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SECRETARY OF INTERIOR v. CALIFORNIA: SHOULD CONTINENTAL SHELF LEASE SALES BE SUBJECT TO CONSISTENCY REVIEW?

Dr. Edward A. Fitzgerald*

I. INTRODUCTION

Outer continental shelf oil and gas resource development has generated a great deal of conflict between the federal and state governments. The outer continental shelf (OCS) consists of submerged land lying beyond the three-mile limit of the coastal zone of states bordering the Atlantic and Pacific Oceans.1 While the coastal zone is under state jurisdiction,2 the OCS is under the jurisdiction of the federal government.3 The Department of the Interior (Interior) is authorized to lease tracts on the OCS to industry for the development of oil and gas resources and to regulate such activity.4

The federal Coastal Zone Management Act of 1972 (CZMA)5 provides that federal activity “directly affecting” the coastal zone must not conflict or interfere with state coastal zone management programs established under the CZMA.6 On January 11, 1984 the Supreme Court decided Secretary of Interior v. California.7 The Court held that OCS lease sales by the Department of the Interior do not “directly affect” the coastal zone within the terms of the

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4 The Department of the Interior is delegated the authority to administer the OCS leasing process by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a) (1982).
6 Id. at § 1456(c)(1).
CZMA and therefore are not subject to consistency review under section 307(c)(1) of the Act. This decision was a defeat for the states in their struggle to participate effectively in the OCS energy development process.

The CZMA was enacted "to preserve, protect, develop, and where possible to restore or enhance" the coastal environment. The Act makes federal funding available to each coastal state for the development and administration of a comprehensive coastal zone management program regulating the use of coastal areas' land and water resources of coastal areas. Section 307(c)(1) of the Act provides that all federal activity "directly affecting" the coastal zone must be conducted "in a manner which is, to the maximum extent practicable, consistent with approved state management programs." The Supreme Court's narrow interpretation of "directly affecting" in Interior v. California undermines the meaningful role Congress established for the states in the OCS development process. The states are now relegated to being mere advisors, rather than cooperative partners, during the crucial early planning stages of the process. This frustrates the policy and purpose of the Coastal Zone Management Act. Furthermore, the Supreme Court's decision is not supported by legislative history or administrative interpretations of the CZMA, nor by the district and circuit court opinions in the case.

The issue of whether the CZMA's consistency requirement applies to outer continental shelf lease sales was the focus of controversy between the State of California and the Department of Interior beginning in 1980. California asserted that Lease Sale...
53 directly affected its coastal zone and that consequently a consistency determination was warranted. The Department of the Interior strongly disagreed. When negotiations failed to resolve the dispute, California brought suit in U.S. District Court for the Central District of California.

The district court held for California, and the U.S. Court of Appeals for the Ninth Circuit affirmed. Both courts adopted the state's interpretation of the CZMA's phrase "directly affecting." The Ninth Circuit ruled, "[d]ecisions made at the leasing stage [of OCS energy development] establish the basic scope and charter for subsequent development and production." Accordingly, Interior was enjoined from taking any further action in Lease Sale 53 regarding offshore tracts which California maintained ought not be developed.

The Supreme Court reversed the Ninth Circuit's decision, and held that only federal activity conducted within the geographical confines of the coastal zone can "directly affect" the coastal zone within the meaning of the CZMA. The Court decided that OCS lease sales by the Department of the Interior are not subject to the requirement of section 307(c)(1). Consequently, Interior was

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21 Letter from Michael L. Fischer, Executive Director of the California Coastal Commission, to Cecil B. Andrus, Secretary of the Interior (July 8, 1980).

CZMA regulations provide that the federal agency conducting an activity directly affecting the coastal zone must submit a consistency determination to each affected state. The consistency determination is a document describing how the federal activity has been tailored to be consistent with the state coastal zone management program. 15 C.F.R. §§ 930.34(a), 930.39 (1979). The state has 45 days to review the consistency determination and notify the federal agency of its agreement or objections. Id. at § 930.41(a). If a federal agency determines that a proposed activity does not "directly affect" the coastal zone, it must so notify adjacent states in a "negative determination." Id. at 930.35(d). If the federal agency and a state have a disagreement about these determinations, either party may request the Secretary of Commerce to mediate the dispute. Id. at 930.110-116. See generally 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. AFF. L. REV. 431, 440-42 (1980).

22 Letter from Larry E. Meierotto, Assistant Secretary of the Interior, to Michael L. Fischer (Oct. 22, 1980).


24 520 F. Supp. at 1365.

25 683 F.2d at 1253.

26 Id. at 1260.

27 Id.


29 Id. at 666.

30 Id. at 667.
not required to submit a consistency determination to the state of California before issuing a Final Notice of Sale for Lease Sale 53.\(^{31}\)

This article will first review the factual background and events leading up to the litigation over Lease Sale 53. The article will then examine the judicial opinions in *Interior v. California* at the various stages in the case. The Supreme Court's decision will then be analyzed. Finally, two bills designed to overturn the Supreme Court's decision will be examined.

II. BACKGROUND OF THE LEASE SALE 53 LITIGATION

A. The Lease Sale 48 Controversy

The issue of whether OCS lease sales must be consistent with state coastal management programs under section 307(c)(1) of the CZMA was first raised in the controversy surrounding Lease Sale 48, which took place in 1979.\(^{32}\) This lease sale also involved tracts off the coast of California, and the controversy it generated foreshadowed the conflict that was later to develop over Lease Sale 53. Furthermore, an opinion letter written by the Department of Justice in the Lease Sale 48 controversy became an important factor in the litigation surrounding Lease Sale 53.\(^{33}\)

California's coastal zone management program was established by one of the most comprehensive state coastal protection laws ever enacted.\(^{34}\) California has consistently taken an active role in coastal zone and OCS planning and development.\(^{35}\) The California Coastal Commission (CCC) asked Interior to conduct a consistency determination for the Final Notice of Sale for Lease Sale 48,\(^{36}\) taking the position that a Final Notice of Sale "directly affected" the California coastal zone. The Final Notice of Sale is the step in the OCS leasing and development process which conclusively es-

\(^{31}\) *Id.* at 672.

\(^{32}\) For a complete discussion of Lease Sale 48, see Linsley, *supra* note 21, at 456-74.

\(^{33}\) See California v. Watt, 520 F. Supp. 1359, 1380.


\(^{35}\) See Linsley, *supra* note 21, at 457 n.123.

establishes the size of the lease sale, the location of tracts to be leased, the timing of the lease sale, and the conditions or stipulations to which the leases are subject. Interior refused the request on the grounds that federal pre-lease activities did not "directly affect" the coastal zone within the terms of the CZMA and thus were not subject to the consistency requirement. After a mediation effort by the Department of Commerce failed to resolve the dispute, Interior and Commerce jointly requested an opinion from the Department of Justice concerning the applicability of section 307(c)(1) to OCS lease sales.

In its opinion issued April 20, 1979, the Justice Department refused to decide if Interior's pre-lease activities in Lease Sale 48 directly affected California's coastal zone. This issue was characterized as a factual question outside of the Justice Department's jurisdiction. However, the Justice Department did state that in general Interior's pre-lease activities were subject to consistency review under CZMA section 307(c)(1), if these activities did, in fact, directly affect the coastal zone.

Even though the Justice Department did not explicitly support California's position in the Lease Sale 48 dispute, it did reject the interpretation of the CZMA which had been advanced by Interior. Interior had asserted that CZMA section 307(c)(3)(b), enacted in 1976, superseded section 307(c)(1) regarding OCS development. Section 307(c)(3)(b) explicitly requires a consistency re-

39 16 U.S.C. § 1456(h) provides that "[i]n the case of serious disagreement between any Federal agency and a coastal state ... the Secretary [of Commerce], with the cooperation of the Executive Office of the President, shall seek to mediate the differences in such a disagreement."
40 Letter from William V. Skidmore, Acting General Counsel of the Department of Commerce, and Frederick N. Ferguson, Deputy Solicitor of the Department of the Interior, to John M. Harmon, Assistant Attorney General, Department of Justice (Mar. 23, 1979).
41 Department of Justice Advisory Opinion rendered for the Department of Commerce and the Department of the Interior (Apr. 20, 1979) [hereinafter cited as DOJ Opinion].
42 Id. at 12-14.
44 Id. at 10-11.
45 Id. at 2.
47 DOJ Opinion, supra note 41, at 2.
view before any exploration and development permit is issued for a particular leased offshore tract. Interior maintained that its pre-lease decisions were per se exempt from the CZMA's requirements.46 The Justice Department disagreed. It ruled that while section 307(c)(3)(b) "simplifies the regulatory process during the post-lease period," the new subsection "has no bearing on the consistency requirements antedating that stage of the process."49

The Department of Justice explained that repeal by implication is not a doctrine that should be afforded great respect.50 Since Congress did not intend to repeal section 307(c)(1) by enacting section 307(c)(3)(b), and since the mandates of both sections did not conflict, the opinion letter ruled that both sections ought to be given effect.51 Accordingly, in the view of the Justice Department, section 307(c)(1) applied to the pre-lease stage, while section 307(c)(3)(b) pertained to post-lease sale activities.52

Despite the Justice Department's opinion, on May 25, 1979 Interior informed the CCC that no consistency determination would be conducted for Lease Sale 48 because Interior's preleasing activities did not in fact directly affect California's coastal zone.53 Interior did take several steps to meet California's objections.54 The Commission then decided that Lease Sale 48 was, for the most part, consistent with the California coastal management program.55

Nevertheless, the CCC, seeking to establish a favorable precedent, requested the Secretary of Commerce to mediate the dispute over whether the Final Notice of Sale in Lease Sale 48 was

46 Letter from William V. Skidmore, Acting General Counsel of The Department of Commerce and Frederick N. Ferguson, Deputy Solicitor of The Department of the Interior, to John M. Harmon, Assistant Attorney General, Department of Justice (Mar. 23, 1979).

49 DOJ Opinion, supra note 41, at 10.

50 Id. The DOJ opinion stated that the Supreme Court has "consistently applied the rule that repeals by implication are not favored; that the intention of the legislation to repeal must be clear and manifest; that every attempt must be made to reconcile the statutes involved; and that a repeal by implication will be found only where there is a 'positive repugnancy' between the statutes in question," citing Morton v. Mancari, 417 U.S. 535, 549-50 (1974); Borden v. U.S., 308 U.S. 188, 198-99 (1939).

51 DOJ opinion, supra note 41, at 10.

52 Id.

53 Letter from Heather L. Ross, Deputy Assistant Secretary of Interior, to Michael L. Fischer, Executive Director of the CCC (May 1979).

54 Linsley, supra note 21, at 460-61.

55 Id.
subject to consistency review under section 307(c)(1) of CZMA.\textsuperscript{56} The mediation conference was held on October 19, 1979. The mediation officer's report determined that pre-lease activities were indeed subject to section 307(c)(1)'s consistency determination requirement.\textsuperscript{57} However, the voluntary, non-binding mediation proceeding failed to resolve the dispute. This prompted the Secretary of Commerce to instruct the National Oceanic and Atmospheric Administration (NOAA), the agency charged with administering the CZMA, to develop new regulations defining the phrase "directly affecting" in section 307(c)(1).\textsuperscript{58}

The Lease Sale 48 controversy did not resolve the issue of whether OCS lease sales are federal activities "directly affecting" the coastal zone and thus subject to section 307(c)(1)'s requirement that they be consistent with state coastal zone management programs. This issue reemerged during the preparations for Lease Sale 53 and became the subject of lengthy litigation culminating with the Supreme Court's interpretation of "directly affecting" in \textit{Interior v. California}.

\textbf{B. The Lease Sale 53 Controversy: Events Leading to \textit{Interior v. California}}

The Department of Interior's preparations for Lease Sale 53 began in 1977. Lease Sale 53 initially included tracts located in five distinct areas off the California coast: the Santa Maria Basin, the Point Arena Basin, the Bodega Basin, the Santa Cruz Basin, and the Eel River Basin. Although Interior later deferred offering the tracts located in four of these areas, when Lease Sale 53 took place in May 1981 it was the second largest in OCS history.\textsuperscript{59}

In July, 1980 the California Coastal Commission requested the Secretary of Interior to submit a consistency determination for Lease Sale 53 when the proposed Notice of Sale was issued.\textsuperscript{60} On

\textsuperscript{56} Letter from Michael L. Fischer, Executive Director of the California Coastal Commission, to Jimmy Carter, President of the United States (Dec. 5, 1978). The CZMA provides that the Executive Branch will provide assistance in resolving "serious disagreements" arising under the Act. 16 U.S.C. § 1456(h) (1982).

\textsuperscript{57} Memorandum of C.L. Haslam, General Counsel to the Department of Commerce, to Phillip M. Klutznick, Secretary of Commerce (Jan. 25, 1980), \textit{reprinted in H.R. REP. No. 1012, 96th Cong., 2d Sess., 82-84 (1980).}

\textsuperscript{58} Letter from Phillip M. Klutznick to Cecil D. Andrus (Feb. 27, 1980), \textit{reprinted in H.R. REP. No. 1012, 96th Cong., 2d Sess., 79-80 (1980).}

\textsuperscript{59} 683 F.2d at 1258; 12 ENV'T REP. (BNA) 196 (June 5, 1981).

\textsuperscript{60} See infra text and notes at note 21.
October 22, 1980, six days after the proposed Notice of Sale was issued, the Secretary notified the CCC that no consistency determination would be conducted because Interior had determined that Lease Sale 53 would not directly affect the California coastal zone. At the same time, however, the Secretary nullified many of the Commission's objections to the sale by eliminating all of the tracts in four of the five basins originally scheduled for leasing because of environmental reasons. The remaining tracts to be leased in the lease sale were located in the Santa Maria Basin, off the coast of California.

The Commission admitted that Interior's elimination of tracts in the four basins satisfied most of the state's initial objections. Nevertheless, the CCC requested that 31 of the tracts in the remaining Santa Maria Basin be eliminated from the sale because "leasing within 12 miles from the Sea Otter Range in the Santa Maria Basin would not be consistent" with California's coastal management program. California Governor Edmund G. Brown made similar recommendations.

On February 10, 1981 the newly appointed Secretary of Interior, James G. Watt, issued a revised proposed Notice of Sale for Lease Sale 53. The four basins which had been part of the original sale proposal were included in the revised notice, along with the disputed tracts in the Santa Maria Basin. The reason given by Interior for the re-inclusion of tracts in the four basins was that Governor Brown had never fully commented on them. On April 7, 1981 Governor Brown, responding to the new proposed Notice of Sale, reiterated his earlier recommendations.

On April 10, 1981 the Secretary announced that Lease Sale 53 would be divided into two sales: lease sale of the tracts in the Santa Maria Basin would take place in May, while the sale of

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61 683 F.2d at 159.  
62 Id. at 1259.  
63 Id. at 1258-59.  
64 Id.  
66 Id.  
69 683 F.2d at 1259.
tracts in the other basins would be postponed indefinitely to permit a full study of Governor Brown's recommendations.\textsuperscript{70} However, Interior declared that it would not follow Governor Brown's recommendation to withdraw tracts in the Santa Maria Basin on the ground that the recommendation did not strike a reasonable balance between national and state interests.\textsuperscript{71} On April 27, 1981, Interior issued the Final Notice of Sale, announcing May 28, 1981 as the sale date.\textsuperscript{72}

III. THE LEASE SALE 53 LITIGATION

A. California v. Interior \textit{In Federal District Court}

On April 28, 1981 the State of California\textsuperscript{73} brought suit in federal district court seeking to enjoin the sale of 29 of the tracts\textsuperscript{74} in the Santa Maria Basin.\textsuperscript{75} A coalition of environmental groups,\textsuperscript{76} led by the National Resources Defense Council, brought a similar suit.\textsuperscript{77} The states of Alabama, Massachusetts, Oregon, the Coastal States Organization, and the National Governors Conference filed amicus briefs in support of the injunction.\textsuperscript{78} The Western Oil and Gas Association and several member oil companies\textsuperscript{79} intervened in the case to support Interior's position.

\textsuperscript{70}Id.
\textsuperscript{71}Id. Section 19 of the OCSLA, 43 U.S.C. § 1345 (1982), requires the Secretary of Interior to accept the recommendations of governors of coastal states affected by OCS development concerning the "size, timing, or location of a proposed lease sale," only if such recommendations "provide for a reasonable balance between the national interests and the well-being of the citizens of the affected States." Id. This standard appears to be significantly less stringent than the CZMA's consistency requirement. See Linsley, \textit{supra} note 21, at 481.
\textsuperscript{72}683 F.2d at 1259.
\textsuperscript{73}The plaintiffs in the case were the State of California, California Coastal Commission, California Air Resources Board, California Resources Agency, California Department of Fish and Game, and California Department of Conservation. Several cities and counties, located on or near the California coast, intervened as plaintiffs in the case.
\textsuperscript{74}Interior consolidated several tracts before issuing the Final Notice of Sale. Although the area in question remained the same, the number of tracts was reduced from 115 to 111. Consequently, the number of tracts objected to by the CCC changed from 31 to 29, and the number of tracts subject to the governor's recommendation declined from 34 to 32. Interior Brief, \textit{supra} note 65, at 14 n.15.
\textsuperscript{75}California v. Watt, No. 81-2080 (C.D. Cal., filed Apr. 29, 1981).
\textsuperscript{76}Joining the NRDC were the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53.
\textsuperscript{77}NRDC v. Watt, No. 81-2081 (C.D. Cal., filed Apr. 29, 1981).
\textsuperscript{78}See Note, \textit{The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development}, 82 WILLAMETTE L. REV. 534, 553 (1982).
\textsuperscript{79}The companies which remained part of the suit were those which had offered the high bids on the disputed tracts. See 520 F. Supp. at 1365.
The plaintiffs alleged that Lease Sale 53 directly affected California's coastal zone. California alleged that Interior's failure to determine if Lease Sale 53 was consistent with California's coastal management plan and submit to the CCC a consistency determination violated section 307(c)(1) of the CZMA. In addition, the state maintained that any sale of leases on the disputed 29 tracts in the Santa Maria Basin was not consistent with California's coastal management program because of the possible detrimental effects development would have on the sea otter and the gray whale, both endangered species.

The Department of the Interior maintained that Lease Sale 53 did not directly affect California's coastal zone. Interior argued that "directly affecting" meant "without intervening cause." Since the lease sale itself would not cause any physical alteration in the coastal zone, it could not directly affect the coastal zone. Furthermore, activities which would occur during the exploration, development, and production stages constituted intervening causes that were subject to consistency review under section 307(c)(3)(B).

On May 27, 1981 the district court issued a preliminary injunction which prevented Interior "from accepting or rejecting any bids, issuing any leases, or taking any other action" regarding the disputed tracts in Lease Sale 53. The following day, May 28, Lease Sale 53 was held. Interior received bids totalling approximately 2.3 billion dollars in lease offerings, making the sale the second largest in OCS history. 81 of the 111 tracts offered for lease received bids, including 21 of the disputed tracts in the Santa Maria Basin. However, the preliminary injunction issued

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80 Id. at 1368. The plaintiffs also claimed violations of the National Environmental Policy Act, OCSLA, Endangered Species Act, and Marine Mammal Protection Act. The district court resolved these issues in favor of the Interior. See 520 F. Supp. at 1382-89. The Ninth Circuit affirmed these findings. See 683 F.2d at 1267-69.
81 Interior Brief, supra note 65, at 14-15.
83 Id.
84 Id.
85 Id.
86 Id.
88 12 ENV'T. REP. (BNA) 197 (June 5, 1981).
by the district court prevented Interior from accepting any bids on the disputed tracts until the case was resolved.

1. Analysis of the District Court Opinion in California v. Watt

On August 18, 1981 the district court issued its decision on the merits.\(^90\) The court held that the Final Notice of Sale for Lease Sale 53 directly affected California’s coastal zone and was therefore subject to consistency review under section 307(c)(1).\(^91\) The court’s reasoning was based on six principles.

First, the court determined that its interpretation of the CZMA was consistent with the purposes of the Act.\(^92\) The CZMA provided for comprehensive, coordinated, long-term federal-state planning to protect the coastal zone.\(^93\) OCS pre-lease decisions were crucial planning decisions which established the parameters of subsequent development.\(^94\) The lease sale set in motion a series of events leading to development.\(^95\) If participation was restricted to post-sale activities, the state would be “relegated to a defensive role of objecting to the proposals of individual lessees as they are presented.”\(^96\) This would frustrate the orderly decision-making process and comprehensive planning scheme envisioned by Congress.\(^97\)

Second, the court held that its interpretation of “directly affecting” in section 307(c)(1) was supported by the legislative history of the CZMA.\(^98\) The language in the original bills passed by the House and Senate provided for consistency review of federal activities occurring “in” the coastal zone.\(^99\) The conference committee substituted “directly affecting” for “in” the coastal zone.\(^100\) Since the conference committee report was silent on the reasons for the change, the court asserted that the substitution


\(^{91}\) Id. at 1377.

\(^{92}\) Id. at 1369-71. The court held that “[e]ffectuating the purpose of a statute should be the primary concern of the court in construing the meaning of the disputed language,” id. at 1369, citing Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

\(^{93}\) 520 F. Supp. at 1369.

\(^{94}\) Id. at 1371.

\(^{95}\) Id.

\(^{96}\) Id.

\(^{97}\) Id.


broadened the scope of section 307(c)(1) to include federal activities occurring outside the coastal zone.\textsuperscript{101}

The CZMA was amended to deal with the impacts of OCS development in 1976.\textsuperscript{102} At that time Congress focused its attention on section 307(c)(3). OCS leasing was originally included in section 307(c)(3),\textsuperscript{103} but it was deleted during debate on the House floor.\textsuperscript{104} It was not restored by the conference committee. However, the court reasoned that the exclusion of OCS leasing from section 307(c)(3) during the 1976 amendment process did not repeal the requirements independently imposed by section 307(c)(1).\textsuperscript{105} The sections had different concerns: section 307(c)(3) is directed primarily at the activities of lessees, while section 307(c)(1) governs federal activities.\textsuperscript{106} Since there was nothing in the 1976 amendments which indicated that section 307(c)(3) was the exclusive provision dealing with OCS activities, the district court held the requirements of both sections should be given effect.\textsuperscript{107}

The CZMA was reauthorized in 1980.\textsuperscript{108} At that time, House and Senate reports both acknowledged that OCS leasing was subject to consistency review under section 307(c)(1).\textsuperscript{109} The court found that these reports were important evidence of congressional intent regarding the scope of the section.\textsuperscript{110}

The third element of the district court's rationale was that applying section 307(c)(1) to federal pre-leasing decisions would not interfere with the operation of the Outer Continental Shelf Lands Act (OCSLA).\textsuperscript{111} Even though the CZMA and the OCSLA

\begin{thebibliography}{111}

\bibitem{101} 520 F. Supp. at 1371.
\bibitem{104} 122 CONG. REC. 6128 (1976).
\bibitem{105} 520 F. Supp. at 1372.
\bibitem{106} \textit{Id.}
\bibitem{107} \textit{Id.}
\bibitem{110} 520 F. Supp. 1373-74. The court held that "[w]hile subsequent legislative history generally is not controlling, neither should subsequent congressional interpretation be 'rejected out of hand.'" \textit{Id.} at 1373. Furthermore, "[t]he court should not overlook valuable sources in the search for legislative intent." \textit{Id.}
\end{thebibliography}
have different concerns, the court ruled that their mandates are not incompatible. The court recognized the two statutes did give the Secretary of Interior the difficult task of balancing energy development and environmental protection concerns. Nevertheless, the court refused to alter the statutory scheme established by Congress.

Fourth, the court held that its position was consistent with the administrative interpretation of section 307(c)(1) by the NOAA. NOAA regulations had consistently supported an expansive definition for "directly affecting." In 1979, responding to the Justice Department’s opinion, NOAA specifically subjected OCS lease sales to consistency review under section 307(c)(1).

Fifth, the court rejected Interior’s interpretation of “directly affecting.” Interior had argued that the plain meaning of the phrase, according to Webster’s Dictionary, was “effects resulting from an activity without intervening cause.” The court determined that Interior’s reliance on the plain meaning rule was a “subterfuge.” Interior’s definition was an amalgamation of two of the six definitions offered in Webster’s, while four other defini-

112 Id. at 1375. The focus of the OCSLA is oil and gas development, while the CZMA centers on environmental protection. Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979).
113 520 F. Supp. at 1376.
114 Id.
115 Id. at 1377.
118 DOJ Opinion, supra note 41.
119 44 Fed. Reg. 37142-43, 37146-47 (1979). The court noted that in 1981, two weeks after the complaints were filed in California v. Watt, NOAA had issued new CZMA regulations in which the Agency altered its position on the issue of the “directly affecting” test. 520 F. Supp. at 1377-78. The district court refused to follow these new regulations, however, on the grounds that they were self-serving and contrary to NOAA’s prior policy of encouraging long-range planning under the CZMA. Id. at 1378.
120 California v. Watt, 520 F. Supp at 1378-80.
121 Id. at 1378.
122 Id. The plain meaning rule dictates that “where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.” U.S. v. Missouri Pacific Railroad, 278 U.S. 269, 278 (1929). See generally Murphy, Old Maxima Never Die: The “Plain Meaning Rule” and Statutory Interpretation in the Modern Federal Courts, 75 COLUM. L. REV. 1299, 1299 (1975).
tions were ignored. Furthermore, Interior's definition was contrary to congressional intent and frustrated the purposes of the CZMA.

Finally, the court held that the Final Notice of Sale for Lease Sale 53 did in fact directly affect California's coastal zone. The Final Notice of Sale contained ten stipulations which specified the actions permitted or required of lessees. The Secretarial Issues Document and the Environmental Impact Statement prepared for the lease sale also listed the multiple effects the sale would have on the coastal zone, such as the "impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreation and sport fishing, navigation, cultural resources, and socio-economic factors."

The district court accurately perceived that Congress intended the states to participate effectively during the early planning stages of the OCS energy development process. The court's position is supported both by NOAA regulations and by the Justice Department's opinion. The court correctly concluded that Lease Sale 53 directly affected California's coastal zone and therefore the sale was subject to consistency review under section 307(c)(1) of the CZMA. Interior, however, decided to appeal the district court decision.

B. Ninth Circuit Opinion

The Ninth Circuit affirmed the district court's decision, concurring with the lower court's interpretation of the CZMA. The circuit court held that the Final Notice of Sale for Lease Sale 53 was subject to consistency review under section 307(c)(1) because it was a federal activity directly affecting California's coastal zone. The court of appeals noted that federal pre-leasing decisions, which become final upon the issuance of a Final Notice of

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123 520 F. Supp. at 1378-79.
124 Id. at 1379-80.
125 Id. at 1380.
126 Id.
127 The Secretarial Issues Document is composed before a lease sale in order to help the Secretary of Interior arrive at a decision whether to lease. Id. at 1381.
129 520 F. Supp. at 1381.
130 State of California v. Watt, 683 F.2d 1253, 1257 (9th Cir. 1982).
131 Id. at 1260.
Sale, "establish the basic scope and charter for subsequent development and production." The lease sale stage is the only time each multi-stage OCS energy development project is evaluated in its entirety, and the only stage when the cumulative effect of offshore development on state coastal resources is considered.

The court asserted that a broad definition of "directly affecting" should be adopted in order to strengthen the state's ability to influence the events set in motion by OCS lease sales and to enhance the state's ability to protect its coastal zone. The fundamental purpose and policy of the CZMA was to foster effective state protection of coastal resources. However, the court was careful to note that the Secretary of Interior, not the state, would determine whether the lease sale was consistent "to the maximum extent practicable," with the California coastal management program.

C. Lease Sale 53 In The Supreme Court: Interior v. California

1. Arguments to the Supreme Court

A brief look at Interior's and California's arguments to the Supreme Court will be helpful in assessing the impact the court's narrow interpretation has upon state-federal interaction during the OCS energy development process. The state of California's approach was policy-oriented, based upon the lower courts' decisions in the case. California maintained that the most meaningful and practical time to evaluate federal OCS pre-leasing decisions for their consistency with state coastal management programs was before the basic terms of a lease sale were conclusively established by a Final Notice of Sale. California supported its interpretation of the CZMA with post-enactment Congressional interpretation of the Act and with NOAA and Justice Department administrative interpretations of the phrase "directly affecting."

The Department of the Interior, by contrast, took a narrower approach to formulating the legal definition of the statutory phrase "directly affecting." Interior portrayed the OCS leasing

132 Id.
133 Id.
134 Id.
136 683 F.2d at 1263-66.
and development process under the OCSLA and CZMA as a series of discrete phrases. Interior maintained that the role of a state's coastal management program was limited to stages involving physical alteration of the three-mile coastal zone. Interior supported its position primarily on the basis of the language and structure of CZMA section 307 and the OCSLA Amendments of 1978.

a. Interior's Arguments

The Department of the Interior filed a petition for certiorari with the Supreme Court and the Court agreed to review the case. In its brief Interior first asserted that, "[s]ection 307(c)(1) limits consistency obligations to those federal activities that have a direct, identifiable impact on the coastal zone." Interior maintained that OCS lease sales did not directly affect the coastal zone because they did not produce any physical alteration of the coastal zone. Furthermore, Interior argued, subsequent activities occurring during the exploration, development and production stages did not constitute direct effects of federal leasing decisions because they were subject to consistency review and federal approval under 307(c)(3)(B). Interior argued that to require consistency review of the potential impacts of OCS development would thus undermine the statutory requirement of having to demonstrate the direct effects of the federal action.

Interior's second argument was that, "[t]he decision below runs contrary to a carefully crafted legislative scheme that fully integrates the CZMA into the OCS oil and gas process." The DOI contended that the enactment of amendments dealing with OCS energy development to the CZMA and the OCSLA was an explicit recognition on the part of Congress that energy and environmental concerns could not be properly balanced during the early stages of development because insufficient information was available. Consequently, Congress developed a phased decision-making process which separated the lease sale from the later stages of development. This phased process ensured that

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137 Interior Brief, supra note 65, at 20.
138 Id. at 21.
139 Id. at 22.
140 Id. at 21.
141 Id. at 27.
142 Id. at 27-30.
143 Id. at 30.
decisions would be made only when adequate information was available.\textsuperscript{144}

Interior's final contention was that "[l]imiting section 307(c)(1) to activities that directly affect the coastal zone fully implements the policies behind the CZMA and the OCSLA."\textsuperscript{145} The DOI asserted that the CZMA was concerned with "achieving substantive compliance, to the maximum extent practicable, with state coastal zone management programs."\textsuperscript{146} Congress determined that the most effective manner of accomplishing this was to postpone consistency review until the later stages of the process.\textsuperscript{147} Furthermore, argued Interior, if OCS lease sales were subject to consistency determinations, the national interest in developing OCS resources could be frustrated.\textsuperscript{148} The Secretary of Interior might be prevented from proceeding because of erroneous assumptions concerning the hypothetical effects of such development.\textsuperscript{149}

b. California's Arguments

Responding to Interior's assertions, California in its brief first asserted that "[t]he lower courts had properly construed the meaning of 'directly affecting.'"\textsuperscript{150} California maintained that it was clear from the "plain meaning" of section 307(c)(1) that direct effects included "the intended uses of the property leased."\textsuperscript{151} The lease sale represented the first step in a series of events leading to development.\textsuperscript{152} The federal government's issuance of a Final Notice of Sale conclusively established which offshore tracts would be leased, as well as the basic terms of future exploration and production on these tracts.\textsuperscript{153} The fact that subsequent activities on the part of the lessees were subject to state consistency review and federal approval did not make "the effects of the federal activity any less direct."\textsuperscript{154} California went on to point out

\textsuperscript{144} Id.
\textsuperscript{145} Id. at 41.
\textsuperscript{146} Id. at 42.
\textsuperscript{147} Id. at 43.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 10.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
that the courts have often held that environmental review is required "at the earliest possible time" in multi-stage decision-making processes.\textsuperscript{155}

California next argued that "Congress has determined that OCS lease sales must be consistent with approved coastal management programs pursuant to section 307(c)(1)."\textsuperscript{156} California asserted that CZMA legislative history indicated that consistency determinations were to be prepared at the lease sale stage.\textsuperscript{157} The 1978 Outer Continental Shelf Lands Act Amendments, which set forth the stages of the federal OCS leasing and development process, did not alter this requirement.\textsuperscript{158} In addition, this position was consistent with both prior lower federal court decisions as well as NOAA and Department of Justice interpretations of the CZMA.\textsuperscript{159}

California's final argument was that "[t]he decisions below will not disrupt OCS leasing or other federal activities."\textsuperscript{160} California asserted that requiring consistency determinations for OCS lease sales would not delay energy development.\textsuperscript{161} On the contrary, such consistency determinations would likely reduce conflicts with the affected states, thereby avoiding delay at the later stages of the development process.\textsuperscript{162}

2. Interior v. California: the Supreme Court Opinion

The Supreme Court heard oral arguments on the case on November 1, 1983 and delivered its opinion on January 11, 1984.\textsuperscript{163} The Court, in an opinion written by Justice O'Connor, held that only federal activities within the geographical boundaries of the coastal zone can directly affect the coastal zone.\textsuperscript{164} The enactment of amendments to the Outer Continental Shelf Lands Act setting forth the mechanics of the federal OCS leasing and development

\textsuperscript{156} \textit{Id.} at 19.
\textsuperscript{157} \textit{Id.} at 21-23.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.} at 18-19.
\textsuperscript{160} \textit{Id.} at 26.
\textsuperscript{161} \textit{Id.} at 26-27.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.} at 26.
\textsuperscript{164} \textit{Id.} at 666.
process reinforced this interpretation of Congressional intent.\textsuperscript{165} Consequently, OCS lease sales were not subject to consistency review under section 307(c)(1).\textsuperscript{166}

Finding no definition for the phrase "directly affecting" in the CZMA, Justice O'Connor turned to the legislative history of the Act.\textsuperscript{167} In the bills passed by the House and Senate in 1972, only federal activities occurring "in" the coastal zone were subject to consistency review.\textsuperscript{168} However, the two CZMA bills defined coastal zone differently. In the Senate bill, federal lands were excluded from the definition of coastal zone, whereas federal territory within 3 miles of shore were included in the House definition.\textsuperscript{169} Justice O'Connor thus inferred\textsuperscript{170} that the most plausible explanation for the conference committee's substitution of "directly affecting" for "in" the coastal zone was a "simple compromise" over the definition of coastal zone.\textsuperscript{171} The substitution was not meant to expand the scope of section 307(c)(1) to include federal activities outside the 3-mile zone, like OCS lease sales.\textsuperscript{172} The substitution simply allowed the conference committee to retain the Senate's narrower definition of coastal zone, while making federal activities occurring on federal lands physically within the coastal zone subject to consistency review, as urged by the House.\textsuperscript{173}

The majority opinion goes on to point out that during the enactment of the CZMA in 1972 Congress specifically rejected four proposals which would have extended CZMA provisions to activities conducted beyond the coastal zone.\textsuperscript{174} The first proposal was section 313 of the House bill, which would have required the Secretary of Commerce to develop a management program for the area three to twelve miles from shore.\textsuperscript{175} Federal activities occurring in the area immediately adjacent to state coastal zones would then be required to be consistent with state coastal management programs. The second proposal, section 312 of the House bill, would have allowed the extension of state estuarine

\textsuperscript{165} Id. at 668-71.
\textsuperscript{166} Id. at 672.
\textsuperscript{167} Id. at 660-68.
\textsuperscript{168} H.R. 14146, S. 3507, supra note 99.
\textsuperscript{169} S. 3507 § 304(a), H.R. 14146 § 304(a), supra note 99.
\textsuperscript{170} 104 S. Ct. at 662.
\textsuperscript{171} Id. at 662-63.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 663-66.
\textsuperscript{175} H.R. 14146 § 313, supra note 99.
sanctuaries into the OCS.\textsuperscript{176} Two other proposals were made during the debates on the Senate floor. One proposal would have granted coastal state governors a veto over OCS lease sales,\textsuperscript{177} while the other authorized a study of the environmental effects of OCS drilling in the Atlantic.\textsuperscript{178} None of these proposed provisions were enacted. Furthermore, Justice O'Connor cited statements made during the floor debates which indicated that the CZMA was not to extend beyond the coastal zone.\textsuperscript{179}

Justice O'Connor explained that the intent of Congress at the time of the enactment of the CZMA was the controlling factor in determining the definition of "directly affecting."\textsuperscript{180} Language in an earlier Senate Report, stating that federal activities having a functional relationship with the coastal zone should be conducted in a manner consistent with the state's program, was dismissed.\textsuperscript{181} The statements in the congressional reports dealing with the 1976 CZMA Amendments\textsuperscript{182} and the 1980 reauthorization of the CZMA\textsuperscript{183} that OCS sales were subject to consistency review were also rejected.\textsuperscript{184} Justice O'Connor maintained that such subsequent congressional statements were not helpful in construing the intent of Congress at the time the CZMA was enacted.\textsuperscript{185} These statements were characterized as "[l]egislative committees' desires to reaffirm positions they have taken that were [previously] rejected by the full Congress."\textsuperscript{186}

The Court ruled\textsuperscript{187} that nothing in the other provisions of the CZMA compelled\textsuperscript{188} a broader reading of section 307(c)(1).\textsuperscript{189} Congress clearly intended that the purposes of the CZMA be carried out without reaching federal activities occurring outside of the coastal zone.\textsuperscript{190} Furthermore, the structure of section 307 indi-
cated that OCS lease sales were not intended to be covered by section 307(c)(1). 191

Justice O'Connor maintained that section 307(c)(3), not section 307(c)(1), was the most pertinent regarding OCS lease sales. 192 Section 307(c)(1) deals with activities in which the federal government is the principal actor, while section 307(c)(3) deals with federally approved actions. 193 In 1976 Congress specifically rejected the proposal to amend section 307(c)(3) to include leasing. 194 Instead, Congress added a new subsection, 307(c)(3)(B), 195 which subjected federal OCS exploration, development and production permits to consistency review. 196 This exclusion of OCS leasing in 1976 demonstrated explicit congressional intent not to subject OCS lease sales to consistency review, wrote Justice O'Connor. 197

The majority's second major argument concerned the relationship between the Outer Continental Shelf Lands Act (OCSLA) and the CZMA. 198 Prior to the enactment of the OCSLA Amendments of 1978, one could have argued that the issuance of an OCS lease triggered CZMA section 307(c)(3) on the grounds that the lease sale implied federal approval for the lessees' exploration and development plans. 199 At that time OCSLA did not specify the consequences of the lease sale. 200 However, the OCSLA Amendments of 1978 divided the OCS development process into four distinct phases: the development of the five-year leasing program, 201 the lease sale, 202 exploration, 203 and the development and production phase. 204 A lease sale was clearly separated from the issuance of subsequent permits. Since the lease sale only entitled the lessee to priority in the submission of subsequent plans, it could not directly affect the coastal zone. 205 Consistency review

191 Id.
192 Id.
193 Id. at 668.
194 Id. at 668 n.18.
197 104 S. Ct. at 668.
198 Id. at 668-71.
199 Id. at 669.
200 Id. at 669.
205 104 S. Ct. at 670-71.
was reserved for the two later stages of the OCS development process under section 307(c)(3)(B).206

Justice O'Connor noted that Congress had taken great pains to delineate the phased OCS development process, and to provide for coordination between the OCSLA and the CZMA.207 The Court concluded that this carefully balanced legislative scheme ought not be upset "by a superficially plausible, but ultimately unsupported construction of two words in CZMA section 307(c)(1)."208

3. Interior v. California: The Dissenting Opinion

The dissenting opinion in Interior v. California, written by Justice Stevens,209 was very critical of the majority's position. Justice Stevens asserted that the majority's view of the scope of section 307(c)(1) contradicted the plain language,210 legislative history,211 and purposes of the CZMA,212 as well as the lower courts' decisions in Interior v. California.213 Furthermore, legislative activity concerning OCS development subsequent to the enactment of the CZMA in 1972 undermined the majority's interpretation.214

The dissent found nothing in the plain language of section 307(c)(1) which distinguished between federal activity occurring inside or outside of the coastal zone,215 stating, "it is the effect of the activities, rather than their location, that is relevant."216 Since Congress' express purpose in passing the CZMA was to encourage federal-state cooperative long-range planning to protect the coastal resources,217 it was necessary to subject federal activity occurring outside of the coastal zone to consistency review under section 307(c)(1).218 The conference committee replaced "in the coastal zone" with "directly affecting the coastal zone" in order to ensure that "if an activity outside the zone has the same kind of effect on
the zone as an activity conducted in the zone it [would be] covered by section 307(c)(1).”219

Reviewing the 1972 legislative history of the CZMA, Justice Stevens determined that the majority’s conclusion that Congress had not demonstrated any concern for federal activities outside of the coastal zone was based on a misreading of the scope of the House and Senate bills.220 For example, sections 312 and 313 of the CZMA bill passed by the House specifically concerned activities occurring outside of the coastal zone.221 Section 312 permitted state coastal programs to establish marine sanctuaries extending into the OCS.222 Motions to delete or amend section 312 had been defeated on the House floor.223 Section 313 required the federal government to develop a management program for OCS activities that would ensure that they would be consistent with adjacent states’ coastal programs.224

Justice Stevens noted that the Senate was also concerned with federal activities occurring outside of the coastal zone.225 Coastal zone management legislation was debated in the Senate in 1971,226 the year before the CZMA was finally enacted by Congress.227 The 1971 Senate bill’s federal consistency requirement provision, the forerunner of section 307(c)(1), was similar to section 307(c)(1) of the CZMA as finally enacted in 1972. The 1971 Senate Committee Report on this legislation extended the consistency requirement to “any federal activity having a functional interrelationship from an economic, social, or geographical standpoint” with the coastal zone.228 Since the wording of the CZMA’s section 307(c)(1) threshold requirement is similar to the 1971 Senate bill’s, and there is no indication in the 1972 CZMA legislative history that Congress had changed its intended mean-

219 Id. at 675-77. The dissent goes on to recognize that the decision to lease an OCS tract is the "only federal activity that ever occurs with respect to OCS oil and gas development." Id. at 680. Subsequent activities are conducted by the lessee petroleum companies. The dissent urged that the majority's interpretation, by exempting the federal leasing decision from the CZMA's consistency requirement, renders this part of the Act nugatory and thus ought to be rejected. Id.
220 Id.
221 Id.
222 Id. at 676.
223 Id. at 675-76.
224 Id. at 675.
225 Id. at 676-78.
226 S. REP. 526, supra note 181.
227 S. REP. 753, supra note 99.
228 Id. at 20.
ing concerning the scope of this section, Justice Stevens argued that section 307(c)(1) should be interpreted in accordance with the 1971 Senate Committee Report.\footnote{104 S. Ct. at 676-77.}

The dissenting opinion proceeded to explain why the two proposals offered during the Senate debates, which would have extended provisions of the CZMA to the OCS, were defeated.\footnote{Id. at 677-78 n.13. See also supra notes 175-76.} The first proposal, which would have granted coastal state governors a veto over the issuance of leases off their coasts, was rejected because it granted the states too much authority and was presented without hearings and deliberation.\footnote{Id.} The second proposal, authorizing a study of the environmental effects of Atlantic OCS drilling, was broadened to provide for the study of environmental effects of OCS drilling \textit{in general}, and incorporated into the Senate bill.\footnote{Id. See S.3507 § 316(c), reprinted in S. REP. 753, supra note 99.}

Justice Stevens asserted that the conference committee substituted “directly affecting” for “in” the coastal zone in order to clarify the scope of section 307(c)(1).\footnote{Id. at 678.} The House then agreed to drop sections 312 and 313 and the inclusion of federal lands in the definition of coastal zone. In return, federal activities which directly affected the coastal zone, whether occurring inside or outside of the coastal zone as then defined by the bill, became subject to consistency review under section 307(c)(1).\footnote{Id. at 677.}

The dissent maintained that a broader construction of the scope of section 307(c)(1) better accomplished the purposes of the CZMA.\footnote{Id. at 678-80.} Subjecting OCS lease sales to consistency review would ensure federal-state cooperation in the protection of the coastal zone.\footnote{Id. at 678-80.} Early review would put concerned parties on notice as to any state objections to OCS development, thereby ensuring better planning.\footnote{Id.} Moreover, if the lease sale, which is the only exclusively federal activity in the OCS development process, was not subject to consistency review, section 307(c)(1) would be rendered meaningless.\footnote{Id.}
Justice Stevens determined that Lease Sale 53 directly affected the coastal zone, reiterating the factual findings of the lower courts. The Secretary of Interior's decision to lease, which involved selecting tracts and formulating lease stipulations, was a crucial step in the OCS development process. It involved large sums of money and set in motion a series of events leading to development. The impacts of the sale were significant and occurred immediately. Justice Stevens argued that if federal-state conflicts were not resolved at this early stage of the process, they would never be adequately resolved.

Justice Stevens then reviewed subsequent congressional actions dealing with OCS energy development. The CZMA was amended in 1976. At that time, Congress was concerned with the scope of section 307(c)(3), which outlines the consistency obligations of private lessees of offshore tracts, and not with section 307(c)(1), the federal consistency requirement. Justice Stevens presented evidence in the legislative history of the 1976 CZMA amendments showing that OCS leases were not made subject to consistency review under 307(c)(3) because Congress was concerned with extending the consistency requirements, which Congress assumed already applied to OCS leases, to the later stages of OCS development. Justice Stevens inferred that Congress' decision not to include the word lease in section 307(c)(3) was based on a desire not to alter the scope of that section. Nonetheless, the "central premise on which Congress legislated [in 1976 was] that section 307(c)(1) already applied to OCS oil and gas leasing decisions."

The dissent then turned to the Outer Continental Shelf Lands Act Amendments of 1978, upon which the majority had placed so much reliance. The dissent maintained that Congress simply

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239 Id. at 680-83.
240 Id. at 681-82.
241 Id.
242 Id. at 682-83.
243 Id. at 683-88.
244 Supra note 102.
247 104 S. Ct. at 685-86.
248 Id. at 685.
249 104 S. Ct. at 685.
251 See Interior v. California, 104 S. Ct. at 668-71, 672.
did not intend these OCSLA amendments to affect the consistency requirements of CZMA section 307(c)(1).\textsuperscript{252} In fact, the OCSLA amendments contained a savings clause\textsuperscript{253} specifically stating that the amendments were not to interfere with the consistency requirements of the CZMA.\textsuperscript{254} Legislative history construing this savings clause asserted that "OCS activities, including lease sales ... must comply with 'consistency' requirements as to coastal zone management plans..."\textsuperscript{255} Furthermore, section 18(f) was also added to the OCSLA\textsuperscript{256} in 1978 expressly to require the Secretary of Interior to consider state coastal zone management programs when developing the OCS leasing program.\textsuperscript{257}

Finally, the CZMA was reauthorized in 1980.\textsuperscript{258} The House\textsuperscript{259} and Senate\textsuperscript{260} reports of the 1980 CZMA contained explicit language which stated that OCS lease sales were subject to consistency review under section 307(c)(1).\textsuperscript{261} Justice Stevens also noted that in 1981 NOAA attempted to alter CZMA regulations to exempt OCS lease sales from consistency review.\textsuperscript{262} The House Committee on Merchant Marine and Fisheries promptly voted to exercise the legislative veto\textsuperscript{263} over the new regulations\textsuperscript{264} and NOAA withdrew the proposed change.\textsuperscript{265} The dissent cited these actions as demonstrating a continuous congressional commitment to apply CZMA's consistency requirement to federal OCS lease sale decisions.\textsuperscript{266}

4. Critique of the Majority Opinion in \textit{Interior v. California}

The majority adopted a very narrow construction of "directly affecting," which confines consistency review under section

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{252} \textit{Id.} at 686-87.
\item \textsuperscript{253} 43 U.S.C. § 1866(a).
\item \textsuperscript{254} \textit{Id.}
\item \textsuperscript{256} 43 U.S.C. § 1344.
\item \textsuperscript{257} 104 S. Ct. at 686-87.
\item \textsuperscript{258} \text{H. REP. NO. 1012, 96th Cong., 2d Sess. 34, reprinted in} 1980 U.S. CODE Cong. & Admin. News 4362, 4382.
\item \textsuperscript{259} \text{S. REP. NO. 783, 96th Cong., 2d Sess. 11 (1980) quoted in} \textit{Interior v. California}, 104 S. Ct. at 688.
\item \textsuperscript{260} 104 S. Ct. at 687-88.
\item \textsuperscript{261} \textit{Id.} at 688-89. \textit{See also infra} note 361.
\item \textsuperscript{262} \text{See} 16 U.S.C. § 1463a (1982).
\item \textsuperscript{263} \text{H.R. REP. NO. 269, 97th Cong., 1st Sess. 7-8 (1981).}
\item \textsuperscript{264} 47 Fed. Reg. 4231 (1982).
\item \textsuperscript{265} 104 S. Ct. 687-89.
\end{itemize}
\end{footnotesize}
307(c)(1) to federal activities occurring inside the geographical limits of the coastal zone. This decision frustrates the purpose of the CZMA. It is not supported by the legislative history, the plain language, or NOAA's interpretations of the CZMA. The decision also misconstrues the relationship between the CZMA and the OCSLA.

a. Legislative History

The majority expressly refused to allow considerations of the CZMA's purpose or policy to affect its construction of the Act's threshold requirement of a "direct effect" on the coastal zone.267 The majority viewed the problem as defining the statutory phrase "directly affecting." Ruling the competing interpretations advanced by California and Interior both "superficially plausible" but without support in the CZMA itself,268 the majority turned almost immediately to the Act's legislative history. The majority placed primary reliance on the legislative history of the CZMA in 1972 to support its construction of "directly affecting" in section 307(c)(1).269 The majority cited congressional rejection, during the enactment of the CZMA, of four proposals which would have extended the CZMA to the OCS, as evidence of Congress' intention that "directly affecting" be narrowly construed.270 These four proposals, however, were not rejected because of congressional opposition to extending CZMA requirements to OCS activities. In fact, they were deleted because of their own inherent defects.

Section 313 of the original House bill allowed the Secretary of Commerce, in coordination with the Secretary of Interior, to develop a multi-purpose management plan for OCS areas adjacent to the coastal zone within twelve miles from shore.271 The plan was intended to complement state coastal programs.272 Activities occurring in the area immediately adjacent to state coastal zones were to conform to the states' programs to "the maximum extent practicable."273 This requirement was designed to ensure that

267 Id. at 672.
268 Id. at 661.
269 104 S. Ct. at 661-68.
270 Id. at 663-66.
271 H.R. 14146 § 313(a), supra note 99.
272 H.R. REP. No. 1049, supra note 99.
273 H.R. 14146 § 313(c), supra note 99.
OCS activities, especially oil and gas development, did not jeopardize the state coastal programs.\textsuperscript{274} Section 313 was rejected by the conference committee in 1972 because "the provisions relating thereto did not prescribe sufficient standards or criteria and would create potential conflicts with legislation already in existence concerning OCS resources."\textsuperscript{275} This rejection indicated that Congress did not want to establish a new federal management program for OCS areas, particularly since no standards or criteria for such a program were set forth in the section. As thus drafted the proposal could have interfered with OCS energy development.

Section 312 of the original House bill allowed states to establish estuarine sanctuaries in the coastal zone.\textsuperscript{276} The Secretary of Commerce could then permit a state to extend its sanctuary into the OCS,\textsuperscript{277} but the Secretary would promulgate regulations for sanctuary extensions.\textsuperscript{278} This provision did not require federal activities occurring inside the sanctuary extension to be subject to consistency review. Nevertheless, congressmen expressed concern that this section duplicated existing OCS programs\textsuperscript{279} and might foreclose OCS energy development without judicial or administrative review.\textsuperscript{280} The conference committee deleted this proposed provision, saying that "the need for such a provision appears rather remote."\textsuperscript{281}

The majority also relied on Congress' rejection of several proposals raised during the Senate CZMA debates that would have expanded the scope of the Act. Senator Hale Boggs, expressing concern about offshore oil transport terminals, offered an amendment which would have granted coastal state governors a veto over the issuance of any OCS lease which affected the coastal zone.\textsuperscript{282} During the subsequent debate it was pointed out that the amendment would grant the state governors too much authority over OCS activities and was offered without public hearings or

\textsuperscript{274} 104 S. Ct. at 663-64, citing remarks of Congressman Anderson, 118 CONG. REC. 26484, 26495, 35549-50 (1972).
\textsuperscript{275} H. CONF. R. 1544, supra note 100, at 15.
\textsuperscript{276} H.R. 14146 § 312, supra note 99.
\textsuperscript{277} Id. § 312(b).
\textsuperscript{278} Id. § 312(c).
\textsuperscript{279} 104 S. Ct. at 678 n.13, citing remarks of Congressman Kyl, 118 CONG. REC. 26495-96 (1972).
\textsuperscript{280} Id., citing remarks of Congressman Clark, 118 CONG. REC. 26495 (1972).
\textsuperscript{281} H. CONF. R. 1544, supra note 100, at 14-15.
\textsuperscript{282} 104 S. Ct. 665 n.14.
committee deliberation.\footnote{283 Id., citing remarks of Senators Hollings and Moss, 118 CONG. REC. 14184 (1972).} Furthermore, the issue of offshore oil transport terminals was being considered by the Senate Committee on Interior and Insular Affairs.\footnote{284 Id.} In light of this information, Senator Boggs withdrew his amendment.\footnote{285 Id.}

The final proposal, also offered on the Senate floor, required "the National Academy of Science to undertake a full investigation of the environmental hazards attendant on offshore oil drilling on the Atlantic OCS."\footnote{286 Id., citing remarks of Senators Hollings and Moss, 118 CONG. REC. 14183 (1972).} Several senators objected to the proposal because of its narrow focus.\footnote{287 Id.} However, when the provision was amended to provide for recommendations on the elimination of environmental hazards of OCS drilling in general the objection was withdrawn\footnote{288 Id., citing remarks of Senators Stevens and Moss, 118 CONG. REC. 14180-81 (1972).} and the provision was incorporated into the Senate bill.\footnote{289 Id.} The conference committee ultimately omitted this proposal on the grounds that it was simply "non-germane" to the CZMA.\footnote{290 Id.}

An objective examination of the legislative activity regarding the four proposals cited by the majority indicates that each proposal was rejected because of its own inherent defects. Their deletion does not demonstrate that federal OCS leasing decisions were excluded from consistency review under section 307(c)(1). Justice O'Connor apparently misconstrued the purposes of the rejected provisions and the reasons for their deletion.

The more accurate explanation of congressional intent was put forward in the rationales of the dissenting and lower court opinion. Congress explicitly announced, in section 303 of the Act, that the purpose of the CZMA was to establish a "national policy to preserve, protect, develop and where possible, to restore or enhance, the resources of the coastal zone."\footnote{291 16 U.S.C. § 1452(a) (1982).} Congress realized that the "competing demands . . . occasioned by population growth and economic development" were destroying the coastal environment.\footnote{292 16 U.S.C. § 1451(c) (1982).} One of the circumstances leading to the CZMA's passage
in 1972 was the Santa Barbara oil spill of 1969,\textsuperscript{293} which was caused by a federally authorized offshore oil well.\textsuperscript{294} Furthermore, Congress determined that the various state and local authorities had proven incapable of comprehensively "planning and regulating land and water uses in the coastal zone."\textsuperscript{295} Congress decided that to protect the coastal zone it was necessary "to encourage the states to exercise their full authority over the lands and waters in the coastal zone."\textsuperscript{296}

Congress decided in 1972 that the best management of coastal resources would be achieved if states were given the major role in developing and administering coastal programs. The CZMA was thus designed to encourage and assist the states to assume comprehensive planning and regulatory functions over the coastal zone. It sought to accomplish this in two ways. First, it provided grants-in-aid to coastal states to develop and implement coastal zone management programs.\textsuperscript{297} Second, it dictated that federal activities which affected the coastal zone should be conducted in a manner consistent "to the maximum extent practicable" with the state coastal zone management program.\textsuperscript{298}

Preventing the states from participating in the crucial early planning stages of OCS energy development defeats the purpose and design of the CZMA. It seems impossible to protect the natural systems of the coastal zone adequately without considering activities in the OCS seaward of the coastal zone. As Representative Anderson of California remarked, "[O]il spills do not respect legal jurisdictional lines."\textsuperscript{299} Restricting the state role in the OCS leasing and development process might also discourage states from participating in the federal coastal zone management program.

Congress clearly recognized the need to extend provisions of the CZMA to OCS activities. This was manifested in sections 312 and 313 of the original House bill. The Senate was also concerned with extending consistency review to activities occurring outside of the coastal zone. The consistency language in the 1972 Senate bill was

\begin{itemize}
  \item \textsuperscript{293} Gulf Oil v. Morton, 493 F.2d 141, 143 (9th Cir. 1973).
  \item \textsuperscript{294} 118 CONG. REC. 26484 (1972) (remarks of Rep. Anderson). \textit{See also} 104 S. Ct. at 663-64.
  \item \textsuperscript{295} 16 U.S.C. § 1451(h) (1982).
  \item \textsuperscript{296} 16 U.S.C. § 1451(i) (1982).
  \item \textsuperscript{297} 16 U.S.C. § 1454, 1455 (1982).
  \item \textsuperscript{298} 16 U.S.C. § 1456(c)(1) (1982).
  \item \textsuperscript{299} 118 CONG. REC., \textit{supra} note 294, at 26484.
\end{itemize}
identical to that in the CZMA bill of the previous year. The Report on the 1971 bill had construed this language to extend the consistency requirement to any federal activity having "a functional interrelationship from an economic, social or geographic standpoint" with the coastal zone. There is nothing in the 1972 Senate report to contradict this language, so it can be assumed that this language aptly describes the scope of section 307(c)(1).

Given the explicit purposes of the CZMA and the express intent of Congress to subject activities occurring outside of the coastal zone to consistency review, the conference committee's substitution of "directly affecting" for "in" the coastal zone can only be construed as expanding the scope of section 307(c)(1). As a result, federal activities which have an impact on the coastal zone, whether occurring inside or outside of the coastal zone, were intended by Congress to be subject to consistency review under section 307(c)(1).

Congressional actions following the enactment of the CZMA lend further support to this position. In 1976 Congress enacted amendments to the CZMA in order to deal with the impact of OCS energy development. The amendments contained two major revisions. First, the Coastal Energy Impact Program was established to provide financial assistance to states and local communities to deal with the effects of OCS energy development. Second, section 307(c)(3) was modified. Its original language was retained as section 307(c)(3)(A) and a new provision, section 307(c)(3)(B), was added. The new subsection granted the affected coastal states the right to review exploration, development and production plans for each OCS tract in order to ensure that the particular development plans do not interfere with the state's coastal zone management process. This new section was designed to expedite OCS energy development.

The majority in Interior v. California distorted the intent of Congress regarding OCS leasing in the 1976 amendments. While

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300 S. Rep. No. 526, supra note 181, at 20. See also 104 S. Ct. at 676 n.10, 11.
301 CZMA Amendments of 1976, supra note 102.
305 H.R. Rep. No. 1298, supra note 196, at 30-31. The new section provides that once a lessee's plan is certified as being consistent with a state's coastal zone management program, the issuance of all subsequent federal licenses and permits during that phase of the process are presumed to be consistent with the state's program. This eliminates the consistency requirement for each license and permit.
Congress ultimately decided not to include the words *lease* in section 307(c)(3)(B), both the initial 1976 House and Senate bills confirmed that OCS leasing was already subject to consistency review. Throughout the debates congressmen stated that the proposed inclusion of the word *lease* was merely a reaffirmation of the original intent of Congress to subject OCS lease sales to consistency review. In addition, leasing was deleted from the 1976 bill in the House not because of opposition to the concept, but merely in order to give Congress more time to consider the issue during the conference committee deliberations.

The conference committee's exclusion of leasing from section 307(c)(3) was not meant to preclude consistency review of OCS lease sales under section 307(c)(1). Any comments made during the conference committee's deliberation implying this are

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306 122 CONG. REC. 6128 (1976).
307 S. 586, H.R. 3981, supra note 103.
308 104 S. Ct. at 684 n.25.
309 Supra note 104. Representative DuPont, sponsor of the amendment, stated: By striking it in the House bill and leaving it in the bill that has already passed the Senate we will be giving ourselves a little bit of flexibility in the conference to either adopt the language as the Senate put it in or adopt some other language we feel would be more beneficial and at the same time protect the rights of the States. 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.
310 The following discussion took place in the conference committee between Representative Breaux and Congressional staff members:

**Mr. Breaux:** It is your interpretation we are extending that [consistency requirement of section 307(c)(3) of the CZMA] to leases?

**Mrs. Baldwin [Senate Staff]:** We are extending it to development plans.

**Mr. Hussey [Senate Staff]:** This typically excludes leases.

**Mr. Breaux:** I don't want to take up the committee's time, but what happens if a state says no to an exploration plan? What happens to the lease somebody bought and paid for?

**Mrs. Baldwin:** Nothing would happen to the lease. It would have to be modified as any other provision would have to be.

**Mr. Kitsos [House Staff]:** The Secretary of Commerce can declare in the interest of national security [that] consistency is assumed. He can override the state in that process.

**Mr. Hussey:** Of course, you realize the states have to get an approved section 306 program prior to the specific provision taking place.

**Mr. Breaux:** It is clearly the intent that it doesn't extend to leases.

**Mrs. Baldwin:** Only to activity covered in the plans.

Conference Committee Transcript of May 17, 1976, at 29. Furthermore, one of the staff members of the conference committee stated:

The Administration, ... does not have serious concerns about applying that provision to leases because of the potential for delay in the leasing process. Also, most of the states wouldn't be able to take advantage of it at that time because they won't have approved coastal zone management programs at the time of the
explicitly contradicted by a statement in the committee’s report.311 The 1976 conference committee report states that “the conference substitute follows the Senate bill” which “required that each Federal lease [for example, offshore oil and gas leases] had to be submitted to each state with an approved coastal zone management program for” a consistency determination.312

Even though OCS lease sales were not subject to consistency review under revised section 307(c)(3), this does not affect the consistency requirements imposed by section 307(c)(1).313 Congress expressed no intention in 1976 to repeal section 307(c)(1) by enacting section 307(c)(3)(B), nor is there any “positive repugnancy” between the two provisions. Consequently, the Supreme Court should have given effect to both provisions in Interior v. California.314

leas sale. In light of this, and in light of the suggestion from the Department of the Interior, the staff is suggesting that the conferees consider making it available at the plan approval stage. This is the process that takes place after an oil field is discovered and when a lessee is applying for approval of its plan to develop that.

Transcript at 21-22. This testimony is cited in 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. CAL. DAVIS L. REV. 105, 115 n.42; Note, Consistency Provisions to OCS Leasing, 2 STAN. ENVTL. L. ANN. 144, 162-63.


313 104 S. Ct. at 685 n.28, citing a comment made by Congressman Studds, one of the sponsors of the CZMA Amendments in 1976, who stated:

Nowhere in this entire set of deliberations [in 1976], was there any explicit or implicit reference to consistency decisions by [Interior] in its pre-lease activity pursuant to § 307(c)(1). The focus was on the proper time for the state to certify a private company’s activity—not on the federal agency’s obligations under § 307(c)(1).

The deletion of lease from § 307(c)(3) . . . had absolutely no reference to the range of pre-leasing decisions made by the Interior Department and no implication is warranted with respect to the § 307(c)(1) issue here.


314 The doctrine of repeal by implication has been consistently disfavored by the Supreme Court, as the 1979 opinion of the Justice Department, supra note 41, recognized.

Since OCS leasing was already covered by section 307(c)(1), it might be presumed that the conference committee decided to delete the word lease from the 1976 Amendments’ version of this section to avoid risking a presidential veto of the Amendments. Senator Tunney, one of the Senate sponsors of the 1976 Amendments, noted the conference committee “compromised on this issue due to a threat of a presidential veto of the entire bill.” 122 CONG. REC. 10941 (1976). Furthermore, only section 307(c)(3) was being considered for revision. Section 307(c)(3) was designed to expedite OCS development, and deals primarily with the post-sale activities of lessees. The conference committee may have decided not to alter the focus of 307(c)(3) by adding the word lease. See 104 S. Ct. at 685-86.
A 1977 study by the Office of Technology Assessment (OTA)315 concluded that any confusion over CZMA consistency provisions stems from the fact that the CZMA embodied two different consistency standards.316 The first standard, set forth in section 307(c)(1), was the weaker of the two and applied to OCS lease sales.317 The second standard, set forth in section 307(c)(3), was more stringent and applied to OCS post-lease permits, not to OCS lease sales.318 The OTA's observation is significant because it recognized that OCS lease sales were subject to consistency review under section 307(c)(1).

The CZMA was reauthorized in 1980.319 The committee reports of that year explicitly state that section 307(c)(1) applies to OCS lease sales.320 The majority briefly recognized these comments in a footnote, but ruled that the comments were "of little help in construing the intent behind the law actually enacted."321

In sum Justice O'Connor disregarded strong congressional language clearly indicating that Congress intended OCS leasing to be subject to consistency review under section 307(c)(1). The 1980 Senate report explained that "Interior's activities which precede the OCS lease sales were to remain subject to the requirements of section 307(c)(1)."322 The House report of that year asserted that the 1976 CZMA amendments "did not alter Federal agency responsibility to provide states with a consistency determination related to OCS decision which preceded the issuance of leases."323 The House report went on to state that consistency review under section 307(c)(1) was mandated "whenever Federal activity had a functional interrelationship from an economic, geographic or social standpoint with a State's coastal program's land and water use policy."324 Alternatively, federal consistency review applied

316 Id. at 155-57.
317 Id. at 155. Section 307(c)(1) requires the federal government to determine that its activities are consistent "to the maximum extent practicable" with a state's coastal program.
318 Id. at 156. Section 307(c)(3)(B) requires state certification that a lessee's plans are consistent with the state's coastal program. 16 U.S.C. § 1456(c)(3)(B) (1982).
319 CZMA Improvement Act, supra note 108.
321 104 S. Ct. at 666 n.15.
322 S. REP. No. 783, supra note 109, at 11.
323 H.R. REP. No. 1012, supra note 109, at 28.
324 Id.
"when a Federal agency initiates a series of events of coastal management consequence."325

While such statements are not conclusive, they do represent congressional interpretation of the CZMA and should have been afforded proper respect by the Court in \textit{Interior v. California}.326 Instead, the majority ignored this crucial data in its statutory interpretation. The Supreme Court should have adopted the logic of the Ninth Circuit, which held that, "[i]n the circumstances of this case we accord them [committee statements] substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the Federal appellants."327

b. The Administrative Interpretation Of "Directly Affecting:"
National Atmospheric And Oceanic Administration
Regulations

The Supreme Court's interpretation of the CZMA's threshold requirement in \textit{Interior v. California} was contrary to NOAA regulations implementing the Act. Considerable deference is traditionally given to agency expertise.328 Since NOAA's regulations are not arbitrary or capricious, the Supreme Court should have followed them in \textit{Interior v. California}.329 Instead, the Supreme Court dismissed NOAA's regulations in a footnote, on the grounds that "in construing section 307(c)(1) the Agency has walked a path of such tortured vacillation and indecision that no help is to be gained in that quarter."330 An objective review of NOAA regulations on the CZMA's threshold requirement of a direct effect on the coastal zone does not support the Supreme Court's conclusion.

When the amendments to the CZMA were enacted in 1976, only one state, Washington, had an approved coastal management

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\item 325 Id.
\item 326 104 S. Ct. at 688 n.36. See also 683 F.2d at 1262. See generally Linsley, \textit{supra} note 21, at 460-61.
\item 327 683 F.2d at 1262.
\item 328 Id. at 1263. The Ninth Circuit held that a court generally defers to agency regulations if the regulations "implement the congressional mandate in some reasonable manner." 683 F.2d at 1263. As the district court held, "[i]t is the settled principle that an agency interpretation of a statute is normally entitled to deference from the courts." 520 F.Supp. at 1276-77. See also American Petroleum Institute v. Knecht, 456 F. Supp. 889, 903-08 (C.D. Cal. 1978), 609 F.2d 1306, 1310 (9th Cir. 1979).
\item 330 104 S. Ct. at 661 n.6.
\end{itemize}
When NOAA proposed the first federal consistency regulations in that year, the Agency recognized that the Federal agency and "the state/local government community" had different perspectives on the issue. The proposed regulations gave federal agencies authority to conduct consistency determinations under section 307(c)(1) and (2) but they did not define "directly affecting." Instead, NOAA took the position that the regulations would "adopt the 'causal' terms of the Act." Federal activities would have to be evaluated on a factual case-by-case basis to determine if they directly affected the coastal zone.

In 1977, responding to a request to clarify the meaning of the statutory language, NOAA amended its proposed regulations. The new proposed regulations defined individual threshold tests to identify activities requiring consistency review. NOAA explained that "directly affecting" should be defined "in terms of the significance of the effects on the coastal zone." In the 1977 proposed regulations, NOAA also addressed the specific issue of whether OCS lease sales were subject to CZMA consistency determinations. NOAA announced that it was "considering a position which treated the DOI's pre-lease sale decisions, as federal activities subject to the requirements of section

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332 Id. at 42878.
333 Id. at 42879.
334 Id.
335 Id. at 42880.
336 Id.
338 Id. at 43588. The different federal activities subject to consistency review under section 307(c) have different threshold requirements: sections 307(c)(1) and (2) apply to direct federal activities including development projects, and the threshold test is "directly affecting the coastal zone;" section 307(c)(3)(A) applies to federally licensed and permitted activities, and the threshold test is "affecting land or water uses in the coastal zone;" section 307(c)(3)(B) applies to federally licensed and permitted activities described in OCS plans, and the threshold test is "affecting any land or water use in the coastal zone;" and section 307(d) applies to federal assistance to state and local governments, and the threshold test is "affecting the coastal zone."
339 Id. at 43590. NOAA noted that it was impossible to develop a precise definition for "directly affecting." However, the term could be defined by analogy. NOAA examined the definition of the coastal zone which held that "shorelands" were to be considered part of the coastal zone, if their use had a "direct impact" on coastal waters. Direct impacts were defined as "only those impacts of a significant nature." NOAA thus equated significant with direct. NOAA then turned to CEQ regulations to define "directly affecting" which NOAA equated with the "significantly affecting" test of NEPA, 42 U.S.C. § 4332(2)(C) (1982).
307(c)(1)."\textsuperscript{340} However, citing uncertainty regarding congressional intent on the matter and Interior's strong opposition to the position, NOAA decided not to adopt a firm stance on the issue.\textsuperscript{341}

In 1978 the final CZMA regulations regarding federal consistency were issued.\textsuperscript{342} The regulations adopted a single liberal interpretation of all of the threshold tests set forth in the five subsections of section 307(c), including 307(c)(1), triggering consistency review. All federal activities which "significantly affected" the coastal zone would be subject to consistency review.\textsuperscript{343} The term "significantly" was broadly defined.\textsuperscript{344} This "significantly affecting" test was modeled\textsuperscript{345} on the threshold test in NEPA.\textsuperscript{346} In effect, the "significantly affecting" test of the regulations replaced the "directly affecting" test of subsection 307(c)(1).

Despite the expansion of the "directly affecting" test, OCS lease sales were exempt from consistency review under the 1978 regulations.\textsuperscript{347} NOAA explained that it had received conflicting comments from the oil industry and the states regarding the question whether OCS lease sales should be considered "Federal licenses or permits" subject to CZMA consistency rules.\textsuperscript{348} NOAA further realized that the controversy between Interior and the Department of Commerce over the applicability of section 307(c)(1) to federal OCS lease sales had not been resolved. NOAA, unwilling

\textsuperscript{340} Id. at 43591.
\textsuperscript{341} Id. at 43592.
\textsuperscript{342} 43 Fed. Reg. 10510 (1978).
\textsuperscript{343} Id. at 10511. NOAA explained that uniformity among the threshold tests was justified, on the grounds that the legislative history was "replete" with statements that Congress intended to include all federal activities capable of significantly affecting the coastal zone. Furthermore, the terms were "interchangeable and synonymous."
\textsuperscript{344} Id. at 10519. The regulations directed that a federal activity was subject to consistency review if it caused significant: (1) changes in the manner in which land, water, or other coastal zone resources are used; (2) limitations on the range of uses of coastal zone natural resources; or (3) changes in the quality of coastal zone natural resources. Furthermore, the regulations provided that:
The significance of the changes or limitations caused by Federal action must be considered in terms of the primary, secondary, and cumulative effects on the coastal zone. A Federal action which causes significant changes in or limitation on the coastal zone natural resources meets the requirements of this section even when the action causes both beneficial and adverse coastal zone effects and, on balance, the effects are determined to be beneficial.
\textsuperscript{347} 43 Fed. Reg. 10519, 10513 (1978).
\textsuperscript{348} Id. at 10513.
to make a controversial decision on the issue, simply deferred issuing its judgment.\textsuperscript{349}

The Department of Justice opinion on CZMA’s applicability to federal OCS pre-lease activities, issued on April 20, 1979 during the controversy over Lease Sale 48, had a major impact on NOAA’s regulations.\textsuperscript{350} The Justice Department ruled that OCS pre-leasing activities were generally subject to consistency review, if such activities did, in fact, directly affect the coastal zone.\textsuperscript{351} The Department of Justice maintained that 307(c)(1)’s requirement of a direct effect on the coastal zone was a factual standard to be applied to OCS lease sales on a case-by-case basis.\textsuperscript{352}

At the same time, the Justice Department rejected NOAA’s substitution of the “significantly affecting” test for the statutory “directly affecting” test in section 307(c)(1).\textsuperscript{353} The Justice Department determined that Congress had intended that different threshold requirements should be applied to the different activities that were subject to consistency review under the five subsections of section 307(c).\textsuperscript{354} Consequently, the “directly affecting” requirement of section 307(c)(1) ought not be lowered to a “significantly affecting” standard.\textsuperscript{355}

In response to the Justice Department’s opinion, NOAA issued revised regulations.\textsuperscript{356} The new regulations established individual threshold tests for the activities subject to consistency review under section 307(c). The “directly affecting” test was reinstated for the implementation of section 307(c)(1). The phrase “directly affecting” itself remained undefined.\textsuperscript{357}

Although “directly affecting” was not given a definition, the new regulations did dictate that OCS pre-leasing activities were subject to consistency review under section 307(c)(1).\textsuperscript{358} NOAA also

\textsuperscript{349} Id. at 10512.
\textsuperscript{350} DOJ Opinion, supra note 41.
\textsuperscript{351} Id. at 13-14.
\textsuperscript{352} Id. at 14.
\textsuperscript{353} Id. at 13-14.
\textsuperscript{354} Id.
\textsuperscript{355} Id.
\textsuperscript{357} Id.
\textsuperscript{358} The regulations (5 C.F.R. § 930.71) excluded OCS lease sales from the definition of “Federal licenses or permits.” 44 Fed. Reg. at 37154. However, OCS activities were subject to review under section 930.33(c) which stated that, “[f]ederal activities outside the coastal zone (e.g. on excluded Federal land, or OCS, or landward of the coastal zone)
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e ncouraged federal agencies to “construe liberally the ‘directly affecting’ test in borderline cases so as to favor the inclusion of Federal activities subject to consistency review.”359 In 1980 NOAA reiterated its position that OCS lease sales were subject to consistency review.360

The NOAA’s interpretation of section 307(c)(1) shows the agency’s awareness that the CZMA’s applicability to OCS energy development was highly controversial. Nevertheless, NOAA regulations have never in any sense been arbitrary or capricious. Accordingly, the Supreme Court ought to have given the administrative interpretation of the phrase “directly affecting” more weight in Interior v. California.

From the time when it first proposed CZMA regulations in 1976, until 1981, when California v. Watt was initiated,361 NOAA consistently maintained that section 307(c)(1)’s “direct effect” threshold requirement be liberally construed. In fact, the agency briefly

are subject to Federal agency review to determine whether they directly affect the coastal zone.” 44 Fed. Reg. at 37146.

359 Id. at 37146-47.

360 Letter from NOAA to State Coastal Management Program Directors (Apr. 9, 1980), cited at 683 F.2d at 1262, which reads: “In our view, Federal consistency requirements subject the final notice of [an] OCS sale to consistency determinations. This critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will invariably affect coastal resources.”

361 In May 1981, two weeks after the complaints were filed in California v. Watt, the NOAA issued a notice of Proposed Rule-Making in which the Agency announced it was adopting Interior’s narrow interpretation of “directly affecting.” 46 Fed. Reg. 26658 (1981). The proposed regulation directed that federal activity directly affected the coastal zone under the CZMA only if “the conduct of the activity itself produces a measurable physical alteration in the coastal zone or [if] that activity initiates a chain of events reasonably certain to result in such alteration, without further required agency approval.” 46 Fed. Reg. 26659 (1981). In its comments to the proposed regulation, NOAA said that OCS planning decisions were not the type of activities which would directly affect the coastal zone. Id. at 26660. The rule was issued in final form on July 8, 1981. 46 Fed. Reg. 50976 (1981); see also 47 Fed. Reg. 4231 (1982).


Resolutions disapproving the new regulation were introduced in both houses of Congress, 12 ENV’T. REP. (BNA) 522 (Aug. 21, 1981); 12 ENV’T. REP. (BNA) 609 (Sept. 18, 1981), and the House Committee on Merchant Marine and Fisheries voted to veto the regulations, H. Rep. No. 269, supra note 264. This congressional veto became part of the CZMA Amendments of 1980, see H. REP. No. 1012, supra note 109, at 53-54.

directed that federal agencies use a less stringent threshold test, the "significant effect" standard of NEPA, to determine whether a federal activity should be consistent with a state coastal management program under the CZMA. The NOAA's liberal construction of section 307(c)(1) was faithful to the explicit purposes and policy of the CZMA, and the agency's regulations should have been given the weight due them according to precedent in Interior v. California.

C. 1978 Outer Continental Shelf Lands Act Amendments

The final element of the Supreme Court's rationale in Interior v. California concerned the relationship between the CZMA and the OCSLA.\[362\] The OCSLA, originally enacted in 1953, gives the federal government jurisdiction over the OCS.\[363\] The OCSLA Amendments of 1975\[364\] established a strong national policy to develop the energy resources of the OCS. In Interior v. California the Court ruled that under the scheme established by the 1978 legislation a federal OCS lease sale could not directly affect the coastal zone.\[365\] However, the Court's opinion is not only based on an inaccurate portrayal of the consequences of an OCS lease sale, but also misinterprets the relationship Congress fashioned between the OCSLA and the CZMA in its 1978 legislation.

The OCSLA Amendments of 1978 set up the mechanics of OCS energy development by delineating four distinct stages: (1) the preparation of a five-year lease program;\[366\] (2) the lease sale;\[367\] (3) exploration;\[368\] (4) development and production.\[369\] The majority in Interior v. California held in essence that during the first two stages of OCS energy development there was by definition no federal activity which directly affected the coastal zone within the terms of the CZMA.\[370\]

Viewing the federal lease sale narrowly, the majority determined that the lease sale only entitles the lessee to priority in the

\[362\] See supra text and notes at notes 198-208.
\[363\] See supra text and notes at notes 1-4.
\[365\] See 104 S. Ct. at 668-72.
\[367\] Id. at § 1337(a).
\[368\] Id. at § 1340.
\[369\] Id. at § 1351.
\[370\] 104 S. Ct. at 669-71.
submission of subsequent exploration and development plans.\textsuperscript{371} If these plans are ultimately rejected by Interior, no further development will take place. Accordingly, the Court ruled that the lease sale did not directly affect the coastal zone since it authorized no activity that could have a physical impact on the coastal zone.\textsuperscript{372}

The Court's decision of \textit{Interior v. California} understates the true significance of the federal OCS lease sale. The OCSLA defines a "lease" as "any form of authorization which ... authorizes exploration for, and development and production of, minerals."\textsuperscript{373} This definition assumes subsequent development. The lease sale establishes the parameters of energy development by identifying the tracts to be developed and the stipulations governing such development. It is the only time each multi-phased energy development project is evaluated in its entirety, and the only stage when the cumulative effect of offshore oil and gas development on state coastal resources is considered. Furthermore, the high bidding among petroleum companies for the leases belies the majority's characterization of the lease sale as mere priority positioning for the submission of subsequent plans.\textsuperscript{374}

The majority conceded that the lessee's activity during the exploration, development and production stages would have a direct effect on the coastal zone and that the requisite federal permits would be issued only after consistency review under section 307(c)(3)(B) of the CZMA.\textsuperscript{375} However, the Court ruled the statutory scheme dictated that no activity prior to the final two stages would be subject to the CZMA's consistency requirement. Justice O'Connor asserted that the planning and development stages had been separated by Congress "to forestall premature litigation regarding adverse environmental effects" that would occur only at the later stages of the process.\textsuperscript{376}

The majority approach disregards both the 1979 Justice Department opinion as well as the two lower court decisions in the case on this issue. The Justice Department found that whether or not an OCS lease sale directly affected the coastal zone was a

\textsuperscript{371} Id. at 670.
\textsuperscript{372} Id. at 670-71.
\textsuperscript{373} 43 U.S.C. § 1331(c) (1982).
\textsuperscript{374} The highest bid made on a single tract in Lease Sale 53 was $333,600,000, submitted by Chevron Oil and Phillips Petroleum. This tract was not involved in the case.
\textsuperscript{375} 104 S. Ct. at 670-71.
\textsuperscript{376} Id. at 671.
factual question to be answered on a case by case basis. The district court's factual determination in California v. Watt that Lease Sale 53 did directly affect California's coastal zone was affirmed by the Ninth Circuit. Justice O'Connor simply ignored the direct effects of OCS pre-lease activities on the coastal zone.

The majority asserted that nothing in its analysis of section 307(c)(1) was inconsistent with the savings clause in the OCSLA Amendments which states that, "nothing in this chapter shall be construed to amend, modify or repeal any provision of the CZMA." However, Justice O'Connor's conclusion on this point is erroneous. OCSLA's savings clause expressly states that the 1978 OCSLA Amendments are not meant to override the provisions of the CZMA, but this is precisely what the majority's interpretation accomplishes. Furthermore, the section of the House report explaining this savings clause indicates that Congress assumed the CZMA consistency review applied to federal OCS lease sales. The report states, "the committee is aware that in the CZMA of 1972, as amended in 1976 ... certain OCS activities including OCS lease sales ... must comply with 'consistency' requirements as to coastal zone management programs.

D. Conclusion

The Supreme Court's interpretation of the CZMA's threshold requirement of a "direct effect" on the coastal zone in Interior v. California is incorrect. The decision diminishes state input at the crucial early stages of the OCS development process. This relegates the states to a minor advisory role during the pre-lease and lease sale stages. These stages are the only points in the OCS energy development process at which the lease sale in its entirety can be evaluated to determine if it interferes with state coastal zone management programs. Later review is restricted to particular tracts under section 307(c)(3)(B). Consequently, limiting state involvement at the lease sale stage frustrates the purpose of the CZMA, which is to establish a cooperative management

377 DOJ Opinion, supra note 41, at 10-11.
378 520 F. Supp. at 1380-82; 683 F.2d at 1260. See 104 S. Ct. at 680-82.
379 104 S. Ct. at 671 n.21.
381 Id.
scheme between the federal and state governments to protect the natural systems of the coastal zone.

The majority misreads the legislative history of the CZMA to come to a conclusion contrary to the Justice Department’s 1979 interpretation, NOAA regulations, and the district and appellate court opinions in the case. The decision fundamentally understates the importance of the lease sale and misconstrues the relationship between the OCSLA and the CZMA.

The Court’s opinion interprets the CZMA’s threshold requirement in a manner contrary to the purpose and policy embodied in the CZMA. The CZMA was enacted to promote effective state protection of coastal resources; Interior v. California is a defeat for states’ rights. It would be in the public interest to insure that OCS oil and gas development is consistent with state coastal plans at the lease sale stage. This would not only improve long-range planning but also enhance federal-state cooperation.

State involvement in OCS energy development at the lease sale stage would allow a state to scrutinize Interior’s leasing proposal to determine that the proposal did not conflict with the state’s coastal zone management program. This would give the state a better opportunity to negotiate with Interior regarding both the location of development and the conditions under which such development would occur. In turn, the process would insure a better balancing of both federal and state interests, as well as energy and environmental concerns.

Granting the states a more expansive role at the lease sale stage would also provide the states with a better opportunity to resolve the conflicts among local interests affected by OCS development, such as the fishing industry, petroleum companies, environmental groups, and local communities. This could diminish the time-consuming litigation which has plagued OCS development.\(^{383}\)

State involvement at the lease sale stage would also minimize the risk of monetary loss to petroleum companies and the federal government.\(^{384}\) Should a state object to a company’s exploration or development and production plans, the company might not be

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\(^{384}\) See Deller, supra note 310, at 122.
able to realize a return on its massive investment. Early state participation in the process would put the companies on notice of state objections. The companies could then determine if bidding on certain tracts would be worthwhile.

Furthermore, if the federal government later revokes a lease because of a state’s denial of the lessee’s consistency certification, the federal government must return the lease payments, as well as interest on the money. Since this would involve a massive drain on the Treasury, the federal government would be placed in the awkward position of having to put pressure on the state to alter its determination. Alternatively, the Secretary of Commerce could override the state’s determination if he finds that the plans are in fact consistent with the state’s coastal zone management program or essential for national security.

Finally, a ruling that consistency determinations were required for OCS lease sales would not delay OCS energy development. Interior, not the state, would initially decide whether proposed lease sales are consistent with state coastal zone management programs. The demonstration of consistency should not pose any difficulty for Interior. Furthermore, if a state objects to Interior’s findings, the Secretary of Commerce could be called upon to mediate the dispute. If the mediation fails, the state would have to adjudicate the conflict. In court, the state would have to demonstrate that the Secretary of Interior abused his discretion, acted in an arbitrary and capricious manner, or insufficiently articulated the reasons for his findings.

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387 S. REP. NO. 783, supra note 109, at 10; Deller, supra note 310, at 122-23; California Brief, supra note 150, at 26-29.
389 In order for a state Coastal Zone Management Program to get federal approval under the CZMA, 16 U.S.C. § 1454(h), the NOAA must determine that the program considers “the national interest in both coastal protection and energy development” as well as “the views of the Federal agencies principally affected.” Accordingly, Interior would not have to reconsider these issues when preparing an OCS lease sale consistency determination. 16 U.S.C. §§ 1452(2)(A),(B), 1455(c)(8), 1456 (1982).
392 Id. See also Greenburg, Federal Consistency Under the CZMA: An Emerging Focus of Environmental Controversy in the 1980’s, 11 ENVTL. L. REP. (ENVTLL. L. INST.) 50001 (1981).
Interior v. California rests on dubious grounds and frustrates the purposes of the CZMA. Federal OCS lease sale decisions should be subject to consistency review under section 307(c)(1). This would facilitate long-range planning, improve federal-state relations, and strengthen the states ability to manage and protect the coastal zone. Early state participation in the OCS development process would prevent delays at later stages of the process which could have major negative consequences for the federal government and the petroleum companies. Consequently, OCS lease sales should be subject to CZMA consistency review in order to improve and facilitate OCS energy development.

IV. POSTSCRIPT: CONGRESSIONAL RESPONSE TO Interior v. California

Congress quickly reacted to the Supreme Court’s narrow interpretation of section 307(c)(1) in Interior v. California. Bills designed to reverse the Court’s decision were introduced in both houses. In the House of Representatives, the Merchant Marine and Fisheries Subcommittee on Oceanography reported a bill to the full committee on May 3, 1984. On June 13, 1984 the Senate Commerce Committee issued a favorable report on a bill which revised section 307(c)(1) in several ways.

First, in order to clarify congressional intent, the Senate bill substituted the words “significantly affecting” for “directly affect-

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394 H.R. 4589, 98th Cong., 2d Sess. (1984); S. 2324, 98th Cong., 2d Sess. (1984). Both bills stated that “Federal activity shall be treated as one that ‘directly affects the coastal zone’ if the conduct or support of the activity either (1) produces identifiable physical, biological, social, or economic consequences on coastal zone, or (2) initiates a chain of events likely to result in any of such consequences.

395 The House bill was similar to the Senate bill, with the following exceptions: First, the House bill specified that § 307(c)(1) applied to federal activity “whether within or outside of the coastal zone.” This addition explicitly rejected the Court’s geographical definition of “directly affecting.” Second, the House bill adopted the exceptions set forth in NOAA’s regulations to the CZMA regulations’ “fully consistent” requirement. 15 C.F.R. 930.32. Full consistency was required unless (i) compliance was prohibited based upon the requirements of Federal law, or (ii) a circumstance arising after that management program was approved, and unforeseen at the time of approval, presents a substantial obstacle that prevents the achievement of full consistency in conducting or supporting the activity.” H.R. 4589, supra note 394.

396 S. REP. No. 512, 98th Cong., 2d Sess. (1984). The new language for § 307(c)(1) read in part: “Each Federal agency conducting or supporting an activity significantly affecting the natural resources or land or water uses in the coastal zone shall conduct or support that activity in a manner which is fully consistent with the enforceable, mandatory policies of approved State management programs...."
The significance of effects depends on their context and intensity. The committee stressed that the substitution of “significantly affecting” was designed to reject the Supreme Court’s interpretation of “directly affecting” in Interior v. California in two ways. The words were to be broadly construed, not limited to the geographical location of the activity. In addition, the phrase should include the reasonably foreseeable consequences of federally conducted or supported activity. The committee affirmatively stated that it “intends that Federal OCS lease sales be subject to section 307(c)(1) Federal consistency provisions.”

Second, in order to narrow the focus of the bill, the Senate committee added the phrase, “to the natural resources or land or water uses in the coastal zone.” This addition meant that the only significant effects of federally conducted or supported activities which would trigger the CZMA consistency requirement would be those “to the natural resources or land or water uses in the coastal zone.” Consequently, economic, social, or cultural effects, by themselves, could not trigger consistency review. However, should federal OCS activity cause a physical impact on ocean resources which in turn affected a coastal industry, such as commercial fishing, the federal activity would be subject to consistency review.

Third, the bill altered the standard of federal consistency from “to the maximum extent practicable” to “fully consistent,” with four exceptions. This change brought the statutory language

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397 Id.
398 Id. at 8. The bill followed the Council of Environmental Quality regulations (40 C.F.R. § 1508) in defining the significance of effects.
399 Id. at 6-7.
400 Id.
401 Id. at 7.
402 Id. at 9.
403 Id.
404 Id. The Committee intended to remedy a contrary interpretation by a federal district court in Kean v. Watt, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20618 (1982), which limited consistency review to physical, not economic, impacts.
405 Federal activity had to be “fully consistent” unless it was: (i) undertaken to counter the immediate effects of an emergency declared by the President; ii) required by any provision of a Federal law which prevents consistency with any provision of an approved State coastal zone management program; or iv) undertaken pursuant to the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).” S. 2324, supra note 391.
into conformity with the standard of consistency set forth in NOAA regulations.\footnote{1985 C.F.R. § 930.32 (1984). NOAA regulations define “to the maximum extent practicable” as “fully consistent.” The Senate bill only adopted the first of NOAA’s exceptions. See supra note 395. The committee should have retained the “unforeseen circumstances” exception. This would have provided a degree of flexibility which was missing in the Senate bill. Its inclusion would have more fully exhibited the intent of Congress, which recognized that, “leeway should be written into the law with respect to the activities of Federal agencies in connection with approved programs.” H.R. REP. No. 1049, supra note 99, at 20.}

Finally, the bill’s full consistency requirement was limited to “the enforceable mandatory policies of approved State management programs.”\footnote{S. REP. No. 512, supra note 396, at 11.} These include “the policies relevant to State constitutional provisions, laws, regulations and judicial decisions which comprise a State’s management program.”\footnote{Id.} The recommendations and standards incorporated into the state program were not binding. This requirement built upon existing regulations\footnote{15 C.F.R. §§ 930.35, 930.39 (1984).} and was designed to prevent states from attempting to use vaguely worded policy statements to assert control over federal activities unrelated “to natural resources or land or water uses in the coastal zone.” However, federal agencies were urged to “give substantial deference to a State’s interpretation of enforceable, mandatory policies.”\footnote{S. REP. No. 512, supra note 396, at 10-11.}

The Senate and House bills would remedy the narrow construction of “directly affecting” announced by the Supreme Court. Both bills substitute “significantly affecting” for “directly affecting” in CZMA section 307(c)(1). This would insure that OCS lease sales would be subject to consistency review. Furthermore, the change in the consistency standard to “fully consistent,” and the requirement that “substantial deference” be given to a state’s interpretation of its “enforceable, mandatory policies,” indicated that the states would play a major role in such consistency determinations. However, the 98th Congress took no further action on either bill before the close of its second session.

It is likely that Congress will readdress the issue this session in the context of the reauthorization of the CZMA. It will be a victory for state environmental protection if Congress rectifies the error committed by the Supreme Court in \textit{Interior v. California} and restores the state/federal cooperative framework envisioned in the CZMA to protect the coastal zone.