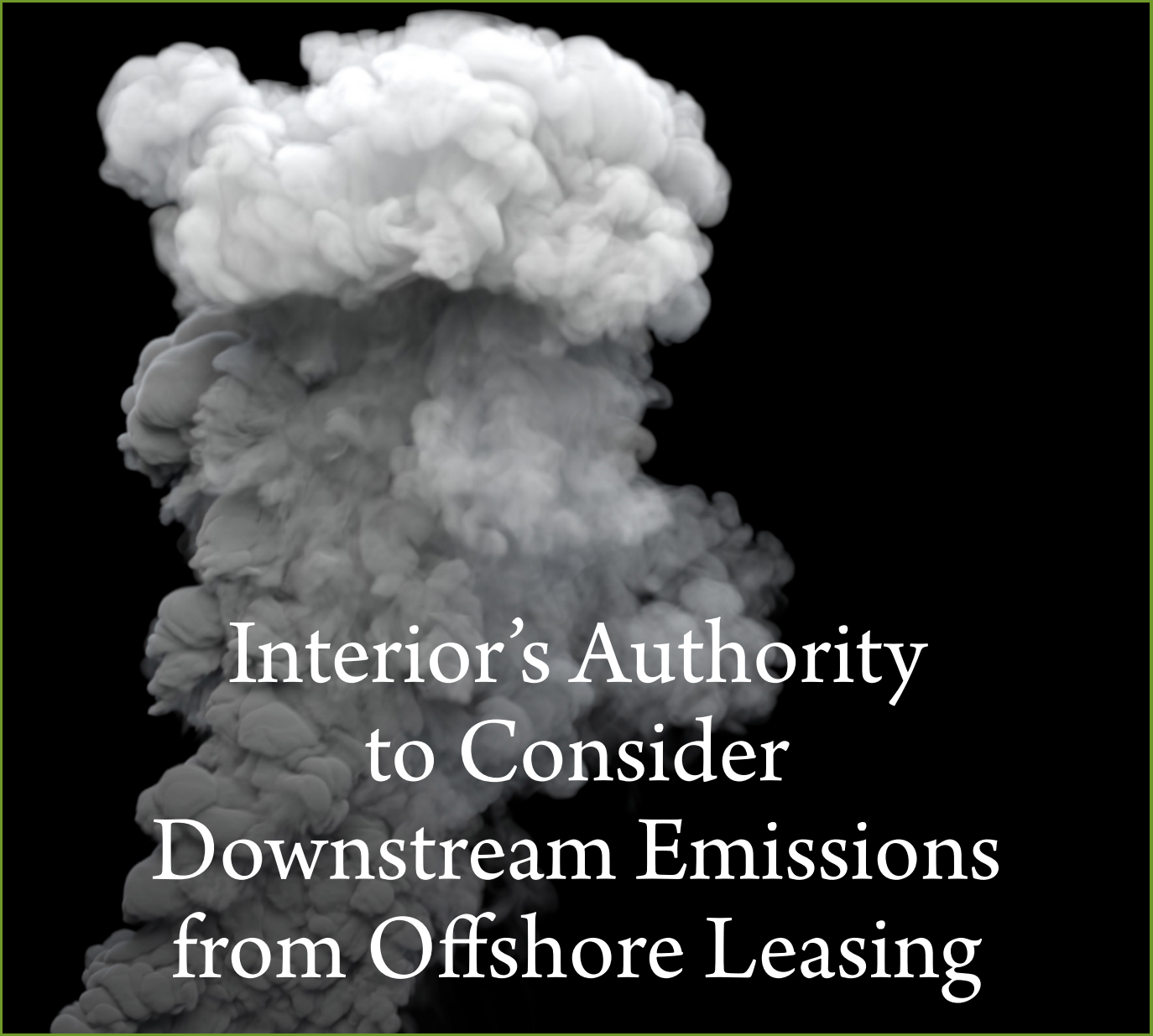
POLICY BRIEF



Interior's Authority to Consider Downstream Emissions from Offshore Leasing

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Executive Summary

In its proposed 2023–2028 Outer Continental Shelf (OCS) leasing program, the Department of the Interior[1] declined to include the substantial impacts related to the final consumption of oil and gas in its monetized net benefits analysis 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*").[2] Interior's position is mistaken for several reasons.

To begin with, Interior misreads *CBD*, which held only that the Outer Continental Shelf Lands Act (OCSLA) does not *require* the agency to consider downstream effects.[3] And Interior overlooks other caselaw holding that Interior *may* consider the downstream combustion effects of OCS leasing.[4] That caselaw aligns with OCSLA's text, legislative history, and Interior's regulatory practice for the past several decades, all of which support Interior's authority to consider downstream impacts of oil and gas consumption.

Part I of this report explains that no judicial decision bars Interior from considering the downstream environmental effects of OCS leasing. *CBD*'s holding is narrow, and although the 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 Interior from considering environmental effects outside the OCS.[5] And the U.S. Court of Appeals for the Ninth Circuit held that Interior may consider downstream environmental impacts in administering the leasing program.[6]

As we explain in Part II, these more recent judicial decisions align with OCSLA's text. OCSLA gives Interior 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.[7] But these principles are not an exhaustive list of factors that Interior may consider when determining how best to meet "national energy needs." To the contrary, numerous OCSLA provisions indicate that Interior 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 Interior 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 OCS development would alleviate a near-term energy crisis while causing "substantially less harm to the environment," including

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[1] Throughout this report, "Interior" refers to the Department of the Interior and its current and former entities—namely, the Bureau of Ocean Energy Management and Minerals Management Service.

[2] Bureau of Ocean Energy Mgmt., 2023–2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program 5–35 (2022) [hereinafter Proposed Program] (citing Center for Biological Diversity v. U.S. Dep't of Interior ("CBD"), 563 F.3d 466 (D.C. Cir. 2009)).

[3] *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).

[4] 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").

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

[6] *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").

[7] 43 U.S.C. § 1344(a).

through its downstream effects, "than most other sources" then available.[8] 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."[9]

Interior 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 OCSLA's planning and leasing stages. In doing so, Interior 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."[10]

For all these reasons, Interior should fully consider the downstream environmental effects of oil and gas consumption under the 2023–2028 program, including in its net benefits analysis. And beyond this single program, Interior should fully consider downstream impacts in all future OCS planning and leasing decisions.

I. No Case Holds that OCSLA Bars Interior from Considering Downstream Effects, and Key Cases Support the Opposite Conclusion.

Despite projecting that OCS leasing will result in substantial downstream greenhouse gas emissions,[11] Interior does not include the resulting climate costs in its net benefits analysis because, according to Interior, the D.C. Circuit's decision in *CBD* prevents it from doing so.[12] But *CBD* holds only that Interior is not *required* to consider such effects, not that it is barred from considering them. And Interior's interpretation of *CBD* as barring consideration of downstream effects also conflicts with other caselaw.

A. *CBD* narrowly holds only that OCSLA does not require consideration of downstream effects.

The D.C. Circuit reached a narrow holding in *CBD*: "[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."[13] Some *CBD* passages admittedly go further, stating that OCSLA does not authorize Interior to consider downstream environmental effects.[14] But those statements were "unnecessary for [the] disposition of the case" and are therefore dicta.[15]

Indeed, the D.C. Circuit later characterized its *CBD* holding as narrow, stating that *CBD* "conclude[s] that OCSLA was sufficiently ambiguous to *permit* Interior to forgo consideration of climate-related effects of burning OCS-derived fossil fuels, and to *allow* Interior to limit its consideration of the environmental impact of OCS leasing."[16] Because courts are

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[8] S. Rep. No. 95-284, at 42 (1977).
[9] H. Rep. No. 95-590, at 149 (1977).
[10] Minerals Mgmt. Serv., Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2002–2007 at 71 (2002) [hereinafter 2002 Plan].
[11] Bureau of Ocean Energy Mgmt., 2023–2028 National Outer Continental Shelf Oil and Gas Leasing Program Draft Programmatic Environmental Impact Statement C-10 tbl.C-7 (2022) [hereinafter Proposed Program DEIS].
[12] Proposed Program, *supra* note 2, at 5-35.
[13] 563 F.3d at 484 (emphasis added).
[14] *See id.* at 485.
[15] Telecommunications Rsch. & Action Ctr. v. F.C.C., 917 F.2d 585, 588 (D.C. Cir. 1990) (Silberman, J., concurring).
[16] Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 608 n.11 (D.C. Cir. 2015) (emphasis added).

"not bound by dicta,"[17] Interior need not heed *CBD*'s stray comments on the scope of Interior's discretion—particularly in light of the dicta's conflict with the D.C. Circuit's later analysis in *Center for Sustainable Economy v. Jewell*[18] and the Ninth Circuit's analysis in *Center for Biological Diversity v. Bernhardt*,[19] as discussed below.

CBD's dicta is also unpersuasive. For one thing, the decision rests on just a few isolated passages from one subsection in OCSLA, and fails to analyze the statute's nearby language, legislative history, or past practice discussed later in this report—all of which demonstrate Interior has discretion to consider non-local environmental effects.[20]

For another, *CBD* misunderstands other OCSLA case law. Citing *State of California by & through Brown v. Watt* ("*Watt I*"), *CBD* asserts that Interior "need only consider the 'potential for environmental damage' on a localized area basis."[21] In *Watt I*, however, the D.C. Circuit analyzed only Interior's duty to balance the costs and benefits of leasing in various OCS regions, approving Interior's view that "planning activities in an area" should be based on whether "the costs in that area outweigh the benefits."[22] *Watt I* never discusses whether Interior can look beyond local environmental effects when determining the size and scope of OCS leasing. The D.C. Circuit did not address that question until *Jewell* (discussed below).

CBD's analysis also rests partly on the erroneous premise that "Interior's decisions . . . do not affect the impact that *consuming* oil and gas may have on climate change," because any leasing program "would presumably lead to the same overall consumption effects."[23] There are many problems with this assumption, but the most obvious is that Interior has "broad . . . discretion" to select the "size" of OCS leasing,[24] and different sizes of OCS leasing can lead to different downstream consumption effects.[25] For all these reasons, *CBD*'s dicta poses no obstacle for Interior to consider the downstream consumption effects of OCS leasing.

B. The D.C. Circuit later held that Interior may consider non-local environmental effects.

What is more, in *Jewell*, the D.C. Circuit later rejected the argument "that environmental effects that do not occur in any OCS area should be treated as irrelevant to Interior's environmental calculus under OCSLA."[26] That conclusion from the same court that decided *CBD* only further undermines the validity of *CBD*'s dicta regarding the scope of Interior's authority to consider downstream emissions.

In rejecting this argument, the D.C. Circuit concluded that Interior's "replacement-cost methodology" analyzing the relative effects of substitute energy sources was a reasonable method to craft an OCS leasing policy that "will best meet national energy needs."[27] More specifically, the court found that Interior had authority "to quantify environmental. . . and social costs . . . , in addition to costs from activities associated with exploration, development, production and transportation that might occur with new OCS production and its most likely replacement."[28] The court observed that "[m]eeting

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[17] Kerry v. Din, 576 U.S. 86, 94 (2015).
[18] 779 F.3d at 606–7.
[19] 982 F.3d 723, 740 (9th Cir. 2020).
[20] Center for Biological Diversity v. U.S. Dep't of Interior ("CBD"), 563 F.3d 466, 484–85 (D.C. Cir. 2009); *see infra* Parts II, III, IV.
[21] 563 F.3d at 484 (citing *State of California by & through Brown v. Watt*, 668 F.2d 1290, 1318 (D.C. Cir. 1981)).
[22] 668 F.2d at 1317.
[23] 563 F.3d at 485.
[24] *Watt I*, 668 F.2d at 1317; 43 U.S.C. § 1344(a).
[25] *See* Proposed Program DEIS, *supra* note 11, at C-13 tbl. C-10 (showing how different amounts of fuel production in different regions lead to different foreign downstream emissions).
[26] Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 605 (D.C. Cir. 2015).
[27] *See id.* at 603–06.
[28] *Id.* at 603 (cleaned up).

national energy demands from [non-OCS] sources carries its own environmental risks and harms, distinct from the familiar risks associated with extraction from the OCS, which Interior determined should be taken into account."[29] And, the court held, nothing in OCSLA "expressly proscribed" this "approach."[30]

True, the replacement-cost methodology in *Jewell* compared only upstream OCS effects with substitute national upstream effects.[31] But nothing in the court's holding or analysis suggests Interior is barred from also considering downstream effects from energy consumption. Rather, the court's analysis confirms that, in crafting a policy to "[m]eet[] national energy demands," Interior has discretion to determine if "environmental risks and harms[] distinct from the familiar risks associated with extraction from the OCS . . . should be taken into account," so long as those considerations are "neither expressly proscribed by the statute nor unreasonable."[32] And as explained later in this report, downstream effects are neither proscribed nor unreasonable. In fact, they are permitted under OCSLA's text,[33] contemplated in the statute's legislative history,[34] and have been considered by Interior for decades.[35]

C. The Ninth Circuit has expressly recognized Interior's authority to consider the downstream effects of OCS leasing.

A recent Ninth Circuit decision further contradicts the dicta in *CBD*, holding that Interior may consider downstream greenhouse gas emissions in administering the OCS leasing program.[36] The Ninth Circuit explained that Interior "has the statutory authority to act on the emissions resulting from [downstream] oil consumption" and that, "[i]f it . . . concludes that such emissions will be significant, it may well approve another alternative included in the [environmental impact statement] or deny the lease altogether."[37] This recognition is perhaps unsurprising given the Ninth Circuit's previous reference to the importance of "adequately consider[ing] cumulative effects of [an OCS] lease sale . . . on climate change."[38] Yet Interior does not even address these two on-point Ninth Circuit decisions when concluding that it cannot consider downstream emissions in its proposed program.[39]

D. Other decisions hold that Interior and other agencies may consider downstream emissions under similar contexts.

Interpreting similar statutes, multiple courts have also ruled that "combustion emissions are an indirect effect of an agency's decision to extract those natural resources" that the agency may consider.[40] One court relied in part on Interior's

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[29] *Id.*
[30] *Id.* at 605.
[31] *Id.* at 603–06.
[32] *Id.* at 603, 605; *cf. also* Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 295–96 (D.C. Cir. 1988) (holding Interior must consider potential energy-conservation alternatives that would "provid[e] significant environmental benefits" beyond the OCS area).
[33] *See infra* Part II.
[34] *See infra* Part III.
[35] *See infra* Part IV.
[36] Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 740 (9th Cir. 2020).
[37] *Id.* Although the Ninth Circuit's analysis focused on the National Environmental Policy Act (NEPA), the court was well aware that NEPA analysis of a particular effect is unnecessary if the agency "lacks the power to act on whatever information might be contained" about that effect in the analysis, as it cited the source of that conclusion—the Supreme Court's decision in *Department of Transportation v. Public Citizen*—just after explaining that Interior has authority to consider downstream emissions. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 754 (2004); Bernhardt, 982 F.3d at 740. Accordingly, the Ninth Circuit effectively recognized that Interior may consider downstream environmental impacts under OCSLA.
[38] Native Vill. of Point Hope v. Jewell, 740 F.3d 489, 504 (9th Cir. 2014).
[39] Proposed Program, *supra* note 2, at 5–35.
[40] San Juan Citizens All. v. U.S. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1242–43 (D.N.M. 2018) (collecting cases).

authority in the onshore context to "weigh long-term benefits to the public against short-term benefits"[41] to conclude that the agency "could decline to sell [onshore] oil and gas leases . . . if the environmental impact of those leases—*including use of the oil and gas produced*—would not be in the public's long-term interest."[42] And the D.C. Circuit similarly held that the Federal Energy Regulatory Commission's charge to consider "the public convenience and necessity" in pipeline certification proceedings allows it to consider "power-plant carbon emissions that the pipelines will make possible."[43] These cases further support Interior's authority to consider downstream emissions under OCSLA.

II. OCSLA's Text Does Not Bar Interior from Considering Downstream Effects when Making Leasing Decisions.

Recent caselaw recognizing Interior's authority to consider a wide range of environmental impacts, including downstream emissions, fully aligns with OCSLA's text: OCSLA gives Interior discretion to consider a wide range of environmental effects, including impacts from downstream energy consumption, when creating an offshore-leasing program that best meets national needs.

The primary section of OCSLA governing the five-year planning process is 43 U.S.C. § 1344. That section directs Interior to "prepare . . . and maintain an oil and gas leasing program to implement the policies of this subchapter."[44] The "policies of this subchapter" are found in 43 U.S.C. § 1332, which declares, among other things, that the OCS "is a vital national resource reserve" that should be developed "in a manner which is consistent with the maintenance of competition and other national needs."[45] The second sentence of § 1344(a) then directs Interior to craft a "leasing program . . . indicating . . . the size, timing, and location of leasing activity which [Interior] determines will best meet national energy needs[.]"[46] OCSLA thus gives Interior broad discretion to craft a leasing program that it determines best meets "national needs" and "national energy needs."

Courts must give such "general words . . . their full and fair scope."[47] And they have done so when interpreting similar general words. Take the Ninth Circuit's explanation that "such terms as 'that (which) will best meet the needs of the American people' . . . 'breathe[] discretion at every pore.'"[48] Or consider the D.C. Circuit's observation that there is "no conflict" between assessing environmental effects and a statutory command to consider "the need of the Nation to conserve energy" in developing vehicle fuel-efficiency standards.[49]

This broad discretion is further evident in § 1344(a)'s subsections, which provide that the leasing program that Interior "determines will best meet national energy needs" must also be "prepared and maintained in a manner consistent with the . . . principles" contained in § 1344(a)(1)–(4). Although some of the "principles" in § 1344(a)(1)–(4) have a lo-

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[41] 43 U.S.C. § 1712(c)(7).

[42] WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 73 (D.D.C. 2019) (emphasis added).

[43] Sierra Club v. FERC, 867 F.3d 1357, 1371–73 (D.C. Cir. 2017) (citing 15 U.S.C. § 717f(e)).

[44] 43 U.S.C. § 1344(a).

[45] *Id.* § 1332(3). Multiple other sections echo this emphasis on development consistent with national interests. *See id.* § 1801(7) (finding the OCS "must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest"); *id.* § 1802(1) ("establish[ing] policies and procedures . . . to achieve national economic and energy policy goals"); *id.* § 1345(c) (requiring Interior to "balance . . . the national interest and the well-being of the citizens of the affected State").

[46] *Id.* § 1344(a).

[47] Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 101 (2012).

[48] Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979) (cleaned up).

[49] Pub. Citizen v. Nat'l Highway Traffic Safety Admin., 848 F.2d 256, 263 n.27 (D.C. Cir. 1988); *accord* Zero Zone, Inc. v. U.S. Dep't of Energy, 832 F.3d 654, 677 (7th Cir. 2016) (reaching same conclusion under provision addressing "need for national energy . . . conservation").

cal focus,[50] these principles do not constrain Interior's discretion to consider only local environmental effects, as *CBD*'s dicta suggests. Had Congress wanted to constrain Interior's authority in this way, it easily could have done so explicitly. Congress instead said that the leasing program that Interior "determines best meets national energy needs" must be "consistent with" the principles in § 1344(a)(1)–(4), meaning "compatible."[51] A leasing program that considers non-local environmental effects—such as one that analyzes how varying amounts of OCS development would alter the relative volumes of different energy sources and the knock-on environmental and economic effects of those various amounts[52]—can easily be "consistent with" one that also considers the principles in § 1344(a)(1)–(4), including those with a local focus.[53]

If anything, these principles act as a floor for what Interior must consider, which makes sense given that Congress's decision to amend OCSLA was a reaction to unbridled OCS leasing that catered to the petroleum industry.[54] But the principles do not bar Interior from considering other relevant factors when determining "national energy needs."[55] In other words, OCSLA "provides [Interior] with broad standards to govern promulgation of the leasing program—it must best meet national energy needs and be consistent with enumerated principles—but leaves it to the Secretary to devise a program satisfying those broad standards."[56]

Moreover, the principles in § 1344(a)(1)–(4) are not exclusively focused on local effects. For example, subsection (a)(1) instructs Interior to "consider[] economic, social, and environmental values of the renewable and nonrenewable resources contained in the [OCS]." 43 U.S.C. § 1334(a)(1). "[C]ontained in the [OCS]" limits only the "resources" at issue (to those in the OCS); it does not constrain how Interior may assess the "economic, social, and environmental values" of OCS resources, which may have values that accrue nationally or even internationally.[57]

Of course, some of the principles in § 1344(a)(1)–(4) direct Interior to consider local environmental harms.[58] But § 1344(a)(2) provides only that the "timing and location"—not the size—of OCS production "shall be based on a consideration of" the local effects enumerated in that provision.[59] In contrast, § 1344(a)'s preamble makes clear that the "*size*, timing, and location of leasing activity [is that] which [Interior] determines will best meet national energy needs."[60] The notable omission from § 1344(a)(2) indicates Congress did not intend to limit Interior's discretion regarding the "size" of the leasing program to the local considerations in § 1344(a)(2). Furthermore, as noted above, Congress provided that the leasing program must be "consistent with" the principles in § 1344(a)(1)–(4), and a leasing schedule whose timing and location accounts for local considerations is "consistent with" one whose size accounts for additional environmental considerations, such as downstream effects.[61]

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[50] *See, e.g.*, 43 U.S.C. § 1344(a)(2)(A).

[51] Merriam-Webster's New Collegiate Dictionary 266 (11th ed. 2014).

[52] *See* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 603 (D.C. Cir. 2015).

[53] *Cf.* O.A. v. Trump, 404 F. Supp. 3d 109, 150 (D.D.C. 2019) (interpreting different statute's use of "consistent with" to mean "compatible" and as permitting consideration of additional factors if "compatible" with the statute).

[54] *See infra* Part III.

[55] 43 U.S.C. § 1344(a).

[56] State of California by & through Brown v. Watt ("Watt I"), 668 F.2d 1290, 1301 (D.C. Cir. 1981).

[57] Avoiding redundancy also requires that the first clause of § 1344(a)(1) be understood to encompass something different from the second, which directs Interior to consider "the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments."

[58] *See, e.g.*, 43 U.S.C. § 1344(a)(2)(A).

[59] *Id.* § 1344(a)(2).

[60] *Id.* § 1344(a) (emphasis added).

[61] *Cf.* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 603 (D.C. Cir. 2015) (approving comparative consideration of on-shore substitution effects not expressly listed in § 1344(a)(1)–(4)).

Finally, OCSLA envisions a robust review under NEPA for all lease sales and further states that "[e]xcept as otherwise expressly provided," the statute should not "be construed to amend, modify, or repeal any provision" of NEPA.[62] At the time of the 1978 OCSLA amendments, Council on Environmental Quality (CEQ) guidance advised agencies to include "[s]econdary or indirect . . . consequences" in their NEPA analysis.[63] In November 1978, CEQ adopted that requirement in regulations that remain effective today.[64] Under that requirement, agencies "typically include" downstream environmental effects in NEPA reviews of "resource extraction and development projects."[65]

Considered as a whole, OCSLA's text authorizes Interior to determine the OCS leasing program that will best serve national needs, and nothing in the statute's text bars Interior from considering downstream environmental effects when making that determination. But if there were any doubt on this score, OCSLA's legislative history further clarifies that Interior may consider downstream environmental effects, as detailed next.

III. OCSLA's Legislative History Shows that Congress Sought to Address a Short-Term Energy Crisis While Balancing Environmental Concerns.

Congress enacted OCSLA in 1953 to assert exclusive federal jurisdiction and control over the seabed and subsoil of the OCS.[66] As originally enacted, OCSLA granted Interior a "carte blanche delegation of authority" over the nation's OCS leasing program.[67]

Initially, OCS leasing was limited. Interior held only 24 relatively small lease sales in the first 15 years after OCLSA's enactment, and, after the Santa Barbara oil spill in 1969, halted all leasing outside the Gulf of Mexico for five years.[68] In the mid-1970s, however, increased dependence on imported oil and the 1973–1974 oil embargo created an acute energy crisis that prompted a drastic increase in leasing activity. President Nixon directed Interior to extend leasing to all OCS areas and to triple the acreage offered.[69] Over the next five years, Interior offered for lease nearly 20 million offshore acres—more than it had in the entire 19-year period since the leasing program began.[70]

The rapid pace of OCS leasing "crystalized growing concern on the part of many in Congress and elsewhere about the open-ended authority granted in the 23-year-old legislation."[71] Among other things, representatives worried that "the

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[62] 43 U.S.C. § 1346(a); *id.* § 1866(a).

[63] Council on Env't Quality, Preparation of Environmental Impact Statements Guidelines, 147 Fed. Reg. 20,550, 20,553 (Aug. 1, 1973).

[64] 40 C.F.R. § 1508.1(g)(2).

[65] Council on Env't Quality, Final Guidance for Fed. Depts. and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 14 (2016) (withdrawn Apr. 5, 2017; under review Feb. 19, 2021, for revision and update); *see also id.* at 16 n.42 (counseling agencies to consider "impacts associated with the end-use of the fossil fuel being extracted"). Interior states that its decision to prepare a Programmatic Environmental Impact Statement for the proposed program in accordance with NEPA is "discretionary" because, according to Interior, the D.C. Circuit has ruled that the agency's "obligation to fully comply with NEPA does not mature until the lease sale stage." Proposed Program, *supra* note 2, at 1-17 (citing *CBD*, 563 F.3d 466, and *Jewell*, 779 F.3d 588). Nonetheless, even assuming that Interior's interpretation is correct, the effects that Interior may consider at the planning stage presumably encompass all of the foreseeable effects Interior would consider in its NEPA analysis at the lease sale stage.

[66] Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462, 462 (1953).

[67] *See* S. Rep. No. 95-284, at 43; 67 Stat. 462, § 5.

[68] *See* Bureau of Ocean Energy Mgmt., All Lease Offerings (2022) [hereinafter All Lease Offerings], https://perma.cc/N6MV-8DN7; *see also Biliana Cicin-Sain, et al., The Evolution of the Federal OCS Program in Assessment of the U.S. Outer Continental Shelf Environmental Studies Program* 107, 110 (1992), https://perma.cc/MBY8-6PUV.

[69] Richard Nixon, Special Message to the Congress on Energy Policy (Apr. 18, 1973), https://perma.cc/MU4X-NL62.

[70] *See* All Lease Offerings, *supra* note 68.

[71] H. Rep. No. 94-1084, at 73–74 (1976).

present law's grant of total discretion to [Interior] led to a situation where the petroleum industry had a too dominant voice" and "provide[d] too many advantages for industry at the possible expense of the taxpayer."[72] And many in Congress were concerned that this "closed process" for leasing failed to reflect the public's growing "environmental protection concerns."[73] Congress acted in 1978 by significantly amending OCSLA.[74] These amendments gave structure to the national leasing program by mandating a five-year planning schedule and, as discussed above, setting out principles for OCS development "subject to environmental safeguards" and "in a manner . . . consistent with . . . national needs."[75]

These amendments were grounded in three core and related ideas, as reflected in the Senate and House Reports leading up to enactment: (1) that increased production of oil and gas in the OCS in the short-term would help overcome the 1970s energy crisis; (2) that OCS oil and gas production was favored in part because it was environmentally desirable when compared to then-available alternatives; and (3) that, in the future, Interior would need to balance a wide range of considerations as fuel sources and national needs changed.

First, Congress was focused on the 1970s energy crisis and saw "expeditious yet safe" OCS development as a way to address immediate energy demand.[76] But Congress did not necessarily expect OCS leasing to remain at elevated levels indefinitely. All the Senate reports leading up to the amendments' enactment focus on OCS production "during the next decade" and highlight the need to structure development activity taking place in the "next few years."[77] Rather than mandate indefinite and unbridled drilling—already possible under the original OCSLA—the amendments embodied an effort to "improve the short- and medium-term supply of domestic primary fuels" from the OCS while implementing "standards and criteria" for leasing activity moving forward.[78]

Second, Congress considered offshore oil and gas production more environmentally favorable than other available fuel sources within this near-future timeframe. For instance, the final Senate report recognized that despite "justified concern of many people over the potential damage to the environment" resulting from OCS development, OCS oil and gas was expected to "supply [energy] with substantially less harm to the environment than most other sources" then available.[79] In particular, this report noted "an increasing feeling that responsible OCS development may well be more acceptable environmentally than other potential domestic energy resources such as massive strip mining for coal and oil shale."[80]

This assessment of the desirability of OCS oil and gas was based in part on the downstream environmental effects of competing fuel sources. A CEQ report on the environmental effects of boosting OCS production that was a "major focus"[81] of congressional hearings explained that, "[i]n its extraction *and end uses*, coal presents a number of environmental problems," making "coal-fired powerplant systems [] the least desirable from an environmental standpoint."[82] The report further noted that "air and water, solid wastes, and land use impacts are higher with coal-fired systems than with oil, gas, or nuclear systems."[83] Representatives thus considered downstream effects and determined that OCS leasing was

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[72] *Id.* at 76, 78.
[73] *Id.* at 48, 74 (internal quotation marks omitted).
[74] Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978).
[75] 43 U.S.C. § 1332(3).
[76] H. Rep. No. 95-1474, at 76 (1978) (Conf. Rep.); *see* H. Rep. No. 95-590, at 53.
[77] *E.g.,* S. Rep. No. 95-284, at 42; S. Rep. No. 94-284, at 1–2 (1975) (same).
[78] S. Rep. No. 93-1140, at 1–2 (1974); S. Rep. No. 95-284, at 43.
[79] S. Rep. No. 95-284, at 42; *see also* S. Rep. No. 93-1140, at 3 (asserting that OCS leasing of oil and gas would "supply [energy] with substantially less harm to the environment than almost any other source").
[80] *Id.;* S. Rep. No. 93-1140, at 3 (same).
[81] S. Rep. No. 94-284, at 23.
[82] Council on Env't Quality, OCS Oil and Gas: An Environmental Assessment 41 (1974) (emphasis added), https://babel.hathitrust.org/cgi/pt?id=uva.35007000492391&view=1up&seq=7.
[83] *Id.*

beneficial because it was capable of providing energy "at a lower expense than most [then-available] alternatives in terms of development *and impact* costs."[84]

Third, Congress understood that national energy needs could evolve over time and that the nation's reliance on fossil fuels could change. For example, the final House report anticipated that "[d]evelopment of our OCS resources will afford us needed time—as much as a generation—within which to develop alternative sources of energy . . . [and] provide time to bring on-line, and improve energy technologies dealing with, solar, geothermal, oil shale, coal gasification and liquefaction, nuclear, and other energy forms."[85] Congress thus drafted OCSLA to guide Interior's management of these resources "in a manner which takes into consideration the Nation's long-range energy needs."[86]

To that end, Congress empowered Interior to consider the availability and relative environmental effects of competing energy sources in future leasing decisions. For example, the final law omitted language that would have required all productive lands to "[be made] available for leasing as soon as practicable,"[87] due to concerns that such development "may involve undesirable environmental or other effects."[88] Congress instead directed Interior to administer the leasing program to "best meet national energy needs,"[89] which the final House report explained would require Interior to "weigh environmental and other risks against energy potential and other benefits" in a manner that "consider[s] all the economic, social, and environmental impacts of oil and gas activities."[90] As part of such an analysis, a Senate report explained that Interior would consider "alternatives to large scale expansion of [OCS] leasing" and how the leasing program "relate[s] to national energy goals and plans."[91] As this Court has recognized, these provisions granted Interior broad discretion to weigh elements that "may well shift with changes in technology, in environment, and in the nation's energy needs."[92]

Interior's position that OCSLA bars it from considering downstream emissions is thus at odds with not only OCSLA's text but also its legislative history. Congress did not intend for Interior to blind itself to the downstream effects of oil and gas in relation to available alternatives when administering a leasing program that "balance[s] orderly energy resource development with protection of the human, marine, and coastal environments."[93]

IV. Interior Has Long Considered Downstream Effects when Administering the OCS Leasing Program.

As Congress intended, Interior has for decades considered downstream environmental effects in administering the OCS leasing program—both when developing five-year plans and when assessing individual lease sales. This offers further proof that OCSLA does not bar Interior from considering downstream environmental effects, since, as the Supreme Court has explained, "agency interpretations that are of long standing" have "a certain credential of reasonableness, since it is rare that error would long persist."[94]

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[84] H. Rep. No. 95-590, at 53 (emphasis added).
[85] *Id.*
[86] 43 U.S.C. § 1801(14).
[87] S. Rep. No. 93-1140, at 6.
[88] S. Rep. No. 94-284, at 48.
[89] 43 U.S.C. § 1344(a).
[90] H. Rep. No. 95-590, at 149.
[91] S. Rep. No. 94-284, at 17–18 (highlighting General Accounting Office policy report).
[92] State of California by & through Brown v. Watt ("Watt I"), 668 F.2d 1290, 1317 (D.C. Cir. 1981).
[93] 43 U.S.C. § 1802(2)(B).
[94] Smiley v. Citibank, 517 U.S. 735, 740 (1996).

A. Interior frequently considers downstream environmental effects in its five-year plans.

As noted above, Interior's previous five-year plans propose a leasing schedule that Interior determines will "best meet national energy needs."[95] Interior has in the past recognized that "[e]nergy needs . . . is a broad term that includes" many "aspects of national welfare affected by the availability of appropriate quantities and qualities of oil and gas."[96] To assess national energy needs, Interior has analyzed the current energy mix in the market, projected demand for energy, the most likely alternative energy mix that would emerge without OCS leasing, and the relative environmental effects of those alternative energy mixes.[97] This analysis has often led to direct comparisons between fuel sources, including downstream environmental effects—comparisons that would be irrelevant if OCSLA required Interior to disregard those downstream effects.

Interior first considered the environmental advantages of natural gas relative to other fossil fuels in 1987. Since then, it has repeatedly described natural gas as "clean burning" (1987, 2007, 2012),[98] the "cleanest form of fossil fuel" (1997),[99] and a "clean burning, environmentally preferred source of energy for electricity generation" (2002).[100] In discussing the cumulative nature of greenhouse gas emissions, Interior has specifically noted that "[t]he use of natural gas results in significantly lower emissions of CO_2 than the use of either coal or oil."[101]

Interior's assessment of downstream environmental effects has directly influenced the structure of its leasing programs. For instance, Interior's 1992 five-year plan included a guiding principle to "[e]mphasize gas-prone areas to promote the expeditious development of natural gas as an environmentally preferable energy source."[102] This emphasis carried over to the 1997 plan, which asserted that "[e]xpanded use of natural gas, including that produced on the OCS, has substantial environmental benefits over other fossil fuels" and offers "the cleanest form of fossil fuel."[103] In that plan's assessment of "energy policy goals" under 43 U.S.C. § 1802(1), Interior also determined that the "environmentally sound development of the Nation's OCS resources will help further the . . . goal" of the Department of Energy's 1995 National Energy Policy Plan "to reduce the adverse environmental impacts associated with energy production, delivery, *and use*."[104]

At the same time, and consistent with expectations reflected in the legislative history, Interior has recognized that it may no longer consider natural gas "a favored fuel" once "renewable energy sources can supply a much larger share of the Nation's energy."[105] Interior has also recognized the downstream environmental advantages of renewables, as well as the connection between leasing policy and renewable development.[106]

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[95] 43 U.S.C. § 1344(a).

[96] Bureau of Ocean Energy Mgmt., 2017–2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program 1-3 (2016) [hereinafter 2017 Plan].

[97] *See, e.g.,* Bureau of Ocean Energy Mgmt., Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012–2017 at 100–14 (2012) [hereinafter 2012 Plan].

[98] *See* Minerals Mgmt. Serv., 5-Year Leasing Program Mid-1987 to Mid-1992 at 76 (1987) [hereinafter 1987 Plan]; Minerals Mgmt. Serv., Proposed Final Program Outer Continental Shelf Oil and Gas Leasing Program 2007–2012 at 74 (2007) [hereinafter 2007 Plan]; 2012 Plan, *supra* note 97, at 113.

[99] Minerals Mgmt. Serv., Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 1997 to 2002 at 69 (1996) [hereinafter 1997 Plan].

[100] 2002 Plan, *supra* note 10, at 71.

[101] Minerals Mgmt. Serv., Comprehensive Program 1992–1997 Final Environmental Impact Statement V-62 (1992).

[102] Minerals Mgmt. Serv., Outer Continental Shelf Natural Gas and Oil Resource Management Comprehensive Program 1992–1997 at 13 (1992) [hereinafter 1992 Plan].

[103] 1997 Plan, *supra* note 99, at 4.

[104] *Id.* at 3–4 (emphasis added).

[105] 2012 Plan, *supra* note 97, at 113.

[106] *Id.* at 114; *see* U.S. Dep't of the Interior, 5-Year OCS Oil and Gas Leasing Program 78 (1980) ("A potential benefit of [the No-Action Alternative] is that it might serve as a catalyst in bringing new energy alternatives on line (i.e., solar)").

In addition, starting as early as 2002, Interior has calculated the greenhouse-gas emissions that would result from consumption of oil and gas produced from OCS leasing programs.[107] Although Interior found the calculation to be of "limited value" in 2002 given the complexities of predicting future trends in domestic greenhouse gas emissions, in 2017 it used these figures to inform its consideration of the no-action alternative.[108]

B. Interior frequently considers downstream environmental effects in its lease sales.

Beyond the five-year programs, since at least the 1980s, Interior has similarly considered the downstream environmental effects of alternative fuel sources in individual lease sales. For example, Interior's analysis for a 1987 lease sale unfavorably characterized the "problems of air pollution" resulting from coal consumption that a no-leasing option may facilitate, "including the local and global effects of sulfur oxides and carbon-dioxide emissions."[109] Likewise, a 1990 analysis considered various "[a]dverse environmental effects from heavier reliance on coal" that may occur absent the lease sale, noting that "[c]ombustion of coal results in various emissions, notably SO_2 and particulates."[110]

For at least the past 35 years, Interior has specifically highlighted the potential for greenhouse gas emissions from the downstream use of fossil fuels as part of its lease-sale analysis.[111] And dating back to at least 2003, Interior has calculated greenhouse gas emissions of "shipping, refining, end-product transportation, and *consumption*" resulting from a lease sale.[112]

Interior's claim that it cannot consider downstream environmental effects is thus further undermined by over three decades of agency practice.

Conclusion

For the foregoing reasons, Interior should reassess its interpretation of *CBD* and fully consider the downstream environmental effects of oil and gas leasing in its proposed program.

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[107] *See* Minerals Mgmt. Serv., Outer Continental Shelf Oil & Gas Leasing Program: 2002-2007, Final Environmental Impact Statement 5-50 (2002) [hereinafter 2002 EIS]; Bureau of Ocean Energy Mgmt., Outer Continental Shelf Oil and Gas Leasing Program: 2017–2022, Final Programmatic Environmental Impact Statement 4-6 to -10 (2016) [hereinafter 2017 EIS].

[108] 2002 EIS, *supra* note 107, at 5-50; 2017 EIS, *supra* note 107, at 4-8.

[109] Minerals Mgmt. Serv., Chukchi Sea Oil & Gas Lease Sale 109 Final Environmental Impact Statement App. H, H-2 (1987) [hereinafter Lease Sale 109 EIS].

[110] Minerals Mgmt. Serv., Chukchi Sea Oil & Gas Lease Sale 125 Final Environmental Impact Statement App. I, I-1 to I-2 (1990).

[111] *E.g.*, Lease Sale 109 EIS, *supra* note 109, at App. H, H-2; Minerals Mgmt. Serv., Beaufort Sea and Planning Area Oil and Gas Lease Sale 144 Final Environmental Impact Statement App. C, C-3 to C-4 (1996).

[112] Minerals Mgmt. Serv., Beaufort Sea Planning Area Oil and Gas Lease Sales 186, 195, and 202 Final Environmental Impact Statement V-82 (2003) (emphasis added).

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