ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1023, 24-1024 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and BUREAU OF OCEAN ENERGY MANAGEMENT,

Respondents,

and

ALASKA COMMUNITY ACTION ON TOXICS, et al.,

Intervenors.

ENVIRONMENTAL PETITIONERS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Petitioners Healthy Gulf, Bayou City Waterkeeper, Friends of the Earth, Oceana, Natural Resources Defense Council, Sierra Club, Surfrider, and Turtle Island Restoration Network (collectively "Environmental Petitioners" or "Petitioners") submit this certificate as to parties, rulings, and related cases.

A. Parties, Intervenors, and Amici

In addition to Environmental Petitioners, the parties to this case are Respondents Debra Haaland, the Secretary of the United States Department of the Interior, the Bureau of Ocean Energy Management, an agency of the United States, and Liz Klein, the Director of the Bureau (collectively "Interior"). The American Petroleum Institute has likewise petitioned to challenge the agency action at issue and has also intervened on behalf of Respondents.

B. Rulings Under Review

Environmental Petitioners challenge the 2024-2029 National Outer Continental Shelf Oil and Gas Leasing Proposed Final Program approved by Interior on December 14, 2023.

C. Related Cases

There are no related cases.

/s/ Brettny Hardy
Brettny Hardy

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Federal Register

Other Authorities

GLOSSARY

EIS	Environmental Impact Statement
Gulf	Gulf of Mexico
Interior	Department of the Interior
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
Program	2024-2029 National Outer Continental Shelf Oil and Gas Leasing Program
Service	National Marine Fisheries Service

INTRODUCTION

In December 2023, Interior promulgated its 2024-2029 National Outer Continental Shelf Oil and Gas Leasing Program ("Program") which schedules three offshore oil and gas lease sales in the Gulf of Mexico ("Gulf"), each of which could offer for development nearly 80 million acres. The sales would lock in 50 years of increased fossil fuel production in a region where communities suffering heavy pollution burdens from offshore oil development desperately need clean air and water; where critically endangered species are clinging to survival; and where expanding fossil fuel infrastructure is squeezing other resource users into ever smaller areas. Even worse, new leasing is not needed—oil and gas companies have already leased over 11 million acres in the Gulf that remain undeveloped.

The Outer Continental Shelf Lands Act ("OCSLA") requires Interior to consider and weigh harms to the environment before deciding where or when to hold lease sales. The statute identifies several factors Interior must consider as part of its decision. Of relevance here, Interior must base its decision about the timing and location of leasing on an equitable sharing of environmental risks among regions, including risks to minority and low-income communities. Interior must also evaluate the relative environmental sensitivity of different regions, including the vulnerability of endangered species in various areas. And Interior is required to evaluate whether new leasing will create conflicts with other resource uses.

Ultimately, Interior must obtain a proper balance between the potential for environmental damage and developmental benefits from leasing.

Despite these explicit requirements, Interior failed to comparatively assess threats to vulnerable communities from new oil and gas activities. And Interior failed to even mention, much less weigh, the effects of new leasing on the most endangered great whale on the planet—the Rice's whale—which has been reduced to a population of about 50 individuals due largely to offshore oil and gas impacts in the Gulf. Finally, Interior failed to analyze how new leasing would impede other resource uses in the Gulf, including commercial, subsistence, and recreational fishing, offshore wind energy, and aquaculture.

As a result, the Program impermissibly downplays leasing impacts, fails to properly balance benefits and harms, and subverts the purposes of OCSLA. For these reasons, this Court should declare that the Program violates OCSLA, vacate the Program, and remand to Interior to conduct the full analysis OCSLA requires.

JURISDICTIONAL STATEMENT

Pursuant to 43 U.S.C. § 1349(c), this Court has original subject-matter jurisdiction over a Petition for Review of Interior's Program. All jurisdictional requirements under that provision have been met: Environmental Petitioners participated in relevant administrative proceedings, are aggrieved by the Program as set forth below, filed a timely Petition for Review on February 12, 2024

(following the Program's adoption on December 14, 2023), and transmitted the Petition to Interior and the Attorney General.

ISSUES PRESENTED

1. Did Interior adequately evaluate and properly balance environmental risks from new fossil fuel lease sales when it did not comparatively examine environmental justice impacts among regions or weigh damage to vulnerable communities against potential benefits?
2. Did Interior properly evaluate relative environmental sensitivity and balance the potential for environmental damage when it ignored impacts to Rice's whales without explanation, flouting its own methodology for evaluating sensitivity and ignoring new population information?
3. Did Interior properly evaluate conflicts with other uses of Gulf resources and weigh the potential for adverse impacts when Interior acknowledged other uses but failed to assess whether new leasing would create conflicts with those uses?

STATUTES AND REGULATIONS

Pertinent sections of statutes and regulations appear in an addendum to this brief.[1]

[1] Citations to Environmental Petitioners' Addendum, which includes standing declarations, are designated "ADD."

STATEMENT OF THE CASE

I. Factual Background

A. Oil and gas development dominates the Gulf seascape.

For decades, the Gulf has been the nation's primary producer of offshore oil and gas. The region now generates 99% of all offshore oil and gas production. AR13145. Vast networks of oil and gas pipelines crisscross the seafloor, and numerous transport vessels, storage facilities, and onshore terminals support operating platforms. AR13211. This development has produced frequent and devastating oil spills, harmful emissions and air pollution, degradation of ecosystems and species, and other harms. AR13513, AR13516, AR353246-50. The Gulf currently contains approximately 2,500 leases, which collectively span 13 million acres.[2] AR9619, AR13447, AR318989. Of those, about 70% remain unexplored, undeveloped, or are not yet in production. AR13447.

B. Oil and gas activities in the Gulf create environmental justice burdens.

Polluting fossil fuel infrastructure has beleaguered Gulf communities. AR13524-25, AR353250. The region is home to half of the nation's petroleum refining and natural gas processing plant capacity. AR354951. Most of the country's petrochemical production also occurs on the Gulf coast. AR353701,

[2] *Combined Leasing Report*, BOEM (June 1, 2024), https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/Lease%20stats%206-1-24.pdf.

AR354815-16. These industries, which offshore oil and gas development support, are some of the most polluting in the nation and cause serious health harm to adjacent communities, including elevated cancer rates and respiratory illnesses. AR322814-22, AR353384-90. And they are often disproportionately sited in low-income communities and communities of color. AR353366. Offshore fossil fuel development contributes to these burdens, which increase as production grows. AR57606, AR57616.

In Louisiana, for example, an 85-mile stretch along the Mississippi River has long been known as "Cancer Alley" because more than 200 industrial facilities release toxic air pollution into communities, often low-income and majority Black communities, with documented increased cancer rates. AR13524, AR349485-87, AR352639-40. Construction of infrastructure, such as pipelines and channels through coastal lands to service offshore operations, has caused significant coastal erosion—the state lost 1.2 million acres of coastal wetland between 1932 and 2010. AR80824, AR354783-84, AR354788. This loss has exacerbated environmental justice concerns for coastal communities. For example, the Biloxi-Chitimacha-Choctaw tribe lost 98% of its Isle de Jean Charles land to coastal erosion and flooding. AR0332451, AR40401. The loss of these important ecosystems also degrades their ability to buffer against the effects of increasingly severe storms. AR40403.

The greater Houston area is "home to one of the world's largest petrochemical complexes and a quarter of the nation's refining capacity." AR331207. Air pollution from this petrochemical complex causes elevated cancer risk for communities of color that flank the ship channel. *Id*. Similarly, Jefferson County has some of the largest oil refineries and petrochemical plants in the nation. AR121085. Many of these facilities are in communities of color, and Black residents of Jefferson County have cancer rates 15% higher than the average Texan. *Id.*

C. Gulf oil and gas activities have pushed Rice's whale to the brink of extinction.

Rice's whale, also known as the Gulf of Mexico whale (and formerly, Bryde's whale), is the only baleen whale species resident in the Gulf. AR125165, AR126902. It was listed as an endangered species in 2019, 84 Fed. Reg. 15446 (Apr. 15, 2019), and is one of the most endangered marine mammals in existence, with a remaining population of approximately 50 individuals, AR66502-03, AR125166. The continued survival of this species is precarious: "Small-scale incremental impacts over time or a single catastrophic event" or even the loss of a single whale could result in extinction. AR66503, AR126996.

Oil and gas activities in the Gulf pose one of the most significant threats to the whale's survival. AR66598, AR126936. These activities degrade the whale's

habitat and cause behavioral abnormalities, illness, injury, and death. For example, noise from high-energy seismic surveys used in exploration causes abnormal "surfacing, respiration, and dive cycles" and physical injury, including permanent hearing impairment. AR66557-58. Rice's whales are also particularly susceptible to serious injury or death resulting from vessel strikes because they spend most of their time near the water's surface. AR125168, AR126936. Moreover, oil spills can cause physical injury, behavioral changes, or death. AR66543-44. The 2010 *Deepwater Horizon* spill devastated Rice's whale, killing approximately 22% of its population. AR125169.

Although once believed to exclusively inhabit the northeastern Gulf, new evidence demonstrates that the whale persistently occurs in the western and central Gulf, where oil and gas development occurs. *See, e.g.*, AR126983. In its July 2023 proposed critical habitat designation, the National Marine Fisheries Service ("Service") summarized this evidence, which includes "a genetically confirmed sighting of a Rice's whale in the western [Gulf]," and acoustic monitoring data detecting Rice's whale calls year-round in the western and central Gulf. 88 Fed. Reg. 47453, 47457 (July 24, 2023); *see also* AR126988, AR126996-97. Based in part on these studies, the Service proposed designating critical habitat for Rice's whale that includes waters 100-400 meters deep along the entire Gulf continental shelf. 88 Fed. Reg. at 47461.

D. Fossil fuel development conflicts with other uses in Gulf waters.

Despite harm from oil and gas activities, the Gulf region is still ecologically rich and vitally important to its coastal communities. Gulf ecosystems support robust commercial fisheries, which generate $6.9 billion in annual income. AR13467. The region provides more than 20% of total commercial and recreational fishing harvests each year. AR13522. Fishing and shrimping are also part of the traditional livelihoods and culture of many Gulf communities. AR13523. Offshore platforms, pipelines, and associated water pollution and oil spills can shut down access to fishing grounds through the life of a platform and introduce contaminants that can persist in fish for decades. *E.g.,* AR13459, AR13557, AR13558, AR13583 ("Exclusion from a highly productive area may decrease landings or cause longer trips [], resulting in decreased revenue."), AR13612, AR332115. Facilities and associated vessel traffic can also interfere with "the sustainable harvest, transport, sale, processing or storage of fish," impacting important cultural practices, nutrition, community resilience, and cultural identity. AR13583-84.

Offshore wind and aquaculture (farming for seafood) industries are being developed in the Gulf but face space-use conflicts with oil and gas activities. AR13452, AR13453. The Gulf produced about 22% of U.S. marine aquaculture in 2018. AR13212. The Service has started identifying additional aquaculture

opportunity areas and has determined oil and gas lease areas could create conflicts for aquaculture. 87 Fed. Reg. 33124 (June 1, 2022); *see* AR352142-45. Wind energy development includes activities like surveying, construction, and maintenance of wind turbines, and building transmission lines and other infrastructure to carry power to shore, which oil and gas activities will interfere with. AR354717-19, AR460960.

II. The Outer Continental Shelf Lands Act

OCSLA provides a "pyramidic" framework for leasing areas in the Outer Continental Shelf ("OCS") for oil and gas development, "proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt* ("*Watt I*"), 668 F.2d 1290, 1297 (D.C. Cir. 1981). The first stage (at issue here) is development of a five-year leasing program, which is followed by lease sales, exploration, development, and production. *Id.*; 43 U.S.C. §§ 1344, 1337, 1340, 1351. Interior makes the key decisions about the size, timing, and location of leasing on a national level—and the analyses and justifications for any new leasing—at the program stage. 43 U.S.C. § 1344.

Congress amended OCSLA in 1978 to ensure that Interior both "provide for *rational* management of the oil and gas resources of the [OCS]" and "protection of the marine, coastal, and human environment," curtailing the "carte blanche delegation of authority" prior versions of the statute granted. H.R. Rep. No. 95-

590, at 45-46, 51, 54, 57 (1977) (emphasis added). The amendments addressed concerns about the environment, triggered by a large oil spill in Santa Barbara. *Id*. at 74; *see also Watt I*, 668 F.2d at 1295 (citing H.R. Rep. 95-590, at 74) (amendments were meant to alleviate state and local governments' fears of "damaging impacts to their coastlines from oil spills and the onshore development which accompanies offshore drilling"). The amendments also sought to "minimize[e] or eliminat[e] conflicts between oil and gas development on the shelf and other uses of the marine environment." H.R. Rep. No. 95-590, at 122. Congress underscored that "preparation of a leasing program, … *must* consider environmental consequences—to the waters, to the air, to adjacent coastal areas, and to the living resources." *Id*. at 51-52 (emphasis added).

To address these and other concerns, Congress added Section 18 to OCSLA with the 1978 amendments. Section 18 obligates Interior to "weigh environmental and other risks against energy potential and other benefits in determining how, when and where oil and gas should be made available from the various [OCS] areas to meet national energy needs." *Id*. at 149. A program produced under Section 18 consists of a schedule of lease sales that Interior "determines will best meet national energy needs for the five-year period following [the program's] approval." 43 U.S.C. § 1344(a). The program must be based on four principles, three of which are relevant here.

First, Section 18(a)(1) obligates Interior to "consider[] economic, social, and environmental values of the renewable and nonrenewable resources contained in the [OCS], and the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and *human* environments." *Id.* § 1344(a)(1) (emphasis added). This includes a consideration of "environmental justice," i.e., whether leasing "will have a 'disproportionately high and adverse' impact on low-income and predominantly minority communities." *See Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017). OCSLA defines "human environment" to include "the state, condition, and quality of living conditions, employment, and health of those affected" by oil and gas activities. 43 U.S.C. § 1331(i); *see also* H.R. Rep. 95-590, at 125 (stating Interior must evaluate impacts on the "'human environment' for conditions determining the quality of life of those areas affected directly or indirectly by OCS-related activities"). Executive Orders 12,898 and 14,096 buttress OCSLA's obligation, calling on agencies to identify and address program impacts on minority and low-income populations. 59 Fed. Reg. 7629 (Feb. 16, 1994); 88 Fed. Reg. 25251 (April 26, 2023); s*ee also Vecinos para el Beinstar de la Communidad Costera v. FERC*, 6 F.4th 1321, 1326 (D.C. Cir. 2021).

Second, Section 18(a)(2) requires Interior to base the timing and location of its leasing program on several explicit factors. *Watt I*, 668 F.2d at 1306-07. Among

those, Section 18(a)(2)(B) requires Interior to evaluate whether there is "an equitable sharing … of environmental risks among the various regions," and Section 18(a)(2)(G) requires Interior to assess the "relative environmental sensitivity" of different regions. 43 U.S.C. § 1344(a)(2)(B), (G). Those two factors require a comparative analysis of different areas. *Watt I*, 668 F.2d at 1306. Sections 18(a)(2)(A) and (H) also require Interior to consider information on the "ecological characteristics" of regions as well as any other relevant and predictive information. 43 U.S.C. § 1344(a)(2)(A), (H). And Section 18(a)(2)(D) requires Interior to evaluate "other anticipated uses" of the ocean and whether new oil and gas leasing will "conflict" with those uses. *Id.* § 1344(a)(2)(D); *Watt I*, 668 F.2d at 1309-10. In developing a program, Interior must both "fully consider" all the Section 18(a)(2) factors and "base the leasing program" on a result of that consideration. *Id*. at 1305-07. Finally, Interior must evaluate all Section 18(a)(2) factors at the program stage—it cannot defer consideration until a later stage. *Id*. at 1307.

Third, under Section 18(a)(3), Interior must strike "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" when selecting "the timing and location of leasing." 43 U.S.C. § 1344(a)(3). In achieving that balance, Interior cannot ignore any of the Section 18(a)(2) factors. *Ctr. for Biological Diversity v. U.S. Dep't of Interior* ("*CBD*"), 563 F.3d 466, 488 (D.C. Cir. 2009)

("[A] flawed consideration of Section 18(a)(2) factors hinders Interior's ability to obtain a proper balance."). And Interior must account for all environmental and social costs, even those that are not quantifiable. *Watt I*, 668 F.2d at 1318.

A Program developed through the Section 18 process "achieves important practical and legal significance"—no leases can be issued in areas not included in an approved program, and any issued leases must be consistent with an approved program. *Id.* at 1299 (citing 43 U.S.C. § 1344(d)(3)).

III. The 2024-2029 Program

On July 8, 2022, Interior released a Proposed Program and accompanying Draft Programmatic Environmental Impact Statement ("EIS") that proposed a range of zero to ten lease sales in the Gulf and one sale in Alaska. AR3536.

In the Proposed Program, Interior mentioned impacts to vulnerable coastal communities. Interior acknowledged that "environmental risks" include risks to the "quality of the human environment," cultural resources, and "access to subsistence resources." AR3587-88. Although Interior recognized that vulnerable coastal communities "are often near onshore infrastructure and could be disproportionately impacted by new construction or the increased use of existing onshore infrastructure," AR3540, AR3781, Interior did not comparatively evaluate the risks to vulnerable communities in different areas from additional oil leasing, *see* AR3776-812.

Interior also ignored impacts to Rice's whales in the Gulf. To support its environmental sensitivity analysis, Interior used "an improved model" it developed in 2014, AR3750, which analyzed the "vulnerability and resilience" of species and habitats to oil and gas exploration, AR3756-57. Under the 2014 model, Interior selects marine mammal species of "conservation importance [based on] Federal listing status under the [Endangered Species Act]." *Id*. Interior updated the list of species selected for analysis from its 2014 model. AR3758. While the Service listed Rice's whale as an endangered species in 2019, Interior did not update its analysis to include that species. *See* AR3760.

Finally, Interior recognized several other uses of Gulf resources in the Proposed Program, including offshore wind development, fishing, and aquaculture. *See* AR3734-39. Despite recognizing that those other uses represented "potentially conflicting uses of the OCS that warrant[ed] a targeted leasing approach" which would remove acreage in conflicting areas, AR3539, Interior did not evaluate whether Gulfwide lease sales, encompassing all available acreage in the Gulf, would conflict with those uses. *See* AR3734-39.

Petitioners commented on the Proposed Program, explaining that Interior failed to adequately consider environmental justice, among other things. AR318964-72, AR319006-27, AR320333, AR360217-18, AR460887, AR461012-16. Petitioners also provided new evidence about the status and distribution of

Rice's whales and urged Interior to designate Rice's whale as a species of conservation importance in its environmental sensitivity analysis. AR460933-45. Further, Petitioners highlighted the agency's missing conflicts analysis, asking Interior to assess how new leasing might create conflicts that limit future wind energy development, fishing, and aquaculture opportunities. AR319028-32, AR460959-60.

On October 2, 2023, Interior released the Final Program and EIS, which "narrowed the schedule of potential lease sales" to three sales in the Gulf. AR13052-13386, AR13387-14024. And, on December 14, 2023, Interior issued the record of decision approving the Final Program. AR137138-41.

In the Final Program, Interior acknowledged that Gulf states have "borne most of the environmental risks associated with developing OCS resources." AR13063. Yet Interior still did not compare risks to vulnerable communities across different potential leasing areas. *See* AR13246-57.

In the Final EIS, Interior identified new information demonstrating that Rice's whales are not only highly endangered, but also distributed throughout the entire northern Gulf. AR13515. Interior also acknowledged that the Service had proposed critical habitat for Rice's whale. *Id*. Despite this, Interior did not evaluate that information, include the species as one of conservation importance in its

environmental sensitivity analysis, or even mention Rice's whales in the Final Program. *See* AR13225-30.

Finally, even though Interior stated in the Proposed Program that more targeted sales offering less acreage could reduce harms and potential conflicts, Interior ultimately chose to offer areawide sales in the Gulf, each of which could offer close to 80 million acres.[3] *See* AR13059-60, AR13123, AR13271-72, AR13410. And Interior recognized that the sales would have long-term effects "for … close to 50 years." AR13160, n.25.

SUMMARY OF ARGUMENT

Section 18(a)(2) of OCSLA requires Interior to base the "timing and location" of new leasing on "a consideration" of several specified factors. 43 U.S.C. § 1344(a)(2). Section 18(a)(3) requires the Secretary to also "select the timing and location of leasing, … so as to obtain a proper balance between the potential for environmental damage, the potential for discovery of oil and gas, and the potential for adverse impact on the coastal zone." *Id*. § 1344(a)(3). Interior violated Sections 18(a)(2) and (a)(3) by failing to account for *three* environmental harms in the factors it analyzed and in its ultimate balancing.

[3] For example, a recent areawide lease sale in the western and central Gulf offered 73.3 million acres. 88 Fed. Reg. 12413, 12414 (Feb. 27, 2023).

First, Interior failed to incorporate environmental justice impacts. Gulf communities already face immense environmental burdens from offshore oil and gas development, which new leasing will only exacerbate. Section 18(a)(2)(B) requires Interior to base its decision on "an equitable sharing of … environmental risks among the various regions." *Id.* § 1344(a)(2)(B). Yet Interior did not assess the susceptibility of communities in different areas, compare risks to those communities, or consider whether those risks warrant less sales or sales of smaller size. Nor did Interior weigh the outsized damage to minority and low-income communities from oil leasing against the benefits of new leasing, as Section 18(a)(3) requires.

Second, Interior did not incorporate impacts to Rice's whale. Rice's whale is the most critically endangered species in the Gulf, largely because of oil and gas development. Yet, without explanation, Interior disregarded impacts to the species when addressing "relative environmental sensitivity" under Section 18(a)(2)(G), contrary to the agency's own guidance to consider the region's most imperiled species. Further, Interior entirely ignored new information about the whale's status and population, in violation of Sections 18(a)(2)(A) and (H). Nor did Interior account for the potential that new leasing may lead to the extinction of Rice's whale when weighing environmental damage under Section 18(a)(3).

Third, Interior did not assess how new oil and gas leasing may create conflicts with other ocean uses. Section 18(a)(2)(D) requires Interior to consider the location of new leasing "with respect to other uses of the sea and seabed, including fisheries, … and other anticipated uses of the resources and space." *Id.* § 1344(a)(2)(D). While Interior acknowledged that offshore wind development, fishing, and aquaculture occur and are planned in the Gulf, it did not evaluate how new leasing may impede those uses. In turn, Interior failed to account for use conflicts when balancing adverse impacts from leasing under Section 18(a)(3).

STANDING

Environmental Petitioners have standing to bring this action on behalf of their members, who have standing in their own right. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Hearth, Patio & Barbeque Ass'n v. EPA*, 11 F.4th 791, 802 (D.C. Cir. 2021).[4] This Circuit has previously found that organizations like Petitioners have associational standing to challenge a leasing program because leasing would harm their members' interests. *E.g.*, *Center for Sustainable Economy v. Jewell* ("*CSE*"), 779 F.3d 588, 596 (D.C.

[4] Environmental Petitioners are nonprofit organizations whose purposes include protection of the environment and public health interests. *E.g.*, ADD133-34; *see Friends of the Earth*, 528 U.S. at 180-81. Vacating the Program does not require direct participation of Petitioners' members. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Cir. 2015) (holding "program … that failed rationally to account for leasing's impact on the environment would harm [petitioners' members'] concrete economic and aesthetic interests" in using "marine and coastal ecosystems for commercial and recreational purposes"); *CBD*, 563 F.3d at 479. Here too, Petitioners' members' have concrete recreational, informational, commercial, scientific, and aesthetic interests in protecting Gulf communities and wildlife, which will be harmed by the Program. ADD42-213.

Environmental Petitioners' members live and recreate in and near areas that will be impacted by the Program. *E.g.*, ADD69-71. Some use those areas for enjoyment and observation of wildlife and have strong interests in the health of wildlife populations and the ecosystems which support them. *E.g.*, ADD186-89, ADD164-70 (describing harms to recreational fishing interests); ADD90-95 (describing commercial interests), ADD203-06 (describing scientific interests). Other members live near polluting onshore facilities that store, process, and transport offshore oil and gas, which harms their health and enjoyment of coastal areas. *E.g.,* ADD83-85. Their enjoyment of these activities depends on the health of Gulf ecosystems, which are threatened by the Program. *E.g.*, ADD107-21; *see Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Interior's failure to follow OSCLA's required procedures also deprives members

of the procedural rights and information guaranteed by the statute. *CBD*, 563 F.3d at 479 (recognizing "procedural injury" as basis for standing).

The harm to Environmental Petitioners' and their members' interests is redressable by vacatur of the Program. Absent the Program, the areas that members are concerned about would not be subject to additional oil leasing and development and consequent environmental and public health impacts. Likewise, the relief Petitioners seek will redress their injuries because an order requiring Interior to properly consider the Program's impacts on vulnerable communities, Rice's whales, and other uses of the Gulf may change the outcome of the decision toward reducing Petitioners' injuries.

STANDARD OF REVIEW

This Court uses a "hybrid" standard of review in challenges to Programs. *CBD*, 563 F.3d at 484. Factual findings are reviewed for substantial evidence. *Id*. Review of Interior's policy decisions "charts the typical contours of administrative review." *CSE*, 779 F.3d at 600. A decision is arbitrary and capricious if an agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted); *see also Watt I*, 668 F.2d at 1302. This standard requires "searching scrutiny" of Interior's decisions "to ensure that they

are neither arbitrary nor irrational," *Watt I*, 668 F.2d at 1301–02, and this Court has vacated or remanded programs that fell short, *e.g.*, *id.* at 1307-08; *CBD*, 563 F.3d at 488.

ARGUMENT

I. Interior failed to incorporate environmental justice impacts into its analysis.

The Program's three Gulfwide lease sales will have adverse impacts on minority and low-income communities that will extend over the next 50 years. Yet Interior marginalized impacts to vulnerable communities in its decisionmaking when comparing environmental risks among regions under Section 18(a)(2)(B) and in its balancing under Section 18(a)(3). The resulting, legally flawed Program perpetuates inequities in the Gulf and extends leasing where historically marginalized communities have long suffered impacts from oil and gas development.

Risks to vulnerable communities are part of the environmental risks that Interior must comparatively examine under Section 18(a)(2)(B) and part of the environmental damage and adverse impacts to the coastal zone that Interior must balance under Section 18(a)(3). The scope of environmental impacts Interior must evaluate under those provisions is guided by Section 18(a)(1)'s command that Interior fully consider "the potential impact of oil and gas exploration … on the *human environment*," 43 U.S.C. § 1344(a)(1) (emphasis added), which is "the

physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the [OCS]," *id.* § 1331(i).[5]

Interior's analysis under OCSLA is also guided by Executive Order 12,898, which requires federal agencies to "make achieving environmental justice part of [their] mission" by addressing "disproportionately high and adverse human health or environmental effects" of their actions on environmental justice communities. 59 Fed. Reg. at 7629. The Order requires federal agencies to analyze environmental justice. *Id*. at 7631. This includes both the disproportionate health and environmental effects of federal activities and the historical inequities arising from federal actions that impair the ability of communities to achieve a healthy environment. 88 Fed. Reg. at 25253.

A. Interior failed to account for how environmental justice risks are equitably shared under Section 18(a)(2)(B).

Section 18(a)(2)(B) requires Interior to evaluate whether there is "an equitable sharing of … environmental risks among the various regions." 43 U.S.C. § 1344(a)(2)(B). This factor requires "the Secretary to engage in a comparative analysis." *Watt I*, 668 F.2d at 1306. Such a comparison requires, at a minimum, an

[5] Consideration for and protection of the human environment permeates the rest of OCSLA. *See, e.g.*, 43 U.S.C. §§ 1346, 1802(2)-(4).

understanding of how susceptible communities in different areas are to harm and how—given those distinct susceptibilities—new leasing will compound baseline risks. *See id*. at 1308. And it requires Interior to base its decision on that comparison, by evaluating whether the relative risks to vulnerable communities warrant offering fewer sales or reducing the size of areas offered. *See CBD*, 563 F.3d at 488. Here, Interior did not comparatively evaluate the vulnerability level of communities in different areas, despite acknowledging that environmental justice is a relevant component of Section 18(a)(2)(B). AR13111. Instead, Interior unlawfully punted that analysis to later stages.

As explained above, continued oil development in the Gulf presents risks to vulnerable communities. Minority and low-income communities along the Gulf Coast are already forced to live near refineries, gas processing plants, and petrochemical plants, which emit chemicals and other pollutants, AR57616, that have led to elevated cancer rates and other health conditions, *see supra* Section I.B. These activities have also eroded the coast and forced Indigenous and tribal communities to migrate. *Id*.

Interior first failed to assess these risks under Section 18(a)(2)(B) because it never gauged the susceptibility of communities in different areas to additional harm. An assessment of risk first requires understanding an area's susceptibility to hazards. *Watt I*, 668 F.2d at 1308 ("A risk is commonly understood to mean the

'exposure to the chance of injury or loss.' Injury or loss … depends upon both the likelihood of [harm] and the amount of damage the [harm] would inflict [which] … is in turn dependent on an assessment of … sensitivity."). That makes sense. Pollution from oil and gas activity in an area where communities are more susceptible to hazard will cause greater damage or accelerate the health and social burdens to the communities in that region than equivalent impacts in areas where communities have less susceptibility, i.e., the risk of harm is lower. *See id*. For example, the impacts to environmental justice communities along the Texas coast will likely vary from those experienced in the Central Gulf or those near Alaska or California.

Interior needed to appraise the community vulnerabilities in different areas to rationally evaluate how communities in each area will respond to environmental harm from new leasing. It did not do so in its analysis of equitable sharing or any other Section 18(a)(2) factor. *See* AR13221-33. Without even a basic understanding of the level of vulnerability communities in different areas face, Interior did not and could not undertake the required evaluation of environmental justice risks.

Further, Interior failed to compare the impacts in different areas, in light of the varying level of susceptibility for communities in each area. This Court has concluded that Interior has broad discretion to make such comparisons so long as it

is rational. *See CBD*, 563 F.3d at 488-89 (endorsing comparisons in context of environmental sensitivities using a ranking system). Here, Interior could have used any number of methods, including, as in *CBD*, ranking different areas based on risks. But Interior chose not to use any methodology at all to make comparisons. Interior proposed leasing in two areas—the western Gulf and the central Gulf. At the very least, Interior needed to compare risks between those two areas. It did not. Interior's only attempt to draw comparisons is its unremarkable conclusion that the Gulf currently bears "most of the risks to the human [] environment." AR13257. That basic statement falls far short of what is needed.

Finally, Interior failed to explain how its decision to lease in the Gulf is based on an equitable sharing of risks to vulnerable communities. In developing a program, Interior must both "consider all factors listed in section 18(a)(2)" *and* "base the leasing program upon the result of [a] consideration of these factors." *Watt I*, 668 F.2d at 1305-07. Because of its faulty evaluation of risks, Interior did not even consider whether risks to vulnerable communities warrant fewer sales, the exclusion of any proposed areas—like exclusion of the western Gulf—or a more targeted leasing approach that would reduce the size of the areas offered. *See CBD*, 563 F.3d at 489 (explaining the requirement in the context of the comparative sensitivity analysis). Thus, Interior failed at the most basic level to base the timing and location of new leasing on equitable sharing because it failed to explain

whether risks to Gulf communities necessitate a reduction in the number or size of lease sales offered.

Rather than evaluate the comparative environmental justice risks at the Program stage as required by OCSLA, Interior suggested in its EIS that it would delay its evaluation until a later stage. *See* AR13470. OCSLA prohibits such a deferral. Analysis under Section 18(a)(2)(B) "is one that the Secretary logically must undertake when [s]he is considering the various regions at the one and the same time; namely, at the program stage." *Watt I*, 668 F.2d at 1306. Section 18(a)(2) "requires the Secretary at the program stage to consider, each factor listed therein on the basis of the best information available, and to base the leasing program upon the information thereby obtained." *Id*. at 1307; *see also id*. at 1313.

Interior had information to evaluate environmental justice issues but neglected to use it. For example, Interior stated in the EIS that it would use available tools for "later stages" of the OCSLA process. AR13471 (describing an environmental justice index that can identify and map areas most at risk and the Environmental Protection Agency's EJScreen, which can evaluate other indicators). It offered no reason to forego use of those tools at the program stage.

Deferring any environmental justice impact analysis until *after* Interior has already decided where, when, and how much to lease puts the cart before the horse. At later stages, when Interior is considering a particular lease sale or exploration

plan, it is impossible for Interior to evaluate whether risks to communities across areas are equitably shared in the context of those more narrowly focused decisions like "the placement of a particular exploratory well." *Watt I*, 668 F.2d at 1306. Because Interior did not attempt to evaluate the relative impacts to communities in each region or compare those risks among regions, Interior failed to comply with Section 18(a)(2)(B).

B. Interior omitted environmental justice impacts from its balancing assessment in violation of Section 18(a)(3).

Section 18(a)(3) requires Interior, when selecting the "timing and location for leasing," "to obtain 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." 43 U.S.C. § 1344(a)(3). Both environmental damage and adverse impacts to the coastal zone include harm to the human environment. *See supra* pp. 21-22. Nevertheless, Interior did not include environmental justice impacts in its balancing under Section 18(a)(3).

While Interior has discretion as to the weight it gives each element in the Section 18(a)(3) balance, it cannot ignore an element altogether. *Watt I*, 668 F.2d at 1317 ("The obligation [at the Program stage] is to look at all factors and then balance the results."). And the three elements that Interior must balance in Section 18(a)(3) "are, in large part, a condensation of the factors specified in section 18(a)(2)." *Id*. at 1315. Thus, Interior's failure to properly account for

environmental justice risks under Section 18(a)(2), as discussed above, taints its balancing analysis: "A flawed consideration of Section 18(a)(2) factors hinders Interior's ability to obtain a proper balance of the factors." *CBD*, 563 F.3d at 488; *see also Watt I*, 668 F.2d at 1318.

Moreover, Interior failed to incorporate environmental justice into its cost-benefit analysis, which Interior conducts as part of its Section 18(a)(3) evaluation. AR13114, AR13165-66; *see also* AR14025-177 (explaining net benefit analysis). While Interior has discretion to choose a reasonable cost-benefit model, OCSLA requires Interior to account for all environmental and social costs—even those that are not quantifiable. *Watt I*, 668 F.2d at 1317-19 (explaining Interior must still *weigh* those benefits that can be quantified in monetary terms *against* "environmental and social costs, which do not always lend themselves to direct measurement"); *see also Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 306 (D.C. Cir. 1988); *CBD*, 563 F.3d at 484-85.

Interior incorporated some environmental and social costs into its calculation of net benefits, but not impacts to vulnerable coastal communities. While Interior purported to qualitatively discuss these impacts, AR14080 (claiming Interior "lacks the capability to quantitatively assign benefits and costs among different demographic groups"), it did not weigh damage to vulnerable communities from oil leasing against the benefits of leasing.

Rather than do any sort of balancing, Interior merely offered a handful of conclusory statements. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) (finding conclusory statements with no "reasoned explanation" for a decision are insufficient). Interior noted "that there is a potential for impacts in at least one but not all planning areas" and "not all individuals and communities will be equally impacted by the costs and benefits associated with" the Program. AR14080, AR14111. But Interior did not compare the environmental justice costs and the estimated monetary benefits. In other words, Interior left the nonquantifiable environmental justice costs out of its cost-benefit analysis entirely, something OCSLA does not allow. *See Watt I*, 668 F.2d at 1318-19; *cf. Nat'l Cmty. Reinvestment Coal. v. Consumer Fin. Prot. Bureau*, Civ. A. No. 20-2074 (BAH), 2022 WL 4447293, at *30-31 (D.D.C. Sept. 23, 2022) (finding agency's "recognition of the disparate impact on protected groups, without any meaningful discussion of the issue" in cost-benefit analysis arbitrary and capricious).

Interior's failure to weigh environmental justice in its cost-benefit analysis contrasts with the agency's analysis of other non-monetizable costs. For example, Interior determined it was unable to quantify the costs of catastrophic oil spills but still incorporated this cost qualitatively, using statistical papers on the likelihood of spills. AR14119, AR14122. Interior explicitly weighed the qualitative cost of a

catastrophic oil spill against the monetized benefits of the Program, stating, "Although these costs are not inconsequential, they represent a fraction of the incremental net benefits associated with the mid-case scenarios for each program area." AR14124. In contrast, Interior did not assess the Program's environmental justice costs at all, declining to use available tools and stating it would assess these costs at a later stage. AR13471, AR137139.

Insofar as the Program purports to incorporate the EIS's qualitative discussion of environmental justice impacts by reference, that is insufficient. *See* AR14080, AR14107, AR14111. The EIS focused on whether impacts to vulnerable coastal communities are "significant" on their own, as defined by the National Environmental Policy Act. *See e.g.*, AR13407. It did not perform the balancing required by Section 18(a)(3) nor compare the Program's environmental justice costs against its benefits. Even if the EIS did contain the requisite evaluation, a single sentence stating that Interior considered the issue in the EIS "does not do all the work" of incorporating the impacts into the Program's balancing analysis. *Oceana, Inc. v. Ross*, Civ. A. No. 15-0555 (PLF), 2020 WL 5995125, at *16 (D.D.C. Oct. 9, 2020).

If Interior had instead properly weighed the damage to environmental justice communities against the benefits, it may have chosen to include fewer or smaller sales. Proper weighing should have—or at least could have—led the agency to

exclude certain areas, if not reduce the number of sales in the Program. For example, Interior estimated that the monetary benefits of leasing in the western Gulf were far less than in the central Gulf area. AR628. Incorporating environmental justice burdens may have tipped the scale against including the western Gulf in the Program. Interior's arbitrary failure to weigh the costs of the Program's environmental justice impacts against the Program's benefits violates OCSLA. *Watt I*, 668 F.2d at 1317-18.

II. Interior's unexplained exclusion of impacts to Rice's whales violates OCSLA.

Interior's Program proposes new leasing in the Gulf, home to Rice's whale, one of the world's most endangered marine mammals. Yet, without explanation, Interior did not include Rice's whales in its Section 18(a)(2)(G) evaluation of the Gulf's environmental sensitivity. Rather, Interior relied on an outdated application of its methodology for selecting representative marine mammal species, despite record evidence to support the inclusion of Rice's whales. In doing so, Interior ignored existing scientific information that Interior separately acknowledged in another decision the previous year, in violation of Sections 18(a)(2)(A) and (H). Moreover, Interior failed to weigh the costs of potentially causing the species to go extinct as part of its cost-benefit analysis under Section 18(a)(3). If Interior had considered the vulnerability of Rice's whales in its environmental sensitivity analysis or as part of its balancing, it may have changed the number, size, or

location of Gulf lease sales to avoid Rice's whale habitat and minimize harms to the species. *See* AR127123.

A. Interior arbitrarily omitted the endangered Rice's whale when evaluating the Gulf's environmental sensitivity in violation of Sections 18(a)(2)(A), (G), and (H).

Section 18(a)(2)(G) requires Interior to evaluate the "relative environmental sensitivity" of different areas. 43 U.S.C. § 1344(a)(2)(G). To do so here, Interior used the same methodology that it has employed for a decade. AR13221, AR13118-19, AR103837. However, Interior ignored impacts to Rice's whale, without explanation, despite record evidence that the whale satisfied the agency's methodology for species selection.

Under its sensitivity methodology, rather than consider the impact of oil and gas development on every species, Interior selects "examples of living marine resources" that "provide representation of the environmental resources that may be vulnerable to" oil and gas development. AR103846. For marine mammals and sea turtles, it selects exemplar species for "conservation importance" using listing status under the Endangered Species Act, with priority given to endangered species. AR103847. For regions with multiple endangered species, Interior prioritizes those with critical habitat and then those with the lowest Potential Biological Removal—the number of individuals that could be removed without destabilizing the population. AR103852.

In 2014, when it first developed this method, Interior selected the sperm whale as the representative marine mammal for "conservation importance" to model oil and gas development's damage to marine mammals in the Gulf. AR103989, AR103997. At the time, Rice's whale was not a candidate because it was not listed as endangered until 2019.[6] In applying the methodology for this Program, Interior stated it examined all previous species selected in 2014 to ensure the selections "were still valid based on the criteria prescribed in the methodology" and "determined that some changes in selected species were warranted." AR13227. But Interior failed to add Rice's whale despite the species fitting Interior's own selection criteria. Unlike the sperm whale, Rice's whale has proposed critical habitat. *See* AR13515, AR103852; 88 Fed. Reg. 47,453 (July 24, 2023).[7] Likewise, the Potential Biological Removal for Rice's whales is more than ten times lower than that for sperm whales (meaning that far fewer Rice's whales can be removed

[6] 84 Fed. Reg. 15446, 15487-88 (Apr. 15, 2019) (originally listed sub. nom. "Whale, Bryde's (Gulf of Mexico subspecies)")
[7] Indeed, the Service has explicitly declined to designate critical habitat for the sperm whale in the Gulf. 78 Fed. Reg. 68032 (Nov. 13, 2013).

without harming their population).[8] This is unsurprising—with a remaining population of about 50 individuals, Rice's whales is one of the most endangered marine mammals in existence. AR460934.[9]

If Interior considered and rejected Rice's whale as a Gulf species of conservation importance, it failed to explain or justify that decision in the Program. Only in response to comments on the EIS did Interior even acknowledge commenters' request to include Rice's whale in the sensitivity analysis. AR13811, 13853. Rather than explain its omission, Interior simply stated that the "Rice's whale was not selected" and noted incongruously that the eastern Gulf (only one of the areas the whale inhabits) already has high environmental sensitivity. AR13853. Given the evidence that Rice's whale satisfies Interior's established selection methodology, Interior's failure to explain its omission from the sensitivity analysis is arbitrary. A court "cannot excuse" Interior's application of "a methodology that

[8] The Service calculates Potential Biological Removal levels. 16 U.S.C. §§ 1386(a)(6), (b)(3). At the time Interior finalized the Program, the Potential Biological Removal for Rice's whales was 0.07, while that for sperm whales in the Gulf was 2. *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2022: Rice's Whale*, NOAA, 118 (May 2023), https://www.fisheries.noaa.gov/s3/2023-08/Rices-Whale-Northern-Gulf-of-Mexico-2022.pdf; *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment Reports: Sperm Whale Northern Gulf of Mexico Stock*, NOAA, 151 (April 2021), https://media.fisheries.noaa.gov/2021-07/f2020_AtlGmexSARs_GMexSpermWhale2.pdf.

[9] *See also Rice's Whale*, NOAA (Mar. 4, 2024), fisheries.noaa.gov/species/rices-whale.

generates apparently arbitrary results particularly where, as here, the agency has failed to justify its choice." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1035 (D.C. Cir. 2001); *see also CBD*, 563 F.3d at 488-89 (remanding a program to Interior because, without explanation, it did not consider the environmental sensitivity of areas beyond the immediate coastline of Alaska).

Moreover, Interior stated in the Program that it would base its decision about whether to change its selected marine mammal species on "public comments" and "best available science," AR13227, but arbitrarily ignored information, offered by an expert federal agency as well as public commenters, in violation of Sections 18(a)(2)(A) and (H). 43 U.S.C. § 1344(a)(2)(A), (H); *see also Watt I*, 668 F.2d at 1313 (stating Interior should balance factors "based upon the best 'existing information' available").

Record evidence demonstrates Rice's whale is at high risk of extinction due to oil and gas activities. *See* AR460934-37. The record also demonstrates that the whale occupies habitat across the entire northern Gulf rather than just the eastern Gulf. *Id*. One study, which was part of a comprehensive, five-year Service assessment of Rice's whale habitat and distribution, repeatedly detected Rice's whale vocalizations at three sites in the northwestern Gulf in every month of the year, providing "evidence for the persistent occurrence of some Rice's whales over a broader distribution in the [Gulf] than previously understood." AR127123. In

September 2022, Service biologists recognized this study was part of a "growing body of evidence supporting the importance of the extended habitat" in the western and central Gulf, AR126996, and the Service later proposed critical habitat for Rice's whale in waters 100-400 meters deep throughout the northern Gulf, *id.*; *see also* 88 Fed. Reg. 47453 (July 24, 2023).

Commenters, including Petitioners, urged Interior to add Rice's whale as a selected species throughout its habitat and reminded Interior that the Service had emphasized in comments on proposed Gulf wind leasing (in bold type) that "**no offshore wind leasing and/or development occur 'within the boundaries of the currently known distribution of Rice's whales in the western and central** [Gulf].'" AR461370, AR460934-37. In comments, the federal Marine Mammal Commission—an independent expert agency charged with making recommendations for marine mammal conservation, 16 U.S.C. § 1402(a)(4)—also cited new evidence, noting the species' "precarious conservation status" and its "confirmed presence in the western Gulf," and recommended that Interior therefore "exclude areas with 100 to 400 m depths from proposed lease sales in the [Gulf]." AR320785. Yet Interior ignored these comments and new information in omitting Rice's whale from its selected species.

Interior's omission is even more irrational considering that the agency itself conceded the risks of ocean energy development throughout Rice's whale's

extended distribution. In July 2022, consistent with the Service's recommendation, Interior decided to exclude Rice's whale habitat in the western and central Gulf from offshore wind leasing. AR319767 (examining entire western and central Gulf planning areas), AR319775 (assigning Rice's whale habitat a suitability score of zero), AR319796. In doing so, Interior determined that Rice's whale habitat in the western and central Gulf is "completely unsuitable" for development activity. AR319774-75.

Interior even acknowledged this habitat information in its Final EIS. AR13515. Recognizing that "the best abundance estimate available for northern [Gulf] Rice's whales is 33 individuals" and "any mortality events could affect the population's survival," Interior cited evidence that Rice's whales are present throughout the northern Gulf in waters between 100-400 meters deep and that the Service had issued a proposed critical habitat designation. *Id*. Yet, in response to comments urging Interior to consider Rice's whale as a species of conservation importance throughout its habitat, Interior only mentioned sensitivities of the *eastern* Gulf. AR13853. And Interior did not reference Rice's whale once in the Program, much less consider its critical status or presence in the western and central Gulf under any of the Section 18(a)(2) factors.

B. Interior failed to properly balance the potential environmental damage to Rice's whales under Section 18(a)(3).

Section 18(a)(3) requires Interior to obtain a proper balance between environmental damage, benefits from oil development, and adverse coastal impacts. 43 U.S.C. § 1344(a)(3). Interior's arbitrary failure to fully consider environmental sensitivity, a Section 18(a)(2) factor, precluded proper balancing. *Supra* pp. 27-28. Moreover, Interior failed to weigh the costs of damaging or potentially causing the extinction of Rice's whale as part of its net benefits analysis under Section 18(a)(3).

Record evidence demonstrates that additional leasing and attendant oil and gas activities could cause Rice's whale to go extinct. AR126996. The western Gulf, in particular, "has high levels of shipping traffic, … oil and gas exploration (including seismic airgun surveys), and oil and gas production activity." AR127123. Vessel strikes and industrial noise from fossil fuel development pose serious risks to Rice's whales. AR126996. These risks are especially consequential because the loss of just one whale could "drive the species to extinction." *Id.*

Yet Interior arbitrarily failed to discuss those costs, either qualitatively or quantitatively, in the Program. As a result, Interior did not compare the potential benefits of leasing against the potential costs—in this instance, causing the Gulf's only resident baleen whale to go extinct—in violation of Section 18(a)(3). *See CBD*, 563 F.3d at 484-85.

III. Interior failed to analyze whether and how new leasing may create conflicts with other ocean uses in violation of Section 18(a)(2)(D).

Section 18(a)(2)(D) requires Interior to evaluate how new leasing may conflict with "other uses of the sea and seabed." 43 U.S.C. § 1344(a)(2)(D); *see Watt I*, 668 F.2d at 1309-10. Interior identified other uses of the OCS in its Program but did not assess whether new oil and gas leasing may impede or otherwise affect those uses. Interior's failure to consider conflicts under Section 18(a)(2) also prevented a proper balancing analysis under Section 18(a)(3).

One of the main purposes of the 1978 OCSLA amendments was to "minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources." 43 U.S.C. § 1802(7); *see also* H.R. Rep. 95-590, at 122. Section 18(a)(2)(D) reflects that intent. Simply identifying other uses without evaluating their compatibility with new oil and gas leasing does nothing to minimize or eliminate potential conflicts. Yet that is exactly what Interior did.

Interior identified offshore wind development, fishing, and aquaculture as other uses in the Gulf. Rather than assess potential conflicts with these uses in the Program, however, Interior either ignored conflicts or indicated it would delay their consideration to some other process. *See* AR13212 (stating Interior "*will* work" with the Service to minimize conflicts with aquaculture (emphasis added)). But Interior cannot lawfully defer that required Section 18(a)(2) evaluation to a

later stage. *Watt I*, 668 F.2d at 1305. Having failed to consider conflicting uses, Interior risks exacerbating existing conflicts or creating new ones.

Nowhere did Interior evaluate how new oil and gas leasing might create conflicts with future wind leasing or development. *See* AR13217-18 (merely identifying offshore wind's existence). This omission is especially egregious because in its separate decision on where to offer wind leasing in the Gulf, Interior *did* assess that "active oil and gas infrastructure" posed a conflict preventing wind development. AR354707, AR354714, AR354717, AR354719. Yet, in the Program, Interior entirely ignored that conflict. Moreover, Interior stated that a benefit of the three-sale Program was to facilitate new wind leasing. AR13091. But it never considered if issuing new oil and gas leases in the Gulf would *constrain* the amount of wind leasing that could occur.

The Program similarly did not evaluate how oil and gas leasing could conflict with fishing or aquaculture. *See* AR13210-14; *see also supra* Section I.D. Commercial, recreational, and subsistence fishing are highly important to the Gulf's economies and communities. AR13214, AR13522-23. Yet Interior never mentioned in the Program that new oil and gas development can close off fishing grounds and contaminate fish through oil spills and other discharges. *See supra* Section I.D. And, similar to offshore wind, Interior's disregard for conflicts between aquaculture and oil and gas leasing contrasts with the Service's

accounting for those conflicts when selecting suitable aquaculture sites in the Gulf. *See* AR13212. Without having considered potential conflicts with fishing or aquaculture, Interior could not evaluate whether or how to minimize conflicts through the location and size of new leasing.

Interior violated Section 18(a)(2)(D) by failing to fully consider use conflicts with offshore wind, fishing, and aquaculture. That failure in turn means Interior did not base its Program on use conflicts in violation of Section 18(a)(2). *See CBD*, 563 F.3d at 489; *supra* pp. 25-26. Had Interior properly evaluated potential use conflicts, it could have considered Subarea Options—which it uses "to avoid or minimize impacts on areas of important environmental, subsistence, or multiple use value"—to omit acreage from leasing and minimize conflicts. AR13121-22. Instead, Interior chose to lease the entire western and central Gulf regions without regard for other uses. Finally, Interior's "flawed consideration" of use conflicts also "hinder[ed] Interior's ability to obtain a proper balance" and "comply with Section 18(a)(3)'s balancing requirements." *CBD*, 563 F.3d at 488; *supra* pp. 27-28.

CONCLUSION

For the foregoing reasons, Interior's decision to approve the Program violates OCSLA. OCSLA provides this Court authority to "vacate" the Program. 43 U.S.C. § 1349(c)(6). And this Circuit has already found vacatur to be an

appropriate remedy where Interior failed to adequately consider a Section 18 factor. *See CBD*, 563 F.3d at 489. Here too each of Interior's errors warrants vacatur. *Cf. Colorado v. Surface Transportation Bd.*, 82 F.4th 1152, 1196 (D.C. Cir. 2023) (vacating agency decision where agency failed to conduct reasoned review of policies as required by statute).

Environmental Petitioners respectfully request that the Court grant their Petition, declare the Program unlawful, vacate the Program and Record of Decision, and remand to the agency to promulgate a new program based on proper Section 18(a)(2) and (3) analyses, correcting the flaws identified above.

Respectfully submitted this 12th day of July, 2024.

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Respectfully submitted this 12th day of July, 2024.

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