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Ocean Law Memo

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Developing Oil and Gas Resources from the Outer Continental Shelf: Legal Management Capabilities in Oregon

With the passage of the Outer Continental Shelf (OCS) Lands Act Amendments of 1978, new opportunities became available to states and local governments to participate in the OCS leasing program. This legislation and the increase in West Coast oil production has alerted coastal states to the certainty of further petroleum related activities and the magnitude of their potential impacts. In January, 1977, the governor appointed an interagency Task Force on Outer Continental Shelf Oil & Gas Development to define Oregon's role in the OCS development process. The University of Oregon Ocean Resources Law Program prepared a series of reports for the task force use on the legal aspects of state and local management of offshore oil and gas development and associated facilities. This issue of the Ocean Law Memo contains abstracts of those reports. The reports were funded under the Oregon 305 Outer Continental Shelf Development Grant provided by the Coastal Zone Management Act of 1972 as amended through the Office of Coastal Zone Management, NOAA, and administered by the Oregon Department of Land Conservation and Development. Limited copies of the complete reports are available at cost for the Department of Land Conservation and Development and the Ocean Resources Law Program.

PREEMPTION

The doctrine of preemption results from the Supremacy clause of the Constitution (Art. VI, cl 2), which mandates that the laws of the federal government have priority over state or local regulations when a conflict develops.

Traditionally, preemption of state law by federal law is a matter of Congressional intent. This intent may be explicit. When creating some legislation, Congress will indicate if and to what extent the states remain free to regulate in the same area. More often, however, Congress is silent in this respect. Depending on the nature of the state and federal regulation involved, the courts may infer Congressional intent to preempt the states' power. If it is physically impossible for someone to obey both regulations, or if the state regulation somehow hinders the purpose of the federal regulation, the courts will hold that the conflict between the two powers indicates an implicit Congressional intent to preempt state regulation.

Intent to occupy the field of regulation, either explicit or implied involves a hybrid analysis of supremacy and commerce clause considerations. Under the commerce clause state or local regulation may not burden inter-state commerce unless the regulation is necessary to further an important local interest. Again, Congressional intent to occupy an area of regulation, to provide for uniformity of regulation in the area in question, may be explicit. Sometimes, however, the courts will add commerce considerations to the statutory analysis, balance the federal and state interests involved and hold that the state regulation is preempted by federal act because the field of regulation itself requires uniformity. This is referred to as implicit Congressional intent to occupy the field and thus prevent the states from acting.

State licensing of federally owned facilities is presumed by the courts to be forbidden on supremacy grounds unless specifically allowed by Congress. When such a situation is brought to the courts, the terms of the federal statute allowing such state regulation are strictly construed against the states. This bias of the courts in favor of federal exemption from state regulation indicates that the courts may strictly construe the consistency provisions of the CZMA against the states. For example, the CZMA provides that the Secretary of Commerce may override a decision of non-consistency with the state program if she finds that the action in question either is consistent with the federal CZMA, or else is necessary for national security purposes. In light of the court's past actions, these override provisions may be interpreted to hinder state regulation of federal activity at every turn. To avoid such a development, an amendment by Congress to the CZMA may be needed.

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CONSISTENCY

The Federal Coastal Zone Management Act of 1972 proclaimed the congressional policy that the nation's coastal zone be preserved, protected, developed, and where possible, restored for the benefit of this and succeeding generations. Rather than promulgate nationwide standards to govern coastal activities from Hawaii to the Great Lakes to the Florida keys, Congress chose to let each coastal state develop its own coastal management program. In order to encourage the states to implement effective coastal management programs, the CZMA dangles two carrots; upon federal approval of a coastal management program the state is eligible for significant amounts of federal funds, and thereafter all federal activities occurring on non-federally owned property must be consistent with the state's program.

The consistency provisions of the CZMA are rather uncommon in our federal system, since it is usually the federal government which dictates what the states may do, and not vice versa. According to the Act and the regulations issued thereunder, there are five areas in which federal consistency with an approved state program is required: 1) federal agency activities that significantly affect the coastal zone; 2) federal agency development projects in the coastal zone; 3) federal licenses or permits to conduct an activity which significantly affects the coastal zone; 4) plans for the exploration, development, and production of oil or gas from an area leased under the Outer Continental Shelf Lands Act; and 5) federal assistance programs for proposed projects submitted by state or local governments which significantly affect the coastal zone.

The state has not been granted unbridled control over all federal actions in the coastal zone; federally owned land is excluded from the state's coastal zone, and it is federal agencies that determine whether their activities or development projects are consistent with the state's program. The remaining areas where consistency is required (federal licenses and permits, OCS activities, and federal grants) are left to state determination. The 1978 Amendments to the Outer Continental Shelf Lands Act expand the consistency concept by providing that all activities relating to the exploration, development, or production of oil or gas from the outer continental shelf which affect land or water uses in the coastal zone must be consistent with the state's program.

The Oregon Coastal Management Program requires local governments to develop local comprehensive plans which comply with the statewide goals and guidelines adopted by the Land Conservation and Development Commission. Until plans are approved, goals provide the basis for consistency determinations. Ultimately, local government applying their comprehensive plans will be the basis for consistency determinations. As long as they act pursuant to an approved local plan, local governments can allow or prohibit activities which affect their part of the coastal zone.

Consistency in Oregon relates not only to federal activities, but to state activities as well. LCDC has adopted a rule whereby state agencies may issue permits only when the activity involved is consistent with the comprehensive plans of affected local governments. Thus, comprehensive planning by local governments is the heart of Oregon's Coastal Management Program. Federal and state activities which cause significant effects within the coastal zone are required to be consistent with the statewide goals, applicable state statutes, and with approved local comprehensive plans.

JURISDICTION AND MANAGEMENT

The seabed extending outward from the coastline of the United States may be divided into three Jurisdictional domains: 1) The area nearest the coastline out to three miles, often referred to as the marginal sea, is owned by the adjacent coastal state. As to activities in the waters overhead there is concurrent federal and state regulatory jurisdiction. 2) The area seaward of the marginal sea, extending outward to an internationally determined boundary, is known as the Outer Continental Shelf (OCS) and is under the dominion and jurisdiction of the federal government. 3) The remaining deep seabed is in the international domain.

By and large the battles concerning this distribution of jurisdiction and dominion have been fought and settlements reached, however, two important issues remain unsettled: 1) the precise location of the international boundary; and 2) the precise location of the boundary between the marginal seabed and the OCS.

The OCS is really a politically described area, the result of international agreement. This agreement sets the seaward boundary of the OCS at a depth of 200 meters <u>or</u> at the point where the resources of the seabed can be exploited (as a technological possibility). This leaves the position of the boundary unascertainable because it is now possible to exploit seabed resources at almost any depth.

Between the area of coastal State jurisdiction, and the OCS (federal jurisdiction) there is also uncertainty over the boundary line. The problem is that the method used for determining the baseline, from which the three mile seaward distance is calculated, is subject to change due to changes in the geological features of the coastline. To date, few agreements exist regarding these boundaries between the United States and the various coastal states (although such agreements are legally possible). Therefore, disputes can be expected to arise when the resources of these areas are exploited near the boundary between state and federal jurisdiction.

The central element of the management scheme of OCS development is the OCS Lands Act as amended in 1978. This federal statute describes the various management powers and duties involved, and distributes them among the various federal agencies. The bulk of management power is given to the Department of Interior which has, by regulation, divided its responsibilities among the Bureau of Land Management (BLM) and the U.S. Geological Survey (USGS). Basically, the BLM is in control of developmental planning and lease sales, while the USGS is responsible for operational manage-

ment and oversight, and information gathering.

The OCS Lands Act was subject to extensive amendment in 1978. The Amendments attempt to:

1) Provide a statutory system for the management and development of oil and gas resources in the OCS. Under this system development proceeds in the following manner: a) development and promulgation of a five year leasing plan; b) lease sales conducted according to the plan; c) period of explorations; and d) period of development. In its bare bones, this is simply a codification of the management systems developed administratively over years. However, other features of the Amendments modify the existing system somewhat.

2) At the exploration and development stages lessees are obliged to submit operational plans, which must be approved, both by the Interior Department and by "affected states" under the Coastal Zone Management Act.

3) The Secretary of Interior is given new powers to make leases conditional and provide for cancellation of leases and forfeiture of sums paid by lessees for certain failures to submit approvable plans, observe plan provisions, or pursue development of leased tracts.

4) The affected coastal states are given extended opportunities to participate in the planning process through the Secretary of Interior. Prompt response appears to be the main vehicle for effective participation.

5) An informational program is provided for, whereby the traditional imbalance in information regarding lease areas (favoring lessees over the government) is corrected by requirements that exploratory information be made available to the federal government (and through it, to the states and local governments).

6) Finally, special procedures are set up for judicial review of the administration of the Act at the behest of any person adversely affected by such administration, or an effected state.

The 1978 Amendments will not automatically provide for the effective administration of OCS resources or participation of the coastal states in that administration. In many ways they change the system little. Only intelligent consideration of options and diligent attention to the problems involved at both the state and federal levels can accomplish a rational plan for the extraction of needed energy resources while avoiding the destruction of existing renewable resources in the same area.

OIL TANKER OPERATIONS

The transportation of crude oil and refined petroleum products by tankers is a hazardous activity with serious implications for health, safety, and economic well-being. More pollution is produced during routine tanker operations than from the more spectacular large spills. The likelihood increased oil tanker traffic along the Oregon coast and possibly on the Columbia River has served to focus attention on just what measures remain legally available to a state to protect its human and natural resources. Despite recent improvements in regulatory programs, international standards fail to cover certain types of tanker activity. Most tankers which enter the Columbia River, for instance, are too small to be covered by international regulations. The federal tanker program also contains gaps which states may wish to fill.

The limits within which states may regulate oil tanker operations have been somewhat settled by two U.S. Supreme Court cases, Ray v. ARCO, 435 U.S. 151 (1978), decided in 1978, and the 1960 decision in Huron Portland Cement v. Detroit, 362 U.S. 440 (1960).

Ray v. ARCO examined the interaction of the federal Ports and Waterways Safety Act and the State of Washington's Tanker Law. The Supreme Court ruled that the state did not have the authority to ban tankers over 125,000 DWT from the Puget Sound or to require state licensed pilots for tankers engaged in domestic trade. Federal laws and regulations addressing these issues could not be contradicted or supplemented by state law. Similarly, the federal government, through the U.S. Coast Guard, retains exclusive control over other aspects of tanker design and operations, including structural specifications, training standards, vessel traffic systems, and the authority to deny entry into port to unsafe or uncooperative vessels.

State action was allowed, however, where expressly provided for in the federal program, such as the state requiring state-licensed pilots on vessels engaged in foreign trade or setting safety standards for structures in the waterways, and where such permission was implied from federal silence or inaction. Thus, states could require tugboat assistance for tankers, at least until the Coast Guard acted and decided whether or not to do so. Also, state laws designed for purposes other than those of the federal program, such as laws for general safety and protection of the marine environment, were acceptable.

In discussing this last point, the Court reaffirmed the earlier Huron decision where a local government was allowed to impose air pollution regulations upon federally licensed vessels engaged in interstate commerce. [Though less sepctacular than oil pollution, air emissions from engines and cargo vapors do pose serious health hazards]. The amendments to the federal Clean Air Act, enacted since the Huron decision provide additional authority to states and local governments to regulate air pollution. Thus it seems a state may impose air emission standards upon tankers operating in state waters. While state authority to require design modifications to reduce air emissions is not clearly established, states may simply impose emission limitations and leave the tanker operators free to reach such limits in any manner they choose. The ultimate solution then could involve a combination of design modifications, the use of low-sulfur fuels, and operational modifications.

OIL SPILLS: CLEANUP, LIABILITY AND COMPENSATION

The past decade has seen a dramatic increase in production and transportation of oil in U.S. waters and the coastal zone. This development, coupled with a series of headline-making oil spills such as Santa Barbara and Argo Merchant, has lead to the passage of a maze of state and federal legislation dealing with oil pollution. Many of these laws are directed particularly towards cleanup of spills, liability of spillers, and compensation for damages.

The passage of these new laws was necessary because of the failure of traditional legal remedies to adequately compensate victims of oil pollution damage and to penalize the parties responsible. Common law actions such as trespass, nuisance, and negligence are available to the oil spill claimant, but burdens of proof and other procedural requirements often preclude their use. The new laws are designed to provide an incentive to prevent spills, to encourage rapid clean-up of spills when they do occur, and to "internalize" the costs of oil pollution by including them in the overall costs of the oil industry.

The Federal Water Pollution Control Act as amended by the Clean Water Act of 1977 is the primary federal law governing the discharge of oil and other hazardous substances into navigable waters. It prohibits discharges in any quantity which present "an imminent and substantial danger to the public health and welfare." Violations are subject to a $5,000 civil penalty for each offense.

The FWPCA also sets up liability provisions for cleanup costs incurred by the federal government, states, or private parties as a result of an oil spill. Liability can be avoided only where the discharge is proven to be the result of an act of God, act of war, negligence on the part of the U.S. government, or the act or omission of a third party.

These provisions are reflected in the recently passed Outer Continental Shelf Lands Act Amendments of 1978. In addition to cleanup costs, these amendments impose liability for damages to property and natural resources or loss of earnings caused by a spill from an offshore oil operation or related vessel. The amendments establish both a $200 million Offshore Oil Pollution Fund and a Fishermen's Contingency Fund to provide compensation and financial support.

Two other federal statutes setting up liability schemes and compensation funds are the Trans-Alaska Pipeline Act and the Deepwater Act. Their coverage is limited to spills of Alaskan oil en route or spills around deepwater ports. Proposals have been made for a single Compensation Act in the last three Congressional sessions but so far non has passed and prospects for passage in the future are uncertain. Thus both federal and state law will continue to govern many spills.

Seeking to protect substantial tourist, recreation, and fishing industries, most coastal states have enacted their own pollution liability statutes similar to, or more stringent than the federal laws. Alaska, Florida, and Maine have particularly strong statutes which have survived court challenges. In the case of <u>Askew v American Waterways Operators</u>, the U.S. Supreme Court indicated there was room for state involvement in oil spill control.

LIQUIFIED NATURAL GAS (LNG)

The siting of an LNG facility may have significant environmental and socio-economic impacts. The property damages, personal injuries, and deaths from a major accident could be catastrophic. Locating an LNG facility within a populated area increases these dangers. A recent United States General Accounting Office report concluded that present federal standards for the construction of LNG facilities are inadequate and recommended that LNG facilities be sited in remote areas. Improved federal LNG safety standards have been proposed but not finally adopted. Even if the proposed standards are adopted, the siting of an LNG facility will still require very careful coastal planning.

The Oregon legislature has not specifically dealt with the siting of LNG facilities. Primary authority for energy facility siting has been assigned to the state Energy Facility Siting Council, but LNG facilities are not included within that authority. On the other hand, Massachussetts and California have adopted specific LNG siting regulations.

The question of whether state LNG siting regulations are preempted by federal legislation such as the Natural Gas Pipeline Safety Act and the Natural Gas Act has been raised in a memorandum published by the Federal Energy Regulatory Commission. Close analysis of this legislation shows no clear intent by Congress to preempt the states with respect to LNG facility siting, although Congress could probably enact constitutional mandatory LNG facility siting legislation if it chose to. Significantly, proposed federal LNG legislation provides for a substantial state role in LNG siting. In any case, federal licenses and permits issued to an LNG facility in Oregon would have to be found consistent with the Oregon Coastal Management Program pursuant to the consistency requirements of the federal Coastal Zone Management Act. Any state permits required, such as a Division of State Lands dredging or filling permit, would be subjected to a similar consistency review.

Consistency of a proposed LNG facility with the Oregon Coastal Management program would be determined by reviewing the proposed facility against any relevant planning and siting criteria contained in an acknowledged local comprehensive plan covering the proposed site; in the absence of an acknowledged local comprehensive plan or relevant criteria within an acknowledged plan, the nineteen statewide planning goals adopted by LCDC would provide the basis for LNG consistency determinations. Of the nineteen statewide goals, the four coastal goals concerning estuaries, shorelands, beaches and dunes, and ocean resources would usually be relevant to an LNG proposal; however, they and the other goals are not specific with respect to the siting of LNG facilities or other

major energy facilities. Also relevant to LNG siting would be any limits placed on the use of Oregon submerged and submersible lands through the public trust doctrine as interpreted by the Oregon Supreme Court in the pending case of Morse v. Division of State Lands.

PORTS AND ONSHORE FACILITIES

As oil exploration and production increase in the North Pacific, there will be a growing demand for further development of Oregon's coastal ports. Oregon's statutes give ports broad latitude to aid developers in siting oil and gas facilities. Fiscally, a statewide Port Revolving Fund is available to port districts to finance commercial development, and port authorities can issue bonds and arrange for pre-payment of some taxes. Ports develop rules for navigation within the harbor, possibly affecting tanker or pipeline operations, and ports can acquire, lease and develop land within the port for commercial and industrial purposes.

These broad regulatory and proprietary powers are exercised within Oregon's comprehensive land use planning program. Ports are classified as "special districts" and must plan and coordinate their activities with affected counties. The Department of Land Conservation and Development may review planning agreements between the ports and counties for consistency with statewide planning goals. The result is that energy facility siting within Oregon ports reflect statewide and national interests as well as local interests.

All of the Pacific Ocean ports are bound by Oregon's federally approved coastal management program's coastal goals. The Estuarine Resource Goal limits the development capability of many ports. Dredge and fill is to be permitted within as estuary only for water dependent activities and only if adverse effects are mitigated by creation of an alternative wetland area. The mitigation condition has been strictly interpreted by Oregon's Court of Appeals in Moe v. Division of State Lands (31 Or App 3, 569 P 2d 675 (1977)), and the meaning of "water dependent" may be determined in a case currently before the Oregon Supreme Court, Morse v. Division of State Lands. The Estuarine Resources Goal (Goal 16) authorized classification of all Oregon's coastal estuaries according to the maximum level of potential development: conservation, natural, shallow draft and deep draft. These categories have the effect of consolidating energy facilities in certain ports, unless specific exceptions are applied for and granted by LCDC. Thus the effect of Oregon's coastal goals on port planning is potentially very significant. The goals protect estuaries for water-related development.

The role of a port district in the siting of any specific energy facility will depend on the type of facility and the permit approval process involved. The Energy Facility Siting Council (EFSC) currently has the authority to issue binding permits for pipelines wider than specified diameters and longer than five miles. EFSC has criteria for permit approval which include examination of the impacts of the facility on the community and the environment. The local port authority might, for example, facilitate negotiations between the developer and commercial fishing interests or help determine harbor safety needs for the facility. The current legislature is considering expanding EFSC's jurisdiction to include more types of energy facilities, such as LNG terminals and oil refineries.

Currently, most facilities associated with petroleum development are not under EFSC's jurisdiction, and the permit approval process is less streamlined. The port authority can intercede and help the developer in any of the necessary applications. For example, the Port of Astoria is facilitating the siting of a platform construction plant by helping acquire the necessary land for the developer and by participating in developing the mitigation proposal for approval by the Division of State Lands.

The above reports were prepared by Moshe Berger, James Buck, Martha Evans, Kenneth Johansen, Richard Parrish, Deborah Schroth and William Tufts, second and third year law students in the Ocean Resources Law Program at the University of Oregon. Students who satisfactorily complete one of two programs receive a Certificate of Specialty in Ocean Law. A "Statement of Completion may be obtained through either of the following programs: (1) completing seminars in Ocean Resources and Coastal Law, and completing any combination of the following courses and seminars totaling at least nine hours of credits: Admiralty, Water Resources Law, International Law, Transnational Legal Problems, Environmental Quality, International Institutions, and Natural Resources; or (2) employment for at least one academic year as a Research Assistant in the Ocean Resources Law Program, and satisfactory completion of a publishable research paper dealing with an ocean-law topic approved by the Ocean Resources Law Program Director.

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Oregon and offshore oil

For a readable description of what oil industry would mean to coastal communities, the state economy, and environment, write for a copy of Oregon and offshore oil. This 54-page booklet summarizes: the history of offshore oil development in the U.S.; the likelihood of discoveries off the Oregon coast; how federal and state government control offshore oil exploration and development; environmental issues related to offshore drilling; energy, water, and land needs of offshore operators; how coastal communities are affected by offshore oil operations; how this development affects other ocean-related industries, especially fisheries; oil's likely impacts on the state economy; and how the state is planning for potential offshore oil operations.

Oregon and offshore oil was prepared for the Governor's Task Force on Outer Continental Shelf Oil and Gas Development by the OSU Sea Grant College Program. For a free copy, write: Sea Grant Communications, Oregon State University, Corvallis, OR 97331.

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