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WATER LOG

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OFFSHORE OIL AND GAS LEASING

The Outer Continental Shelf (OCS) of the United States is comprised of an area approximately one-third the size of the U.S. mainland. Almost thirty years ago, federal leasing on the OCS for the exploration and development of oil and gas resources was begun. The first OCS lease sale, which took place on October 13, 1954 in the Gulf of Mexico off Louisiana's coast, offered 199 tracts covering 748, 819 acres. Bids were accepted on a total of 90 tracts covering 394,721 acres. The most recent Gulf of Mexico OCS lease sale on May 25, 1983 offered 7,250 tracts covering 39 million acres off Louisiana, Mississippi and Alabama. A total of 1,015 bids were made on 656 of the tracts. High bids totalling over $3 billion were accepted on 623 of the tracts. At present, more than 7 million acres are leased in the Gulf of Mexico, and the U.S. Treasury has received over $17.5 billion dollars from these leases.

The phenomenal growth of such oil and gas leasing activity has been accompanied by an increasing amount of governmental regulation, which, in turn, has created the need for making difficult policy decisions in areas such as energy conservation, multiple vs. single use management of marine resources, and environmental protection of marine ecosystems. As a result, a complex body of federal and state statutes, regulations and case law has developed to deal with the problems associated with offshore oil and gas development. This issue of the *Water Log* provides a basic introduction to this process.

FEDERAL OFF SHORE OIL AND GAS LEASING

Oil and gas leasing activity on the Outer Continental Shelf (OCS) is governed primarily by the Submerged Lands Act and the Outer Continental Shelf Lands Act (OCSLA). The Submerged Lands Act, 43 USC §§1301 *et seq.* (1964 & Supp. 1964-1982), provides generally that all lands extending three miles seaward of a state's coastal boundary are subject to the sovereignty of the states for the purpose of management and development of coastal natural resources. What actually constitutes a state's territorial waters pursuant to the Submerged Lands Act has been the object of extensive litigation in recent years, but will not be discussed in this article. *See, e.g., United States v. Louisiana,* 363 U.S. 1(1960); and "Who Owns the Mississippi Sound?," Cathy Jacobs, *Water Log,* Apr.-June 1982.

However, the federal government has retained its authority over navigation, power production, and flood control in this zone. In addition, in time of war, as necessary for the national defense, Congress and the President can prescribe that the federal government has the right of first refusal to purchase any natural resource at fair market value or acquire or use any of the state's submerged lands.

Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act, 43 USC §§1331 *et seq.* (1964 and Supp. 1964-1982), authorizes the Secretary of the Interior (hereinafter referred to as the Secretary) to develop the natural resources found in the waters, subsoil and seabed of the OCS. It establishes a policy that provides for the expeditious and orderly development of the natural resources of the OCS, subject to environmental safeguards. It also recognizes the right of coastal states, which may be impacted by such development, to participate in OCS mineral development and planning decisions.

The OCSLA directs the Secretary to develop an OCS leasing program which includes a schedule of proposed lease sales indicating the size, timing, and location of leasing activity which he determines best meets the national energy needs for the 5 year period following its approval. An abundance of information ranging from the interests of oil and gas producers and the national energy market to information concerning marine productivity and environmental sensitivity must be considered by the Secretary in developing such a program. His staff must prepare environmental studies and any environmental impact statements as may be required under the National Environmental Policy Act. Recommendations from a variety of sources including all interested Federal agencies, the Attorney General, the Federal Trade Commission, and the Governors and executives of state and local governments respectively must be solicited. Sixty days prior to publication of the proposed program, the Secretary must forward a copy of the plan to the Governors of the affected states for review and comment. The Governors then may solicit suggestions from heads of the local coastal governments. The Secretary must reply in writing to the appropriate Governor concerning rejection of any suggestions received from him. The Secretary is further authorized to enter into cooperative agreements with the affected states to implement the program. Within 60 days prior to approval of the plan, the Secretary must submit it to Congress and the President with copies of the received suggestions and the reasons why any of the recommendations were rejected. [For a discussion of the current OCS Five Year Leasing Program, see "Watt's OCS Leasing Program—Progress Report" in this issue of the *Water Log.*]

Pursuant to OCSLA and its accompanying regulations, OCS leases are offered at sales on a competitive bidding basis. However, before a lease sale can occur, the Secretary must send a notice of the proposed lease sale to the Governor of any affected state, as well as publish such notice in the *Federal Register.* Within 60 days from such notice, the Governor of any affected state may submit recommendations to the Secretary regarding the size, timing and location of the proposed lease sale. Affected local governments may submit recommendations through their Governors. The Secretary is obligated to respond to a Governor's recommendations in writing with his reasons for accepting or rejecting such recommendations.

Another statute which affords states input into the leasing process is the Coastal Zone Management Act of 1972 (CZMA). The CZMA, 16 USC §§1451 *et seq.* (1974 & Supp. 1975-1982), among other things, provides grants to coastal states to assist them in developing environmentally sound programs to manage their coastal natural resources. A key provision of the CZMA provides that federal activities that directly affect a state's coastal zone must be consistent with that state's approved coastal zone management plan. See "CZMA Consistency Determinations in OCS Lease Sales: A Case Law Analysis" in this issue, for a discussion of federal consistency requirements under the CZMA.

The next stage in the leasing process is the lease sale itself. At least 30 days prior to the

(Continued on page 7)

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LEASING MISSISSIPPI'S OFFSHORE OIL AND GAS TRACTS

Mississippi held its first offshore oil and gas lease sale on July 8, 1982. Although overall the sale was disappointing, eight bids were received, with the state accepting two worth a total of $3.2 million. The accepted bids were for two separate 2,880 acre tracts west of Cat Island. It is expected that another 15,000 acres in south Hancock County will be offered later this year.

Primary responsibility for mineral leasing in Mississippi's coastal waters rests with the Commission on Natural Resources. Miss. Code Ann. §§29-7-1 *et seq.* (1972 & Supp. 1982). It has established a policy to protect and preserve the mineral resources of the state. However, this preservationist policy is tempered by a recognition of the need to facilitate the development of these same resources when it would be in the best interest of the state and can be accomplished in an environmentally responsible manner. To further this policy, the Commission has promulgated regulations governing the manner in which state lands are leased for mineral exploration. In addition to these regulations, there are pertinent federal laws which apply but will not be addressed in this article.

Bidding and Leasing Process

The regulations pertaining to oil and gas leasing provide for competitive bidding on individual tracts no larger than 2,880 acres. (The Commission on Natural Resources reserves the right, however, to lease by competitive or noncompetitive negotiation when necessary.) All calls for leasing are to be published for at least 60 days in the *Southeastern Oil Review,* at least one major paper in Jackson, and one paper in the county or counties where the involved lands lie. The advertisement must include a description of the tracts to be leased, the date, time and place where bids will be received and publicly opened, any pre-set lease terms or conditions, and a description of the lease form or the place where the form or any additional information is available.

Sealed bids may be submitted on any or all of the tracts offered, but a separate bid must be submitted for each advertised tract sought to be leased. All bids are opened publicly by the Commission as specified in the advertisement, and must either be accepted, rejected or taken under advisement. After final review of the bids, the Commission can in its discretion accept those most advantageous to the state or reject all bids.

A separate lease must be drawn up for each tract bid upon. (Standard lease forms may be obtained from the Department of Natural Resource's main office in Jackson.) The following minimum requirements must be contained in oil and gas leases in Mississippi's territorial waters and tidelands. The delay rental (optional payment made by a lessee to delay commencement of drilling operation) cannot be less than two dollars per mineral acre, and may be made an escalating delay rental upon terms prescribed by the Commission on Natural Resources. Lease royalties (a share of the production or proceeds thereof payable to the state by the lessee) must equal a minimum of one-eighth (⅛) of the oil, gas, or other gaseous substances produced. Unless the Commission on Natural Resources determines a longer lease is more beneficial to the state, the primary term is five years for tracts in the Mississippi Sound and Gulf of Mexico and three years for all other leases. Assignment of a lease or transfer of all or any interest therein are permitted only upon prior written notice to the state.

In order to satisfy the requirements of the Mississippi Coastal Wetlands Protection Law Miss. Code Ann. §§49-27-3 *et seq.* (1982 Supp.), the lease must also contain the following conditions:

1. A requirement that the lessee comply with all rules and regulations of the Department of Wildlife Conservation (DWC) regarding the submission of environmental data and assessments and field monitoring plans prior to obtaining a permit from the Oil and Gas Board to initiate drilling operations;
2. A requirement that the lessee prepare an Exploratory Evaluation Document which identifies anticipated drilling operations and their impacts on ambient environmental systems in the drilling area, the socio-economic conditions of the vicinity, and an environmental monitoring plan, and have such document approved by DWC;
3. A requirement that the lessee prepare and have approved by DWC an Appraisal Evaluation Document enumerating more specifically the factors in (2) above, after completion of initial exploratory operations; and
4. A requirement that the lessee prepare and obtain approval from DWC of a Development/Production Document to supplement the previously submitted environmental/socio-economic assessments prior to beginning full scale production.

The lessee must comply with these conditions prior to receiving appropriate drilling, exploration and production permits from the Oil and Gas Board.

Some uncertainty exists as to whether coastal county port authorities are subject to the Commissions' leasing regulations. The Ports, Harbors, Landings and Watercraft Act, Miss. Code Ann. §§59-1-17, 59-1-19 (1972 & Supp. 1982) can be interpreted as giving them complete control over waters below the mean high tide within their geographical boundaries. If this is correct, they have authority to make leases on their own, without going through the Commission. To date this potential conflict, though recognized by the agencies, has not been resolved.

Permitting

Before a lessee can begin exploration and production, certain permits must be acquired from the state. Permits for seismographic or other mineral exploration must be obtained from the Commission on Natural Resources. The Commission on Wildlife Conservation has the authority to review each such permit and specify any special conditions to be included in the permit for the protection of wildlife. Drilling and other operational permits are issued by the Mississippi Oil and Gas Board, *See* Miss. Code Ann. §§53-3-11 *et seq.* (1972 & Supp. 1982). These permits are also reviewed by the Commission on Wildlife Conservation pursuant to a Memorandum of Agreement (MOA) among the Bureau of Marine Resources, the Department of Natural Resources, the Department of Wildlife Conservation, and the Oil & Gas Board. The MOA also provides for the monitoring of drilling operations by the Commissions on Wildlife Conservation and Natural Resources, and obligates the Oil and Gas Board to suspend operations which are judged by those Commissions to be inconsistent with previously approved documents.

Conclusion

To date, no significant mineral exploration activities have occurred on the tracts leased last July. Hence, the effectiveness of the Mississippi's offshore oil and gas leasing program remains to be seen. For more information regarding the leasing of oil and gas in Mississippi's territorial waters, contact the Mississippi Department of Natural Resources, Post Office Box 5348, Jackson, Mississippi 39216, (601) 354-6228.

Linda Marshall
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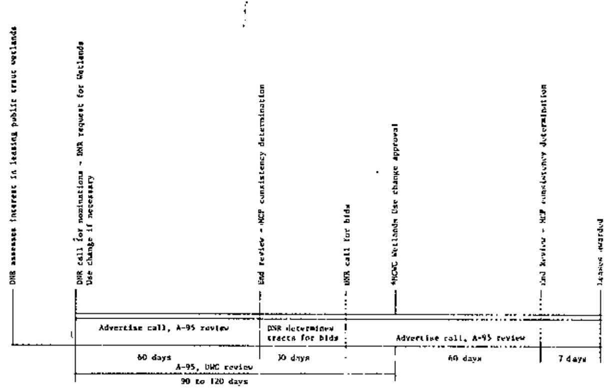
LEASING SCHEDULE



*MCWC Disapproval Stops Process
DNR -Department of Natural Resources
DWC -Department of Wildlife Conservation
MCP -Mississippi Coastal Program
MCWC -Mississippi Commission on Wildlife Conservation

LEASING ALABAMA'S OFFSHORE OIL AND GAS TRACTS

In 1981, Alabama held its first sale of leases for the offshore production of oil and gas. Oil! It seemed too good to be true. It appeared strange to the Alabama citizen that in addition to some of the best fishing and seafood to be had, there was an untapped wealth promising to fill the treasury of the State and individual alike. The mood smacked of the twenties and thirties, oil field rags-to-riches stories. Yet when the flurry died down, the pragmatic concern for Alabama waters re-emerged. "Just who is in charge of the leases? How long are they? What kind are they? Is anybody in control?" were questions to which conservationists, scientists, and concerned Alabama anglers wanted answers. This article explores some of these questions.

Leasing and supervision of Alabama's offshore tracts is divided among three separate state agencies: the Department of Conservation and Natural Resources, the State Oil and Gas Board, and the Department of Environmental Management. There interaction is established and effectuated by statute, regulation and an interagency memorandum of agreement.

The Department of Conservation and Natural Resources (DCNR) is responsible for the transfer of a state oil and gas interest. The Commissioner of DCNR is authorized to lease interests in submerged offshore lands owned by the State. Ala. Code §9-17-62 (Michie 1980). While the state still claims jurisdiction to six leagues (roughly 18 nautical miles) from the shoreline under this section, the Supreme Court, interpreting the Submerged Lands Act (43 U.S.C. §§1301 *et seq.*), has limited Alabama's territorial waters to three miles. *United States v. Louisiana,* 363 U.S. 1 (1960).

Leasing Process

The leasing process is initiated by the Commissioner, at the request of the head of any other state agency owning or having interest in the land to be leased, or at the request of the governor. Alabama has no formal regulations, but the format which DCNR must follow is set out in skeletal form by statute. Ala. Code §§9-17-62-69 (Michie 1980). More detailed information is supplied by DCNR notices entitled "Invitation for Bids for Oil and Gas Leases on Certain Submerged Lands. . . ." which are issued anew for each sale. Essentially, sealed bids are invited for the tracts offered through advertisements placed in the *Montgomery Advertiser,* and the newspapers published in the nearest littoral counties adjacent to the tracts to be leased. Publication must occur at least twenty-five days in advance of the final day for submitting bids; give the final date; state the time and place the bids will be opened; and set out the size and location of the tracts leased. Ala. Code §9-17-65 (Michie 1980).

The tracts, which have traditionally ranged from being as small as 30 acres to as large as 5,000, must be bid on as a whole. The invitation for bids establishes a primary term (usually five years) and minimum amounts for annual rent per acre ($5 in 1981), for cash bonus per acre ($100 in 1981, $200 in 1982), and for production royalty (25% in 1981).

The opening of the bids is merely to announce them publicly and record them; no decision is made at that time. The Commissioner has five days to award the tract to the "highest responsible bidder making the most advantageous offer to the state." As the process is held "with reserve," the Commissioner has the right to withdraw any offered tract from the sale prior to issuance of written acceptance, if in his opinion the "public interest" is thereby served. Ala. Code §9-17-65 (Michie 1980).

The "responsible" element seems to be the only requisite characteristic the bidder must possess. Looking at the statute as a whole, it appears to be an element which allows the state to reject an otherwise valid bid if the bidder is deemed incapable of fulfilling the terms of the lease and/or of assuring the state of its revenues. Yet "responsible" is nowhere defined, and there appears to be no absolute financial or other qualities a bidder must possess other than meeting the minimum bid amounts and tendering one-half of the cash bonus with his offer. After the Commissioner's decision, and approval of the governor, the lessee has a mineral right which he may exploit subject to other permitting and review processes discussed below.

Form of Lease

The lease form which is used is a version of the "Producers 88" or "unless" lease. *See* 6 W. SUMMERS, THE LAW OF OIL & GAS, §§1121-1151 (Perm. ed. 1967). It contains the standard covenants of a typical property lease, but is tailored toward granting mineral rights only. Some notable elements are discussed here briefly.

The lease is specific to oil and gas. It reserves to the state the right to grant other interests for other minerals in the tract, but this reservation is subject to the provision that the activities involved in harvesting the other minerals can not unreasonably interfere with the operations under the original oil and gas lease. It is given for a primary term, which is extended at its expiration for as long as oil and/or gas is produced in paying quantitites, as the state receives its money in the form of production royalties (in kind or cash). If activities are not begun within one year of signing, the lease terminates unless an established rental amount is paid. Such annual rental payments can extend the lease, year by year, without production occurring throughout the primary term.

Furthermore, if at the end of the primary term a well capable of production is found to have been "shut in" (closed down) by the lessee, the lease which would normally terminate will be extended if the lessee pays as royalty two times the annual rental amount.

Recognizing the need for a coordinated effort, since two other state and numerous Federal agencies could foreseeably be involved with the performance of the lease, a deference clause is included. This requires the lessee to comply with the other agencies' regulations, and extends the lease if attempts to so comply cause conflicts which delay the performance of the lease.

Oft-times, for efficiency's sake, a number of wells will be "pooled." "Pooling" or unitization is the bringing together of small tracts so as to control the flow of the oil or gas (which occurs geologically as a unit) through a consolidated effort of the several lessees or well operators. To insure that the State will receive its proper royalties after such an event, a special paragraph is included.

Resulting from the continuing boundary controversy even after *United States v. Louisiana* (the case did not establish the coastline bench mark from which the three mile maritime boundary was to be measured), Alabama's rights to certain offshore tracts may still be uncertain. For this and other policy reasons, an indemnity and disclaimer of warranty clause is included. If litigation results from the leasing of the tracts, the lessee agrees to indemnify the state against suit from third parties. The lessee also agrees to perform a title search. This shifts the burden of assuring proper title to the lessee; Alabama cannot be held liable should title to the lands prove not to be vested in the state.

As noted above, the lease form (used for both dry and submerged land sales) is amended and supplemented by an attachment of "Special Provisions." These can include general terms or may be tract-specific. They establish requirements such as minimal distance from shore at which drilling is permitted, or whether directional drilling is mandatory.

Permits and Review Requirements

As mentioned earlier, there are two other agencies which are involved in the process which regulates the leasing and production of petroleum products from offshore tracts in state waters. The first of these is the three-member State Oil and Gas Board, charged with the conservation of Alabama's oil and gas resources, with preventing their waste and ensuring that all recovery operations are carried out in a manner which will most benefit the public interest. It is given the power to adopt necessary rules, regulations and orders to fulfill these functions. Ala. Code §§9-17-2, 6-7 (Michie 1980). The statute carefully defines prohibited wastefulness, and for the sake of efficiency, the Board may require pooling or unitization. Ala. Code §§9-17-11 - 13, 81-88 (Michie 1980). In order to derive maximum benefit from the resource, the Board also can limit production in the state. Ala. Code §9-17-14 (Michie 1980).

The State Oil and Gas Supervisor (who is the state geologist) is responsible for carrying out the formal regulations, duties and decisions of the Board. Furthermore, terms and conditions relative to the location of wells and the manner of drilling established due to regulations are implemented by the supervisor from whom a permit must be obtained before any drilling is initiated. Ala. Code §9-17-24 (Michie 1980). As a result of interagency agreements, the current lease form requires that the Commissioner of DCNR must also approve of the well location. Before a permit can be issued for drilling to begin, the lessee must satisfy a final state agency—the newly formed Department of Environmental Management (DEM).

DEM, established by consolidation of a number of other state agency functions in 1982,

(Continued on page 7)

WATT'S OCS LEASING PROGRAM—PROGRESS REPORT

In the summer of 1982, Secretary of Interior James Watt inaugurated his five-year outer continental shelf (OCS) oil and gas leasing program, after obtaining the approval of President Reagan and the U.S. Congress. This leasing schedule was recently upheld on June 9, 1983, by the Court of Appeals for the District of Columbia, after four years of litigation which challenged the OCS plans of both Secretaries of Interior Andrus and Watt. The goal of the 1982-87 program is to make available for leasing over one billion acres of the OCS. Now—one year after the controversial "streamlined" plan was announced—Watt's program is well under way in spite of its drawing fire from almost all quarters. Opposition from individual coastal states, special interest groups, and concerned members of Congress has raised a full spectrum of issues over the past year, and has had varying degrees of success in causing Watt to compromise his original projects and policies.

The sheer massiveness of Watt's accelerated program was a signal of alarm for many. For 23 years after the first OCS leasing in 1954, only about 3% of the entire shelf had been leased—a total of 15 million acres. Leasing accelerated to 7.8 million acres in 1976-78, and 14.5 million acres in 1979-81. The phenomenal growth of the OCS program since 1976 is largely attributable to the Arab oil embargo. "It is my job," said Watt of the 1982-87 program, "to bring about the change needed to reduce American dependency on sometimes unstable and unfriendly countries which supply us with so much of our crude energy."

Another change from previous OCS leasing practices is the opening up of entire areas of OCS instead of offering specific sea-bottom tracts, so that an unknown number of oil companies makes an unknown number of bids on an unknown number of tracts. The most recent "streamlined" lease offering, in the Gulf of Mexico, drew a record $3.47 billion in high bids by 78 companies on 623 tracts. In contrast, the previous high total of $2.67 billion was on 147 tracts. Some tracts offered in the May sale lie 150 miles off Louisiana's coast, in waters more than one mile deep. Oil companies bidding on these tracts are confident that technology to transport minerals from these tracts to shore will exist before their 10-year leases expire.

The magnitude of Watt's OCS program is not the only source of controversy. Several states have filed suit to enjoin the leasing off their coastlines on procedural grounds. Until recently, continental shelf leasing under the Outer Continental Shelf Lands Act (OCSLA) was a closed affair to all but the oil companies and the Secretary of Interior. This changed with 1978 amendments to the OCSLA which required coastal state input into the leasing process. The amendments, which required the Secretary to form comprehensive five-year leasing programs "taking into account economic, social, and environmental values and the impact of oil and gas exploration upon such values," also provided that coastal states must be consulted both before and after the completion of these programs. Shortly after Watt announced his leasing program last spring, the state of California filed suit in federal district court to enjoin lease offerings scheduled off its coast. California cited the proposed sale as violative of these 1978 OCSLA amendments, the National Environmental Protection Act, and the public trust. Furthermore, claimed the state, pursuant to the federal Coastal Zone Management Act (CZMA), the offering is subject to consistency review under its coastal zone management plan. (For more information on consistency review, see "CZMA Consistency Determinations on OCS Lease Sales: A Case Analysis" this issue.) This particular allegation resulted in a court order to halt the leasing of certain tracts off California's coast until new hearings were held to reach the merits of the case.

In mid-summer 1982, the district court ruled against Watt on the merits of the California case. The U.S. Court of Appeals for the Ninth Circuit upheld the decision that Watt's leasing program did violate the federal CZMA consistency provision, but did not violate NEPA or OCSLA. Choosing a broad definition of federal action which "directly affects" a state's coastal zone, the court ruled further that such action must be consistent with California's coastal plan "to the maximum extent practicable." As a result, consistency review procedures were begun, and Watt endeavored to work more closely with the governors of all objecting coastal states to reach consistency agreements.

Alaska and New Jersey had similar problems with Watt's OCS procedures. New Jersey's concerns were directed at fisheries protection issues and geological hazards. In September 1982, a U.S. District Court in that state handed down a decision enjoining the sale of tracts until a consistency determination was made as to the state's coastal management plan. The Diapir Field sale off Alaska's coast, which originally had been scheduled for late September, was rescheduled for October pending the negotiation of an agreement with Alaska's Governor Hammond as to consistency with the state coastal management plan. Such an agreement was reached in September, once the strength of stipulations incorporated into the lease offerings met with Alaska's approval. These stipulations concerned the clean-up of oil spills in Arctic-ice conditions and drilling in the path of bowhead whale migration.

The U.S. Supreme Court has recently agreed to hear California's suit against Watt on the issue of whether federal activity, without physically impacting the coast, is activity which "directly affects" the coastal zone within the meaning of the CZMA. Until this decision is heard, it is likely that states will continue to seek injunctions against Watt's issuance of leases.

Other issues raised by state governments in the past year have included revenue sharing from OCS profits, concern for Atlantic coast fisheries, the fear that economic trends and pending litigation would lead to unspirited bidding, and the costs of schedule delays.

In addition to the protests of the coastal states themselves, various special interest groups adamantly oppose Watt's OCS program. For instance, in June 1982, the National Wildlife Federation (NWF) began voicing its concern that Watt's "decisions relating to 'process' . . . result in stacking the deck 'in favor of single-purpose commercial interests, not the broad public interest.' " The program, said NWF, "would be accomplished at the expense of: (1) adequate environmental analysis of the areas offered for lease, (2) consultation with affected states, (3) a fair return on the sale of the public resources and (4) public control over the management of outer continental shelf lands."

In July 1982, Watt's OCS leasing program became the subject of Congressional debate when Senator Kennedy and several representatives introduced a resolution of disapproval of the five-year plan. Specifically, Kennedy pointed out that given the potential for significant damage to the environment, the program "invites and unnecessarily encourages costly and time-consuming opposition by seeking to circumvent or ignore established procedures to bring about consensus on controversial points." The plan fails on three grounds, the resolution continued: it does not define the areas to be leased as precisely as possible; it does not appreciate the environmental sensitivity of some areas; and it fails to assure fair-market value compensation to the federal and state treasuries in return for industrial exploitation of public resources.

Congressional hearings in September again placed Watt under vehement attack from Senators who accused him of "frustrating the objectives of environmental laws and of circumventing the federal-state relationship required by law," of "wasting our natural resources" by setting up a bidding system which plays into the hands of the largest oil companies, and of ignoring certain "information gaps" which posed a threat to the nation's fisheries and other valuable resources. Watt's reply was that Congress had had its chance to disapprove the program earlier and not one negative vote was recorded. His program was misunderstood, he went on. It does not entail leasing near beach areas, and, in the event of a spill, sufficient technology will exist to take care of it by the time drilling begins. Furthermore, says a federal Mineral Management Service deputy director, the bidding system employed by Interior is one of "fair market value"—which means "the amount a willing buyer will pay a willing seller."

Later in September, the Sierra Club reported before a joint session of House Interior Subcommittees that a conservative estimate of total loss to the U.S. Treasury under Watt's leasing program amounted to $77 billion. According to the report, the size and pace of the lease sales was expected to depress bid levels to 32% lower than the maximum dollar bid estimated under the slower-paced approach.

Meanwhile, the first lease offering in October 1982 was hailed a success by Secretary Watt. The Alaskan Diapir Field Sale, which was seen as "a true test of the current state of the program," brought in high bids of over $2 billion on 125 of 338 tracts offered, $400 million more than expected by Interior. Later that month, oil companies announced the discovery of a giant oil field off California's coast (Santa Maria Basin) conservatively estimated at 100 million barrels. With the next Claifornia lease offering scheduled for September 1983, Interior's outlook was buoyant, in spite of all opposition.

However, more snags were encountered during the fall of 1982. Congressional discussion concerning revenue sharing picked up, as Interior officials outlined the changes in proposed bills which would be necessary before Reagan would accept them. (Basically, revenue sharing requires the federal government to split the bonus, royalty, and rental income from OCS leases with the coastal states.) In California, a group of local and state representatives banded together to form a statewide approach for responding to Interior's "decision steps" on offshore drilling plans. By the end of the year, Interior had postponed the St. George Basin sale until a resolution of consistency could be obtained from Alaska.

In January 1983, somewhat inconsistent with the aforementioned optimism, Watt announced an estimated decline in OCS receipts for 1984 of about $6 billion. He cited timing of sales, uncertain oil prices, and changes in reserve estimates in North Atlantic and Gulf of Mexico tracts as reasons for the projected decline. (For fiscal 1983, expected offshore receipts total $17 billion—much of it from the Gulf area.)

In this setting of pending litigation and wildly varying expectations, the St. George Basin lease sale proceeded on April 12. Alaska had filed suit and requested the court to enjoin the lease offering but had been denied, although Interior was prohibited from signing the leases until the merits of the case were litigated in May. The sale was deemed a success, resulting in bids 40% higher than estimated by the Congressional Budget Office. In May, however, the U.S. District Court enjoined the issuance of the leases until Watt "prepares a worst case analysis on environmental impacts upon gray and right whales resulting from preliminary seismic activity," and reconsiders issuing the leases without the appropriate restrictions.

Interior proceeded in like manner with North Atlantic tracts in the face of litigation by Virginia and New York. It was agreed that no leases on the controversial tracts would be signed until after the suits were heard on their merits. A memorandum of understanding had been signed with New Jersey's governor, who sought strengthening of the biological resources stipulations in order to provide more timely information for protection of marine life within certain tracts. This sale, however, brought in only $71.1 million—much less than expected.

The Gulf sale (discussed earlier) met with no state opposition and, according to Watt, indicated a "phenomenal success story."

The first area-wide offering in the South Atlantic is scheduled for early summer 1983. Interior has reached an agreement with Florida Governor Graham and North Carolina Senators Helms and Jones, in response to several concerns about the adequacy of environmental information and lease stipulations. Certain tracts have been deleted (a 500 meter isobath area near Jacksonville, Florida, and 151 nearshore tracts, which include those around the U.S.S. Monitor National Marine Sanctuary, off North Carolina's coast); oceanographic studies will be renewed by Interior with state participation; and more detailed information will be supplied by Interior for future environmental impact statements, particularly addressing oil spill data and socioeconomic effects of oil and gas activity on Kennedy Flight Center operations.

An unexpected obstacle to this sale presented itself on June 6, when the House appropriations subcommittee approved a funding bill which could ban leasing in areas of the South Atlantic, Georges Bank, and off California's coast. As mentioned earlier, it was three days later that the D.C. Court of Appeals upheld Watt's 5-year plan. Exhibitions of extreme fluctuations in public policy such as this cast much doubt as to the economies of proceeding with the sales.

Furthermore, it is unclear how the pending U.S. Supreme Court litigation of *California v. Watt* will affect future OCS lease offerings. The results of the South Atlantic sale, should it occur on schedule, will be a helpful indicator of whether or not oil companies feel it is economical to proceed in this uncertain setting.

Thus far, the net effect of state opposition to the program (which, incidentally, has been the most effective opposition) is merely to delay the leasing schedule. This small victory, against what so many view as a poorly thought-out, over-optimistic leasing program, took root in procedural issues. As is so often the case, economic and environmental issues will probably remain unaddressed until OCS leasing and drilling repercussions are actually felt by the American public.

Catherine L. Mills

THE MISSISSIPPI DEPARTMENT OF WILDLIFE CONSERVATION

In 1976, the Mississippi Legislature took steps to better protect, conserve, manage and develop the state's natural resources and wildlife by establishing two new state agencies, the Department of Natural Resources and the Department of Wildlife Conservation. Miss. Code Ann. §49-4-1 (Supp. 1982) The Department of Wildlife Conservation (hereafter the Department) was founded to coordinate all state government functions related to wildlife within its jurisdiction. Miss. Code Ann. §49-4-7 (Supp. 1982).

While the Department acts as the administrative agency, the Commission on Wildlife Conservation actually formulates the policies of the Department. Miss. Code Ann. §49-4-9 (Supp. 1982). The Commission is composed of five members who are appointed from each Congressional district by the Governor with the advice and consent of the state Senate. The Commission members, who serve five-year terms, should have extensive knowledge and practical experience in at least one area over which the Commission has jurisdiction. It is also required that at least one member be experienced in marine fisheries management and have a bachelor's degree in marine technology. In addition, at least three members of the Commission should be knowledgeable in management of game and freshwater fisheries. The Commission is headed by a chairman and vice-chairman, who are elected by the Commission members. Besides formulating the Department's policy, the Commission has the power to adopt, repeal and amend rules and regulations necessary to administer that policy. Miss. Code Ann. §49-4-9 (Supp. 1982). Current members of the Commission are:

1. Joseph W. Gex, Bay St. Louis
2. Dr. Edmund Keiser, Oxford
3. Jim Hunter McCaleb, Cleveland
4. Lonnie Tadlock, Morton
5. A. G. Williams, Osyka

The Department itself is headed by an executive director, presently Lon Strong, who is appointed by the Commission to serve at its will and pleasure. It is his duty to administer the policies of the Commission and supervise the functions of the Department. Miss Code Ann. §49-4-13 (Supp. 1982).

The Department is subdivided into two bureaus which are organized by the executive director and approved by the Commission. They are the Bureau of Marine Resources and the Bureau of Fisheries and Wildlife. Miss. Code Ann. §49-4-7 (Supp. 1982). The Bureau of Marine Resources administers the laws pertaining to seafood. The Bureau of Fisheries and Wildlife oversees the protection of game and fish resources. The Commission on Wildlife Conservation also has the authority to establish advisory committees to aid these bureaus in policy formation. A member of the state Attoney General's office serves as counsel for the entire Department and Commission.

Anyone desiring further information concerning the Department of Wildlife Conservation may call the Jackson office at (601) 961-5300.

*This article is the third in a series of articles that will appear in the *Water Log* describing federal, regional, state and local entities that exercise jurisdiction over coastal resources in Alabama and Mississippi.

CZMA CONSISTENCY DETERMINATIONS IN OCS LEASE SALES: A CASE LAW ANALYSIS – A. L. Sage, III*

The issue of Outer Continental Shelf (OCS) lease sale consistency determinations under the Coastal Zone Management Act (CZMA) has made it to the United States Supreme Court. The Court has granted certiorari in *California v. Watt,* 683 F. 2d 1253 (9th Cir. 1982), the first appellate court decision involving an OCS lease sale and the CZMA consistency provisions. The litigation, among other issues, involved a dispute concerning the leasing of twenty-nine tracts in the northern portion of the Santa Maria Basin off the California coast. On October 22, 1980, the Department of Interior had notified the California Coastal Commission (CCC) of its "negative determination" that the preleasing activities associated with Lease Sale No. 53 had no "direct effects" on California's coastal zone. The CCC disagreed, and, although there was a substantial amount of communication between various California governmental entities and Interior, the lease sale in its final form proposed leasing of the disputed tracts.

A decision by the Supreme Court in this case will resolve an issue which has resulted in litigation in several other OCS lease sales, three of which have ended in decisions adverse to the Department of Interior's position that lease sales are not subject to the CZMA consistency provisions. All of the other cases involving CZMA consistency have been resolved on other grounds or have ended in agreements between the states involved and Interior.

The particular consistency provision in controversy is subsection 307(c)(1) of CZMA. 16 USC §1456(c)(1)(1972). The provision in its entirety states:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

In each case which has confronted the issue, Interior has argued that OCS lease sales do not *directly* affect the state's coastal zone and thus no consistency determination is necessary. Interior's argument is that any impacts that a lease sale may have are speculative and remote and that the legislative history of section 307 clearly indicates that Congress did not intend consistency determinations for OCS lease sales.

In *California v. Watt, supra,* the Court strongly disagreed:

> It is enough to point out that decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction.

683 F. 2d at 1260.

For specific examples of direct affects, the Ninth Circuit cited those set out by the District Court in its opinion. 520 F. Supp. 1371, 1380-82 (C.D. Cal. 1981). Space limitations prevent even a summary of the District Court's list, but one example follows. In the area in question—the Santa Maria basin—the Court outlined impacts detailed in an internal Interior memorandum, a Secretarial Issue Document (SID) and the environmental impact statement (EIS). The SID and the EIS indicated a 52% probability of an oil spill impacting a point within the sea otter range in the northern Santa Maria basin within the life of the project. 520 F. Supp. at 1381.

The Court rejected Interior's argument that "directly affecting" should be read to cover only those activities which have effects that "'are part of, or immediately authorized by'" such activity. 683 F.2d at 1260, citing Interior's brief. It reasoned that a lease sale "established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." *Id.* The lease sale stage also is the only stage at which all the tracts and the cumulative effects could be considered together, because consistency determinations made during the exploration, development and production stages under §307(c)(3) are on a tract-by-tract basis.

The Court did agree with Interior that the holding by the District Court that Interior conduct "all activities on [the tracts in question] in a manner consistent with California's Coastal Management Plan," (520 F. Supp. at 1389), was a misplacement of final authority over the actual determination of consistency. The Court held that final authority rested with the Secretary of Commerce under §307(h) when the state and Interior disagreed.

In *Conservation Law League v. Watt,* 560 F. Supp. 561 (D.C. Mass. 1983), the Massachusetts District Court substantially agreed with the Ninth Circuit's reasoning. The primary impacts asserted by the plaintiffs (including the state) were damage to fisheries, water quality, wildlife and the recreational values of the coast. The Court noted that the CZMA is concerned with "'ecological, cultural, historic and esthetic values *as well as . . . economic development*'" (citing 16 U.S.C. §1452(2); court's emphasis). Also, both food and energy resources are identified as important coastal assets by the CZMA. 560 F. Supp. at 575. Therefore, a consistency determination was required prior to a lease sale.

Bowing at least temporarily to *California v. Watt,* 683 F. 2d 1253, Interior had made a consistency determination in the Massachusetts sale, finding the sale consistent with the state coastal management program. The Court, however, found that Interior had violated the substantive requirements of CZMA, holding that a consistency determination stating (with examples) common goals of minimum damage to fisheries, water quality, wildlife and the general environment did not "articulate a proper basis for his [the Secretary's] finding" of consistency. 560 F. Supp. at 578. The Court stated that the lease sale may be consistent to the maximum extent practicable, but the consistency determination must go beyond a statement of "similar aims and goals between state and federal regulatory schemes." *Id.*

The final case in which consistency was raised is perhaps the most interesting. *Kean v. Watt,* 18 ERC 1921 (D.C. N.J. 1982), was an oral opinion in a re-offer sale of tracts on which bids had not been submitted in a regular sale, probably because of the controversy surrounding them. The Court essentially followed the reasoning of the Ninth Circuit in deciding that Interior should have made a consistency determination, but then held that the lease sale was not inconsistent with New Jersey's coastal management program because the impact cited was economic in character and such impacts were not covered by CZMA. 18 ERC 1921. It seems unusual to hold that a consistency determination should have been made, then to proceed to hold that the lease sale was not inconsistent. Moreover, the Court seems to disregard the New Jersey coastal program in determining consistency, by comparing the lease sale impacts with the policies of CZMA rather than the policies of the New Jersey program. 18 ERC 1935.

The courts appear to be in agreement that states do not have a veto, i.e. the Secretary's determination is final unless arbitrary or capricious. Agreement concerning the content of a determination also seems to be unanimous, the courts citing the regulations with approval. *See,* 15 C.F.R. §930.39(a).

The discussion above, while necessarily brief, illuminates several important questions concerning consistency determinations besides the issue of their necessity in OCS sales, such as what impacts should be considered in lease sales, what should a consistency determination contain, and what does "consistent" mean? Unfortunately, these questions may not be answered by the Supreme Court. The question presented to the Supreme Court is whether an OCS lease sale that does not authorize any conduct having a physical impact upon the coast is a federal activity "directly affecting the coastal zone" within the meaning of Sect. 307(c)(1) of the Coastal Zone Management Act of 1972. This language would seem to effectively limit the activities in question to these which the Ninth Circuit stated "will *eventually* have an appreciable impact on the coastal zone." 683 F. 2d at 1261. (emphasis added).

The question of what impacts are encompassed by the language "directly affecting" may be decided by the Supreme Court if it upholds the Ninth Circuit's reasoning. However, it may only enumerate "eventual" impacts which definitely fall within the scope of the Act and may postpone an enumeration of specific impacts such as the economic impact rejected in *Kean.* It also seems doubtful that the Court will answer the question of whether to judge consistency against CZMA policies or against states' coastal management policies.

(This is a two-part examination of the consistency provisions of the Coastal Zone Management Act (16 USC §§1451 *et seq.*) as applied to oil and gas lease sales on the Outer Continental Shelf. This part discusses the cases which have considered the requirement of consistency determinations by the Secretary of Interior prior to a sale. The second part will explore the legislative history behind the consistency provisions and examine briefly commentaries on lease sale consistency.)

*A. L. Sage, III is Director of the Mineral Resources Legal Program and staff attorney with the Mississippi Law Research Institute at the University of Mississippi Law Center.

Federal Off-Shore Oil and Gas Leasing
(Continued from page 1)

sale, the Secretary submits to Congress and publishes in the *Federal Register* an identification of the designated tracts that will be leased; the time and place where bids are to be filed; the place and time that bids will be open; any special conditions of the sale; and the bidding system that will be utilized. The leased tract cannot be larger than 5,760 acres (a block three miles square) unless the Secretary determines that a bigger tract is necessary to comprise a reasonable economic production unit. A separate sealed bid must be submitted for each tract bid upon. Sealed bids are opened at the time specified in the notice solely for the purpose of publicly announcing and recording the bids. The Secretary has 90 days from the time of opening to accept the highest valid bid. If he fails to do so, the bids are considered rejected.

The primary term of an OCS oil and gas lease is typically five years, but cannot exceed ten years. An oil and gas lease can be continued beyond the primary term for as long as oil and gas is produced from the lease tract in paying quantities. Other lease provisions entitle the lessee to explore, develop, and produce the oil and gas within the leased area upon the condition of due diligence requirements and approval of the lessee's exploration, development and production plans. The lease also provides requirements for suspension and cancellation, payment of rentals and royalties, and assignment and transfer.

If the area to be leased possibly contains one or more pools of oil and gas underlying lands within the state's jurisdiction under the Submerged Lands Act as well as OCS lands, the Secretary of the Interior is to forward to the Governor of the affected state a schedule of the areas proposed to be leased; all information identifying the geographical, geological and ecological conditions of the region; and an estimate of the oil and gas reserves in the proposed areas. Once notified, the Governor has 90 days in which to decide to participate in the lease agreement. If he chooses not to participate, the Secretary is authorized to proceed with the lease sale.

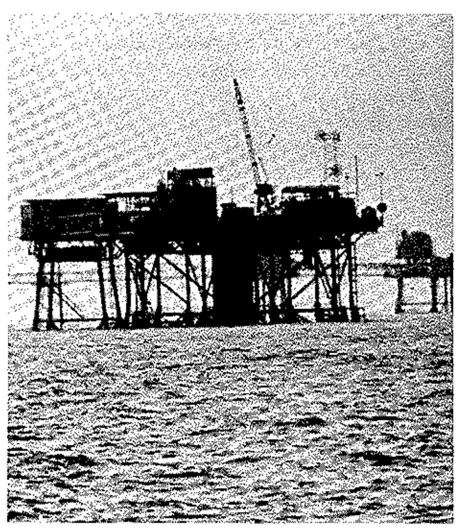
After the lease has been obtained, the lessee must present the Secretary with a description of the exploration plan for his approval. Permits and licenses for drilling and exploration are granted as long as the plan does not pose a serious threat to the environment, endanger the surrounding leases, or result in pollution or hazardous and unsafe conditions. Also, the lessee must certify that the activities proposed in the plan are consistent with the coastal management program of any state in which coastal zone land or water uses are affected.

When the lessee is ready to begin development and production, he must forward to the Secretary a plan describing fully the operations, facilities and environmental safeguards to be employed when production is begun. At this stage, the Governor of affected states are again entitled to submit recommendations. This procedure is essentially the same as the comment procedure at the proposed lease sale stage discussed earlier. However, there is one distinction. Under the OCSLA, a development and production plan is not required for activities in the Gulf of Mexico. The extent of this exemption is not clear. Regulations governing development and production plans found at Title 30 of the *Code of Federal Regulations* appear to require such a plan, but at the same time give the Interior Department broad discretion in determining the information that is included in the plan. In making this decision in the western Gulf of Mexico, "current and expected operating conditions, together with experience gained during past operations of a similar nature in the area of proposed activities" must be considered. 30 CFR §250.34-2 (1982). No reference is made in this CFR section to the content of plans for the eastern Gulf of Mexico. The CZMA requires that all lessees attach to development or production plans a certification that the activities described therein comply with and will be carried out in a manner consistent with the approved coastal management programs of affected states.

Conclusion

The above information provides only a basic introduction to the federal role in the development of OCS oil and gas resources. Other federal statutes and regulations interface with OCSLA, but are beyond the scope of this article. For more detailed information, contact the Minerals Management Service of the Department of the Interior at: Imperial Office Building, 3301 North Causeway Boulevard, Post Office Box 7944, Metairie, Louisiana 70010.

Tim Weeks
Casey Jarman



Leasing Alabama's Offshore Tracts
(Continued from page 3)

is responsible for dealing with air and water pollution; solid and hazardous wastes matters; water quality and water treatment systems; and coastal area preservation development, permitting, regulatory and enforcement functions. Ala. Code §22-22A-4 (Michie Supp. 1982). This task is to be carried out through the formation of a seven member Environmental Management Commission which is to establish rules, regulations and policies and to hire a director and staff, and with the assistance of a Coastal Resources Advisory Committee. Ala. Code §§22-22A-6, 12 (Michie Supp. 1982).

To date, DEM has not issued any new regulations in this area; instead, it administers those previously promulgated by other agencies and boards whose functions it assumed under reorganization. As noted, before the permit by the State Oil and Gas Board can be issued, a DEM determination which must be made in addition to those relating to discharge and water quality, is a finding that the activity will not be inconsistent with the state's coastal area management program. Ala. Code §9-7-20 (Michie Supp. 1982). DEM will be making such a decision soon on an application currently before the State Oil and Gas Board to permit a new well off the west end of Dauphin Island. Drilling is slated to begin there in August. Other relevant DEM tasks include waste water discharge and non-degradation of state water quality determinations. Currently there is a no-discharge policy agreed to by the State Oil and Gas Board and DEM.

As common sense dictates, and as recent case law has confirmed, agencies such as DEM have a proper and important role in seeing that offshore oil and gas exploration and exploitation do not negatively impact the quality of a state's coastal areas and adjacent waters. Alabama's approach in this regard seems carefully considered.

Invitations for offshore bids have gone out in 1981 and 1982, and leases have been granted as a result in both years. In late 1982, bids were sought for Perdido Bay, but because of the economy and early exploration work which produced negative results, none were submitted. There has not been a sale in 1983 as of this date. In addition to these regulations, there are pertinent federal laws which apply but will not be addressed in this article. For more information concerning the sale and operation of offshore leases, write Alabama Department of Conservation and Natural Resources, Lands Division, 64 North Union Street, Montgomery, Alabama 36130, or phone (205) 832-6354; Alabama State Oil and Gas Board, Post Office Drawer O, University of Alabama, Tuscaloosa, Alabama 35401 or phone (205) 349-2852; Alabama Department of Environmental Management, State Capitol, Montgomery, Alabama 36130 or phone (205) 834-1303.

John Steele Olmstead

WATER LOG

This newsletter is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. The purpose of the newsletter is to increase public awareness of coastal problems and issues.

If you would like to receive future issues of the WATER LOG free of charge, please send your name and address to: Sea Grant Legal Program, University of Mississippi Law Center, University, Mississippi 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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NOTES

The Department of the Interior has completed making minor/technical modifications to the boundaries of the Coastal Barrier Resources System. Copies of maps showing final delineations are available for public review. Contact: Frank McGilvrey at (202) 343-5000.

A study of the national needs and capabilities for maintaining and improving the dredging of coastal ports, harbors, and navigational channels will be done by the National Research Council of the National Academy of Sciences. For more information call Aurora Gallagher, Staff Officer, Study of National Dredging Issues, Marine Board, National Academy of Sciences, 2101 Constitution Avenue, N.W., Washington, D.C. 20418.

After several years of effort, a NEPA environmental document will soon be coming out on the gear modification solution to the shrimp/sea turtle conflict. Originally written as a draft supplemental EIS, to update the late 70's EIS listing species of turtles as endangered or threatened, NMFS now will issue the information in the form of an Environmental Assessment. While there are those who wonder about this somewhat backwards approach (an EA is to determine if a full environmental impact statement or supplement is necessary), everyone is pleased that the sum total of NMFS information on the trawling efficiency device (TED) will be available for public perusal and comment. The TED eliminates bycatch, including sea turtles, while maintaining or increasing the level of harvested shrimp, and may decrease fuel consumption as well.

Catherine L. Mills, 1983 University of Mississippi Law School graduate, former Sea Grant law student research associate and now staff attorney with the Mississippi Law Research Institute, presented her paper entitled "The Marine Sanctuary Program" at the Northern Gulf of Mexico Estuaries and Barrier Islands Research Conference held recently in Biloxi.

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