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RECENT CONGRESSIONAL ACTION ON OUTER CONTINENTAL SHELF OIL AND GAS DEVELOPMENT

Fred Craft, Jr.*

I. INTRODUCTION

I would like to look at the issues which are confronting the Congress today in dealing with the Outer Continental Shelf. I would like to take a concise look at the rules and regulations that pertain in the environmental constraints to the Outer Continental Shelf. I will also highlight the Outer Continental Shelf action/inaction and then look at a scenario of activity concerning the Outer Continental Shelf—where we are and some recent court cases in the area.

But frankly, my assigned task is to explore with you environmental restrictions and regulation on exploration and development of oil and gas. To focus this topic, I will discuss current Congressional action with regard to the Outer Continental Shelf (OCS) Lands Act,¹ which is awaiting conference between the House and the Senate.

The OCS issues addressed by the Congress certainly highlight the running battle between the environmentalists and the exploiters of our natural resources. As our energy demands escalate, so does this running battle. It is just another skirmish in that confrontation.

The energy crisis obviously has increased the demand for the production of oil and gas from the sea floor adjoining the coast of the United States. These demands are confronted with the need to avoid polluting the sea and a desire to preserve the coastal environment. Concern is particularly intense over offshore development along the

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1. S.9, H.R. 1614, 95th Cong., 1st Sess. (1977).

Atlantic coast, including deep water ports, as well as oil and gas activities.

The issue is further aggravated by jurisdictional assertion between the federal and state governments and among member nations who will meet in March, 1978, at the United Nations Conference of the Law of the Seas. Frankly, all states and local jurisdictions want a piece of the action of the Outer Continental Shelf.

II. POTENTIAL OCS OIL AND GAS RESOURCES

The lands extending from the coast into the surrounding sea form a continental margin that holds substantial amounts of oil and gas. The United States Geological Survey, in a report issued in 1975,² estimated the undiscovered mean potential for recoverable reserves in offshore areas to be 26 billion barrels of oil and 107 trillion cubic feet of gas. To put this reserve in perspective, the undiscovered oil potential of 26 billion barrels is eighty percent of proven United States oil reserves at year end 1975. The 107 trillion cubic feet of gas undiscovered is forty-seven percent of the potential natural gas available to the United States. Despite these great potentials, only three percent of the United States continental margin has been leased for development. From this three percent the United States, in 1976, obtained about fifteen percent of all of its oil and twenty-seven percent of domestic natural gas. You may recall a blowout in the Santa Barbara Channel in 1969 that focused attention on adverse environmental effects and, in fact, halted or slowed federal leasing of offshore tracts and ushered in a wave of concerned opposition to offshore drilling and production.

I want to dwell for a moment on the potential that I have just spoken about in terms of current United States energy demand. Demand for all petroleum products was at an all time high for the last ten months of 1977, at 18.3 million barrels a day, with imports comprising a record forty-eight percent of our total daily need. Imports are increasing at about twenty-two and one half percent per year, while our domestic oil and gas production peaked in the 1970's and has started to decline at about two and one half percent per year.

If these trends continue, by 1984 we will be consuming 28 million barrels a day instead of 18 million barrels a day. By that time our domestic production will be down to about 8 million barrels a day, leaving us with a deficit of 20 million barrels a day to make up from some

2. S. Rep. No. 94-284, 94th Cong., 1st Sess. 8 (1975).

source. The only production which can significantly fill that gap is from the Outer Continental Shelf, and I think that gives you the key to the significance of why we need to get on with the drilling on the Outer Continental Shelf.

Let me give you one more perspective. You and I as consumers in the United States are paying 45 billion dollars per year for foreign imports. If import demands continue to rise at expected OPEC prices, assuming OPEC prices remain constant, then over the next seven years that 45 billion dollars would grow to 600 billion dollars. If OPEC imposes a five percent price increase over that same period, our total bill would run 725 billion dollars. Pressure is obviously mounting then for the development of our own OCS resources. A prime target is the Atlantic Continental Shelf, where potential is believed to be the most promising, yet no drilling has been done by the United States. The locations where such promise is greatest include the Georges Bank on the Continental Shelf off Cape Code, the Baltimore Canyon Trough off Delaware, the Southwest Georgian Embayment, and Blake Plateau.

III. AMENDMENTS TO THE OUTER CONTINENTAL SHELF LANDS ACT

The Supreme Court in *United States v. Maine*³ ruled in 1975 that the issue of state jurisdiction and the three mile limit was settled. The principal argument in support of new OCS legislation is that the 1953 Act⁴ needs revamping to encourage increased oil and gas production under environmentally sound conditions. It is also argued that the 1953 law favors large oil companies in lease bidding and therefore discourages competition by smaller independent operators. Contrary to this belief, there are not any "mom and pop" operators on the Outer Continental Shelf. It is claimed that previous lease bidding methods deny the federal government a fair return on the values of the OCS resources that are mined. When I examine the results of almost twenty-five years of experience with the 1953 law, it is hard for me to accept these arguments, or to become convinced that there exist ills warranting new legislation, particularly in light of numerous revisions to the regulations.

Under the 1953 Act, this country has established an excellent record of gas and oil production, while at the same time maintaining a commendable record for environmental protection. Competition for

3. *United States v. Maine*, 420 U.S. 515 (1975).

4. Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1301-15 (1976).

leases under existing law has been intense, with small independent companies sharing favorably with the large major operators. As a matter of fact, since 1953, over 21,000 wells have been drilled on the Outer Continental Shelf with total production mounting to 7.5 billion barrels of oil and 42 trillion cubic feet of gas. Declines in the rate of oil production can be traced directly to the fact that the six most recently scheduled lease sales have been delayed by litigation challenging those sales on environmental grounds. Such challenges are indeed overstated, considering the fact that in spite of the staggering number of wells, 21,000, and the vast quantities of oil and gas that have been moved to the mainland, only one OCS production well accident has resulted in oil damage to the coast line in all that experience. Moreover, exploratory wells have never experienced a blowout which resulted in more than fifty barrels of oil being discharged into the sea.

As is often the case in the Congress, promoters of legislation set out lofty goals in the purposes section of the bill that bear little or no relationship to the specifics that follow. For example, in the OCS Lands Act bill that is just about to go to Conference,⁵ one of the purposes stated in the Senate version is to "establish policies and procedures for managing the oil and gas resources of the Outer Continental Shelf which are intended to result in expedited exploration of the development of the area in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." Likewise, in the strip mining bill⁶ passed in 1977, one of the provisions was to strike a balance between environmental concerns and the need for coal in our society. Just as that purpose has not been heeded in the regulations promulgated thereafter, I venture to describe in S.9 how this purpose certainly cannot be achieved if the other provisions are followed. A review of just a sampling of those specifics in S.9 emphasizes the inconsistency between this purpose and the inescapable effects which implementation of the provisions will undoubtedly cause.

Section 204 of S.9 mandates that new regulations have retroactive application to "all operations conducted under any lease issued or maintained under the Outer Continental Shelf Lands Act." Changing the rules in the middle of the game is what the federal government continually does. I do not know whether retroactivity is intended to

5. S.9, H.R. 1614, 95th Cong., 1st Sess. (1977).

6. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (to be codified in 30 U.S.C. § 1201).

frustrate the opportunities or to bring them in line with new requirements, but such an approach wreaks havoc on trying to accelerate energy production in order to meet the world problems that we are facing.

Other sections of S.9 grant new authority to the Secretary for cancellation and suspension of leases whenever it is determined that a lessee's activities would probably cause serious harm or damage to aquatic life or human environment.⁷ Here again, one should remember that the federal government used to grant emergency stream-lined procedures to go in and close something down for health, safety and welfare purposes. This gave the government the authority to bypass procedural due process and to deny one the opportunity for a hearing and confrontation. And yet today, Congress is drafting this authority to suspend operations into every piece of legislation, not just for the purposes of protecting health and welfare, but also for protecting the environment. Such authority is a significant change that perhaps merits holding a conference of its own to discuss. But this and similarly ill-defined provisions, when coupled with the new citizen suit provisions, provide virtually a limitless source of litigation and delay in addition to that provided by the National Environmental Policy Act (NEPA).⁸

The retroactive thrust of this language in the bill could well interfere with exploration and production efforts which are presently under way. Other sections add a multitude of new requirements and obligations to the process of acquiring an operator's license and for security approval of an exploration program. Secretarial authority to delay approval of such proposed exploration is granted in the bill on the same grounds as are applicable to cancellation of leases. By separating the exploration phase and the production phase and applying the cancellation provisions in the exploration phase, a "chilling effect" on exploration is created. Certainly there is every possible indication that the amendments proposed in the OCS Lands Act will in fact hinder rather than enhance the recover of vital OCS resources.

To put the swirl of issues enveloping the OCS bill in a nutshell, they are: (1) whether to lease before or after all environmental questions are answered; (2) whether to accelerate or to halt leasing until the need has been thoroughly demonstrated (there are many in Congress who say we ought to do that today); (3) how much influence states and local governments should have in that development; (4) what revisions

7. Section 208, S.9, 95th Cong., 1st Sess. (1977).

8. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1976).

of the bidding system are necessary; and (5) what type of antitrust review should be available.

IV. COMPLICATIONS STEMMING FROM ENVIRONMENTAL PROTECTION LEGISLATION

I want to see if I can put some of what I have been discussing into perspective. Remember that my vantage point has been Capitol Hill where we are trying to look at the big picture. Very often we forget that and we get so narrow in our viewpoint that we do something on the right hand that the left hand does not understand or does not realize. It is unfortunate but true that the Congress to date has ignored the need to increase domestic production. It seems to me in fact that the only bills which have been passed to facilitate the production of domestic oil and gas since 1970 are the Alaskan Pipeline Bill⁹ and the Alaskan Gas Pipeline Bill.¹⁰ The Alaskan Pipeline Bill was necessary because Congress had to step in and say as a matter of law that NEPA was satisfied in order to put an end to the lawsuits. Unfortunately, none of the President's bills¹¹ which are in the energy conference today, the so-called energy package, does anything to increase production. Parts of that package are energy conservation, coal conversion, utility rate reform and natural gas pricing. Congress is still preoccupied with enacting environmental legislation which grew out of the causes of the early 1970's. We talked about them here today and yesterday: the Strip Mining Bill,¹² the Mineral Leasing Act,¹³ the Coastal Zone Management Act,¹⁴ the Oil Spill Liability Act.¹⁵ These are all an outgrowth of that early NEPA period, and I applaud the purposes but wonder about some of the specifics.

The Alaskan Pipeline Bill¹⁶ that was passed had a provision which revolutionized the accounting practices of the oil and gas industry and levied brand new requirements explaining how to fill out forms so that the federal government could better regulate the industry, but which

9. Trans-Alaska Pipeline Authorization Act of 1973, *amending* 30 U.S.C. § 185 (1970).

10. Alaska Natural Gas Transportation Act of 1976, Pub. L. No. 94-586, 90 Stat. 2903 (to be codified at 15 U.S.C. § 719).

11. H.R. 8444, H.R. 5037, H.R. 5289, H.R. 4018, H.R. 5263, H.R. 5289, 95th Cong., 1st Sess. (1977).

12. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (to be codified in 30 U.S.C. § 1201).

13. Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 94th Cong., 2d Sess. (1976), *amending* the Mineral Lands Leasing Act, 30 U.S.C. § 181 *et seq.* (1976).

14. Coastal Zone Management Act, 16 U.S.C. §§ 1451-64 (1976).

15. 33 U.S.C. § 1321 (1976).

16. Trans-Alaska Pipeline Authorization Act of 1973, *amending* 30 U.S.C. § 185 (1970).

did not have a thing to do with the Alaskan Pipeline. The purpose of the bill was to solve the very narrow problem of determining the width limitations which grew out of a case¹⁷ which held that the Secretary of Interior was violating the twenty-eight foot easement allowed on either side of the pipeline which was authorized in the Mineral Leasing Act.¹⁸ But instead of passing the very narrow bill which said that the easement would be fifty feet, or whatever, Congress passed a bill that was ninety-nine pages long and had antitrust reviews which would take the Department of Justice a number of years to perform.¹⁹ We also provided new legislation for the Federal Trade Commission to get into the act.²⁰ We required all kinds of social reforms on this "horse" that we knew was going to go somewhere.

The executive branch has been preoccupied with fighting off the NEPA challenges to leasing of the Outer Continental Shelf Oil and gas, including OCS tracts near Alaska, and trying to do things such as getting the Sea Brooke Nuclear Power Station turned on again after the Court of Appeals found that EPA had violated the Administrative Procedure Act.²¹ That is another pet peeve of mine. There are certain Senators who passed the Administrative Procedure Act who want every bill that comes down the pike to have the Administrative Procedure Act be applicable to it. In its new revised form, because they found things did not work quite the way they wanted, they will tack such a provision on to this Outer Continental Shelf bill. It in fact will not just be an OCS Lands Act bill, but then it will be revisions to the Administrative Procedures Act. Politicians everywhere frankly are afraid to face the fact publicly that energy will cost more and that the consumer will pay the bill. Many in Congress are reverting to schemes devised to subsidize and hold down those rising costs. A prime example is the President's Natural Gas Pricing bill.²² All of this adds up to a great package of lawyers' relief acts, which will certainly keep us well fed, but pity the poor country. We have indulged ourselves enough, and we can ill afford the luxury of more time because, shortly down the road, we will have to pay.

17. *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973).

18. 30 U.S.C. § 185 (1970), *as amended by* Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. No. 93-153, 87 Stat. 576 (to be codified at 30 U.S.C. § 185).

19. Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. No. 93-153, 87 Stat. 576 (amending 30 U.S.C. 185 (1970)) (to be codified at 30 U.S.C. § 185y).

20. Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. No. 93-153, 87 Stat. 576 (to be codified at 30 U.S.C. § 185u) (*amending* 30 U.S.C. § 185 (1970) and 43 U.S.C. § 1654 (1970)).

21. Administrative Procedure Act, 5 U.S.C. §§ 551-76, 701-03, 3105, 3344, 5371, 7521 (1970).

22. H.R. 5289, 95th Cong., 1st Sess. (1975).

Now those who exclaim excitedly that coal was our ace in the hole may have second thoughts after the longest coal strike in history is over. There are even greater obstacles to using more coal, and we have heard some of them, but the Department of Interior continues to refuse to lease western coal lands because of environmental pressures and court suits. Something that happened in March, 1978, could give us an inkling of what is in store. The Secretary of Interior announced that the Department of Interior had an agreement with four environmental groups that would allow resumption of limited coal leasing "to alleviate short term hardships and economic dislocation," if the accord is approved by the federal courts.

The Department of Interior has had a moratorium on leasing in effect since 1970, and now four environmental groups are going to negotiate and have negotiated with the Department of Interior to set national policy. The clout of these groups, at least in this example, exceeds that of an elected official. It confounds me to believe that we are doing to ourselves what we would never allow any enemy to do to us. Somehow, our balance has gone haywire, creating severe shortages of many domestically available natural resources, and, for those which can be obtained, we pay an enhanced and almost skyrocketed price because of these constraints.

Now if you think I am overstating it, I want you to think back for a second. A three inch minnow called the snail darter can prevent an almost completed \$100 million TVA Dam from being completed. Charges of noise pollution and potential damage to the ozone layer have long kept the Concorde out of the United States. Western low sulfur coal cannot be burned without million dollar scrubbers even though it is cleaner unscrubbed than Eastern scrubbed coal. Newly discovered natural gas sold interstate is federally controlled at \$1.48 per mcf, but our government in Washington will allow the Canadians to sell us gas for \$2.20 per mcf and Algeria to sell us liquefied natural gas for \$4.50 per million btu's.

Since 1970, when NEPA became law, a total of 783 court cases have been brought naming federal agencies as defendants. Of this total, the bulk of the cases are still pending. As of June, 1976, 7,334 draft environmental statements have been filed. A lot of engineers and a lot of lawyers ask what difference all this makes. Let me tell you that twenty-five percent of this nation's reserves of oil and gas were found on the north slope of Alaska in 1968. For more than four years, our government planners studied a pipeline to transport this oil to market.

Over 1,500 man-years went into technical and environmental studies. The environmental impact statement for the Alaskan Pipeline cost the taxpayers nine million dollars and 175 man-years of effort. Now, had the pipeline been constructed on schedule, it could have delivered two million barrels a day into the United States in 1973 and 1974, at a time when an Arab embargo denied us two million barrels of oil a day.

V. CONCLUSION

There is an old story that I will conclude with which I think amply illustrates how some national leaders are glossing over, with a public relations front, the real problems that confront us. It seems that a man went to a tailor to try on a custom made suit that he had ordered. He found one arm was too short. The tailor told him to scrunch his arm back a little and it would look fine. Then one leg seemed to be longer than the other, but the tailor advised that if he bent forward and to the right it would look perfect. Finally, the collar could be seen to fit very badly but the ever resourceful tailor had an answer for that too. If the customer would only hunch his back, the collar would lie perfectly. Well, totally bedazzled, the customer paid for the suit, and left the shop, arms scrunched back, leaning forward and to the right and with a hunch back. On the way out he passed two acquaintances and after he passed, one man said to his friend, "Isn't it a pity to see old Sam in that condition? He used to be so healthy." His friend replied, "Yes, but didn't the tailor do a beautiful job to fit such a cripple?" Well, some members of Congress have determined that this suit of clothes is going to fit properly, even if it has to cripple out energy economy.