

REAPPRAISAL OF STATE INTERESTS IN OUTER CONTINENTAL SHELF LEASE SALES UNDER THE COASTAL ZONE MANAGEMENT ACT: *SECRETARY OF THE INTERIOR v. CALIFORNIA*

The oil and gas resources of the outer continental shelf (OCS)¹ represent both a vital source of energy² and a potential hazard³ for surrounding ecosystems. In an attempt to balance these competing concerns, Congress passed the Coastal Zone Management Act (CZMA)⁴ which encourages states to accept managerial responsibility

1. 43 U.S.C. § 1331(a) (1982) defines outer continental shelf as "all submerged lands lying seaward and outside of the areas of lands beneath navigable waters [title to which is held by the coastal states] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." *Id.* The term "outer continental shelf" does not include submerged lands that are within three miles of a state's coast. *Id.* at § 1301. For a discussion of federal and state ownership of submerged lands within the jurisdiction of the United States, see Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107, 1109-12 (1976).

2. See H.R. REP. NO. 590, 95th Cong., 1st Sess. 53 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1450, 1460. See also BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED 1981 OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE OFFSHORE CENTRAL AND NORTHERN CALIFORNIA OCS SALE No. 53, 1-1 (1980).

3. Possible hazards include "oil spills, air pollution from hydrocarbon emissions generated by loading of barges or tankers with oil, obstruction of shipping channels, adverse effects of energy production related industrial facilities on scenic coastal areas with tourist based economies and fouling of fishing gear on underwater pipelines and other facilities." Deller, *Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations Be Consistent With State Coastal Zone Management Programs?*, 14 U.C.D.L. REV. 105, 113 n.33 (1980).

4. Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-64 (1982)). The congressional declaration of policy is contained in § 1452 of the CZMA which provides in pertinent part:

The Congress finds and declares that it is the national policy (1) to preserve, protect, develop, and where possible to restore or enhance, the resources of the nation's coastal zone for this and succeeding generations; (2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of land and water resources of the coastal zone giving full consideration to ecological,

for their respective coastal zones⁵ and at the same time provides limited assurance of the compatibility of federal activities in adjacent areas.⁶ Congress and the courts, however, frequently criticize the CZMA for its ambiguity and lack of effectiveness in resolving clashes between federal energy development policies and state environmental concerns.⁷ Reviewing one such conflict, the Supreme Court in *Secre-*

cultural, historic, and esthetic values as well as to needs for economic development, . . . (3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decisionmaking; and (4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone.

Id.

5. *Id.* Section 1453 defines "coastal zone" as:

[T]he coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, saltmarshes, wetlands, and beaches. The zone extends, in Great Lakes Waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shoreline only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is held in trust by the Federal Government, its officers or agents.

Id. Cf. Ball, *Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf*, 12 ENVTL. L. 620, 630-37 (1982) (criticizes coastal zone boundaries as useless "lines drawn on water").

The territorial sea for states bordering the Atlantic and Pacific Oceans extends three geographical miles seaward from the coastline. *United States v. California*, 381 U.S. 139, 145-48 (1965).

See infra text accompanying notes 41-45 for a discussion of the incentives offered by the federal government to coastal states.

6. *See infra* notes 37-63 and accompanying text.

7. For example, Gerry E. Studds, Chairman of the House Subcommittee on Oceanography has stated, "I reread the statute several times verbatim, which is something none ought to be condemned to do, and I think particularly that sections 307 and 308 challenge anyone whose native tongue is English to discern what Congress meant when it wrote those sections." *Proposed Amendments to the Coastal Zone Management Act, Hearings on H.R. 6956, H.R. 6979 Before the Subcomm. on Oceanography of the Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st & 2d Sess. 88 (1980).

In American Petroleum Inst. v. Knecht, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), the district court wrote:

[F]or the high purpose of improving and maintaining felicitous conditions in the coastal areas of the United States, the Congress has undertaken a legislative solution, the application of which is so complex as to make it almost wholly unmanage-

*tary of the Interior v. California*⁸ determined that OCS oil and gas lease sales are not activities directly affecting adjoining coastal zones within the meaning of the CZMA and thus need not be consistent with state coastal zone management programs.⁹

In *Secretary of the Interior v. California*,¹⁰ respondents¹¹ challenged the Department of the Interior's (DOI) plans to sell OCS oil and gas leases¹² without providing a review of the sale's consistency with Cali-

able. In the course of the legislative process, there obviously come into conflict many competing interests which, in typical fashion, the Congress sought to accommodate, only to create thereby a morass of problems between the private sector, the public sector, the federal bureaucracy, the state legislature, the state bureaucracy, and all of the administrative agencies appurtenant thereto.

456 F. Supp. at 896.

8. 104 S. Ct. 656 (1984).

9. *Id.* at 672. 16 U.S.C. § 1453(12) (1982) defines "management program" as: [I]nclud[ing], but not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adapted by the state in accordance with the provisions of this chapter setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

Id.

See infra notes 46-52, 58-59 and accompanying text for an explanation of the CZMA's consistency requirements.

10. 104 S. Ct. 656 (1984). *See infra* notes 77-105 and accompanying text for a detailed discussion of this opinion.

11. Respondents are plaintiffs in the original action. The State of California and numerous environmental groups initiated the action by filing separate but comparable complaints. *Secretary of the Interior v. California*, 104 S. Ct. 656, 660 n.3 (1984). Plaintiffs included the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. *California ex rel. Brown v. Watt*, 520 F. Supp. 1359, 1365 (C.D. Cal. 1981), *modified*, 683 F.2d 1253 (9th Cir. 1982), *rev'd sub nom. Secretary of the Interior v. California*, 104 S. Ct. 656 (1984).

Various political subdivisions of the State of California intervened as plaintiffs in the suit brought by the state. 520 F. Supp. at 1365. Among these were the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Cruz, and Sonoma, and the cities of Brisbane, Los Angeles, San Luis Obispo, Santa Cruz, Santa Monica, and Seaside. *Id.*

Defendants named in addition to the Secretary of the Interior were the United States Department of the Interior, the United States Bureau of Land Management, and Robert Burford (Director, United States Bureau of Land Management). *Id.*

Petroleum concerns intervening as parties defendant included the Western Oil and Gas Association, Amoco Production Co., Atlantic Richfield Co., Cities Service Co., Conoco, Inc., Elf Aquitaine Oil and Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. *Id.*

12. In 1977 DOI planned Lease Sale No. 53 which involved 2036 OCS tracts off the

fornia's coastal zone management program.¹³ The district court¹⁴ enjoined the lease sale, finding that the CZMA mandated a consistency review.¹⁵ The Court of Appeals for the Ninth Circuit¹⁶ affirmed the district court decision.¹⁷ A divided Supreme Court,¹⁸ repudiating the

California coast. 104 S. Ct. at 659. DOI requested state and federal agencies to report on potential energy reserves in this area and consulted with bidders, federal and state agencies, environmental organizations, and the public as to which of the tracts it should offer for lease. *Id.* DOI then selected 243 tracts, including 115 tracts in the Santa Marin Basin. *Id.*

In July 1980, the California Coastal Commission, a state entity responsible for the administration of the state's coastal management plan, determined that Lease Sale No. 53 was an activity "directly affecting" the California coast and demanded a consistency determination pursuant to the CZMA. *Id.* DOI rejected California's finding that the lease sale would "directly affect" the state's coastal zone, but eliminated from the proposed lease sale all OCS land but the 115 tracts in the Santa Marin Basin. *Id.*

In December 1980, the California Coastal Commission found that revised Lease Sale No. 53 "directly affected" the coastal zone and concluded that DOI should remove an additional 29 tracts from the lease sale. *Id.* at 659-60 & n.1. California Governor Brown argued for the exclusion of 32 additional tracts. *Id.* at 660 & n.2.

In April 1981, however, DOI again found that Lease Sale No. 53 would not "directly affect" the coastal zone and proceeded with the lease sale. *Id.*

See infra note 48 for a discussion of the procedure for implementing the CZMA.

13. Respondents asserted that petitioners violated five federal statutes. California *ex rel.* Brown v. Watt, 520 F. Supp. 1359, 1366 (C.D. Cal. 1981), *modified*, 683 F. 2d 1253 (9th Cir. 1982), *rev'd sub nom.* Secretary of the Interior v. California, 104 S. Ct. 656 (1984). The most important of these claims within the context of this Comment involves § 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1) (1982). *See infra* notes 37-52 and accompanying text for a discussion of the history and interpretation of this statute.

The other statutes at issue were the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 4321-4447 (1982), the Endangered Species Act, 16 U.S.C. §§ 1361-1407 (1982), the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1982), and the National Environmental Policy Act, 43 U.S.C. §§ 4321-4447 (1982). 520 F. Supp. at 1366.

14. California *ex rel.* Brown v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981), *modified*, 683 F. 2d 1253 (9th Cir. 1982), *rev'd sub nom.* Secretary of the Interior v. California, 104 S. Ct. 656 (1984).

15. The district court analyzed the policies, statutory purpose, and legislative history of the CZMA and concluded that "the consistency requirements should apply when a federal agency initiates a series of events which have consequences in the coastal zone. Any other interpretation would thwart the purposes of the Act." 520 F. Supp. at 1374. Although the district court declined to hold that lease sales would always "directly affect" a state's coastal zone and thus require regular consistency determinations, the court observed that lease sales "would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical." *Id.* at 1380.

The district court ruled against respondent's other four statutory claims. *Id.* at 1389.

16. California *ex rel.* Brown v. Watt, 683 F. 2d 1253 (9th Cir. 1982), *rev'd sub nom.* Secretary of the Interior v. California, 104 S. Ct. 656 (1984).

17. In upholding the district court's interpretation of the CZMA, the Ninth Circuit

lower courts' interpretation of the CZMA, reversed.

The states and the federal government long have shared the power to regulate submerged lands within the jurisdiction of the United States.¹⁹ The Supreme Court declared in 1845 that title to the submerged lands beneath the marginal sea²⁰ is vested in the states.²¹ The federal government, with only minor exceptions,²² acquiesced in state ownership of these lands for an entire century.²³ By 1945, however, the federal government desired control of this territory and challenged the states' do-

not only ruled that Lease Sale No. 53 would directly affect the coastal zone, but observed that the sale:

[E]stablish[es] the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis.

683 F.2d at 1260.

18. 104 S. Ct. at 656 (5-4 decision). See *infra* notes 77-105 and accompanying text for a complete discussion of the Court's opinion.

19. For a more detailed discussion of the history of the OCS federal-state jurisdictional conflict, see E. BARTLEY, *THE TIDELANDS OIL CONTROVERSY* (1953); Note, *State's Rights in the Outer Continental Shelf Denied by the United States Supreme Court*, 30 U. MIAMI L. REV. 203 (1975).

20. The marginal sea represents the three-mile wide area of water surrounding a nation's coastline. See *The Schooner Exchange v. M'Fadden*, 11 U.S. (7 Cranch) 116, 137 (1812) (dictum). See generally Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597 (1959) (evolution of the three mile marginal sea).

21. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). State title to the submerged lands was grounded upon the theory that ownership passed from England to the states as independent sovereigns at the time of the American Revolution. It was actually unclear, however, whether the marginal sea was recognized to have a territorial component in 1776. E. BARTLEY, *supra* note 19, at 19-22. This fact was pivotal in the later modification of *Pollard's Lessee* in *United States v. California*, 332 U.S. 19 (1947). See *infra* notes 25-26 and accompanying text.

22. The Commerce clause and national defense powers gave the federal government limited powers in the marginal sea. See *Gibson v. United States*, 166 U.S. 269, 272 (1897); E. BARTLEY, *supra* note 19, at 39. The states nonetheless retained title to the lands beneath the marginal sea. *Gibson*, 166 U.S. at 272; E. BARTLEY, *supra* note 19, at 41.

23. During this time, the federal government allowed California, Texas, and Louisiana to issue mining permits for OCS lands beneath the marginal sea. E. BARTLEY, *supra* note 19, at 99, 128-31; Krueger, *An Overview of Changes Occurring in the Law of the Sea—Implications for Federal-State Relation*, 10 NAT. RESOURCES LAW 226, 228-29 (1977). Furthermore, the federal government issued no mining permits of its own because it assumed that title to these lands was vested in the states. H.R. REP. NO. 1778, 80th Cong. 2d Sess., App. I, reprinted in 1953 U.S. CODE CONG. & AD. NEWS 1415, 1417.

minion.²⁴ The Supreme Court resolved this dispute in *United States v. California*²⁵ by stripping the states of their title to the marginal sea.²⁶

Congress responded to the Supreme Court's decision by enacting the Submerged Lands Act²⁷ and the Outer Continental Shelf Lands Act (OCSLA)²⁸ in 1953. The Submerged Lands Act restored the states' title to the bed and the resources of the marginal sea.²⁹ The Act reaffirmed the federal government's "paramount powers"³⁰ over this area, but explicitly excluded control over resources from those powers.³¹

24. The federal government took two steps to perfect its claim to the marginal sea. President Truman issued a proclamation asserting jurisdiction over the OCS. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945), reprinted in 59 Stat. 884 (1945). For a complete discussion of the Truman Proclamation, see Hollick, *U.S. Oceans Policy: The Truman Proclamation*, 17 VA. J. INT'L L. 23 (1976). Although the proclamation had no effect upon the states' title to the marginal seabed, it forestalled future state claims to the OCS. E. BARTLEY, *supra* note 19, at 142.

The United States also filed suit against California seeking a declaration of the federal government's rights in the marginal sea and an injunction preventing the state from leasing further offshore oil tracts. *United States v. California*, 332 U.S. 19, 38-39 (1947); Breeden, *supra* note 1, at 1110-11. See *infra* notes 25-26 and accompanying text for further discussion of *United States v. California*.

The federal government renewed its interest in the marginal sea after post-World War II technology permitted more extensive exploration of these lands and unveiled the economic potential of OCS resources. See H.R. REP. NO. 590, *supra* note 2, at 56; Krueger, *The Development and Administration of the Outer Continental Shelf Lands of the United States*, 14 ROCKY MTN. MIN. L. INST. 643, 675 (1960).

25. 332 U.S. 19 (1947).

26. The Court found that a territorial concept of the marginal sea was merely a "nebulous suggestion" at the time of the Revolution. *Id.* at 32. The Court distinguished *Pollard's Lessee* on the ground that the land at issue in that case was submerged under inland waters where local concerns supported control by the state. *Id.* at 34-36. In the marginal sea, however, the Court declared that local concerns must yield to considerations of national sovereignty. *Id.* Specifically, Justice Black found that the federal government must have exclusive control over this area to execute its duties under the Constitution and as a member of the international community. *Id.* at 29, 34-40. The Court held that "full dominion over the resources of the soil under [the marginal sea] including oil," is incidental to the government's "paramount rights." *Id.* at 38-39. Since *United States v. California*, the Supreme Court has reaffirmed the doctrine of paramount powers. See *United States v. Maine*, 420 U.S. 515 (1975); *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 669 (1950).

27. Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1982)).

28. Pub. L. No. 67-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356 (1982)).

29. 43 U.S.C. § 1311(b)(1) (1982).

30. See *supra* note 26.

31. 43 U.S.C. § 1314(a) (1982).

The OCSLA established federal jurisdiction over the OCS and its mineral resources beyond the three mile marginal sea.³² Specifically, the Act authorized the Secretary of the Interior to lease OCS mineral resources³³ and gave the Secretary broad discretion to promulgate leasing regulations.³⁴ This legislation focused closely upon the "urgent need" to explore and develop OCS oil and gas resources³⁵ and largely excluded state participation in this development.³⁶

Congress passed the CZMA in 1972 in an attempt to halt deterioration of the coastal zone³⁷ caused by OCSLA-facilitated³⁸ OCS develop-

32. *Id.* at § 1332(a).

33. *Id.* at § 1337(a). Authorization of federal leasing of OCS oil and gas resources was a major impetus for passage of the Act because the federal government previously had lacked this power. H.R. REP. NO. 590, *supra* note 2, at 57.

34. 43 U.S.C. § 1334(a)(1) (1982). For a detailed explanation of OCS leasing procedure under the OCSLA, see Linsley, *Federal Consistency and Outer Continental Shelf Oil and Gas Leasing: The Application of the "Directly Affecting" Test to Pre-Lease Sale Activities*, 9 B.C. ENVTL. L. REV. 431, 447-53 (1980). See also McDonald, *Federal Energy Resource Leasing Policy*, 18 NAT. RESOURCES J. 747 (1978) (analysis of federal leasing policy).

35. H.R. REP. NO. 590, *supra* note 2, at 53.

36. The Secretary exercised exclusive managerial authority over the OCS and had no obligation to consult the states regarding his decisions. S. REP. NO. 277, 94th Cong., 1st Sess. 3 (1975), *reprinted in* SENATE COMM. ON COMMERCE, 94th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, AS AMENDED IN 1974 AND 1976 WITH A SECTION-BY-SECTION INDEX 729 (Comm. Print 1976) [hereinafter cited as CZMA LEGISLATIVE HISTORY]. Furthermore, the states received no lease revenues, 43 U.S.C. §§ 1334, 1337, 1338 (1982), nor were they allowed to extend their taxing jurisdiction to the OCS. *Id.* § 1333(a)(2)(A). The Act does require that state laws consistent with federal laws be applied to OCS activities. *Id.* The federal government, however, administers these state laws. *Id.*

Congress passed the OCSLA without a major conflict because certain controversial sections of the Submerged Lands Act drew the majority of congressional and public attention. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 23 (1953).

37. CZMA LEGISLATIVE HISTORY, *supra* note 36, at 736-37; see also *supra* note 4 (congressional policy underlying the CZMA).

38. One congressional report noted that the 1953 OCSLA provided "an open-ended grant of authority to the Secretary of the Interior to proceed with leasing on the Outer Continental Shelf, [and] was based on . . . expectations that offshore production would be a relatively small supplement to the continued reliance on production from onshore fields." H.R. REP. NO. 590, *supra* note 2, at 102.

The same report observed that the broad grants of federal authority under the OCSLA were:

[E]ssentially a carte blanche delegation of authority to the Secretary of the Interior. The increased importance of OCS resources, the increased consideration of environmental and onshore impacts and emphasis on comprehensive land use planning,

ment.³⁹ The CZMA encourages states to develop comprehensive management programs for their coastal zones.⁴⁰ Because state participation under the CZMA is voluntary,⁴¹ the Act provides two incentives. First, the federal government will provide grants to cover a percentage of the management program's administrative costs.⁴² Second, once the Secretary of Commerce⁴³ approves a coastal plan,⁴⁴ the CZMA empowers the state to require that specified federal activities be consistent with that plan.⁴⁵

The CZMA contains several consistency provisions.⁴⁶ One of these

require that Congress detail standards and criteria for the Secretary to follow in the exercise of his authority.

Id. at 54.

39. A massive blowout of an oilwell in the Santa Barbara Channel in 1969 focused national attention on OCS leasing. See generally Krueger, *International and National Regulation of Pollution from Offshore Oilwell Production*, 7 S.D.L. REV. 541 (1970); Utton, *A Survey of National Laws on The Control of Pollution from Oil and Gas Operation on the Continental Shelf*, 9 COLUM. J. TRANSNAT'L L. 331 (1970); Walmsey, *Oil Production Problems Arising Out of Exploitation of the Continental Shelf: The Santa Barbara Disaster*, 9 S.D.L. REV. 514 (1972); Note, *The Oil Men and the Sea: The Future of Ocean Resource Development in Light of Santa Barbara—Some Proposals to Rectify Continuing Inadequate Federal Regulation of Offshore Oil Leasing*, 11 ARIZ. L. REV. 677 (1969).

A 1969 report by the Commission of Marine Science, Engineering and Resources (the Stratton Commission) also detailed the increasing demands upon the coastal zone and expedited passage of the CZMA. See Yi, *Application of the Coastal Zone Management Act to Outer Continental Shelf Lease Sales*, 6 HARV. ENVTL L. REV. 159, 162-63 (1982).

40. See 16 U.S.C. § 1452 (1982).

41. See *id.* at § 1451.

42. *Id.* at § 1455(a). For a complete discussion of federal grant procedures under the CZMA, see Comment, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401, 417-20 (1984).

43. Congress delegated the authority to administer the CZMA to the Department of Commerce (DOC). 16 U.S.C. § 1463 (1982). The DOC has directed that the National Oceanic and Atmospheric Administration (NOAA), a subdivision of the DOC, enforce the CZMA through the Office of Coastal Zone Management, a subdivision of the NOAA. 15 C.F.R. § 923.2(b) (1985). Recent legislation would establish the NOAA as an independent agency. H.R. 3381, 98th Cong., 1st Sess. (1983); see *NOAA as an Independent Agency: Hearings on H.R. 3381 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 98th Cong., 1st Sess. 1-207 (1983).

44. Approval by the Secretary of Commerce ensures that the state management program sufficiently embraces national concerns. See 16 U.S.C. § 1455(c) (1982).

45. 16 U.S.C. § 1456(c) (1982). See *infra* notes 46-52 and accompanying text for a discussion of the consistency provisions and the federal activities to which they apply.

46. The CZMA currently includes five distinct consistency provisions which apply to various federal activities: (1) § 307(c)(1), 16 U.S.C. § 1456(c)(1) (1982) (activities

provisions, section 307(c)(1),⁴⁷ applies to federal activities that “directly affect” a state’s coastal zone and requires that those federal activities be consistent with the state programs “to the maximum extent practicable.”⁴⁸ This language, particularly the phrase “directly affect,” is nebulous⁴⁹ and neither the legislative history⁵⁰ nor the administrative interpretations⁵¹ of the section clarify the type of federal activities

conducted or supported by a federal agency which directly affect the coastal zone); (2) § 307(c)(2), 16 U.S.C. § 1456(c)(2) (federal development projects within the coastal zone); (3) § 307(c)(3)(A), 16 U.S.C. § 1456(c)(3)(A) (1982) (activities of applicants for federal licenses or permits where the proposed activities will affect land or water uses in the coastal zone); (4) § 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B) (1982) (plans for the “exploration or development of, or production from any area that has been leased under the [OCSLA]” and affects land or water uses in the coastal zone); and (5) § 307(d), 16 U.S.C. § 1456(d) (1982) (federal programs which fund state and local government projects that affect the coastal zone). This Comment will focus only on § 307(c)(1) and (c)(3). For an analysis of all consistency provisions, see Linsley, *supra* note 34.

47. 16 U.S.C. § 1456(c)(1) (1982). Section 307(c)(1) provides that “[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practical, consistent with approved state management programs.” *Id.* See *infra* note 48 for a discussion of the application of this provision.

48. 16 U.S.C. § 1456(c)(1) (1982). The Office of Coastal Zone Management has promulgated regulations establishing a detailed procedure for applying § 307(c)(1) to a federal activity. See 15 C.F.R. § 923.2(b) (1985). First, the federal agency determines whether its activity will have a “direct effect” on the coastal zone management program. *Id.* at § 930.33(a). If so, the federal agency must provide a formal notice or consistency determination to the administrator of the state program that it will conduct its activities in a manner consonant with the state program. *Id.* at § 930.34(a). Should the federal agency determine that its activity will not have a direct effect on the state program, it must provide the state with a formal written notice of this conclusion called a “negative determination.” *Id.* at § 930.35(d). If a dispute arises as to the accuracy of a consistency determination or negative determination, either party may submit the matter to the Secretary of Commerce for mediation. *Id.* at § 930.110-.116.

49. See *supra* note 7.

50. The original CZMA bills generated by the House and the Senate applied § 307(c)(1)’s consistency requirement to federal activities “in” the coastal zone. See H.R. 14146, 92d Cong., 2d Sess. § 307(c)(1) (1972), 118 CONG. REC. 26,487 (1972); S. 3507, 92d Cong., 2d Sess. § 314(b)(1) (1972), 118 CONG. REC. 14,187 (1972). The House-Senate Conference Committee replaced “in the coastal zone” with the “directly affecting” standard and both houses of Congress passed the bill without noting the change. H. CONF. REP. NO. 1544, 92d Cong., 2d Sess. 8, 15 reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4822, 4824.

Evidence exists suggesting that the Conference Committee’s language did not broaden § 307(c)(1). See, e.g., 118 Cong. Rec. 14,180 (1972) (various statements restricting the jurisdiction of the CZMA). The Conference Committee also rejected two sections of the original House bill that applied the consistency requirements to OCS leasing. H. CONF. REP. NO. 1544, *supra* at 8, 31.

51. In 1976 the NOAA issued the first proposed CZMA regulations, but failed to

Congress intended to subject to this consistency requirement.⁵²

Another consistency provision, section 307(c)(3)(A),⁵³ applies to nongovernmental applicants for federal licenses or permits to conduct activities affecting a state's coastal zone. Applicants for such licenses or permits must certify that their activities will be conducted in a manner consistent with state management programs.⁵⁴ If a state disagrees with the certification of consistency, the federal government will deny the application unless the Secretary of Commerce overrides the state's objection.⁵⁵

Congress amended the CZMA in 1976.⁵⁶ The amendments represented a growing congressional recognition that OCS development

define "directly affecting." 41 Fed. Reg. 42,878-79 (1976). Rather, the NOAA determined that "[the] terms will speak for themselves and difficulties will be addressed on a case by case basis." *Id.* at 42,880. In 1978 the NOAA construed § 307(c)(1) to apply to "all federal actions which were capable of *significantly affecting* the coastal zone" (emphasis added). 43 Fed. Reg. 10,510, 10,511 (1978); *see also* Linsley, *supra* note 34, at 431, 445-46 (evolution of the 1978 regulations).

The NOAA changed its regulations again in 1979. 44 Fed. Reg. 37,142 (1979). This alteration came in response to a Department of Justice Opinion which concluded that the application of consistency requirements depends upon the facts in each particular case. Department of Justice Advisory Opinion rendered for the Department of Commerce and the Department of the Interior, 13-14 (April 20, 1979). Accordingly, the NOAA amended its regulations to comply with the Justice Department opinion by striking the "significantly affecting" language and returning to the undefined "directly affecting" standard. 44 Fed. Reg. 37,141-42 (1979).

In 1981 the NOAA published a Notice of Proposed Rulemaking that stated lease sales do not directly affect the coastal zone. 46 Fed. Reg. 26,660 (1981). This regulation was withdrawn, however, after Congress exercised a "legislative veto." 47 Fed. Reg. 4231 (1982).

The Supreme Court aptly observed that the NOAA, "in construing § 307(c)(1) . . . has walked a path of such tortured vacillation and indecision that no help is to be gained in that quarter." *Secretary of the Interior v. California*, 104 S. Ct. 656, 661 n.6 (1984).

52. The ambiguity of this language is at the heart of the controversy in *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984). *See infra* notes 77-105 and accompanying text.

53. 16 U.S.C. § 1456(c)(3)(A) (1982).

54. *Id.* The state reviews the proposed activity and informs the federal licensing agency within six months of its approval or objection. *Id.* The federal agency cannot issue the license or permit until the state consents or the six month period expires without a response from the state. *Id.*

55. The Secretary of Commerce may override the state's objection if he finds that the activity is consistent with the state plan or otherwise necessary in the interest of national security. *Id.*

56. Pub. L. No. 94-370, 90 Stat. 1013 (1976) (codified at 16 U.S.C. § 1456(a), (c)(3) (1982)).

could have severe effects on the coastal zone.⁵⁷ The legislation left existing consistency provisions intact⁵⁸ and added a new consistency provision⁵⁹ that reinforced the states' power to influence OCS development. The new provision, section 307(c)(3)(B), requires OCS lessees to certify that any planned development, exploration, or production will be consistent with the affected state management programs.⁶⁰ The procedure followed under this provision is nearly identical to that prescribed by section 307(c)(3)(A). If the state objects to the proposed activity on the ground that it is inconsistent with the state's management plan, the federal government will not issue a permit or license for the activity unless the Secretary of Commerce decides to override the state's remonstrance.⁶¹

While the amendments contain no express regulation of OCS leasing and language explicitly regulating leasing was deleted from the legislation, evidence exists in the legislative history that Congress intended

57. S. REP. NO. 277, 94th Cong., 1st Sess. 10-19 (1975); H.R. REP. NO. 878, 94th Cong., 2d Sess. 15-17, 119-26 (1976). The 1973 Arab oil embargo and the resulting increase in domestic oil and gas production heightened concern for the coastal zone. H.R. REP. NO. 590, *supra* note 2, at 100.

58. The Conference Committee tabled action pending the outcome of oversight hearings. H.R. REP. NO. 1298, 94th Cong., 2d Sess. 31, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1820, 1828. The reports on the 1976 amendments from both houses of Congress emphasize the importance of the consistency provisions in providing an incentive for state participation in the CZMA and in minimizing the adverse effects of OCS development. The House report states, "[O]ne major encouragement [for state participation] has been the belief that in the future, the impacts which flow from federal Outer Continental Shelf leasing will have to conform to state and local prescriptions about the best location for energy support and industrial facilities." H.R. REP. NO. 878, *supra* note 57, at 53. The Senate report states:

One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of federal activities on the Outer Continental Shelf beyond the state's coastal zones, including federal authorizations for non-federal activity, but under the act as it presently exists, as well as the S. 586 amendments, if the activity may affect the coastal zone and it has an approved management program, the consistency requirements do apply.

S. REP. NO. 277, *supra* note 57, at 37.

For a detailed discussion of the 1976 CZMA amendments, see Note, *The Coastal Zone Management Act Amendments of 1976*, 1 HARV. ENV'T'L L. REV. 259 (1976).

59. § 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B) (1982).

60. *Id.*

61. *Id.* As under § 307(c)(3)(A), the Secretary can override the state's objections if he finds that the activity "is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security." *Id.* For further discussion of the amendment's consistency procedures, see Linsely, *supra* note 34, at 453-55.

leasing to be subject to the consistency requirements of the CZMA.⁶² In addition to these amendments, Congress enacted a system of federal financial aid to help states cope with the impact of OCS leasing.⁶³

Congress passed the 1978 OCSLA amendments⁶⁴ to expedite development of OCS resources for domestic energy needs, to balance OCS development with protection of the environment, to preserve competition in OCS development, to insure the public a fair return on OCS resources, and to allow coastal states the opportunity to participate in policy and planning decisions relating to OCS resources.⁶⁵ These amendments advanced two major reforms to correct the inequities of the 1953 Act.⁶⁶ First, the amendments imposed a structured lease decision-making process upon the Secretary of the Interior.⁶⁷ Second, the revisions granted the states a functional role in the lease development process by requiring the Secretary of Interior to submit any proposed leasing program to affected coastal states for review and comment.⁶⁸ Furthermore, the legislation specifically provided that it

62. The bills coming from both houses attempted explicitly to apply this section to leasing. H.R. 3891, 94th Cong., 2d Sess. § 2(15) (1976); S. 586, 94th Cong., 1st Sess. § 102(12) (1975). Furthermore, the reports state that the amendment served only "to make explicit the Committee's original intent to include leases as actions that come under the purview of this section." H.R. REP. NO. 878, *supra* note 58, at 52 (emphasis added). See S. REP. NO. 277, *supra* note 57, at 19, 36-37, 53. Although the House later deleted the term "leases" from § 307(c)(3), H.R. CONF. REP. 1298, 94th Cong., 2d Sess. 30 (1976), the legislators' remarks clearly manifest their intent to maintain leasing subject to state review. 122 CONG. REC. 6128 (1976). As Congressman DuPont explained:

My amendment is offered to strike that [term] not because I disagree with having leases included. As a matter of fact I feel very strongly that leases should be included. . . . So the purpose of this amendment is not to get rid of the word "lease" but to allow us time to work on the problem a little bit longer.

Id.

63. Coastal Energy Impact Program, Pub. L. No. 94-370, 90 Stat. 1013 (1976) (codified at 16 U.S.C. § 1456a (1982)). This section provides federal grants and loans to fund a portion of the coastal state's expenses for providing public facilities, public services, and environmental maintenance. *Id.* For a more detailed analysis of this legislation, see Comment, *supra* note 42, at 422-24.

64. Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified at 43 U.S.C. §§ 1331-1343 (1982)).

65. H.R. REP. NO. 590, *supra* note 2, at 122-23.

66. For a discussion of the abuses that the 1978 amendments attempted to correct, see Murphy & Belsky, *OCS Development: A New Law and a New Beginning*, 7 COASTAL ZONE MGMT. J. 297, 307-09 (1980); *supra* note 38.

67. H.R. REP. NO. 590, *supra* note 2, at 62-65.

68. After the Secretary of the Interior prepares a leasing program, he must submit it to the governors of affected coastal states for review and comment. 43 U.S.C. § 1344(c)(2) (1982); 43 C.F.R. § 3310.2(a)(1) (1984). An "affected state" is one in

would not construe, modify, or repeal any part of the CZMA.⁶⁹

Congress reauthorized the CZMA in 1980⁷⁰ "to reinforce and promote the progress states have made in resolving the struggles on their coasts."⁷¹ Aware of a dispute between California and the Department of the Interior concerning the application of the CZMA's consistency requirements to a federal OCS lease sale,⁷² Congress chose not to amend the consistency provisions.⁷³ The House Merchant Marine and Fisheries Committee found that with the exception of the above dispute, the consistency provisions "appeared to be working" and that "changes to this section of the act were not now needed."⁷⁴ The Senate Committee on Commerce, Science and Transportation also confirmed the value of the consistency requirements.⁷⁵

In sum, attempts by the courts and the legislature to administer the OCS represent a struggle to achieve a balance between state and federal authority in light of energy demands and environmental welfare. The result of this struggle is the uneasy partnership which exists between the states *qua* custodian of the coastal zone and the federal government *qua* overseer of OCS resources. One major flaw in this scheme was the uncertainty regarding the application of the CZMA's consistency provisions to OCS lease sales. Given the expanding role of the state in the management of the OCS since the 1972 CZMA, courts and commentators that considered the issue generally supported a requirement of

which OCS activity may cause significant damage to the marine and coastal environments. 43 U.S.C. § 1331(f)(4)-(5) (1982). Next, the Secretary submits the leasing program to Congress where state and local government officials may make recommendations regarding the timing, size, and location of a lease sale. *Id.* at § 1345(a). The Secretary must accept these recommendations if they provide for a "reasonable balance between the national interest and the well-being of the citizens of the coastal state." *Id.* The Secretary's determination of whether to accept the state's recommendation controls unless it is arbitrary and capricious. *Id.* at § 1345(a)-(d).

69. 43 U.S.C. §§ 1340(c), 1345 (1982); H.R. REP. NO. 590, *supra* note 2, at 153 n.52. *But see* Linsley, *supra* note 34, at 435-37 (discussion of the inherent conflict between the CZMA and the OCSLA).

70. Coastal Zone Management Improvement Act, Pub. L. No. 96-464, 94 Stat. 2060 (1980) (codified at 16 U.S.C. §§ 1451-64 (1982)).

71. H.R. REP. NO. 1012, 96th Cong., 2d Sess. 35, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4362, 4383.

72. The dispute centered on a lease sale separate from that at issue in *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984). *See* H.R. REP. NO. 1012, *supra* note 71, at 34.

73. H.R. REP. NO. 1012, *supra* note 71, at 34.

74. *Id.* at 31.

75. S. REP. NO. 783, 96th Cong., 2d Sess. 10-11 (1980).

consistency between coastal zone programs and OCS leasing.⁷⁶

In *Secretary of the Interior v. California*,⁷⁷ however, the Supreme Court found that federal OCS lease sales need not be consistent with state coastal zone management programs because leasing is not an activity "directly affecting" the coastal zone within the meaning of section 307(c)(1) of the CZMA.⁷⁸ Justice O'Connor, writing for the majority,⁷⁹ first dismissed the plain meaning of the Act as inconsequential.⁸⁰ Second, in examining the legislative history, she found that the addition of the "directly affecting" language to section 307(c)(1)⁸¹ was not an attempt by Congress to enlarge the scope of the statute.⁸² Rather, it represented a compromise between members of the House and Senate over the definition of the term "coastal zone."⁸³ Third, Justice O'Connor observed that Congress rejected every attempt to incorporate OCS activities into section 307.⁸⁴ Fourth, Justice O'Connor

76. See, e.g., *Conservation Law Found. v. Watt*, 560 F. Supp. 561, 574-76 (D. Mass. 1983), *aff'd sub nom. Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983); Linsley, *supra* note 34. *Contra Moore, Outer Continental Shelf Development and Recent Applications of the Coastal Zone Management Act of 1971*, 15 TULSA L.J. 443 (1980) (argument for a narrow interpretation of the CZMA).

77. 104 S. Ct. 656 (1984).

78. *Id.* at 672.

79. Chief Justice Burger and Justices White, Powell, and Rehnquist joined Justice O'Connor in the opinion. *Id.* at 660.

80. The Court found that because the CZMA neither defines "directly affects" nor specifies which federal activities "directly affect" the coastal zone, the construction of the plain meaning of the phrase urged by each party is unsupported. *Id.* at 661. The Department of the Interior asserted that "directly affects" meant "[h]av[ing] a [d]irect, [i]dentifiable [i]mpact on [t]he [c]oastal [z]one." *Id.*, quoting Brief for Federal Petitioner at 20. The respondents, on the other hand, contended that "directly affects" meant "[i]nitiating a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence." 104 S. Ct. at 661, quoting Brief for Respondents at 10.

81. See *supra* note 50.

82. 104 S. Ct. at 661-62.

83. *Id.* at 662. The Senate version of the original CZMA bill sought to exclude federal enclaves from the coastal zone. *Id.* The House bill included these federal enclaves. *Id.* Justice O'Connor reasoned that the "directly affecting" language adopted by the Conference Committee intended "to reach at least some activities conducted in those federal enclaves excluded from the Senate's definition of 'coastal zone.'" *Id.* She concluded, however, that because both of the original bills exempted federal activities outside the three-mile marginal sea and because the Conference Committee's change was merely the product of a compromise, a broad construction of the section is unjustified. *Id.*

84. *Id.* at 663. The Court cited numerous statements in the Congressional Record purporting to limit the jurisdiction of the CZMA. *Id.* at 663 n.11. See *supra* note 50. The Court also considered §§ 312(b) and 313 of the original House bill, found that they

found that section 307(c)(3) rather than section 307(c)(1) subsumes leasing.⁸⁵ Section 307(c)(3), however, does not require consistency reviews of OCS lease sales.⁸⁶ In fact, Justice O'Connor reasoned that Congress added section 307(c)(3)(B) as an alternative to applying the consistency provisions of section 307(c)(1) to OCS leasing.⁸⁷ Finally, Justice O'Connor concluded that even if she examined lease sales under section 307(c)(1), they would not "directly affect" the coastal zone.⁸⁸ Because only limited activities are authorized by the purchase of a lease, the possible effects on the coastal zone cannot be considered direct.⁸⁹ Justice O'Connor admitted that there is merit to the argument that consistency of OCS leasing is best determined at the earliest possible stage.⁹⁰ She rejected this contention, however, as a policy consideration contrary to the congressional intent evinced in the CZMA and OCSLA.⁹¹

would have provided respondents with the same relief they now sought under § 307(c)(1), and observed that Congress rejected both sections. 104 S. Ct. at 664-65. The Court wrote that "it is fanciful to suggest that the Conferees intended the 'directly affecting' language of § 307(c)(1) to substitute for . . . specific and considerably more detailed language." *Id.* at 665. *But see infra* note 95.

85. 104 S. Ct. at 667-68. The Court concluded that § 307(c)(1) is inapposite "if only because drilling for oil and gas on the OCS is neither 'conducted' nor 'supported' by a federal agency." *Id.* See *supra* notes 46, 56-63 for a discussion of these sections.

86. 104 S. Ct. at 668. Because § 307(c)(3) of the 1972 CZMA omitted the word "lease" and attempts to include the term in the 1976 amendments failed, the Court stated that "it is not for us to add to the statute what Congress twice decided to omit." *Id.* *But see supra* note 60.

87. 104 S. Ct. at 668. The majority, citing the language of the statute, found that § 307(c)(3)(B) applies only to applicants for licenses or permits to explore, produce, or develop oil or gas on the OCS. *Id.* *But see supra* note 62. To clarify the distinction between a lease sale and the issuance of a license or permit, the Court relied upon the OCSLA, to which § 307(c)(3)(B) refers. 104 S. Ct. at 668.

In examining the 1978 OCSLA amendments, the majority found that there are four distinct phases to developing an offshore oilwell: (1) preparation of a leasing program; (2) lease sales; (3) exploration; and (4) development and production. *Id.* at 669-71. Under this system, a leaseholder has only two rights: priority in exploration, production, and development and the ability to conduct limited preliminary activities. *Id.* at 669. The purchase of a lease does not authorize full exploration, development, or production which might trigger § 307(c)(3)(B). *Id.* at 671. Thus, consistency review is required only at the last two stages of oilwell development. *Id.* at 671.

88. 104 S. Ct. at 671-72.

89. *Id.*

90. *Id.* at 673.

91. *Id.* See *supra* notes 80-88 and accompanying text.

Dissenting, Justice Stevens⁹² excoriated the majority's interpretation of the CZMA.⁹³ He first examined the majority's contention that section 307(c)(1) is inapplicable to federal activities on the OCS and found that assertion refuted by the plain language of the statute,⁹⁴ its legislative history,⁹⁵ its purpose,⁹⁶ and the findings of the lower courts.⁹⁷ Second, Justice Stevens argued that the legislative developments since the passage of the CZMA in 1972 support the requirement of a consistency review for OCS lease sales that directly affect the coastal zone.⁹⁸

92. Justices Brennan, Marshall, and Blackmun joined Justice Stevens in his dissent. *Id.* at 672.

93. *Id.* at 673-89.

94. The dissent stated, "The plain meaning of the words . . . indicates that the words 'directly affecting' were intended to enlarge coverage of § 307(c)(1) to encompass activities conducted outside as well as inside the [coastal] zone." *Id.* at 674.

95. Justice Stevens argued that the majority had misconstrued the legislative history of § 307(c)(1). *Id.* at 675. He observed that both of the original CZMA bills intended this section to apply to OCS activities. *Id.* at 675-76. In addition, he noted that the House surrendered §§ 312(b) and 313 from its original bills only because the insertion of "directly affecting" in § 307(c)(1) protected the same interests. *Id.* at 677. *See supra* note 50. *But see supra* note 84 and accompanying text.

96. Justice Stevens observed that "Statutes should be interpreted in a manner consistent with their underlying policies and purposes." 104 S. Ct. at 679. Moreover, he noted that the CZMA contains numerous provisions that demonstrate a congressional desire to achieve long range planning and close cooperation between the states and the federal government in conducting or supporting activities that directly affect the coastal zone. *Id.* Thus, according to Justice Stevens, § 307(c)(1) must apply to lease sales in order to construe the statute in a manner consonant with its underlying purpose. *Id.*

Justice Stevens also observed that:

The *only* federal activity that ever occurs with respect to OCS oil and gas development is the decision to lease If the leasing decision is not subject to consistency requirements, then the intent of Congress to apply consistency review to federal OCS activities would be defeated and this part of the statute rendered nugatory.

Id. at 680 (emphasis in original).

97. The findings of fact made by the district court, 520 F. Supp. 1359, 1380-82 (D.C. Cal. 1981), and preserved by the court of appeals, 683 F. 2d 1253, 1260 (9th Cir. 1982), show that oil and gas production, "the intended and most probable consequence [of federal lease sales]," will directly affect the coastal zone within the meaning of § 307(c)(1). 104 S. Ct. at 683.

98. 104 S. Ct. at 683-89. The dissent first pointed to the Coastal Energy Impact Program and the House and Senate reports of the 1976 CZMA amendments. *Id.* at 683. *See supra* notes 56-63 and accompanying text. Next, the dissent cited the specific language of the 1978 OCSLA amendments and the House Committee report as evidence that this legislation did not affect the CZMA. 104 S. Ct. 686-87. *See supra* notes 68-69 and accompanying text. Finally, the dissent examined the 1980 CZMA amendments and concluded that Congress reaffirmed the application of consistency require-

The majority decision in *Secretary of the Interior v. California*⁹⁹ misinterprets the history of the entire body of OCS legislation since the CZMA.¹⁰⁰ The decision also ignores the fundamental congressional objective underlying these enactments: Equalization of the interests of OCS resource development and environmental preservation.¹⁰¹ To attain this goal, Congress, through thirty years of legislative endeavor,¹⁰² established a strategy of collaboration between the federal government and the coastal states.¹⁰³ As the demand for OCS resources grew and the technology to harvest those resources improved, Congress countered ensuing environmental threats by increasing coastal state authority to regulate federal activity in the coastal zone.¹⁰⁴ *Secretary of the Interior v. California*¹⁰⁵ reverses this trend and upsets the balanced regulatory scheme created by Congress.

The Court's decision that federal lease sales need not be consistent with state management programs will have wide-ranging impact. First, it will impinge directly upon the policies and purposes of the CZMA by restoring the Secretary of the Interior's carte blanche authority to plan OCS leasing.¹⁰⁶ Second, the decision imperils the continued vitality of the CZMA by destroying one of two major incentives for coastal state participation.¹⁰⁷ After the elimination of the states'

ments to lease sales. 104 S. Ct. at 688-89. See *supra* notes 70-75 and accompanying text.

99. 104 S. Ct. 656 (1984).

100. See *supra* notes 37-75 and accompanying text for a discussion of the history and development of this legislation.

101. See *supra* notes 27-75 and accompanying text for a discussion of OCS legislation and underlying congressional policies.

102. *Id.* Congress enacted the Submerged Lands Act and the OCSLA in 1953. See *supra* notes 27-28 and accompanying text.

103. 104 S. Ct. at 658-59.

104. *Id.* See Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945 (1982).

105. 104 S. Ct. 656 (1984).

106. The Secretary of the Interior is free to ignore the legitimate environmental concerns of coastal states while planning OCS oil and gas developments because states can challenge the consistency of those developments only under § 307(c)(3)(B) when exploration or development and production occurs. See *supra* note 87; see also *supra* notes 38, 66-69 and accompanying text for a critical discussion of the Secretary of the Interior's powers under the 1953 OCSLA.

Moreover, only the OCS developer is involved in consistency determinations at the later stages of the development process. See *supra* notes 34, 87. Justice Stevens recognized in his dissent that the federal government is no longer encumbered by consistency constraints. 104 S. Ct. at 680. See *supra* note 96.

107. See *supra* notes 42-45 and accompanying text; Comment, *supra* note 42, at 434.

ability to require that federal lease sales be consistent with coastal zone programs, the only remaining incentive for state participation in the CZMA is the prospect of federal funding.¹⁰⁸ The future availability of these funds, however, is uncertain.¹⁰⁹ Third, lease revenues for the federal government may decrease. Petroleum companies will be reluctant to commit millions of dollars¹¹⁰ to a lease that a coastal state could thwart under later-stage consistency requirements.¹¹¹ Moreover, if the Secretary found it necessary to cancel a lease, the federal government would have to compensate the lessee.¹¹² Finally, and perhaps most importantly, the states are effectively eliminated from any meaningful role in an expansion of the territorial sea.¹¹³

It now becomes the responsibility of Congress to analyze the vestiges of the CZMA. If *Secretary of the Interior v. California*¹¹⁴ accords with Congress' conception of the proper course of evolution for the CZMA, Congress may acquiesce. If, however, Congress views the Court's decision as an attempt to abrogate a carefully designed legislative policy, the legislature must amend the "directly affecting" language to obviate the Court's decision.¹¹⁵

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108. See *supra* note 42.

109. The Reagan administration reduced federal funding for coastal zones. 13 ENV'T REPT. 2084, 2084-90 (BNA) (Mar. 18, 1983). Furthermore, President Reagan sought to eliminate these state grant funds from his fiscal year 1985 budget request. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, APPENDIX, BUDGET OF THE U.S. GOVERNMENT FY 1985, I-F23 (1984). On May 31, 1984, however, the House passed a fiscal year 1985 appropriations bill for NOAA which would provide \$42 million for grants to states for administering coastal zone management programs. H.R. 5712, 98th Cong., 2d Sess. (1984).

110. For example, Chevron U.S.A., Inc. bid \$333,600,000 for one tract of Lease Sale No. 53. L.A. Times, April 29, 1981, Part 1 at 1.

111. See *supra* note 98. Respondents asserted the economic appeal of determining consistency as early as possible. Brief for Respondents at 38, *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984).

112. 43 U.S.C. § 1334(a)(2)(C) (1982). See *Union Oil Co. v. Morton*, 512 F.2d 743, 750-51 (9th Cir. 1975).

113. See *Knecht & Westermeyer, State v. National Interest in an Expanded Law of the Sea*, 11 COASTAL ZONE MGMT. J. 317 (1984) (argues that the states should play a pivotal role in the 12 mile territorial sea that was established by the recently adopted Law of the Sea Convention).

114. 104 S. Ct. 656 (1984).

115. A House bill introduced on January 23, 1984, sought to amend § 307(c)(1) and provided that "a Federal agency activity shall be treated as one that directly affects the

coastal zone' if [it] . . . (i) produces identifiable physical, biological, social, or economic consequences in the coastal zone; or (ii) initiates a chain of events likely to result in any of such consequences." H.R. 4589, 98th Cong., 2d Sess. (1984). The House Subcommittee on Oceanography approved the bill on May 3, 1984 and referred it to the House Committee on Merchant Marine and Fisheries where it was never considered. Telephone interview with Anthony J. Mazzanchi, Professional Staff Member of the House Subcommittee on Oceanography (Jan. 3, 1985).

Similarly, a Senate bill introduced on February 22, 1984, sought to amend the "directly affecting" standard to the more lenient test of "significantly affecting." S. 2324, 98th Cong. 2d Sess. (1984). A report by the Senate Committee on Commerce, Science and Transportation noted that in defining "significantly affecting," the Senate intended "to reject two principal interpretations of 'directly affecting' found in the Supreme Court decision—first, "that the CZMA's purposes can be adequately effectuated without applying to Federal activities conducted outside the coastal zone"; and second, "that lease sales belong under section 307(c)(3), not 307(c)(1), of the CZMA." S. REP. No. 512, 98th Cong., 2d Sess. 6-7 (1984). S. 2324 was reported favorably out of committee on June 13, 1984. *Id.* The bill died, however, without reaching the Senate floor. Telephone interview with Joani Wales, Professional Staff Member of the Senate Committee on Commerce, Science and Transportation (Jan. 3, 1985).

