
NATURAL RESOURCES JOURNAL

Volume 18
Issue 3 *Summer 1978*

Summer 1978

Standards of Adequacy for an EIS for Off-Shore Leasing

William Moyers

STANDARDS OF ADEQUACY FOR AN EIS FOR OFF-SHORE LEASING

ENVIRONMENTAL LAW–ADEQUACY OF AN EIS: Where a multistage project is involved an EIS need not discuss speculative impacts where specific information as to those impacts is not available. *County of Suffolk v. Secretary of Interior, 562 F.2d 1368 (2nd Cir. 1977).*

On August 25 of last year the U.S. Court of Appeals for the 2nd Circuit announced its decision in the well-publicized case of *County of Suffolk v. Secretary of Interior.*[1] The case involved the leasing of various tracts, off the East Coast of the United States, for oil and gas exploration. At stake were an estimated .4 to 1.4 billion barrels of oil worth approximately 5 to 17 billion dollars[2] and 2.16 to 9.4 trillion cubic feet of natural gas worth 4 to 14 billion dollars.[3] The holding by the 2nd Circuit allowed the Federal Government to proceed with the leasing of the tracts. This decision became final when the U.S. Supreme Court denied certiorari.[4]

The case has a long and rather involved history. In January 1974, the President proposed that the leasing of offshore oil and gas tracts be accelerated subject to the requirements set forth in the National Environmental Policy Act (NEPA).[5] After hearings were held around the country relative to this proposal, a programmatic environmental impact statement (PEIS) was published in final form on July 11, 1975. Soon after, the Secretary of Interior (Secretary) adopted a proposed accelerated leasing schedule.[6]

The Bureau of Land Management selected the Baltimore Canyon Trough area, off the mid-Atlantic coast, to be considered for possible leasing. From this area, 154 tracts were chosen. This sale was announced on August 20, 1975, and was referred to as "Sale 40."[7] Once the tracts had been selected, work began on preparation of an

1. County of Suffolk v. Secretary of Interior, 562 F.2d 1368 (2d Cir. 1977).
2. 1976 dollars.
3. County of Suffolk v. Secretary of Interior, No. 75-C 208, 76-C 1229 (E.D. N.Y., Aug. 13, 1976) (order granting preliminary injunction).
4. 98 S.Ct. 1238 (1978).
5. National Environmental Policy Act of 1969, 42 U.S.C. § §4321-47 (1970).
6. County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1373 (2d Cir. 1977).
7. *Id.*

environmental impact statement (EIS) as required by NEPA.[8] Following extensive hearings, a final EIS was published on May 25, 1976.[9]

After discussing the proposed sale with his staff and reviewing what has been termed a "Program Decision Option Document" (PDOD) prepared by them, the Secretary announced on June 30, 1976 that Sale 40 would proceed. The actual sale of the leases was scheduled to occur on August 17, 1976.[10]

Several parties, including various New York counties and towns, brought an action in the United States District Court of the Eastern District of New York to enjoin the sale. Principal among the plaintiffs' allegations was that the EIS did not meet the requirements set out in §102(2)(c) of NEPA. On August 13, 1976, District Judge Weinstein granted a preliminary injunction to prevent Sale 40 from occurring as scheduled. However, the preliminary injunction was shortlived. Three days after it was issued, the U.S. Court of Appeals for the 2nd Circuit stayed its enforcement. Sale 40 occurred as originally scheduled. Bids were accepted on 93 tracts; the government received bonuses in the amount of $1.128 billion.[11]

However, the odyssey through the courts was not yet over. On October 14, 1976, the court of appeals reversed the grant of the preliminary injunction for the same reasons that its enforcement had been stayed.[12] Trial of the case began early in 1977. At its conclusion, Judge Weinstein again decided that the EIS failed to meet the requirements of NEPA and he voided the leases.[13] He found that the EIS "could have and should have projected possible pipeline routes, and that it then would have been possible to evaluate the acceptability of those routes under existing state and local land use controls, the environmental impacts of those routes, and the economic feasibility of pipelining."[14] The court went on to find that "the EIS and its accompanying program decision option document (PDOD) substantially overestimated the projected daily production of the field and underestimated finding costs and the costs of pipeline construction, thereby overstating the economic feasibility of pipelining oil to shore and rendering the picture of overall costs and benefits unrealistically attractive."[15] Further, the court held that

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. State v. Kleppe, 551 F.2d 301 (2d Cir. 1976).
13. County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1374 (2d Cir. 1977).
14. *Id.*
15. *Id.*

"the EIS should have discussed the effect of tract selection on pipeline routes and evaluated the alternatives of offering for lease less-environmentally hazardous tracts, which had not been offered, in lieu of tracts actually offered."[16] Finally, the court found that the EIS "inadequately discussed the alternative of postponing the decision to lease until after further federal exploration of the area."[17] Judge Weinstein's decision was appealed to the U.S. Court of Appeals for the Second Circuit and on August 25, 1977 his decision was reversed.

The court of appeals began its discussion by stating that the principal issue was whether the EIS "contained sufficient information with respect to the environmental consequences of the proposed action and alternatives to satisfy the requirements of § 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C)."[18]

The court stated that it would apply the "rule of reason" standard in reviewing the district court's decision. Under this standard

> an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.[19]

The district court had been concerned that, due to the great number of local authorities involved, placement of pipelines from the oil tracts to shore might be restricted in many areas. Because of this possible burden on pipeline placement, Judge Weinstein felt the use of tankers might be necessary to transport the oil to shore and that this would increase the danger of oil spill. He indicated that "in order to assist a decision-maker in making practical determinations the EIS should have projected routes that pipelines would be likely to take from the field to refineries in New York, Philadelphia and Baltimore. . . ."[20] Although the EIS did make reference to the fact that on-shore development, such as pipelines, would be subject to state and local land use controls, it did not project what pipeline routes would be "likely" to be used.

16. *Id.*
17. *Id.*
18. *Id.* at 1372.
19. *Id.* at 1375.
20. *Id.* at 1376.

In defense of this limited reference to state and local regulations, the Secretary argued that an extended discussion would be of little help to a decision-maker. It was explained that pipeline routes cannot be projected until oil is discovered and "its quality, quantity and pumpability determined."[21] Because of this, the issues raised by pipeline routes and transportation of the oil "are divisible from those presented by the sale of the leases and can finally be resolved at a later point."[22]

The court emphasized that this argument does not suggest that an EIS should not consider all available and relevant facts or "ignore clear environmental consequences of the decision at hand on the ground that another statement will be forthcoming later."[23] But, the court accepted the view that because of the "massive" nature of such a development, it is necessary to consider the project in stages. With respect to Sale 40, the court broke its development into three stages.

The first stage was seen as the decision "whether to accelerate the Department's offshore leasing program at all and, if so, in what order to offer the various offshore fields."[24] The second stage was that of deciding which specific areas to lease, while the third and final stage would be development of areas where oil is discovered. The court indicated that some sort of EIS would be necessary for each of these steps. For the first stage the PEIS was said to have fulfilled the need. The EIS prepared for Sale 40 was the necessary document for the second stage, while a "Development Plan EIS" would have to be prepared for the final stage in the process.

In view of this, the court termed the central question as being

> not whether the Sale 40 EIS failed completely to discuss the environmental risks involved in transporting oil to shore from the tracts under consideration for lease but whether a limited discussion, with the balance deferred until preparation of a Development Plan EIS, satisfies the "rule of reason" by which we are governed in determining whether there has been compliance with NEPA.[25]

In order to answer this question two factors were considered. These were 1) whether obtaining more detailed information on the topic of transportation is "meaningfully possible" at the time when the EIS is prepared, and 2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project.[26]

21. *Id.*
22. *Id.* at 1376-77.
23. *Id.* at 1377.
24. *Id.*
25. *Id.* at 1378.
26. *Id.*

The court drew a distinction between two types of projects which might be subject to the requirement of an EIS. In the first type of project, it might not be possible to "modify or change" the action once it is begun or authorized. The second type of project the court identified was a "multistage" sort of project that allows for future alteration to meet environmental needs. In the first type, it might be necessary to gather all available information, "speculative or not," in order to make a decision. However, with the "multistage" type project, the court said "it might be both unwise and unfair not to postpone the decision regarding the next stage until more accurate data is at hand."[27]

With these considerations in mind, the court determined that projecting pipeline routes at this stage would be a "meaningless exercise."[28] This conclusion was reached by taking into account the size of the sale area and the fact that the location, amount, and quality of any discovery were yet to be determined.

It was also indicated that projections for pipeline routes were not necessary for the Secretary to make his decision concerning the second stage of the project—the lease sale. The court stated that the Secretary still would be reviewing proposed development plans and their environmental consequences when the development stage was reached. At that time, the Secretary would have available more complete information. Also, the court stated that the Secretary would be able to take into consideration "federal-state-local programs" created under the Coastal Zone Management Act (CZMA).[29] Under this act, each affected state, working in coordination with the federal government, prepares a coastal zone program defining areas authorized for various facilities, including pipelines.[30]

It was argued by plaintiffs that the Secretary, having once made the decision to lease, had made a commitment to allow future transportation of the oil to shore, even though he might have retained some future influence for the time when pipeline routes are selected. However, the court disagreed with this argument saying that the Secretary "possesses full power to prescribe 'such rules and regulations as may be necessary' to protect the environment from hazards posed by exploitation of the continental shelf."[31] The source of this power is found in the Outer Continental Shelf Land Act.[32]

In response to an argument that should pipelines prove to be

27. *Id.*
28. *Id.*
29. Coastal Zone Management Act, 16 U.S.C. §§1451-64 (Supp. V 1975).
30. County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1380 (2d Cir. 1977).
31. *Id.* at 1381.
32. Outer Continental Shelf Land Act, 43 U.S.C. §1334(a)(1) (1970).

economically unfeasible, the Secretary would be required to allow the transportation of the oil by tanker, the court stated that the Secretary retained the power to "suspend operations" until a pipeline becomes feasible. Thus, it was the conclusion of the court that the projection of pipeline routes at that time was not necessary nor perhaps even possible and would be best left to the future.

At trial, Judge Weinstein had found that a cost-benefit analysis included in the PDOD seriously overestimated "peak production rates" and underestimated the costs of any pipelines. The court of appeals disagreed. The court felt that the evidence failed to show that the cost-benefit analysis was "unfounded or that it ignored any data."[33] Also, Judge Weinstein, by substituting his judgment and the opinion of a witness at trial for the judgment of the Department and its experts, had exceeded "the proper scope of judicial review."[34]

Another finding of the district court was that the

> EIS failed to comply with NEPA because it gave "no consideration" or "failed to adequately consider" the alternative of separating the exploration of the tracts from production so that the government, either alone or through a joint venture, could first determine whether there was oil or gas in the area and then offer the hydrocarbon-producing tracts for lease on terms that would provide greater government control over environmental impacts.[35]

However, the court of appeals indicated that this alternative had been adequately considered and discussed in both the PEIS and the EIS. The EIS concluded that government exploration of the tracts would be expensive in terms of money and personnel and would cause the government to forego a substantial bonus which would result from the lease sales. For these reasons, the court felt that the Secretary was adequately informed and justified in deciding against "the alternative of separate government exploration."

The court of appeals also dealt with the district court's findings that the EIS should have discussed the possibility of leasing tracts other than those chosen and that the Secretary apparently did not exercise good faith in attempting to meet NEPA requirements. With regard to the possibility of offering other tracts for lease, the court felt that this "criticism ignores the logical procedure which was followed by the Department of Interior."[36] The court described the

33. County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1385 (2d Cir. 1977).
34. *Id.* at 1386.
35. *Id.* at 1386-87.
36. *Id.* at 1388.

procedure as first identifying areas which have some "potential hydrocarbon content." Secondly, the Department would ask for tract nominations in order to see whether any "qualified lessees" would be willing to explore for oil or gas in the area. Finally, taking into account certain "environmental criteria," the tracts nominated would be reviewed and some would then be offered for lease. The court found this procedure "reasonable" and one that "gave proper consideration to alternatives of the type suggested by the district court."[37]

The court of appeals found the claim that the Secretary acted in bad faith concerning the EIS to be unsupported by the evidence. It was stated that

> [t]here is always the risk that a government official who originates a project may be too partial toward it to be completely objective in weighing environmental objections to it. However, to suggest that because he originated it before exposing it to NEPA review, the latter was a "charade" and the outcome a "foregone conclusion" is not only unnecessary but does a disservice in the absence of supporting proof. Here we fail to find such proof.[38]

Therefore, having dispensed with the findings of fault with the EIS made by the district court and being satisfied that the Department of Interior would be capable of exercising sufficient control over the development phase of the project, the court of appeals reversed the district court, vacated the injunction, and remanded with instructions to dismiss the complaints. With the denial of certiorari by the U.S. Supreme Court in February of this year, this holding became final.

The ramifications of this case could be important. On the immediate level, it opens the door for exploratory drilling to begin off the East Coast in the Sale 40 area. But there are legal and environmental consequences as well. The court of appeals set forth a standard of review to be used by a district court in reviewing an EIS but, even more importantly, the court made a distinction between two types of projects subject to NEPA standards and the resulting effect upon the necessary EIS's. If the project is one in which, once a decision is made to proceed, it would be difficult to modify or change it, the EIS should take into account and discuss as much information as possible, speculative or not, before the commitment is made. However, if the project might be characterized as being of a multistage nature that can be modified or changed in the future, such

37. *Id.*
38. *Id.* at 1390.

as the Sale 40 project, then perhaps extensive discussion of succeeding stages in the project and their environmental effects are best left for later EIS's, when more information is available.

WILLIAM MOYERS