SUBMITTED COMMITTEE REPORTS

As a general policy, the Federal Energy Bar Association does not take positions in published Committee Reports on substantive issues that are the subject of pending litigation.

Report of the Committee on Energy Development—Federal Lands

The most significant 1990 developments regarding energy exploration and production on federal lands were in the environmental area. While Exxon crews labored for a second summer to remove oil spilled in Prince William Sound by the *Valdez*, the Congress passed the Oil Pollution Act of 1990 and the President and the Congress took actions to bar new oil and gas leasing on much of the outer continental shelf (OCS). Highlights of environmental and other activities affecting federal lands are discussed below.

I. ENVIRONMENTAL DEVELOPMENTS

A. *The Oil Pollution Act of 1990*

The Oil Pollution Act of 1990 (OPA)[1] was enacted partly as a result of the *Valdez* oil spill[2] and attempts to consolidate various state and federal laws dealing with oil spills.[3] The Act affects vessels, onshore facilities, offshore facilities, deepwater ports and pipelines.[4] With respect to offshore facilities, a "responsible party" is defined as "the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act. . . ."[5]

The OPA provides for increased liability for oil spills in the form of administrative penalties, civil penalties, and criminal transactions. Damages and recoverable costs include removal costs, natural resources damages, damage to real or personal property, lost subsistence use, lost revenues, lost profits and earning property, lost profits and earning capacity, and the costs of increased public services. Damage assessment is vested in the National Oceanic and Atmospheric Administration within the Department of Commerce.

Like prior laws, the OPA contains liability limits.[6] The OPA limits, however, do not apply if the incident was proximately caused by gross negligence or willful misconduct, by the violation of applicable federal safety, construction, or operating regulations[7] or if the responsible party fails or refuses to report an incident and cooperate with removal activities.

The defenses under OPA are narrow, limited to (1) an act of God, (2) an act of war, (3) an act or omission of a third party, other than an employee or agent or third person in a contractual relationship with the responsible party,

1. Oil Pollution Act of 1990, Pub. L. No. 101-380, §§ 1001-9002, 104 Stat. 484 (1990) [hereinafter OPA].
2. S. REP. NO. 94, 101st Cong., 2nd Sess. 5, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 722.
3. *Id.*
4. OPA, *supra* note 1, at § 1001(32).
5. *Id.*
6. *Id.* at § 1004.
7. *Id.* at 1004(c)(1).

and (4) any combination thereof.[8] Even these defenses will be overcome if the responsible party has knowledge of a discharge and fails to report it or to cooperate with removal activities or comply with an order issued under section 311 of the Clean Water Act (CWA).[9]

Subtitle C of the OPA amends the CWA with respect to penalties and enforcement. Administrative penalties are increased to $10,000 per day/ $25,000 total for Class I[10] and $10,000 per day/$125,000 total for Class II.[11]

Civil penalties are increased from a $5,000 maximum penalty for an oil spill to $25,000 per day or up to $1,000 per barrel of spilled oil.[12] This limit is raised if the violation results from gross negligence or willful misconduct. Criminal penalties may also be imposed if a person fails to report an oil discharge.

With respect to the OCS, the OPA increases the maximum available penalties for violation of the Outer Continental Shelf Lands Act (OCSLA).[13] The maximum penalty will be adjusted at least every three years to reflect any increases in the Consumer Price Index. These penalties may be assessed without regard to the requirement of the expiration of a period allowed for corrective action if the violation constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment.

B. OCS Leasing Moratoria

In 1990, there were three significant developments expanding on recent trends to impose moratoria on oil and gas leasing on the OCS. Those developments were (1) the June 26 announcement by President Bush of his decision to postpone or cancel altogether certain lease sales off the West Coast and the Florida Coast, (2) the enactment into law of a moratorium on oil and gas exploration activities off the North Carolina coast, and (3) the inclusion of oil and gas leasing moratoria in the 1991 Department of the Interior (DOI) appropriations act.

1. The President's Decision

Shortly after taking office in 1989, President Bush appointed a cabinet-level task force and charged it with reviewing and resolving environmental concerns raised for two California OCS lease sales and one OCS sale planned for the southwestern Florida coast. Each of the three sales was postponed until after the task force could complete its work. In early 1990, the task force presented its report to the President.

In his June 26 decision, the President postponed all of Sale 91 (Northern

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8. *Id.* at § 1003(a).

9. 33 U.S.C. § 1321 (1988).

10. OPA, *supra* note 1, at § 4301(b)(6)(B)(i). A responsible party subject to a Class I administrative penalty is entitled only to a reasonable opportunity to be heard.

11. *Id.* at § 4301(b)(6)(B)(ii). A responsible party subject to a Class II administrative penalty is entitled to a full notice and opportunity for hearing as with civil penalties.

12. OPA, *supra* note 1, at § 4301.

13. 43 U.S.C. § 1350(b) (1988).

California) and most of Sale 95 (Southern California) until after the year 2000. However, some 87 tracts within the Sale 95 area with high resource potential are located in or near current producing areas and may be available for sale as early as January 1, 1996 following the completion of additional oceanographic and socioeconomic studies recommended by the National Academy of Sciences (NAS). With regard to the Florida sale, the President postponed until after the year 2000 Sale 116, Part II and, in addition, suggested that this sale could take place only after additional oceanographic, ecological and socioeconomic studies had been completed pursuant to NAS recommendations. Further, the President indicated that he would cancel certain existing leases off Florida and initiate discussion with the State of Florida on its participation in a joint federal-state buy-back of the leases.

In his June 26 decision, the President also deferred, until after the year 2000, Lease Sale 132 off the coast of Washington and Oregon in order to conduct additional environmental studies. Lease Sale 96, scheduled for the Georges Banks area, was also subjected to a moratorium until after the year 2000 in order to allow additional resource and environmental studies. In addition, the President directed the cancellation of Sale 119 (Central California) and directed the establishment of a 2200-square mile Monterey Bay sanctuary which would be permanently closed to oil and gas exploration and development. Other parts of the Sale 119 area would be available for leasing after the year 2000 if it were determined that exploration and development could proceed without significant damage or risk to the environment.

In announcing his decision, the President indicated that he was guided by five principles: (1) the necessity to obtain adequate information and analysis of potential lease sale areas, (2) environmental considerations, (3) the resource potential of the sale areas, (4) the energy requirements of the nation's economy and the overall cost and benefits of various sources of energy and (5) national security requirements. He directed DOI Secretary Lujan to take three actions to improve the OCS leasing program: (1) to improve the information needed to make decisions on OCS development, (2) target proposed sale areas in future OCS five-year plans to give highest priority to areas with the highest resource material and low environmental risk and (3) prepare a legislative initiative that would provide coastal communities directly affected by OCS development with a greater share of the financial benefits of new development and a larger voice in decisionmaking.

2. Outer Banks Protection Act

With the Oil Pollution Act of 1990, Congress barred, at least until October 1, 1991, all oil and gas exploration or production activity off the North Carolina coast.[14] It also prohibited DOI approval of any development or exploration plan for the area until October 1, 1991 or 45 days after the Secretary of Interior has submitted a report to Congress, proposing that such activities go forward. Section 6003 requires that the Secretary of the Interior

14. OPA, *supra* note 1, at § 6003. Pursuant to § 6003(a), the short title of § 6003 is the Outer Banks Protection Act.

undertake certain additional ecological and socioeconomic studies, including oceanographic studies, to ascertain the potential impact of oil and gas development on North Carolina. The legislation thus further defers attempts by a group of producers, led by Mobil, to drill an exploratory well off the North Carolina coast.

3. Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1991

Apparently unwilling to rely on the President's June 26 decision, the Congress, in approving appropriations for DOI, prohibited the expenditure of funds on any of the areas closed to oil and gas activity by the June 26 decision.[15] In addition, however, the appropriations legislation barred any expenditure of funds by DOI on leasing or other oil and gas activities within the North Aleutian Basin planning area.[16] Congress also prohibited the expenditure of funds for pre-leasing and leasing activities for Lease Sale 137 (offshore Florida) in the Eastern Gulf of Mexico[17] and prohibited the expenditure of funds for pre-leasing and leasing activities in the Atlantic between Rhode Island and Maryland.[18]

4. Federal Leasing Outlook in the 1990s

As a result of the decisions of the President and the Congress, the only significant areas where OCS oil and gas leasing activity may be conducted in the next several years are certain areas off Alaska and the central and western portions of the Gulf of Mexico. Coupled with the refusal of the Congress to allow leasing in the Alaskan National Wildlife Refuge and calls for bans on additional leasing in areas outside federal national parks, it appears likely that no vast areas of federal lands are likely to be open to oil and gas leasing before the turn of the century. Thus, new federal leasing activities are likely to be confined to discrete areas in the lower 48 states and to some portions of Alaska. The result may be to encourage the export of oil and gas exploration and production investment. In any event, 1990 may emerge as a watershed year in the federal oil and gas leasing program.

C. *Coastal Zone Management Act Reauthorization*

Legislation aimed at reauthorizing the Coastal Zone Management Act (CZMA), and approved as part of the Omnibus Budget Reconciliation Act of 1990,[19] will overturn the U.S. Supreme Court decision in *Secretary of Interior Department v. California*.[20] In this case the Court held that the consistency provisions of Section 307(c)(1) of the CZMA[21] do not apply to DOI's sale of

15. Department of the Interior and Related Agencies Appropriations Act 1991, Pub. L. No. 101-512, § 110, 104 Stat. 1915, 1936 (1990).
16. *Id.* at § 111.
17. *Id.* at § 112.
18. *Id.* at § 113.
19. Pub. L. No. 101-508, 104 Stat. 1388 (1990).
20. 464 U.S. 312 (1984).
21. 16 U.S.C. § 1451 (1988).

OCS oil and gas leased because the sales do not directly affect the coastal zone. The new legislation will make all activities that have an effect on the coastal zone, including OCS lease sales, subject to consistency with state coastal zone management regulations which have been approved by the Department of Commerce. In addition, the legislation increases the authorization for federally approved coastal management programs in about thirty states from $69,000,000 in fiscal year 1991 to $113,000,000 in fiscal year 1995.

D. *EPA Proposed Rule Regarding Effluent Limitations Guidelines and New Source Performance Standards*

The Environmental Protection Agency is developing regulations under the Clean Water Act (CWA) to establish Effluent Limitations Guidelines to be applicable, *inter alia*, to offshore oil and gas activities.[22] The proposed rule would regulate New Source Performance Standards (NSPS) for produced water, drilling fluids and drill cuttings, well treatment fluids, and produced sand based on the best available technology economically achievable (BAT) and the best conventional pollutant controlled technology (BCT).

With respect to drilling fluids and drill cuttings, the agency's preferred option for control is zero discharge within four miles with a toxicity limit for suspended particles of cuttings at 30,000 ppm for discharges beyond the four mile mark. The zero discharge requirement could be met either through recycle/reuse of the mud system and/or through transport to shore of the spent mud system and associated cuttings for land disposal.

The agency's preferred option for produced water again differentiates between those structures that are located four miles from shore. For those structures within four miles of shore, the limitations would be based on the use of filtration technology. Beyond four miles, discharge would be subject to the best practicable control technology currently available (BPT). For other waste streams, the agency's preferred options are: (1) that deck drainage be subject to the same limitations as produced water during production operations and to requirements equal to the current BPT limits where filtration technology for produced water has not been installed; (2) that zero discharge be required for produced sands from any location; (3) that zero discharge be required for well treatment/workover fluids, and for those fluids that cannot be segregated from the produced water, the produced water limitations would apply; and (4) that BPT, plus conditions that would control foam, be required for domestic and sanitary waste.

E. *The Clean Air Act*

On November 15, 1990, President Bush signed legislation amending the Clear Air Act.[23] Passed by Congress after much debate, the new statute is designed to curtail automobile emissions, toxic pollutant emissions from industry, and utility sulfur dioxide emissions that cause acid rain, and affects in certain regards, the OCS.

22. 55 Fed. Reg. 49094 (1990) (to be codified at 40 C.F.R. § 435).

23. Clean Air Act, Amendments, Pub. L. No. 101-549, § 101, 104 Stat. 2399 (1990).

The new law applies to OCS pollution sources within twenty-five miles of the seaward boundary of coastal states adjacent to the Pacific, Arctic and Atlantic Oceans as well as parts of Florida adjacent to the Gulf Coast. For these areas, the requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing and reporting must comport with the applicable state's air quality standards. Each state adjacent to an OCS source is authorized to promulgate regulations implementing the new legislation. If the regulations meet with EPA approval, enforcement authority is then delegated to that state.

For the OCS areas adjacent to Texas, Louisiana, Mississippi, and Alabama, the law requires completion of a study within three years. The study will determine whether additional controls are necessary in order for emissions from OCS activities in such areas to meet the national ambient air quality standards for either ozone or nitrogen dioxide. Under the new law, air quality regulatory authority is transferred from DOI's Minerals Management Service to EPA.

F. Environmental Impact Statement Requirement: The Michael Gold *Case*

The Interior Board of Land Appeals (the Board), on July 12, 1990, affirmed with certain modifications its prior ruling in the *Michael Gold* case.[24] In its earlier decision, the Board held that the exemption of an application for a permit to drill (APD), which made the preparation of an environmental assessment (EA) unnecessary, applied only to exploratory wells and not, as in the instant case, to development wells. Second, in the prior decision, the Board held that the specific EA prepared for the APD was inadequate due to its failure to discuss relevant mitigation measures and to document the reasoning behind the rejection of various alternatives to the proposed action. Third, the Board held that once the lease proceeded from the exploratory stage to the developmental stage an environmental impact statement (EIS) became necessary unless such a document had already been prepared analyzing the environmental impacts of development.[25]

The Board granted the Petition for Reconsideration "for the limited purpose of reconsidering that part of the decision which determined that an EIS was needed for a development well unless an EIS had already been prepared which covered the area."[26] The Board articulated the question on reconsideration as whether, consistent with the *Park County Resource Council*[27] case, the EA prepared for the APD represents a proper discharge of the department's responsibilities under the National Environmental Policy Act of 1970 (NEPA).[28] The Board held it did not. Moreover, the Board held that in light

24. Michael Gold, 108 IBLA 231, *reaff'd as modified*, 115 IBLA 218 (1990) (WESTLAW, GFS data base).

25. *Id.* 108 IBLA at 239, (citing Park County Resource Council, Inc. v. United States Dept. of Agric., 817 F.2d 609 (10th Cir. 1987)).

26. Michael Gold, 115 IBLA 210, WL GFS database, at 4.

27. Park County Resource Council, Inc. v. United States Dept. of Agric., 817 F.2d 609 (10th Cir. 1987).

28. 42 U.S.C. §§ 4321-70 (1988).

of the fact that field development had been occurring for nearly twenty years, constituting "a major federal action significantly affecting the quality of the human environment,"[29] preparation of an EIS was necessary. The Board, however, held that its prior decision was overbroad in its suggestion that there were not situations in which approval of an APD for a development well could proceed absent an EIS for either the specific well or for the entire field. The Board stated:

> Rather than enunciating a universal rule of unvarying applicability, we believe on reconsideration that the decision of the Circuit Court in Park County should be read as establishing a general rule which may, in special circumstances warranted by extant factual circumstances of a specific case, be varied.

Accordingly, it appears that an EIS will be required for development wells only where a plan of full field development can be demonstrated.

II. OTHER DEVELOPMENTS

A. *FLPMA Right-of-Way Permits*

After a decade of interpreting Title V of the Federal Land Policy and Management Act (FLPMA)[30] as not authorizing the Bureau of Land Management (BLM) and the Forest Service to issue right-of-way permits to hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC or Commission) and occupying United States lands under their administration, the FERC reversed its stand in *Henwood Associates, Inc.* in February[31] and May 1990.[32] The FERC based its final conclusion, that Congress did intend licensed hydroelectric projects to be within the scope of FLPMA's permitting authority, on review of the legislative history and wording of section 501(a)(4) of FLPMA.[33] In July 1989, the Comptroller General had concluded similarly.[34]

The FERC also concluded, however, that the land management agencies' authority to deny or condition a right-of-way under FLPMA should not be allowed to be a *de facto* veto of a Commission license. Thus, the FERC viewed BLM's issuance to *Henwood* of a right-of-way permit conditioned upon a higher minimum stream flow than that specified in the Commission license as probably exceeding BLM's FLPMA authority, but recognized that the final resolution of the matter lies with the courts.

This question, together with two other issues from the *Henwood* proceeding, is now before the U.S. Court of Appeals for the Ninth Circuit in *State of California ex rel. State Water Resources Control Board v. FERC.* At present, only the petitioners' opening briefs have been filed. Supporting the land management agencies' authority to set permit conditions and advancing their authority even to reject permits to licensed projects is the brief filed by Ameri-

29. Michael Gold, WESTLAW, GFS data base, at 6.
30. 43 U.S.C. §§ 1761-1771 (1988).
31. 50 F.E.R.C. ¶ 61,183 (1990).
32. 51 F.E.R.C. ¶ 61,196 (1990).
33. 43 U.S.C. § 1761(a)(4) (1988).
34. Opinion Letter B-230729, General Accounting Office (July 7, 1989).

can Rivers, Inc. and Friends of the River. Opposing this position is the joint brief filed by Edison Electric Institute, National Hydropower Association and Pacific Gas and Electric Company, whose arguments Henwood Associates adopted fully.

The first argument made by American Rivers is that FLPMA, by its plain language, applies to hydroelectric projects because section 501(a)(4) specifically states that the permits are applicable to systems for generation, transmission, and distribution of electric energy, and also because section 501(a)(2)[35] specifically excludes from conservation oil and natural gas pipelines (also regulated by the FERC). It also finds support in the legislative history from the House and Senate Committee Reports, and in DOI's consistent interpretation of Section 501(a)(4). American Rivers' second argument is that FLPMA's plain language in sections 501(a) and (b) and sections 505(a) and (b)[36] intend that BLM make an independent regulatory decision whether or not to issue a right of way for a hydroelectric project, and mandates that BLM impose terms and conditions to protect fish and wildlife habitat and other public land resources. Third, American Rivers argues that Congress has, since the inception of the Federal Water Power Act (FPA) in 1920,[37] intended that other government agencies impose terms and conditions on hydroelectric projects. This, it argues, is shown by sections 4(e)[38] and 18[39] of the FPA, which permit a Department Secretary to impose conditions necessary to protect a reservation and to require installation of fishways in dams, and by section 404 of the Clean Water Act[40] pursuant to which the Army Corps of Engineers issues a dredge or fill permit for hydroelectric projects. American Rivers' concluding argument is that Congressional enactment of FLPMA represented a major change in this country's land use policies mitigating the adverse effects of hydroelectric development.

The joint brief's first argument is that once an application for a FERC license has been filed, the federal land to be utilized by the hydroelectric project is no longer "public land" under FLPMA purview. This argument is supported by reference to sections 3(1) and 24 of the FPA,[41] by Supreme Court cases between 1892 and 1938, and by discussion of FLPMA's savings provisions, sections 701(f) and (g). Additional support is provided by legislative history that makes clear that FLPMA is not intended to affect the FERC's exclusive authority to authorize and regulate hydropower development on federal lands. The last argument is that by enacting FLPMA Congress did not intend to create a duplicative, conflicting scheme hydropower regulation, and did not intend to give the land resource agencies veto power over hydroelectric projects. Congress also did not intend to erode a licensee's reliance on the articles of its license, nor to skew the federal government's balance of factors

35. 43 U.S.C. § 1761(a)(2) (1988).
36. 43 U.S.C. §§ 1765(a)-(b) (1988).
37. 16 U.S.C. §§ 791a-823b (1988).
38. 16 U.S.C. § 797(e) (1988).
39. 16 U.S.C. § 810 (1988).
40. 33 U.S.C. § 1344 (1988).
41. 16 U.S.C. §§ 796(1), 818 (1988).

that enter into the hydroelectric licensing decision in the direction of environmental protection. A decision by the Ninth Circuit resolving the dispute may be forthcoming before the end of 1991.

B. Minerals Management Service Coal Valuation Regulations

During 1990, DOI reversed provisions of a 1989 coal royalty valuation rule that was the product of a three-year rulemaking process and which, in part, permitted operators to deduct state severance taxes, black lung taxes and abandoned mine reclamation fees from the reported value of coal for royalty purposes.[42] The 1990 rule, rescinding the prior royalty exclusions, became effective as of October 1, 1990.[43]

In the preamble to the new rule, Minerals Management Service (MMS) concluded that recision of the prior royalty exclusions was necessary to avoid an aberration from the fundamental standard that the value of production could not be less than the gross proceeds received for production, and further determined that, as commodities, coal, oil and gas could not be distinguished for royalty purposes.[44] MMS noted two additional reasons for its determination to rescind the prior exclusions: 1) there had been no demonstrable increase in coal production as a result of the exclusions; and 2) the exclusions were negatively affecting royalty receipts on certain Indian leases despite the prior conclusions by MMS that the rescinded rule would be revenue neutral for Indians.[45]

On October 30, 1990, the National Coal Association and the American Mining Congress filed suit in the United States District Court for the District of Colorado challenging the legality of the new rule, seeking to set aside the rule and asking to reinstate the rescinded rule.[46] At present, that case is still in an early procedural stage.

III. 1991 AND BEYOND

As the events of the last two years make clear, the 1990s are likely to be the decade of the environment for federal lands. While the war in the Persian Gulf and the unveiling of the Administration's new national energy policy may give modest encouragement to development of energy (both conventional and renewable sources) from federal lands, the legislative, regulatory, and, therefore, litigation emphasis is likely to be on protecting the environment. Moreover, due to federal budgetary problems, those who do produce energy from federal lands are likely to continue to be subjected to close scrutiny in an effort to assure prompt, full payment of royalties. Thus, 1991 and beyond will likely be very active years for practitioners concerned with federal lands.

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42. 54 Fed. Reg. 1492 (1989) (to be codified at 30 C.F.R. pts. 202, 203, 206, 210 & 212; 43 C.F.R. pt. 3480).

43. 55 Fed. Reg. 35,427 (1990) (to be codified at 30 C.F.R. pt. 206).

44. *Id.* at 35,432.

45. *Id.* at 35,433.

46. National Coal Association v. Lujan, No. 90-1927 (D. Colo. Oct. 30, 1990).

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