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Environmental Considerations in Federal Oil and Gas Leasing on Outer Continental Shelf

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ENVIRONMENTAL CONSIDERATIONS IN FEDERAL OIL AND GAS LEASING ON OUTER CONTINENTAL SHELF

ENVIRONMENTAL LAW–OUTER CONTINENTAL SHELF LANDS ACT: The Court of Appeals for the District of Columbia holds that the Department of the Interior is required to fully consider alternative operating orders in Outer Continental Shelf oil and gas leasing programs. Outer Continental Shelf Lands Act Amendments of 1978 specifically allows the Secretary of the Interior to terminate Outer Continental Shelf leases for environmental reasons. *State of Alaska v. Andrus,* 580 F.2d 465 (D.C. Cir. 1978).

BACKGROUND

President Nixon stated in January, 1974, that as part of "Project Independence"[1] he was ordering the Secretary of the Interior (Secretary) "to increase the acreage leased on the Outer Continental Shelf (OCS) to 10 million acres beginning in 1975. . . ."[2] Mr. Nixon also stated that there would be "no decision on leasing on the OCS in the . . . Gulf of Alaska until the Council on Environmental Quality (CEQ) completes its current environmental study of those areas."[3] This CEQ study, released in April of 1974, concluded that, of the regions studied, OCS development in the Eastern Gulf of Alaska would pose the highest level of environmental risks.[4] The Environmental Protection Agency (EPA) also expressed criticism of the proposed inclusion of Alaska OCS areas in the leasing schedule.[5]

The Department of the Interior (DOI) agreed that development in the Gulf of Alaska would be "highly hazardous."[6] However, the DOI

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1. The name given to the former President's program designed to free the U.S. from dependence on foreign sources of petroleum. *See,* 9 WEEKLY COMP. PRES. DOC. 1309, 1317 (1973).
2. 10 WEEKLY COMP. PRES. DOC. 69, 84 (1974).
3. *Id.*
4. COUNCIL ON ENVIRONMENTAL QUALITY, O.C.S. OIL AND GAS–AN ENVIRONMENTAL ASSESSMENT: A REPORT TO THE PRESIDENT BY THE COUNCIL ON ENVIRONMENTAL QUALITY, at 6 (1974).
5. ENVIRONMENTAL PROTECTION AGENCY, 3 ENERGY DEVELOPMENT: THE ENVIRONMENTAL TRADEOFFS: RELATIVE ENVIRONMENTAL RANKING OF PROPOSED OFFSHORE CONTINENTAL SHELF AREAS ON THE BASIS OF IMPACTS OF OIL SPILLS (1975).
6. DEPARTMENT OF THE INTERIOR, 2 DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT, 98, 401 (1974).

scheduled the Gulf of Alaska areas for leasing earlier than any of the regions of lower risk which were analyzed in the CEQ study.[7] When thy DOI published its final environmental impact statement (EIS), the document was submitted to the EPA under Section 309 of the Clean Air Act Amendments of 1970.[8] Pursuant to the provisions of Section 309, the EPA Administrator determined that the proposed action was environmentally unsafe and urged that the sale be delayed.[9] The EPA then referred the matter to the CEQ which recommended, *inter alia,* proceeding with a lease sale of only "the northeasternmost zone of the original sale proposal."[10] This area amounted to 150,000 acres and was, in the CEQ's view, "both highly promising in oil and gas potential and relatively low in vulnerability to environmental damage."[11]

Subsequently, the Secretary deleted some 700,000 acres from the sale, stating that these were "by far the most risky tracts."[12] Later, he eliminated 92,000 more acres, which had been identified as areas of particular environmental concern, from the lease sale.[13]

The DOI held the sale (Sale No. 39) as scheduled. Before doing so, it had weighed the relative value of delays to complete ongoing environmental studies. It had concluded that such studies would not appreciably alter knowledge of the hazards of oil and gas development in the Gulf of Alaska.[14] The Secretary, in making the decision to go ahead with the sale, stated that the operating orders, safety requirements, and lease stipulations developed by the Bureau of Land Management (BLM) and the U.S. Geological Survey (USGS) would tolerably lessen the environmental dangers.[15] The total area of tracts for which bids were received and accepted in the lease sale was about 410,000 acres.

STATE OF ALASKA v. ANDRUS

The State of Alaska, the City of Yakutat, the United Fishermen of Alaska, and the Cordova District Fisheries Union brought suit in the

7. DEPARTMENT OF THE INTERIOR, 3 ENVIRONMENTAL IMPACT STATEMENT, LEASE SALE NO. 39, app. 1-1 (1975).

8. 42 U.S.C. §1857h-7 (1976). This section requires the EPA Administrator to examine the environmental impacts of federal actions governed by NEPA, 42 U.S.C. §4321-4361 (1976), and refer the matter to the CEQ.

9. *See,* State of Alaska v. Kleppe, 9 E.R.C. 1497 (D.D.C. 1976).

10. State of Alaska v. Andrus, 580 F.2d 465, 471 (D.C. Cir. 1978).

11. *Id.*

12. *Id.*

13. *Id.* at 472.

14. *Id.* at 471. *See,* notice of Sale No. 39 appearing in 41 Fed. Reg. 10, 792 (1976).

15. State of Alaska v. Andrus, 580 F.2d 465, 471 (D.C. Cir. 1978).

United States District Court for the District of Columbia seeking a preliminary injunction to enjoin the defendants, the Secretary of the Interior and the Director of the BLM, from holding the lease sale.[16] The trial judge denied a motion for a preliminary injunction and the sale was held as scheduled. Plaintiffs then sought a declaration that the DOI violated the National Environmental Policy Act (NEPA)[17] by holding Sale No. 39. They claimed that the EIS which had been prepared for the sale was inadequate. The trial court upheld the EIS and plaintiffs appealed.[18]

A. The Issue of Delaying the Sale

Appellants raised three major environmental issues in their appeal. First, they argued that the information available to the Secretary was, as a matter of law, insufficient to support a decision to proceed with the sale at that time. Alternatively, they claimed that even if the Secretary had enough information regarding environmental effects to support Sale No. 39 in 1976, the Secretary failed to adequately respond to the suggestions by the EPA, the CEQ, and others that the sale be delayed.

An agency's primary responsibility under NEPA is to predict the environmental consequences of its proposed action before it proceeds with that action and to fully ascertain those environmental effects.[19] Chief Judge Bazelon, writing for the U.S. Court of Appeals for the District of Columbia, noted that there must be a point in each case where the environmental data is sufficient for agency action regulated by NEPA, even if that information does not constitute complete knowledge of potential environmental ramifications.[20] If the responsible decision-maker has considered the costs of proceeding without more complete information, and has decided that such possible environmental consequences are "outweighed by the benefits of proceeding with the project without further delay,"[21] neither a court nor an environmental agency can substitute its judgment for that of the decision-maker.[22] Thus, the appeals court found that the Secretary was not required to delay the sale until the completion of ongoing studies.

16. State of Alaska v. Kleppe, 9 E.R.C. 1497 (D.D.C. 1976).
17. 42 U.S.C. §4321 *et. seq.* (1976).
18. State of Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978).
19. Scientists' Institute for Public Information, Inc. v. A.E.C., 481 F.2d 1079, 1092 (D.C. Cir. 1973).
20. State of Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978). *See also* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1975).
21. Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974).
22. Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

Under NEPA, the Secretary, though not required to delay the sale, was obligated to fully advert to that alternative before going forward with the sale.[23] Appellants' corollary argument was that the Secretary did not sufficiently consider the alternative of delay in the EIS for Sale No. 39.[24] The EIS briefly discussed the alternative of delay, but did not deal with the costs of such a delay.[25] Section 102(2)(C) of NEPA[26] requires a detailed statement of altneratives to proposed agency action. And compliance with this provision must "amount to a full, good faith consideration of the environment."[27] NEPA's requirements are designed to guarantee that environmental values are fully considered in agency decision-making.[28] Although an agency must therefore examine alternatives and their respective costs, the court determined that, as a general proposition, under NEPA an agency has "reasonable discretion to decide when it has sufficient information to choose intelligently between alternative courses of action that affect the environment."[29]

Whether the Secretary had adequately considered the alternative of delaying the sale was not decided, however. The court felt it useless to rule on this issue since the period of postponement recommended by the EPA and the CEQ had by that time passed and most of the data thought necessary for the sale decision had supposedly already been collected.

B. The Operating Orders

The Outer Continental Lands Act (OCS Act)[30] charges the Secretary with administration of an oil and gas leasing program in OCS areas. This responsibility is subdivided between the BLM, which has the duty of administering the leasing of OCS tracts,[31] and the USGS, which is responsible for overseeing lessees' activities on the leased areas.[32] The USGS, in fulfilling its duty, enforces those operating regulations set out in the Code of Federal Regulations and issues

23. NEPA, §102(2)(C), (E), 42 U.S.C. §4332(2)(C), (E) (1976).

24. §102(2)(C) of NEPA states that an EIS must contain a "detailed statement" of "alternatives to the proposed action."

25. *Supra* note 7, Vol. II, 676-79, Vol. III, 114.

26. *Supra* note 23.

27. Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., 449 F.2d 1109, 1115 (D.C. Cir. 1971).

28. For an excellent discussion of NEPA's applicability to OCS leasing, *see* McDermott, *Expanded Offshore Leasing and the Mandates of NEPA,* 10 NAT. RESOURCES LAW. 531 (1977).

29. State of Alaska v. Andrus, 580 F.2d 465, 476 (D.C. Cir. 1978).

30. 43 U.S.C. §1331 *et. seq.* (1970).

31. 43 C.F.R. 3300, *et seq.* (1977), 42 Fed. Reg. 49, 983 (1977).

32. 30 C.F.R. 250.1, *et seq.* (1977); *See,* 41 Fed. Reg. 10, 105 (1976), 43 Fed. Reg. 43 3883, 43, 3889 (1978).

precise "operating orders" for every area in which drilling is anticipated. Such orders determine the way in which exploration and development are conducted and detail the environmental and safety standards the lessee will be obliged to meet. The operating orders for Sale No. 39 were summarily outlined in the EIS for the sale.[33]

Appellants' second major contention was that the DOI was required to assess alternatives to those operating orders which were actually chosen. The State of Alaska observed that determinations as to how OCS operations are to be managed are at least as important as decisions regarding whether or not OCS development is allowed at all in a specific area.

In response to this argument, the court first stated that the Secretary would not be required to compile a separate EIS dealing with the operating orders. Additionally, the opinion noted that the Secretary has discretion "to consider the OCS orders within the context of the EIS for Sale No. 39."[34] Thus, the Secretary's decision to delay consideration of the impact of the orders was not disturbed by the court.

Moving to the heart of this issue, Judge Bazelon phrased the crucial question: "While the Secretary could thus consider the impact of the Orders within the context of the Sale No. 39 EIS, the more important issue is whether the 'consideration' given to the Orders in that EIS was adequate."[35]

As previously noted, the EIS for Sale No. 39 only described the proposed and adopted orders without assessing their environmental impact vis-a-vis other orders which might have been selected. The Secretary claimed that he was not required to more fully consider the adopted orders and alternatives since "these orders are nothing more than methods of mitigating potential adverse environmental impacts and promoting safety . . ."[36] However, the operating orders, the court wrote, were "not bestowed by the Secretary . . . out of sheer beneficence toward the environment."[37] Instead, they were a basic means by which the Secretary sought to fulfill his mission to keep untoward effects of the lease sale upon the Gulf of Alaska to a minimum.[38] In fact, DOI's election to go forward with the sale without delay was founded upon the assertion of protective operating orders.[39]

33. *Supra* note 7, Vol. II at 552, 679.
34. State of Alaska v. Andrus, 580 F.2d 465, 477 (D.C. Cir. 1978).
35. *Id.* at 477-478.
36. *Id.* at 478.
37. *Id.*
38. *Id.*
39. *Id.* at 479.

Where operating orders are expressly intended by an agency "as part of the basic premise for the kind of consideration of adverse environmental impact that is mandated by NEPA," the court said that promulgation of those protective orders "must be conducted with full consideration of environmental consequences and alternatives."[40] The court did not detail what kind of consideration by an agency would satisfy such a test, except to observe that a "rule of reason" governs evaluation of alternatives to a proposed action. At a minimum, though, the court stated that an agency must evaluate plausible alternative operating orders suggested by comments on the agency's own proposed orders. Having ascertained DOI's responsibility to conduct such an assessment of alternative orders, the court asked that the Interior Department perform such an evaluation. However, the court refused to set aside on this basis, saying that even had the Secretary properly considered alternative orders he nevertheless could have decided to conduct the sale.

C. Termination Clauses

Finally, appellants argued that environmental risks occasioned by OCS drilling in the Gulf of Alaska could have been controlled to a fair extent had the DOI included "termination clauses" in leases it sold. Such clauses would give the Secretary power to cancel a lease if environmental dangers subsequently arose during exploration or development. Appellants urged that the DOI's failure to consider the inclusion of such clauses violated NEPA, since such clauses constituted an alternative to the proposed sale.

The Secretary took the position that under the OCS Act leases can be terminated only if the lessee is guilty of some wrongdoing. He based his argument on two provisions of this act. First, the continuance of a lease is conditioned upon the lessee's compliance with those regulations issued and in force upon the date of the lease.[41] Also, the act states that a lease can be terminated if the lessee does not comply with the provisions of the act, of the lease, or of the regulations in effect at the time the lease was granted.[42] Thus, the Secretary maintained, these provisions were the only means by which he could terminate a lease.[43]

However, the Secretary had not based his argument upon the

40. *Id.*
41. 43 U.S.C. §1334(a)(2) (1970).
42. *Id.* §1334(b)(1), (2).
43. The OCS Act provided that leases "contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease." 43 U.S.C. §1337(b)(4) (1970).

relevant issue. The question was, in the court's view, not whether the Secretary had the power to cancel a lease even if it did not contain a termination clause. Rather, the pertinent inquiry was whether the Secretary could include a termination clause in OCS leases offered for sale. Looking to the legislative history of the OCS Act,[44] the opinion noted that there was a distinct congressional intent to give the Secretary "broad discretion in the administration of the OCS leasing program."[45] The court then opined that Congress intended that the leases must be terminable if the lessee has been guilty of wrongdoing, but that the Secretary was not thereby prohibited from contracting with lessees to make OCS leases cancellable for other reasons.

The cancellation provision of the Mineral Leasing Act,[46] which was very like the OCS Act's termination section, was found in *Boesche v. Udall*[47] not to constitute the exclusive means by which the DOI can cancel a lease granted under the Mineral Leasing Act. In *Boesche*, the Supreme Court dealt with the question of whether the Secretary had the power to administratively cancel a lease which had been issued in violation of the Mineral Leasing Act, even though the lessee had not been guilty of wrongdoing. The opinion determined that, under the Act, Congress had reserved the fee interest in leased areas in the United States. Therefore, the Court found that the Secretary has general managerial authority over such lands and that he thus has a general administrative power of termination. The Court also stated that the Mineral Leasing Act "was intended to expand, not contract, the Secretary's control over the mineral lands of the United States . . ."[48] However, in *Boesche*, the Secretary had claimed no power to cancel a lease where there were no post-lease violations of lease terms; and the Court noted that the Mineral Leasing Act's provisions provided the exclusive means of termination based on post-lease events.

Judge Bazelon drew an analogy between the Mineral Leasing Act and the OCS Act, there being no case law exactly on point. He observed that both pieces of legislation were intended to settle issues of federal versus state control over certain resource development and exploration, and both acts substantially expanded the Secretary of the Interior's authority. Thus, the D.C. Court of Appeals found that

44. *See, e.g.*, H. REP. NO. 1084, 94th Cong. 2d Sess. 86 (1976); H. REP. NO. 413, 83d Cong. 1st Sess. (1953); S. REP. NO. 411, 83d Cong. 1st Sess. (1953).
45. State of Alaska v. Andrus, 580 F.2d 465, 480 (D.C. Cir. 1978).
46. 30 U.S.C. §188 (1976).
47. 373 U.S.C. §472 (1963).
48. *Id.* at §481.

"it would be surprising to find in the (OCS) Act's cancellation provisions a limitation on the Secretary's authority to prescribe the terms and conditions that should be included in each lease."[49]

In *Union Oil Co. v. Morton,*[50] the Ninth Circuit held that the Secretary does not have the power to cancel a lease under the OCS Act, even in the face of an environmental hreat. That court found that the Secretary's open-ended suspension and order denying oil and gas lessees permission to build a drilling platform in the Santa Barbara Channel, which was allegedly necessary for the complete exercise of their lease rights, constituted a taking which was not expressly or implicitly authorized by Congress.

The D.C. Court of Appeals noted this decision, but made it clear that it was not deciding whether the Secretary has the power to terminate an OCS lease if that lease does not contain a cancellation provision. The court found only that the Secretary has, under the OCS Act and as part of his "general managerial powers," the authority to decide which clauses are included in OCS leases offered for sale and that he does have the discretion to include termination clauses in such leases. Given that the Secretary has this power, the court concluded that "there can be little question that the possibility of including such clauses in the leases at issue here does constitute an 'alternative to the proposed action' that should have been evaluated in the EIS and considered by the Secretary."[51]

But, since cancellation of the lease sale, which had already taken place, would create legal problems and would be inappropriate, the court refused to grant appellants' petition for that remedy. However, the court entered a declaratory judgment to the effect that termination clauses should have been considered in the EIS.

APPEAL TO THE SUPREME COURT

An industry trade group, the Western Oil and Gas Association (Association), having intervened as a defendant in the case from the beginning, petitioned the United States Supreme Court for a writ of certiorari. The Association alleged that the appeals court's opinion conflicted with years of uniform statutory construction to the effect that the DOI could not terminate leases where the lessee is without fault, except in return for the government's payment of fair compensation.

49. State of Alaska v. Andrus, 580 F.2d 465, 483 (D.C. Cir. 1978).
50. 512 F.2d 743 (9th Cir. 1975).
51. State of Alaska v. Andrus, 580 F.2d 465, 484 (D.C. Cir. 1978).

A. OCS Lands Act Amendments of 1978

On September 18, 1978, President Carter signed into law the OCS Lands Act Amendments of 1978 (Amendments).[52] Perhaps one of the most important provisions of the Amendments is that giving the Secretary the power to cancel an OCS lease or permit for environmental reasons.[53] The cancellation procedure is undertaken in two steps. First, if there is a threat of serious harm to life, property, mineral deposits, or to the marine, coastal, or human environment, the Secretary can temporarily suspend operations creating the threat. Next, if after a hearing the Secretary decides that continued operations under the lease would work serious harm to the environment, national security, or life, and that the threat of harm will not appreciably diminish within a reasonable time, and finally that the advantages of cancellation outweigh those of continuing a lease in force, he may cancel the potentially harmful lease. With respect to any lease so cancelled, the Amendments entitle the affected lessee to be compensated for the loss of his lease.

The Amendments require that the Secretary conduct a study of areas included in oil and gas lease sales.[54] Such studies are to assess the environmental impacts on the human, marine, and coastal environments of the OCS and of coastal areas which could be affected by development in the region. Also, the Secretary may gather additional environmental data during development of OCS areas in order to detect ecological changes in those regions. All studies are to be conducted in cooperation with affected states.[55] Executives of affected state and local governments may give recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to proposed plans for development and production. If such recommendations provide for a reasonable balance between the national and local interests, they may be accepted by the Secretary. In addition, the DOI is now authorized to engage in joint planning, review, and surveillance of OCS activities with local governmental entities.

Significantly, the Amendments state that the "best available and safest technologies which the Secretary determines to be economically feasible" are to be used where the failure of a particular system could lead to damaging safety, health, or environmental

52. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-373 (S.9) 92 Stat. 629-698, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2856.

53. Pub. L. No. 95-372, 92 Stat. 636-640, *amending* 43 U.S.C. §1334 (1970).

54. Pub. L. No. 95-372, 92 Stat. 653-654, *adding new section* 43 U.S.C. §1346.

55. Pub. L. No. 95-372, 92 Stat. 652-653, *adding new section* 43 U.S.C. §1345.

effects.[56] All safety and environmental regulations under the Act are to be enforced by the Secretary, the Coast Guard, and the Secretary of the Army.

Citizens' suits are expressly provided for. Anyone with a valid legal interest may sue in a civil action to enforce compliance with the OCS Act.[57] The United States, a governmental body, or any other person can be named as defendant. Specific guidelines and procedures for such actions are set forth in the Amendments.

Remand

The petitioners and the State of Alaska suggested to the Supreme Court that the portion of this case dealing with termination clauses was mooted by the 1978 changes in the OCS Act. On October 30, the Supreme Court granted certiorari in the case, vacated the portion of the appeals court's opinion dealing with termination clauses, and remanded the case to the U.S. District Court in the District of Columbia for dismissal of the pertinent parts of the plaintiffs' complaint.[58]

CONCLUSION

Obviously, a federal agency responsible for administering projects in a given field should be considered a knowledgeable authority in that area. Hence, it is proper that agencies such as the Department of the Interior retain their discretion to decide when they have enough ecological information to prudently proceed with a proposed action. The U.S. Court of Appeals for the District of Columbia felt it important to state that an agency, though having such discretion, must thoroughly assess the costs and benefits of proceeding without further environmental data—as opposed to delaying action until more information is gathered. The appeals court did not have to make a definitive statement on the matter since the suggested time for study had already elapsed. Perhaps this was best, since such decisions are properly left to responsible agencies with expertise.

The court seemed to indicate that NEPA is more than simply a procedural statute. An agency may not simply go through the motions. According to this opinion, an agency must exhaustively and accurately examine alternatives to the proposed actions. Real justification must be shown for agency projects. Agencies must also consider viable suggestions as to the actual operation of those

56. Pub. L. No. 95-372, 92 Stat. 654-655, *adding new section* 43 U.S.C. §1347.
57. Pub. L. No. 95-372, 92 Stat. 657-658, *adding new section* 43 U.S.C. §1349.
58. *Sub nom* Western Oil & Gas Assn. v. Alaska, ____U.S. ____(1978).

projects. This is particularly so when, as in this case, the decision to proceed with a program has been predicated upon the protection offered by strict operating orders.

Additionally, the OCS Amendments provide for cancellation of leases even when termination clauses are not included in lease agreements. The federal government now has a valuable new tool with which to avoid environmental damage. Since the DOI need not have complete knowledge of environmental hazards before leasing OCS lands, and termination clauses and protective operating orders may not always suffice to prevent extensive ecological damage, much harm could result if destructive OCS development could not be halted. The new OCS cancellation measure is the missing link—a way to quickly stop polluting activities in the event other mechanisms are not adequate. And, the constitutional "taking without compensation" problems which had arisen in this context previous to the passage of the Amendments have been solved. Congress provided for compensation in such instances, recognizing that the prior lack of payment provisions created legal entanglements.

It is worthwhile to note the role of citizens' groups and state and local governments in enforcing consideration of ecological values. Here, a state and a local government joined with concerned fishermen in a lawsuit to vindicate the failure of traditional administrative procedures to properly take account of human and environmental values in decision-making. The OCS Amendments, in realization of the fact that those closest and most affected by federal actions must be given a voice in federal decision-making, mandate that more attention be paid to those voices. The Amendments also reflect Congressional recognition of *le droit du plus fort* that area residents can bring to bear to ensure proper OCS leasing and administration. It is important that such groups bring their complaints into a court of law so that their viewpoints and grievances can properly be considered.

The appeals court's decision not only strengthens the effect of NEPA's environmental review procedures, but also provides agencies with much needed guidelines for OCS lands management. One would certainly tend to agree with Rep. John Murphy (D-NY)[59] that the OCS Amendments are "... one of the key ... environmental measures of the 95th Congress."[60]

HOWARD THOMAS

59. Chairman of House Ad Hoc Select Committee on the Outer Continental Shelf.
60. 9 ENVIR. REP. (BNA) 972 (1978).