



PETROQUEST ENERGY, L.L.C.

198 IBLA 157

Decided February 23, 2023



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Office of Hearings and Appeals
Interior Board of Land Appeals
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PETROQUEST ENERGY, L.L.C.

IBLA 2017-191

Decided February 23, 2023

Appeal from a Bureau of Safety and Environmental Enforcement order granting in part and denying in part an application to decommission an offshore pipeline in place. Pipeline Segment Numbers 9727 and 9728.

Affirmed.

APPEARANCES: Jana L. Grauberger, Esq., Jillian M. Marullo, Esq., and Elizabeth Byrne, Esq., Liskow & Lewis, Houston, Texas, for PetroQuest Energy, L.L.C.; Stephen Vorkoper, Esq., and Matthew Ballenger, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Bureau of Safety and Environmental Enforcement.

OPINION BY ACTING DEPUTY CHIEF ADMINISTRATIVE JUDGE IDZIOREK

PetroQuest Energy, LLC, appeals a March 7, 2017, Order issued by the Bureau of Safety and Environmental Enforcement (BSEE). In the Order, BSEE granted in part and denied in part PetroQuest's application to decommission offshore pipeline segment number (PSN) 9728 in place and ordered PetroQuest to submit a decommissioning application for removal of portions of PSNs 9727 and 9728. PetroQuest appealed BSEE's Order, and we granted PetroQuest's unopposed petition to stay BSEE's Order during the pendency of this appeal.¹ In this decision, we resolve the merits of PetroQuest's appeal.

SUMMARY

When an appellant challenges a discretionary decision by BSEE, it must show that BSEE based its decision on a material error of law or fact or that the decision otherwise lacks a rational basis. Here, PetroQuest submitted an application to decommission an offshore pipeline segment in place instead of removing it, and BSEE had discretion to grant or deny the application. We conclude that BSEE's Order and the record supporting that Order show that BSEE appropriately applied its regulations and relevant guidance and had a rational basis for its decision to grant the application in part and deny it in

¹ Order, Unopposed Petition for a Stay Granted; Extension of Time Request Granted at 1 (May 31, 2017).

part and order the removal of a portion of another pipeline segment that had been decommissioned in place. Accordingly, we affirm BSEE's Order.

BACKGROUND

This appeal involves PetroQuest's request for BSEE's approval to leave offshore pipelines it no longer uses on the seafloor instead of removing them. For background, we first summarize BSEE's regulation of pipeline decommissioning, then describe the role of the Bureau of Ocean Energy Management (BOEM) sand resource management program in BSEE's decommissioning decisions, and finally review the procedural history of this appeal.

1. Regulation of Offshore Pipeline Decommissioning

BSEE regulates pipelines on oil and gas leases on the Outer Continental Shelf (OCS).² BSEE's regulations require pipeline operators to decommission all pipelines when the associated facilities are no longer useful for operations.³ To decommission a pipeline, the operator must end oil and gas operations and "[r]eturn[] the lease . . . to a condition that meets the requirements of regulations."⁴ Operators must also clear the seafloor of all obstructions created by their lease operations,⁵ which may include pipelines if leaving them in place "would hinder other users of the OCS."⁶

An operator may seek BSEE's approval to decommission a pipeline in place instead of removing it.⁷ Decommissioning a pipeline in place involves, among other things, flushing the pipeline, filling it with seawater, cutting and plugging each end of the pipeline, and burying each end below the seafloor or under protective concrete mats.⁸ BSEE may approve an application to decommission in place if it "determines that the pipeline does not constitute a hazard (obstruction) to navigation and commercial fishing operations, unduly interfere with other uses of the OCS, or have adverse environmental effects."⁹ But even if BSEE approves an application to decommission a

² See 30 C.F.R. § 250.1000(b)(1) (2021) (requiring BSEE approval for installation, modification, or abandonment of a lease term pipeline). All citations in this Decision to Title 30 of the Code of Federal Regulations are to the 2021 edition unless otherwise indicated. The relevant provisions of the 2021 edition of Title 30 are substantively the same as those in effect at the time BSEE issued its Order in March 2017.

³ *Id.* § 250.1703(d).

⁴ *Id.* § 250.1700(a) (defining "decommissioning").

⁵ *Id.* § 250.1703(e).

⁶ *Id.* § 1700.00(b) (defining "obstructions").

⁷ See *id.* § 250.1751.

⁸ *Id.*

⁹ *Id.* § 250.1750.

pipeline in place, under 30 C.F.R. § 250.1754, it may later determine that the pipeline is an obstruction and order the operator to remove it.

2. BOEM's Management of OCS Sand Resources

Under the Outer Continental Shelf Lands Act, BOEM is authorized to enter into agreements for the use of OCS sand, gravel, and shell resources for use in projects for shore protection, beach restoration, and coastal wetlands restoration undertaken by a Federal, State, or local government agency.¹⁰

In 2009, the Minerals Management Service (MMS, BOEM and BSEE's predecessor agency¹¹) issued a Notice to Lessees and Operators, NTL No. 2009-G04, to "provide[] guidance for the avoidance and protection of significant OCS sediment resources essential to coastal restoration initiatives in the MMS Gulf of Mexico OCS Region."¹² MMS explained that "significant quantities of OCS sediment resources that are compatible with the target environments" are needed "to mitigate future coastal erosion, land loss, flooding, and storm damage in the Gulf of Mexico, especially along coastal Louisiana."¹³ MMS stated that "[o]ffshore sand resources . . . are extremely scarce where most needed," and "sizable areas of these relatively small offshore sand resources are not extractable because of the presence of oil and gas infrastructure," among other things.¹⁴ "[T]o help safeguard the most significant OCS sediment resources, reduce multiple use conflicts, and minimize interference with oil and gas operations," the NTL instructed operators to "[m]ake sure that bottom-disturbing activities . . . avoid, to the maximum extent practicable, significant OCS sediment resources" and referred them to online information about significant OCS sediment resources MMS had identified.¹⁵ The NTL continued as follows:

As applicable, the MMS GOMR will analyze OCS plans and pipeline applications for consistency with this protection policy. If it is determined

¹⁰ 43 U.S.C. § 1337(k)(2)(A).

¹¹ See Reorganization of Title 30: Bureaus of Safety and Environmental Enforcement and Ocean Energy Management, 76 Fed. Reg. 64,432 (Oct. 18, 2011) (describing the restructuring of the former Minerals Management Service).

¹² NTL No. 2009-G04, Notice to Lessees and Operators of Federal Oil, Gas, and Sulphur Leases, Pipeline Right-of-Way Holders, and Lessees of Minerals Other than Oil, Gas, and Sulfur on the OCS, Gulf of Mexico OCS Region, Significant OCS Sediment Resources in the Gulf of Mexico at 1 (Jan. 27, 2009), <https://www.bsee.gov/sites/bsee.gov/files/notices-to-lessees-ntl/notices-to-lessees/09-g04.pdf> (last visited Feb. 23, 2023) (NTL No. 2009-G04).

¹³ *Id.* at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 2.

that significant OCS sediment resources may be impacted by a proposed activity, the MMS GOMR may require you to undertake measures deemed economically, environmentally, and technically feasible to protect the resources to the maximum extent practicable. . . .

Future requests for in-place decommissioning of pipelines in these designated areas are discouraged. If it is deemed necessary, MMS may require pipelines previously decommissioned in place to be removed to minimize conflict with other uses of the OCS.^[16]

3. PetroQuest's Lease-Term Pipeline Segments

a. PSNs 9727 and 9728, and PetroQuest's Applications to Decommission Them in Place

PetroQuest is the operator of lease-term pipeline segments—pipeline segments that are completely contained within the boundaries of a single lease, unit, or an operator's contiguous leases¹⁷—numbered 9727 and 9728 in Ship Shoal Area Blocks 72 and 87 on the OCS in the Gulf of Mexico.¹⁸ PSNs 9727 and 9728 were installed in 1992, one for bulk oil and the other for supply gas, and they lie parallel to each other in a trench.¹⁹ PetroQuest states that the pipelines are in one of the oldest, still-active OCS units “within a dense network of wells and production facilities.”²⁰

In 2014, BSEE approved PetroQuest's application to decommission PSN 9727 in place.²¹ In 2015, PetroQuest submitted an application seeking approval to decommission PSN 9728 in place.²² BSEE denied the application, stating that the pipeline is located in a “significant sand resource block.”²³ Citing NTL No. 2009-G04, BSEE stated that “all pipelines and associated equipment should be decommissioned and removed entirely

¹⁶ *Id.*

¹⁷ See 30 C.F.R. § 250.105 (defining “lease term pipeline”).

¹⁸ PetroQuest Energy, L.L.C.'s Statement of Reasons at 3-4 (filed June 24, 2019) (Statement of Reasons).

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ *Id.* at 3.

²² *Id.* at 4 (citing Administrative Record (Public Copy) Document (AR) 38, Application to Decommission Pipeline (In-Place) (May 13, 2015)).

²³ *Id.*, Exhibit A-3, Letter from BSEE to PetroQuest (Sept. 18, 2015); see also <https://www.boem.gov/marine-minerals/managing-multiple-uses-gulf-mexico> (last visited Feb. 23, 2023) (identifying Ship Shoal Area Blocks 72 and 87 as among the Gulf of Mexico Lease Blocks with significant sediment resources).

from areas which cross sand resources.”²⁴ PetroQuest asked BSEE to reconsider its decision in light of the fact that PSN 9728 is in the same trench as PSN 9727, which was decommissioned in place.²⁵ BSEE again denied the application, citing NTL No. 2009-G04, and also ordered PetroQuest to submit an application to decommission both PSN 9727 and PSN 9728 by removal.²⁶ PetroQuest appealed BSEE’s order to the Board, and we stayed the order pending appeal.²⁷

While the appeal was pending, the parties engaged in settlement discussions and realized that the Louisiana Office of Coastal Management had not reviewed PetroQuest’s application for consistency with its coastal management program in accordance with the Coastal Zone Management Act.²⁸ To allow BSEE to consider additional information from BOEM and Louisiana, BSEE filed a motion asking the Board to remand BSEE’s order.²⁹ We granted BSEE’s unopposed motion.³⁰

b. State and BOEM Reviews

In June 2016, Louisiana’s Office of Coastal Management found that PetroQuest’s application was conditionally consistent with the State’s coastal management program as long as PetroQuest agreed in writing to remove PSN 9728 if the State determined that “removal is necessary for access to sediments or otherwise in the best interest of Louisiana coastal resources.”³¹ The State explained that, although “these particular sand resources are not designated for any protection project” at this time, Louisiana is “in critical need of sediment for coastal restoration programs.”³² PetroQuest agreed to Louisiana’s condition.³³

²⁴ Statement of Reasons, Exhibit A-3, Letter from BSEE to PetroQuest (Sept. 18, 2015).

²⁵ Statement of Reasons at 5 (citing AR 75, Email between BSEE and BOEM (Sept. 29, 2015) (referencing a contact from PetroQuest about denial of the PSN 9728 decommissioning application)).

²⁶ *Id.*, Exhibit A-1, Letter from BSEE to PetroQuest (Nov. 13, 2015).

²⁷ *See* Order, Joint Motion to Continue Temporary Suspension Granted; Briefing Schedule Established, IBLA 2016-060 (Feb. 26, 2016).

²⁸ Answer at 9 (filed Oct. 7, 2019) (citing AR 70, Summary of PetroQuest Decommissioning Meeting from May 4, 2016, at unpaginated (unp.) 2); *see also* 16 U.S.C. § 1456(c) (“Consistency of Federal activities with State management programs”).

²⁹ Motion to Remand, IBLA 2016-060 at unp. 1-2 (filed May 13, 2016).

³⁰ Order, Motion to Remand Granted; Appeal Dismissed, IBLA 2016-60 (May 17, 2016).

³¹ AR 19, Letter from Louisiana Department of Natural Resources, Office of Coastal Management, to PetroQuest at 2 (June 2, 2016).

³² *Id.* at 1.

³³ AR 13, Letter from PetroQuest to Louisiana Department of Natural Resources, Coastal Management Division (June 13, 2016).

PetroQuest then sent BSEE a copy of the consistency determination and its original 2015 application to decommission PSN 9728 in place, asking BSEE to reconsider the application.³⁴ BSEE forwarded the application to the BOEM Marine Minerals Program for review.³⁵ BOEM conducted a “site[-]specific geologic review” and determined that the location of PSN 9728 “contains valuable sand-rich deposits.”³⁶ BOEM explained as follows:

[R]ecent work conducted by [Louisiana State University] and Louisiana [Coastal Protection and Restoration Authority] demonstrate[s] that the thickest and highest ore-quality sands contained in the Ship Shoal sand body are migrating north into this location. If left in place this pipeline would interfere with development of this OCS mineral resource and its availability would not [be] considered feasible during coastal restoration program and project planning. Presently, of the ~ 2 million^[37] cubic yards of sand in Ship Shoal, less than 10% of this volume can be developed for coastal restoration programs due to oil and gas infrastructure obstructions (active and abandoned).^[38]

But BOEM recognized that a portion of PSN 9728 is in “close proximity to wells that comprise permanent obstructions and already interfere with access to surface minerals.”³⁹ For this reason, BOEM concluded that it would be appropriate to allow PetroQuest to decommission in place the northern portion of PSN 9728 and require PetroQuest to remove “[o]nly the southern ~0.8 miles” of the pipeline segment.⁴⁰

BOEM included with its review a memorandum from the Regional Director of BOEM to the Regional Director of BSEE titled, “Statement of [BOEM’s] position regarding pipeline decommissioning in Significant [OCS] Sediment Resource areas.”⁴¹ In

³⁴ Statement of Reasons at 8 (referencing Exhibit A-5, Letter from PetroQuest to BSEE (Sept. 12, 2016)).

³⁵ Answer at 9 (citing AR 38, Email from P. Smith, BSEE, to M. Miner, BOEM (Sept. 28, 2016)).

³⁶ AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM (Oct. 31, 2016).

³⁷ See Answer at 10 n.4 (“The cited source . . . indicates that Ship Shoal contains greater than 1,700,000,000 cubic meters of sand (AR 104 at p. 728), so ‘million’ is likely an error and should have been ‘billion.’”).

³⁸ AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM (Oct. 31, 2016). (references omitted).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*; AR 7, BOEM Memorandum from Regional Director, BOEM Gulf of Mexico OCS Region, to Regional Director, BSEE Gulf of Mexico OCS Region (Oct. 28, 2016) (BOEM Memorandum).

this position statement, BOEM explained that “any infrastructure located in a Significant OCS Sediment Resource is an obstruction, unduly interfering with development of and hinders use of OCS sediment resources unless site-specific reviews conducted by BOEM determine otherwise.”⁴² Because BSEE’s regulations limit decommissioning in place to pipelines that do not constitute an obstruction or unduly interfere with other uses of the OCS, and BOEM’s position is that pipelines in significant OCS sediment resource areas are obstructions and unduly interfere with other uses, BOEM concluded that “[d]ecommissioning a pipeline by abandonment in-place in these areas is in conflict with regulations, guidance, and with BOEM’s ability to meet its statutory mandates.”⁴³ Where BSEE had previously approved decommissioning in place for pipelines in Significant OCS Sediment Resource areas, BOEM recommended that BSEE direct removal of those pipelines in accordance with 30 C.F.R. § 250.1754.⁴⁴

c. The BSEE Order on Appeal

Based on BOEM’s review and recommendations, BSEE granted PetroQuest’s application in part and denied it in part.⁴⁵ BSEE explained as follows:

Based on BOEM’s site-specific Marine Minerals geologic and environmental review, if left in place portions of [PSN 9728] would interfere with development of [the] OCS mineral resource [in a significant OCS sediment resource area], and its use would not be considered feasible during coastal restoration program and project planning. This is true despite BSEE’s authority under 30 CFR 250.1754 to order later removal of the pipeline as an obstruction, because the increased uncertainty and risk created by abandoned pipelines hinder investment and planning toward exploration and development of such areas in favor of more distant and costly, but unobstructed, resources. By contrast, BOEM’s spatial data review indicates that other portions of the pipeline are in close proximity to wells that comprise permanent obstructions and already interfere with access to surface minerals along the pipeline route, allowing partial decommissioning in place.^[46]

Consistent with BOEM’s determination, BSEE ordered removal of 0.8 mile of the total 1.27-mile length of PSN 9728.⁴⁷ BSEE also determined that, similarly, the corresponding

⁴² BOEM Memorandum at 4.

⁴³ *Id.*; *see id.* at 3-4 (listing regulatory authority requiring removal of pipelines).

⁴⁴ *Id.*; *see* 30 C.F.R. § 250.1754 (“You must remove a pipeline decommissioned in place if the Regional Supervisor determines that the pipeline is an obstruction.”).

⁴⁵ AR 22, Letter from BSEE Acting Regional Supervisor to PetroQuest (Jan. 13, 2017).

⁴⁶ *Id.* at 1-2.

⁴⁷ *Id.* at 2.

portion of PSN 9727, which it previously approved to be decommissioned in place, is an obstruction that hinders other uses of the OCS and must be removed.⁴⁸ BSEE then directed PetroQuest to submit a decommissioning application for removal of the identified portions of PSNs 9727 and 9728.⁴⁹

After BSEE issued this order, PetroQuest informed BSEE that BSEE had used incorrect coordinates to identify the 0.8 mile of PSNs 9728 and 9727 that must be removed.⁵⁰ On March 7, 2017, BSEE issued an order substantively identical to its earlier order but with a different description of the 0.8 mile of pipeline that must be removed.⁵¹ This order was intended to clarify the location of the 0.8 mile of PSNs 9727 and 9728 that must be removed and expressly superseded the previous order.⁵² PetroQuest timely appealed.⁵³

ANALYSIS

1. Standard of Review

A decision by BSEE granting or denying an operator's application to decommission a pipeline in place is an exercise of BSEE's discretion.⁵⁴ An exercise of agency discretion "must have a rational basis that is stated in the decision and supported by facts of record demonstrating that it is not arbitrary, capricious, or an abuse of discretion."⁵⁵

When an operator appeals BSEE's determination, its burden is to show "that the decision is based on an error of law [or] a material error of fact, or that the decision-maker failed to give due consideration to all relevant factors and act on the basis of a rational connection between the facts found and the choice made."⁵⁶ A mere difference of opinion about the proper management of the OCS and its resources does not show error or otherwise justify reversing BSEE's decision.⁵⁷

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See AR 22, Email from A. Gobert, BSEE, to P. Smith, BSEE (Feb. 14, 2017).

⁵¹ See AR 49, Order from BSEE Gulf of Mexico OCS Region to PetroQuest at 1-2 (Mar. 7, 2017) (BSEE Order).

⁵² AR 49, Email from P. Smith, BSEE, to, among others, A. Buquet, PetroQuest (Mar. 7, 2017); BSEE Order at 1.

⁵³ Notice of Appeal (filed with the Board May 5, 2017).

⁵⁴ See 30 C.F.R. §§ 250.1750, .1754.

⁵⁵ *Taylor Energy Co.*, 193 IBLA 283, 292 (2018).

⁵⁶ *Id.*

⁵⁷ *Id.*

2. BSEE's Order Has a Rational Basis and Is Supported by the Record

Applying our standard of review to BSEE's Order, we conclude that BSEE had a rational basis for its decision, which is supported by the record, and PetroQuest has not shown error in that decision. BSEE's Order directed PetroQuest to remove a targeted portion of both PSNs, 0.8 mile of each, allowing 0.47 out of 1.27 miles of each pipeline to be decommissioned in place.⁵⁸ BSEE cited the statutory authority to make OCS sediment resources available for coastal protection, beach restoration, and coastal wetland restoration and the requirement to avoid "undue use conflicts between significant OCS sediment resource areas and oil and gas infrastructure installation and abandonment."⁵⁹ BSEE explained that it coordinates with BOEM by facilitating "BOEM reviews of proposals to abandon pipelines in place in significant OCS sediment resources areas containing known mineral resources" and stated that its decision to allow only part of the pipelines to be decommissioned in place was based on "BOEM's site-specific Marine Minerals geologic and environmental review."⁶⁰ BSEE's reliance on BOEM's analyses and conclusions is justified by the fact that the Marine Minerals Program falls within BOEM's jurisdiction and expertise.⁶¹ BOEM's analysis is included in the record and supports BSEE's Order.⁶²

PetroQuest's primary argument is that BSEE erred by finding that the pipeline segments would hinder or unduly interfere with sediment extraction because there are no current or foreseeable plans to excavate sediment from the area and, according to PetroQuest, the area is unsuitable for sediment excavation.⁶³ PetroQuest argues that BSEE's decision does not have a rational basis in the record because "BSEE made no reasoned finding that PSN 9727 obstructs or hinders, or the PSN 9728 unduly interferes with, sediment extraction, and failed to demonstrate a rational connection between the facts (which show no interference) and the Decision."⁶⁴ PetroQuest emphasizes that "neither pipeline hinders or obstructs any current or foreseeable plans for sediment extraction from Ship Shoal Blocks 72 or 87"⁶⁵ and argues that, therefore, BSEE's "finding of interference [is] based on hypothetical speculation."⁶⁶ PetroQuest also contends that BSEE's Order runs counter to the facts because active wells, platforms, and pipelines

⁵⁸ See BSEE Order at 2 (citing 30 C.F.R. §§ 250.1703, .1751, .1752, .1754).

⁵⁹ *Id.* at 1 (citing 43 U.S.C. § 1337(k)(2) and NTL 2009-G04).

⁶⁰ *Id.*

⁶¹ See *Pub. Emples. for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 102-03 (D.D.C. 2014) (concluding that BOEM was justified in relying on the Coast Guard's expertise in maritime safety).

⁶² AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM (Oct. 31, 2016).

⁶³ Statement of Reasons at 19, 21.

⁶⁴ *Id.* at 19.

⁶⁵ *Id.* at 20.

⁶⁶ *Id.*

unrelated to PSN 9727 and PSN 9728 will prevent the area from being dredged or used for sediment extraction for years to come.⁶⁷

But BSEE’s Order shows consideration of the facts PetroQuest identifies—both the absence of current plans for extraction and the obstructions created by other infrastructure. BSEE responded to these points by allowing some portion of the pipelines to remain in place where other infrastructure would prevent extraction and explaining that leaving the remainder of the pipeline in place would prevent the sand in this location from ever being used because users will look for other locations instead of waiting for removal.⁶⁸ BSEE acknowledged its authority under 30 C.F.R. § 250.1754 to allow the entire pipeline to be decommissioned in place and order its removal later when the need for the sand resources was imminent, but BSEE explained that leaving the entire pipeline in place creates “increased uncertainty and risk” that hinders investment in the development of the area⁶⁹ because “its use would not be considered feasible during coastal restoration program and project planning.”⁷⁰

We conclude that PetroQuest has not shown that BSEE erred by concluding that a portion of PSNs 9727 and 9728 unduly interferes with sediment extraction. BSEE provided a rational basis for its decision, which is supported by the record. PetroQuest disagrees with BSEE’s decision, but this disagreement is insufficient to show error.

PetroQuest’s additional arguments challenging the basis of BSEE’s Order also do not show error in BSEE’s decision. We address each of those arguments in turn.

a. The Need for Sand Resources in the Location of PSN 9727 and PSN 9728

PetroQuest argues that the record includes “no finding that Ship Shoal Blocks 72 and 87 are ideal locations for sediment extraction” or that there is a “need for or feasibility of sediment extraction from these blocks.”⁷¹ But BSEE’s Order cites BOEM’s review of the location of PSN 9728—and therefore also “PSN 9727, which lies parallel to PSN 9728 in the same trench”⁷²—for its finding that the pipeline segments are in a

⁶⁷ *See id.* at 21.

⁶⁸ *See* BSEE Order at 1-2.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 1; *see* Answer at 15 (“Given the often[-]tight timeframes involved in these projects, which may be dictated by the timelines for the use of state and federal funds, and which rely on complex geologic judgments about the best source of sediment, the planners cannot take the risk of pursuing borrow areas that have pipelines abandoned in place on the hope that removal can be secured in a timely fashion.”).

⁷¹ Statement of Reasons at 22.

⁷² BSEE Order at 2.

“significant OCS sediment resource area[.]”⁷³ Indeed, BOEM’s review, which is included in BSEE’s record, describes the findings of “a site[-]specific geologic review”:

Based on a site[-]specific geologic review, this location contains valuable sand-rich deposits in the form of relict distributary channels and splays, back shoal and lower shoal deposits (Penland et al., 1988; 1989; Suter et al., 1991; Kulp et al., 2001; SJB Group, LLC, 2006). These OCS mineral resources are part of the same system recently used by the Natural Resources Conservation Service to construct the Raccoon Island Shore Protection/Marsh Creation Project Phase B (TE-48). Moreover, recent work conducted by LSU and Louisiana CPRA demonstrate that the thickest and highest ore-quality sands contained in the Ship Shoal sand body are migrating north into this location (Roberts, 2013). If left in place this pipeline would interfere with development of this OCS mineral resource and its availability would not [be] considered feasible during coastal restoration program and project planning.^[74]

BOEM expressly considered the feasibility of extracting sediment from the location of PSN 9727 and 9728, concluding that “the wells along the northern portion of this segment comprise more permanent obstructions to accessing surface minerals” and therefore that portion of the pipeline should be decommissioned in place.⁷⁵ BOEM listed the eight reports it consulted for its review.⁷⁶

We conclude that PetroQuest has not shown that BSEE erred in determining that the sand resources surrounding PSNs 9727 and 9728 are appropriate and needed for coastal restoration projects.

b. The Timing of BOEM’s Analysis

PetroQuest next argues that BOEM’s position statement and Marine Minerals Program review do not provide a reasoned basis for BSEE’s Order because BSEE had already reached its decision before these documents were issued.⁷⁷ In fact, PetroQuest

⁷³ *Id.* at 1.

⁷⁴ AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM at 1 (Oct. 31, 2016); *see also* AR 37, Email from J. Mallindine, BOEM, to Angie Gobert, BSEE (Aug. 12, 2015) (explaining that “[p]ipelines within Ship Shoal labeled as the highest priority [for removal] are currently restricting access to large sediment deposits which could be used for ongoing restoration projects” and attaching a list of 200 “priority pipelines” that include PSN 9727 and 9728).

⁷⁵ AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM at 1 (Oct. 31, 2016).

⁷⁶ *Id.* at 1-2.

⁷⁷ Statement of Reasons at 22.

states, “the Position Statement was drafted in response to a hindsight request by BSEE for support to defend against PetroQuest’s eventual appeal,” so the statement is “improper post hoc rationalization.”⁷⁸ But the position statement is dated October 28, 2016,⁷⁹ and the analysis in the Order on appeal was originally dated January 13, 2017,⁸⁰ before BSEE clarified location data and reissued the Order on March 7, 2017.⁸¹ Granted, it is possible that BSEE anticipated that PetroQuest would appeal its Order given that it had appealed the previous denial of its decommissioning application in 2015,⁸² but BSEE specifically sought remand of that denial to consider information from the State of Louisiana and BOEM.⁸³ Furthermore, BSEE’s Order relies on the regulations, NTL 2009-G04, and BOEM’s “site-specific Marine Minerals geologic and environmental review,” not the position statement.⁸⁴ The content and timing of BSEE’s Order defeats the allegation of post hoc rationalization.

c. Reliance on BOEM’s Analysis

PetroQuest also argues that BOEM’s findings are not sufficient because BSEE must decide whether to allow decommissioning in place, not BOEM, and BSEE accepted BOEM’s findings “carte blanche without any independent judgement or analysis or finding of interference.”⁸⁵ But as we mentioned earlier, BSEE justifiably relied on BOEM’s analyses and conclusions because the Marine Minerals Program falls within BOEM’s jurisdiction and expertise.⁸⁶ Furthermore, a memorandum of agreement between BOEM and BSEE assigns BOEM responsibility for “provid[ing] BSEE the . . . locations of significant sand resources,”⁸⁷ so BSEE did not have an independent judgment to make in that regard.

⁷⁸ *Id.* at 22-23.

⁷⁹ BOEM Memorandum at 1.

⁸⁰ AR 22, Letter from BSEE Acting Regional Supervisor to PetroQuest (Jan. 13, 2017).

⁸¹ *See supra* notes 50-52 and accompanying text.

⁸² *See supra* notes 26-27 and accompanying text.

⁸³ *See* Motion to Remand, IBLA 2016-060 at unp. 1-2.

⁸⁴ *See* BSEE Order at 1-2.

⁸⁵ Statement of Reasons at 24; *see id.* at 23 (“Per the regulations, the decision is to be made by BSEE, not BOEM.”).

⁸⁶ *See supra* note 61 and accompanying text.

⁸⁷ Memorandum of Agreement Between the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement, Marine Minerals Program at 1, 2 (Oct. 3, 2011), <https://www.boem.gov/sites/default/files/documents//MOA%20BOEM-BSEE%20Marine%20Minerals%20Program%202011-10-03.pdf> (last visited Feb. 23, 2023).

d. Consideration of All Relevant Factors

PetroQuest next argues that BSEE unlawfully failed to consider all relevant factors, specifically, whether removal is “economically, environmentally, and technically feasible” and “necessary” “to protect the resources,” as required by the NTL; the fact that there are no plans for sediment excavation from these blocks; the State of Louisiana’s concurrence with PetroQuest’s decommissioning application; the impediments to excavation in the blocks that make it unsuitable for sand mining; alternatives to removal, including PetroQuest’s commitment to remove the pipeline segments if the blocks are needed for sediment extraction in the future, a bond to cover removal, and the availability of more suitable blocks for sediment excavation; and the burden on PetroQuest of abandonment by removal in relation to the minimal benefit to be gained.⁸⁸

The question before BSEE was whether it was appropriate to permit decommissioning in place instead of by removal, and BSEE considered the relevant factors set forth in regulations to determine that decommissioning in place was appropriate for 0.47 mile of the pipelines. The regulation identifies three factors, any one of which weighs against decommissioning in place: whether the pipeline “constitute[s] a hazard (obstruction) to navigation and commercial fishing operations, unduly interfere[s] with other uses of the OCS, or [has] adverse environmental effects.”⁸⁹ Here, BSEE concluded, based on BOEM’s site-specific review, that 0.8 mile of the pipeline segments would unduly interfere with the use of significant OCS sediment resources needed for coastal restoration.⁹⁰ BSEE expressly addressed the need to avoid “undue use conflicts between significant OCS sediment resource areas and oil and gas infrastructure installation and abandonment.”⁹¹

The regulation identifies no other factors BSEE must consider to determine whether decommissioning in place is appropriate, but PetroQuest cites NTL 2009-G04 to supplement the factors listed in the regulation. PetroQuest argues that BSEE was required by the NTL to consider whether removal is “economically, environmentally, and technically feasible” and “necessary” “to protect the resources.”⁹² For reference, we again quote the relevant portion of the NTL:

As applicable, the MMS GOMR will analyze OCS plans and pipeline applications for consistency with this protection policy. If it is determined that significant OCS sediment resources may be impacted by a proposed activity, the MMS GOMR may require you to undertake measures deemed

⁸⁸ Statement of Reasons at 25-27.

⁸⁹ 30 C.F.R. § 250.1750.

⁹⁰ BSEE Order at 1-2.

⁹¹ *Id.* at 1.

⁹² Statement of Reasons at 25 (quoting NTL 2009-G04 at 2); *see id.* at 28 (arguing that BSEE’s failure to consider these factors is inconsistent with NTL 2009-G04).

economically, environmentally, and technically feasible to protect the resources to the maximum extent practicable. Measures may include modification of operations and monitoring of pipeline locations after installation.

Future requests for in-place decommissioning of pipelines in these designated areas are discouraged. If it is deemed necessary, MMS may require pipelines previously decommissioned in place to be removed to minimize conflict with other uses of the OCS.⁹³

We do not read these paragraphs as imposing restrictions on when BSEE may deny an application to decommission a pipeline in place—nor could an NTL, which is a guidance document, alter the requirements set forth in duly promulgated regulations.⁹⁴ Also, we read the first paragraph as describing when BSEE could impose measures as part of its approval of “proposed activities”—new facilities—set forth in plans and applications as opposed to decommissioning applications aimed at existing pipelines, which is addressed in the second paragraph.

But regardless of the intent of the guidance provided in NTL 2009-G04, the record shows that BSEE considered whether removal is necessary and the other factors PetroQuest lists. For example, BSEE considered what PetroQuest calls “impediments to excavation”⁹⁵ in the location of PSNs 9727 and 9728. BSEE relied on BOEM’s site-specific analysis, in which it expressly considered the feasibility of extracting sediment from the location of PSNs 9727 and 9728, noting that the northern portion of the pipeline segment “is in close proximity to wells that comprise permanent obstructions and already interfere with access to surface minerals” and therefore may remain decommissioned in place.⁹⁶ Regarding the absence of plans for sediment excavation from these blocks,⁹⁷ BSEE acknowledged its authority under 30 C.F.R. § 250.1754 to order removal of the pipeline segments later, when the need for the sand resources was imminent, but explained that leaving the entire pipeline in place would have the effect of precluding

⁹³ NTL 2009-G04 at 2.

⁹⁴ See 30 C.F.R. § 250.103 (“BSEE may issue Notices to Lessees and Operators (NTLs) that clarify, supplement, or provide more detail about certain requirements. NTLs may also outline what you must provide as required information in your various submissions to BSEE.”); see, e.g., *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1036 (D.C. Cir. 2008) (“An agency’s interpretation of its own regulation is entitled to substantial deference, unless . . . inconsistent with the regulation.” (internal quotation marks omitted)).

⁹⁵ Statement of Reasons at 26.

⁹⁶ AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM at 1 (Oct. 31, 2016).

⁹⁷ Statement of Reasons at 25-26; see also *id.* at 26 (arguing that BSEE should have considered “PetroQuest’s commitment to remove the pipelines should the blocks be needed for sediment extraction in the future”).

future use of the resources.⁹⁸ BSEE stated, “the increased uncertainty and risk created by abandoned pipelines hinder investment and planning toward exploration and development of such areas in favor of more distant and costly, but unobstructed, resources.”⁹⁹ And, contrary to PetroQuest’s argument that BSEE must “defer[] to Louisiana’s opinion in this case,”¹⁰⁰ BSEE is not required to defer or conform to Louisiana’s finding that PetroQuest’s application to decommission in place was conditionally consistent with the State’s coastal management program as long as PetroQuest agreed in writing to remove PSN 9728 if necessary.¹⁰¹ Regardless, BSEE ensured BOEM had access to the State of Louisiana’s concurrence with PetroQuest’s decommissioning application, which it forwarded to BOEM Marine Minerals Program staff for review.¹⁰²

Two additional considerations PetroQuest raises warrant mentioning. First, although there was no requirement that BSEE consider alternatives to removal, including “PetroQuest’s commitment to remove the pipelines should the blocks be needed for sediment extraction in the future,” “a bond to cover future removal,” or the availability of “more suitable” blocks for sediment excavation,¹⁰³ BSEE considered relying on PetroQuest’s financial assurance for later removal.¹⁰⁴ But, as BSEE argues, while financial assurance “help[s] ensure that funds would be available to pay for removal later on[,] . . . it would do nothing to address the primary existing concern . . . that the current presence of the pipelines will prevent this area from ever being considered for a borrow area.”¹⁰⁵

⁹⁸ See BSEE Order at 1-2; *see also* Statement of Reasons, Exhibit C-4 (email from B. Obiol, BOEM Deputy Regional Director, to J. Ming (May 3, 2016)) (“[P]ipelines abandoned in place in significant sand resources could prevent consideration for their use. The sand must be available before it can be considered in a proposal.”).

⁹⁹ BSEE Order at 2.

¹⁰⁰ Statement of Reasons at 26.

¹⁰¹ AR 19, Letter from Louisiana Department of Natural Resources, Office of Coastal Management, to PetroQuest at 2 (June 2, 2016).

¹⁰² Answer at 9 (citing AR 38, Email from P. Smith, BSEE, to M. Miner, BOEM (Sept. 28, 2016)); *see also id.* at 16 (“BSEE’s regulations do not require the bureau to approve everything that would be consistent with Louisiana’s coastal management plan. BSEE and BOEM are charged with stewardship and conservation of the natural resources of the OCS and to so pursuant to their own distinct legal and policy regimes.”).

¹⁰³ Statement of Reasons at 26.

¹⁰⁴ *See id.*, Exhibit C-4 (email exchange among BOEM staff about the need for PetroQuest to maintain financial assurance if the pipeline segment were decommissioned in place (May 3, 2016)).

¹⁰⁵ Answer at 19; *see supra* notes 98-99 and accompanying text (discussing how leaving the entire pipeline in place would affect future use of the resources).

Second, BSEE was also not required to weigh the burden on PetroQuest of abandonment by removal in relation to the benefit to be gained.¹⁰⁶ The “burden” of removal was an obligation PetroQuest incurred when it chose to install the pipelines or become the lessee of a lease with a lease-term pipeline.¹⁰⁷ But even if BSEE had weighed the costs and benefits, the record suggests that the cost of decommissioning the pipelines by removal—which PetroQuest estimated as \$458,550 at the time it filed its statement of reasons¹⁰⁸—is outweighed by the economic value of the sand resources BSEE and BOEM seek to protect: “[G]iven the average thickness of the Ship Shoal sand formation, an 8,000 foot length of pipeline in that formation could obstruct a volume of sand with an economic value of approximately \$180 million.”¹⁰⁹

We conclude that PetroQuest has failed to show an error of law or fact in BSEE’s Order or that BSEE failed to give due consideration to all relevant factors and act on the basis of a rational connection between the facts found and the choice made.

3. BSEE’s Order Is Consistent with NTL 2009-G04, BOEM’s Position Statement, and Regulatory Reform Initiatives

PetroQuest argues that BSEE’s Order to remove the pipeline segments is inconsistent with NTL 2009-G04.¹¹⁰ Citing the language in the NTL stating that MMS (now BSEE and BOEM) “may require you to undertake measures deemed economically, environmentally, and technically feasible to protect the resources to the maximum extent practicable,”¹¹¹ PetroQuest asserts that BSEE ignored the NTL’s “reasoned approach” and instead “decree[ed] an absolute ban on all decommissioning in place of pipelines in [significant sediment resource areas].”¹¹²

But BSEE did not “decree[] an absolute ban on all decommissioning in place of pipelines in [significant sediment resource areas]” because it expressly allowed PetroQuest to decommission in place 0.47 mile of the 1.27-mile pipeline segments.¹¹³

¹⁰⁶ Statement of Reasons at 27.

¹⁰⁷ See 30 C.F.R. §§ 250.1702(b), (d) (“When do I accrue decommissioning obligations?”); see also Answer at 24 n.8 (“While the record does not indicate whether the pipelines were installed before or after PetroQuest became a lessee, PetroQuest does not dispute that it accrued decommissioning obligations for these pipelines.”).

¹⁰⁸ Statement of Reasons at 27.

¹⁰⁹ See Answer at 20 (citing AR 9, Presentation from the BOEM-BSEE-LA DNR-OOC Information Meeting at 61 (March 2016)).

¹¹⁰ Statement of Reasons at 28.

¹¹¹ See *supra* note 93 and accompanying text.

¹¹² Statement of Reasons at 28.

¹¹³ See BSEE Order at 2.

Furthermore, as we explained above, we do not read the NTL as imposing restrictions on when BSEE may deny an application to decommission a pipeline in place,¹¹⁴ and BSEE addressed not only the factors it was required to consider, but others relevant to economic, environmental, and technical feasibility as well.¹¹⁵ We conclude that BSEE's Order to remove 0.8 mile of PSNs 9727 and 9728 is consistent with NTL 2009-G04, whose purpose is to "safeguard the most significant OCS sediment resources, reduce multiple use conflicts, and minimize interference with oil and gas operations under existing leases or pipeline rights-of-way."¹¹⁶

PetroQuest also asserts that BSEE could not rely on BOEM's "Position Statement"—"a non-public, inter-agency memorandum"—to "expand[]" the NTL by "impos[ing] a substantive requirement to remove all pipelines located in [significant sediment resource areas]."¹¹⁷ PetroQuest contends that BSEE's reliance on BOEM's position statement, which BOEM had attached to the site-specific analysis it provided BSEE,¹¹⁸ is unlawful because the position statement is a "legislative rule issued without compliance with the notice-and-comment-rulemaking requirements of the APA," violates fair notice obligations, and constitutes improper post hoc rationalization.¹¹⁹

But PetroQuest has not demonstrated that BSEE relied on BOEM's position statement in issuing the Order on appeal. BSEE's Order states that BSEE relied on "BOEM's site-specific Marine Minerals geologic and environmental review," and BSEE did not reference BOEM's position statement.¹²⁰ Also, although BOEM's memorandum states a "general position" that abandoned pipelines are obstructions that "must be decommissioned by removal,"¹²¹ it concludes by specifying that "site-specific reviews conducted by BOEM [could] determine otherwise."¹²² And in fact, here, BOEM's site-specific review determined that 0.47 mile of PetroQuest's pipeline segments was not an obstruction.¹²³ Accordingly, BSEE did not rely on a "substantive requirement to remove all pipelines located in [significant sediment resource areas],"¹²⁴ nor did BOEM impose one.

¹¹⁴ See *supra* note 94 and accompanying text.

¹¹⁵ See *supra* notes 89–109 and accompanying text.

¹¹⁶ NTL 2009-G04 at 2.

¹¹⁷ Statement of Reasons at 29.

¹¹⁸ AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM (Oct. 31, 2016) (referencing the "letter attached," which "needs to be transmitted and incorporated into the official . . . review").

¹¹⁹ Statement of Reasons at 29.

¹²⁰ BSEE Order at 1.

¹²¹ BOEM Memorandum at 1 (Purpose).

¹²² *Id.* at 4 (Conclusion).

¹²³ See AR 27, Email from J. Mallindine, BOEM, to B. Cervini, BOEM (Oct. 31, 2016).

¹²⁴ Statement of Reasons at 29.

PetroQuest then argues that BSEE's Order is inconsistent with the former Administration's goals of reducing regulatory burdens.¹²⁵ PetroQuest cites Executive Order No. 13,777¹²⁶ and several Interior Secretary's Orders¹²⁷—all of which have since been revoked¹²⁸—which PetroQuest states were intended “to implement the Administration's goals of promoting energy independence and reducing burdens on the energy industry.”¹²⁹ PetroQuest concludes that, because BSEE's Order “would require PetroQuest to undertake costly operations to remove the pipelines when they do not currently (or foreseeably) interfere with any OCS use,” the Order “directly conflicts with the policies of the Administration and the Interior.”¹³⁰

But neither the Executive Order nor the Secretary's Orders directed BSEE to refrain from applying current regulations or deferring to BOEM's site-specific studies, and therefore none were inconsistent with BSEE's Order. Moreover, neither the Executive Order nor the Secretary's Order created obligations enforceable by PetroQuest through the Board.¹³¹

¹²⁵ *Id.*

¹²⁶ Exec. Order No. 13,777, *Enforcing the Regulatory Reform Agenda*, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

¹²⁷ Secretary Orders 3349, *American Energy Independence* (Mar. 29, 2017) (directing review of department actions impacting energy development, including mitigation and climate change policies); Secretary Order 3350, *America-First Offshore Energy Strategy* (May 1, 2017) (directing BOEM and BSEE to, inter alia, review pending rules and guidance); Secretary Order 3351, *Strengthening the Department of the Interior's Energy Portfolio* (May 1, 2017) (establishing the position of Counselor to the Secretary for Energy Policy).

¹²⁸ See Exec. Order 13,992, *Revocation of Certain Executive Orders Concerning Federal Regulation* 86 Fed. Reg. 7049 (Jan. 25, 2021) (revoking Exec. Order 13,777); Secretary Order No. 3398, *Revocation of Secretary's Orders Inconsistent with Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* at unp. 1 (Apr. 16, 2021) (revoking Secretary Order Nos. 3349, 3350, and 3351).

¹²⁹ Statement of Reasons at 30.

¹³⁰ *Id.*

¹³¹ See *Enterprise Field Services, LLC*, 193 IBLA 313, 322-23 (2018) (rejecting an argument that BLM violated an Executive Order “by failing to avoid unnecessary regulatory burdens” and noting that the Executive Order states that it does not create enforceable rights); Exec. Order No. 13,777 Sec. 6(c) (“This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person”); Sec. Order 3349, Sec. 5 (similar statement); Sec. Order 3350, Sec. 6 (similar statement).

We conclude that PetroQuest has failed to show that BSEE's Order is inconsistent with the Department's guidance or regulatory reform initiatives.

4. PetroQuest Has Not Shown that BSEE Failed to Treat Like Cases Alike

PetroQuest argues that “BSEE has routinely allowed other similarly-situated pipelines to be decommissioned in place,” including “[o]ver 1,500 pipelines . . . in [significant sediment resource areas]”¹³² and 39 pipelines in the Ship Shoal significant sediment resource area.¹³³ Citing the “fundamental norm . . . to treat like cases alike,”¹³⁴ PetroQuest argues that BSEE's inconsistency, without “provid[ing] a reasoned explanation for any failure to adhere to its own precedents,” makes BSEE's order unlawful.¹³⁵

In support of this argument, PetroQuest references a BOEM website that provides data about pipeline segments by area on the Gulf of Mexico OCS.¹³⁶ As of the date of this Decision, the website provides a 686-page report that generally supports the notion that there are thousands of pipeline segments on the OCS that are currently “abandoned.”¹³⁷ PetroQuest also cites a spreadsheet it exported from the online BOEM Data Center on June 11, 2019, showing that BSEE approved the abandonment of 38 pipeline segments in the Ship Shoal area since 2009.¹³⁸ BSEE does not dispute this information, and the record supports the point that BSEE has allowed operators to abandon pipelines in place in significant sediment resource areas in the Gulf of Mexico. For example, the record

¹³² Statement of Reasons at 31.

¹³³ *Id.* at 32.

¹³⁴ *Id.* at 31 (quoting *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.”)); see also *General Chemical (Soda Ash) Partners*, 176 IBLA 1, 12 (2008) (quoting *Westar Energy*, 473 F.3d at 1241).

¹³⁵ Statement of Reasons at 31 (quoting *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981)).

¹³⁶ *Id.* (citing BOEM Data Center, *Pipeline Segment List by Area Block* (compiled Feb. 15, 2023), <https://www.data.boem.gov/Pipeline/Files/2050.pdf> (last visited Feb. 23, 2023) (BOEM Data Center)).

¹³⁷ BOEM Data Center (listing over 10,000 pipeline segments with a status of “ABN”); BSEE File Description Report-ArcInfo Format, https://www.data.bsee.gov/Mapping/Files/8219_arcinfo_pipelines.pdf (last visited Feb. 23, 2023) (BSEE File Description Report) (explaining that “ABN” means “abandoned”).

¹³⁸ Statement of Reasons at 31-32 (citing Ex. B-4, which appears at Statement of Reasons at 157).

contains an email from 2015 from a BOEM employee to a BSEE employee listing 200 abandoned pipelines in the Gulf of Mexico that BOEM identified as priorities for removal.¹³⁹

But the only pipeline PetroQuest specifically cites as a “like case” is PSN 9727, which BSEE allowed PetroQuest to decommission in place in 2014.¹⁴⁰ And that was not a “like case.” When PetroQuest submitted the application for PSN 9727, it had not yet applied to decommission PSN 9728, which lies in the same trench as PSN 9727 and therefore prevented the use of sand resources near both PSN 9728 and PSN 9727. BSEE explains that BOEM “frequently recommends to BSEE that companies be allowed to wait to remove one pipeline until they are ready to decommission all the pipelines in the same trench,”¹⁴¹ which is what happened here. According to BSEE, “when PetroQuest applied to decommission the second pipeline in the trench, it presented the bureaus with the opportunity to have all of the now-defunct pipeline obstructions removed, resolving the interference with the ability to locate and plan sediment borrow areas.”¹⁴² But when PetroQuest applied to decommission PSN 9727, the circumstances were different, and the two cases are not alike.

Besides PSN 9727, PetroQuest does not specify a single other pipeline that is similarly situated to PSN 9728. It asserts only generally, “[u]pon information and belief, BSEE does not appear to be ordering removal of all abandoned pipelines in [significant sediment resource areas].”¹⁴³ PetroQuest also relies upon the negative responses it received to the Freedom of Information Act requests it sent to BSEE and BOEM seeking orders for removal of decommissioned-in-place pipelines.¹⁴⁴

¹³⁹ AR 37, Email from J. Mallindine, BOEM, to Angie Gobert, BSEE (Aug. 12, 2015) (“While there are significantly more pipelines that have been abandoned in place within designated sediment resource blocks, these were selected based on relative location to existing or proposed borrow sites, how much sand is restricted by its presence, and the proximity (or lack thereof) to active Infrastructure”).

¹⁴⁰ Statement of Reasons at 31.

¹⁴¹ Answer at 25 (citing Answer, Ex. A, Declaration of Angie D. Gobert, Chief of the Pipeline Section in BSEE Gulf of Mexico Region ¶ 5 (Oct. 3, 2019) (“There have been instances in which staff in BSEE’s pipeline section and BOEM [Marine Minerals Program] staff have recommended or agreed that removal of a pipeline in a significant sediment resource area be delayed to coincide with the removal of surrounding infrastructure.”)).

¹⁴² *Id.* at 26.

¹⁴³ Statement of Reasons at 32 (citing Exhibit C-3, which appears at Statement of Reasons at 176 (a draft redlined response to a congressional inquiry in which the author opined that the policy stated in NTL No. 2009-G04 “was not being enforced.”)).

¹⁴⁴ *Id.* (quoting Exhibit C-7 (BSEE stating “there were no previous pipelines required to be removed in accordance with 30 CFR § 250.1754 and based on NTL No. 2009-G04.”)).

But this general information indicating that BSEE granted applications to decommission pipelines in place and had not since ordered removal of those pipelines does not provide us enough specificity to determine whether BSEE has failed to “treat like cases alike.”¹⁴⁵ We cannot determine, for example, if other pipelines are in the same trench as active pipelines or are surrounded by operating infrastructure that prevent access to sand resources. Furthermore, BSEE provided another order it issued for the removal of a pipeline that was decommissioned in place,¹⁴⁶ suggesting that BSEE’s Order is not an isolated deviation from the bureau’s practice.¹⁴⁷ Moreover, as we previously discussed, BSEE provided a reasoned explanation for its decision to require PetroQuest to remove 0.8 mile of its pipeline segments.¹⁴⁸ So even if BSEE’s decision to require PetroQuest to remove portions of its pipelines differs from other BSEE decisions, BSEE justified the approach with a reasoned explanation.¹⁴⁹ We conclude that PetroQuest has not shown that BSEE failed to treat like cases alike or otherwise acted in an arbitrary and capricious manner.

5. BSEE’s Order Did Not Violate Fair Notice or Rulemaking Principles

Finally, PetroQuest makes two arguments about the legal process BSEE followed in making its decision. The first argument is that BSEE failed to provide PetroQuest fair

¹⁴⁵ See, e.g., *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (granting a petition for review of a National Labor Relations board decision where the appellant made “a significant showing that analogous cases have been decided differently”); see also, e.g., *Univ. of Tex. M.D. Anderson Cancer Ctr. v. United States HHS*, 985 F.3d 472, 480 (5th Cir. 2021) (holding that the appellant proved the agency’s failure to treat like cases alike by providing specific examples of similarly situated entities).

¹⁴⁶ Answer, Ex. A-1, Letter from B. Domangue, Acting Regional Supervisor, Regional Field Operations, BSEE Gulf of Mexico Region, to BP Exploration & Oil Inc. (Apr. 29, 2019) (ordering removal of pipeline segment that was decommissioned in place in November 1994 pursuant to 30 C.F.R. § 250.1754); see also AR 18, Gulf of Mexico Offshore Sand Management Working Group, Meeting Summary at 7 (Dec. 15, 2016) (stating that BOEM has requested partial removal of a pipeline segment 11 times); BOEM Data Center (identifying 1,295 appearances of the status “REM” (removed) or “PREM” (proposed removal)); BSEE File Description Report (defining “REM” and “PREM”).

¹⁴⁷ See *Westar Energy*, 473 F.3d at 1241 (explaining that the “fundamental norm” of treating like cases alike requires that, “[i]f the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.”).

¹⁴⁸ See *supra* Analysis section 2 for a discussion of the bases of BSEE’s decision.

¹⁴⁹ See *LeMoyne-Owen Coll.*, 357 F.3d at 61 (requiring “an adequate explanation of apparent departures from precedent”); *Hatch*, 654 F.2d at 834 (requiring an agency to “provide a reasoned explanation for any failure to adhere to its own precedents”).

notice of a new policy.¹⁵⁰ PetroQuest contends that it “justifiably relied” on a decades-long pattern of approving applications to decommission pipelines in place, even in significant sediment resource areas, and will now incur “duplicate expenses . . . to decommission PSN 9727 twice.”¹⁵¹ PetroQuest also argues that BSEE failed to provide a reasoned explanation for its “new policy of removal regardless of demonstrated need,” which BSEE applied “in contravention of the applicable regulations without any rational justification for that change.”¹⁵²

PetroQuest has not shown that BSEE failed to provide fair notice of decommissioning requirements or that it changed or reversed established policies or practices. As we already explained, contrary to PetroQuest’s assertion that the application of BSEE’s regulations is a “new policy of removal regardless of demonstrated need,” BSEE’s Order itself undermines that argument by granting PetroQuest’s application in part, allowing a portion of the pipeline segments to be abandoned in place.¹⁵³ And in doing so, BSEE applied a regulatory construct that has existed for decades.

When PSNs 9727 and 9728 were installed in 1992,¹⁵⁴ MMS regulations allowed abandonment in place only when MMS determined that the pipeline would not “constitute a hazard to navigation [or] commercial fishing operations, or unduly interfere with other uses in the OCS.”¹⁵⁵ In 2002, MMS published a rule updating decommissioning requirements.¹⁵⁶ The new regulations required lessees and operators to decommission all pipelines and clear the seafloor of obstructions,¹⁵⁷ which was defined to include pipelines if they “would hinder other users of the OCS.”¹⁵⁸ This rulemaking included § 250.1750, explaining when an operator may decommission a pipeline in place, and § 250.1754, which requires an operator to “remove a pipeline decommissioned in place if the Regional Supervisor determines that the pipeline is an obstruction.” These regulations notified operators that the ability to decommission a

¹⁵⁰ Statement of Reasons at 34.

¹⁵¹ *Id.*

¹⁵² *Id.* at 34-35.

¹⁵³ See *supra* notes 113 and 123-24 and accompanying text.

¹⁵⁴ Statement of Reasons at 3-4.

¹⁵⁵ 30 C.F.R. § 250.156(a)(1) (1991); see also *id.* § 250.159(c)(9) (requiring, within one year of the effective date of a relinquishment, forfeiture, or cancellation of a pipeline right-of-way grant, “the removal of “all platforms, structures, domes over valves, pipes, taps, and valves along the right-of-way”).

¹⁵⁶ Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Decommissioning Activities, 67 Fed. Reg. 35,406 (May 17, 2002).

¹⁵⁷ 30 C.F.R. § 250.1703(d), (e) (2002).

¹⁵⁸ *Id.* § 250.1700(b).

pipeline in place was subject to a case-by-case determination that the pipeline would not hinder other users of the OCS.

Then, in 2009, MMS issued NTL No. 2009-G04 “to help safeguard the most significant OCS sediment resources, reduce multiple use conflicts, and minimize interference with oil and gas operations.”¹⁵⁹ MMS explained that it would “analyze OCS plans and pipeline applications for consistency with this protection policy,” cautioning that “[f]uture requests for in-place decommissioning of pipelines in these designated areas are discouraged” and reiterating that, “[i]f it is deemed necessary, MMS may require pipelines previously decommissioned in place to be removed to minimize conflict with other uses of the OCS.”¹⁶⁰ Later—but before BSEE issued the Order on appeal—BSEE and BOEM engaged in additional outreach to industry about the need to remove pipelines in significant sediment resource areas.¹⁶¹ This history of the regulations and NTL No. 2009-G04, along with efforts to educate industry about them, show that the bureaus provided fair notice of the requirements applied and discretion exercised in BSEE’s Order.

To the extent PetroQuest argues that the notice of requirements and policy BSEE and BOEM provided was ineffective because they had not used the authority to order removal of pipelines “for decades,”¹⁶² we reject that argument. Based on the record before us, we have held that PetroQuest did not demonstrate that BSEE’s Order was a departure from past practice such that BSEE failed to “treat like cases alike.”¹⁶³ In addition, the OHA Director has held that “an agency’s past failure to enforce a regulation . . . [does not] prevent it from enforcing the regulation in the present, if the agency had not previously established an authoritative interpretation upon which a regulated entity could reasonably rely.”¹⁶⁴ Although this case is not so much a matter of “enforcing” a regulation as it is applying the regulation in appropriate circumstances, the same

¹⁵⁹ NTL No. 2009-G04 at 2.

¹⁶⁰ *Id.*

¹⁶¹ *See, e.g.*, AR 33, Email from J. Mallindine, BOEM, to L. Turner, BOEM (Apr. 28, 2015) (seeking to update the “lists of sediment blocks” on BOEM’s website, “where we direct industry”) (referencing <https://www.boem.gov/marine-minerals/managing-multiple-uses-gulf-mexico> (last visited Feb. 23, 2023)); AR 9, BOEM Marine Minerals Program Presentation at the BOEM-BSEE-LA-DNR-OOC Information Meeting, Pipeline Decommissioning in Significant OCS Sediment Resources at slides 43, 52, 77 (Mar. 2016) (identifying sand resources in the Ship Shoal Area and stating BOEM’s policy of “[n]o in-place abandonment of decommissioned pipelines”); AR 40, Email from A. Buquet, PetroQuest to M. Miner, BOEM (Mar. 17, 2016) (asking for a copy of BOEM’s Mar. 2016 presentation).

¹⁶² Statement of Reasons at 34.

¹⁶³ *See supra* Analysis section 4.

¹⁶⁴ *Statoil Gulf of Mexico LLC*, 42 OHA 261, 306 (2011).

principle applies: incidents of BSEE choosing not to apply 30 C.F.R. § 250.1754 to require operators to remove other pipelines decommissioned in place in significant sediment resource areas does not prevent it from applying the regulation now. And PetroQuest cites no authoritative interpretation or policy statement indicating that BSEE would *not* apply § 250.1754. That absence, taken together with evidence of the application of § 250.1754,¹⁶⁵ defeats PetroQuest’s argument that it reasonably relied on a contrary policy. The history of the Department’s regulations—which had been in effect in their current form for 13 years when PetroQuest submitted the application to decommission PSN 9728 in place—in addition to guidance documents and outreach efforts convince us that PetroQuest had ample advance notice of the procedures BSEE would apply to evaluate an application to decommission a pipeline in place.

Finally, PetroQuest argues that BSEE and BOEM violated the Administrative Procedure Act (APA) by changing regulatory requirements without engaging in notice-and-comment rulemaking.¹⁶⁶ PetroQuest asserts that both BSEE’s Order and BOEM’s position statement modified existing regulations by prohibiting decommissioning in place in significant sediment resource areas and removing the requirement that BSEE determine whether the pipeline is an obstruction.¹⁶⁷ PetroQuest concludes that, because the documents changed existing regulatory criteria, they are legislative rules imposed in violation of the APA.¹⁶⁸

We consider PetroQuest’s argument only with respect to BSEE’s Order because, as we noted earlier, BSEE’s Order is based on BOEM’s site-specific review, not BOEM’s position statement.¹⁶⁹ We conclude that BSEE’s Order neither changes regulatory requirements nor qualifies as a legislative rule.

First, BSEE’s Order does not change existing regulations; it applies them. Specifically, BSEE’s Order cites and applies BSEE’s regulations at 30 C.F.R. § 250.1703, the requirement to “[d]ecommission all pipelines” when they are “no longer useful for operations”; § 250.1750, the authority to allow decommissioning in place if the pipeline does not constitute an obstruction; § 250.1754, the authority to order removal of a pipeline decommissioned in place if BSEE determines that it is an obstruction; and § 250.1700(b), the definition of “obstruction.”¹⁷⁰ BSEE’s Order acknowledges that pipelines in Significant OCS Sediment Resource areas generally qualify as obstructions and applies BOEM’s site-specific review to conclude that certain portions of PetroQuest’s

¹⁶⁵ *See supra* note 146.

¹⁶⁶ Statement of Reasons at 35-36.

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See supra* notes 120-24 and accompanying text.

¹⁷⁰ BSEE Order at 1-2; 30 C.F.R. §§ 250.1700(b), .1703, .1750, .1751, .1754.

pipelines qualify as obstructions and other portions do not.¹⁷¹ The Order does not modify the regulatory requirement for an operator to apply to decommission a pipeline in place—whether the pipeline is in a significant sediment resource area or not—or BSEE’s authority to grant or deny decommissioning in place or order removal of a pipeline decommissioned in place if it is later found to be an obstruction.¹⁷² We conclude that BSEE’s Order does not impose any requirement that changed, expanded, or conflicts with BSEE’s existing regulations.

Second, for the same reasons—because BSEE’s Order applied existing regulations and a site-specific review to address PetroQuest’s decommissioning application—BSEE’s Order is not a legislative rule. The APA defines a rule as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”¹⁷³ The term “legislative rule” refers to a rule an agency issues after providing notice of the proposed rulemaking and an opportunity to participate in the rulemaking through submission of comments—a notice-and-comment process.¹⁷⁴

BSEE’s Order does not meet the definition of a rule, legislative or otherwise. The Order is not “an agency statement of general or particular applicability and future effect.”¹⁷⁵ Instead, BSEE’s Order is the product of an adjudication. Under the APA, an adjudication is agency action that results in an “order,”¹⁷⁶ which means “the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing.”¹⁷⁷ The term “licensing” includes the process an agency engages in to grant or deny an approval or other form of permission¹⁷⁸—here, approval to decommission a pipeline in place. As we have stated, BSEE’s Order applied the regulatory definition of “obstruction” and the findings of BOEM’s site-specific review to determine that portions of PSNs 9727 and 9728 are obstructions that must be removed and other portions are not and therefore may stay in place. Using the existing regulations, BSEE exercised its discretion to adjudicate PetroQuest’s application to

¹⁷¹ BSEE Order at 1-2.

¹⁷² 30 C.F.R. §§ 250.1750, .1751, .1754.

¹⁷³ 5 U.S.C. § 551(4).

¹⁷⁴ *See id.* § 553(b) (notice), (c) (comment); *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (“Rules issued through the notice-and-comment process are often referred to as ‘legislative rules’ . . .”).

¹⁷⁵ *See* 5 U.S.C. § 551(4) (definition of “rule”).

¹⁷⁶ *See id.* § 551(7) (“adjudication means agency process for the formulation of an order”).

¹⁷⁷ *Id.* § 551(6) (definition of “order”).

¹⁷⁸ *Id.* § 551(8), (9) (definitions of “license” and “licensing”).

decommission in place. Furthermore, contrary to what PetroQuest implies,¹⁷⁹ BSEE was not required to announce any new (or renewed) effort to apply § 250.1754 through adjudication.¹⁸⁰

We conclude that PetroQuest has not shown that BSEE violated fair notice or rulemaking principles.

CONCLUSION

We hold that PetroQuest has not shown that BSEE's Order is based on an error of law or a material error of fact or that BSEE failed to give due consideration to all relevant factors and act on the basis of a rational connection between the facts found and the choice made. Accordingly, we affirm BSEE's Order.

SILVIA IDZIOREK Digitally signed by SILVIA IDZIOREK
Date: 2023.02.23 10:52:32 -05'00'

Silvia Riechel Idziorek
Acting Deputy Chief Administrative Judge

I concur:

STEVEN LECHNER Digitally signed by STEVEN LECHNER
Date: 2023.02.23 12:58:12 -05'00'

Steven J. Lechner
Acting Chief Administrative Judge

¹⁷⁹ See, e.g., Statement of Reasons at 33 (stating that “[t]here are limits on an agency’s ability to proceed through adjudication rather than rulemaking”).

¹⁸⁰ See *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293 (1974) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)) (“[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”); see *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 909 (5th Cir. 1983) (“[A]n agency has the discretion to proceed through case-by-case adjudications and interpretative orders, rather than through the rulemaking process, for the agency will often confront special problems necessitating a flexible approach to their resolution.”).