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New Delays in the First Sale of Offshore Oil and Gas Leases in the Atlantic

NEW DELAYS IN THE FIRST SALE OF OFFSHORE OIL AND GAS LEASES IN THE ATLANTIC

The prospects for the future development of oil and gas resources off the Atlantic coast have again become clouded by litigation in the federal courts. Finding that the Secretary of the Interior had violated the National Environmental Policy Act and that the Department of Interior's Environmental Impact Statement was inadequate, Federal District Judge Jack Weinstien on February 17 voided the first sale of leases for the exploration and production of oil and gas resources off the Delaware and New Jersey coast. New York v. Kleppe, 9 E.R.C. 1799 (E.D. N.Y.) The decision is another step in what will apparently become a long journey through the courts for the lease sale.

On August 13, 1976, the same court had issued a preliminary injunction preventing the sale on the ground that the Secretary had, in deciding to proceed with the sale, "virtually ignored the power of the states and their political subdivisions to regulate the siting, construction and use of nearshore and offshore facilities." The court had noted that the banning of pipelines by states or municipalities due to impacts from construction or spillage was a real possibility. However the Environmental Impact Statement contained "no meaningful discussion" and reflected "no real awareness" of this possibility, and was therefore invalid.

The Second Circuit Court of Appeals had stayed the order of the district court on August 16, finding that the plaintiffs had not demonstrated that the lease sale would cause them the requisite "irreparable harm," and that there was a substantial question as to whether the plaintiffs would succeed on the merits of the case. 9 E.R.C. 1794. Justice Thurgood Marshall declined to overturn the stay, __ U.S. __, 97 S.Ct. 4 (1976), and the sale took place the following day, resulting in the sale of $1.1 billion of the leases.

When the final hearing resumed, the district court not only reaffirmed the original finding, but found other grounds to support the issuance of a permanent injunction against the sale. In addition to the Secretary's failure to consider the impact of local government powers, the court found that the Secretary had "failed to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry or could have been made by the Secretary or his agents The court said that this failure ". . . border[ed] on the irresponsible in view of NEPA's explicit mandate that all potential environmental considerations be weighed prior to the decision to proceed."

The court also found that the Environmental Impact Statement had failed to consider the impact of particular tracts or the feasibility of potential pipelines. Further, the Statement had neglected to consider the alternative of holding separate lease sales for the exploratory and production phases of development. In addition, the court held that the Statement's cost-benefit analysis required by the National Environmental Policy Act was faulty. Relying heavily on expert testimony, it found that the Statement had "greatly overstated peak oil and gas production . . . and significantly understated the cost of such production. . . ," thereby resulting in a lack of consideration of the necessity of bringing the oil and gas ashore via tanker instead of pipeline.

The court stated that each of these inadequacies violated both the letter and spirit of NEPA, finding that "adequate consideration of these factors might have led to modifications in the . . . leasing program, resulting in greater environmental protection without impairing reasonable exploitation of offshore hydrocarbon resources." Because the Environmental Impact Statement was so inadequate that it constituted "a failure to make a meaningful inquiry," the Secretary's decision to permit the sale was "arbitrary and capricious" and thus violated the National Environmental Policy Act. In addition to this conclusion, the court also found "substantial evidence" of a lack of good faith on the part of the Secretary, but refused to base its decision on this finding, having demonstrated "ample other grounds."

In reviewing the Secretary's decision, Judge Weinstien clearly engaged in a detailed probing of the Department's Environmental Impact Statement. This active review of the administrative findings is doubtless the result of concern over the potential impact of introducing oil and gas exploration and production in an area of the country that has had no experience with such development. While the sale involved leases offshore from Delaware and New Jersey, the Environmental Impact Statement itself noted that impact from the sale could be experienced from New York to Virginia. Based on the stakes involved and the Second Circuit Court of Appeal's earlier reveral of Judge Weinstein's granting of the preliminary injunction, an appeal will doubtless ensue.