



## D.C. Court of Appeals Remands Two Offshore Oil and Gas Leases for NEPA Inadequacy

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In *Gulf Restoration Network v. Haaland*, No. 1:18-cv-01674 (Aug. 30, 2022), the D.C. Court of Appeals remanded, without vacating, two offshore oil and gas lease sales after finding the Department of the Interior's National Environmental Policy Act ("NEPA") analysis inadequate. The lease sales at issue—Lease Sale 250 and 251—span over 150 million acres in the Gulf of Mexico. While presented as a continuation of existing NEPA case law, the decision may have significant impacts on the consideration of enforcement capabilities in other federal lease NEPA contexts. The case appears to be the first time a court has remanded a NEPA review for failure to consider the adequacy of an existing agency enforcement program. Additionally, the case may serve as an impetus for reforms in offshore oil and gas enforcement.

### Background

The two leases at issue in the case, 250 and 251, were part of 11 oil and gas sales proposed by the Bureau of Ocean Energy Management ("BOEM") in its 2017-2022 five-year plan and were issued in 2018 under the Trump administration. For these lease sales, BOEM performed three NEPA environmental documents: (1) a programmatic Environmental Impact Statement ("EIS") for the five-year plan, (2) a more focused multi-sale EIS addressing impacts of leasing in the Gulf of Mexico, and (3) a supplemental EIS specific to Lease Sale 250 and 251.

### Summary of Decision

On appeal, the D.C. Court of Appeals upheld the supplemental EIS for Lease Sales 250 and 251 as adequate on all but one issue. First, the court addressed a complicated issue on whether BOEM's NEPA review adequately considered the option of *not leasing*. The environmental organizations challenging BOEM's NEPA review argued that BOEM did not include a "true" no action alternative, the cancellation of all future planned leases. The court concluded that BOEM had in fact considered a true no action alternative—in the earlier programmatic EIS, which was then incorporated by reference into the supplemental EIS for Lease Sale 250 and 251.

Second, the court concluded that BOEM reasonably refused to consider potential future regulatory changes. The environmental organizations argued that the NEPA review should have considered whether certain safety regulations were likely to remain in effect—specifically the 2016 production safety and well control rules. BOEM had relied on these rules in its NEPA analysis, concluding that the rules would help minimize the risk of a spill. The court considered that at the time BOEM issued the supplemental EIS for Lease Sales 250 and 251, nothing in the record demonstrated that BOEM had specific information about an anticipated rule change. Accordingly, the court concluded that BOEM did not act arbitrarily, reasoning that "[a]n agency need not consider [as part of NEPA review] regulatory developments that are so inchoate as to be not meaningfully possible to analyze."

Third and finally, the court found that BOEM's NEPA environmental review failed to consider possible deficiencies in offshore environmental enforcement. A scathing 2016 [Government Accountability Office \("GAO"\) report](#) detailed the failings of BOEM's sister agency, the Bureau of Safety and Environmental Enforcement ("BSEE"). Specifically, the GAO concluded that BSEE continues to use outdated investigative policies and procedures and that BSEE's ongoing restructuring has reversed the limited progress the agency had made in enhancing the bureau's investigative capabilities. The court noted that BOEM repeatedly considered and cited BSEE's authority to implement requirements for safe operations and environmental protection in the programmatic EIS, multi-sale EIS, and supplemental EIS for Lease Sales 250 and 251, but that BOEM arbitrarily declined to consider the GAO report and failed to explain why the GAO report did not raise significant concerns about the effectiveness of BSEE's enforcement program. Notably, however, the court credited government counsel's arguments defending why the GAO report did not raise significant concerns about BSEE enforcement but explained that it could not affirm based on "post hoc litigation rationalization."

## Implications

The D.C. Court of Appeals remanded the supplemental EIS for Lease Sales 250 and 251, records of decision announcing Lease Sales 250 and 251, and corresponding leases to Interior for further review. Notably, the court *did not vacate* the lease sales. While vacatur is the typical remedy in appeals based on NEPA adequacy, the court noted that the plaintiff environmental organizations had not identified any harm that flowed from leaving the sales in place as exploration and development cannot occur absent further regulatory approvals from Interior. Overall, this decision reinforces the long trend of NEPA decisions in which courts have concluded that NEPA environmental review is adequate where the record demonstrates that the reviewing agency clearly considered and analyzed the impacts of an issue raised during the environmental review process, and inadequate where the reviewing agency effectively dismissed a concern without analysis. In this instance, the court seemed to indicate that it would not be difficult for BOEM to cure its error of failing to address concerns regarding BSEE's enforcement program, particularly the 2016 GAO report.

Ultimately, the court's decision turned on BSEE's enforcement capability even though the court was considering BOEM's environmental reviews for the leasing stage. The court relied heavily on an Army Corps of Engineers case (*Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581 (4th Cir. 2012)) where the NEPA review failed to consider the complete lack of any enforcement program. The court indicated that the precedent was not limited to where there is no enforcement program—but also includes where an existing enforcement program is inadequate. The court did not provide guidance on what kinds of enforcement program would pass muster in this context, and it is possible that BOEM could have simply explained why the criticism of BSEE's enforcement program did not affect the environmental impacts of BOEM's leasing decision. Applicants and project developers involved in leasing—or potentially any action which would be subject to federal regulatory oversight—should identify any specific criticism of that regulatory enforcement program and consider advocating for a specific consideration of such criticism in the NEPA review.

Additionally, the court's decision shined a spotlight on the 2016 GAO report, and stakeholders should pay attention to whether BSEE takes further actions to address perceived enforcement gaps. Among other things, BSEE could address offshore operational and environmental risks by enforcing a provision that was contained in the Well Control Rule, which may create challenges for industry by mandating that companies conducting offshore operations affirmatively address and mitigate risks (see previous [alert](#) for additional information).

## For More Information

If you are interested in additional information about offshore development, federal environmental regulations, or any matter facing those operating in the Oil and Gas industry, please contact [Mike Farber](#), [Molly Lawrence](#), [Mosby Perrow](#), or [Rachael Lipinski](#).

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