Public Land & Resources Law Review

Volume 0 *Case Summaries 2021-2022* Article 4

5-5-2022

Friends of the Earth v. Haaland Case Summary

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Friends of the Earth, v. Haaland, No. 21-2317, 2022 U.S. Dist. LEXIS 15172 (D.D.C. Jan. 27, 2022).

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A federal district court vacated the U.S.'s largest offshore oil and gas lease sale ever because of an inadequate NEPA analysis. The court found that the BOEM's decision to exclude estimations of reductions in foreign oil consumption if no lease took place was arbitrary and capricious.

I. INTRODUCTION

In *Friends of the Earth v. Haaland,*[1] the District Court for the District of Columbia vacated the Bureau of Ocean Energy Management's ("BOEM") Lease Sale 257 due to defciencies in BOEM's National Environmental Policy Act ("NEPA") analysis.[2] The lease involved 80.8 million acres in the Gulf of Mexico for oil and gas drilling.[3] Environmental organizations Friends of the Earth, Healthy Gulf, Sierra Club, and Center for Biological Diversity ("Plaintiffs") filed suit against the secretary of the Department of Interior ("DOI"), the DOI, the assistant Secretary of the Interior for Land and Minerals Management, and BOEM ("Federal Defendants"). [4] The Plaintiffs claimed that BOEM violated the Administrative Procedure Act ("APA") and NEPA by aribtrarily excluding foreign greenhouse gas emissions from their No Action Alternative and failing to issue a Supplemental Enviromental Impact Statement ("Supplemental EIS") when one was necessary.[5] The court granted summary judgement in part for Plainttiffs and in part for Defendants, holding that BOEM's decision to exclude reductions in foreign emissions from its anaylsis was arbitrary and caprioious[6] but the decision to not issue an Supplemental EIS was backed by the evidence.[7]

II. FACTUAL AND PROCEDURAL BACKGROUND

BOEM's five-year oil and gas leasing plan for 2017-2022 included Lease Sale 257, the largest offshore lease in United States history, totaling 80.8 million acres.[8]. Five-year plans must comply with the Outer Continental Shelf Leasing Act ("OCSLA") when they issue leases in the

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1. No. 21-2317, 2022 U.S. Dist. LEXIS 15172 (D.D.C. Jan. 27, 2022).
2. *Id.* at *92–93, 76.
3. *Id.* at *2.
4. *Id.* at *11.
5. *Id.* at *29, 56.
6. *Id.* at *76.
7. *Id.* at *55–76.
8. *Id.* at *2 (Lease Sale 257 is located in the Gulf of Mexico).

Outer Continental Shelf.[9] Under OCSLA, leasing proceeds in four stages.[10] First, BOEM, an agency within DOI, prepares five-year schedules of proposed leases.[11] Next, BOEM accepts bids, issues leases, and allows lessees to explore and survey on the area after approval.[12] Then, BOEM requires lessees to propose a detailed exploration plan that shows exploration will not unduly harm aquatic life, the ecosystem, or sites of historical significance.[13] In the last stage, BOEM and affected local and state governments review the lessee's development and production plan and terminate the lease if the plan would "probably cause serious harm or damage to life, to property, to any mineral deposits, to the national security or defense, or to the marine, costal, or human environments."[14]

BOEM's lease sales must also comply with NEPA, which requires federal agencies to consider the environmental impact and alternatives to any proposed major federal action that significantly affects the environment.[15] Usually, multi-stage programs like OCSLA are allowed under NEPA to incorporate previous related analyses in a process called "tiering."[16] Although BOEM originally planned to issue a supplemental EIS once a year for the five-year plan, they only released one for Lease Sales 250 and 251 ("The 2018 Supplemental EIS").[17] On September 11, 2020, BOEM published a Determination of NEPA Adequacy that stated the Program EIS, Multisale EIS, and 2018 Supplemental EIS were sufficient for moving forward with Lease Sale 257.[18] Therefore, BOEM did not perform a Supplement EIS for Lease Sale 257, as it had originally planned to do.[19]

BOEM then issued a Record of Decision for Lease Sale 257 in January 2021, but quickly rescinded it due to President Biden's Executive Order 14,008,[20] which paused new oil and gas leases on both public lands and in offshore waters.[21] After a successful suit by Louisiana challenged the pause, BOEM resumed the sale in August 2021.[22] Shortly after,

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9. *Id.* at *4 (citing 43 U.S.C. § 1334 (2022)) (the Outer Continental Shelf refers to the submerged land extending approximately 200 miles into the sea from the United States).

10. *Id.* at *4–5.

11. *Id.* at *5.

12. *Id.*

13. *Id.* (citing 43 U.S.C. § 1340(g)(3) (2022)).

14. *Id.* at *5–6 (quoting 43 U.S.C. § 13(h)(1)(D)(i)) (internal quotation marks omitted).

15. *Id.* at *6 (citing 42 U.S.C §§ 4331, 4332(2)(C)).

16. *Id.* (citing WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 53 (D.D.C. 2019)).

17. *Id.* at *9–10.

18. *Id.* at *10 (this determination was made shortly before the presidential election and subsequent administration change).

19. *Id.* at 10.

20. 86 Fed. Reg. 7619, 7624–25 (Feb.1, 2021).

21. *Friends of the Earth*, 2022 U.S. Dist. LEXIS at *10.

22. *Id.* at *11 (citing Louisiana v. Biden, 543 F. Supp. 3d 388 (W.D. La. June 15, 2021)).

Plaintiffs sued the Federal Defendants[23] alleging violations of NEPA and the APA.[24] The State of Louisiana and the American Petroleum Institute ("API") intervened as defendants.[25] The challenged lease sale occurred on November 17, 2021, but has not yet officially been given to the highest bidder.[26] On January 27, 2022, the Court considered four cross-motions for summary judgement.[27]

III. ANALYSIS

The court first determined that Plaintiff's claims were ripe for review since no further NEPA analysis would take place after the Record of Decision.[28] In the most substantial part of the decision, the court held that BOEM's decision to exclude calculations of foreign greenhouse gas emissions in the No Action Alternative was arbitrary and capricious.[29] The court also held that BOEM's decision not to issue a Supplemental EIS was not arbitrary and capricious as there was no substantial new information or circumstances that warranted a Supplemental EIS.[30] The court finally held that vacatur was an appropriate remedy.[31]

A. Plaintiff's Claims were Ripe

The Court first considered whether Plaintiff's claims were ripe for review on motion from defendants API and Louisiana.[32] In order to be heard by an Article III court, claims must allege a "present injury."[33] In the context of NEPA, a claim is ripe when there has been an irreversible obligation of resources to an action with environmental consequences.[34] OCSLA claims are typically ripe once a lease sale has occurred, but not before.[35]

The Court found that when the action was filed, the Federal Defendants had signaled their intention hold the lease sale by publishing a Record of Decision in the Federal Register.[36] The Court explained that although there were more steps between the Record of Decision and

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23. *Id.*
24. *Id.*
25. *Id.* at *11–12.
26. *Id.* at *12.
27. *Id.* at *12–13.
28. *Id.* at *17.
29. *Id.* at *45–46.
30. *Id.* at *55–56.
31. *Id*. at *92–93.
32. *Id.* at *17.
33. *Id.* at *15, 18 (citing Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 48 (D.C. Cir. 1999).
34. *Id.* at *16 (citing Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 480 (2009)).
35. *Id.* at *16–17; *see Ctr. for Biological Diversity*, 563 F.3d at 480; Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 599 (2015).
36. *Id.* at *17.

issuance of leases, none of the steps past the publishing required further NEPA analysis.[37] Further, BOEM's discretion is limited past this stage, there would have to be compensation provided if the lease was canceled, and ancillary activity can begin immediately.[38] Thus, the court determined the awarding of the lease represented an irreversible commitment of resources for an action with environmental consequences, making the case ripe.[39]

B. BOEM's Exclusion of Foreign Greenhouse Gas Emissions was Arbitrary and Capricious

After the court determined the case was ripe, it turned to whether BOEM's exclusion of foreign greenhouse gas emissions from its NEPA analysis was arbitrary and capricious.[40] Although it does not bind the agency to any course of action, NEPA analysis requires agencies to take a "hard look" at the environmental consequences of an action and ensures transparency.[41] An agency action may be set aside by a court if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42] An action is determined to be arbitrary or capricious if the "agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence. . .or is so implausible that it could not be ascribed to a difference in view."[43] When applying this standard of review to NEPA, the agency's assessment should be considered satisfactory unless the deficiencies are important enough to "undermine informed public comment and informed decision-making."[44] Leases subject to OCSLA are still subject to NEPA before the lease sale stage and OCSLA review does not lessen or replace NEPA analysis.[45]

In the programmatic EIS, BOEM analyzed likely emissions under the proposed program and if no leasing took place.[46] Using a market simulation model called MarketSim to estimate downstream emissions, BOEM concluded that emissions would be slightly higher if no leasing took place.[47] Although the MarketSim model did identify a substantial

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37. *Id.*
38. *Id.* at *28.
39. *Id.* at *28–29.
40. *Id.* at *29.
41. *Id.* at *6.
42. *Id.* at *14 (quoting 5 U.S.C. § 706(2) (2022)) (internal quotation marks omitted).
43. *Id*. (quoting Motor Vehicle Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).
44. *Id.* at *15 (quoting Sierra Club v. FERC, 867 F.3d 1357, 1368 (D. C. Cir. 2017)) (internal quotation marks omitted).
45. *Id.* at *7.
46. *Id.* at *29–30.
47. *Id.* at *30–31.

decrease in foreign oil consumption if no leasing took place, this was excluded from the final emissions analysis.[48]

In determining whether this exclusion was arbitrary and capricious, the Court found analysis from the Ninth Circuit and District Court for the District of Alaska compelling.[49] Both cases evaluated the MarketSim Model and the same assumption of excluding foreign consumption.[50] In *Biological Diversity*, the Ninth Circuit found the exclusion to be arbitrary and capricious, holding a qualitative estimate or a more thorough explanation for why an estimate could not be done was needed.[51] In *Sovereign Inupiat*, the District Court for Alaska arrived at a similar conclusion even though there was a longer explanation for the exclusion, with the court reasoning that the agency did not describe the research used to arrive at that conclusion or address other studies in the agency record.[52]

Here, the court determined the exclusion of foreign emissions was arbitrary and capricious, even when granting substantial deference to the agency, since the decision was about scientific data within its technical expertise.[53] First, the court addressed whether considering the downstream effects of emissions from consumption was too speculative.[54] The court distinguished this from other cases revolving around oil spill risk since reduction in foreign consumption can be calculated just as easily at the lease stage as at the development stage.[55]

The court then distinguished the current case from *Sierra Club v. U.S. Department of Energy*,[56] where the agency did not have to consider the potential for liquified natural gas to compete with renewables in calculating foreign emissions.[57] Whereas in *Sierra Club*, the resulting calculation was likely to be too speculative to inform decision-making, here, the court reasoned a more complete consideration of emissions would have been no more speculative than the current calculation and could have significantly affected decision-making.[58]

The court then pointed out BOEM's assertion that it could not have accurately estimated foreign emission was undermined by evidence in the record that BOEM modeled a decrease and had the ability to convert

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48. *Id.* at *32.

49. *Id.* at 32–34; Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir. 2020); Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt., No. 3:20-cv-00290, 2021 U.S. Dist. LEXIS 155471 (D. Alaska Aug. 18, 2021)).

50. *Friends of the Earth*, 2022 U.S. Dist. LEXIS at *32.

51. *Id.* at *33 (citing *Ctr. for Biological Diversity*, 982 F.3d at 740).

52. *Id.* at *33–34 (citing *Sovereign Inupiat for a Living Arctic*, 2021 U.S. Dist. LEXIS at *10–11).

53. *Id.* at *76, 35.

54. *Id.* at *36.

55. *Id.* at *36–37.

56. 867 F.3d 189 (D.C. Cir. 2017).

57. *Friends of the Earth*, 2022 U.S. Dist. LEXIS at *37–38.

58. *Id.* at *38–39.

that decreased consumption into decreased emissions.[59] The Wolvovsky and Anderson Report in the agency record showed a reduction in foreign oil consumption of millions of barrels of oil.[60] The record also included papers from the Stockholm Environment Institute that emphasized a likely decrease in foreign oil consumption and provided a formula to convert barrels of oil into greenhouse gas emissions.[61] The court emphasized when there is missing or incomplete information, an agency must do more than simply acknowledge it.[62] The agency must also explain the information's relevance and summarize the existing credible scientific evidence that is available.[63] The court concluded that BOEM's decision to exclude foreign emission and the reasoning for doing so was arbitrary and capricious.[64] BOEM should have given the best available qualitative analysis or explained in detail why it could not.[65]

C. BOEM's Decision not to Prepare a Supplemental EIS was not Arbitrary and Capricious

After holding that the exclusion of foreign emissions was arbitrary and capricious, the court addressed whether BOEM should have prepared a Supplemental EIS before Lease Sale 257.[66] A Supplemental EIS should be prepared when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts."[67] The court addressed Plaintiff's concerns regarding new climate change science, an accountability report on the agency responsible for pipeline safety, potential change in depth of drilling, effects of drilling on the Rice Whale, hazards with fracking, and BOEM's consideration of the site for offshore wind.[68] The court determined that the new information presented by the Plaintiffs was not enough to show that Sale 257 would affect the environment significantly more than already considered in the Programmatic EIS and 2018 Supplemental EIS.[69] Therefore, an additional Supplemental EIS was not necessary for Lease Sale 257.[70]

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59. *Id.* at *41–42.
60. *Id.* at *41.
61. *Id.* at *42.
62. *Id.* at *43–44 (citing 40 C.F.R. § 1502.22 (2022)).
63. *Id.*
64. *Id.* at *45–46.
65. *Id.*
66. *Id.* at *54–55.
67. *Id.* at *55 (quoting 40 C.F.R. § 1502.9(c)(1)(ii)) (internal quotation marks omitted).
68. *Id.* at *55–76 (explaining why each topic did not meet the standard necessary to require a Supplemental EIS).
69. *Id.* at *56.
70. *Id.*

D. Vacatur of the Lease is an Appropriate Remedy

Having determined that BOEM's exclusion of foreign emissions was arbitrary and capricious, the court turned to what the appropriate remedy should be.[71] The typical remedy for an unlawful agency action that violates NEPA is vacatur.[72] The decision to set an agency action aside depends on the seriousness of the order's deficiencies and how disruptive vacatur is likely to be.[73] The court found that the deficiency was serious due to it substantially undermining BOEM's conclusion that more greenhouse gas emissions would take place without the lease.[74] The court also found the disruptive consequences of vacatur would be minimal considering the lease has not yet been conferred and no exploration has taken place.[75] The court acknowledged there are some disruptive consequences in BOEM having to hold another lease sale before the end of the five-year plan and participants in the sale having publicly disclosed their valuation of the land, but these are not significant enough to outweigh the seriousness of the NEPA error.[76] The court concluded that the Record of Decision for Lease Sale 257 should be vacated and remanded to the agency for further proceedings.[77]

IV. CONCLUSION

The immediate impact of this decision is substantial, as Lease Sale 257 was the largest offshore oil and gas lease in U.S. history.[78] There will be a chance for an accurate accounting of foreign emissions reduction to influence whether to grant the lease again or whether to modify it. Especially with a new administration very focused on climate change, this revisiting of the lease has a lot of potential to change which direction the United States takes in offshore development of resources.

Beyond the immediate implications, the court following the Ninth Circuit and District of Alaska moves NEPA analysis in the direction of requiring a qualitative estimate of impacts like foreign emission reductions. This encourages a more rigorous and global perspective when considering the environmental impacts of major federal actions. NEPA analysis has often been more focused on local and national effects, so multiple courts requiring agencies to consider the effect of leases on foreign emissions is a turn towards an interconnected view of countries' decisions affecting climate change.

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71. *Id.* at *76.
72. *Id.* at *77 (citing Standing Rock Sioux Tribe v. Army Corps of Eng'rs, 985 F.3d 1032, 1050 (D.C. Cir. 2021).
73. *Id.* at *79.
74. *Id.* at *80–81.
75. *Id.* at *83–84.
76. *Id.* at *82–88.
77. *Id.* at *92–93.
78. *Id.* at *2.