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Outer Continental Shelf ("OCS") oil and gas drilling has been a controversial subject ever since the Santa Barbara Oil spill of January, 1969. In the past decade, the Reagan Administration's plans to open to exploration additional areas of the OCS on the East and West Coasts have been met with Congressional action denying the Department of the Interior the funds necessary to carry out proposed lease sales, and in the last Congressional session legislation was introduced to place a permanent moratorium on oil and gas leasing on most of the OCS. In general, the federal government's program to develop the OCS is in trouble everywhere outside the Western Gulf of Mexico, an area that has traditionally welcomed oil and gas development. The Bush Administration has acknowledged this, and promised some reforms, including greater attention to environmental concerns, in its soon to be released OCS leasing program.

The political maneuverings that have shut down a good deal of OCS leasing in the past decade are symptomatic of a general perception that the federal government is prepared to go ahead with OCS development at the expense of environmental concerns, and specifically at the expense of the coastal states, which will bear much of the impact of that development. This has placed the coastal states outside the Western Gulf of Mexico in something of an institutional role of opposing OCS development, or at least insisting upon greater safeguards than the Minerals Management Service (MMS), the branch of the Department of the Interior that handles OCS development, would require. One useful way to look at this conflict between the coastal states and the federal government is to say the coastal states are prepared to accept less uncertainty about the effects of OCS development than is the MMS.

The quality and quantity of environmental information used in the federal offshore leasing program has been the target of criticism from several sources other than the coastal states or green advocacy groups. A committee of the National Research Council, charged to evaluate the adequacy of environmental information for making leasing decisions in three areas offshore California and southern Florida, recently released a report finding inadequacies in the information available for each of the areas. Equally important, the committee expressed a number of more far-reaching criticisms of the OCS leasing program. (NRC 1989). A joint federal-state task force evaluating the propriety of scheduled OCS leasing off the coasts of Washington and Oregon has also recommended that leasing be delayed until additional environmental studies are completed. Finally, in late June 1990, the Bush Administration announced a decision that scheduled leasing of OCS areas off California, Florida and New England would be delayed until further environmental studies could be performed.

All of this points to something amiss in the way the United States has gone about developing its Outer Continental Shelf resources. A system that has left some of the coastal states frustrated enough to resort to policy-making through the unwieldy device of Congressional budget moratoria is rather clearly a system with a problem. Likewise, a system prepared to schedule and undertake

leasing and development without adequate scientific information on their impacts also has a problem. The OCS contains a lot of oil and gas, and recent events in the Persian Guld underscore the importance of developing that resource, if it can be done safely. The purpose of this paper is to see how these two ideas--input by the coastal states and scientific uncertainty--interact at some critical points in the OCS leasing and development process, and how that interaction has helped to cause the present problems.

The approach I will take is to briefly review the sorts of environmental impacts that OCS drilling can have, with an emphasis on what we don't know about the consequences of these impacts. Since I am a lawyer and not a scientist, this will necessarily be a fairly superficial review, and will stick to propositions on which there seems to be general agreement. I will then take a look at the way the regulatory system treats this uncertainty about environmental effects of OCS drilling in some specific statutes, regulations, and in judicial review of OCS development decisions, and the implications that this treatment has for state input into OCS decisions.

The conclusion that I reach--and I hope the conclusion that the reader will reach--is that given the present state of knowledge about the effects of OCS oil and gas development and the present regulations, it will be an extremely rare case in which OCS development will be stopped by the federal government, or can be stopped by the coastal states, out of environmental concerns without resort to political measures. This means that which might be called the "burden of uncertainty" is on the coastal states in their institutional role of opposing OCS development. This conclusion has several implications for the system which I will discuss in the conclusion.

Environmental Impacts of OCS Development and Uncertainty

Let's begin with a few basics.

OCS oil and gas wells are drilled from one of several different sorts of installations, including fixed platforms, so-called "jack-up" rigs, or anchored drilling vessels. Drilling is a big operation, requiring a large number of support personnel and significant onshore support facilities. If oil or gas is discovered, then additional wells are drilled, and fixed platforms to hold production facilities are installed. In addition, the oil or gas must be transported to shore either by pipeline or by vessel. Unless the production is transported elsewhere by vessel, onshore transmission and possibly processing facilities must be constructed.

These activities cover a lot of ground, and the kinds of environmental effects they can cause are equally wide-ranging. Many are rather obvious and can be predicted with some certainty. Rig emplacement can cause physical impacts on bottom-dwelling biological communities. Pipelines must cross often-fragile coastal zone areas. Support facilities take up space that may be at a premium in coastal areas.

Other environmental effects are less obvious and less certain. The cumulative effects of construction of gravel causeways for placement of pipelines, for example, are not known. Animals may adapt to the noise and human presence associated with drilling operations, or those factors may significantly disturb their behavior patterns. (MMS 1988).

Drilling an oil and gas well produces a number of different sorts of effluents, often in large quantities. These include drill cuttings, which are the ground up material produced by the bit as a well is drilled, and drilling fluids, which are used to lubricate and

cool the drilling pipe and bring drill cuttings back to the surface. The ingredients of drilling fluids are generally fairly innocuous, but they may on occasion contain toxic additives. In addition, if large amounts of these cuttings or drilling fluids are discharged directly into the ocean, as they often are in OCS drilling, they may bury nearby bottom-dwelling organisms, and may affect other factors, such as light penetration, for a considerable distance around the platform. The available studies do not indicate any long-term harmful environmental effects from the discharge of the sorts of drilling fluids routinely used in OCS operations, but definitive studies of areas in the Gulf of Mexico that have experienced heavy OCS development have not been performed. (NRC 1989, NRC 1983).

Other sorts of pollutants produced by OCS drilling include sanitary waste, miscellaneous sorts of materials used in servicing or operating machinery, and solid waste such as lost tools or pipe. The engines necessary to run the drilling rig may produce significant amounts of airborne pollutants. None of these are produced in the same volume as drilling fluids and cuttings, but they do have potential environmental effects.

OCS drilling activities also have the potential to disrupt the life cycles of various inhabitants of the OCS. This can occur simply through the presence of installations on the OCS, for example if they are placed adjacent to spawning areas, or through the conduct of operations, as when vessel traffic crosses whale migration routes. These potential effects can be of particular importance when they involve one of the several endangered species that inhabit the OCS.

Production of oil and gas involves additional potential environmental hazards. Oil and gas is often found in association with various amounts of water, which must be separated from the hydrocarbons at some point. This produced water can contain a number of pollutants, including hydrocarbons and various sorts of heavy metals. Definitive studies on the long-term effects of produced waters on the marine environment have not been performed. (MMS 1988).

Finally, actual production and transportation of OCS oil brings about the possibility of oil spills, which are the real hobgoblin of OCS development. They are not predictable, they are ugly, and their consequences for wildlife and scenery can be devastating. Oil spills differ from other sorts of OCS pollution in that they are unexpected events. Over the life of any OCS project, however, it is statistically certain that small oil spills will occur. In addition, an OCS development project of any size brings with it the risk that larger spills will occur. As is the case with drilling discharges and produced waters, the available literature indicates no real environmental harm from small discharges of oil, but the long-term effects of such discharges are not known with certainty. In addition, many of the long-term effects of larger spills are not completely understood. Finally, it is generally agreed that the available technology for spill containment is incapable of completely containing a spill in unfavorable weather conditions. This means, in essence, that no matter what precautions are taken, there will be some danger of damage to the environment if a spill occurs. (MMS 1989, NRC 1985).

The point of all this is not to give a definitive review of the scientific information on the environmental impacts of OCS drilling, but simply to show that in all of these areas there is anywhere from a little bit to a great deal of uncertainty. Some of that uncertainty is unavoidable. In the case of oil spills, their size and occurrence cannot be predicted with any certainty, and their effects are largely

dependent on conditions at the time of their occurrence. It is difficult to predict the consequences of many other sorts of impacts because ecological relationships on the OCS are extremely complex and not well understood. In some cases research is difficult, in others the necessary research simply has not been performed. In some cases there is disagreement about the value of the work that has been performed.

The National Research Council committee had several basic concerns about the available ecological data that are relevant here. The committee's study was directed toward specific areas of California and Florida, but these concerns have general application to OCS development. First, there has been little focus on regional ecosystem process studies, or how the elements making up an ecosystem work together. This kind of knowledge is necessary to help predict the impacts of OCS activities. Second, the risk analysis used in making OCS decisions has tended to focus on the possibility of oil spills, and gives less attention to other potential effects of OCS activities. In addition, sublethal and chronic impacts of OCS activities are often given short shrift. The committee stated that the MMS should have performed studies in established fields off Southern California or in the Gulf of Mexico to determine these sorts of effects.

Another point the National Research Council committee makes that is important for our analysis is that more detailed, site-specific environmental information is necessary for decisions on development and production than for decisions on leasing. The committee expressed concern, however, that it could not verify that there was a distinction between the decision to lease an area and the decision to permit oil and gas development and production in the area if hydrocarbons were found. This appeared to be the case because by the time leasing and exploration had taken place, millions of dollars had been expended on the prospect, and consequently a decision not to develop is not a realistic possibility. In support of this idea, the committee pointed out that the Department of the Interior has never used the procedures the Outer Continental Lands Act (OCSLA) provides for cancelling a lease, nor has it ever refused to approve a plan submitted under the OCSLA for development of a proven area on the OCS. The same conclusions were echoed in a recent article by John Van de Kamp, Attorney General of the state of California, in the winter 1990 edition of the **Harvard Environmental Law Journal.**

The National Research Council committee also expressed concern that the OCS-related environmental studies that had been performed seemed to be concentrated in areas in which opposition to OCS leasing was vociferous, perhaps at the expense of areas no less deserving of protection and study but less vocal. A quick look at the historical expenditure of funds in the Minerals Management Service's Outer Continental Shelf Environmental Studies Program seems, at least superficially, to support this conclusion: although approximately ninety percent of OCS leasing and development has occurred in the Gulf of Mexico OCS region, only fifteen to twenty percent of environmental expenditures have occurred there. (MMS 1988). The Gulf of Mexico region has, of course, historically been receptive to offshore development, while other areas of the country have been less so.

The Structure of the Leasing and Development Process

With that background, let's talk for a bit about the OCS leasing and development process. Beginning in 1978, when Congress extensively amended the OCSLA, the OCS leasing and development process has had four stages: pre-leasing, leasing, exploration, and

development and production. The basic idea behind putting this structure in place was to guide the Secretary of the Interior in making leasing and development decisions, ensure that environmental factors were taken into account, and cut down on the litigation that had plagued the leasing process since the 1969 Santa Barbara oil spill. To accomplish this, the tiered approach was intended to require more specific environmental information about an OCS area as more specific and intrusive activities were planned. As a part of the OCSLA overhaul, the states were also given opportunities for input at each of these stages.

In the latter two phases, exploration and development/production, state input comes both through the OCSLA and the Coastal Zone Management Act (CZMA). The CZMA permits a state having an approved coastal zone management program to review federally permitted activities for consistency with that program. In the 1978 amendments to the OCSLA, this "consistency review" power was extended to plans covering OCS exploration and development (although not, as the Supreme Court held in *Secretary of the Interior v. California*, 464 U.S. 312 (1984), to OCS lease sales). These mechanisms for state input were one of the key aspects of the 1978 amendments intended to coopt state dissatisfaction with the leasing process.

How does this system work together with information about environmental consequences of OCS drilling? As we go through the phases of OCS development, it will become clear that scientific information is supposed to drive the system, and the MMS is supposed to make many of its decisions based on this information. The interesting part is what happens when scientific information is inconclusive or non-existent.

Pre-Leasing

Section 18 of the OCSLA requires the Secretary of the Interior to prepare a program of proposed lease sales for a five-year period. This is generally referred to as the "five-year plan." Environmental information is one of the key factors the Secretary is required to consider in setting the leasing schedule: Sections 18(a)(1) and (2) require consideration of the environmental and predictive information available, other uses of OCS areas, and the equitable sharing of benefits and risks of development among the various OCS regions. Section 18(a)(3) requires the Secretary, in setting the timing and location of lease sales, to attempt to "obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone."

This balancing has generated most of the controversy under Section 18. The coastal states, in playing their institutional role of opposing OCS development, have a real interest in seeing that particular areas they view as inappropriate for development are not included in the five-year plan. This is because inclusion in the plan does not necessarily mean an area will be leased, but if an area is not included in the plan it cannot be leased. This is obviously a good thing from the perspective of the coastal states because it permits them to stop worrying about an area and move on to other things.

One historical fact bears noting before we look at the cases considering Section 18. This provision has only been around since 1978, and consequently only three five-year plans have been proposed. The first was proposed by Secretary of the Interior Cecil Andrus for 1980-85. The second, which was essentially a revision of the Andrus plan, was

proposed by James Watt for 1982-87, and the third was proposed by Donald Hodel for 1987-92. All of these plans, and particularly the 1982-87 Watt plan, represented significant expansions of the OCS leasing program and consequently generated a lot of controversy. The Watt program also introduced the very controversial concept of "area leasing," under which essentially the entire OCS was proposed for leasing, and ultimate decisions about what would be leased were made on the basis of industry interest.

The challenge to the 1980-85 Andrus program set the standards of review for Section 18 decisions, and they are quite lenient ones. *(California v. Watt*, 688 F.2d 1290 (D.C. Cir. 1981)). (The OCSLA establishes, by the way, that review of a five-year plan is by direct appeal to the District of Columbia Circuit). The way the court got to these standards of review is a little unusual.

Section 23(c) of the OCSLA actually prescribes the standard of review to be applied to secretarial findings with respect to a five-year plan: "The findings of the Secretary, if supported by substantial evidence, shall be conclusive." The D.C. Circuit did not, however, follow literally this apparently clear directive, and instead applied different, less stringent standards of review to certain key types of secretarial findings with respect to five-year plans.

In *California v. Watt*, the court acknowledged the language of Section 23(c), but reasoned that the relationship between Section 18 and Section 23(c) rendered the literal application of the substantial evidence standard of Section 23(c) inappropriate. The court said this was because Section 18 basically leaves the devising of a leasing plan to the Secretary's discretion, and directs that the plan be developed through procedures similar to informal administrative rule-making.

In addition, the court analogized the function the Secretary of the Interior performed in formulating the leasing program to the function that the Secretary of Commerce performs under the Occupational Health and Safety Act of 1979: both involve the determination of policy as well as the adjudication of disputed facts. Policy determinations are simply not susceptible to the same kind of review as factual determinations, said the court, because they often involve areas in which there is no clear evidence on which to draw factual conclusions. Based on all this, *Watt I* summarizes the standards of review for the Secretary's decisions in the Section 18 process as follows:

> When reviewing findings of ascertainable fact made by the Secretary, the substantial evidence test guides our inquiry. When reviewing the policy judgments made by the Secretary, including those predictive and difficult calls the Secretary is called upon to make, we will subject them to searching scrutiny to insure that they are neither arbitrary nor irrational - in other words, we must determine 'whether the decision is based on a consideration of the relevant factors and whether there has been a clear error in judgment.'

We have already seen that much of the scientific information about the environmental consequences of OCS development is uncertain or subject to interpretation. Taken together with the arbitrary and capricious standard of review the D.C. Circuit has determined to apply to decisions involving prediction, it will be extremely difficult for a state to successfully

challenge a Secretarial decision to include an area in the five-year plan.

This is especially so in light of a second holding by the D.C. Circuit concerning the balancing the Secretary must perform under Section 18(a)(3). The court said the Secretary is not required to treat all of the factors to be balanced equally, because the purpose of the OCSLA is "the expeditious development of OCS resources:"

> The environmental and coastal considerations are undoubtedly important, but the Act does not require that they receive a weight equal to that of potential oil and gas discovery. A balancing of factors is not the same as treating all factors equally....The Act does not mandate any particular balance, but vests the Secretary with substantial discretion to weigh the elements so as to 'best meet national energy needs.'

Given this, it seems unlikely that a court could find a "clear error of judgment" in the Secretary's decision to put an area in the five-year plan. Two other decisions by the D.C. Circuit considering various challenges to the Watt and Hodel five-year plans have confirmed these standards of review.

So we see that the state of information about the environmental consequences of OCS development interacts with the statutory standards and judicial interpretation to vest a great deal of discretion in the Secretary at the five-year plan stage. Is this necessarily a bad thing? After all, including an OCS area in the five-year plan is not the same as leasing it or developing it. Let's reserve judgment on that question until after we have looked at the other phases of OCS development.

Leasing

Again, when Congress enacted the 1978 amendments to the OCSLA, one of its purposes was to cut down on the litigation and delays that had plagued OCS lease sales since the Santa Barbara blowout by bringing the coastal states into the process. One of the primary avenues for doing this was Section 19 of the OCSLA, which provides in pertinent part as follows:

> (a) Any Governor of any affected state or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan.
>
> * * *
>
> (c) The Secretary shall accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. For purposes of this subsection, a determination of the national interest shall be based on the desirability of obtaining oil and gas supplies in a balanced

> manner and the findings, purposes and policies of this subchapter.

This sounds to the good, so far as the coastal states are concerned. It gives them a formal voice in leasing decisions, and is mandatory in terms: the Secretary shall accept recommendations provided he finds a reasonable balance between the national interest and the well-being of the citizens of the affected state. Section 19 also provides, however, that the Secretary's decision on Section 19 recommendations is subject only to arbitrary and capricious review:

> The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of an affected state shall be final and shall not, alone be a basis for invalidation of a proposed lease sale or a proposed development and production plan in any suit or judicial review pursuant to section 1349 of this title, unless found to be arbitrary or capricious.

In practice, this has meant that the Secretary's decisions on Section 19 recommendations are more or less unassailable. *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1988) is a good example. In that case, the Secretary balanced the net economic value of the proposed lease sales against the probability and impact of oil spills in making the Section 19 determination--quite a narrow set of considerations given the numerous potential impacts of OCS leasing. The Ninth Circuit said this approach was permissible, and stated "Alaska uncovers no fundamental flaw or irrationality; rather, Alaska only succeeds in showing it prefers the results reached by a different methodology."

Again, we have seen that the scientific information regarding environmental impacts of OCS activities is often uncertain. The Secretary is given wide discretion not only to choose the information he will consider in the Section 19 balancing, but also to draw conclusions from that information. Taken altogether, this means that the Secretary's decisions will very seldom exhibit the kind of "irrationality" needed for them to be overturned under an arbitrary and capricious standard of review.

Another aspect of the leasing process deserves mention here. Like other federal actions, OCS leasing activities are subject to the National Environmental Policy Act, and an environmental impact statement is routinely prepared for lease sales. A number of lease sales have been challenged on the basis that the accompanying environmental impact statements were too vague or were incomplete. Many of these challenges have been turned down on the basis that the phased nature of OCS development excuses the government from the need to consider many potential impacts or perform extensive analysis at the lease sale stage.

The courts have pointed to a number of reasons to support the conclusion that detailed environmental analysis need not be performed at the lease sale stage. A key one is the idea that leasing is a paper transaction, giving the lessee no vested right to actually go out and develop the leased area. Consequently, additional analysis can be performed if necessary when specific activities are proposed. A second idea the courts have often relied upon is that the MMS retains the power under its regulations to modify or disapprove altogether proposed activities, and the states have the right, through the consistency review process, to influence the

process at the exploration and development stages. The same general sort of logic has been used to reject claims under the Endangered Species Act (ESA). The courts have on several occasions turned down challenges to lease sales based on the ESA based on the idea that leasing itself does not put any species in danger, and that all subsequent activities will be subject to the ESA's restrictions.

There has been a good deal of criticism of this kind of analysis recently: we have seen that the National Research Council has questioned whether there is a true separation of leasing and development. Mr. Van de Kamp also questions this reasoning. The points he makes are generally valid: it is fundamentally rather silly to think, as the courts apparently do, that OCS lessees pay millions of dollars for nothing more than a "priority" to develop OCS reserves. It is also, as a matter of common sense, naive to think that the federal government will be completely neutral in its administration of a program that is its second largest source of revenue. This is not to suggest that the Department of the Interior or the MMS are doing anything improper, but simply to make the point that their job is to get the OCS developed, and their view of environmental matters is going to be colored by that fact.

These are good practical, if somewhat difficult to prove empirically, reasons to question whether the federal government will take a hard look at environmental concerns before permitting development of a leased area to go forward. Equally important, the provisions of the OCSLA and the CZMA permit OCS development to be stopped only if serious environmental harm is virtually certain. The next section looks at these provisions.

Exploration/Development and Production

When an OCS lessee gets ready to actually go out and drill wells on the OCS, a number of federal statutes come into play. The critical ones for this discussion are the OCSLA and the CZMA.

The OCSLA requires the offshore operator to submit a document, known as a plan of exploration, prior to drilling an exploratory well, and a development and production plan prior to drilling additional wells for development of an oil and gas field. These documents, which I will sometimes refer to generically as "plans," outline the elements of the proposed operations. They are required to include information about facilities, expected discharges of pollutants, and expected impacts of the proposed operations on the environment. In the Western Gulf of Mexico, an abbreviated version of the development and production plan, known as a "development operations coordination document," is required. The plans are reviewed for adequacy by both the MMS and the adjacent coastal state or states: the MMS under the authority of the OCSLA, and the states under the provisions of both the OCSLA and the CZMA.

The MMS has the authority to require modification of a plan if it is "inconsistent with the provisions of the lease, the [OCSLA], or the regulations prescribed under the [OCSLA]...." The MMS has authority to reject an exploration plan, however, only if it meets some fairly stiff criteria:

> ...a proposed activity would probably cause serious harm or damage to life (including fish or other aquatic life)...or the marine, coastal, or human environment, and that the proposed activity cannot be modified to avoid the condition(s).

The criteria for rejection of a development and production plan are even stiffer:

> Exceptional geological conditions in the lease area, exceptional resource value in the marine or coastal environmental, or other exceptional circumstances exist, and all of the following:
>
> (A) Implementation of the plan would probably cause serious harm or damage to life (including fish or other aquatic life)...or to the marine, coastal or human environments.
>
> (B) The threat or harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time.
>
> (C) The advantages of disapproving the plan outweigh the advantages of development and production.

This is almost word-for-word the same test that is used to determine whether an OCS lease may be cancelled out of environmental concerns.

Now, these tests require, in addition to their other conditions, that the OCS activities in question probably cause serious harm to the environment. Looking back at the uncertainties surrounding OCS development impacts, it is clear that it would be a rare situation when these tests could be met. The National Research Council and Mr. Van de Kamp both point to the fact that the MMS has never rejected a development plan or cancelled a lease for environmental reasons as proof of the fact that the decision to lease is a de facto decision to produce and develop. I would suggest that given the terms of the OCSLA and the state of knowledge about the effects of OCS development, it is no wonder that this is the case. It would be difficult to find a situation in which a discrete OCS well or even series of wells, with their low risk of oil spills and speculative risk from discharges of cuttings, produced waters and the like would probably cause serious harm to the environment. So we see that review by the MMS is extremely unlikely to result in cancellation of an OCS lease or rejection of an exploration or development and production plan.

What about the review power granted the states under the OCSLA and the CZMA? The OCSLA permits the states to comment on exploration plans, but does not say anything about the kind of deference the MMS must give to these comments. Section 19 of the OCSLA applies to development and production plans as well as leasing decisions, and consequently requires consideration of state recommendations, but as we have seen, the standard of review for the Secretary's decisions on Section 19 recommendations is quite lenient. This leaves consistency review power.

The federal courts, including the Supreme Court in *Secretary of the Interior v. California*, have tended to treat the consistency review power as a sort of "veto" over OCS development, subject to appeal to the Secretary of Commerce as provided in the CZMA. A look at the Secretary of Commerce's decisions in OCS-related appeals from a refusal to concur in a consistency certification suggests that this power is a strong one, but is something less than a veto. It further suggests that the Secretary of Commerce, in deciding consistency appeals, has developed standards of review that again place the "burden of uncertainty" on the coastal states.

The CZMA provides that a non-concurrence can be overturned "[if] the Secretary [of Commerce], on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security." The regulations implementing the CZMA expand the term "consistent with the objectives of this chapter" into a four-part test:

> (a) The activity furthers one or more of the competing national objectives or purposes contained in Section 302 or 303 of the Act;
>
> (b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the resources of the coastal zone substantial enough to outweigh its contribution to the national interest;
>
> (c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and
>
> (d) There is no reasonable alternative available (e.g. location, design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

As of the end of 1989, nine appeals from state refusals to concur in consistency determinations have resulted in written opinions from the Secretary of Commerce. Four of those opinions have involved OCS plans, and two more appeals involving OCS plans are presently pending before the Secretary. This relatively small sample of opinions gives a pretty clear idea of the kind of reasoning the Secretary of Commerce will use in applying this four-part test in consistency appeals.

First of all, the first and third elements of this test are ciphers. The Secretary has found that OCS development is itself a purpose of the CZMA, and that OCS development exploration and development plans are always required to comply with the Clean Water Act and the Clean Air Act. The fourth element, whether alternatives are available, is important, but does not furnish a means of stopping an OCS project altogether. The real heart of this test is the second element: balancing adverse effects on the coastal zone against the national interest.

In considering this element, the Secretary of Commerce has looked at the individual and cumulative effects of routine conduct of the proposed activities, and at the individual and cumulative risk of "unplanned events," or oil spills. Since the available studies do not establish any chronic effects from drilling fluids and other routine discharges, the Secretary has uniformly found that the individual and cumulative impact of routine conduct is minimal.

With respect to oil spills, the Secretary has routinely focused on the low risk of a spill occurring, and given little weight to the possibility of a spill. More troubling, in considering the cumulative risk of oil spills from the proposed activity and other activities in the area, the Secretary seems to focus on the amount by which the specific project under consideration will add

to the cumulative risk of a spill. For example, in the Secretary's most recent opinion involving a Texaco project in the Santa Barbara Channel offshore California, the Secretary acknowledged that the environmental impact statement for the area in question showed a virtual certainty of a major spill occurring from development in the Santa Barbara area. But, said the Secretary, "Texaco's proposed project will not add significantly to the cumulative adverse effects on coastal zone resources." There seems to be no place in this analysis where cumulative effects can really make a difference in the outcome.

To determine the "national interest" against which the potential adverse effects must be balanced, the Secretary consults with various government agencies, who typically respond with predictable, and in many respects, valid comments on the importance of national energy security, creating jobs, and the like. As might be expected, these readily outweigh the minimal adverse effects on the coastal zone which the analysis discussed above identifies.

This is not intended to suggest that consistency review is worthless in the OCS context. It is worth quite a lot. California in particular has used this power to require OCS operators to install additional oil spill protection equipment, use specific sorts of drilling muds, and the like. It does appear, however, that the way the Secretary of Commerce goes about analyzing OCS projects will not permit the coastal states to outright stop an OCS development project absent extremely unusual circumstances. In effect, the burden of proof is again on the coastal states or other parties opposing OCS development to show that the development will cause serious environmental harm and, given the present state of information about the effects of OCS development, that cannot be done.

Conclusions

Now, let's retrace our steps a bit and think about how these different ideas work together. In the early stages of the process, leasing and pre-leasing, the government is afforded discretion in its decision whether to put an OCS area up for development. The burden is on the coastal states to show that the Secretary is wrong, and if information is inconclusive or non-existent, that simply can't be done. Thus, virtually any area having some hydrocarbon potential can make it through the pre-leasing and leasing stages.

In the latter stages of the process, the regulations permit cancellation of a lease or rejection of a plan only if the activity will probably cause serious harm to the environment. Given the present state of knowledge, that situation may never arise. The states can attempt to block particular projects through the consistency review process, but the sort of analysis used by the Secretary of Commerce in consistency appeals, again along with the present state of information about environmental effects of OCS drilling, means that such an attempt won't likely be successful.

These conclusions have several implications for the idea that leasing is more or less a paper transaction, and so NEPA compliance for lease sales can be subjected to less than exacting scrutiny. It means that the decision to lease is, in essence, a decision to go ahead with exploration and possibly development. It also means that the federal government has less incentive to do what the courts have assumed they will do--obtain better environmental information in the latter stages of the exploration and development process--since, as things now stand, a lack of information or inconclusive information will not stop development.

Is it necessarily a bad thing that the burden of uncertainty is on the states and other opposing OCS development? After all, just as we do not need perfect information to go forward with OCS development, so we do not need perfect assurance that no environmental harm whatsoever will result. In addition, the policies to be served by OCS oil and gas development, such as energy security and providing employment, are undoubtedly important. Yet for the reasons I stated at the beginning of this piece, I think putting the entire burden of uncertainty on the states is a bad idea.

As a policy matter, we do not need perfect information to make decisions about OCS leasing, exploration and development, but we do need adequate information. The National Research Council tells us that information in some areas--how ecosystems work, and chronic and sublethal effects of development, for example--is not adequate. Yet the system as it now exists would permit development to go forward in those areas.

As a purely practical matter, if we accept the idea that the states are, in many cases, less willing to tolerate uncertainty about the environmental effects of OCS development, then it is easy to see how this process has helped send the states to the political forum. Looking at the process, there appears to be no point at which the states' environmental concerns are entitled to any particular deference. This is what Mr. Van de Kamp says in his recent article, and I generally agree with his conclusions, if not all of his reasoning. Mr. Van de Kamp lays the blame on the courts, which have admittedly given a great deal of deference to the Secretary of the Interior's decision, but I believe the language of the OCSLA and its regulations, along with a lack of information, are as much to blame. In any case, what's to be done?

First, the federal government needs to face up to the fact that the entire OCS is not the Gulf of Mexico, and the coastal states, with respect to routine conduct of oil and gas operations, want assurance that there will be no serious environmental damage, not just assurance that there is no evidence that such damage will occur. This means performing the studies necessary to generate consensus. This in turn means paying more attention to studies in the Gulf of Mexico, which in the past has been something of a stepchild in the OCS study process. It may be that this is what the Bush Administration proposes to do in its new OCS leasing program.

Second, the federal government should recognize that there are areas, the Florida Keys being a good example, that local residents (and often others) feel so strongly about that they will not countenance even the most minimal risk of a catastrophic environmental event such as an oil spill. In other words, there are some areas in which the unavoidable uncertainties of OCS development simply are not acceptable. The Bush Administration also seems to be moving toward this view.

Third, in areas in which development can occur, the government may need to rethink its way of doing business. If the real purpose of OCS development is to increase domestic energy production and national energy security, and not just to bring more money into federal coffers, then the government could give up a share of its royalties and bonuses to afford greater environmental protection, but still keep offshore drilling financially attractive to oil companies.

One example would be to give up a portion of its lease bonus in exchange for a guarantee of on-site, state-of-the-art oil spill containment and cleanup equipment during

exploratory drilling, and the barging of drilling muds to onshore disposal facilities. Another way might be to accept a slightly lesser royalty, but require additional safeguards during production, such as reinjection rather than ocean disposal of all produced waters. Another suggestion, which again the Bush Administration is considering, would be to give the adjacent coastal states a more significant share of OCS revenues than the small amount they receive now. This would not be a bribe, as some politicians have recently suggested, but is necessary to permit the states to maintain the infrastructure and technical staff necessary to properly deal with OCS development. It would also permit the states to more readily fund their own research into the effects of OCS development.

All of these suggestions, with the exception of revenue sharing, could be implemented with regulatory rather than statutory changes. Statutory changes may be required, however, if coastal communities are to have any real faith in the process. Either way, a real change in attitude by the federal government is necessary to get the OCS development program out of its present impasse.

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