

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FRIENDS OF THE EARTH, *et al.*,

Plaintiffs-Appellees,

v.

DEBRA A. HAALAND, in her official
capacity as Secretary of the Interior, *et al.*,

Defendants-Appellees,

AMERICAN PETROLEUM INSTITUTE
and STATE OF LOUISIANA,

Intervenors-Defendants-
Appellants.

Nos. 22-5036, 22-5037
(consolidated)

EMERGENCY MOTION TO EXPEDITE

Appellant the American Petroleum Institute (“API”) requests that the Court expedite consideration of this appeal by entering an abbreviated briefing schedule and setting the case for oral argument before the Court rises for its Summer recess. API also asks that the Court act on this motion by February 18, 2022, so that the parties may have clarity as to the briefing schedule as soon as possible. *See* Circuit Rule 27(f).

We have conferred with counsel for the other parties regarding this motion. Plaintiffs and the Federal Defendants both reserved their right to take a position

after reviewing API's motion. The State of Louisiana consents to the relief requested.

API members bid more than \$100 million to acquire new Gulf of Mexico oil and gas leases at Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 257, held by the United States Department of the Interior ("Interior") on November 17, 2021. *See* Bureau of Ocean Energy Management, Lease Sale 257, <https://www.boem.gov/Sale-257>. After Interior opened the bids but before it issued any leases, the District Court vacated Lease Sale 257. Expedited consideration is essential because Interior's statutory 2017-2022 Five-Year Leasing Program, which includes Lease Sale 257, is scheduled to expire on June 30, 2022, and Plaintiffs and Interior have not agreed that, after June 30, the Court can resolve this appeal in a manner that allows Interior to issue new oil and gas leases to the companies that submitted high bids at Lease Sale 257. API disagrees that the scheduled expiration of Interior's Leasing Program on June 30 will prevent the Court from resolving this appeal. But the Court should direct swift briefing and oral argument given that Plaintiffs and Federal Defendants have not yet indicated whether they share API's position.

1. This case is the latest in a series involving Interior's administration of the federal offshore oil and gas leasing program that Congress mandated in the

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (“OCSLA”).¹ Interior leases exploration rights on the Outer Continental Shelf to qualified companies through competitive bidding at Lease Sales that Interior holds pursuant to Five-Year Leasing Programs. Memorandum Opinion and Order, D. Ct. Dkt. No. 78 [*hereinafter* “D. Ct. Op.”] at 6; *see* 43 U.S.C. § 1337 (leasing), *id.* § 1344 (Five-Year Leasing Programs). This case involves Gulf of Mexico Lease Sale 257, which is part of Interior’s 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program. D. Ct. Op. 6.

2. Interior, through the Bureau of Ocean Energy Management, issued a Record of Decision authorizing Lease Sale 257 on August 31, 2021. *Id.* at 8. Plaintiffs filed this suit the same day, alleging that Interior’s Record of Decision violated the Administrative Procedure Act and National Environmental Policy Act (“NEPA”). *Id.* API and the State of Louisiana intervened in support of Interior. *Id.*

3. Plaintiffs sought to expedite consideration of their claims in the District Court, contending that “failure to expedite could deprive the requested relief of much of its value.” D. Ct. Dkt. No. 11 at 6. The District Court agreed and

¹ *See, e.g., Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015); *Ctr. for Biological Diversity v. Bernhardt*, 563 F.3d 466 (D.C. Cir. 2009); *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981); *N. Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

entered an expedited summary judgment briefing schedule. D. Ct. Dkt. No. 24 at 4; 12/8/21 Minute Order.

4. After Plaintiffs filed suit but before the District Court issued its decision, Interior held Lease Sale 257 on November 17, 2021. Consistent with Congress's mandate that offshore leases be offered using "competitive bidding" and "sealed bids," 43 U.S.C. § 1337(a)(1), Interior opened 317 sealed bids totaling more than \$198 million. Once Interior opened the bids, they were available to all bidders involved in the sale and to the general public. As of January 24, 2022, the statutorily required reviews of the high bids by Interior, the Attorney General, and the Federal Trade Commission (*see* 43 U.S.C. 1337(a)(1) & (c)) were completed and Interior stood ready to notify high bidders of its acceptance of bids. D. Ct. Dkt. No. 74 at 2; D. Ct. Dkt. No. 74-1 at 2 (¶ 5) (Interior "has reviewed the bids to determine the adequacy of the bids"), *id.* (¶ 6) ("the Attorney General and the Federal Trade Commission notified BOEM that it did not have any recommendations to provide"), *id.* (¶ 7) ("some bids have been accepted and leases will be awarded and could be sent to the prospective lessees sometime the week of January 24, 2022").

5. The District Court ruled on January 27, 2022, holding that Plaintiffs' claims were ripe and that Interior's NEPA analysis was insufficient. D. Ct. Op. 11-41. As a remedy, the District Court vacated Interior's Record of Decision and

“the action taken based on the [Record of Decision], including Lease Sale 257.”

D. Ct. Op. 67; *see also* D. Ct. Dkt. No. 77 (Order). The District Court thus vacated Lease Sale 257 before Interior issued leases to successful bidders.

6. To our knowledge, sealed bids have never previously been opened and publicly disclosed without then being used to grant a single offshore oil and gas lease. To do so now would contradict the OCSLA’s system of competitive bidding and threaten essential confidence in the lease-sale system. The companies that submitted sealed bids have already invested billions of dollars in existing offshore federal oil and gas leases. *See* D. Ct. Dkt. No. 73-1, at 7-8, 10-12. Their sealed bids represent the culmination of thousands of personnel hours and the expenditure of millions of dollars devoted to identifying the most valuable unleased offshore acreage. *Id.* A company’s submission of bids on unleased acreage reflects a business decision to abandon the confidentiality of these proprietary calculations, in exchange for the possibility of acquiring new offshore leases. *Id.* The bidders’ willingness to publicly disclose these confidential valuation calculations is inextricably tied to Interior’s decades-old history of administering a predictable, systematic offshore leasing program in accordance with Congress’s mandate that the federal Outer Continental Shelf be made available for leasing. Employing competitive-bidding procedures, Interior has held at least one Gulf of Mexico Lease Sale each year since 1966. *E.g., Ctr. For*

Biological Diversity v. Bernhardt, 563 F.3d 466, 485 (D.C. Cir. 2009) (“Congress has already decided that the OCS should be used to meet the nation’s need for energy.”).

7. API quickly appealed to this Court. API then sought assurances from the parties that Interior could award leases based on the high bids submitted in November 2021 if this Court reverses the District Court’s decision after June 30, 2022. To date, Plaintiffs and Interior have not given those assurances on this critical issue.

8. API is confident that, in the event this Court reverses the District Court, Interior will have the authority to complete the sale it held on November 17, 2021 by issuing leases to the high bidders even after June 30. *See* D. Ct. Dkt. No. 74 at 4 (Interior explaining that “if the sale is not vacated, the date of the sale for the five-year program purposes would still be November 2021, well within the established 2017-2022 Five-Year Outer Continental Shelf Leasing Program”). This would be consistent with past practice where Interior has held lease sales within the timeframe covered by the Five-Year Leasing Program and then continued processing bids and issuing leases after the program expired. *See* U.S. Department of the Interior, Press Release, Obama Administration Announces Proposed Central Gulf of Mexico Oil and Gas Lease Sale (Jan. 26, 2012), <https://tinyurl.com/344jt6xn> (announcing “last remaining sale scheduled in 2007-

2012” plan to be held on June 20, 2012, ten days before the expiration of the plan); Bureau of Ocean Energy Management, Press Release, BOEM Extends Evaluation Period for Central Gulf of Mexico Sale (Sept. 19, 2012), <https://tinyurl.com/45ysyfbs> (extending the post-sale bid-evaluation period through mid-October 2012).

9. Interior and Plaintiffs, however, have yet to give assurances that they agree with API’s position. Interior told the District Court that, if the court vacated the Lease Sale, it would be forced to *re-conduct* Lease Sale 257 and initiate a “new bidding process” rather than rely on the bids that were publicly opened on November 17. Interior likewise has stated that it is “unlikely that” it can re-conduct Lease Sale 257, based on a “new bidding process,” before the 2017-2022 Five-Year Leasing Program ends. Thus, according to Interior, there may be circumstances under which Interior would be precluded from issuing leases based on the high bids that were publicly opened on November 17. Plaintiffs took the same view as Interior. *See* D. Ct. Dkt. No. 76. Under these circumstances, absent accelerated briefing and oral argument, the high bidders at Lease Sale 257 risk being unable to receive the leases that Interior was ready to award to them before the District Court ruled, even if this Court reverses the District Court’s vacatur.

10. Plaintiffs’ and Interior’s failure to give assurances also risks the bidders’ proprietary valuations of the Lease Sale 257 acreage being made public

without Interior actually leasing any of it. And valuations, once known, cannot be made secret again. This Court has recognized that “reject[ing] all bids and beg[inning] anew” undermines the “integrity of the entire governmental program of selling oil leases on public lands and indirectly indeed the whole process of making public contracts by the process of sealed bids.” *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1120 (D.C. Cir. 1969); *see also P. Francini & Co. v. United States*, 2 Cl. Ct. 7, 10 (Ct. Cl. 1983) (disclosing sealed bids to the public and not awarding a contract pursuant to the disclosed bids “undermine[s] the integrity of the bidding process,” and is against the “public interest in preserving the integrity of the competitive bid system” (internal quotations and citations omitted)).

11. It is also in the broader public interest to expedite this appeal. Because Interior has not finalized a Five-Year Program to succeed the 2017-2022 Program, it is possible—even likely—that if the Lease Sale 257 is not given effect, then *no* offshore Gulf of Mexico leases will be awarded between 2021 and 2023 (or perhaps later), contrary to OCSLA’s goals. Congress has determined that the development of the Nation’s offshore oil and gas resources is essential and must occur expeditiously. *See* 43 U.S.C. § 1802(1) (OCSLA’s primary purpose is to “expedite[] exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade”);

see also id. § 1332(3) (OCS “should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs”). Indeed, Congress has specified that it wishes to “make [OCS] resources available to meet the Nation’s energy needs as rapidly as possible[.]” *Id.* § 1802(2)(A); *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981) (OCSLA “has an objective—the expeditious development of OCS resources”).

12. Consistent with these goals, Interior has issued new Gulf of Mexico leases every calendar year for more than 50 years. Since the creation of the offshore federal oil and gas leasing program in the 1950s, Interior has held hundreds of Gulf of Mexico oil and gas lease sales, and has opened and processed thousands of sealed bids totaling more than \$100 billion. Department of the Interior, Bureau of Ocean Energy Management, Gulf of Mexico Oil & Gas Lease Offerings, <https://tinyurl.com/fj7smddb>. But if the Lease Sale 257 bids cannot be used, that unbroken streak of efficient lease administration—which is remunerative to both the Treasury and coastal states such as Louisiana—will come to an end.

13. Interior has stated that, as of January 24, 2022, “some bids [had] been accepted” and that it was prepared to award leases the week of January 24, 2022. *See* ECF No. 74-1. If the Court issues its judgment by mid-June—even if an opinion follows later—Interior will be able to complete its processing of the bids

and issue leases to high bidders before June 30, 2022. *See PSSI Global Servs., LLC v. FCC*, 983 F.3d 1, 7 (D.C. Cir. 2020) (explaining that the Court issued judgment in advance of a time-sensitive spectrum auction taking place and issued its opinion after). That will eliminate the risk of Lease Sale 257 bidders having their bids nullified because of the pace of this litigation, a factor outside of their control. Alternatively, a ruling prior to June 30 could include relief that would enable Interior to accept the Lease Sale 257 high bids even after June 30, with the Court's decision providing the terms under which that could happen.

14. Under these unique circumstances, expediting this appeal is in the public interest. API accordingly requests that the Court enter the following briefing schedule and schedule oral argument on the first appropriate day following the completion of briefing:

Appellants' Opening Briefs: March 4, 2022

Joint Appendix: March 4, 2022

Appellees' Briefs: April 4, 2022

Appellants' Reply Briefs: April 18, 2022

15. The proposed schedule provides the parties sufficient time to brief the factual and legal issues presented, and it allows the Court to hear argument and render judgment in time for Interior to accept or reject Lease Sale 257 high bids in the ordinary course before June 30, 2022. Although API believes that Interior has

the authority to accept bids and issue leases after June 30, 2022, the proposed expedited schedule would render it unnecessary for the parties to dispute and the court to later adjudicate the issue.

16. Adopting the proposed schedule would not prejudice any party. The Lease Sale remains vacated as a result of the District Court's order, and neither Plaintiffs nor Interior have argued—or could argue—that the expeditious resolution of this appeal would adversely affect their interests. Indeed, the District Court expedited proceedings below at Plaintiffs' request.

For the foregoing reasons, the motion should be granted, the briefing schedule set forth above entered, and oral argument scheduled for the first appropriate day following the completion of briefing.

Respectfully submitted,

/s/ Jonathan A. Hunter

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,368 words.

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/s/ Jonathan A. Hunter

CERTIFICATE OF SERVICE

I certify that on February 11, 2022, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Jonathan A. Hunter