

Offshore Pipelines

Report 4:

The Development of Petroleum
Resources from the Outer
Continental Shelf: Legal
Management Problems and
Capabilities in Oregon

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*Report to the
Oregon Outer Continental Shelf
Oil and Gas Development Task Force*

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OREGON OUTER CONTINENTAL SHELF OIL & GAS DEVELOPMENT TASK FORCE REPORTS

<u>OCS Oil and Gas Development: Jurisdiction, Administration, and Management Systems, by William Tufts</u>	Report #1
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PREFACE

This report was prepared by James B. Buck of the University of Oregon Ocean Resources Law Program. It is one of a series of reports to the Governor's Outer Continental Shelf Oil and Gas Development Task Force on legal issues associated with the development of petroleum resources and associated facilities. It is intended for the use of the members of the Task Force and other interested persons. Specific views and recommendations are those of the author and not necessarily the views of the Task Force, the Department of Land Conservation and Development, or other persons who provided assistance or information.

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OFFSHORE PIPELINES

Section 1

INTRODUCTION

Pipelines running from the outer continental shelf, crossing state owned submerged lands, and terminating at a landfall on the shore present diverse issues for coastal planning agencies. Environmental impacts range from chronic leakage problems to siting of onshore facilities such as tank farms or refineries. Jurisdictional complexities abound; within the three mile territorial sea the state has primary authority over pipelines, but on the outer continental shelf (OCS), the U.S. Departments of Interior, Transportation, and Energy are all involved in pipeline regulation. This paper shall discuss some of the environmental consequences of offshore pipelines, and attempt to explain the regulatory functions of the various agencies involved.

After discovery of significant quantities of offshore oil or gas, petroleum companies are faced with the problem of how and where to transport the product to shore. There are two options: an offshore terminal for transferring the oil or gas to tankers which then transport the recovered hydrocarbons to refineries or onshore storage facilities, or a pipeline running from the OCS to shore facilities. Depending on several factors,¹ a pipeline may not be economically feasible, but generally pipelines are the preferred method of transportation when petroleum reserves are large, and the distance to shore is not too great. Pipelines are not affected by weather conditions which might preclude the use of tankers, and there is less danger of a large oil spill from a pipeline than from a tanker.² Natural gas is almost always transported by pipeline, since it must be liquefied in order to transport it.

by tanker, and liquefied natural gas tankers are very expensive to build and maintain. When oil and gas are found in the same field, separate pipelines are often used, because mixing even small amounts of liquid in a gas pipeline can triple the amount of energy required to pump the product to shore.³

Pipelines related to the transportation of OCS oil or gas may be grouped into two functional classifications, gathering lines and transportation lines. Gathering lines are those owned and operated by an offshore developer which transport oil or gas within the leased tract to a central location. Transportation lines transport the recovered hydrocarbons to shore, and are often common carriers. These lines normally originate on the federally owned outer continental shelf, cross into state owned submerged lands (three miles from shore) and end at a landfall on the shore. Thus transportation lines are subject to both state and federal control, whereas gathering lines are usually more than three miles offshore and thus outside the state's jurisdiction.⁴

In addition to pipelines from offshore petroleum fields, there may also be pipelines from Deepwater Ports. These "ports" are offshore tanker unloading facilities which can be used by tankers which are too large to gain entrance into harbors, or to minimize environmental dangers of having large tankers navigate in tight quarters close to shore. In 1975 Congress passed the Deepwater Ports Act⁵ which provides for the construction and regulation of such ports, which are connected to shore by transportation pipelines. The main difference between pipelines from deepwater ports and from offshore oil or gas fields is related to siting; pipeline routes and onshore facilities for deepwater ports can be studied and chosen with more emphasis on environmental factors. Coastal planners can pick the most environmentally

suitable (or least harmful) location for deepwater port facilities, while the high costs involved in laying pipe⁶ may dictate that pipelines from offshore petroleum fields take the shortest route to shore.

Section 2

ENVIRONMENTAL CONSEQUENCES

OF PIPELINES

The environmental effects of pipelines must be studied from two aspects, the effects of constructing the pipeline, and the effects of operating the pipeline. Generally, pipelines are laid by a lay barge on which 40' sections of pipe are welded together and lowered to the seafloor. The sections of pipe are usually coated with anti-corrosive material, and with concrete. To further protect pipelines from ship anchors or fishing gear, and from ocean currents, pipelines are usually buried. A jet barge is used to bury pipelines (more accurately, it blasts a trench). The jet barge tows a sled over the pipeline which injects pressurized water under the pipeline. The pipe then settles into the trench and is gradually covered with sediments by ocean currents. Depending on the seafloor, several passes with the jet barge may be necessary, and in some instances blasting may be required.⁷ Peaks and valleys on the seabed may have to be smoothed out. All these operations can severely disrupt the ocean floor and destroy all organisms in the area. If the sediments are polluted, the turbidity caused by the jet barge can be particularly harmful by resuspending toxic substances. Similarly, the turbidity can cause organisms to be smothered, and may decrease light penetration to the area, hindering photosynthesis.

When the lay barge approaches shore and encounters shallow water, different construction procedures are necessary since the lay barge cannot operate without a significant draft. Thus a trench or channel is opened from the landfall site out to where the water is sufficiently deep.⁸ After the pipeline has been laid the trench can be filled and the site restored, but

nonetheless any such trench dredging close to shore will inevitably destroy the habitat of organisms living along the pipeline route.

Shoreline effects from pipeline construction can also be significant. Generally, natural gas pipelines require a right-of-way of 50 to 100 feet.⁹ Oil pipelines can require even larger rights-of-way, depending on the destination of the product.¹⁰ If a pumping station is needed to increase pressure, an additional 40 acres may be required, whereas 60 additional acres are required for a tanker or barge terminal.¹¹ The shore approach should be flat and gentle, and not subject to seabed shifting or strong tidal flows, which can cause stress on the pipeline and possible failure. Pipelines should have a 7 foot cover at a depth of 50 feet and a 10 foot cover at low water,¹² thus considerable dredging in shallow water and marshland is necessary. Although restoration may mitigate ecological harm, fragile coastal ecosystems such as estuaries and wetlands could sustain inevitable damage in the event a landfall were sited in those areas.

The operational consequences of pipelines center around leakage, whether chronic small leaks or a major failure. The possibility of total failure is lessened by use of concrete coating and burial, which makes the pipeline less susceptible to ocean currents, seawater corrosion, or damage from ship anchors. Although failure (rupture) is always a possibility, and can result from unforeseen causes such as a flaw in the materials, a defective seam, or a pumping station which puts too much pressure on the pipeline, most pipeline failures have occurred with older pipes which were laid when federal and state controls were not as strict as today's standards.¹³ However, until there is a reliable method for detecting weak points or flaws in existing pipelines in order to allow preventative maintenance, the danger and possibility

of a spill must be considered and guarded against.¹⁴

Chronic leaks from pipelines also pose a significant environmental threat, although little is currently known about the long term effects of small chronic leaks.¹⁵ The environmental impacts could be severe, however, if the leakage occurred close to shore or in estuaries or wetlands. Frequent inspection of waters over pipelines has reduced the incidence of chronic leaks.¹⁶

Section 3

FEDERAL CONTROL OF OFFSHORE PIPELINES

In most cases offshore pipelines originate from oil or gas fields located under the federally owned outer continental shelf. Since the pipelines transport such an increasingly valuable commodity, and since the environmental and economic dangers from mismanagement, negligence, or faulty construction are so enormous, the federal government has laid a heavy regulatory hand on many aspects of offshore pipelines. The Department of the Interior has primary responsibility over OCS activities, and the Departments of Transportation, Energy, and Defense (Army Corps of Engineers) are involved to varying degrees in pipeline management. Federal law also establishes funds to provide compensation for damages caused by pipelines, whether through pollution or interference with commercial fishing. And in order to provide the state with a more effective role in management of coastal zone resources, there are information programs by which federal agencies convey scientific and environmental information to affected states.

SITING OF PIPELINES

Two agencies within the Department of the Interior (DOI) share principal control over where pipelines are laid on the OCS. The Bureau of Land Management (BLM) grants rights-of-way for transportation pipelines across the OCS, and the United States Geologic Survey (USGS) grants rights-of-use or easements for pipelines within a leased tract (or within contiguous leased tracts) such as gathering lines from various wells.

Under the Outer Continental Shelf Lands Act of 1953, as amended¹⁷ (OCSLA) the

Secretary of the Interior is given the authority to grant pipeline rights-of-way across the OCS.¹⁸ The recent 1978 amendments to the OCSLA amplify this provision somewhat by specifying that the Secretary of the Interior and in some instances the Secretary of Transportation¹⁹ may issue regulations and prescribe conditions for granting pipeline rights-of-way across the OCS, assuring "maximum environmental protection by utilization of the best available and safest technologies."²⁰ Pursuant to the enactment of the amendments, the BLM began revising their existing regulations concerning OCS activities, and have recently published proposed regulations consolidating BLM programs for the OCS. The proposed regulations call for use of the safest technologies, such as the safest reasonable pipeline burial techniques which the Secretary determines to be economically feasible,²¹ and provide that the applicant must suspend operations upon a determination that continued operations would result in serious, irreparable, or immediate harm to life (including fish and other aquatic life), to property, or to the marine, coastal, or human environments.²² The pipeline right-of-way would be limited to 200 feet in width²³ (unless safety and environmental factors require greater width) by the proposed regulations, and the right-of-way would have to be contained within the boundaries of any area designated for pipelines by an authorized BLM officer.²⁴

Prior to enactment of the 1978 amendments to the OCSLA, the functions and responsibilities of BLM and the USGS regarding outer continental shelf activities were governed by a memorandum of understanding.²⁵ According to the memorandum, the BLM conducts pipeline routing studies for pipeline corridors, prepares environmental assessments, pipeline system planning studies, economic studies, and environmental impact statement when necessary, prior to approving applications for rights-of-way. In addition, BLM conducts field

studies relating to the long term environmental impact of all pipelines and associated structures in order to continually assess environmental safeguards for OCS pipelines.²⁶

While BLM grants rights-of-way for transportation lines, the USGS grants the equivalent, referred to as rights-of-use or easements, for gathering lines within leased areas on the OCS.²⁷ Prior to approving applications for rights-of-use or easements, the USGS prepares environmental assessments or impact statements when necessary.²⁸

PIPELINE DESIGN, CONSTRUCTION, OPERATION AND MAINTENANCE

After the BLM has approved the route or pipeline corridor across the OCS for a transportation line, and after the USGS has approved the siting of gathering lines, the lessee must then comply with a host of federal regulatory standards²⁹ regarding design, construction, operation and maintenance of the lines before any hydrocarbons will ever make their way shoreward. There are three areas of regulation. The USGS (Department of Interior) exercises control over gathering lines on the OCS; the Materials and Transportation Bureau (Department of Transportation) controls transportation lines from the OCS to shore, and the state exercises concurrent jurisdiction with the Materials and Transportation Bureau (MTB) within the three mile territorial sea. (State controls will be discussed in the following section.)

The Department of the Interior and the Department of Transportation (DOT) have delineated their respective jurisdictions and responsibilities in a Memorandum of Understanding,³⁰ and both departments have also promulgated regulations implementing the memorandum. The USGS (Interior) has regulatory

control over design, construction, operation and maintenance regulations for offshore pipelines extending upstream from the outlet flange at: i) each facility where hydrocarbons are produced, or ii) each facility where produced hydrocarbons are first separated, dehydrated, or otherwise processed, whichever facility is further downstream.³¹ According to DOI regulations, the USGS area oil and gas supervisor is authorized to approve the design, other features, and plan of installation of all gathering lines, including portions of such lines which extend onto areas other than the OCS.³²

The Department of Transportation has the responsibility for promulgating and enforcing safety regulations for the transportation of gases and hazardous liquids by pipeline. Thus the DOT is charged with establishing and enforcing design, construction, operation and maintenance regulations for pipelines extending to shore from the outlet flange described above.³³ The Materials and Transportation Bureau has implemented pipeline safety regulations which are administered by the Office of Pipeline Safety Operations. The MTB has issued regulations prescribing minimum safety requirements for gas pipelines³⁴ under the Natural Gas Pipeline Safety Act,³⁵ and has promulgated similar regulations for oil pipelines.³⁶ The regulations specify technical standards for pipe material, testing strength, welds, etc., and also require that pipelines in less than 200 feet of water be buried between 18 and 48 inches, depending on location and seabed material, unless the pipe is "supported by stanchions, held in place by anchors or heavy concrete coating, or an equivalent level of protection is provided."³⁷

OTHER FEDERAL REGULATION OF PIPELINES

In addition to the design, construction, operation and maintenance aspects

of pipelines, there are other, non-safety related areas that are regulated by federal agencies.

The Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC, a division of the DOE) regulate rates and competition as they relate to OCS pipelines. The newly formed Department of Energy has taken over all functions related to the transportation of oil by pipeline, including ratemaking, which has previously been within the control of the Interstate Commerce Commission.³⁸ FERC, the successor of the Federal Power Commission, controls ratemaking for gas pipelines, and also issues certificates of public convenience before gas pipelines can be laid.³⁹

Pursuant to the 1978 amendments to the OCSLA, FERC is also involved in regulating who uses OCS transportation pipelines. Transportation lines are generally common carriers; due to high design and construction costs several OCS lessees usually join together and use a single transportation line. In addition to cutting costs, this results in fewer OCS pipelines with a concomitant lessening of environmental dangers. All transportation lines, whether joint projects or not, must transport or purchase, without discrimination and in proportions that FERC may determine, oil or gas produced from OCS lands in the vicinity of the pipeline.⁴⁰ FERC may also order that the throughput capacity of any pipeline be expanded, if such expansion is requested by shippers, and is within technological limits and economic feasibility.⁴¹ Furthermore, the Secretary of Energy and FERC are required to consult with the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or other grant of authority to ensure that pipelines are operated in accordance with

the competitive principles of the 1978 amendments. The Attorney General, in turn, is required to consult with the Federal Trade Commission.⁴²

The Army Corps of Engineers (Department of Defense) has regulatory control over obstructions or alterations within US waters. Under the Rivers and Harbors Act of 1899,⁴³ permits from the Corps are required for any obstruction to navigation or for dredging or filling in US waters. The Corps' jurisdiction under the Act is limited to the navigable waters of the US, which extends seaward three miles from the coast. The Outer Continental Shelf Lands Act of 1953⁴⁴ dealt with this limitation on the Corps' jurisdiction regarding obstructions on the OCS by providing:⁴⁵

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the Outer Continental Shelf.

By its terms the Act does not provide extended jurisdiction for pipelines or for dredging and filling on the OCS. The Corps thus has jurisdiction over pipelines only out to three miles; an offshore pipeline within that area would require a permit for alteration of navigable waters⁴⁶ and a dredge and fill permit.⁴⁷ In July 1977, however, the Corps issued a nationwide permit for dredged or fill material to be placed as pipeline backfill or bedding, providing there is no change in preconstruction bottom contours.⁴⁸

COMPENSATION FOR DAMAGES CAUSED BY PIPELINES

The 1978 amendments to the OCSLA establish an Offshore Oil Spill Pollution Fund and a Fishermen's Contingency Fund to provide compensation for damages or losses caused by offshore pipelines, either due to pollution or to interference with commercial fishing activities.

The Offshore Oil Spill Pollution Fund,⁴⁹ which is administered by the Secretary of Transportation, establishes a fund not to exceed \$200 million, composed of fees assessed per barrel of oil produced from the OCS.⁵⁰ The fund is immediately available for removal and cleanup costs, and for damages arising out of or directly resulting from oil pollution.⁵¹ The owner and operator of an offshore facility, which is defined to include pipelines,⁵² shall be strictly liable for all costs resulting from removal and cleanup, and for an amount limited to \$35 million for all damages.⁵³ Further, the owner or operator of a pipeline must establish and maintain evidence of financial responsibility sufficient to satisfy the maximum amount of liability.⁵⁴

The Fishermen's Contingency Fund is administered by the Secretary of Commerce, and consists of a \$1 million fund intended to provide compensation to fishermen for damages to fishing vessels or gear, and for lost profits, when such losses result from activities related to exploration, development, or production of OCS oil or gas resources.⁵⁵ The Secretary of Commerce is authorized to establish area accounts within the fund which are maintained by fees collected from OCS lessees, holders of pipelines rights-of-way, and holders of exploration permits; payments from area accounts are available only for losses caused by OCS related activities within the area.⁵⁶ Thus if a pipeline were exposed and caused damage to a fishing vessel or fishing gear, the fisherman could claim compensation from either the fund, or from the owner of the pipeline, if he could be identified.⁵⁷

The amendments also require that all potential hazards on the OCS be identified and classified. The Secretary of Commerce is required to establish

regulations requiring all materials, equipment, tools, containers and other items to be color coded, stamped, or labeled with the owner's identification.⁵⁸ In addition, the Secretary, in cooperation with the Secretary of the Interior, is required to conduct a two year survey of obstructions on the OCS. The survey will identify natural and manmade obstructions which pose potential hazards to commercial fishing or fishing gear, and on the basis of this survey the Secretary is to develop charts for commercial fishermen.⁵⁹

PIPELINE INFORMATION PROGRAMS

Since OCS activities occur on federally owned lands, lessees, potential lessees, and other interested persons deal primarily with federal agencies in the initial stages of OCS exploration, development, and production. Congress recognized, however, in the 1978 amendments to the OCSLA, that timely information to affected states which ensures participation on the state and local level is essential to sound OCS resource management. Among the stated purposes of the Act are to:⁶⁰

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf.

To further these purposes, the amendments establish an OCS oil and gas information program⁶¹ and require environmental studies of any region included in an OCS oil or gas lease sale.⁶²

The OCS oil and gas information program provides that any lessee or permittee engaged in exploration, development, or production activities shall provide the Secretary of the Interior with access to all data and information obtained from such activity.⁶³ Additionally, each federal department and agency is required to provide the Secretary with all data or information obtained by such department or agency pursuant to the OCSIA.⁶⁴ This wealth of data is then to be processed, analyzed, and interpreted by the Secretary, and as soon as possible thereafter, a summary of this data must be made available to all states (and local governments upon request) affected by the OCS activity.⁶⁵ The amendments specify that the summary must include estimates of:⁶⁶

- (A) the oil and gas reserves in the areas leased or to be leased;
- (B) the size and timing of development if and when oil or gas or both, is found;
- (C) the location of pipelines; and
- (D) the general location and nature of onshore facilities.

In addition to the summary of data, the Secretary must also provide an index, and upon request, copies of all actual or proposed programs, plans, reports, tract nominations, environmental impact statements, lease sale information and any similar relevant information.⁶⁷ The Secretary may prescribe regulations to preserve the confidentiality of privileged or proprietary information received from OCS lessees or permittees, but if such privileged information regards activities within the three mile state owned seabed, the governor may designate a state official to inspect the privileged information at a regional Department of Interior location.⁶⁸

The amendments also require that the Secretary conduct an environmental study of any region included in an oil or gas lease sale. The study must be commenced at least six months prior to the sale, and should establish

"information needed for assessment and management of the environmental impacts on the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil or gas development in such area or region."⁶⁹ One of the considerations specifically required to be included in the assessment is the "impact on marine biota which may result from chronic low level pollution or large spills associated with . . . the laying of pipe to serve the offshore production area."⁷⁰ The proposed BLM regulations provide that the director of BLM may require additional studies to monitor the human, marine, or coastal environments after leasing and development of an area so as to provide information for comparison with the results of the pre-lease studies. The findings from such comparisons may be used to recommend modifications in existing practices, and to enhance BLM's ability to predict impacts from future lease sales.⁷¹ An assessment of the cumulative impacts of OCS activities on the human, marine, and coastal environments must be prepared by the Secretary for each fiscal year to be submitted to Congress and made available to the general public.⁷²

Further information regarding pipeline and other OCS activities can be obtained through the National OCS Advisory Board. The Board, established by the Department of the Interior in 1975, is presently composed of: (1) Regional Technical Working Groups in each of the six OCS leasing regions, and within each region, State Technical Working Groups; (2) a National Policy Committee; and (3) a National Scientific Committee. Recently the Department of the Interior has established an Intergovernmental Planning Program (IPP) for OCS oil and gas leasing, transportation, and related facilities.⁷³ The IPP is to be implemented by the Regional Technical Working Groups and

will have responsibility for the identification of potential pipeline corridors and the development of a management plan for the transportation of OCS oil and gas. Oregon's representative on the Pacific Technical Working Group will provide information on OCS activities to state and local agencies with jurisdictional responsibilities or interest in the coastal zone.

The thrust of modern coastal and offshore legislation has been to increase the state's opportunity to participate in a meaningful way with management of coastal and ocean natural resources. The amendments to the Outer Continental Shelf Lands Act provide the state with an expanded role in what had heretofore been primarily a federal arena. Through the information programs discussed above, and through the survey of obstructions on the continental shelf,⁷⁴ the state will be better able to plan and regulate pipelines and other OCS activities.

STATE REGULATION OF OFFSHORE PIPELINES

INTRODUCTION

In 1953 Congress passed the Submerged Lands Act⁷⁵ which granted to the states title to lands beneath navigable waters, and vested in the states the right to "manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable state law . . ."⁷⁶ The Act defined lands beneath navigable waters to include all lands permanently or periodically covered by tidal waters, seaward to a line three geographical miles from the coast.⁷⁷ Thus any pipeline entering upon state owned land is subject to the state's jurisdiction concurrent with any federal jurisdiction.⁷⁸ In examining state control over pipelines, two areas must be discussed: the present scope of Oregon's statutory control over pipelines, and whether, under the Public Trust Doctrine, pipelines may be permitted at all. The latter issue shall be discussed first.

THE PUBLIC TRUST DOCTRINE

The public trust doctrine has been recognized in this country since the last century⁷⁹ and puts limits on what the state (or a private landowner) may do with tidelands or lands under navigable waters.⁸⁰ The doctrine has its roots in English law and generally is interpreted to mean that the state holds tidelands as trustee for the public, and that the public has a right of use of the waters over the tide lands which the state is required to preserve and protect. Oregon courts have recognized that the public has the right of navigation, fishing, commerce and recreation in the waters over public trust lands,⁸¹ and the state may not convey the tidelands or permit

activities on such lands if the public rights would be extinguished or interfered with.⁸²

The public trust issue arises in relation to offshore pipelines since a pipeline would cross the tidelands at the site of the pipeline landfall. The pipeline would have to be buried under the submerged lands, the tidelands, and up past the vegetation line.⁸³ Thus a fill and removal permit would be required from the Oregon Division of State Lands.⁸⁴ The questions relating to the public trust doctrine are whether a pipeline would be a use consistent with the public trust, and if not, whether a pipeline would interfere with public trust rights.

An oil or gas pipeline could be found to be a use consistent with the public trust right of commerce, since the pipeline's purpose is to transport a salable commodity. The fact that it is an ocean resource that is being transported further strengthens the position that a pipeline is a use consistent with public rights in tidelands. Furthermore, the Oregon Coastal Management Program implicitly recognizes the need for providing for offshore energy development by defining as "water dependent" (and thus necessarily located in the coastal zone) uses which require water borne transportation or energy production.⁸⁵

Even if pipelines were found to be an inconsistent use of the public trust lands, nonetheless they would not likely interfere with permitted public trust uses. If a pipeline were properly constructed, suitably located (considering tides, erosion, etc.) and buried at least 10 feet deep at the shoreline, there would be little opportunity for interference with public uses after

the construction and restoration of the area were completed. There is always the possibility of pipeline failure through seismic activity, extreme pressure within the pipe, or other unforeseen causes, and such possibilities would have to be examined and weighed in the decision on whether and where to allow a pipeline, but under most conditions a pipeline would not interfere with public uses of the tidelands.

PRESENT STATUTORY CONTROL

INTRODUCTION

If sections of the outer continental shelf off Oregon were leased and marketable quantities of oil or gas were found, the lessee, depending on the size of the find, would begin negotiating with the BLM, FERC, and other federal agencies regarding pipeline routing and construction. It is at this stage that Oregon should become involved, since a transportation line would inevitably cross (or at least have some effect on) state lands.

There are three state agencies that exercise control over offshore pipelines: The Division of State Lands, the Department of Transportation, and the Energy Facility Siting Council. Since the probability of an offshore pipeline is at present very low, the state agencies involved have not promulgated regulations directed at pipeline activities; thus, the basic jurisdictional authority is contained in state statutes.

DIVISION OF STATE LANDS

The Division of State Lands (DSL) has jurisdiction over activities on the state owned seabed out to three miles. DSL has authority to grant leases for mining of gas and oil on state submerged lands⁸⁶ and for

selling or leasing state submersible lands.⁸⁷ Easements across the state owned submerged lands are within DSL's jurisdiction⁸⁸ and Oregon law lists some considerations which are relevant in granting a lease or easement over state submerged lands, including safety, recreation, aesthetics, navigation, and pollution, inter alia.⁸⁹ In addition, DSL is prohibited from permitting any interference other than temporary, with the surface of the ocean shore.⁹⁰ Thus the routing of pipelines up through to the vegetation line is within DSL's control. Before granting any easements for pipelines DSL is required to consult with the Department of Geology and Mineral Industries⁹¹ (DOGMI) and the state Fish and Wildlife Commission.⁹² It is important to note, however, that DSL leases of state submerged or submersible lands or easements across such lands are not considered to be "state agency permits affecting land use," and thus consistency with the Oregon Coastal Management Program and with the statewide planning goals is not required. The Land Conservation and Development Commission has promulgated a rule⁹³ requiring state agencies to apply the 19 statewide planning goals⁹⁴ when reviewing applications for permits affecting land use, and the appendix to the rule lists state agency permits which may be granted only upon a determination of consistency with the statewide goals. DSL leases of submerged or submersible lands are not included in the list. Thus DSL is not required to ensure that offshore leases or easements are consistent with the statewide goals, or with acknowledged comprehensive plans of affected local governments.

Since pipelines are required to be buried in water less than 200 feet deep by federal regulation,⁹⁵ a fill and removal permit would be required from both the Army Corps of Engineers⁹⁶ and the DSL.⁹⁷ The fill and

removal permit is considered to be a "permit affecting land use," and therefore DSL would be required to assure that permit approvals are consistent with the statewide goals or acknowledged local comprehensive plans. In addition, the director of DSL may include conditions on the permit which are formulated through consultation with several state officials.⁹⁸

DEPARTMENT OF STATE LANDS

Under the Ocean Shores Law,⁹⁹ the Oregon legislature vested ownership of Oregon's Pacific shore in the state and granted the Oregon Department of Transportation (ODOT) jurisdiction over the area.¹⁰⁰ The ODOT has authority to grant permits for pipelines across and under the ocean shore and the submerged lands adjacent to the ocean shore.¹⁰¹ Such permits must assure public safety and preservation of economic, scenic, and recreational values, and may be granted only after consultation with DSL, DOGMI, and the Fish and Wildlife Commission.¹⁰²

ENERGY FACILITY SITING COUNCIL

The Energy Facility Siting Council (EFSC), a division of the Oregon Department of Energy, receives applications for site certificates for all energy facilities proposed to be built within Oregon.¹⁰³ Certain pipelines are considered to be "energy facilities" and would require a site certificate: oil pipelines six inches or greater in diameter and five miles or longer in length, and gas pipelines sixteen inches or greater in diameter and five miles or longer in length.¹⁰⁴ Prior to submitting an application for a site certificate, an applicant must secure permits or approvals from other agencies or governmental entities which would be required in addition to the site certificate, or must show how the standards for such permits or

approvals will be met.¹⁰⁵ The Council then must apply 10 specific standards to each application, and a certificate may be issued only upon a determination that each of the standards has been met.¹⁰⁶ If the site certificate is approved, the Council shall include conditions for the protection of public health and safety,¹⁰⁷ and after the certificate is issued all affected state agencies, counties, cities and political subdivisions are bound by the approval, and must issue the appropriate permits, licenses and certificates necessary for construction and operation of the facility.¹⁰⁸ According to a recent Oregon Attorney General Opinion, the location of energy facilities has been declared by the legislature to be a matter of statewide concern, and local governments may not act to prohibit construction and operation of energy facilities.¹⁰⁹ Thus the ultimate authority for determining whether an offshore pipeline may be sited in Oregon submerged lands (assuming the pipeline to be of sufficient diameter and length to be classified as an "energy facility" rests with EFSC. Jurisdiction for judicial review of EFSC's approval or rejection of an application for a site certificate is conferred upon the Oregon Supreme Court, and a petition for review must be filed with the Court within 60 days following EFSC's approval or rejection.¹¹⁰

Section V

FEDERAL PREEMPTION OF STATE REGULATION OVER OFFSHORE PIPELINES

INTRODUCTION

Under our system of government, the United States Constitution places limits on the activities of both the federal government and the state governments. The supremacy clause¹¹¹ and the commerce clause¹¹² provide authority for the federal government to override or preempt state activity in certain areas; whatever powers which are not granted to the federal government are reserved to the states.¹¹³ Since pipelines from the outer continental shelf are regulated by the federal government, and since they carry a product which would be involved in interstate commerce, the supremacy and commerce clauses must be examined to determine what limitations on state regulation exist.

THE SUPREMACY CLAUSE

The supremacy clause declares that the Constitution and federal law shall be supreme. Thus when either the Constitution or federal law governs a particular activity, the state may be either totally or partially preempted from regulating in the same field. The Constitution, of course, makes no mention of pipelines, but there are various provisions in federal laws concerning pipelines.¹¹⁴ To determine if existing federal law preempts state regulation (for example, over the granting of pipeline rights-of-way) Congress' intent must be discerned. If Congress explicitly declares that the federal law shall be exclusive, then the preemption inquiry need not proceed further, so long as Congress has acted within federal power. If Congress did not explicitly preclude state regulation, then the preemption

question must be addressed by looking to the impact of federal legislation (i.e., whether it would necessarily conflict with state legislation) and to whether Congress intended to occupy the field by prescribing uniform national standards.¹¹⁵

The provisions of the Outer Continental Shelf Lands Act, as amended, do not explicitly oust the state from regulation of pipelines, and the Act does not require that pipelines be sited or constructed, but only provides standards for such activities when they occur. Thus Oregon would not be precluded from refusing to site offshore pipelines.¹¹⁶ However, if Oregon did grant approval for offshore pipelines, federal regulations concerning design, construction, operation and maintenance would be applicable. Since existing federal law does not evince a Congressional intent that federal control be exclusive, and since offshore pipeline regulation is not an area where national uniformity is necessary,¹¹⁷ the state would not be preempted from regulating, but would have concurrent jurisdiction. State lawmakers, however, should avoid legislation that directly conflicts with the application of federal law in the same area.¹¹⁸

THE COMMERCE CLAUSE

The commerce clause of the Constitution grants to Congress the power to regulate foreign and interstate commerce. The state is precluded from regulating interstate commerce activities if such regulation would impede the free flow of goods through the nation, unless some countervailing state interest justifies the interference. The Supreme Court has held that under its police power, the state may legislate "on all subjects relating to the health, life, and safety of their citizens, though the legislation

might indirectly affect the commerce of the country."¹¹⁹ In determining the validity of state regulation over interstate commerce, the federal courts balance federal interests against state interests to see which predominates. To withstand a challenge under the commerce clause, the state regulation must bear a rational relationship to legitimate state interests, and must advance those interests more than it burdens the federal interest of unhindered interstate commerce.¹²⁰ As regards pipelines, the federal interest would be quite high, given the importance of domestic energy sources to the national economy and security. Thus state legislation which heavily burdens pipeline activity would likely fail (i.e., be declared an impermissible interference with interstate commerce) whereas legislation regarding local environmental or safety concerns might not be objectionable.

Section VI

OFFSHORE PIPELINES AND CONSISTENCY WITH THE OREGON

COASTAL MANAGEMENT PROGRAM

FEDERAL CONSISTENCY

The Coastal Zone Management Act, as amended¹²¹ (CZMA) provides that federal activities, development projects, licenses, permits, and grants for activities which significantly affect the state's coastal zone must be consistent with the state's coastal management program.¹²² In respect to offshore pipelines, the CZMA requires that federal licenses or permits for activities described in detail in an exploration, development, or production plan for any area leased under the Outer Continental Shelf Lands Act must be consistent with the Oregon Coastal Management Program (OCMP).¹²³ The 1978 amendments to the OCSLA describe what exploration, development, and production plans must contain,¹²⁴ and the amendments specify that production and development plans must include a description of all facilities (including pipelines) located both on the OCS¹²⁵ and not on the OCS¹²⁶ (i.e., within state owned submerged lands or on shore). The amendments reiterate the consistency requirements for such facilities:¹²⁷

The Secretary shall not grant any license or permit for any activity described in detail in a plan and affecting any land use or water use in the coastal zone...unless the state concurs or is conclusively presumed to concur with the consistency certification accompany such plan...or the Secretary of Commerce makes the finding authorized by section 307 of such act. [CZMA]

Since only those offshore activities affecting the coastal zone which require federal licenses or permits must be consistent with the OCMP, it is necessary to determine whether an offshore pipeline requires a federal

license or permit. The main federal activities regarding pipelines (reviewing section III above) are BLM's granting of a right-of-way and the Materials and Transportation Bureau's approval of pipeline design and plan of installation.¹²⁸ Although neither of these activities is referred to as a "license or permit"¹²⁹ proposed BLM regulations preclude any ambiguity regarding the application of consistency by explicitly providing that a right-of-way granted by the BLM shall be afforded state consistency review.¹³⁰ According to the proposed regulations, an application for a pipeline right-of-way which would affect any land or water use in the coastal zone may not be approved unless it is consistent with the state Coastal Management Program, unless the Secretary of Commerce finds that the granting of the right-of-way would be consistent with the objectives and purposes of the CZMA, or is necessary in the interest of national security.¹³¹ Even if the proposed regulations did not require consistency review for offshore pipeline rights-of-way, the National Oceanic and Atmospheric Administration has promulgated final rules implementing the CZMA which define "federal license or permit" to mean:¹³² "Any authorization, certificate, approval, or other form of permission which any federal agency is empowered to issue to an application."

If the granting of a pipeline right of way were deemed to be a federal license or permit, then any exploration, development, or production plan submitted to the Secretary of the Interior which includes a pipeline that would affect any land or water use in the state's coastal zone must include a certification that the proposed pipeline complies with the Oregon Coastal Management Program¹³³ (OCMP). The BLM could not grant the right-of-way for the pipeline until the state concurs with the certification of

consistency, unless concurrence is conclusively presumed due to state inaction.¹³⁴

Thus all transportation pipelines crossing Oregon's submerged lands (whether or not terminating at a landfall in Oregon) and all transportation lines and gathering lines which are outside the state-owned submerged lands but would nevertheless have a significant impact on the land or water uses in Oregon's coastal zone, would have to be consistent with the OCMP. If the situation arose where Oregon wished to prevent a pipeline which emanated from the federally owned OCS from entering on state submerged lands, DSL could deny an easement for the pipeline,¹³⁵ but further, under the consistency power, Oregon could prevent the federal government (BLM) from issuing a right-of-way across federal owned lands if the proposed pipeline were determined by the state not to be consistent with the OCMP.¹³⁶

STATE CONSISTENCY

According to LCDC rule,¹³⁷ state agencies issuing permits affecting land use must find that the proposed activity is consistent with the statewide planning goals or the acknowledged local comprehensive plan of any affected local government. Thus any state permits necessary for an offshore pipeline would in effect, have to be consistent with the OCMP, which contains the same criteria (local plans or statewide goals) for federal consistency determinations. The rule groups state permits into two categories, class A (major) and class B (minor), and the appendix to the rule lists the class A and class B permits.

As noted above,¹³⁸ DSL's granting of leases or easements on state submerged

or submersible lands are not included as either class A or class B permits; thus DSL may site offshore pipelines without considering either the state-wide goals or acknowledged local comprehensive plans. However, siting of pipelines of sufficient diameter and length¹³⁹ would be afforded consistency review by EFSC, which must additionally apply ten separate standards to every energy facility site application. A problem would arise if oil or gas were found within the three mile state submerged lands, since an offshore pipeline within state lands would presumably be less than 5 miles length (and thus outside of EFSC's jurisdiction). A fill and removal permit from DSL would be required for pipeline burial and dredging at the landfall, and an ocean shore improvement permit from ODOT may be necessary, both of which do require consistency review. Thus offshore pipelines within state waters would probably be afforded consistency review in most, if not all instances, but such review should instead be assured for all aspects of pipeline siting within state waters.

Section VII

RECOMMENDATIONS FOR OREGON

1. EFSC's jurisdiction should be expanded to encompass all offshore pipelines, of whatever length and diameter.
2. OAR 660-31-010 (state permit consistency rule) should be amended to include as class A permits all DSL leases of submerged or submersible lands, and easements across such lands.
3. EFSC should be designated the lead state agency for siting of offshore pipelines. Since EFSC is required to apply particularly stringent standards to all energy facility site applications, and since the granting of a site certificate by EFSC binds all state and local agencies, EFSC should have complete authority over the siting process.
4. DSL should be designated the lead state agency for regulation of design, construction, operation and maintenance of offshore pipelines. In the event that a lease sale is proposed by the Department of the Interior for oil or gas operations off the Oregon coast, DSL should implement regulations regarding such activities.
5. The Department of Transportation's authority to grant permits for pipeline landfalls on Oregon's shoreline should be terminated. ODOT's functions in this regard should be vested in EFSC, and the director of ODOT should consult with EFSC about the suitability of particular areas for pipeline landfalls.
6. Oregon should participate in all National OCS Advisory Board meetings, with the regional and state technical working groups, and with the Inter-governmental Planning Program to ensure exchange of information regarding

all proposed pipeline activities affecting Oregon.

NOTES

1. Some of the most important considerations related to pipeline construction are the size and distribution of the reserve, the anticipated rate of production, distance to shore, depth of the water, contours of the seabed, the capital investment required, and the operating costs. NERBC-RALI Factbook: Onshore Facilities Related to Offshore Oil and Gas Development, p.3.23 (1976).
2. Offshore Oil and Gas Development: Southern California, California Coastal Commission OCS Project Task Force, Vol. I, 81 (1977).
3. NERBC-RALI Factbook, supra note 1 at 3.25.
4. If gathering lines on the OCS were found to have a significant impact on the state's coastal zone, and were also found to be inconsistent with the Oregon Coastal Management Program, then under the consistency provisions of the Coastal Zone Management Act 16 U.S.C. §1456, the state could prevent the issuance of any federal license or permit needed in conjunction with the construction of the gathering lines.
5. 33 U.S.C. §1501 - 1524 (1975).
6. The cost of laying a pipeline can run to millions of dollars per mile, depending on water depth, seabed conditions, type of pipe, etc. NERBC-RALI Factbook, supra note 1 at 3.35.
7. A permit from the Oregon Department of Fish and Wildlife would be required for any blasting or use of explosives within the state owned submerged lands.
8. NERBC-RALI, Onshore Facilities Related to Offshore Oil and Gas Development: Estimates for New England, p.4.76 (1976).
9. Id. p.4.75.
10. Under proposed BLM regulations, a pipeline right-of-way shall not exceed 200 feet in width. Proposed 43 C.F.R. §3340.0-5, 44 Fed. Reg. 6478, 1 Feb. 1979.
11. NERBC-RALI, Factbook, supra note 1 at 3.2.
12. Id. p.3.34.
13. Id. p.3.37.
14. Methods for detecting leaks have been improved through more sensitive pressure valves. The largest pipeline spill occurred in 1967 when a pipeline failed as a result of anchor damage sustained two years earlier. The leak wasn't discovered for 10 days, during which time 167,000 barrels leaked into the ocean. Kash, Energy Under the Oceans, 68 (1973).

15. Gowen, The Environmental Effects of OCS Pipelines, NERBC-RALI Project, 32 (1978).
16. On June 1, 1971 the USGS Conservation Division, Branch of oil and gas operations for the pacific region, issued OCS order #9, which requires, inter alia, that the ocean surface above all oil and gas pipelines be inspected at least once a week for indication of leakage.
17. 43 U.S.C. §1331 et seq. (1953).
18. Id. §1334(c).
19. The Secretary of Transportation is granted regulatory control over gas pipelines by the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §1671 et seq., and has promulgated regulation concerning gas pipelines across the OCS, which are further discussed below. See text accompanying notes 33-35.
20. 43 U.S.C. §1334(5) (e) (1978). Further, in section 21 of the 1978 amendments, the Secretary of the Interior and the Secretary of the Department in which the Coast Guard is operating must require the use of the best available and safest technologies which are economically feasible, whenever failure of the equipment would have a significant effect on safety, health, or the environment. 43 U.S.C. §1347(b) (1978).
21. Proposed 43 C.F.R. §3340.1(a) (1), 44 Fed. Reg. 64780, 1 Feb. 1979.
22. Id. §3340.1(a) (f).
23. Id. §3340.0-5.
24. Id. §3340.1(a) (4).
25. This is not to say that the 1978 amendments or the proposed BLM regulations, if adopted, would supercede or render nugatory the dictates of the memorandum.
26. Memorandum of Understanding Between the Bureau of Land Management and the Geologic Survey for Outer Continental Shelf Pipelines, August 1, 1974.
27. 30 C.F.R. §250.18(c) (1969).
28. Memorandum of Understanding, supra note 26.
29. In addition, state standards must be complied with when pipelines enter state owned submerged lands.
30. Memorandum of Understanding Between the Department of Transportation and the Department of the Interior Regarding Offshore Pipelines, May 6, 1976.

31. Id.
32. 30 C.F.R. §250.19(b) (1969). If gathering lines extended from the OCS onto the state owned submerged lands, the state would have concurrent jurisdiction with the USGS.
33. Memorandum of Understanding, supra note 30. In addition the MTB has control over any subsequent on-line transmission equipment, but not over any subsequent production equipment, which would be under USGS control.
34. 49 C.F.R. §192(1970).
35. 49 U.S.C. §1671 et seq. (1968).
36. 49 C.F.R. §195(1969).
37. Id. §§195.246(b), 192.319(c).
38. Department of Energy Organization Act, P.L. 95-91 §306, 42 U.S.C. §7155(1977).
39. 15 U.S.C. §717f(c) (d) (e) (1938). Although the Department of Energy Organization Act does not specify, it is likely that FERC will control ratemaking for oil pipelines as well as for gas pipelines.
40. 43 U.S.C. §1434(e) (1978).
41. Id. §1334(f) (1) (B).
42. Id. §1334(f) (3). The state may also be involved in FERC Pipeline proceedings. According to the Coastal Zone Management Newsletter of Dec. 20, 1978, OCS State Participation Grants may be available by May or June 1979 to allow funding for, inter alia, state participation in FERC hearings on the amounts of oil or gas to be transported ashore by pipeline, and on expansion of pipeline facilities. President Carter, however, did not provide funding for this program in the budget he submitted to Congress, thus the future of the program is presently uncertain.
43. 33 U.S.C. §403(1899).
44. 43 U.S.C. §1331 et seq. (1953).
45. Id. §1333(f).
46. 33 U.S.C. §403(1899).
47. Id.
48. 33 C.F.R. §323.4-3(a) (1) (1977).
49. 43 U.S.C. §1811 - 1824(1978).
50. Id. §1812(d).

51. Id. §1813(a).
52. Id. §1811(8).
53. Id. §1814(b).
54. Id. §1815(b).
55. Id. §1842.
56. Id.
57. The Act provides defenses to fishermen's claims; if nautical charts recorded the existence of pipelines, then the fishermen's claims may be reduced or perhaps denied. 43 U.S.C. §1844(1978).
58. 43 U.S.C. §1843(b) (1978).
59. Id. §1847.
60. Id. §1802 (5) (6) (1978).
61. Id. §1352. The USGS has published proposed rules on the OCS oil and gas information program, which more fully implement the mandate of the amendments. Proposed 30 C.F.R. §252.1 - 252.7, 44 Fed. Reg. 3524 Jan. 17, 1979.
62. Id. §1346.
63. Id. §1352(a) (1) (A).
64. Id. §1352(a) (2).
65. Id. §1352(b) (1) (2).
66. Id. §1352(b) (2).
67. Id. §1352(d) (1). See also proposed 43 C.F.R. §3300.2, 44 Fed. Reg. 6467, 1 Feb. 1979.
68. Id. §1352(d) (2).
69. Id. §1346(a) (1).
70. Id. §1346(a) (3).
71. Proposed 43 C.F.R. §3331.1(d), 44 Fed. Reg. 6478, 1 Feb. 1979.
72. Id. §1346(e).
73. Letter of March 12, 1979, from Secretary of Interior Andrus to Oregon Governor Atiyeh.
74. See text accompanying note 59.

75. 43 U.S.C. §1301 et seq. (1953).
76. Id. §1311(a).
77. Id. §1301(a) (2).
78. Since the federal laws regulating pipelines are not exclusive nor intended to preempt state regulation, the supremacy clause of the US Constitution does not prohibit state regulatory activity. See section V on preemption.
79. Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892); Shively v. Bowlby, 152 U.S. 1 (1893).
80. The scope of the public trust doctrine is usually limited to tidelands (submersible lands washed by the tides) and to lands beneath interior navigable waters, e.g. rivers or lakes. The doctrine has not been extended to cover submerged ocean lands, but is limited to the area between the mean low tide line and the mean high tide line. This discussion deals solely with such tidelands.
81. Corvallis & Eastern R. Co. v. Benson, 61 OR 359(1912); Anderson v. Columbia Contract Co. 94 OR 171 (1919).
82. Some courts have found that certain activities, although inconsistent with the public trust, do not materially interfere with public rights, or that the interference nonetheless confers a substantial public benefit and should be allowed. Corvallis & Eastern R. Co. v. Benson, supra note 81.
83. 49 C.F.R. §195.246(1969), ORS 274.710(3) (1967), ORS 390.715(1) (1969).
84. There has been a considerable amount of recent litigation concerning whether DSL may grant a fill and removal permit in tidal areas for a non-water related use. DSL granted the city of North Bend a permit in 1977 to fill part of an estuary to enable expansion of airport runways. The action was challenged, and the Oregon Court of Appeals wrote two opinions on the case, the second of which held that the Oregon fill and removal laws (ORS 541.605-665) were a codification of the public trust doctrine, and that non-water related undertakings violated the public trust and Oregon law. 34 Or App 853 (1978). The Oregon Supreme Court, in an opinion of February 13, 1979 (unpublished at the time of this writing), upheld the decision of the Court of Appeals in denying the fill permit, but found that the public trust doctrine and the Oregon fill and removal law do not necessarily prohibit all fills for non-water related uses. The Court, speaking through Justice Holman, found that DSL had failed to show that the public need for the runway extension outweighed any detriment to navigation, fishing, or recreation. It appears that the court will be applying a balancing test to determine if activities which are not within the public trust are nonetheless permissible because there is a substantial public benefit conferred by the activity in question.
85. Oregon Coastal Management Program, 216 (1977).

86. ORS 273.551(3) (1974).
87. ORS 274.040 (1961).
88. ORS 274.710 (1967).
89. ORS 274.760 (1961).
90. ORS 274.710(3) (1967).
91. DOGMI has authority to grant permits for drilling activities on Oregon's submerged lands. In addition, DOGMI acts as a technical advisor in the DSL leasing process.
92. ORS 274.760 (1961).
93. OAR 660-31-005 to 035 promulgated Sept. 15, 1978.
94. OAR 660-15-000 to 010.
95. 49 C.F.R. §§195.246(b), 192.319(c). See text accompanying notes 36, 37.
96. 33 U.S.C. §403 (1899). See text accompanying note 47.
97. ORS 541.605-665 (1971).
98. ORS 541.625(2) (1967). Among the officials are the State Geologist, the State Fish and Wildlife Director, the State Forester, the director of the Department of Environmental Quality, and the Water Resources Director, inter alia.
99. ORS 390.605 et seq. (1967).
100. This jurisdiction is subordinate to DSL's jurisdiction to lease or sell the tidelands or submerged lands. ORS 390.635 (1969).
101. ORS 390.715(1) (1969).
102. ORS 390.725 (1969).
103. ORS 469.350 (1975).
104. ORS 469.300(10) (e) (1975).
105. OAR 345-75-020 (19 July 1977) requires that EFSC make a determination that all applicable standards for the conduct of the proposed facility have been met by the applicant.
106. OAR 345-75-025 (19 July 1977) lists the ten standards, which include:
1. There must be a need for the proposed facility.
 2. Risk to public health or safety will be reduced to an

extent reasonably practicable.

3. Foreseeable adverse impacts on the environment will be reduced to an extent reasonably practicable.
4. Beneficial use of wastes will be made.
5. Construction and operation of the facility will be carried out in conformance with the statewide planning goals and local comprehensive land use plans.
6. Construction and operation of the facility will avoid adverse impacts on historical or archaeological sites.
7. Existing water rights of other persons will not be infringed upon.
8. The applicant has the expertise to construct, operate and retire the facility.
9. The applicant has sufficient funds for construction, operation and retirement of the facility.
10. The applicant has identified the socio-economic impacts on the vicinity, and the vicinity can absorb the resultant growth.

107. ORS 469.400(3) (1977).

108. ORS 469.400(5) (1977).

109. A.G. Opinion No. 7653, 27 July 1978.

110. ORS 469.400(1) (1977).

111. U.S. CONST. art.VI, cl.2.

112. U.S. CONST. art.I, §8, cl.3.

113. U.S. CONST. amend. X.

114. The Outer Continental Shelf Lands Act, as amended, is the primary federal law governing pipelines. See text accompanying notes 17-48.

115. See Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

116. Although the federal government could not force Oregon to site pipelines across the state owned submerged lands, nonetheless considerable pressure could be exerted on the state to allow pipelines. An example of federal pressure occurred in California regarding Exxon's development and production plans for oil and gas from the Santa Ynez Unit. The Department of the Interior approved Exxon's development plans for a pipeline running from the OCS across state submerged lands to shore. In addition Interior approved Exxon's alternative

plan to develop and process the recovered hydrocarbons entirely in federal waters if the state either refused permission for the pipeline, or granted approval subject to conditions which Exxon might consider oppressive. California's Coastal Commission granted approval subject to Exxon's building a 140 mile onshore pipeline to a refinery. Immediately prior to the Commission vote on whether to allow Exxon's proposal a telegram from Under Secretary of Interior Frizzell was received which warned that Interior would grant Exxon permission for an offshore processing facility outside the state's jurisdiction (with the concomitant increased environmental risk to the state) if Exxon rejected the conditions. Subsequently Exxon filed suit in Federal District court in Los Angeles to set aside the commission's decision. For a report of this controversy see Offshore Oil and Gas Development; Southern California, California Coastal Commission OCS Project Task Force, Vol II, 781-811 (1977).

117. Although uniformity in certain aspects of pipeline design and construction may be needed so as to prevent unnecessary expenditures for two radically different sets of standards for the same pipeline on federal land and on state land, nonetheless the Coastal Zone Management Act, as amended (16 U.S.C. §1451 et seq. 1972) indicates Congress' intent to expand the states' control over their respective coastal zones.
118. Oregon could also enter into a cooperative agreement with the Secretary of the Interior regarding planning, regulating, and monitoring offshore pipelines. Section 19 of the 1978 amendments to the Outer Continental Shelf Lands Act (43 U.S.C. §1345(e) (1978)) provides that the Secretary of the Interior may enter into cooperative agreements with the states for regulating offshore activities such as pipelines. Such an arrangement could help avoid inconsistent regulatory standards and could ensure more effective control and efficient operation of offshore pipelines.
119. Huron Portland Cement Co. V. City of Detroit, 362 U.S. 440, 443-44 (1960).
120. See Pike v. Bruce Church, Inc., 397 U.S. 137, (1970).
121. 16 U.S.C. §1451 et seq. (1972).
122. Id. §1456. For a discussion of the consistency provisions of the CZMA, see the consistency paper of this Task Force report written by this author.
123. Id. §1456(c) (3) (B).
124. The Department of the Interior, U.S. Geologic Survey, has published proposed rules concerning the contents of exploration, development, and production plans. Proposed 30 C.F.R. §250.34-1 - 250.34-7, 44 Fed. Reg. 3513-24, Jan 17, 1977. The proposed regulations deal with, inter alia, a discrepancy between the amendments to the OCSLA and the CZMA. Under the 1978 amendments the Secretary of the Interior must approve or disapprove an exploration plan within 30 days

of its submission, and must approve or disapprove a development or production plan within 120 days in some cases (or 60 days after the release of a final environmental impact statement). The CZMA, on the other hand, allows the state up to six months to approve or disapprove of any exploration, development, or production plan which affects the state's coastal zone. To resolve this situation, the proposed rules specify that the Secretary may conditionally approve an exploration plan subject to the state's concurrence, but the Secretary must disapprove any development or production plan until the state certifies the proposed activity is consistent with the Coastal Management Program. Proposed 30 C.F.R. §§250.34-1(g), 250.34-2(g) (2) (iii).

125. 43 U.S.C. §1351(c) (2) (1978).
126. Id. §1351(a) (2).
127. Id. §1351(d).
128. A federal permit from the Corps of Engineers is required for dredging and filling, but as discussed in Section III, the Corps' jurisdiction over pipeline activities does not extend to the OCS but is limited to the three mile territorial sea. See text accompanying notes 43-48.
129. In addition, the 1978 amendments to the OCSLA refer, at various points, to "the permit, license, easement, right-of-way, or other grant of authority..." (see, e.g., 43 U.S.C. §1334(f) (1) (B) (1978)). Under strict statutory construction, a right-of-way is not a license or a permit, and vice versa.
130. Proposed 43 C.F.R. §3340.2-2(e), supra note 10.
131. Id.
132. 15 C.F.R. §930.51, 43 Fed. Reg. 10517(1978). In addition, the Federal Administrative Procedure Act (5 U.S.C. §551(1946)), which governs many federal agency activities, also broadly defines "license" to mean: "The whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."
133. 16 U.S.C. §1456(c) (3) (B) (1972).
134. The state has a maximum of 6 months before concurrence in conclusively presumed, 16 U.S.C. §1456(c) (3) (B) (ii) (1978). Additionally, BLM could grant the right-of-way notwithstanding the state's failure to concur if the Secretary of Commerce finds that the granting of the right-of-way is consistent with the objectives or purposes of the CZMA, or is necessary in the interest of national security. 16 U.S.C. §1456(c) (3) (B) (iii) (1972).
135. The Submerged Lands Act, while granting the coastal states ownership of submerged lands out to three miles, also reserved to the President or to Congress the right to condemn any portions of such lands (upon

payment of just compensation) in the event of war or when necessary for national defense. 43 U.S.C. §1314(b) (1970). If at some future time production of offshore oil or gas were declared to be necessary in the interests of national defense, then the federal government could condemn part or all of the state submerged lands in order to accommodate petroleum transportation facilities.

136. It must be remembered that the issuance of a federal license or permit must "significantly affect" the state's coastal zone before consistency with the state coastal management program is required. 15 C.F.R. §930.50 (1978). If the state were overly chary of offshore pipelines and refused to concur with consistency certification, the Secretary of Commerce could override the state's refusal on the amorphous grounds provided by the CZMA. See note 134.
137. OAR 660-31-005 to 035, supra note 93.
138. See notes 93-98 and text accompanying.
139. See text accompanying note 104.

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