

## Court of Appeals Validates First Sale of Oil and Gas Leases in the Atlantic

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COURT OF APPEALS VALIDATES FIRST SALE  
OF OIL AND GAS LEASES IN THE ATLANTIC

As reported in the last issue of the Environmental Protection News (April, 1977), in February of 1977, federal district judge Jack Weinstein of the Eastern District of New York invalidated the first sale of leases for oil and gas development on the Atlantic outer continental shelf because of alleged inadequacies in the Environmental Impact Statement (EIS) prepared for the lease sale by the Department of the Interior. New York v. Kleppe, (February 17, 1977) 9 Envir. Rep.-Cas. (BNA) 1799. Weinstein's decision has been reversed by the Circuit Court of Appeals for the Second Circuit, thus giving the go-ahead for the first off-shore oil drilling on the Outer Continental Shelf of the Atlantic Ocean. County of Suffolk v. Department of the Interior, (August 25, 1977) 10 Envir. Rep.-Cas. (BNA) 1513 (2d Cir. 1977). The lease area lies off the Delaware and New Jersey coast.

In holding that the Department's EIS was in violation of the National Environmental Policy Act, Weinstein had concluded that the Department of Interior's EIS 1) failed to project potential pipeline routes to aid in evaluating their environmental and economic impacts, as well as restrictions on these pipelines pursuant to existing state and local land use controls; 2) substantially overestimated the projected daily production of the oil field and underestimated the costs of exploration and construction; 3) failed to properly evaluate the alternative of offering for lease less environmentally hazardous tracts; and 4) inadequately discussed the alternative of postponing the lease sale pending further federal exploration of the area to determine the actual existence of oil within the field. Additionally, Weinstein concluded that the Secretary of the Interior failed to evaluate the EIS in good faith and that the Department "had little interest in properly fulfilling its obligations under NEPA."

The circuit court found that the projection of possible pipeline routes would be futile given that 1) it is not known where, if at all, oil will be discovered; 2) no ocean bottom survey has been conducted; 3) no determination of state and local regulations may be made until the affected states complete their plans for coastal development under the Coastal Zone Management Act of 1972; 16 U.S.C. sec. 1451 (1972), as amended by Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, sec. 4, 90 Stat. 1015; and 4) at the time the EIS was drafted it was not known which companies, with refineries in what locations, would make successful bids.

Concerning the district court's determination that the cost-benefit analysis of the project overstated its feasibility, the circuit court held that because the district court had relied entirely on the testimony of a witness called by the plaintiffs, it had substituted its judgment for that of the Department, thus exceeding its proper scope of review. The court of appeals stated that "the district court does not sit as a super-agency empowered to substitute its scientific expertise or testimony presented to it de novo for the evidence received and considered by the agency which prepared the EIS."

The district court's criticism that the EIS failed to suggest alternate tracts for lease was held by the circuit court to be unfounded in light of the tract-selection procedure used by the Department. By identifying the 557 tracts (3.2 million acres) which were potentially oil-producing, and then eliminating all but 154 of the tracts (.5 million acres) after considering sixteen environmental criteria, the Department, said the circuit court, had given "proper consideration to alternatives of the type suggested by the district court."

In response to the claim of lack of good faith on the part of the Secretary, the court of appeals noted that the district court had changed its position on the Secretary's impartiality from favorable, in an earlier injunctive hearing, to discrediting, in its latest decision, without benefit of any additional "probative" evidence. This constituted an "unnecessary . . . disservice in the absence of supporting proof."

The circuit court emphasized that its reversal of the district court's decision was in no way a commitment of public resources to irreversible environmental damage. It expressed its faith in the Department's unqualified intention to allow transportation of discovered oil only after a thorough analysis of a Development Plan EIS which will be prepared in the event that oil or gas is discovered in substantial amounts. The future direction, then, of the oil and gas field leases may be determined only after the completion of state and local CZMA plans, adequate mapping of the affected areas on the ocean floor, and, of course, the eventual discovery of oil within the lease area, all of which will be evaluated in the Development Plan EIS.