

IS CLIMATE CHANGE THE NEW STANDARD FOR OIL AND GAS PERMITS? COURT'S DECISION REVOKES OIL AND GAS LEASE SALE

In a decision that could potentially have significant long-term impact, in *Friends of the Earth v. Haaland*, the United States District Court for the District of Columbia, vacated the results of the Bureau of Ocean Energy Management's (BOEM's) Lease Sale 257.¹ Lease 257 was made up of approximately 80 million acres on the Outer Continental Shelf (OCS) in the Gulf of Mexico and would have been the largest offshore oil and gas lease sale in U.S. history. The District Court's decision cancelled the sale due to BOEM's alleged failure to consider climate change as part of an environmental review required under the National Environmental Policy Act (NEPA).

The Friends of the Earth decision comes in the wake of the Biden Administration's 2021 Climate Change Order set forth in 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").

This decision may impact the procedural requirements and scope of analysis required for federal leasing of oil and gas fields. If adopted by other courts, the Friends of the Earth holding could be extended to require climate change to be considered when assessing the environmental impact of not only federal oil and gas leasing, but across the entire spectrum of oil and gas activities.

The Statutory and Regulatory Context of Leasing on the OCS

Overview

- The Outer Continental Shelf Lands Act (**OCSLA**) gives the federal Government, through BOEM, the right to issue oil and gas leases on the OCS, which is federal land. BOEM therefore has the statutory authority to regulate offshore oil and gas leases issue permits for oil and gas activities on the OCS. A lease sale is the process by which BOEM transfers the right to private actors to explore and develop the mineral resources in a specific area on the OCS.
- During the lease process, BOEM is required to consider environmental impacts associated with lease sales. NEPA is a procedural statute intended to ensure federal agencies consider the environmental impacts of their actions in the decision-making process. NEPA requires federal agencies, including BOEM, to identify alternatives for an agency's proposed action. Therefore, BOEM's proposed Lease Sale 257 was required to undergo a NEPA review process.

OCSLA and Environmental Review

- The OCSLA dictates that the first step is to prepare and maintain a schedule of proposed lease sales. Then the Department of Interior (**DOI**) solicits bids and issues leases for offshore leasing areas. Finally, the lessee submits a detailed exploration plan and the DOI may only approve if exploration **"will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archaeological significance."**⁴³ U.S.C. § 1340(g)(3).

¹ See 2022 WL 25425 (D.D.C January 27, 2022).

NEPA Considerations

- Before authorizing any OCS activities, BOEM is required under NEPA and numerous other environmental laws to ensure that the agency's proposed activities will be conducted in a safe and environmentally friendly manner. NEPA requires that an agency prepare a detailed environmental impact statement that includes:
 - the environmental impact of the proposed action,
 - any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - alternatives to the proposed action,
 - the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity, and
 - any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

The District Court's Decision

The 2021 Biden Climate Order & Lease Sale 257

- In January 2021, the Biden administration signed Executive Order 14008: "Tackling Climate Crisis at Home and Abroad" (the "**Executive Order**") Under Section 208 of the Executive Order, the Secretary of Interior was asked to "pause new oil and gas leases on public land and offshore waters" and was encouraged to undertake a rigorous review of existing programs related to fossil fuel development. As a result of Executive Order 14008, Lease Sale 257, was impacted.
- The crux of the dispute was whether BOEM's NEPA review was legally sufficient. Based on a Determination of NEPA Adequacy, BOEM issued its first Record of Decision for Lease Sale 257 in January 2021, during the final days of the Trump administration, which would allow the sale to go forward. But just a few days later, President Biden issued Executive Order 14008, and BOEM then reversed course and rescinded its prior Record of Decision authorizing Lease Sale 257 to go forward.

The Louisiana Injunction Suit

- As background, the *Friends of the Earth* court briefly summarized an action pending in the United States District Court for the Western District of Louisiana² (**Western District**) as follows:
- In March 2021, a lawsuit was filed against the Biden administration in the Western District on behalf of 13 states seeking an injunction against the "pause" under Section 208 of the Executive Order 14008, based on the assertion that the Biden Administration 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.³ On June 15, 2021, the Western District of Louisiana agreed and issued a nationwide preliminary injunction blocking the Biden Administration's pause.⁴ As such, in accordance with the injunction, BOEM moved forward with Lease Sale 257, issuing a Determination of NEPA Adequacy, stating that a supplemental environmental impact study (**EIS**) was not required for the sale to proceed. BOEM published the record of decision in relation to Lease 257 and proceeded with the sale in November 2021.⁵

Vacatur of the Sale of Lease 257⁶

- In *Friends of The Earth*, several environmental groups challenged the renewal of Lease Sale 257 by filing suit in the United States District Court for the District of Columbia. The Plaintiffs alleged that BOEM violated NEPA and the APA, based on BOEM's failure to prepare additional environmental studies and improperly exclude greenhouse gases (**GHG**) from its consideration.
- The Court reviewed BOEM's decision under the APA, which provides the decision of a federal agency with great deference.⁷ Ultimately, the District of Columbia vacated the Sale of Lease 257.
- The District Court considered what should have been the appropriate scope of environmental impact that must be considered by BOEM before approving the lease sales. According to the District Court, BOEM failed to consider the impact of climate change in its review and had to calculate the total greenhouse gas emissions from Lease Sale 257. **BOEM chose to exclude foreign greenhouse gas emissions from its analysis and only considered domestic greenhouse gas emissions, which the District Court found was inadequate.**

² The caption and cause number is *Louisiana v. Biden*, Cause No. 2:21-cv-778.

³ *Louisiana v. Biden*, 2021 WL 2446010 (W.D. La. June 15, 2021).

⁴ *Id.*

⁵ Around the same time, in April 2021, another lawsuit was filed by 10 States against the Biden Administration seeking a declaratory and injunctive relief against Executive Order 13990 ("EO 13990"). EO 13990 reinstated the interagency working group on social costs of greenhouse gas emissions and ordered the group to publish interim estimates for the social costs of greenhouse gas emissions. The motion was granted on February 11, 2022. See *Louisiana v. Biden*, 2022 WL 438313 (W.D. La. Feb. 11, 2022).

⁶ *Friends of The Earth, et Al.*, 2022 WL 25425 (D.D.C. January 27, 2022).

⁷ 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," which applies when assessing NEPA compliance.

The Potential Impact of the *Friends of the Earth* Ruling on the Future of Offshore Energy in the U.S.

- Given the decisions rendered by Ninth Circuit and two federal District Courts, climate change and the calculation of "social costs" related to greenhouse gases appears to be a factor that BOEM and other federal agencies that oversee oil and gas activities, must consider under NEPA.
- The *Friends of the Earth* decision comes at a time when the Council on Environmental Quality (**CEQ**) issued [Proposed Rulemaking](#) to strengthen and streamline the NEPA review process and to roll back the Trump administration's NEPA measures.⁸ The proposed Rulemaking includes initiatives such as rescinding prior draft guidance and directing federal agencies to quantify and consider a proposed action's projected direct and indirect GHG emissions in their NEPA reviews.⁹ This decision reinforces the Biden administration's climate change priority of reassessing fossil fuel leasing and strengthens the administration's 2050 goal of moving towards a carbon free world.
- As it stands now, the *Friends of the Earth* ruling requires BOEM to review the environmental analysis and reassess the greenhouse gas modeling, after which it will need to decide whether to move forward with a new lease sale. The vacatur of the sale could ultimately bring significant changes to offshore oil drilling and may pave the way for how federal agencies consider oil and gas operations in the future. That being said, the *Friends of the Earth* decision is a district court opinion. The American Petroleum Institute has filed a timely notice of appeal in the United States District Court for the District of Columbia. It therefore remains to be seen whether the *Friends of the Earth* decision has a long-term impact.

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⁸ See <https://www.natlawreview.com/article/nepa-old-becomes-new>

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