



October 6, 2022

To: Bureau of Ocean Energy Management, U.S. Department of the Interior

Subject: 2023–2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program

The Institute for Policy Integrity at New York University School of Law¹ (Policy Integrity) respectfully submits this comment letter in response to the Bureau of Ocean Energy Management’s (BOEM) National Outer Continental Shelf Oil and Gas Leasing Proposed Program (the Proposed Program). Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity frequently submits comments to federal agencies on the consideration of climate and other environmental impacts in administrative decisionmaking, including the balancing of costs and benefits.

In the Proposed Program, BOEM conducts a “net benefits analysis” in which it compares the benefits of holding oil and gas lease sales in each Outer Continental Shelf (OCS) program area against the costs to society of holding those lease sales. Through that analysis, BOEM “finds that there are potential net benefits” of the 11 proposed lease sales, while finding that “a National OCS Program with no lease sales for 2023–2028 would reduce net benefits as substitute energy sources increase to meet the largely unchanged energy demand.”² Yet BOEM recognizes uncertainty in its net benefits analysis and seeks comment on its approach, with a particular request for feedback on its analysis of substitute energy sources.³

In response to this call for comments, **Policy Integrity published two original reports offering extensive feedback on BOEM’s net benefits analysis. As detailed in those reports, BOEM’s net benefits analysis severely understates the costs of OCS leasing—particularly the climate costs.** This cover letter summarizes and appends those reports. The two reports are:

- ***The Real Costs of Offshore Oil and Gas Leasing*** highlights numerous ways that BOEM’s analysis understates the costs of offshore leasing, provides original economic modeling finding that the climate costs of the proposed program alone may exceed the program’s total benefits, and offers suggestions for improvement. Of particular interest, this report responds to BOEM’s request for comments on how to “better reflect assumptions associated with a transitioning economy” into the

¹ This document does not purport to represent the views, if any, of New York University School of Law.

² BUREAU OF OCEAN ENERGY MGMT., 2023–2028 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROPOSED PROGRAM 7 (2022) [hereinafter Proposed Program].

³ *Id.* (requesting “potential data sources sufficient for BOEM’s modeling that could help enhance the model and better reflect assumptions associated with a transitioning economy”).

agency's energy substitution modeling⁴ and conducts illustrative model runs demonstrating how such changes may affect the agency's results.

- ***Interior's Authority to Consider Downstream Emissions from Offshore Leasing*** criticizes BOEM's decision to omit downstream greenhouse gas emissions from its net benefits analysis. The report explains that BOEM misreads case law, which does not prohibit the agency from considering downstream emissions and in fact indicates that it has the authority to consider those emissions. This report also analyzes the Outer Continental Shelf Lands Act's (OCSLA) text, legislative history, and regulatory history, which all support BOEM's authority to consider the downstream impacts of oil and gas consumption.

This comment letter provides more detailed summaries of both reports below. For a more detailed analysis of these issues, see the attached reports.

The Real Costs of Offshore Oil and Gas Leasing

This report details crucial limitations in BOEM's net benefits analysis, offers suggestions for the agency to improve its analysis, and provides original modeling in several areas to identify how those improvements may affect the agency's results. **Our analysis calls into question BOEM's conclusion that OCS leasing is cost-justified, and offers extensive evidence suggesting that, if BOEM followed economic best practices, it may conclude that the costs of the proposed leasing exceed the benefits.**

Part I of this report critiques BOEM's substitution analysis, explaining that the agency's current analysis understates the potential climate impacts of OCS leasing by disregarding the likelihood that the United States and foreign nations will take additional actions to mitigate climate change.⁵ According to BOEM's net benefits analysis, the vast majority of the climate pollution that results from OCS leasing would still occur under a no-leasing scenario because substitute sources of oil and gas will take the place of the forgone OCS production. Yet, as BOEM acknowledges, this finding is predicated on the assumption that the United States and other nations will remain heavily reliant on fossil fuels in the coming decades and will fail to meet their international climate commitments, resulting in an abundance of substitute fossil-fuel sources.

BOEM can quantitatively model energy substitution under a range of future pathways, and, by doing so, it would likely find that OCS leasing has far greater climate consequences than the agency currently acknowledges. This Part offers suggestions in response to BOEM's request for comments on improving the agency's substitution modeling to incorporate decarbonization pathways. It then presents the results of our original modeling, which finds that **total net greenhouse gas emissions from the proposed program (i.e., total emissions from the**

⁴ *Id.*

⁵ PETER HOWARD, MAX SARINSKY & MINHONG XU, THE REAL COSTS OF OFFSHORE OIL AND GAS LEASING 1–23 (2022).

program minus total emissions from substitute energy sources) could roughly triple or quadruple under plausible assumptions about more aggressive decarbonization pathways.⁶

Part II details three other ways, apart from substitution modeling, through which BOEM understates the climate costs of OCS leasing, and offers suggestions to correct these limitations.⁷ First, while BOEM acknowledges in its environmental analysis that the proposed program would result in billions of dollars in climate damages, its net benefits analysis actually counts climate change as a benefit of the proposed program because it omits emissions from downstream consumption and midstream transmission and focuses only on upstream emissions. As detailed in the companion report titled *Interior's Authority to Consider Downstream Emissions from Offshore Leasing*, OCSLA permits BOEM to consider downstream emissions and case law does not compel otherwise. Accordingly, **BOEM should consider the full climate impacts of the proposed program, and not focus its net benefits analysis on a small subset of emissions that falsely implies that OCS leasing mitigates climate change.**

Besides its omission of downstream emissions, BOEM undercounts and undervalues greenhouse gas emissions in at least two other key ways. For one, this Part suggests that BOEM consider the potential for foreign reciprocity—that other nations will reduce their fossil-fuel development if the United States does—and explains that by ignoring this impact, BOEM disregards an important climate benefit of the no-leasing alternative. For another, this Part suggests that BOEM apply higher valuations of the social cost of greenhouse gases, as the Interagency Working Group on the Social Cost of Greenhouse Gases has recommended. Using those valuations, this Part presents our original analysis finding that **the climate costs of the proposed program alone may exceed the program's total benefits.⁸**

Part III explains that BOEM's analysis overlooks a critical cost of OCS leasing by omitting the cost of catastrophic oil spills and offers suggestions to improve BOEM's analysis in this area.⁹ This Part first suggests that BOEM include catastrophic oil spills in its net benefits analysis rather than entirely omit them from the analysis, as BOEM has sufficient data to include this potentially severe effect. It discusses how the possibility of a catastrophic oil spill is not especially unlikely, nor is it necessarily more uncertain than the economic impacts that BOEM does monetize in its net benefits analysis. This Part then explains that BOEM disregards important countervailing considerations, documented in peer-reviewed research and government reports, when it states that the likelihood and severity of oil spills have been declining. The Part concludes by offering recommendations for BOEM to improve its existing quantification of oil spills, finding that the monetized estimates that the agency presents are likely under-valuations for numerous reasons.

Part IV explains that BOEM's analysis of uncertainty—both through its consideration of option value and its hurdle price analysis—overlooks important environmental risks while applying flawed methodologies that bias the analysis in favor of

⁶ *Id.* at 15–21.

⁷ *Id.* at 23–32.

⁸ *Id.* at 32.

⁹ *Id.* at 33–42.

leasing.¹⁰ In particular, this Part provides existing techniques that BOEM could use to quantify environmental and social cost uncertainties and incorporate into its option value analysis. This Part also critiques BOEM’s hurdle price analysis for ignoring economic best practices in a manner that renders the analysis deficient and inappropriately biases it in favor of development. It also explains how the large number of currently undeveloped leases, which BOEM does not consider in its option value analysis, counsels in favor of delay by limiting the potential costs of not leasing at this time.

Part V criticizes BOEM’s treatment of energy security as a benefit of OCS leasing and explains that OCS leasing may in fact come at a cost to energy security.¹¹ As this section explains, the very literature that BOEM cites does not support its conclusions and in fact suggests that expanded OCS leasing, by making the United States more dependent on fossil fuels, could make the nation less energy secure by increasing its sensitivity to oil price shocks.

All told, this report demonstrates that **BOEM’s net benefits analysis omits most of the environmental and social costs of OCS development**, including the climate damages that would result under decarbonization pathways, downstream and midstream greenhouse gas emissions, the costs of catastrophic oil spills, and additional environmental and social cost uncertainties. **It concludes that there is extensive evidence that, properly considered, the costs of OCS leasing may exceed the benefits.**

Interior’s Authority to Consider Downstream Emissions from Offshore Leasing

In its net benefits analysis, BOEM omits the substantial impacts related to the consumption of oil and gas because it believes that it lacks discretion to do so under a 2009 decision from the U.S. Court of Appeals for the D.C. Circuit, *Center for Biological Diversity v. U.S. Department of Interior* (“*CBD*”).¹² BOEM’s position is mistaken for several reasons.

To begin with, **BOEM misreads *CBD*, which held only that OCSLA does not require the agency to consider downstream effects.**¹³ And BOEM overlooks other caselaw holding that it *may* consider the downstream combustion effects of OCS leasing.¹⁴ That caselaw aligns with OCSLA’s text, legislative history, and regulatory practice going back decades, all of which support BOEM’s authority to consider downstream impacts of oil and gas consumption.

Part I of this report explains that no judicial decision bars BOEM from considering the downstream environmental effects of OCS leasing. *CBD*’s holding is narrow, and although the

¹⁰ *Id.* at 42–50.

¹¹ *Id.* at 51–52.

¹² Proposed Program, *supra* note 2, at 5–35 (2022) (citing *Ctr. for Biological Diversity v. U.S. Dep’t of Interior* (“*CBD*”), 563 F.3d 466 (D.C. Cir. 2009)).

¹³ *CBD*, 563 F.3d at 484 (“[W]e hold that OCSLA does not *require* Interior to consider the global environmental impact of oil and gas consumption before approving a Leasing Program.”) (emphasis added).

¹⁴ *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (explaining that Interior “has the statutory authority to act on the emissions resulting from [downstream] oil consumption” and that, “[i]f it later concludes that such emissions will be significant, it may well approve another alternative . . . or deny the lease altogether”).

case’s dicta admittedly goes further, it is based on a flawed analysis that disregards key OCSLA text and history. Moreover, the D.C. Circuit later held that OCSLA does not bar BOEM from considering environmental effects outside the OCS.¹⁵ And **the Ninth Circuit recognized that BOEM may consider downstream environmental impacts in administering the offshore leasing program.**¹⁶

Part II of this report explains that these more recent judicial decisions align with OCSLA’s text. OCSLA gives BOEM broad discretion to craft an offshore-leasing program that it determines best meets “national energy needs” and that is also “consistent with” several statutorily enumerated “principles” requiring consideration of local environmental effects, among other factors.¹⁷ But these principles are not an exhaustive list of factors that BOEM may consider when determining how best to meet “national energy needs.” **To the contrary, numerous OCSLA provisions indicate that BOEM has discretion to consider a broad range of factors, including non-local environmental effects,** when making that determination.

As detailed in Part III, **OCSLA’s legislative history further confirms that BOEM may consider downstream environmental effects.** Congress enacted OCSLA in 1953 and overhauled it in 1978 in response to the energy crisis caused by the 1973–74 oil embargo. The House and Senate Reports for the 1978 amendments demonstrate that, while Congress wanted to ensure Interior retained broad discretion when making offshore-leasing decisions, lawmakers were also concerned about environmental harm from OCS energy production and consumption. In fact, Congress believed increased OCS development would alleviate a near-term energy crisis while causing “substantially less harm to the environment,” including through its downstream effects, “than most other sources” then available.¹⁸ Over time, however, Congress expected that new and potentially cleaner energy sources would emerge. Lacking a crystal ball, Congress left it to Interior to determine how best to meet national energy needs through offshore leasing while also “considering all the economic, social, and environmental impacts of oil and gas activities.”¹⁹

BOEM (and its predecessor, the Minerals Management Service) has done exactly that over the past four decades, as summarized in Part IV. **Since at least the 1980s, Interior has considered downstream environmental effects, including greenhouse gas emissions, at both the offshore planning and leasing stages.** In doing so, it has often highlighted downstream environmental advantages of OCS natural gas relative to dirtier alternative sources such as coal, noting, for example, that natural gas is an “environmentally preferred source of energy for electricity generation.”²⁰

¹⁵ *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 606–07 (D.C. Cir. 2015).

¹⁶ *Bernhardt*, 982 F.3d at 740; *see also* *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 504 (9th Cir. 2014) (recognizing significance of “adequately consider[ing] cumulative effects of [an OCS] lease sale on the environment, including . . . the effects of the sale on climate change”).

¹⁷ 43 U.S.C. § 1344(a).

¹⁸ S. Rep. No. 95-284, at 42 (1977).

¹⁹ H. Rep. No. 95-590, at 149 (1977).

²⁰ MINERALS MGMT. SERV., PROPOSED FINAL OUTER CONTINENTAL SHELF OIL & GAS LEASING PROGRAM 2002–2007 at 71 (2002).

For all these reasons, BOEM should fully consider the downstream environmental effects of oil and gas consumption, including in its net benefits analysis. And beyond this single program, BOEM should fully consider downstream impacts in all future OCS planning and leasing decisions.

Conclusion

Offshore leasing policy should be informed by a balanced and robust assessment of programmatic costs and benefits. Yet in its net benefits analysis for the Proposed Program, BOEM severely understates the environmental and social costs of OCS leasing—particularly the costs related to climate change. The attached reports offer detailed suggestions for BOEM to improve its analysis and fully account for the costs of OCS leasing. They call into question BOEM’s conclusion that OCS leasing is cost-justified, and offer extensive evidence suggesting that, if BOEM followed economic best practices, it may conclude that the costs of the proposed leasing exceed the benefits.

Sincerely,

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Enclosures listed on the next page

Enclosures

Original Policy Integrity Reports

- Peter Howard, Max Sarinsky & Minhong Xu, *The Real Costs of Offshore Oil and Gas Leasing* (2022)
- Laura A. Figueroa, Donald L. R. Goodson & Max Sarinsky, *Interior's Authority to Consider Downstream Emissions from Offshore Leasing* (2022)

Submissions of Cited Literature Into the Record (via separate e-filing)

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- 2) Stephen P.A. Brown, *New Estimates of the Security Costs of U.S. Oil Consumption*, 113 ENERGY POL'Y 171 (2018)
- 3) Stephen P.A. Brown & Hillard G. Huntington, *Assessing the U.S. Oil Security Premium*, 38 ENERGY ECON. 118 (2013)
- 4) Jean-Marc Burniaux & Joaquim Oliveira Martins, *Carbon Leakages: A General Equilibrium View*, 49 ECON. THEORY 473 (2012)
- 5) Mark K. Desantis, *Oil and Gas Companies Gain by Stockpiling America's Federal Land*, CTR. FOR AM. PROGRESS (2018)
- 6) Alexander Q. Gilbert & Benjamin K. Sovacool, *Looking the Wrong Way: Bias, Renewable Electricity, and Energy in the United States*, 94 ENERGY 533 (2015)
- 7) Trevor Houser & Kate Larsen, *Calculating the Climate Reciprocity Ratio for the U.S.*, RHODIUM GRP. (2021)
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- 9) Peter Howard & Jason Schwartz, *Valuing the Future: Legal and Economic Considerations for Updating Discount Rates*, 39 YALE J. REG. 595 (2022)

- 10) INTERAGENCY WORKING GRP. ON THE SOCIAL COST OF GREENHOUSE GASES, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON, METHANE, AND NITROUS OXIDE – INTERIM ESTIMATES UNDER EXECUTIVE ORDER 13,990 (2021)
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- 12) Matthew J. Kotchen, *Which Social Cost of Carbon? A Theoretical Perspective*, 5 J. ASSOC. ENV'T & RES. ECON. 673 (2017)
- 13) Alan Krupnick et al., *Oil Supply Shocks, US Gross Domestic Product, and the Oil Security Premium*, RES. FOR THE FUTURE (2017)
- 14) Michael A. Livermore, *Patience Is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil*, 84 U. COLO. L. REV. 581 (2013)
- 15) OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (2003)
- 16) Brian C. Prest, *Supply-Side Reforms to Oil and Gas Production on Federal Lands: Modeling the Implications for CO₂ Emissions, Federal Revenues, and Leakage*, 9 J. ASSOC. ENV'T & RES. ECONOMISTS 681 (2022)
- 17) Kevin Rennert et al., *Comprehensive Evidence Implies a Higher Social Cost of CO₂*, NATURE (forthcoming 2022)
- 18) Kevin Rennert et al., *The Social Cost of Carbon: Advances in Long-Term Probabilistic Projections of Population, GDP, Emissions, and Discount Rates*, RES. FOR THE FUTURE (2021)
- 19) U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2022 (2022)
- 20) Biying Yu et al., *Review of Carbon Leakage Under Regionally Differentiated Climate Policies*, 782 SCI. TOTAL ENV'T 146,765 (2021)