disclosure was “not a substitute for an agency’s determination of significance”).

²³⁶ Pls.’ Opening Br. on the Merits at 46-47, *High Country Conservation Advocs. v. U.S. Forest Serv.*, No. 13-cv-1723 (D. Colo. Mar. 20, 2014), ECF No. 62.

²³⁷ *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 78-79 (D.D.C. 2019).

substantive statute, there is also no requirement under NEPA that BOEM select the alternative that is deemed most beneficial, or least costly, by any particular measure. Further, the Supreme Court has confirmed that as a purely procedural statute, NEPA does not require a “mitigation plan be actually formulated and adopted.”²³⁸

- iii. The lack of consensus on discount rates used for the SC-GHG estimates highlights that such estimates can lead to misleading results that are not helpful for purposes of NEPA.

The usefulness of the SC-GHG estimates in NEPA analyses is further compromised by the lack of consensus surrounding the selection of the discount rates used. NEPA analyses must “not be based on misleading economic assumptions” such that the public’s review of a project may be skewed.²³⁹ The discount rates underpinning the SC-GHG estimates fail on both accounts, which is, in part, why courts have cited the lack of consensus on discount rates in concluding that agencies acted reasonably when declining to use the SCC in previous NEPA analyses.²⁴⁰

The three discount rates identified by the IWG have an outsized impact on the ultimate estimate, such that even a modest change in the discount rate has the potential to provide the public misleading results. As the IWG acknowledged, “the choice of a discount rate also raises highly contested and exceedingly difficult questions of science, economics, ethics, and law.”²⁴¹ Additionally, the IWG is actively considering whether to further reduce the discount rates used to calculate the estimates.²⁴² Concern over the lack of consensus on the discount rate is more acute, as the SC-GHG estimates discount effects modeled out nearly 300 years and produce a vast range of estimates that are not helpful for the public evaluation of an agency’s action. These concerns are separate from those technical issues with the discount rates that the Energy Institute raises below regarding the IWG’s failure to follow longstanding agency guidance to inform the discount rates selected.

²³⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989).

²³⁹ *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996).

²⁴⁰ *See e.g., EarthReports*, 828 F.3d at 956.

²⁴¹ 2021 TSD at 17.

²⁴² 86 Fed. Reg. 24,669 (May 7, 2021); *see also* 2021 TSD at 4 (stating that “new data and evidence strongly suggests that the discount rate” should be lower).

B. SC-GHG estimates are inappropriate for NEPA purposes, as the estimates are not considered generally accepted in the scientific community given the lack of a robust independent peer review.

As noted above, several reasons support courts' decisions upholding agencies' reasoning not to use the SCC in NEPA analyses. A recent D.C. Circuit decision suggests that if the SCC is considered to be "generally accepted in the scientific community," then the SCC or another accepted analytical framework may need to be used if an action could have reasonably foreseeable significant adverse GHG impacts.²⁴³ The implications of this decision should not be overstated. The court's decision centered on the Federal Energy Regulatory Commission's (FERC's) failure to respond to a comment submitted on a DEIS, which raised a specific provision of CEQ's NEPA regulations, currently codified as 40 C.F.R. § 1502.21(c). The court simply held that FERC needed to respond to the comment expressing a significant opposing viewpoint (as the agency had failed to "discuss, or even cite," CEQ's regulation in its rehearing order and in its briefing in the case); the court did not decide whether FERC had violated the CEQ regulation or whether the SCC is generally accepted in the scientific community within the meaning of the regulation.²⁴⁴

The Energy Institute notes that there are several considerations cautioning against characterizing the SC-GHG estimates as accepted by the scientific community. In particular, as explained further below and in the Energy Institute's June 2021 comments, the estimates do not reflect the recommendations on the development of the SCC provided by the National Academies of Sciences, Engineering, and Medicine (NAS). Because of this, and because of the IWG's failure to conduct an independent peer review for the social cost of methane and nitrous oxide estimates (including for the intended purpose of use in NEPA analyses), the estimates do not meet required peer review or information quality standards.

Some may consider CEQ's guidance that agencies should use "all available tools" for assessing GHG emissions and climate change impacts in NEPA analyses as encouragement or authorization to use the SC-GHG estimates. However, this guidance had not been finalized, and CEQ has never directed agencies to use the SC-GHG estimates.²⁴⁵ More important, CEQ's implementing regulations require agencies to

²⁴³ *Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1328-30 (D.C. Cir. 2021).

²⁴⁴ *Id.* at 1329; *see id.* at 1329-30 ("[W]e do hold that the Commission was required to address Petitioners' argument concerning the significance of 40 C.F.R. § 1502.21(c), and that its failure to do so rendered its analyses of the projects' greenhouse gas emissions deficient. On remand, the Commission must explain whether 40 C.F.R. § 1502.21(c) calls for it to apply the social cost of carbon protocol or some other analytical framework, as 'generally accepted in the scientific community' within the meaning of the regulation, and if not, why not.").

²⁴⁵ 86 Fed. Reg. 10,252 (Feb. 19, 2021).

ensure the professional and scientific integrity of their NEPA analyses.²⁴⁶ In light of the concerns noted above regarding peer review and information quality, and the admission of the IWG that the estimates suffer from uncertainty, speculation, and lack of information, it would be improper for an agency to conclude that the SC-GHG estimates aid its decision-making under NEPA. The Energy Institute also notes that recent interagency advocacy from EPA personnel urging agencies to use SC-GHG estimates in their NEPA analyses is not controlling; the relevant comments from EPA personnel in this regard are purely advisory and do not displace, nor do they augment, agencies' obligations under NEPA.²⁴⁷ Further, it is unclear what (if any) authority EPA, as a member agency of the IWG, has with regard to other agencies' use of the SC-GHG estimates.

C. Another reason why BOEM should reconsider its use of the SC-GHG estimates in the Proposed Program and PEIS is that procedural flaws attended the development of the estimates.

An additional reason why BOEM should not rely on the SC-GHG estimates in the Proposed Program or PEIS is that the IWG process for developing the estimates was procedurally flawed. An agency's NEPA analysis is reviewed under the arbitrary and capricious standard of the APA.²⁴⁸ In this case, the SC-GHG estimates applied in the Proposed Program and PEIS suffer from material defects that are contrary to the APA and basic principles of due process. Specifically, the SC-GHG estimates were not subject to proper notice and comment procedures prior to release and use in the Proposed Program and PEIS. In addition, the SC-GHG estimates applied in the Proposed Program and PEIS have not been subject to robust independent peer review, nor do the estimates conform with agency guidance on information quality and regulatory analyses. Given these procedural flaws, the Energy Institute urges BOEM to reconsider its application of the estimates in the Proposed Program and PEIS.

First, BOEM should not rely on the SC-GHG estimates in the Proposed Program or PEIS because the IWG released the estimates without any prior public notice and comment. The Energy Institute appreciated the comment period on the Technical Support Document that was provided on behalf of the IWG in May 2021; however, the IWG has yet to respond to the public comments that were submitted on the notice. Moreover, a lack of transparency surrounding the IWG process, among other limitations with the May 2021 notice, has impaired the public's ability to meaningfully comment on

²⁴⁶ 40 C.F.R. § 1502.23 (previously 40 C.F.R. § 1502.24).

²⁴⁷ Letter from Assoc. Adm'r for Policy, V. Arroyo, EPA to Sec'y, K. Bose, FERC, Dec. 20, 2021.

²⁴⁸ *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006).

the SC-GHG estimates.²⁴⁹ This lack of transparency extends to this comment period. BOEM has provided no further record in the Proposed Program and PEIS regarding the IWG process, which has not effectively communicated with the public on its work. Nor can the IWG's proposed *future* public comment or peer review process for final SC-GHG estimates remedy the error of applying the estimates in the Proposed Program and PEIS. Absent a clear understanding of the IWG process and of decisions that the IWG has made, accompanied by greater transparency, the public's ability to provide meaningful comments on the estimates in the Proposed Program and PEIS is impaired.

The Energy Institute further cautions that the limited process afforded to the public in years past to comment on earlier SC-GHG estimates does not and cannot serve as an adequate substitute for the need to provide a full opportunity for public input on the current estimates.²⁵⁰ For instance, the comment period on the 2013 SCC estimates did not reflect a meaningful opportunity for public comment at the time, in part, given the lack of peer review and public access to information underpinning the estimates.²⁵¹ That comment period also predated the IWG's release of the social cost of methane and nitrous oxide estimates, which were not independently subject to public input.²⁵² Comment periods on rules using previous estimates were similarly inadequate on a legal and policy basis, and should not be used as a model by BOEM here when responding to these and other comments on the estimates used in the Proposed Program and PEIS.²⁵³

Second, BOEM should refrain from relying on the SC-GHG estimates because the IWG has thus far failed to heed the recommendations of the NAS regarding the IWG's process and methodology for developing a SCC. Five years ago, the NAS completed its review and issued recommendations, calling for a new framework for developing the estimates and multiple changes to the methodologies for calculating the

²⁴⁹ 86 Fed. Reg. 24,669 (May 7, 2021). The APA requires agencies to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).

²⁵⁰ June 2021 Coalition Comments at 10-13 & n.27 ("The Associations caution against reliance on comment periods dating back several years. An agency must examine the *relevant data* and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Normally, an agency rule would be arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency. This means that "an agency cannot *ignore* new and better data." (cleaned up) (citations omitted)); *see also Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (*per curiam*) (agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion").

²⁵¹ 78 Fed. Reg. 70,586 (Nov. 26, 2013).

²⁵² June 2021 Coalition Comments at 11-12.

²⁵³ *Id.*

SCC estimates.²⁵⁴ Consideration of the recommendations of the NAS is critical for any robust social cost analysis—and is in fact mandated by President Biden’s Executive Order that directed the IWG to develop revised SC-GHG estimates, E.O. 13990.²⁵⁵ While the IWG has stated its intent to consider the NAS recommendations, none of the NAS recommendations have been incorporated into developing the estimates that BOEM applied in the Proposed Program and PEIS. Of course, the precise way in which the NAS recommendations may (or may not) be followed in the future cannot form the basis for relying on the estimates here. For BOEM to proceed to apply the SC-GHG estimates without incorporating the NAS recommendations is a major deficiency that the Energy Institute urges BOEM to fully address.

Third, the SC-GHG estimates also conflict, without appropriate explanation, with longstanding agency guidance on information quality and regulatory analyses; consequently, BOEM reliance on the estimates in the Proposed Program and PEIS would be arbitrary and capricious.²⁵⁶ The estimates fail to follow the Office of Management and Budget’s (OMB) “Final Information Quality Bulletin for Peer Review,” which requires “influential scientific information,” such as the modeling inputs and assumptions underlying the estimates, to be subject to rigorous peer review.²⁵⁷ Further, the lack of a formal uncertainty analysis and the improper characterization of uncertainty with the SC-GHG estimates deviate from OMB’s final “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies” pursuant to the Information Quality Act.²⁵⁸ Such analysis is necessary to inform a full and adequate peer review and to enable rational agency decision-making concerning the potential use of the SC-GHG estimates.²⁵⁹ As noted, the EPA, on behalf of the IWG, has announced a contractor-led peer review of the SC-GHG estimates. While the Energy Institute commends plans for a peer review,

²⁵⁴ Nat’l Acads. of Scis., Eng’g, and Med., *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017).

²⁵⁵ Exec. Ord. 13990, 86 Fed. Reg. at 7041 (Sec. 5 (iii) Methodology states: “In carrying out its activities, the Working Group shall consider the recommendations of the National Academies of Science, Engineering, and Medicine as reported in *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017) . . .”).

²⁵⁶ *See Morton v. Ruiz*, 415 U.S. 199, 235-36 (1974) (agency’s failure to follow its own guidance documents is arbitrary and capricious).

²⁵⁷ Off. of Mgmt. & Budget, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005).

²⁵⁸ Off. of Mgmt. & Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002); Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 to 2763A-153 .

²⁵⁹ 5 U.S.C. § 706.

there are questions as to how robust and independent that review may be, as limited information has been made available on the process and EPA's particular role.²⁶⁰

Lastly, the IWG's selected discount rates and presentation of global estimates for the SC-GHGs diverge from OMB's Circular A-4.²⁶¹ Circular A-4 remains the governing guidance for any government regulatory cost-benefit analysis. Although the administration has announced a review of and potential revisions to Circular A-4, the Circular still presently reflects active guidance for the IWG and BOEM to follow.²⁶² Accordingly, the Energy Institute urges BOEM to reconsider its reliance on the SC-GHG estimates in the Proposed Program and PEIS and to ensure that any final action by BOEM comports with Circular A-4 in all relevant respects.

The Chamber understands that the IWG is in the process of revising the estimates. In the first instance, the BOEM should wait for the revised IWG process to unfold instead of relying on the flawed SC-GHG estimates for this Proposed Program and PEIS.

The Chamber supports the appropriate consideration of GHG emissions associated with a proposed action; however, the SC-GHG estimates are not a useful tool for environmental reviews under NEPA. For the reasons stated in these comments and the attached June 2021 comments, the Energy Institute urges BOEM to reconsider its application of the SC-GHG estimates to the Proposed Program and PEIS.

That being said, we note that the Proposed Program did correctly conclude that, if the agency was going to use the "social cost of carbon" methodology, it would be required to "analyze the GHG emissions from international production of substitute energy sources."²⁶³ Although the Chamber does not believe it was appropriate for BOEM to use SC-GHG at all, the Energy Institute agrees that, if SC-GHG is going to be used, the "social cost" of emissions related to the production of alternative, non-OCS fuels must be considered. Critically, BOEM's analysis ultimately found that the "increase in social cost of upstream GHG emissions associated with the No Sale Option represents [an] increase in per-barrel GHG emissions from substitute sources" because the "fossil fuel energy sources that substitute for OCS oil and gas have higher GHG intensities" and because "[i]mports result in additional emissions during transport to the U.S." given that "there are less restrictive emissions standards in the producing countries."²⁶⁴

²⁶⁰ 87 Fed. Reg. 3801.

²⁶¹ See Off. of Mgmt. & Budget, Circular A-4: Regulatory Analysis (Sept. 17, 2003) ("OMB Circular A-4"), <https://bit.ly/3edf4dE> (providing OMB's guidance to federal agencies on the development of regulatory analysis as required under E.O. 12866); see also <https://tinyurl.com/5n8x5ewy>.

²⁶² Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021).

²⁶³ Proposed Program Analysis at 5-27; see PEIS at 212.

²⁶⁴ Proposed Program Analysis at 5-44.

Phrased differently, BOEM correctly asserts that the “no lease” alternative is actually environmentally inferior to the Proposed Program because it would have a higher “social cost.”

XI. Conclusion

The Chamber appreciates the opportunity to comment on the Proposed Plan. For the reasons stated above, and based on the information included in this letter and the attachments, we urge BOEM to finalize a Program that includes additional areas for lease and additional lease sales in those areas, and to comply fully with OCSLA’s mandates.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher Guith". The signature is fluid and cursive, with a large initial "C" and "G".

Christopher Guith
Senior Vice President
Global Energy Institute
U.S. Chamber of Commerce