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Clean Air Provisions Extended to Outer Continental Shelf

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CLEAN AIR ACT PROVISIONS EXTENDED TO OUTER CONTINENTAL SHELF

ENVIRONMENTAL LAW–CLEAN AIR ACT: EPA rules that provisions of the Clean Air Act are applicable to oil storage and treatment facilities located on the Outer Continental Shelf, although the Act itself is not expressly applicable to such facilities. 43 Fed. Reg. 16, 393 (1978).

"Preservation of the sea is prior to the law of the sea, in urgency as well as logic."[1]

"The future of the world's oil industry lies underwater. . . . Seismic exploration goes much faster on water–it's flat, and there are no obstructions."[2]

Today about one-fifth of the world's oil and gas is coming from offshore sources and the proportion could be half by the turn of the century. Scientists predict that there is far more petroleum to be found under the sea than on land.[3] As the energy squeeze tightens, large oil and mining companies are turning increasingly to developing these potentially richer offshore deposits. But opposition and concern over their efforts are mounting. Environmental and civic groups raise the specter of massive oil spills and other forms of pollution; concern about the inevitable development of large, onshore industries to augment the drilling has also been expressed. Government regulation has often lagged, however–with the hesitancy to be expected in formulating new rules or adapting old ones. A good example is the recent ruling by the Environmental Protection Agency (EPA) which extends its jurisdiction to the Outer Continental Shelf (OCS).[4] EPA debated the action for two years, then issued a bold and unequivocal ruling–one that is surely destined to a stormy, uncertain future.

The ruling requires Exxon Corporation to both comply with the Clean Air Act provisions for its proposed Santa Barbara oil storage and treatment facility and to obtain EPA approval before construct-

1. Abrams, *The Environmental Problems of the Oceans: An International Stepchild of National Egotism,* 5 ENVT'L AFF. 3, 30 (1976).
2. Marden, *The Continental Shelf: Man's New Frontier,* 153 NAT'L GEOGRAPHIC 495, 507 (1978).
3. Hudson, *The International Struggle,* BULL. ATOMIC SCIENTISTS (1977).
4. 43 Fed. Reg. 16,393 (1978).

ing this facility in the Santa Barbara Channel.[5] The ruling is not limited to the Exxon facility, but "apply(s) to all activities on the Outer Continental Shelf that can have an adverse effect on air quality over the United States."[6] The determination is the first of its kind and, unless overturned by a court ruling or congressional amendment, could affect all fixed structures on the OCS. The ruling concedes only that the Clean Air Act was intended to protect air quality over the geographical United States and, therefore, should not apply to structures so far from shore that they could not affect national air standards.[7]

The conditions giving rise to the new ruling originated a decade ago. In 1968, Exxon was one of several companies to obtain oil leases in the Santa Barbara Channel. The leases were consolidated and Exxon was named the unit operator.[8] The first tract to be developed was the Hondo field, where a platform was installed in June 1976. Exxon then sought to construct one of two alternate storage and treatment facilities proposed in the original development plan.[9] The first and preferred alternative called for the processing unit to be located on the Santa Barbara coast and connected via pipeline to the Hondo platform. But, as the company had anticipated, it was unable to obtain the necessary approval from state and local authorities to implement this alternative.[10] Undaunted, Exxon resorted to its so-called "offshore alternative."[11] This facility, a converted tanker with processing equipment mounted on its deck, would be moored to the Hondo platform located 3.2 miles from shore, just outside of state jurisdiction. The rather unusual "floating" unit was quickly approved by the Department of Interior.[12]

At this point, EPA opened hearings into Exxon's proposal. The move came as a surprise since the Agency had never before asserted jurisdiction with respect to the hundreds of oil exploration and development facilities that dot the Continental Shelf. But EPA was now buoyed with increased authority: the 1977 Amendments to the Clean Air Act substantially strengthened the provisions on preven-

5. *Id.*
6. *Id.*
7. *Id.* at 16,397.
8. *Id.* at 16,393.
9. Exxon submitted the development plan in 1971. It was approved by the Department of Interior in 1974 after preparation and circulation of a lengthy environmental impact statement.
10. Exxon was unable to obtain approval from the California Coastal Commission on terms acceptable to the company.
11. 43 Fed. Reg. 16,394 (1978).
12. *Id.*

tion of significant deterioration and new source review.[13] EPA hoped to make it clear that it was willing to flex its muscles and enforce the new provisions. In making its ruling, EPA interpreted the law to its four corners, asserted its authority beyond the geographical U.S., and deftly countered each of Exxon's objections.

Exxon argued that EPA could not assume jurisdiction now when the agency had not interfered with the initial construction and installation of the Hondo platform. The ruling explains that EPA took no action previously because it believed that emissions from the platform would be insignificant. But figures revealed a different picture when, two years later, EPA took notice of the proposed storage and treatment facility. Estimates by EPA showed that at a minimum production rate of 30,000 bbl/day[14] the facility would emit enough hydrocarbons, sulfur dioxide and nitrogen dioxide to classify it, under the Clean Air Act, as a "major modification" for purposes of new source review,[15] and a "major emitting facility" for purposes of prevention of significant deterioration.[16]

The statistics were alarming for southern California. The entire South Central Coast Air Basin is already classified as a non-attainment area for photochemical oxidants.[17] The Basin includes Santa Barbara and Ventura Counties, the two areas most likely to be affected by the Exxon facility. It also encompasses Orange County and portions of Los Angeles, Riverside and San Bernardino Counties —all of which are listed as non-attainment areas for several pollutants, including photochemical oxidants.[18] Since these hydrocarbons can be transported long distances, the focus of regulatory action must be on the origins of the particulates, not where they are measured.[19] The ruling reasons that "unless regulated, emissions of air pollutants from sources located on the Outer Continental Shelf will adversely impact air quality in such areas by adding additional pollu-

13. *Id.*

14. The ruling also contains estimates for a production rate of 60,000 bbl/day.

15. The Interpretative Ruling for new source review defines a "major source" as any structure, building, facility, installation, or operation (or combination thereof) for which the allowable emission rate of particulate matter, sulfur oxides, nitrogen oxides or non-methane hydrocarbons is 100 tons per year or more. A "major modification" is any modification to an existing source which increases the allowable emissions to the above levels.

16. The prevention of significant deterioration provisions define a "major emitting facility" as a stationary source of air pollutants within specified categories of sources, including petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, which emit or have the potential to emit, one hundred tons per year of any air pollutant. 42 U.S.C. §7479(1) (1976).

17. 43 Fed. Reg. 16,394, 16,397 (1978).

18. *Id.*

19. *Id.*

tants to areas where air quality is worse than national ambient air quality standards."[20] Similarly, where air quality onshore is better than national standards, state and federal regulations should apply in order to prevent significant deterioration.

Having found a justification for its action, EPA then outlined its authority by law. The ruling concedes that the Clean Air Act is not expressly applicable to facilities located on the OCS. But it explains that the Act can be extended to the Shelf by virtue of the Outer Continental Shelf Lands Act (the OCS Lands Act) which extends the Constitution, laws and jurisdiction of the United States to "the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom."[21] No problem is raised, the ruling states, by the fact that the OCS Lands Act was enacted several years prior to the Clean Air Act. EPA explains that the intent of Congress in passing the OCS Lands Act was to extend all the laws, present and future,[22] of the United States to the seabed. Moreover, it is only by asserting this jurisdiction that EPA can fulfill the very goals of the Clean Air Act: the attainment and maintenance of national ambient air quality standards.[23]

The ruling also states that Exxon's acquisition of a leasehold interest does not exempt the company from "reasonable" regulation. Exxon had argued that EPA's jurisdiction over its facilities would be contrary to its development and production rights as a lessee of the Santa Barbara tract. But EPA, relying on two cases from the 9th Circuit Court of Appeals,[24] stated: "It is only where regulation amounts to a taking of the lessee's property rights without compensation that regulation becomes unconstitutional."[25]

Finally, the ruling refutes Exxon's contention that EPA is without authority to regulate OCS facilities. The company had argued that the OCS Lands Act confers exclusive authority upon the Secretary of

20. *Id.*

21. 43 U.S.C. § § 1331-1343 (1970).

22. 43 Fed. Reg. 16,394, 16,397 (1978).

23. To this end, it is necessary that State Implementation Plans (SIPs) also be applicable. As required by the Clean Air Act Amendments of 1970, all states must formulate their own plans to implement the provisions of the Clean Air Act. SIPs are the basic mechanisms for achieving nationwide air quality. Fortunately, the OCS Lands Act also adopts as "the law of the United States," for application to the OCS, the "civil and criminal laws of each adjacent State" to the extent that such laws "are applicable" and "not inconsistent with the Act or other Federal laws and regulations. . . ." 43 U.S.C. § 1333(a)(2) (Supp. V 1975).

24. Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1974); Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975).

25. 43 Fed. Reg. 16,394, 16,398 (1978).

Interior to administer OCS leases and to prescribe rules and regulations in that regard.[26] EPA, however, points out that the OCS Lands Act also includes the provision that applicable state laws "shall be administered and enforced by the appropriate officers and courts of the United States."[27] Since the Clean Air Act is administered by EPA, it is apparent that EPA is the proper agency to enforce its provisions. It is also "equally apparent" that the Secretary of Interior would not be the "appropriate" official, even with respect to facilities on the OCS, since the Secretary does not presently have any responsibility for administration of the Clean Air Act.[28]

EPA's interpretation of the OCS Lands Act may be considered superficial at best by some observers. The ruling ignores that section of the Act which clearly states that the Secretary of Interior shall "prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf. . . ."[29] The section also states that "in the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent state."[30] Congress apparently envisioned a working relationship between the Interior Department and the appropriate conservation agencies, a possibility which EPA does not address to the obvious consternation of officials at the Interior Department. "Unless they're willing to put the resources into this area, they have bitten off more than they can handle," remarked a dubious attorney in the Department's solicitor's office.[31] The Department is understandably reluctant to relinquish any of its authority over the OCS leases. It is lobbying for an amendment to the OCS Lands Act which would make the Interior Secretary responsible for applying national ambient air quality standards, under the Clean Air Act, to the OCS lease tracts.[32]

Exxon has not decided yet whether to appeal this ruling. It is possible that the company is waiting to see what action Congress will take on proposals to amend the OCS Lands Act. This case points up the need to either amend or interpret the 20-year-old law to fit the realities of ever-increasing, modern-day offshore exploration and

26. 43 U.S.C. §1334 (1970).
27. 43 Fed. Reg. 16,394, 16,398 (1978).
28. *Id.*
29. 43 U.S.C. §1334(a)(1) (1970).
30. *Id.*
31. Current Developments, ENVIR. REP. (BNA) 1989, 1990 (1978).
32. *Id.*

development activities. This is, perhaps, the most significant aspect of the EPA determination. Apart from the inevitable tug-of-war between EPA and the Interior Department, and whatever the eventual outcome, this ruling is important for what it may herald. Our eagerness to exploit the sea is in fact compelled by a growing population on the one hand and dwindling resources on the other. A whole new frontier is opening for development and, with it, a new era in the law of the sea and regulations pertaining to its use. The EPA ruling is a cautious step into this new frontier and, as such, it may represent a bold leap forward.

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