

Court Erases Largest Oil Lease Sale in U.S. History

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Introduction

The Gulf of Mexico, stretching across more than 600,000 square miles, boasts valuable American oil and gas reserves, which are leased to companies for exploration and production by the Bureau of Ocean Energy Management (BOEM) in the U.S. Department of the Interior. The Outer Continental Shelf Lands Act (OSCLA), enacted in 1953, declared the Outer Continental Shelf (OCS) in federal waters “a vital national resource reserve held by the Federal Government for the public.”¹ This means that BOEM is tasked with balancing the competing Congressional interests of environmental conservation and lucrative oil and gas leasing.

The largest lease sale in American history, Lease Sale 257, proved to be problematic. A federal district court ruled that BOEM did not properly consider the total emissions from the project and vacated the agency’s decision for Lease Sale 257, describing BOEM as “barreling full-steam ahead with blinders on.”² As a result, leases will not be issued to the high bidders and no further stages (such as exploration and development) will occur.

Lease Sale 257

BOEM’s 2017-2022 Lease Program for oil and gas exploration and development included 10 lease sales in the Gulf of Mexico, with Lease Sale 257 being for the largest tract of land.³ Lease Sale 257 would allow exploration and development of 80.8 million acres in the OCS, with tracts being divvied up between multiple developers. Lease Sale 257 produced more than \$191 billion dollars in bids, making it the largest oil and gas lease sale in American history.⁴ While bids were taken for the Lease Sale, the leases were not awarded or executed.

BOEM produced three different Environmental Impact Statements (EISs) for different steps during the 2017-2022 Lease Program. First, BOEM produced an EIS for the entire program in 2016, indicating it would supplement its environmental analysis on a regular basis.

In 2017, BOEM published a Multi-Sale EIS which considered the environmental impacts of several specific lease sales, including Lease Sale 257. Additionally, BOEM published a 2018 Supplemental EIS which evaluated two other lease sales of the 2017-2022 Lease Program. In late 2020, three years after the EIS evaluating Lease Sale 257, BOEM published a notice that it was moving forward with that lease sale. The notice stated that the three EISs were a sufficient review under the National Environmental Policy Act (NEPA) of Lease Sale 257 and no supplemental EIS was required.⁵

NEPA and Oil Leasing

Leasing in the OCS is regulated by NEPA,⁶ which forces federal agencies to take a “hard look” at the environmental consequences of all major actions. NEPA requirements are intended to be completed prior to final agency decision and before environmental impacts occur. An agency should prepare an EIS when it determines its actions are likely to result in adverse environmental effects. When producing the EIS, the agency must consider reasonable alternatives to its planned action, including a No Action Alternative which analyzes the environmental impacts as if the planned program did not take place.

However, NEPA does not require the agency to choose the option least harmful to the environment. In other words, NEPA requires a full analysis of environmental impacts but does not require a specific agency action once that analysis has been performed. If the agency fails to consider a major environmental impact when calculating the environmental consequences of its actions, the required hard look under NEPA has not been met. In such a case, a court can declare the EIS to be inadequate and vacate the agency decision that relied upon that EIS.

The Lawsuit

Environmental groups sued BOEM, challenging the adequacy of the NEPA review for Lease Sale 257.⁷



Credit: Jeff Miller

The groups argued that BOEM did not consider all the environmental impacts of the proposed action, notably, that the emissions calculations it was relying on were incorrect.

The proposed action would allow petroleum to be developed, resulting in emissions from the production of the oil and also emissions from the consumer's use of that oil, known as "downstream emissions." According to the court, downstream emissions typically account for the bulk of greenhouse gas emissions from a lease sale. The court agreed with the environmental plaintiffs that BOEM failed to consider important variables in its analysis of downstream emissions, and thus could not satisfy the required hard look under NEPA.

To calculate the downstream emissions for the program, BOEM used a computer model known as the MarketSim.⁸ The model concluded emissions would be higher if BOEM did not have lease sales. To reach this conclusion, the model relied on certain input. First, the model assumed that foreign production of oil and gas would have to take the place of the domestic production from Lease Sale 257. Second, the model assumed that the

production of that replacement foreign petroleum would emit more greenhouse gases than domestic production. This is because the foreign gas would have to be transported to America and also because some foreign countries may not have the same environmental controls in place that American production requires. Third, the model assumed that foreign demand for oil and gas would be unchanged regardless of whether the oil was produced domestically or abroad.

The assumption that emissions would be lower by conducting Lease Sale 257 was based on the premise that foreign-produced petroleum would be consumed in the place of domestic oil at the same rate and likely would produce more greenhouse gases. The court found this assumption to be faulty – in part because the price of foreign petroleum would be higher, reducing demand, thereby reducing consumption and emissions.

The court also took issue with BOEM's using the MarketSim Model which had been deemed arbitrary and capricious by two other courts for leading to faulty conclusions on environmental impacts.⁹

The court was unpersuaded by BOEM’s argument that it was not required to consider downstream effects of emissions at the lease sale stage because those emissions were speculative. The court agreed that some speculation may be required, but it found that the data and methodology to correctly calculate the emissions were already in the record and did not depend on site-specific information. Leaving the information out “undermined the reliability” of the conclusion on emissions. For example, even though BOEM had identified a decrease in “foreign oil consumption ... over the duration of the 2017-2022 Program,” it excluded those data from the total emissions calculations.¹⁰

Notably, the three EISs prepared for the program all relied on a Report which estimated a reduction in foreign demand.¹¹ BOEM assessed a foreseeable and quantifiable reduction in the demand for petroleum, therefore, according to the court, it should have been able to assess the corresponding change in emissions. Further persuading the court that this was not unreasonably speculative, BOEM estimated a reduction in foreign demand in preparing for the very next lease sale (Lease Sale 258). The court reasoned that if BOEM could perform these calculations correctly in September 2021, they could have done so a year before.

The court declared the NEPA evaluation (the three EISs) to be inadequate. BOEM’s exclusion of foreign demand of oil from the total emissions calculation was deemed an arbitrary action. The court reasoned that it was arbitrary to identify an issue as important but exclude it from the total emissions calculation. The exclusion of foreign demand data completely changed the calculations that BOEM relied on for the lease program, so the court vacated the agency’s record of decision for Lease Sale 257. As a result, BOEM did not award or execute the leases to the developers to begin exploration and production activities despite accepting bids. The court found that the claims of economic loss by the State of Louisiana and the American Petroleum Institute, which had joined the suit as defendants, were speculative at this stage of the process.

The Appeal

Efforts to revive the \$191 billion dollar deal began shortly after the district court’s decision. The American Petroleum Institute and the State of Louisiana filed appeals in June 2022.¹²

Their briefs challenge the trial court’s analysis of NEPA’s extraterritorial reach, arguing that foreign emissions were not required to be considered in an EIS at the lease sale stage because downstream emissions are “years away” and the effects of climate change are “more speculative than the possibility of oil spills.” If the ruling stands, it could expand how federal agencies are required to consider downstream environmental effects outside of American territory. 🐦

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Endnotes

1. 43 U.S.C. § 1332(3).
2. *Friends of the Earth v. Haaland*, Civil Action 21-2317 RC (D.D.C. Jan. 27, 2022).
3. Bureau of Ocean Energy Management, 2017-2022 *National OCS Oil and Gas Leasing Program*.
4. Bureau of Ocean Energy Management, *Sale Day Statistics* (Nov. 17, 2021); *see also*, *Friends of the Earth v. Haaland*, Civil Action 21-2317 RC, 2022 WL 254526 (D.D.C. Jan. 27, 2022)
5. Bureau of Ocean Energy Management, *Notice of Availability for the Gulf of Mexico Outer Continental Shelf Lease Sale Final Supplemental Environmental Impact Statement 2018*.
6. National Environmental Policy Act, 42 U.S.C. § 4331.
7. *Friends of the Earth v. Haaland*, Civil Action 21-2317 RC, 2022 WL 254526 (D.D.C. Jan. 27, 2022).
8. Bureau of Ocean Energy Management, *Consumer Surplus and Energy Substitutes for OCS Oil and Gas Production: The 2015 Revised Market Simulation Model (MarketSim)*.
9. *See Ctr. For Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Management*, 555 F. Supp. 3d 739, 754 (D. Alaska 2021).
10. *Friends of the Earth v. Haaland*, No. 21-2317, 2022 WL 254526, *11 (D.D.C. Jan. 27, 2022).
11. Bureau of Ocean Energy Management, OCS Oil and Natural Gas Emissions and Social Cost of Carbon, (referring to OCS Oil and Natural Gas Emissions and Social Cost of Carbon, known as the Wolvovsky and Anderson Report).
12. Brief for Appellant American Petroleum Institute, *Friends of the Earth v. Haaland*, No. 22-5036 (D.C. Cir. filed 06/06/22), Brief for the State of Louisiana, *Friends of the Earth v. Haaland*, No. 22-5036 (D.C. Cir. filed 06/06/22).