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The Requirement of Worst Case Analysis When Approving Oil Leasing Under the Outer Continental Shelf Lands Act: *Village of False Pass v. Clark*

Development of oil and gas reserves on the outer continental shelf (OCS)[1] requires balancing economic and environmental protection policies. The National Environmental Policy Act of 1969 (NEPA)[2] promulgated procedures that federal agencies must follow to ensure national environment protection. NEPA requires that "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" must be accompanied by a detailed environmental impact statement (EIS) assessing the potential impact of the proposed action.[3] In 1978 the Outer Continental Shelf Lands Act (OCSLA) was amended to expedite OCS resource development.[4] The amendments provide procedures for oil leasing on the OCS. The merger of these two acts in the development of OCS resources creates tension between economic and environmental concerns.

Considerable litigation has arisen concerning the content of the EIS required before an OCSLA lease sale may be approved. In *Village of False Pass v. Clark*[5] the Ninth Circuit Court of Appeals held that the Council on Environmental Quality's (CEQ) worst case analysis regulation need not be considered before approving an OCSLA lease sale.[6] However, an examination of CEQ regulations in conjunction with section 18 of the OCSLA reveals that worst case analysis must be considered before approving a proposed lease sale in order to satisfy requirements of the Outer Continental Shelf Lands Act and the National Environmental Policy Act.

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1. The outer continental shelf (OCS) is submerged land more than three miles from a state coastline. 43 U.S.C. §§ 1301(a), 1331(a) (1982).

2. 42 U.S.C. §§ 4321-4370 (1982).

3. 42 U.S.C. § 4332(C) (1982).

4. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629. The amended act is codified at 43 U.S.C. §§ 1331-1356 (1982).

5. 733 F.2d 605 (9th Cir. 1984), *aff'g* Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983).

6. *Id.* at 617.

I. The Worst Case Analysis Regulation

NEPA requires that an EIS "at a minimum, contain information to alert the public and Congress to all known *possible* environmental consequences of agency action."[7] Often the information included in the EIS will be incomplete or scientifically uncertain. The missing information may be economically or technologically unavailable. In those instances the agency may either deny the proposed action or approve it without adequate information. Public interest in a proposed action may compel proceeding although EIS information is inadequate. If an agency proceeds with assessment when information on the proposed action's potential environmental consequences is incomplete or is scientifically uncertain, worst case analysis allows the agency to mitigate the effects of a lack of information by utilizing the best available information.

To perform worst case analysis an agency determines and analyzes the worst case that might happen if the agency permits the proposed action. The analysis is based upon "available information using reasonable projections of the worst possible consequences of a proposed action."[8] Therefore, expense and delay of gathering additional information is avoided. The CEQ regulation requires worst case analysis when information important to an agency decision concerning a major federal action is lacking and technologically unavailable.[9] In *Village of False Pass v. Clark* one of the issues was whether worst case analysis is required before an oil lease sale may be approved under the OCSLA.

II. *Village of False Pass v. Clark*

In *False Pass* the plaintiffs challenged the secretary of the interior's approval of an oil lease sale in the St. George Basin of Alaska. The St. George Basin, located in the southeastern Bering Sea between the eastern Aleutians and the Pribilof Islands, is the gateway between the North Pacific and the Bering Sea.[10] The basin serves as an important migratory corridor for many species of birds, fish, and marine mammals. The basin also serves as an important breeding and feeding area. The full eco-

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7. Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,032 (1981).

8. *Id.*

9. 40 C.F.R. § 1502.22 (1985).

10. Village of False Pass v. Watt, 565 F. Supp. 1123, 1129 (D. Alaska 1983).

logical significance of the St. George Basin to the varied wildlife is presently unknown; however, the "sheer numbers and multitude of species" in the basin attest that the region is of "primary importance."[11]

The secretary began planning the St. George Basin lease sale in 1979. In early 1980 he designated parcels in the St. George Basin to be Lease Sale 70. The draft EIS for the sale was completed by fall 1981. In December 1982 the secretary issued the final EIS. This final statement contained oil spill analyses of a 1000 barrel oil spill and a 10,000 barrel or more oil spill but did not contain worst case analysis of a 100,000 barrel or more oil spill.[12] The Village of False Pass and other plaintiffs sued in the United States District Court of Alaska, claiming among other things that the secretary had violated NEPA because the EIS did not contain a worst case analysis.[13] The plaintiffs sought declaratory and injunctive relief to prohibit the lease sale until the secretary prepared the worst case analysis and satisfied other claims. The district court held that worst case analysis was not required in the lease sale EIS and denied the requested relief.[14]

The Ninth Circuit affirmed the district court decision.[15] The court stated that it would review the adequacy of the EIS according to the Administrative Procedure Act standard[16] that actions of federal agencies shall be set aside if the agencies have acted "without observance of procedure required by law."[17] The court implied that the secretary had met NEPA's procedural standards without performing worst case analysis before approving the lease sale. The court then proceeded to determine whether the secretary had abused his discretion under the law by failing to perform worst case analysis.[18]

The thrust of the court's opinion was that worst case analysis could be deferred to a later stage of a leasing project because the leasing stage was not the only stage at which the secretary could review potential environmental impacts of exploration and

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11. *Id.* at 1130.
12. 733 F.2d at 607.
13. *Id.*
14. *Id.* at 608.
15. *Id.* at 616.
16. *Id.* at 613.
17. 5 U.S.C. § 706(2)(D) (1982).
18. 733 F.2d at 613-14.

development of leased regions.[19] The court distinguished *Sierra Club v. Sigler*,[20] in which the Fifth Circuit held that a worst case analysis of a supertanker's total cargo loss was required before approving construction permits for a tanker port. The Ninth Circuit asserted that *Sigler* was distinguishable from *False Pass* because approving a construction permit was the last opportunity for the government to act on worst case analysis, whereas after approving an OCSLA lease sale the government may still act on a worst case analysis before actual development begins.[21]

The court explained that the OCSLA provides for a three-stage lease development (leasing, exploration, and production and development) and asserted that NEPA could require an EIS at each stage.[22] It indicated that completion of one stage does not assure the lessee's entry into the next stage.[23] The secretary may later cancel tbe lease for environmental reasons or for breaching regulations or conditions set by the secretary.[24] The secretary also has considerable discretion to disapprove a development plan if he finds exceptional environmental circumstances that compel sucb action to protect environmental interests.[25] The court declared that because the secretary has such extensive discretionary power to cancel the lease or disapprove plans at later stages, the information about a worst case 100,000 barrel or more oil spill is not important at the lease sale stage.[26]

The court also argued that the CEQ's tiering regulation[27] supported deferring worst case analysis of a 100,000 barrel or more oil spill to a later stage. The tiering regulation encourages agencies "to focus on the actual issues ripe for decision at each level of environmental review."[28] In doing so, agencies are to issue a broad EIS for an entire program and then issue subsequent EIS's that concentrate on issues specific to each particular stage.[29] The court maintained that the OCSLA process of "dis-

19. *Id.* at 614-16.

20. 695 F.2d 957 (5th Cir. 1983).

21. 733 F.2d at 614.

22. *Id.*

23. *Id.*; *see also* Secretary of the Interior v. California, 104 S. Ct. 656 (1984).

24. 733 F.2d at 615; *see also* 43 U.S.C. § 1334(a)(2)(A)(i) (1982); 30 C.F.R. § 250.12(e)(4) (1985).

25. 43 U.S.C. § 1351(h)(1)(D) (1982).

26. 733 F.2d at 615.

27. 40 C.F.R. § 1502.20 (1985).

28. *Id.*

29. *Id.*

crete stages" suggests that environmental issues may be considered in stages.[30] It argued that a 100,000 barrel oil spill could only occur at a later stage and that the secretary could base his lease sale decision upon an adequate analysis of a 10,000 barrel or more spill until additional information was made available in later stages of lease development.[31]

The court concluded that the secretary did not abuse his discretion when he decided that the 100,000 barrel or more worst case analysis was not important to his lease sale decision. It held that the 10,000 barrel or more analysis of potential impacts on the St. George Basin was adequate at the lease sale stage and that at least one subsequent EIS would be able to address similar issues based on improved information available at later stages of the lease.[32]

III. Analysis

In *False Pass* the Ninth Circuit held that the secretary of the interior had conformed with procedures required by law and did not abuse his discretion when approving the St. George Basin lease sale without performing worst case analysis. In reaching its decision the court failed to consider section 18 of OCSLA.[33] It also failed to discuss the practical impact of delaying worst case analysis until later stages of an OCSLA lease. An analysis of section 18 of OCSLA, CEQ's worst case analysis regulation,[34] and practical considerations of delaying worst case analysis until after lease sale approval reveals that the secretary must consider worst case analysis before approving a lease sale.

A. The Requirement of Worst Case Analysis Under OCSLA Section 18

The legislative history of the 1978 OCSLA amendments[35] indicates Congress's intent to protect the OCS environment. That intent is further manifested in OCSLA section 18,[36] which contains provisions requiring the secretary to consider environ-

30. 733 F.2d at 615.
31. *Id.*
32. *Id.* at 616.
33. 43 U.S.C. § 1344 (1982).
34. 40 C.F.R. § 1502.22 (1985).
35. H.R. Rep. No. 590, 95th Cong., 1st Sess. 10 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 1450.
36. 43 U.S.C. § 1344 (1982).

mental factors before selecting and approving lease sale sites. The effect of worst case analysis regulation on section 18 implementation is determinative of whether the secretary must consider worst case analysis before approving a lease sale.

1. NEPA and the CEQ worst case analysis regulation

NEPA provides environmental policies by which all regulations, public laws, and policies of the United States are to be interpreted and administered. The act requires that all federal agencies cooperate in implementing these policies.[37] NEPA's provisions are implemented under the direction of the Council on Environmental Quality (CEQ). NEPA established the CEQ in the Executive Office of the President[38] and charged the CEQ with the duty "to review and appraise the various programs and activities of the Federal Government in the light of the policy [of NEPA]" and "to develop and recommend to the President national policies to foster and promote the improvement of environmental quality" to meet national needs and goals.[39] In 1977, President Carter issued Executive Order 11,991 authorizing the CEQ to issue "regulations to Federal Agencies for the implementation of the procedural provisions of [NEPA]."[40] The CEQ regulations[41] were issued to make the various federal agencies' implementation of NEPA more unified and effective in promoting national environmental policies.[42]

The Supreme Court established the constitutional authority of CEQ regulations in *Andrus v. Sierra Club*.[43] In *Andrus* the Supreme Court referred to CEQ regulations as "mandatory" and asserted that the regulations are entitled to "substantial deference" as interpretations of NEPA.[44] In the aftermath of *Andrus*,

37. 42 U.S.C. § 4332 (1982).
38. 42 U.S.C. § 4342 (1982).
39. 42 U.S.C. § 4344(3)-(4) (1982).
40. Exec. Order No. 11,991 § 1, 3 C.F.R. 123, 124 (1978).
41. 40 C.F.R. §§ 1500-1508 (1985).
42. Initially CEQ issued nonmandatory guidelines to assist federal agencies in implementing NEPA. The result was interpretation by litigation. The courts applied NEPA with substantial inconsistency. The apparently ineffective NEPA process was criticized as an obstructionist tool. The CEQ regulations promulgated on July 30, 1979, were intended to produce a more uniform and comprehensible procedure under NEPA. The regulations were drafted upon the basis of tan years of "trial and error" administrative and judicial experience with NEPA. Karp, *The NEPA Regulations*, 19 AM. BUS. L.J. 295-97 (1981).
43. 442 U.S. 347 (1979).
44. *Id.* at 357-58.

federal agencies have generally accepted CEQ regulations as binding. CEQ regulations declare that "[a]ll agencies of the Federal Government shall comply with these regulations." However, agencies are allowed flexibility to make adjustments when implementing procedures to resolve conflicts with other applicable laws.[45]

CEQ regulations include a worst case analysis regulation.[46] The regulation provides that if an agency decides to approve a major agency action when the environmental information upon which the decision is based is scientifically uncertain, the agency shall perform worst case analysis if the uncertain information "is important to the decision and . . . the means to obtain [the information] are not known."[47] This regulation requires the secretary to perform worst case analysis when implementing OCSLA section 18.

2. *Environmental protection of the OCS and OCSLA leasing*

The OCSLA provides specific environmental protection procedures that the secretary must follow in selecting and approving lease sites and, later in a leasing program, as he supervises development of a leasing region. For example, section 18 of the OCSLA sets forth environmental protection procedures that the secretary must follow as he selects and approves leasing sites. As a federal agency administrator, the secretary must execute provisions of section 18 in accordance with NEPA procedures. Therefore, an analysis of environmental protection provisions of section 18 is essential when determining whether worst case analysis is required before approving a lease sale under OCSLA.

a. Environmental protection during the preparatory stage of OCS leasing. The Outer Continental Shelf Lands Act of 1953 was amended in 1978[48] in an atmosphere of tension between economic and environmental interests. A large oil spill off the Santa Barbara coast in 1969 heightened environmental concerns about OCS oil operations, and the 1973 Arab oil embargo escalated economic concerns about domestic energy production shortfalls.[49] In the amendments Congress placed primary emphasis upon the

45. 40 C.F.R. § 1507.1 (1985).
46. 40 C.F.R. § 1502.22 (1985).
47. *Id.*
48. Outer Continental Shelf Lands Act Amendments of 1978, *supra* note 4.
49. H.R. REP. No. 590, 95th Cong., 1st Sess. 10, 89 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1496.

nation's economic concerns. It declared that the OCS was a "vital national resource reserve" and that it "should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of [international] competition and other national needs."[50] The avowed purpose of the 1978 OCSLA amendments was to expedite development of OCS resources while eliminating or minimizing risks inherent in exploring for and developing OCS oil.[51] Although the tension was apparently resolved in favor of vigorously pursuing oil development, Congress did not forget environmental protection concerns.

Legislative history evinces Congress's concern that OCS development not occur at environmental expense. Congressional findings accompanying the 1978 amendments declared:

> [T]he oil and gas resources of the [OCS] are limited, nonrenewable resources which must be developed in a manner which takes into consideration the Nation's long-range energy needs and also assures adequate protection of the renewable resources of the [OCS] which are a continuing and increasingly important source of food and protein to the Nation and the world.[52]

Thus, Congress had an express interest in not developing oil and gas resources at the expense of renewable food resources along the OCS. Congress incorporated this concern into section 18 of the amendments which provides for special protection of OCS regions with relatively high environmental sensitivity.

Section 18 delineates what the secretary must do to prepare for a lease sale. The secretary is required to partially base his selection of leasing regions upon environmental considerations. Subsection 18(a)(2) enumerates eight factors that the secretary must consider when selecting the timing and location of lease regions.[53] Two of the factors are environmental: "an equitable sharing of developmental benefits and environmental risks among the various regions"[54] and "the relative environmental sensitivity and marine productivity of different areas of the [OCS]."[55]

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50. 43 U.S.C. § 1332(3) (1982).
51. California *ex rel.* Brown v. Watt, 668 F.2d 1290, 1316 (D.C. Cir. 1981).
52. 43 U.S.C. § 1801(14) (1982).
53. 43 U.S.C. § 1344(a)(2) (1982).
54. 43 U.S.C. § 1344(a)(2)(B) (1982).
55. 43 U.S.C. § 1344(a)(2)(G) (1982).

b. Worst case analysis is essential when determining the relative environmental sensitivity of OCS regions. Section 18 of the OCSLA requires each OCS leasing region to be selected partially on the basis of its relative environmental sensitivity to a large oil spill.[56] Information about the impact of a large oil spill on a particular OCS region is important to assessing the relative environmental sensitivity of that region. A large oil spill would be a juggernaut in an environmentally sensitive area with high marine productivity and is the greatest risk that OCS oil leasing presents to the ecology of an OCS region. Obviously, the study of a large oil spill's potential impact on an OCS region is a primary tool for assessing the relative environmental sensitivity of that region.

Determining the relative environmental sensitivity of different OCS regions is very difficult. When relevant information exists, its utility is limited by the diversity of the biospheres of different regions. The information the secretary must rely on to assess the relative environmental sensitivity of each region to a large oil spill is gap-filled and scientifically uncertain. In *Sierra Club v. Sigler* the Fifth Circuit stated that "all parties acknowledge that an analysis of a supertanker oil spill involving a total cargo loss beyond 24 hours after it occurs is beyond the state of the art."[57] In *False Pass* the Ninth Circuit recognized that information about effects of a large oil spill was missing.[58] Clearly, there is scientific uncertainty about the potential effects of a large oil spill in the St. George Basin.

OCSLA subsection 18(a)(2)(G) requires the secretary to consider the relative environmental sensitivity of OCS regions when he selects regions to be leased.[59] Therefore, information on environmental sensitivity is explicitly important to the secretary's decision to approve a region for OCSLA leasing. The CEQ worst case analysis regulation requires worst case analysis when environmental information important to an agency decision is scientifically uncertain and essential remedial information is technologically unavailable.[60] Since the available information on the relative environmental sensitivity of the St. George Basin to a large oil spill is scientifically uncertain and technologically un-

56. *Id.*
57. 695 F.2d at 973.
58. 733 F.2d at 616.
59. 43 U.S.C. § 1344(a)(2)(G) (1982).
60. 40 C.F.R. § 1502.22 (1985).

available, the secretary should have compiled and acted on a worst case analysis of a 100,000 barrel or more oil spill.

c. Relative environmental sensitivity must be considered before the lease sale. In order that the relative environmental sensitivity of each region be considered during the selection process, the secretary must compile full information on relative environmental sensitivity before selecting a lease region. Judicial interpretation of section 18 underscores the importance of considering each OCS region's relative environmental sensitivity before regions are selected for lease sale.

The United States Court of Appeals for the District of Columbia is the only court that may review the secretary's actions under section 18.[61] That court has interpreted the subsections that pertain to environmental protection. Its interpretation of subsection 18(a)(2) is that "the secretary must base the leasing program upon the result of his consideration of [the] factors" enumerated there and that the secretary must consider all factors and may not defer consideration of any factor until later in the program.[62] Therefore the secretary must consider the relative environmental sensitivity of each OCS region before selecting OCSLA leasing sites. Because the secretary must perform a worst case analysis in order to determine the relative environmental sensitivity of the OCS regions, the Ninth Circuit erred in not requiring the secretary to perform worst case analysis of a 100,000 barrel or more oil spill before approving an OCS lease sale.

B. Practical Considerations of Delaying Worst Case Analysis

Two significant practical considerations weigh against delaying worst case analysis beyond the lease sale stage. First, there is a higher probability that a delayed worst case analysis

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61. Section 18 of the OCSLA provides the procedure for assessing EIS data for selecting leasing regions. *See* H.R. REP. No. 590, 95th Cong., 1st Sess. 10, 149 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1450, 1555. Therefore section 18 should have been considered when determining whether worst case analysis is required before selecting a lease region. To ensure that section 18 is effective in protecting the environmentally sensitive areas of the OCS, Congress included a provision to ensure uniform application of section 18. Section 18 provides that "[a]ny action of the Secretary to approve a leasing program pursuant to section 1344 [section 18] of this title shall be subject to judicial review only in the United States Court of Appeal[s] for the District of Columbia." 43 U.S.C. § 1349(c)(1) (1982). This provision suggests that the Ninth Circuit lacked jurisdiction to determine the question at hand.

62. California *ex rel.* Brown v. Watt, 668 F.2d 1290, 1305 (D.C. Cir. 1981).

will not be heeded. The purpose of worst case analysis is to disclose potential consequences when the secretary decides to proceed with a program when scientific uncertainties or gaps exist in available EIS information.[63] In such situations the secretary should apply worst case analysis to compensate for lack of information in order to make the best possible comparative analysis of relative environmental risks and developmental benefits of prospective OCSLA leasing regions. OCSLA requires the secretary to select oil leasing areas on the basis of this balancing within and among prospective areas.[64] At the initial stage, worst case analysis may affect the secretary's decision merely by showing a potential for great environmental damage in a particular OCS area.

However, if worst case analysis is delayed until after a lease approval, worst case analysis must meet a new standard before the secretary is compelled to cancel the established lease. Under OCSLA, the secretary may cancel a lease if he determines that continuing the lease would "probably cause serious harm . . . to the marine, coastal, or human environment."[65] The delayed worst case analysis must prove not only that potential for serious damage exists, but also that damage would probably occur. Therefore in situations in which the secretary is reluctant to cancel an active lease because of the investment of agency and industry time and money, the "probably cause" standard would allow a secretary to ignore worst case analysis findings. The purpose of worst case analysis is to indicate potential, not probable, environmental effects of proposed agency action when available EIS information is scientifically uncertain. The higher standard imposed upon a delayed worst case analysis does not compel the secretary to consider potential effects and thus worst case analysis would fail in its purpose.

Second, if action on a delayed worst case analysis results in lease cancellation, massive amounts of time and money are wasted. When the secretary cancels a lease for environmental reasons an oil company is entitled to compensation for its investment,[66] resulting in waste of industrial and governmental resources. Taxpayers and oil companies benefit most from requir-

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63. Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,032 (1981).

64. 43 U.S.C. § 1344(a)(2)-(3) (1982).

65. 43 U.S.C. § 1334(a)(2)(A) (1982).

66. 43 U.S.C. § 1334(a)(2)(C) (1982).

ing worst case analysis before lease sale approval because precious resources will not be expended on improperly approved leases.

IV. Conclusion

The Ninth Circuit erred in concluding that the secretary of interior could delay worst case analysis of a 100,000 barrel or more oil spill past the lease sale approval stage. The secretary is required by section 18 of OCSLA to select leasing regions, in part, by a comparative analysis of environmental sensitivity and potential economic benefits of each region. Information about the impact of a large oil spill is essential to determining environmental sensitivity of an OCS region when available information is scientifically uncertain. Therefore CEQ regulations require the secretary to perform worst case analysis before he selects lease regions because information about the impact of a large oil spill is important to the secretary's decision to approve an OCSLA lease sale and is technologically unobtainable. Hence the secretary must prepare worst case analysis before lease sale approval in order to comply with CEQ regulations and section 18 of OCSLA.

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