

## Latest Twist in Oil and Gas Lease Moratorium: Court Revokes Federal Oil and Gas Lease Sale, Citing Faulty Climate Review

04 February 2022

On January 27, 2022, the U.S. District Court for the District of Columbia (“D.C. District Court”) vacated the results of the Department of the Interior’s Bureau of Ocean Energy Management’s (“BOEM’s”) Lease Sale 257, effectively canceling the sale of certain oil and natural gas leases in the Outer Continental Shelf, Gulf of Mexico. The decision was issued against the larger backdrop of the Biden administration imposing a moratorium on new leases for oil and gas development on federal lands and waters, and subsequent legal challenges from industry and environmental groups. Below, we summarize this decision, the general context in which the decision was issued and implications going forward. The Biden administration’s and certain federal courts’ focus on the climate change impacts of federal projects could result in significant changes to the federal oil and gas leasing program.

### Background — The 2021 Biden Climate Order and Rescission of Lease Sale 257

As discussed in a [prior Kirkland & Ellis blog post](#), one year prior to the D.C. District Court’s decision, in January 2021 President Biden signed Executive Order 14008, which among other things, temporarily halted new oil and gas leases on federal lands and waters, pledging that his administration would “reset” the federal oil and gas leasing program (the “Climate Order”).<sup>1</sup> Specifically, Section 208 of the Climate

Order called for the Secretary of the Interior to “pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of federal oil and gas permitting and leasing practices in light of the Secretary of the Interior’s broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.”<sup>2</sup> The Climate Order also rescinded the BOEM Record of Decision for Lease Sale 257 – a large area in the Gulf of Mexico – which BOEM had issued in the final days of the Trump administration. BOEM had issued the Record of Decision following its Determination of National Environmental Policy Act (“NEPA”) Adequacy issued on September 11, 2020. The Determination of NEPA Adequacy concluded that previous relevant environmental impact analyses were sufficient to comply with NEPA for the purpose of moving ahead with Lease Sale 257.

In March 2021, Louisiana and a coalition of states sued the Biden administration, arguing that in its decision to rescind Lease Sale 257, the Department of the Interior violated the Administrative Procedure Act (“APA”) by acting in an arbitrary and capricious manner, failing to provide notice and comment, and unreasonably withholding and delaying agency required activity.<sup>3</sup> On June 15, 2021, the U.S. District Court for the Western District of Louisiana agreed with the challenging states and issued a nationwide preliminary injunction, holding that the states’ APA claims had a substantial likelihood of success on the merits, effectively restraining the Biden administration from implementing a pause of new oil and natural gas leases on federal lands and waters.<sup>4</sup> As such, in accordance with the injunction, BOEM moved forward with Lease Sale 257, issuing another Determination of NEPA Adequacy in August 2021, stating that a supplemental environmental impact study (“EIS”) was not required for the sale to proceed. The lease sale was held on November 17, 2021, bringing in \$191 million. It was expected that the earliest any lease from the sale would become effective was February 1, 2022, but as of the date of publication, the leases have not been awarded. Certain environmental groups brought suit in the D.C. District Court immediately after the lease sale was completed.

On January 27, 2022, the D.C. District Court vacated the results of BOEM’s Lease Sale 257, effectively canceling the sale. As described in further detail below, the D.C. District Court held that BOEM acted in an arbitrary and capricious manner in conducting the sale because BOEM excluded consideration of foreign consumption of oil and natural gas from its greenhouse gas emissions (“GHG”) analysis. The D.C. District Court focused on BOEM’s reliance on the same set of quantitative data to both announce the sale in September 2020 and then reinstate the sale in August

2021.

## NEPA Challenges

While the Department of the Interior and, consequently, BOEM, has the authority to regulate offshore oil and gas leases pursuant to the Outer Continental Shelf Lands Act (“OCSLA”), NEPA imposes additional obligations on the agency as part of its decision-making process. NEPA is “a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process.”<sup>5</sup> Here, BOEM released programmatic EISs in 2016 and 2017 for the entire five-year leasing program, and intended to release a supplemental EIS annually.<sup>6</sup>

The D.C. District Court reviewed BOEM’s decision under the APA. Under the APA, a reviewing court may set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”<sup>7</sup> which applies when assessing NEPA compliance.<sup>8</sup> Courts typically give an “extreme degree of deference” when the agency is evaluating scientific data within its technical expertise, as was the case here.<sup>9</sup> The NEPA rule of reason dictates that agency assessment is sufficient unless deficiencies are significant enough to undermine informed public comment and decision-making.<sup>10</sup> An agency’s NEPA obligations only mature once it reaches a critical stage of a decision that will result in irreversible/irretrievable commitments of resources to an action affecting the environment. The D.C. District Court concluded that the NEPA challenge was ripe for review, as this matter is already at the lease sale stage of the OCSLA process and legal consequences would flow from BOEM’s decision.<sup>11</sup>

The environmental group plaintiffs first challenged the adequacy of BOEM’s calculation of total GHG emissions under NEPA. Specifically, the plaintiffs alleged that BOEM should not have excluded foreign GHG emissions from its quantitative calculation in the No Action Alternative in the EIS. The exact methodology, model and assumptions that BOEM used in the instant case were recently evaluated in other cases by the Ninth Circuit<sup>12</sup> and the U.S. District Court for the District of Alaska;<sup>13</sup> both of which found that the analysis was arbitrary and capricious.<sup>14</sup> As in the instant case, the model assumed that foreign oil consumption will remain static, and that the No Action Alternative would result in a reduction of oil consumption, but did not include the effect on GHG emissions due to those reductions. The Ninth Circuit found that BOEM should have either given a quantitative estimate of the

indirect GHG emissions from foreign consumption or explained in more detail why it could not do so.<sup>15</sup> Here, the D.C. District Court found that BOEM's analysis, while entitled to deferential review,<sup>16</sup> was arbitrary and capricious in line with the Ninth Circuit's reasoning.<sup>17</sup> While the D.C. District Court acknowledged that BOEM provided more details on its rationale in its Determination of NEPA Adequacy for the lease sale, the court said the explanation did not thoroughly justify the agency's decision to exclude foreign emissions.<sup>18</sup>

The second NEPA claim alleged by the environmental group plaintiffs was that BOEM failed to prepare a supplemental EIS and thus did not fulfill NEPA requirements. Despite ultimately concluding that BOEM's NEPA analysis was flawed, the D.C. District Court found that the plaintiffs' "compelling litany of information" still failed to show that the remaining action will affect the quality of the human environment to a significant extent not already considered.<sup>19</sup>

Courts ordinarily will vacate unlawful agency actions that violate NEPA.<sup>20</sup> Here, the D.C. District Court found that BOEM's failure to include foreign GHG emissions in its analysis constituted a serious failure, and while courts have discretion as to the remedy, the court ultimately decided to vacate the Record of Decision for the lease sale and to remand the issue to BOEM.<sup>21</sup> While the D.C. District Court recognized the potentially disruptive consequences of vacating the already completed sale, it noted that the standard remedy of vacatur in such instances "serves to avoid creating perverse incentives for [BOEM] to press forward with a faulty decision and fill in its analysis later."<sup>22</sup> Specifically, the D.C. District Court found that "when it comes to NEPA, it is better to ask for permission than forgiveness; if you can build it first and consider environmental consequences later, NEPA's action-forcing purpose loses its bite."<sup>23</sup> As such, the D.C. District Court noted that because the leases from the November 2021 sale have not yet been awarded to the winning bidders or become effective, BOEM would not have to unravel the past transaction in order to impose a new outcome.

## What Happens Next?

Currently, BOEM is reviewing the decision but has not yet decided whether the agency will appeal the ruling or conduct a new environmental review with the intent to hold another lease sale. Meanwhile, the Biden administration has signaled its intent to strengthen and streamline the NEPA review process, proposing a two-phase rulemaking (with the second-phase rule expected in 2022) to roll back the

Trump administration’s NEPA measures and directing the Council on Environmental Quality (“CEQ”) to rescind prior draft guidance and direct federal agencies to quantify and consider a proposed action’s projected direct and indirect GHG emissions in their NEPA reviews. Additionally, Department of the Interior spokespersons have stated that they have “documented serious deficiencies in the federal oil and gas program . . . especially in the face of the climate crisis,” and that the Department intends to make significant and long overdue programmatic reforms.<sup>24</sup> In response to the Climate Order, which directed the Department of the Interior to conduct a review of federal oil and gas leasing and permitting practices, the Department issued a report in November 2021 summarizing its review and recommendations for reform.<sup>25</sup> The report found “significant shortcomings,” including that the current system does not give taxpayers fair returns nor fully account for environmental harm, and that the current system encourages speculation by, and decreases competition among, energy companies.<sup>26</sup> These findings, together with the Biden administration’s and CEQ’s focus on strengthening and streamlining NEPA reviews, particularly to consider the climate change impacts of federal projects, could result in significant changes to the federal oil and gas leasing program.

---

1. Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021) (the “Climate Order”), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.↵

2. *Id.*↵

3. *State of Louisiana v. Biden*, 543 F. Supp.3d 388 (W.D.La. 2021) (an appeal has been filed in the 5th Circuit). ↵

4. *Id.* at 43.↵

5. 40 C.F.R. § 1500.1 (2019).↵

6. *Friends of the Earth et al. v. Haaland*, 2022 WL 254526 at \*3 (D.D.C. Jan. 27, 2022).↵

7. *Id.* at \*5.↵

8. *Id.*↵

9. *Id.*↵

10. *Id.*↪

11. See *id.* at \*20.↪

12. *Id.* at \*11-12 (citing *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020)).↪

13. *Id.* (citing *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 3-20-cv-00290, 2021 WL 3667986 (D. Alaska Aug. 18, 2021)).↪

14. *Id.*↪

15. *Id.*↪

16. *Id.* at \*12.↪

17. *Id.* at \*16-17.↪

18. *Id.*↪

19. *Id.* at \*18.↪

20. *Id.* at \*25.↪

21. *Id.*↪

22. *Id.*↪

23. *Id.*↪

24. Offshore Magazine, *Federal judge vacates Gulf of Mexico Lease Sale 257*, [www.offshore-mag.com](http://www.offshore-mag.com) (Jan. 28, 2022), <https://www.offshore-mag.com/regional-reports/us-gulf-of-mexico/article/14232821/federal-judge-vacates-gulf-of-mexico-lease-sale-257>.↪

25. Dept. of the Interior, *Report on the Federal Oil and Gas Leasing Program*, [www.doi.gov](http://www.doi.gov) (Nov. 2021) available at <https://www.doi.gov/sites/doi.gov/files/report-on-the-federal-oil-and-gas-leasing-program-doi-eo-14008.pdf>.↪

26. Dept. of the Interior, *Interior Department Report Finds Significant Shortcomings in Oil and Gas Leasing Programs*, [www.doi.gov](http://www.doi.gov) (Nov. 26, 2021), available at <https://www.doi.gov/pressreleases/interior-department->

- Read [all insights](#) from the Energy & Infrastructure Blog.
- Read more [Environmental](#) or [Oil & Gas](#) insights.
- [Subscribe](#) to receive future updates.

## Authors

Rahul D. Vashi, P.C.

Partner / Houston

Jonathan E. Kidwell

Partner / Dallas

Ty'Meka M. Reeves-Sobers

Partner / Houston / Austin

Jennifer C. Cornejo

Of Counsel / Houston

Tyler Burgess

Associate / Washington, D.C.

Caleb Anderson

Associate / Houston

Alex Noll

Associate / Houston

## Related Services

Practices

- Energy & Infrastructure
- Environmental
- Transactional

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.

This publication may cite to published materials from third parties that have already been placed on the public record. The citation to such previously published material, including by use of “hyperlinks,” is not, in any way, an endorsement or adoption of these third-party statements by Kirkland & Ellis LLP.

©2022 Kirkland & Ellis LLP.