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STATE GOVERNMENT and
OCS POLICY:
An Analysis
of the Outer Continental Shelf Lands Act
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INTRODUCTION

The Value of Offshore Production

In August of 1977, the Energy Research and Development Administration (ERDA) published a report detailing foreign and domestic developments affecting national energy policy. Among other things, ERDA revealed the following:

1. America's demand for oil and gas is outstripping her supply. Since 1970, domestic oil production has declined steadily. The same is true for natural gas since 1973.

2. Three courses of action are available to offset this:

- A. Develop alternative energy sources and new sources of oil and gas;
- B. Import more oil and gas; or
- C. Do both.

Of the three alternatives, the greatest emphasis has been placed on "b."

3. Confirming the above, figures show that in early 1977, 47.9 percent of the oil consumed in the United States came from foreign sources.

4. In 1976, imports from the Arab OPEC countries accounted for about one-third of that foreign oil, up from 25 percent in 1975.

5. Imports from Venezuela and Canada decreased proportionately. In 1976, Venezuela's share was 11.7 percent, down from the previous year's 14.3 percent. Canada contributed 7.2 percent in 1976, down from 11.8 percent in 1975. /1

ERDA's report indicates that the United States is increasing its dependence on oil from the countries that participated in the 1973 oil embargo. Given the volatile situation in the Middle East at this writing, the Carter Administration's peace initiatives notwithstanding, this seems an imprudent policy. And, at a time when "Project Independence" is a recent memory, there is a great deal of irony in increased importation. It seems in the Nation's best interest to reverse that trend.

Natural gas is also in demand, of course, especially in the Northeast during the winter. The importation of liquified natural gas (LNG) is one way to help meet the demand. However, local communities are not always willing to accept the siting of an LNG facility nearby. One must also remember that a major source of LNG, Algeria, is a member of OPEC. The current Algerian government is friendly toward American gas distributors,

but these politics can change.

The best solution to the rise in imported energy is the further development of our own resources. Safe, practical alternative energy may be years away, and our economy is at present too dependent on conventional sources (fossil fuels) anyway. Simply put, we need more oil and gas; where, then, do we look for it?

The Council on Environmental Quality has given us a suggestion. According to a 1974 report, there are from 5 to 20 billion barrels of economically-recoverable crude oil and from 35 to 100 trillion cubic feet of natural gas in the Atlantic continental shelf alone. /2 Such reserves would certainly go a long way in satisfying the growing energy hunger. And, most fortunately, they belong not to a foreign power but to the United States.

OUR CLAIM TO THE SHELF

The continental shelf of the Atlantic, Gulf, and Pacific coasts extends far beyond the limit of our territorial sea, but the wealth of the shelf nevertheless belongs to the United States. President Harry S. Truman claimed the "...natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts..." in the name of the United States in the so-called Truman Proclamation of 1945. /3

Apparently the states and the federal government interpreted the word "contiguous" differently, for soon after the Proclamation, confusion arose as to how the shelf would be "shared," if at all. Lease negotiations within the three mile limit were in progress between the oil and gas companies and state governments when the federal government asserted that the states had no dominion whatsoever over offshore lands. (The position taken by the federal government seemed to contradict earlier policy, which at least appeared to recognize state ownership of these areas.) As might be expected, a conflict erupted between those talking about "states' rights" and those advocating a greater "national interest," i.e. the paramount interest of the federal government. Both sides agreed that leasing the continental shelf was a potentially lucrative enterprise. But to whom would go the revenues, the state governments

or the United States Treasury?

The states and the federal government went to court to resolve the dispute and a landmark decision resulted. In U.S. v. California (33 U.S. 19 (1947)), the Supreme Court held that the federal government, and not the states, owned submerged lands adjacent to the coastline. The decision was based on the observation that the original 13 states had, at the time of their entry into Union, "imperium" over nearshore areas (out to 3 miles), meaning political control, but not "dominion" or outright ownership. On the basis of the "equal footing" doctrine, this meant that states entering the Union later did not possess dominion over submerged lands, and therefore had no right to lease them.

The "states' rights" issue did not die with U.S. v. California. Congress responded in 1953 with the Submerged Lands Act, conveying the seabed and subsoil within 3 miles to the states. /4 Later that year, to reaffirm Washington's control of submerged lands beyond 3 miles, Congressional federalists drafted and passed the Outer Continental Shelf Lands Act. /5 Twenty years later, the issue flared anew, forcing Congress to reconsider the provisions of authority granted by the latter Act.

FEDERAL AUTHORITY UNDER THE OCS LANDS ACT

The Outer Continental Shelf (OCS) Lands Act gave the Secretary of the Interior the power to lease areas of the shelf within the federal jurisdiction and to promulgate regulations for the operation of facilities there. The Secretary was authorized to adopt laws of the coastal state nearest the area being leased if he determined that those laws were "not inconsistent with this Act and other Federal laws and regulations...." /6 He would grants rights-of-way for pipelines, and with the Federal Power Commission and the Interstate Commerce Commission, determine the conditions for the transportation of gas and oil respectively. /7 At his discretion, the Secretary was to consult and cooperate with local conservation agencies when developing regulations. /8

Lessees were required to exercise "reasonable diligence in the operation of the lease and to conduct...operations in a sound and efficient oilfield practice so as to prevent waste therein." /9 Exploration of the shelf could proceed as long as it did not "interfere with or endanger any lease pursuant to this Act." /10 The legislation provided nothing else in the way of coordination or compensation for injury to users of the shelf.

There were many "holes" in the OCS Lands Act of 1953. Because the Act represented a carte-blanche

delegation of authority to the Secretary of the Interior that suggested but did not require consultation with state or local officials, leasing and regulation pursuant to the Act could be an essentially closed process between the Secretary and the lessees.

Importantly, there was no provision in the Act for establishing responsibility and liability for pollution incidents resulting from OCS activity. The Act did not suggest any policy to balance timely energy development with protection of the offshore environment. This matter and other problems surfaced when leasing activity increased in the mid-1970s as a consequence of "Project Independence."

STATES' CRITIQUE OF THE FEDERAL AUTHORITY

The Bureau of Land Management, that division of the Interior Department (DOI) charged with administering OCS affairs, and the Department as a whole, were criticized repeatedly for haste, waste, neglect--and bullying. The stories of two states follow.

California

In November of 1974, representatives from a number of coastal states participated in a White House conference with Secretary of the Interior Rogers C. B. Morton. Thomas P. O'Neill, the Lieutenant Governor of Massachusetts, was there and commented later:

In that two-hour period of time the Secretary of the Interior... told all those people coming in representing coastal states that the Outer Continental Shelf was going to be developed and explored and that we were going to have to go along with it whether or not we liked it. /11

Secretary Morton's remark certainly rang true in California, where two lease sales were conducted that state officials did not "like." The sales apparently proceeded with such haste that state planner Bill Press testified in 1977 that they were "railroaded through" to meet an "artificial schedule," at the expense of consulting and cooperating with California officials. He

related the following to the U.S. Senate Committee on Energy and Natural Resources:

In December 1975 the Department of the Interior completed southern California Lease Sale No. 35 by accepting bids for 56 tracts off the southern California coast. This sale was held in spite of opposition by California state and local governments. Our attempts to obtain oil and gas resource and environmental data and information necessary for effective participation in the lease process were repeatedly thwarted as the Department railroaded Lease Sale No. 35 through to meet the arbitrary goals of an accelerated leasing program. /12

Mr. Press later explained that Lease Sale No. 35 was not an isolated incident, but a portend of things to come. A revised lease sale schedule was distributed at a meeting of the National OCS Advisory Board in San Francisco in June of 1976. The State of California responded to the options presented by the DOI, noting that the schedule called for leasing off the coast of Central and Northern California, where little work had been done to determine the environmental effects of OCS activity. State officials also suggested that the DOI's data concerning the economic recoverability of oil and gas in that area was inaccurate. The industry had abandoned tracts out there in 1968, and considered the area of low priority relative to other areas of the U.S. coast. /13

California was concerned about the dearth (or inaccuracy) of information on the proposed lease sites.

The State's position was that the Interior Department was inviting environmental or economic disaster. The DOI disregarded California's warning, however, and in November, 1976, revealed plans for yet another lease sale off the California coast. This new sale, coming "right on the heels" of the Northern California sale and Lease Sale No. 35, was adamantly opposed by the State. Representatives of the Governor's Office of Planning and Research argued that the State could not participate effectively in the lease sale process if three sales were active at once. /14

The Secretary of the Interior (Kleppe) supported the new schedule nevertheless. The Governor's office and various federal agencies were notified of the DOI's intention to issue the Call for Nominations for the new lease sale (No. 53). /15 That lease sale was never held. When Cecil Andrus became Secretary of the Interior, he postponed the sale "until it can be fully reviewed by the Department." /16

Some of the allegations made by Mr. Press were confirmed by the U.S. General Accounting Office Report on Lease Sale No. 35. The GAO concurred with Mr. Press on the matter of adequacy of information. The Interior Department did not have enough data for a thorough assessment of the lease area's economic possibilities but went ahead with the sale anyway. That decision seemed rushed; at the very best, it can be called "hasty." The

lease sale proved a big disappointment: competition for the tracts selected by DOI was "exceedingly low," indicating that the oil and gas industry had "better" information regarding the tracts than did the federal government. Most of those tracts were later shown to have little or no oil or gas potential.

The Department of the Interior overestimated the revenues coming to the U.S. Treasury from the lease sale by some 500 percent. /17

Alaska

The State of Alaska had at least one incident of seemingly "arbitrary" leasing, the decision to lease in the Gulf of Alaska. State officials confessed that they were "mystified" by the very high priority the DOI gave the Gulf of Alaska. Robert LaResche, Commissioner of Natural Resources of the State of Alaska, questioned the wisdom of the decision on the basis of the statement of the Council on Environmental Quality that the Gulf was "the riskiest of all OCS areas to develop," and the report by the Federal Energy Administration that at that time "there was a surplus of oil on the West Coast, the only directly accessible domestic market for this oil." /18 If not intended for the West Coast, where would the oil be shipped?

Was the decision to prioritize leasing in the Gulf

of Alaska based on poor or scanty information, or did the DOI have some other purpose in mind? Mr. LaResche commented before the Senate Committee on Energy that he thought the Department of the Interior was so eager to "open the new Klondikes to industry" that environmental and other concerns were neglected, subordinated for the sake of leasing. /19

There seem to be two points on which officials from California and Alaska agree:

1. There should be more discussion of proposed leasing arrangements between Interior and the coastal states (and more "consultation and cooperation" in general).

2. Decisions on tracts to be leased should not be made until sufficient information is available.

OCS DEVELOPMENT AND ENVIRONMENTAL LEGISLATION

If implementation of the OCS Lands Act did not adequately account for the protection of the coastal or marine environment, could specific environmental legislation be used to halt or at least delay OCS activity until the affected states could respond with a detailed management/mitigation plan?

Four major pieces of legislation introduced additional layers of federal and state authority into the OCS development process, at least regarding the onshore or nearshore location of support facilities. They are the National Environmental Policy Act (NEPA) of 1969, the Clean Air Act of 1970, the Federal Water Pollution Control Act (FWPCA; now the Clean Water Act) of 1972, and the Coastal Zone Management Act of 1972.

National Environmental Policy Act

The major reform introduced by NEPA is the requirement that an Environmental Impact Statement be drafted for all proposed "...major federal actions significantly affecting the quality of the human environment." This statement, or EIS, then accompanies the project proposal through the interagency review process and public hearings. The EIS must be sufficiently detailed to account for all environmental

impacts, and it must also discuss reasonable alternatives and their respective impacts. /20

NEPA was used to postpone a proposed lease sale in the Gulf of Mexico in the early 1970s. In Natural Resources Defense Council v. Morton, an environmentalist group successfully challenged the adequacy of the EIS prepared by the Department of the Interior. /21 The court enjoined the lease sale when it found that Secretary Morton had failed to prepare a "detailed statement" and fully consider all the alternatives to offshore leasing, e.g. increasing oil imports.

A state may be able to challenge an EIS and win, but the critical consultation-cooperation mechanism for OCS decision-making is not to be found in NEPA. Any delay had through the enforcement of NEPA might afford a little extra time for the states to plan for the impacts of a lease sale or subsequent development, but it would not make them equal partners in the process.

The Clean Air Act

According to the Clean Air Act, as amended, states may adopt and enforce more stringent air quality standards than federal regulation requires. /22

Air quality is an important consideration in California, where ozone levels in the Los Angeles area exceed federal standards 200 days a year. /23 The Clean

Air Act gives the State the opportunity to control any pollution generated by onshore energy facilities. However, a major pollution problem originating offshore "slips through the crack"-- OCS facilities are beyond state jurisdiction, so the option of "more stringent" standards is automatically forfeited. At least one OCS developer has taken advantage of this:

Let me give you the example of Exxon's Santa Ynez unit development less than one-half mile outside the state's three-mile territorial limit. In order to avoid (certain regulations) Exxon sought and the Department of the Interior granted approval to install a floating processing facility and marine loading terminal just beyond state jurisdiction. Air quality analyses, prepared by Environmental Resources and Technology, Inc. for the California OCS Project, predicted that tanker loading operations at that facility could increase onshore ozone readings by 93 percent to 160 percent in violation of federal ambient air quality standards. /24

Given that situation, can the Environmental Protection Agency (EPA) intervene to stop the pollution? In the opinion of EPA, the answer is no; regulations pursuant to the Act indicate that EPA has no jurisdiction beyond three miles. As Bill Press stated:

... (O)ffshore facilities such as these enjoy a de facto exemption from the Clean Air Act. The Department of the Interior which regulates offshore facilities has no regulations specifically pertaining to air emissions. The Environmental Protection Agency has no regulations or permit requirements which extend beyond three miles, and the states at present appear to have no jurisdiction beyond their boundaries. /25

Federal Water Pollution Control Act

A comprehensive scheme for preventing and controlling oil spills "upon the navigable waters of the U.S., adjoining shorelines, or into or upon the waters of the contiguous zone" is provided by the FWPCA and its implementing regulations. /26

However, Sec. 401(a)(1) of the Act states quite clearly that this does not apply to facilities located outside state waters:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting authority a certification from the State in which the discharge originates or will originate.... /27

This constitutes another "de facto exemption" of OCS activities from environmental mandate. Discharges from an OCS facility would not "originate" in a state, i.e. in state waters; therefore, the FWPCA would not apply.

On the other hand, a state through its water pollution control agency may block approval of a permit required by Sec. 402 of the FWPCA, "the waters of the contiguous zone," are, of course, also endangered by pollution from offshore facilities. But because this pollution does not originate within state waters, the

regulations simply do not apply. /28

On the other hand, a state through its water pollution control agency may block approval of a permit required by Sec. 402 of the FWPCA, the authorization to discharge under the National Pollutant Discharge Elimination System (NPDES). A public hearing on the permit application, or an adjudicatory hearing (on issues of fact) or a legal decision (on issues of law), may be requested by the state agency on the determination of that application by EPA's Regional Administrator. Unfortunately, even if the state is successful and the proposed project is stopped, this approach does little to increase the state's active participation in OCS policy decisions, as the state's role in such a situation is to react to a given circumstance rather than participate in it. Given the apparent urgency of a comprehensive domestic energy development program, policy determination by a series of "knee-jerk" responses by the states can only result in much delay and contribute little to the needed dialogue between the state, the federal government and the offshore developers.

The Coastal Zone Management Act

The Coastal Zone Management Act (CZMA), as amended, was intended to serve as a vehicle for collaborative planning between federal agencies, state agencies, local

governments, regional organizations, port authorities, and all other interested parties. /29 The "federal agencies" include the Departments of Agriculture, Commerce, Defense, Energy, and the Interior; also the Council on Environmental Quality and the Federal Energy Regulatory Commission. Federal review assures that the "national interest" is considered, and the 1976 Amendments require states to give adequate consideration of that interest in energy facility siting and development. /30 In turn, the Act requires federal licensees to keep their activities "consistent" with the purposes of the coastal management program. /31 States are encouraged to regulate all activities having a "profound effect" on coastal areas; unfortunately, their jurisdiction ends at the 3-mile limit.

Although OCS development can have a "profound effect" on nearshore areas, attempts to subject the OCS process to "federal consistency" requirements before the passage of the 1976 Amendments met largely with failure. It appears that the only means the state had to halt a leasing and development program via the CZMA was through enforcement of its coastal management program onshore. The regulation of support facilities might have made certain OCS activities uneconomical, and induced the lessee to abandon his project. It was impossible to regulate the offshore facility directly because of its location outside state jurisdiction.

The 1976 Amendments, with their requirement for full consideration of the "national interest" in energy development, made this particular tactic difficult. Any coastal program that lessees believed was an unreasonable limitation of onshore support activity could be brought before the Secretary of Commerce for re-evaluation. If the Secretary found a particular regulation conflicting with the general purposes of the Amendments, that regulation would have to be rescinded. California, faced with the prospect of increased OCS development and a comprehensive coastal act that was still on the floor of the State Legislature, and very much aware that control of offshore activity by means of limiting onshore operations would not work under the new guidelines, requested a delay in OCS leasing so that plans could be made to offset onshore impacts. Interior, however, insisted that OCS leasing proceed, because the CZMA in no way "envisioned that the Federal government should halt its programs until the states had adopted plans." /32

Interior did not want to wait for California's coastal management plan to be "in place" before leasing for one important reason. That reason is based on the fact that the provisions of the CZMA are optional--that is, states are not required to implement a coastal program, just encouraged. If the DOI had gone along with California, a precedent would have been set, and states with no intention whatsoever of implementing a coastal

program could delay OCS leasing indefinitely. That would, of course, be an abuse of state power that the sponsors of the CZMA probably had no intention of allowing.

Therefore, even though the CZMA helped inaugurate a new kind of collaborative planning between the states and the federal government, the Act really had very little effect on development occurring offshore. New legislation was necessary.

THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS

State discontent eventually translated into Congressional action. In 1977, two bills, S. 9 and H.R. 1614, were introduced in the U.S. Senate and House of Representatives respectively to amend the OCS Lands Act of 1953. If passed, these bills would give state and local governments the opportunity to participate in OCS policymaking by reviewing leasing, exploration and development plans. There would be a provision for integrating considerations of national interests in energy production and environmental protection. There would be cooperative planning between industry, local governments, and state and federal agencies to mitigate certain onshore impacts. Most important, a new balance would probably emerge between federal and state authorities that could be the beginning of a genuine partnership.

S. 9 passed the Senate by a vote of 60-18. The bill went to the House of Representatives and was passed in lieu of H.R. 1614 in February of 1978. After some time in the Conference Committee, the bill was presented to President Carter. It became Public Law 95-372 on September 18, 1978. /33

The major provisions affecting coastal states are:

1. The Secretary of the Interior will have several

different options when conducting lease sales, but his/her action must take into account the recommendations of affected states concerning the size, timing and location of those sales.

2. States will be able to review and comment on development and production plans for the outer continental shelf.

3. The Secretary will study areas included in the lease sales to determine the potential impact of OCS development on "the human, coastal, and marine environment."

4. The Secretary, the Secretary of Energy and the Federal Energy Regulatory Commission will have the power to suspend or cancel a lease if continued activity is likely to harm life, property or the environment.

5. The Secretary will assure maximum environmental protection by using the "best available and safest technology" when determining pipeline rights-of-way.

6. Lessees will provide the Secretary access to all data obtained from their activity on the shelf. The Secretary, in turn, will share this information with planning agencies in affected states.

7. An "Offshore Oil Spill Compensation Fund" of \$100-200 million will be established from a 3-cent tax on each barrel of oil obtained from the shelf.

8. A "Fishermen's Contingency Fund" will be established to compensate fishermen for gear loss or

damage caused by fouling on equipment used for offshore oil and gas exploration, development or production. /34

State Participation

Section 3 of the OCS Lands Act is amended to read as follows:

(S)ince exploration, development, and production of the minerals of the Outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the Outer Continental Shelf... /35

The Secretary is required to consult with the Governor of any state affected under a proposed leasing program before plans for that program are finalized. Local governments relay their comments to the Governor, who forwards them along with his own remarks to the Secretary. The Secretary determines if the Governor's recommendations are compatible with national goals and policies, and accepts or rejects them accordingly. If the recommendations of the Governor are not accepted, however, the Secretary must demonstrate that they are not in the national interest. The plan is then sent to the President and to Congress, with all comments received

pertaining to the plan. /36

Opportunities for state and local participation extend into the development and production phases by virtue of a new Section 19, which calls for "coordination and consultation with affected States and local governments" in OCS development and production planning so that the Secretary can best determine a "reasonable balance" between the national interest (energy self-sufficiency) and the well-being of the citizens of affected states. Section 19(e) provides a system of joint planning and review, information sharing, and surveillance and monitoring. /37

Environmental Studies and Information Sharing

It will be remembered that Bill Press and other representatives of the coastal states had testified before the Senate Energy Committee that the states, in order to make prudent planning decisions, needed a clearinghouse for environmental information related to OCS activity. From the experience of Lease Sale No. 35, it was evident that federal officials would also benefit from a central data bank of this sort. This matter is dealt with directly in the OCS Amendments. Section 20 authorizes state and federal cooperation in environmental studies such as baseline data-gathering and review to "predict damage to marine biota in cases of low-level

pollution or large spills associated with OCS production" and to determine the "impacts of development offshore on affected and coastal areas." /38

In addition, Section 26(b) (2) requires the Secretary to make available to a representative of the affected state(s) a summary of information obtained from exploration, development and production offshore so that states can plan adequately for impacts. This information includes "proprietary or confidential" data received from the oil and gas industries "under the appropriate arrangements for confidentiality." /39

Coastal Management and Environmental Protection

By Sections 11 and 25(d) respectively, exploration, development and production activities are to be, "to the extent practicable," consistent with the goals and policies of the coastal management programs of affected states. /40 Section 18 directs planners to balance the benefits of a proposed project and the environmental costs, especially in the coastal zone. /41 Section 5 authorizes the suspension or cancellation of leases if offshore activity poses "a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits...or to the marine, coastal, or human environments...." /42 OCS activity can also be

halted if the lessee does not comply with "the national ambient air quality standards pursuant to the Clean Air Act" during operations "authorized under this Act (that) significantly affect the air quality of any State...."

/43 These provisions directly address the problem of immediate impacts. A yearly report on the cumulative effect of OCS activity on the "marine, coastal, or human environments" is required by Section 20(e). /44

Title III, Sections 303(a) and (b) provide for an Offshore Oil Spill Pollution Fund financed by a 3-cent surcharge on each barrel of oil brought up from the shelf. The fund is intended to be used for removal costs, claim processing and settlement, and for assessing any injury to natural resources caused by oil pollution.

/45 In the latter instance, funds will also be used to restore, rehabilitate, or acquire "replacements" for irretrievable resources. The fund is to be used only when responsibility for a pollution incident cannot be determined, the vessel involved is publicly-owned, or the suspected party denies involvement. /46

Section 304 sets the terms of liability for loss in the event that responsibility can be determined. The limit of liability for a vessel is \$250,000, or \$300 per gross ton, whichever is greater. For an offshore facility, e.g. a drilling rig, the limit is \$35 million for all damages. All costs for oil removal incurred by federal, state or local government are to be borne by the

owner or operator of the vessel or facility involved. /47

Title VI, Section 607 calls for a training program for OCS facility personnel and those operating pollution-prevention equipment. During a pollution incident, safe and efficient containment and clean-up procedures must be used if damage is to be minimized. A comprehensive training program for the people most likely involved would help achieve this objective.

The Fishermen's Contingency Fund

Of particular concern to certain local communities is the impact of offshore energy development on commercial fishing. There is sufficient provision for compensation for pollution of one sort or another in the Amendments, but what about the situation where a fishing boat snags and breaks a trawl on old equipment used to prospect for oil?

The Amendments answer that problem with a "Fishermen's Contingency Fund" to provide funds to replace or repair lost or damaged fishing gear. Like the Oil Spill Pollution Fund, these monies are to be used only when the OCS equipment involved in the accident cannot be traced to its owner/operator. To be eligible for compensation, the fishermen must prove their vessel was in the area of OCS activity, was being used for fishing at the time of the accident, and that there was

no buoy or marker to indicate the location of the obstruction.

To help avoid such accidents, the Amendments require the Secretary to conduct a two-year survey of obstructions on the shelf which pose potential hazards to commercial fishing. The oil and gas industries are instructed to label their equipment so that in the event of an accident it can be traced. /48 The latter provision places a good deal of responsibility on OCS developers to discourage the careless discarding of debris that can interfere with fishing and navigation.

One can summarize the spirit and letter of the OCS Lands Act Amendments as follows:

1. The states can participate to a greater extent than ever before in the formulation of policy regarding offshore energy production.

2. The oil and gas industries are compelled to proceed with their business carefully so that there is less chance for pollution accidents and clashes with fishermen.

3. The national interest is to be the primary concern, but never at an unreasonable expense to the coastal states or affected communities.

Taken at face value, then, the Amendments mark an advance for the states, perhaps even a "great leap forward."

IMPLEMENTATION OF THE OCS LANDS ACT AMENDMENTS

If the OCS Lands Act Amendments mean more power to the states, they also mean added responsibility. It is up to the states to take full advantage of the opportunities for participation that the Amendments offer.

A recent publication of the New England River Basins Commission, Strategies for State Participation in OCS Exploration decisions, remarked that "the effectiveness of any state's participation will depend to a large degree on the amount of time devoted to it, but also, and more important, on the extent of its preparedness." /49 In other words, the era of ad-hoc decisionmaking is over, and a conscientious effort will have to be made to organize and plan well ahead of the various stages of OCS development.

An "Intergovernmental Planning Program" (IPP) has been proposed by the Department of the Interior to allow state input into "major decision points" throughout the leasing, development and production phases. According to DOI, the general strategy is

...to provide a forum for early and continuous coordination and consultation among parties having substantial interests in OCS leasing and transportation decisions, especially affected Federal and State agencies....

The program must be initiated and phased to provide

timely inputs which may be considered at key decision points in the OCS leasing and development process in order to avoid unnecessary delays in the delivery of OCS energy products. /50

The IPP represents the new policy of the Department, a greater sensitivity to the need of coastal states to contribute to a process that may impact upon a significant number if not all of their citizens. The states, for their part, should not interpret this to mean that their own parochial interests will determine the federal OCS program. The participatory character of the IPP discourages the "capture" of OCS policy by any special interest group. "Coordination and consultation" necessitates contributions from all parties having "substantial interests in OCS leasing and transportation decisions," including the oil and gas industries. Industry will, of course, to its best to avoid unnecessary delay; DOI/BLM, anticipating revenue for the U.S. Treasury will certainly try to facilitate the leasing process. No doubt many recommendations made by the states will find their way into development plans. It may be said, then, that the IPP implements the balance of interests called for in the OCS Amendments, because planning will result from cooperation between the states, industry, and the federal government.

States will be expected to announce the goals of their OCS policy and to apply them to the decisionmaking process at the pre-lease and leasing stages of activity. They will nominate tracts for leasing or exemption from leasing and comment on the Lease Sale Environmental Impact Statement. Their remarks at this time will be fairly generalized. When an Exploration Plan is submitted by industry, more specific information will be available, and the comments and recommendations of the states will be expected to be more specific. Review of an Exploration Plan will enable the states to reiterate or revise those aspects of policy that concern them most. The Development Plan, which comes later, will offer a similar opportunity, with the added benefit of more detailed, site-specific information that the states can use for comment and for planning. /51

During their review of the EIS, the Exploration Plan and the Development Plan, the states will decide if the proposed OCS activity will have a "significant effect" upon their respective coastal zones. If so, these activities will have to be certified by the appropriate state coastal agency. /52 Those states without a coastal program approved by the Commerce Department will have a considerably shorter time to review and comment on proposed development programs. In some instances this period may be as short as 15 days, certainly driving home the need for "preparedness" if the state is to respond

effectively.

Regional and State Transportation Planning

In the IPP there are two major advisory bodies. The first is the Regional Working Group Committee, found in each of six OCS leasing regions (the North Atlantic, Mid-Atlantic, South Atlantic, Gulf of Mexico, and Pacific regions, and Alaska). The Regional Group is composed of representatives of BLM, the Fish and Wildlife Service, the U.S. Geological Survey (USGS), the Coast Guard, EPA, the National Oceanic and Atmospheric Administration (NOAA), the oil and gas industries, and any other special or private interests involved offshore. Each group will be co-chaired by BLM and the states. /53

The second advisory group is the State Technical Working Group Subcommittee, operative in those states most affected by an oil or gas pipeline or transportation scheme proposed by the Regional Group. Each State Group will be co-chaired by BLM, USGS and the states. Their staff will come from Fish and Wildlife, EPA, NOAA and any other appropriate federal agency, and from industry trade associations such as the American Petroleum Institute and the Western Oil and Gas Association. /54

The Regional and State Working Groups will be utilized in the leasing process, the environmental studies program, and the OCS oil and gas transportation

program, the three major program activities of the IPP. Although each phase of offshore exploration and development is a separate component of the overall planning process, involvement of the Regional and State Groups in all three stages stresses the interdependence of each of the steps taken. BLM described this situation as follows:

The leasing of OCS lands sets in motion a process which can affect interests at all levels, and many decisions are made in that process which can affect interests at all levels, and many decisions are made in that process which, in part, determine the manner in which any subsequent development can take place. Although the issuance of leases in a region does not mean that marketable quantities of hydrocarbons will be found, this action does initiate the activities which may lead to marketable discoveries. /55

The consultation/coordination mechanisms proposed in the IPP will be used in conjunction with existing coordination procedures between BLM and other agencies such as the Corps of Engineers and the Federal Energy Regulatory Commission. /56 For a detailed analysis of the IPP, the reader should refer to BLM's pamphlet, Intergovernmental Planning Program for OCS Oil and Gas Leasing, Transportation and Related Facilities.

CONCLUSIONS

The OCS Lands Act Amendments of 1978, their implementing regulations, and the Intergovernmental Planning Program of the DOI together provide the vehicle for representatives of state and local governments to voice their concerns and reservations about offshore energy development. While this makes those responsible in the Executive Branch for determining the "national interest" more responsive to those concerns, the reforms introduced by this process also bestow considerable responsibility on the states and local governments. The formal review period in some instances is relatively short, and impact planning must be an ongoing process if the plans are to be effective. The time of ad-hoc decisionmaking is past. States must take the initiative and set up the necessary contacts with industry and the federal government. In return, they may expect to receive a wealth of information from private and public sources that can be used for planning.

The Amendments and regulations, then, appear to satisfy the criticisms and suggestions of Messrs. Press and La Resche. But for the program to work, good faith is needed on all sides.

NOTES

1. Energy Research and Development Administration, Quarterly Report, Aug. 1977.
2. Council on Environmental Quality, Report to the President on Oil and Gas, Chapter 2, p. 13 (1974).
3. Proclamation No. 2667, Sept. 28, 1945, 3 C.F.R. 67, 68 (1943-1948 Comp.).
4. 43 U.S.C. 1301 et seq. (1970).
5. 43 U.S.C. 1344 et seq. (1970).
6. U.S. Congressional and Administrative News, p. 2177 (1953).
7. Ibid., p. 2184.
8. Ibid.
9. Ibid., p. 2180.
10. Ibid., p. 2183.
11. Statement of Hon. Thomas P. O'Neill III, Lieutenant Governor, State of Massachusetts, Hearings on the Outer Continental Shelf Lands Act Amendments of 1977, Apr. 25, 1977, pp. 505-506.
12. Statement of Bill Press, Director, Governor's Office of Planning and Research, State of California, Ibid., pp. 582-583.
13. Ibid.
14. Ibid., p. 584.
15. Ibid., p. 583.
16. Ibid.
17. Ibid.
18. Statement of Robert LaResche, Commissioner of Natural Resources, State of Alaska, Ibid., p. 513.
19. Ibid., p. 526.
20. 42 U.S.C. 4332(2)(c) (1970).

21. 458 F. 2d 827 (D.C. Cir. 1972).
22. 42 U.S.C. 1857 (1970).
23. Press, p. 585.
24. Ibid.
25. Ibid.
26. 33 U.S.C. 1321(b) (1) (+supp. II, 1972).
27. 33 U.S.C. 1341(a) (1) (+supp. II, 1972).
28. Press, p. 576.
29. 16 U.S.C. 1451 et seq.
30. 16 U.S.C. 1456(c) (1), (2).
31. Ibid.
32. Rubin, K. A. The Role of the CZMA ...pp. 428-429 (1975).
33. Digest of Public Laws, p. 128 (1979).
34. Ibid., pp. 126-128.
35. 43 U.S.C. 1332.
36. 43 U.S.C. 1344.
37. 43 U.S.C. 1345.
38. 43 U.S.C. 1346.
39. 43 U.S.C. 1352.
40. 43 U.S.C. 1340 and 43 U.S.C. 1351.
41. 43 U.S.C. 1344.
42. 43 U.S.C. 1334.
43. Ibid.
44. 43 U.S.C. 1346.
45. 43 U.S.C. 1812.
46. 43 U.S.C. 1816.

47. 43 U.S.C. 1814.
48. 43 U.S.C. 1843.
49. New England River Basins Commission, Strategies for State Participation, p. 1 (1979).
50. Bureau of Land Management, Department of the Interior, Intergovernmental Planning Program, p. 3 (1979).
51. NERBC, p. 76.
52. Ibid., p. 28.
53. BLM, pp. 6-7.
54. Ibid., pp. 7-9.
55. Ibid., p. 4.
56. Ibid.

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