

REPORT OF THE COMMITTEE ON PUBLIC LANDS

I. INTRODUCTION

The Clinton Administration got off to a slow start. Appointments of key officials in all departments lagged significantly, and the Interior Department was no exception. Selection of former Arizona Governor Bruce Babbitt as Secretary brought cheers from the environmental community, from whose ranks many critical positions were filled. But the honeymoon was short-lived. His efforts to resolve the timber management impasse in the Pacific Northwest and the agricultural development pollution of the Everglades in Florida made developers and environmentalists alike unhappy, particularly the latter. Similarly, his proposal to undertake a major revision of federal grazing policy produced the very kind of "train-wreck" he sought to avoid in federal natural resources management policy, alienating western governors and senators on an evenhanded, bipartisan basis and complicating long overdue efforts at mining law reform, which was the next item on his ambitious agenda. Against this background it is not surprising that initiatives on public land energy development issues, both onshore and offshore, did not command much attention at the Department of Interior. However, 1994 offers promise of more activity in these areas.

II. ENVIRONMENTAL AND ENERGY DEVELOPMENTS: THE OUTER CONTINENTAL SHELF

1993 marked several regulatory developments in environmental issues concerning the exploration and development of the Outer Continental Shelf (OCS). Regulations were proposed or finalized pertaining to the Clean Water Act (CWA),¹ the Oil Pollution Act of 1990² and the Clean Air Act Amendments of 1990 (CAAA).³

A. OCS Air Regulations

In late 1992, the Environmental Protection Agency (EPA) issued a final rule establishing regulations to control air pollution from the OCS sources.⁴ The purpose of the regulations is to maintain federal and state onshore ambient air quality standards as required under section 328(a)(1) of the CAAA. The regulations apply to all OCS sources except those located in the Gulf of Mexico west of 87.5 degrees longitude, which excludes the OCS sources off the coast of Louisiana, Mississippi, and

1. 33 U.S.C. §§ 1251-1387 (1988 & Supp. III 1991). The Clean Water Act is also referred to as the Federal Water Pollution Control Act.

2. 33 U.S.C. §§ 2701-61 (Supp. III 1991).

3. 42 U.S.C. §§ 7401-7671 (Supp. II 1990).

4. See Outer Continental Shelf Air Regulations, 40 C.F.R. §§ 55.1-.15 (1993).

Texas.⁵ The OCS sources located within twenty-five miles of a state's seaward boundaries⁶ are now subject to the same air quality regulations as if the source was located in the corresponding onshore area (COA).⁷ Further, under the regulations, the definition of an OCS source has been modified from that in the Outer Continental Shelf Lands Act (OCSLA)⁸ to allow the EPA to include vessels permanently or temporarily attached, such as drill ships, as OCS sources.⁹

New OCS sources must comply with the regulations as of September 4, 1992, while existing OCS sources must be in compliance by September 1994.¹⁰ Enforcement of the regulations may be delegated by the EPA to state and local agencies except for those sources beyond the twenty-five mile boundary.¹¹ Those sources will be enforced solely by the EPA. Exemptions for non-compliance of the technology requirements may be obtained from the EPA Administrator.¹²

OCS air regulations were also implemented in September and December 1993, updating the EPA's OCS air regulations for consistency with the air pollution control requirements of several COAs.¹³ In this regard, the EPA modified the requirements for the California OCS sources for which the San Luis Obispo County Air Pollution Control District, the Santa Barbara County Air Pollution Control District, and the Ventura County Air Pollution Control District are the designated COAs.¹⁴ Further, the EPA modified the requirements for the OCS sources for which Florida is the designated COA.¹⁵

5. *Id.* § 55.3(a).

6. Seaward boundaries extend three miles from the coastline except off of the Florida Panhandle, where the range is approximately nine miles. 40 C.F.R. § 55.3(b) (1993).

7. The final rule included designation of the COA for existing and proposed OCS sources adjacent to California, including:

(1) The South Coast Air Quality Management District is designated as the COA for the Edith, Ellen, Elly, and Eureka OCS facilities;

(2) The Ventura County Air Pollution Control District is designated as the COA for the Grace, Gail, Gilda, and Gina OCS facilities; and

(3) The Santa Barbara County Air Pollution Control District is designated as the COA for the Habitat, Hacienda, Heritage, Harmony, Harvest, Heather, Henry, Hermosa, Hidalgo, Hillhouse, Hogan, Houchin, Hondo, Irene, Independence, the OS&T, and the Union A, B and C Outer Continental Shelf facilities. 40 C.F.R. § 55.15 (1993).

8. 43 U.S.C. §§ 1331-56 (1988 & Supp. 1991).

9. 40 C.F.R. § 55.2 (1993).

10. *Id.* § 55.3.

11. *Id.* § 55.11.

12. *Id.* § 55.7.

13. The CAAA requires that the EPA establish requirements to control air pollution from the OCS sources located within twenty-five miles of a state's seaward boundaries that remain consistent with onshore air pollution control requirements. 42 U.S.C. § 7627(a)(1) (Supp. II 1990).

14. Final Rulemaking, Outer Continental Shelf Air Regulations, 58 Fed. Reg. 44,616 (1993)(to be codified at 40 C.F.R. § 55.14(e)(3)(ii)(E-F), (H)).

15. 58 Fed. Reg. 44,616 (1993)(to be codified at 40 C.F.R. § 55.14 (e)(6)(i)(A)).

B. OCS Effluent Discharge Regulations

1. Offshore Effluent Limitations Guidelines and New Source Performance Standards

The EPA also issued a final rule, effective April 5, 1993, concerning the development of effluent limitations and new source performance standards limiting the discharge of pollutants to waters of the United States from offshore oil and gas extraction point sources.¹⁶ The effluent limitation guidelines are established based on the "best available technology economically achievable" (BAT) and the "best conventional pollutant control technology" (BCT).¹⁷ New source performance standards (NSPS) are based on the application of the "best demonstrated control technology."¹⁸

The regulations apply to discharges from offshore oil and gas extraction facilities and include field exploration, and development and production operations that are seaward of the inner boundary of the territorial seas (within three miles from shore).¹⁹ The EPA has established BCT, BAT and NSPS limitations prohibiting the discharge of drilling fluids and drill cuttings from wells located in the inner boundary of the territorial seas.²⁰ Wells located beyond that boundary are also subject to BCT, BAT and NSPS standards; however, in these circumstances BCT is limited to only prohibiting the discharge of free oil beyond three miles from shore.²¹ Wells drilled off the Alaskan coast are excluded from the zero discharge limitation and instead must comply with the limitations on toxicity, cadmium, mercury, free oil, and diesel oil, regardless of the distance from shore.²²

2. Proposed Modification of the National Pollution Discharge Elimination System General Permit for the Western Portion of the OCS of the Gulf of Mexico

On August 4, 1993, the EPA issued a notice of proposed modification to the National Pollution Discharge Elimination System (NPDES)²³ for general permits in the western portion of the OCS of the Gulf of Mexico. The modification will affect discharges from existing sources as well as new sources in the offshore subcategory of the Oil and Gas Extraction Point Source Category.²⁴ The current permit authorizes discharges from explo-

16. Final Rulemaking, Oil and Gas Extraction Point Source Category; Offshore Effluent Limitations Guidelines and New Source Performance Standards, 58 Fed. Reg. 12,454 (1993)(to be codified at 40 C.F.R. §§ 425.10-15).

17. *Id.* at 12,455.

18. *Id.* at 12,454. The regulations are promulgated under the authority of sections 301, 304(b), (c) and (e), 306, 307, 308, and 501 of the Clean Water Act. 33 U.S.C. §§ 1311, 1314(b), 1316-18, 1361 (1988).

19. 58 Fed. Reg. 12,504 (1993)(to be codified at 40 C.F.R. § 435.10).

20. *Id.* at 12,506.

21. *See* 40 C.F.R. § 435.14 (1993).

22. 58 Fed. Reg. 12,506 (1993).

23. *Id.* at 41,474.

24. *Id.* at 41,474. The NPDES permit is issued pursuant to the Clean Water Act. 33 U.S.C. § 1342 (1988).

ration, development, and production facilities currently in and discharging to federal waters of the Gulf of Mexico, which is seaward of the OCS boundary of the territorial seas off the shores of Louisiana and Texas.²⁵

The effluent guidelines modifications propose to: (1) decrease oil and grease limits on produced water; (2) prohibit the discharge of produced sand; (3) restrict discharges of oil and grease in well treatment, completion, and workover fluids to the same limits applicable to produced water; (4) allow a partial toxicity test to measure compliance with the drilling fluid toxicity limit; and (5) require the use of the static sheen test method for monitoring free oil in drilling fluids, drill cuttings, and well treatment, completion and workover fluids.²⁶ The EPA is also soliciting comments on a short phase-in period for the modified produced water toxicity limits to enable operators sufficient time for required facility improvements. Further, the EPA proposes minor changes in the current permit's monitoring requirements.

C. Effects of The Oil Pollution Act of 1990 on OCS Environmental Regulation

Signed into law as a result of the Exxon Valdez, the American Trader, and the Mega Borg oil spills, among others, the Oil Pollution Act of 1990 (OPA) increases administrative and civil penalties for oil or hazardous substance spills. In addition, the OPA requires owners and operators of vessels and offshore facilities to establish and maintain evidence of financial responsibility of \$150 million for each offshore facility owned or operated by a party.²⁷ Further, the OPA requires compilation of oil spill response plans and the periodic inspection of oil discharge removal equipment for facilities which could reasonably be expected to discharge oil into or on navigable waters, adjoining shorelines, or the exclusive economic zone (which extends 200 miles out from the United States coast).

The Department of Interior (DOI) and the Department of Transportation (DOT) are responsible for promulgating regulations regarding OCS-applicable provisions of the OPA. Accordingly, the United States Coast Guard (Coast Guard) and the Minerals Management Service (MMS) have issued interim rules implementing the OPA, effective February 1993.

1. Department of the Interior

The MMS issued interim final regulations effective February 18, 1993, through February 18, 1995, for response plans for non-transportation related offshore facilities and transportation related pipelines linking oil production platforms to onshore facilities.²⁸ Because the MMS already requires a comprehensive oil spill contingency plan (OSCP) from lessees

25. The existing NPDES permit is published at 57 Fed. Reg. 54,642 (1992).

26. 58 Fed. Reg. 41,474-75 (1993).

27. Financial responsibility may be established by evidence of: (1) insurance, (2) surety bond, (3) guarantee, (4) letter of credit, (5) qualification as a self-insurer, or (6) other evidence of financial responsibility. 33 U.S.C. § 2716(e) (Supp. III 1991).

28. 30 C.F.R. §§ 254.0-.7 (1993).

operating in the OCS, and because several coastal states currently have requirements for oil spill response plans, the response plans required by the OPA may in fact already be in effect for most of the OCS sources.

The MMS has allowed operators or owners of OCS facilities with approved OSCP's to expand those plans to include facilities in state waters of the same geographic area. Indeed, the MMS indicated that these regulations will have virtually no effect on platform facilities in federal waters, which make up seventy-five percent of the offshore platforms, requiring only minor, if any, modification to existing plans.²⁹ However, pipeline operators in federal and state waters will need to develop oil spill response plans for the first time, unless the right-of-way holder is affiliated with the producing company.

The DOI is also addressing the OPA through proposed revisions to the natural resource damage assessment (NRDA) regulations.³⁰ Comments on this proposal have been submitted and a final rule is expected for release in early 1994. The NRDA regulations establish procedures for assessing damages for injuries to natural resources resulting from a discharge of oil into navigable waters under the CWA, or a release of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended (CERCLA).³¹ The DOI is working in conjunction with the National Oceanic and Atmospheric Administration (NOAA), which is working on regulations for oil discharges into navigable waters, to establish a parallel process for assessing damages under the CWA and the CERCLA.

2. Department of Transportation

The Coast Guard issued an interim final rule effective in February 1993, concerning its statutory responsibilities under the CWA as amended by the OPA.³² Specifically, the Coast Guard regulations require the establishment of a response plan and the periodic inspection of discharge removal equipment for marine transportation related (MTR) facilities, including piping or any structure used to transfer oil to or from a vessel, and deepwater ports subject to the Deepwater Ports Act of 1974.³³

Under the OPA, owners and operators of MTR facilities or a deepwater port must identify and ensure by contract or other means, the availability of private personnel and equipment sufficient to remove, to the maximum extent practicable, a worst case discharge and to mitigate or prevent substantial threat of such a discharge. A "worst case" discharge is

29. 58 Fed. Reg. 7490 (1993).

30. 58 Fed. Reg. 39,328 (1993).

31. 33 U.S.C §§ 1251-1387 (1988 & Supp. 1991).

32. 33 C.F.R. §§ 150, 154 (1993).

33. 33 U.S.C. §§ 1501-1524 (1988). The Coast Guard is required under 33 U.S.C. § 1321(j) (1988), to establish and implement requirements for MTR facility response plans. The current interim rule only concerns facilities that store, transport or handle oil. Regulations for MTR facilities that store, transport, or handle hazardous substances will be the subject of a separate, subsequent rulemaking. 33 C.F.R. § 154.1010 (1993).

defined as "the largest foreseeable discharge in adverse weather conditions."³⁴

The Coast Guard regulations establish requirements categorized as "substantial harm" or "significant and substantial harm" facilities. Mobile facilities that are used or intended to be used for transferring oil in bulk, to or from a vessel with a capacity of 250 barrels or more, are classified as "substantial harm" facilities.³⁵ Although these facilities are required to submit response plans, they are not required to execute a formal contract for pollution response resources. They are, however, required to store limited amounts of clean-up materials which can be deployed within one hour of notification of a discharge of oil.³⁶

Deepwater ports and large, fixed MTR facilities are classified as "significant and substantial harm" facilities.³⁷ These facilities must submit a response plan for review and approval. Any MTR owner or operator believing that his or her facility would not cause significant and/or substantial harm may submit a request to have the Coast Guard reclassify the facility. Factors considered in reclassification include the type, spill history and age of the facility, as well as proximity to public and commercial water intakes, and other relevant factors.³⁸

The Coast Guard issued the interim final rule without a prior notice of proposed rulemaking or prior notice and comment procedures. Accordingly, the Coast Guard is requesting public comments on its interim rule, especially those based on experience gained in developing response plans.

III. ENVIRONMENTAL AND ENERGY DEVELOPMENTS: THE ONSHORE PUBLIC LANDS

In 1993, the incoming Clinton Administration sought to make fundamental changes in the way public lands are used for commercial purposes, including proposals to increase grazing fees, impose royalties for hard rock mining, and eliminate below-cost timber sales. Thus far, however, onshore energy development has not yet been targeted by these proposals.

A. *Domestic Natural Gas and Oil Initiative*

In December 1993, the Administration released its Domestic Natural Gas and Oil Initiative,³⁹ in which the Administration commits itself to enhancing domestic production of natural gas and oil. The Initiative calls for an evaluation of energy production on federal lands, with particular attention to environmental protection.

34. 33 C.F.R. § 154.1020 (1988).

35. *Id.* § 154.1015(b).

36. *Id.* § 154.1017(a).

37. *Id.* § 154.1015(c).

38. *Id.* § 154.1017(b).

39. The Domestic Natural Gas and Oil Initiative: Energy Leadership in the World Economy (Dec. 1993).

An informal interagency energy coordinating group has been established, consisting of the Department of Energy (DOE), the DOI, the Department of Agriculture, the Environmental Protection Agency, and the Department of Defense. This interagency group will assist the Interior and Agriculture Departments in developing leasing policies. It will also develop policies to encourage environmentally responsible natural gas production on public lands and will reconsider producer access to public lands.⁴⁰ The DOI will work with state and local officials and others to resolve concerns raised about development of existing leases, including identification of areas suitable for development and areas warranting permanent protection from energy development.⁴¹ The Initiative also commits the DOE to environmentally responsible development, consistent with environmental protection, of natural gas resources in the government owned Naval Oil Shale Reserves.⁴²

B. Review of Oil and Gas Stipulations

The DOI and the U.S. Forest Service are jointly reviewing onshore oil and gas leasing policy to ensure that the regulatory protections are sufficient to protect sensitive environmental areas. The review will consider whether lease stipulations on surface occupancy and protection of wildlife are sufficiently protecting the surface environment. Industry fears that elimination of lease stipulations could lead to decisions not to lease at all.⁴³

C. Other Regulatory and Legislative Initiatives

The Clinton Administration and Congress have made a number of environmental regulatory and legislative proposals which will affect energy development on both public and private lands.

1. Wetlands

The Clinton Administration's wetlands policy, announced in August 1993, withdraws the Bush Administration's proposal for a "one percent rule" for Alaska.⁴⁴ That rule would have created substantial opportunities for energy development in Alaska by exempting wetlands in Alaska from mitigation requirements under section 404 of the CWA until such time as one percent of Alaska's wetlands had been developed.⁴⁵ This would have permitted development of an additional 1.5 million acres of wetlands. The EPA and the Corps of Engineers have committed to meet with affected industry groups, including the oil and gas industry, to consider environmen-

40. *Id.* at 27-28. Federal sharing of leasing revenues with coastal communities impacted by offshore development is also proposed.

41. *Id.* at 28.

42. *Id.*

43. See PUBLIC LANDS NEWS, Oct. 14, 1993, at 4-5; INSIDE ENERGY WITH FEDERAL LANDS, Oct. 4, 1993, at 14.

44. White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* 23-4 (Aug. 24, 1993).

45. See PUBLIC LANDS NEWS, Sept. 16, 1993, at 7-8.

tally appropriate means of assuring regulatory flexibility in the administration of the section 404 permit program in Alaska. Reforms to the section 404 wetland program will also be considered in the context of CWA reauthorization.

2. National Biological Survey/Endangered Species Act

The DOI Secretary Babbitt is aggressively pursuing development of a National Biological Survey. Funds have already been appropriated for the survey. Authorizing legislation has passed the House⁴⁶ and, in the Senate, it has been referred to the Committee on the Environment and Public Works. The survey is expected to proceed even in the absence of authorizing legislation.

Patterned on the national geological survey, the survey is designed to identify and locate species and habitat systematically. Collecting this data will facilitate the "ecosystem approach" that the DOI hopes to adopt as a basis for administering the Endangered Species Act (ESA).⁴⁷ The issues surrounding the survey and ecosystem management are certain to be addressed by Congress in connection with the ESA, which is currently up for reauthorization.

3. Wilderness Designation/Wilderness Study Areas

Bills to designate 1.4 million acres of the Arctic National Wildlife Refuge, including oil and gas bearing sections of the coastal plain, as wilderness have been introduced in both the Senate and the House of Representatives of the 103rd Congress.⁴⁸ No action has been taken on the bills, and none is expected. Wilderness designation would preclude any oil and gas drilling.

In October 1993, the Interior Board of Land Appeals (IBLA) issued an important decision pertaining to the rights of Federal oil and gas leaseholders. In *Southern Utah Wilderness Alliance*,⁴⁹ environmental interests appealed a Bureau of Land Management (BLM) area manager's decision granting an oil and gas leaseholder's application to permit drilling (APD) on lands within the Cross Canyon Wilderness Study Area (WSA) of New Mexico. They also appealed the manager's decision to grant the leaseholder an APD related access right-of-way across WSA lands.

Because the proposed drilling site and access road were on WSA land, the environmental groups contended that the manager's decision violated section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), which requires that, pending a final decision on wilderness status, WSA lands be managed "in a manner so as not to impair the suitability of such [an] area for preservation as [a] wilderness. . . ."⁵⁰ No party dis-

46. H.R. 1845, 103d Cong., 1st Sess. (1993).

47. *Id.*

48. S.39, 103d Cong., 1st Sess. (1993); H.R. 39, 103d Cong., 1st Sess. (1993).

49. 127 I.B.L.A. 331 (1993).

50. 43 U.S.C. § 1782(c) (1988).

puted that the proposed drilling and road construction would violate this requirement, known as the “nonimpairment standard.”⁵¹ What was disputed was whether the lease, which was issued before FLPMA was promulgated in 1974, constituted a valid existing right not subject to the nonimpairment standard.

The IBLA remanded the decision granting the APD. Implicitly deciding that pre-FLPMA oil and gas leases are not completely exempt from the nonimpairment standard, the IBLA held that the BLM possessed discretion under regulations implementing the FLPMA to suspend wilderness-impairing operations under a federal oil and gas lease pending a final determination on the wilderness status of WSA land.⁵²

Dealing an even greater blow to the leaseholder, the IBLA reversed the manager’s decision authorizing construction of an access road. Specifically, the IBLA held that the issuance of the oil and gas lease in 1974 did not convey any right or guarantee of access,⁵³ and no right-of-way could be issued today because construction of an access road within a WSA would per se violate the nonimpairment standard.⁵⁴ In dicta, the IBLA qualified this holding by instructing that if the pre-FLPMA lease “had been committed to a producing unit before FLPMA’s enactment, the right of access across other leases committed to the unit would constitute a valid existing right [protected under] . . . section 701(h) of FLPMA.”⁵⁵

4. Old Faithful Protection

After languishing in the Senate of the 102nd Congress,⁵⁶ legislation to protect the geothermal and hydrothermal resources of Yellowstone National Park, including the Old Faithful geyser, has cleared the 103rd House of Representatives and is likely to be enacted in the second session. Now pending before the Senate Committee on Energy and Natural Resources, the Old Faithful Protection Act of 1993⁵⁷ would permanently ban geothermal development leasing of federal lands within Yellowstone protection areas comprising lands in three states—Montana, Wyoming, and Idaho. The bill would also restrict geothermal development on private and state lands.⁵⁸

51. *Southern Utah Wilderness*, 127 I.B.L.A. at 352.

52. *Id.* at 359 (citing Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014, 72,029 (Dec. 12, 1979)).

53. *Id.* at 369-70 (citing 2 LAW OF FEDERAL OIL AND GAS LEASES 22-4 (1992)).

54. *Id.* at 371, 374.

55. *Id.* at 374 n.22. The lease at issue in *Southern Utah* wilderness was committed to a producing unit after FLPMA’s enactment, and its committal should have been, but was not, made expressly subject to the non-impairment standard. The IBLA declined on equitable grounds to correct this error retroactively. *Id.* at 357.

56. See Robert B. Keiter, *The Old Faithful Protection Act: Congress, National Park Ecosystems and Private Property Rights*, 14 PUB. LAND L. REV. 5 (1993).

57. H.R. 1137, 103d Cong., 1st Sess. (1993).

58. The State of Montana has already entered into a compact with the National Park Service, H.B. 692, which prohibits geothermal development within a “groundwater control area” north of Yellowstone unless the state makes an explicit finding that the resource to be extracted is not connected to Yellowstone’s water supplies. H.R. 1137 would likewise bar geothermal extraction within the

D. Environmental Developments in the Courts

During the past year the courts resolved important and long-standing challenges to the DOI regulations and policies governing the leasing of coal on federal lands.

In *Natural Resources Defense Counsel, Inc. v. Jamison*,⁵⁹ U.S. District Court Judge William Bryant decided a series of challenges to Reagan-era revisions⁶⁰ to 1979 regulations⁶¹ implementing the federal coal management program. According to three environmental groups, the 1982 revisions and their implementation by the DOI were illegal on several grounds. The court agreed, in part, with the environmental groups and held that the DOI could not indefinitely permit leasing in the absence of comprehensive resource management plans (RMPs). According to the court, RMPs were mandated directly by the Federal Land Policy and Management Act of 1976 (FLPMA)⁶² and indirectly by the Federal Coal Leasing Amendments Act of 1976 (FCLAA).⁶³ The court therefore retained jurisdiction to ensure that, after 15 years, the DOI finally completed RMPs for at least four areas determined to possess "potential for surface mining."⁶⁴ The court also agreed with the environmental challengers that the FCLAA permitted no force majeure exception to the requirement that a leaseholder submit and have approved its operation and reclamation plan within three years of a lease's issuance.⁶⁵

On three other significant issues, however, the *Jamison* court upheld the 1982 revisions. First, the court rejected the environmentalist's contention that the Secretary had to determine whether land could be reclaimed during the initial land-use planning stage. Under the Surface Mining Control and Reclamation Act of 1977 (SMCRA),⁶⁶ the Secretary is required to classify "unreclaimable" lands as "unsuitable" for all or certain types of surface mining.⁶⁷ The court held that SMCRA permitted the Secretary to make the "highly technical and resource intensive" determination of "reclaimability" at a later point in time, following leasing but before issuance of a surface mining permit.⁶⁸ The court agreed that the "diligent development" requirement of FCLAA, which aimed to stop speculation in coal leases by requiring commercial production within ten years of a lease's

Yellowstone protection area in Idaho and Wyoming until those states approve water rights language acceptable to the Park Service and its parent agency, the Department of Interior.

59. 815 F. Supp. 454 (D.D.C. 1992).

60. 47 Fed. Reg. 33,114-95 (1982).

61. See 44 Fed. Reg. 14,902 (1979); 44 Fed. Reg. 15,463 (1979); 44 Fed. Reg. 42,584-652 (1979); and 44 Fed. Reg. 46,386-401 (1979).

62. 33 U.S.C. §§ 1251-1387 (1988).

63. 33 U.S.C. §§ 2701-2761 (1988).

64. 815 F. Supp. at 465 (Big Dry, Great Divide, Green River, and White River resource areas). No funds are allocated in the DOI's 1994 budget for work on RMPs for these areas.

65. *Id.* at 471.

66. 30 U.S.C. §§ 1201-1328 (1988 & Supp. 1993).

67. § 1272(b).

68. 815 F. Supp. at 467-68.

issuance, applied only prospectively to leases issued after August 4, 1976.⁶⁹ Finally, for purposes of SMCRA's provisions permitting a surface owner (of a split estate) to veto surface mining of underlying federal coal reserves, the court agreed that the 1982 regulations could permissibly place on an objecting surface owner the burden of producing evidence of ownership.⁷⁰

In July 1993, Judge Bryant again addressed federal coal management program regulations in *National Wildlife Federation v. DOI*.⁷¹ Following the 1984 Office of Technology Assessment report to Congress, *Environmental Protections in the Federal Coal Leasing Program*, the DOI, in 1987, issued new coal leasing regulations,⁷² which the Wildlife Federation challenged on several grounds. Judge Bryant largely affirmed the 1987 regulations, with one significant exception. He agreed with the plaintiffs and ultimately found that the DOI's "failure to promulgate [under SMCRA] a wetlands 'unsuitability criterion' to be applied during land use planning violate[d] [President Carter's] Executive Order 11,900."⁷³ Since 1984, that Order has directed agencies responsible for land resources planning to "take action to minimize the destruction, loss or degradation of wetlands."⁷⁴ By according the Executive Order the force and effect of law, Judge Bryant further found that the Secretary's "failure to 'articulate a satisfactory explanation' for failing to [comply with Executive Order 11,900] during the 1987 rulemaking is 'arbitrary and capricious' [under the Administrative Procedure Act]."⁷⁵ The issue of establishing a wetlands unsuitability criterion was remanded to DOI.

IV. MMS ROYALTY PROGRAM DEVELOPMENTS

A. Gas Contract Settlements Initiative

In early 1993, the DOI launched an initiative to collect royalties on gas contract settlements. In doing so, it signaled a significant shift from its prior policy on the issue and engendered considerable opposition from federal and Indian lessees, whose trade associations quickly instituted litigation challenging the DOI's initiative.⁷⁶

The new DOI approach was prompted, in part, by the efforts of the DOI Office of Inspector General (OIG). In 1992, the OIG issued an audit report alleging that the DOI had failed to collect \$754 million in potential additional royalties on proceeds received by federal and Indian lessees pur-

69. *Id.* at 469-70.

70. *Id.* at 471-72.

71. 37 Env't Rep. Cas. (BNA) 1670 (D.D.C. 1993).

72. Competitive Leasing and Environment: Amendments to the Federal Coal Management Program, 52 Fed. Reg. 46,469 (1987).

73. 37 Env't Rep. Cas. (BNA) at 1680.

74. Exec. Order No. 11,990, 3 C.F.R. 121 (1977), reprinted in 42 U.S.C.A. § 4321 (West Supp. 1993).

75. 37 Env't Rep. Cas. (BNA) at 1680.

76. *Independent Petroleum Assoc. of America v. Babbitt*, No. 93-0112-E (N.D.W.Va. filed Aug. 13, 1993).

suant to gas contract settlements for the period 1982-90.⁷⁷ According to the report, federal and Indian lessees collected \$3.5 billion during the audit period as consideration for agreeing to reduced contract price and volume requirements (buydowns) and \$1.1 billion for terminating contracts (buyouts),⁷⁸ but the Minerals Management Service (MMS) "was not vigorously pursuing the collection of royalties owed by federal and Indian lessees on proceeds received in contract settlements."⁷⁹

In its response to the OIG's draft audit report, the MMS had taken exception to the "characterization of potential losses and the size of the OIG estimate."⁸⁰ In addition, the MMS remarked that it had drawn some "tentative conclusions" respecting the treatment of payments received for gas contract settlements:

- (1) Payments to settle past pricing disputes are attributable to prior production and become subject to royalty when the settlement payments are made.
- (2) Payments to settle past take-or-pay obligations are not attributable to past production, and are not royalty bearing when made.
- (3) If make-up gas (related to a contract with a take-or-pay clause) is later taken and a portion of a settlement payment is applied by the producer to that production, that portion of the settlement payment becomes royalty bearing upon production of the make-up gas.
- (4) Buydown payments are presumed to be royalty bearing where there is reliable evidence for the MMS to attribute a portion of a payment to future production. The MMS may attribute a payment to future production when the payment is compensation for a price reduction.
- (5) Payments attributed only to contract termination will not be royalty bearing. The circumstances leading to a payment must be reviewed to determine whether the payment is tendered only in consideration of contract termination. The MMS may attribute a payment to future production when there is reliable evidence that the payment is compensation for a price reduction. The MMS will review the settlement agreement, the original contract and evidence of the surrounding negotiations to determine in each case whether it represents a payment attributable to production or termination.⁸¹

Throughout 1992, the MMS struggled to formulate audit guidelines to clarify under what circumstances royalties would be sought on contract buydown and buyout payments. At the end of 1992, the Assistant Secretary of the Interior for Policy, Management and Budget, John Shrote, rejected the MMS's proposals respecting gas contract settlements (which, presumably, were more far-reaching than the "tentative conclusions" listed above), because they greatly departed from the DOI's existing position on

77. Office of Inspector General, U.S. Dept. of the Interior, *Audit Report: Gas Contract Settlements, Minerals Management Service* (1992).

78. *Id.* at 4.

79. *Id.*

80. Memorandum from Director, Minerals Management Service to Assistant Inspector General for Audits (Mar. 13, 1992), attached as Appendix 2 to the OIG Audit Report, at 3 of 14.

81. Memorandum from Director, Minerals Management Service to Assistant Inspector General for Audits (Mar. 13, 1992), attached as Appendix 2 to the OIG Audit Report, at 7-8 of 14.

the subject.⁸² Such a shift in policy could not be implemented, according to Assistant Secretary Shrote, without prior public review and comment; moreover, the MMS's proposed policy changes would constitute a "major rule" requiring preparation of a regulatory impact analysis.⁸³

Following the change in administration, the DOI changed course. In a memorandum dated January 26, 1993 and addressed to Bruce Babbitt, the new DOI secretary, outgoing DOI Inspector General James R. Richards, disputed the conclusion of the Assistant Secretary Shrote's December 22 memorandum that the MMS' proposed contract settlement guidelines constituted a change of position on the subject.⁸⁴ In response, Secretary Babbitt reversed former Assistant Secretary Shrote's conclusion that the MMS' proposed policy respecting contract settlements would constitute a major rule, and he accordingly rescinded the requirement that the MMS prepare a regulatory impact analysis.⁸⁵ He also directed the "MMS, in consultation with the Office of the Solicitor, to convene an interdisciplinary working group to ensure that the Department's policy is fairly implemented to assure the proper collection of royalties."⁸⁶

Subsequently, in a "Dear Payor" letter dated May 3, 1993, the MMS announced its "interpretation" of how its "gross proceeds" regulations apply to payments received pursuant to gas contract settlements resolving take-or-pay, buyout, and buydown issues.⁸⁷ First, the MMS attempted to minimize the impact of the Fifth Circuit's *Diamond Shamrock* decision,⁸⁸ which had greatly limited the MMS's ability to collect royalties on non-recoupable take-or-pay payments. *Diamond Shamrock*, according to the letter's Enclosure 1, did not preclude the MMS from collecting royalties on take-or-pay payments in the event that, at the time the take-or-pay settlements were reached, the purchaser had a pre-existing contractual right to recoup gas which it had not received but for which it had made a payment. Thus, if gas was produced after the settlement date from the particular lease to which a take-or-pay settlement was attributable, and if the gas sales contract, prior to the execution of the take-or-pay settlement, authorized the purchaser to recoup the gas paid for but not taken, then, according to the May 3 letter, the lessee is obligated to pay royalties on the take-or-pay settlement monies as gas is produced in the future, to the extent future

82. Memorandum from Assistant Secretary-Policy, Management and Budget to Director, Minerals Management Service, Major Rule Status of Change in Royalty Policy Regarding Gas and Coal Contract Settlement Payments (Dec. 22, 1992).

83. *Id.*

84. Memorandum from Inspector General of the Dept. of the Interior to the Secretary, Status of Audit Report for Your Information - Gas Contract Settlements Minerals Management Service (Jan. 26, 1993).

85. Memorandum from Bruce Babbitt, Secretary of the Interior, to Acting Director, Minerals Management Service, Applicability of Executive Order 12,291 To Royalty Policy Regarding Gas and Coal Contract Settlement Payments (Feb. 10, 1993).

86. *Id.* at 2.

87. Letter from James W. Shaw, Associate Director for Royalty Management, Minerals Management Service, U.S. Dept. of the Interior, to Payors of federal and Indian oil and gas royalties (May 3, 1993).

88. *Diamond Shamrock Exploration Co. v. Hodel*, 853 F.2d 1159 (5th Cir. 1988).

production volumes exceed the minimum take provisions of the contract giving rise to the take-or-pay settlement. Thus, the royalty obligation attaches even if the contract terminated and even if the gas is subsequently sold to a purchaser unaffiliated with the original purchaser.

With respect to contract buydowns, Enclosures 1 and 2 to the MMS' May 3 "Dear Payor" letter asserted a right to treat, for royalty purposes, buydown payments like prepayments for gas. A complicated procedure for allocating buydown amounts over future production was prescribed. In addition, contract buyout amounts were to be treated similarly to take-or-pay amounts, thus requiring lessees in most cases to pay royalties on contract buyout amounts as gas from the leases formerly dedicated to the terminated contracts is produced.

Subsequently, by letter order dated June 18, 1993, Bob Armstrong, the DOI Assistant Secretary of Land and Minerals Management, ordered most federal and Indian oil and gas lessees to prepare reports on all contract settlement amounts received on or after January 1, 1980.⁸⁹ The order made no exceptions, including none for settlements on which lessees may have made royalty payments.

In response to the May 3 "Dear Payor" letter and the June 18 Armstrong letter order, more than twenty oil and gas trade associations filed suit against the DOI.⁹⁰ In their complaint, the plaintiffs challenged on substantive and procedural grounds the May 3 "Dear Payor" letter and the June 18 Armstrong letter order. On December 2, 1993, the case was ordered to be transferred to the United States District Court for the District of Columbia.⁹¹

B. Other Significant Royalty Developments

At the end of 1992, the MMS issued a rule⁹² which, to some extent, ameliorated some of the harshest aspects of the Outer Continental Shelf Lands Act two-year statute of limitations⁹³ on refunds of overpaid royalties. In its cross-lease netting rule, the MMS allowed lessees who had overpaid royalties on one lease and underpaid on another lease to net the overpayment against the underpayment and thereby eliminate both, provided that the underpayment and the overpayment occurred as a result of the same error (e.g., the misallocation of production from one lease to another). The rule imposed several restrictions on cross-lease netting to minimize the MMS' administrative concerns but generally was viewed as a common-sense approach to reducing some of the obstacles encountered under the two-year refund limit.

89. Letter from Bob Armstrong, Assistant Secretary—Land and Minerals Management, U.S. Dept. of the Interior, to various federal and Indian royalty payors (June 18, 1993).

90. *Independent Petroleum Assoc. of America v. Babbitt*, No. 93-0112-E (N.D.W.Va. filed Aug. 13, 1993).

91. *Independent Petroleum Assoc. of America v. Babbitt*, No. 93-0112-E (N.D.W.Va. Dec. 2, 1993) (Memorandum of Opinion and Order).

92. *Cross-Lease Netting*, 30 C.F.R. §§ 218.42, 230.51 (1993).

93. 43 U.S.C. § 1339(a) (1988).

Toward the end of 1993, the MMS proposed new regulations to address the procedures for claiming credits for overpayments on OCS leases.⁹⁴ According to the proposal's preamble, the purpose of the proposed rule is to "codify the Department's interpretation and application of section 10 [of the Outer Continental Shelf Lands Act of 1953], incorporating the policies and decisions from the various legal opinions, administrative decisions and administrative practice" of the DOI.⁹⁵ While the proposed rule is primarily procedural, both its procedural and its substantive provisions would, in certain respects, limit the ability of lessees to obtain access to royalties overpaid on offshore federal leases.

In a pair of proposed rules published for comment on August 17, 1993, the MMS proposed new restrictions to prevent federal and Indian lessees from obtaining refunds of overpaid royalties in several circumstances. In one proposal, the MMS proposed to exercise administrative offset rights by withholding money due and payable to a party when the MMS believes it has a royalty claim against the party for the same or another lease.⁹⁶ Citing the decade-old Debt Collection Act of 1982⁹⁷ as supportive of what the MMS remarked to be its already inherent authority for engaging in administrative offsets, the MMS sought regulatory provisions to allow the federal government to retain overpaid royalties, taxes, and fees in the event that a lessee has raised the statute of limitations or a similar defense in response to an MMS claim that the lessee has elsewhere underpaid its royalty obligations.

In the last several years, the MMS has frequently encountered arguments that the general statute of limitations⁹⁸ bars the MMS' efforts to collect royalties underpaid more than six years prior to the MMS' assertion of its claims.⁹⁹ The offset rule would permit the MMS effectively to moot the statute of limitations defense in almost all cases by sanctioning administrative offsets against ten-year old DOI and judicial decisions holding that additional royalties are due.¹⁰⁰ However, the MMS would agree to forego administrative offset procedures if lessees entered agreements promising to pay the disputed royalties¹⁰¹ or if lessees waived statute of limitation defenses.¹⁰²

Also on August 17, 1993, the MMS issued a proposed companion rule which would severely limit the ability of lessees to claim credit adjustments for overpaid royalties.¹⁰³ In this proposed rule, the MMS proposes to curtail the royalty overpayment recoupment rights of lessees who interpose

94. 58 Fed. Reg. 53,470 (1993)(to be codified at 30 C.F.R. § 230).

95. *Id.* at 53,471.

96. 58 Fed. Reg. 43,583 (1993)(to be codified at 30 C.F.R. § 218).

97. Pub. L. No. 97-365, 96 Stat. 1449 (applicable sections codified at 5 U.S.C. § 5514 and at 31 U.S.C. §§ 3701, 3711, 3716, 3718).

98. 28 U.S.C.A. § 2415(a) (West 1978 & Supp. 1993).

99. *See Phillips Petroleum Co. v. MMS*, 4 F.3d 858 (10th Cir. 1993).

100. *See* 58 Fed. Reg. 43,583 at 43,587 (to be codified at 30 C.F.R. § 218.608).

101. 58 Fed. Reg. 43,583 at 43,587-88 (to be codified at 30 C.F.R. § 218.609).

102. 58 Fed. Reg. 43,583 at 43,588 (to be codified at 30 C.F.R. § 218.610).

103. 58 Fed. Reg. 43,588 (1993) (to be codified at 30 C.F.R. § 218).

the statute of limitations as a bar to the MMS' claims for additional royalties on past production.¹⁰⁴ Thus, a lessee who mistakenly overpays royalties on one lease and underpays on another by misattributing production would not be able to recoup the overpayment or adjust payments in the event that he has asserted a statute of limitations defense on an unrelated matter, but would have to pay additional royalties on the underpaid lease plus interest. Likewise, the MMS would retain the excess royalty payment to satisfy the unrelated time-barred claim. In addition, the proposal would, for the first time, impose deadlines for seeking credits or refunds of royalties overpaid on onshore federal leases.¹⁰⁵

At the end of 1993, the MMS was analyzing public comments on the two August 17 proposed rules, but it suggested that the effective dates for the final rules issued in both dockets may be the date the proposed rules were published.¹⁰⁶

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104. See, e.g., 30 C.F.R. § 218.505(a) (1993) which provides, in part:

Following any allegation by any payor in any administrative or judicial proceeding that [the] MMS is time-barred from collecting any amount from that payor which was due within ten years before the date of an MMS order to pay the amounts due, [the] MMS may issue an order prohibiting the payor from reporting any credit adjustment which results in a credit with respect to any payment made in connection with any lease for which that payor paid royalties or other payments within ten years before the date of such order, and may disallow any refund request with respect to any such lease.

105. See 58 Fed. Reg. 43,588, 43,592 (to be codified at 30 C.F.R. § 218.503).

106. 58 Fed. Reg. 43,583, 43,585. 58 Fed. Reg. 43,588, 43,591.