Federal Consistency and Outer Continental Shelf Oil and Gas Leasing: The Application of the "Directly Affecting" Test to Pre-Lease Sale Activities

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FEDERAL CONSISTENCY AND OUTER CONTINENTAL SHELF OIL AND GAS LEASING: THE APPLICATION OF THE “DIRECTLY AFFECTING” TEST TO PRE-LEASE SALE ACTIVITIES

Karen L. Linsley*

I. INTRODUCTION

The 1973 Arab oil embargo focused national attention on this country’s growing dependence on the energy sources of the unstable and volatile Middle East.1 In the following year, President Nixon launched Project Independence, a national program aimed at increasing energy self-sufficiency.2 Yet in spite of growing recognition of its adverse economic, military, and diplomatic implications, the amount of oil imported into the United States has risen dramatically in the past decade. Our dependence on foreign oil has in fact increased from 3.4 million barrels a day in 1970 to 8.2 million barrels a day in 1979, while our foreign import bill has risen from $3 billion to $60 billion during the same period.3

The Outer Continental Shelf (OCS) has long been recognized as the domestic energy source with the most potential for reducing the na-
tion's dependence on foreign oil. 4 Recent United States Geological Surveys estimate that 32 percent of all undiscovered oil in the United States may be located beneath the OCS. 5 Experts predict that OCS resources can be utilized to satisfy in part the country's energy needs until production of alternative energy sources such as oil shale, solar, geothermal, coal gasification and liquefaction, and other energy forms becomes feasible and economically realistic on a large scale. 6

In spite of its potential as an energy source, only a fraction of the OCS has ever been leased for oil and gas development. The portion of the OCS extending seaward to a depth of 200 meters comprises approximately 528 million acres. 7 Since 1953, only 17.9 million of the 528 million acres, less than 4 percent, have ever been leased. 8 Only 10.3 million acres, about 2 percent of the total, were under lease at the end of 1979. 9 However, the oil and gas recovered from the OCS represents approximately 17 percent of all domestic oil and gas produced. 10

OCS development was accelerated in response to the energy crisis. In January, 1974, President Nixon ordered the Secretary of the Interior to lease 10 million OCS acres in 1975, more than triple the acreage scheduled for leasing in that year. 11 Proposals for more energy facilities, 12 many of which would be located in coastal areas,


7. API Report, supra note 3, at 44. See note 4 supra.

8. Id.

9. Id.


11. 10 Weekly Comp. of Pres. Doc. 72, 83-84 (Jan. 28, 1974).

12. The term "energy facilities" has been statutorily defined to include any equipment or
accompanied the OCS leasing acceleration order. It soon became apparent that this course of action, without proper safeguards, could have devastating ecological effects on state coastal areas. Several years of congressional activity culminated in amendments to the Coastal Zone Management Act of 1972 (CZMA) and the Outer Continental Shelf Lands Act of 1953 (OCSLA). These amendments were designed to balance the need for increased energy self-sufficiency with environmental protection. The CZMA and the OCSLA each have a major influence on OCS development; however, the two laws have differing priorities.

The OCSLA governs the leasing of the OCS. This Act delegates the authority to administer the OCS leasing process to the Secretary of the Interior. From its inception in 1953 the law remained virtual-

facility which is or will be used primarily—

(A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of any energy resource; or

(B) for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).

The term includes, but is not limited to (i) electric generating plants; (ii) petroleum refineries and associated facilities; (iii) gasification plants; (iv) facilities for the transportation, conversion, treatment, transfer, or storage of liquified natural gas; (v) uranium enrichment or nuclear fuel processing facilities; (vi) oil and gas facilities, including platforms, assembly plants, storage depots, tank farms, crew and supply bases, and refining complexes; (vii) facilities including deepwater ports, for the transfer of petroleum; (viii) pipelines and transmission facilities; and (ix) terminals which are associated with any of the foregoing.


13. See generally Joint Hearings Before the Senate Committees on Interior and Insular Affairs and Commerce on Outer Continental Shelf Lands Act Amendments and Coastal Zone Management Act Amendments, 94th Cong., 1st Sess. (1975); Hearings on Outer Continental Shelf Oil and Gas Extraction and Environmental, Economic and Social Impact Upon the Coastal Zone Before the Senate Committee on Commerce, 93d Cong., 2d Sess. (1974).


ly unchanged\textsuperscript{19} until it was substantially amended in 1978.\textsuperscript{20} The basic purpose of the amendments was to modernize the administrative policies and provisions of the federal OCS leasing program to achieve the goal of rapid and orderly development of OCS resources, and at the same time to delineate standards to insure consideration of environmental factors throughout the leasing process.\textsuperscript{21} Closely related to the mandated recognition of environmental concerns was section 19 of the OCSLA, which established procedures for coordination and consultation between the Department of the Interior and the governors of affected coastal states.\textsuperscript{22} Section 19 guaranteed that the states would have input into the decision-making aspects of proposed lease sales which would impact their coastal areas.\textsuperscript{23}

While the OCSLA requires consideration of environmental factors as an aspect of the OCS leasing process, the CZMA\textsuperscript{24} in contrast addresses the protection of the coastal environment as its primary concern.\textsuperscript{25} The CZMA was enacted in response to increasing public concern for the need to protect coastal areas from the destruction of wetlands and beaches which was occurring as a result of the increased use of coastline areas for industrial, residential, and recreational purposes.\textsuperscript{26} Congress felt that the states should assume more responsibility for protecting the fragile structure of coastal areas from the competing demands being placed upon its limited resources. The CZMA was designed, therefore, to "encourage the states to exercise their full authority over the lands and waters in the coastal zone."\textsuperscript{27}

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\textsuperscript{19} Section 19(f) of the Deepwater Port Act of 1975 amended section 4(a)(2) of the OCSLA and provided that with respect to OCS activities, present state law controls, rather than state law in force in 1953 when the OCSLA was enacted. Pub. L. No. 93-627, 88 Stat. 2126 (1975) (codified at 33 U.S.C. §§ 1501-1524 (1976); 43 U.S.C. § 1333(a) (2) (1976)).

\textsuperscript{20} See note 16 supra.


\textsuperscript{25} See API v. Knecht, 456 F. Supp. 886, 919 (C.D. Cal. 1978), aff'd, 609 F.2d 1306 (9th Cir. 1979). "Although sensitive to balancing competing interests, [the CZMA is] first and foremost a statute directed to and solicitous of environmental concerns." 456 F. Supp. at 919.

\textsuperscript{26} S. REP. No. 753, 92d Cong., 2d Sess. 2 (1972), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 194.

\textsuperscript{27} S. REP. No. 753, 92d Cong., 2d Sess. 6 (1972), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 197-98; 16 U.S.C. § 1451(h) (1976). The CZMA defines the term "coastal zone" to encompass:
The CZMA establishes a voluntary process whereby the coastal states are encouraged to develop comprehensive coastal management programs.\textsuperscript{28} The CZMA provides several incentives to induce states to participate. Two types of federal funding are made available.\textsuperscript{29} In addition, once a coastal management program is approved

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


28. The basic requirement of a coastal management program is the preparation of a comprehensive land use plan for the state’s coastal area, which designates and mandates the protection of critical areas. See Schoenbaum & Rosenberg, \textit{The Legal Implementation of Coastal Zone Management: The North Carolina Model}, [1976] DUKE L. J.1. The CZMA defines the term “management program” as “a comprehensive statement in words, maps, illustrations or other media of communication, prepared and adopted by the state in accordance with the provisions of this Chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.” 16 U.S.C. § 1453(11) (1976).

The CZMA’s definition of the term “coastal zone,” see note 27 supra, includes one controversial exception. Section 304(1) provides that the coastal zone does not include lands “the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.” 16 U.S.C. § 1453(1)(1976). Therefore, federal lands such as military bases, national forests, and national parks are not subject to the requirements of a state coastal management program. States have argued that since federally controlled lands often represent a significant portion of a state’s coastline, the exclusion of federal lands from the requirements of the CZMA undermines coastal planning efforts. See, e.g., Shapiro, \textit{Coastal Zone Management and Excluded Federal Lands: The Viability of Continued Federalism in the Management of Federal Coastlands}, 7 ECOLOGY L.Q. 1011, 1013 (1979).

29. The CZMA provides grants in aid to defray the costs of implementing a coastal management program. 16 U.S.C. § 1454 (1976). An established state program qualifies for additional funding for operational costs after it is approved by the Department of Commerce. Id. § 1455. However, prior to granting approval of a coastal management program, the Secretary of Commerce must find that it satisfies a number of guidelines set forth in the CZMA which regulate the nature and content of the coastal program and the power of the state agency charged with its administration. Id. §§ 1455(c)-1455(e).

The state must provide federal agencies with an opportunity for full participation in a state’s program development, and must demonstrate to Commerce that the views of the principally affected federal agencies have been adequately considered in the program. Id. § 1455(c)-1455(e). This provision insures that a coastal program addresses national concerns as well as those of state and local governments. 41 Fed. Reg. 42,879 (1976). As of the end of 1980, the Department of Commerce had approved coastal programs for twenty-five of the thirty-five eligible states and territories which represent 78 percent of the United States coastline. 126 CONG. REC. H10,111 (daily ed. Sept. 30, 1980) (remarks of Rep. Studds).
by the Department of Commerce, section 307 of the CZMA, which contains what are commonly known as the federal consistency provisions, requires that federal agencies conform their activities with the provisions of that state's coastal management program.30

With regard to OCS development, conflicts exist in the policy directives of the CZMA and the OCSLA.31 The avowed objective of the CZMA is to "protect and give high priority to the natural systems in the coastal zone."32 The 1980 amendments to the CZMA33 expand the Act's statement of national coastal policy but retain the original language of the overall goal "to preserve, protect, develop and where possible to restore and enhance the resources of the Nation's coastal zone."34 Little mention is made of the need to accom-


31. See Schaffer, OCS Development and the Consistency Provisions of the Coastal Zone Management Act—A Legal and Policy Analysis, 4 N. OHIO L. REV. 595, 604 (1976). However, the policy conflict is now less dramatic than that depicted by Ms. Schaffer, in view of the environmental safeguards added to the OCSLA by the 1978 amendments. See text at notes 84-103 infra.


34. Section 303 of the CZMA was amended to provide specific policies to give states guidance in the implementation and improvement of state coastal management plans. H.R. REP. No. 1012, 96th Cong., 2d Sess. 15-16 (1980). Section 303, as amended, provides that it is the national coastal policy:

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, which programs should at least provide for—

(A) the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas of subsidence and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands,

(C) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(D) public access to the coasts for recreation purposes,

(E) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features,
moderate the demands of energy development; the CZMA simply provides that the states must give consideration to economic development and the national interest in energy facility siting in their coastal management programs. 35

In contrast, the basic purpose of the OCSLA is to accelerate OCS leasing, in order to make its resources available to meet domestic energy needs as rapidly as possible. 36 The requisite consideration of environmental factors appears to be significantly less stringent than the policy directives of the CZMA. Although the OCSLA attempts to harmonize OCS development and environmental protection, the decisions which address these concerns are left largely to the discretion of the Secretary of the Interior. Moreover, the Secretary’s decisions are reviewed deferentially by the courts.

In view of the divergent interests involved, it was probably inevitable that a conflict would arise between the administrator of the stepped-up OCS development program authorized by the OCSLA and an administrator of a state coastal program charged with protecting the unique and valuable resources of coastal areas. Such a dispute has arisen between the Department of the Interior and the California Coastal Commission which administers the California Coastal Zone Management Program, 37 the most comprehensive

(F) the coordination and simplification of procedures in order to ensure expedited governmental decision-making for the management of coastal resources,

(G) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(H) the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decisionmaking, and

(I) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies; and

(3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decision making; and

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this title.


coastal legislation enacted by a state. Lease Sale No. 48 which leased tracts off southern California in 1979 and Lease Sale No. 53 which leased tracts off northern California in May, 1981, have provided the focal points for the dispute. At issue has been the applicability of the federal consistency requirements of the CZMA to the activities conducted by the Department of the Interior prior to these lease sales.

This article will analyze the effectiveness of the procedures currently available for state review of the OCS leasing process under the CZMA and the OCSLA. First, the federal consistency provisions will be discussed with focus on section 307(c)(1) of the CZMA. This will be followed by an examination of the scope of the authority vested in the federal and state sectors which has resulted from administrative interpretation of section 307(c)(1). Second, a description of the current OCS pre-lease sale procedures as set forth in the OCSLA and the various opportunities for state review of the terms of a lease sale will be presented. The dispute between the Department of the Interior and California over the applicability of section 307(c)(1) to Interior's pre-lease activities will be examined in detail to illustrate the practical problems with state review of OCS lease sales under the present statutory scheme. Finally, a solution to the statutory interpretation problem created by section 307(c)(1) will be suggested.

II. FEDERAL CONSISTENCY UNDER THE CZMA

A. The Five Consistency Provisions

Department of Commerce approval of a coastal management program triggers the requirements of the federal consistency provisions of the CZMA. The effect of these provisions is to give states leverage over federal activities within or affecting the coastal zone by requiring that certain types of federal actions be conducted in a manner which is consistent with the provisions of the state coastal management program.

The five consistency provisions subject the following federal actions to consistency review: (1) federal activities conducted or supported which directly affect the coastal zone; (2) federal development projects in the coastal zone; (3) activities of applicants for federal li-

The following matrix diagram sets forth the basic requirements and distinguishing features of the five federal consistency provisions including the types of federal actions subject to consistency review, the different threshold impacts required to trigger the consistency provisions, the delegation of decision-making authority for the determination of consistency between the federal agencies and the states and procedures for administrative resolution of conflicts.

<table>
<thead>
<tr>
<th>CZMA Section</th>
<th>307(c)(1)</th>
<th>307(c)(2)</th>
<th>307(c)(3)(A)</th>
<th>307(c)(3)(B)</th>
<th>307(d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Action</td>
<td>Direct federal activities</td>
<td>Federal development projects</td>
<td>Federally licensed and permitted activities</td>
<td>Federally licensed and permitted activities described in detail in OCS plans</td>
<td>Federal assistance to state and local governments</td>
</tr>
<tr>
<td>Coastal Zone Impact</td>
<td>&quot;Directly affecting the coastal zone&quot;</td>
<td>&quot;In the coastal zone&quot;</td>
<td>&quot;Affecting land or water uses in the coastal zone&quot;</td>
<td>&quot;Affecting any land use or water use in the coastal zone&quot;</td>
<td>&quot;Affecting the coastal zone&quot;</td>
</tr>
<tr>
<td>Consistency requirement</td>
<td>Consistent to the maximum extent practicable with CZM Program</td>
<td>Consistent to the maximum extent practicable with CZM Program</td>
<td>Consistent with the CZM Program</td>
<td>Consistent with the CZM Program</td>
<td>Consistent with the CZM Program</td>
</tr>
<tr>
<td>Consistency determination</td>
<td>Made by federal agency (review by state agency)</td>
<td>Made by federal agency (review by state agency)</td>
<td>Made by state agency</td>
<td>Made by state agency</td>
<td>Made by state agency</td>
</tr>
<tr>
<td>Federal agency responsibility following a disagreement</td>
<td>Federal agency not required to disapprove action following state agency disagreement (unless judicially impelled to do so)</td>
<td>Federal agency not required to disapprove action following state agency disagreement (unless judicially impelled to do so)</td>
<td>Federal agency may not approve license or permit following state agency objection</td>
<td>Federal agency may not approve federal licenses or permits described in detail in the OCS plan following state agency objection</td>
<td>Federal agency may not grant assistance following state agency objection</td>
</tr>
<tr>
<td>Administrative Conflict resolution</td>
<td>Voluntary mediation by the Secretary of Commerce</td>
<td>Voluntary mediation by the Secretary of Commerce</td>
<td>Appeal to the Secretary of Commerce by applicant or independent Secretarial review</td>
<td>Appeal to the Secretary of Commerce by person or independent Secretarial review</td>
<td>Appeal to the Secretary of Commerce by applicant or independent Secretarial review</td>
</tr>
</tbody>
</table>


In order for a federal activity to become subject to consistency review under section 307 of the CZMA, it must cause a certain effect on the coastal zone. Each of the five consistency provisions contains slightly different language to describe its threshold requirement. However, neither the CZMA nor its legislative history gives any indication as to the substantive differences between the threshold tests, if in fact any were intended. This article will focus on the interpretation of the phrase “directly affecting the coastal zone,” which is the threshold test for federal activities under section 307(c)(1).

B. The Application of Section 307(c)(1) to a Proposed Federal Activity

Section 307(c)(1) of the CZMA provides that “[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.” “Federal activity” is defined in the regulations to mean “any function performed by or on behalf of the Federal agency in the exercise of its statutory responsibilities.”

The federal agency makes an initial determination as to whether its activity has a “direct effect” on the state coastal zone. The federal agency must evaluate its activity in light of the objectives, 40 Thus, a federal activity must have a “direct effect” on the coastal zone for purposes of section 307(c)(1). A federal development project “in” the coastal zone is subject to consistency review under section 307(c)(2). Applicants for federal licenses or permits must provide consistency determinations under section 307(c)(3)(A) where the proposed activity “affects land or water uses in the coastal zone.” OCS post-lease sale activities “affecting any land use or water use” in the coastal zone are subject to consistency review under section 307(c)(3)(B). Finally, before a state or local project which will “affect” the coastal zone can receive federal funding, it must be reviewed for consistency under section 307(d). 16 U.S.C. § 1456(c)-1456(d) 1976).

40. 16 U.S.C. § 1456(c)(1) (1976). The phrase “to the maximum extent practicable,” seemingly a large loophole for a federal agency which is unwilling to comply with section 307(c)(1), is strictly limited by administrative interpretation. The CZMA regulations define the phrase to require full consistency unless compliance is prohibited by existing law or unless unforeseen circumstances present a substantial obstacle. 15 C.F.R. § 930.32 (1979). Therefore, barring extreme, unforeseen circumstances, a federal activity subject to section 307(c)(1) must comply with the provisions, unless compliance would violate a federal or state law.

41. 15 C.F.R. § 930.31(a) (1979). NOAA’s comment to this section explains that “Federal activity” under section 307(c)(1) is intended to be a “residual category” to cover federal actions which are neither development projects nor related to permitting and licensing procedures. 44 Fed. Reg. 37,146 (1979) (comment to 15 C.F.R. § 930.31 (1979)). NOAA further states that federal OCS pre-lease activities are subject to the requirements of section 307(c)(1). Id. at 37,154.

43. 15 C.F.R. § 930.33(a) (1979).
policies, and standards of the state's coastal management program.\textsuperscript{44} If the federal agency determines that the activity in question will have a "direct effect" on the coastal zone, it must then provide to the administrator of the state coastal program a formal notification, called a consistency determination, that the activity will be carried out in a manner which conforms with the state program.\textsuperscript{45} The state has forty-five days in which to review the consistency determination and inform the federal agency of its agreement or objections.\textsuperscript{46} The state may obtain a fifteen-day extension of the response period.\textsuperscript{47} However, even if the sixty-day period lapses, the federal agency may not give final approval to the activity for a period of ninety days from the date on which it submitted the consistency determination.\textsuperscript{48}

If a federal agency determines that its proposed activity has no "direct effect" on a state's coastal zone, it must provide the state with written notice of that conclusion. Such a notice is called a "negative determination."\textsuperscript{49} In the event that the state and federal agencies disagree as to the propriety of a "negative determination" or the validity of a consistency determination, either party may request the Secretary of Commerce to mediate the dispute.\textsuperscript{50}

The legislative history applicable to section 307(c)(1) provides little indication of what Congress intended in establishing the "directly affecting" threshold test for consistency determinations. The text of the provision as passed by the House of Representatives\textsuperscript{51} and the Senate\textsuperscript{52} stated that all federal activities "in the coastal zone" were subject to section 307(c)(1). The Conference Committee altered the language, without explanation, and substituted "directly affecting"

\textsuperscript{44} 42 Fed. Reg. 43,590 (1977). A coastal management program must include a list of federal actions which the state believes are most likely to affect the coastal zone. 15 C.F.R. § 930.35 (1979). This requirement is designed to aid the federal agency in making its initial determination. \textit{Id.}

\textsuperscript{45} 15 C.F.R. § 930.34(a) (1979). A consistency determination should include a brief statement certifying to the consistency of the proposed activity based on the relevant portions of the coastal management program. The consistency determination should also contain a detailed description of the activity, its associated facilities, and the anticipated coastal zone effects. \textit{Id.} § 930.39.

\textsuperscript{46} \textit{Id.} § 930.41(a).

\textsuperscript{47} \textit{Id.} § 930.41(b).

\textsuperscript{48} \textit{Id.} § 930.41(c).

\textsuperscript{49} \textit{Id.} § 930.35(d).

\textsuperscript{50} \textit{Id.} § 930.110-116. See note 146 infra.

\textsuperscript{51} H.R. REP. No. 1049, 92d Cong., 2d Sess. 5 (1972), \textit{reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 309.}

\textsuperscript{52} S. REP. No. 753, 92d Cong., 2d Sess. 50 (1972), \textit{reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 242.}
for "in." The effect of the substitution seems both to expand and contract the scope of the provision. Activities which take place outside of the coastal zone, but nevertheless have a "direct effect," such as OCS activities, are subject to consistency review. On the other hand, an activity in the coastal zone is not subject to consistency review unless its effect is direct. It seems most likely that the change was an attempt to streamline the provision to make its application more efficient. The "directly affecting" language ensures that all major federal actions will be reviewed, while minor federal actions with little or no effect on the coastal zone, even though within its boundaries, need not be reviewed.

C. Administrative Interpretation of Section 307(c)(1)

The CZMA delegates the authority to administer the Act to the Department of Commerce. An Assistant Administrator in the National Oceanic and Atmospheric Administration (NOAA), a subdivision of the Department of Commerce, enforces the CZMA through the Office of Coastal Zone Management, a subdivision of NOAA.

The statutory language of section 307(c)(1) is cursory and ambiguous. NOAA was required, therefore, to resolve critical interpretation problems concerning the practical application of the provision, and in particular the scope of the authority which Congress intended to vest in the federal agencies and states with respect to the determination of consistency. One key issue left unanswered in the statutory text is whether the federal or state agency should decide whether a federal activity "directly affects" the coastal zone, and make the determination of consistency when a "direct effect" is found. The broad language of section 307(c)(1) gives no indication of what Congress intended.

56. During the 1980 Oversight Hearings held before the House Subcommittee on Oceanography, Chairman Gerry E. Studds remarked, "I reread the statute several times verbatim, which is something none ought to be condemned to do, and I think particularly that sections 307 and 308 challenge anyone whose native tongue is English to discern what Congress had in mind when it wrote those sections." Proposed Amendments to the Coastal Zone Management Act: Hearings on H.R. 6956, H.R. 6979 before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries, 96th Cong., 1st & 2d Sess. 88 (1980) [hereinafter cited as 1980 Oversight Hearings].
57. The legislative history is ambiguous. The Senate bill, as passed, provided that "Federal
With little guidance, but under considerable pressure from the federal sector, \(^{58}\) NOAA interpreted the statute to give the federal agencies the authority to determine consistency. \(^{59}\) Not surprisingly, this decision has not gone uncriticized. The National Advisory Committee on Oceans and Atmosphere (NACOA) \(^{60}\) has argued strongly that the states rather than the federal agencies should properly determine consistency. \(^{61}\) During the hearings on the 1980 reauthorization of the CZMA, NACOA proposed an amendment to section 307(c)(1) which would shift the authority for determining consistency to the states. \(^{62}\) However, the proposal received little positive response, and did not reach the floor of either house of Congress. \(^{63}\)

agencies shall not undertake any development project in the coastal zone of a coastal state which, in the opinion of the coastal state is inconsistent . . . ." S. 3507, 92d Cong., 2d Sess. § 314 (1972), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 242 (emphasis added). In the parallel provision the House bill did not expressly address the issue, and gives no indication as to who should determine consistency. H.R. REP. No. 14146, 92d Cong., 2d Sess. § 307 (1972), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 309. The Conference Committee adopted the House version, without explanation. CONF. REP. No. 1544, 92d Cong., 2d Sess. 8 (1972), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 450.

58. See NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, EIGHTH ANNUAL REPORT TO THE PRESIDENT AND CONGRESS II-7 (June 30, 1979) [hereinafter cited as NACOA REPORT].

59. 41 Fed. Reg. 42,877, 48,880 (1976). "There were a number of comments regarding the question of where initial responsibility rested with respect to making the consistency determination for Federal activities including projects. NOAA construes the Act as imposing this responsibility on the Federal agencies, and the proposed regulations reflect this view." Id.

60. NACOA is an organization charged with maintaining a "continuing review" of national coastal policy and coastal zone management, and advising the Secretary of Commerce with respect to carrying out the various programs administered by NOAA. 33 U.S.C. § 857-13-15 (Supp. III 1979).

61. NACOA REPORT, supra note 58, at II-6 to II-11. NACOA contends that the CZMA legislative history supports its view. Id. at II-6. See note 57 supra. NACOA suggests that the Conference Committee's unexplained adoption of the inexplicit House language over the Senate language was not intended to be an express rejection of state authority to determine consistency. NACOA REPORT, supra note 58, at II-6. However, an equally plausible argument can be made that since Congress explicitly gave the states the authority to determine consistency under section 307(c)(3)(A), the fact that Congress did not include the same language in section 307(c)(1) indicates a different intent as to the arbiter of consistency under the latter provision.

62. Coastal Zone Management and Marine Sanctuaries Reauthorization Hearings before the Senate Committee on Commerce, Science and Transportation, 96th Cong., 1st Sess. 81 (1979). The amendment would have required the federal agency to submit an environmental impact statement together with a certification of consistency to the state agency. The state would then make the determination of consistency. Id.

63. During the 1980 Oversight Hearings before the House Subcommittee on Oceanography, Representative Hughes commented on the proposed NACOA amendment: "I think it would be somewhat unrealistic to believe that this Congress or this administration, or even future administrations, would give the ultimate decision to the States in some of these important decisions that have to be made in the years ahead." 1980 Oversight Hearings, supra note 56, at 177.
A second key issue left open by the ambiguous language of section 307(c)(1) is whether Congress intended that a federal agency be able to proceed with its activity when the state and federal agency disagree on a negative determination or a consistency determination. The legislative history is silent on this issue. Section 307(c)(1) states that a federal activity with "direct effects" on the coastal zone must be conducted in a manner which is consistent with an approved state program\(^{64}\) and one could therefore infer that a proposed federal activity which does not conform with the requirements of the state program cannot be implemented. However, this provision as interpreted by NOAA is not self-effecting. NOAA's regulations provide that when a state objects to a federal agency's consistency determination, neither the Department of Commerce nor the state has the authority to halt the federal activity.\(^{65}\) Therefore, in order to stop a federal activity which the state believes is inconsistent with its coastal program, the state must seek a preliminary injunction and litigate the consistency issue.\(^{66}\)

Although it has been frequently stated that the consistency provisions are intended to give states leverage over federal actions,\(^{67}\) section 307(c)(1) appears to afford little. Section 307(c)(1) can at most be viewed as a non-binding procedure for state input of information. NOAA's regulations resolve the ambiguities of the statutory text decisively in favor of the federal agencies. As a result, any "leverage" is greatly diluted by administrative interpretation of the statute. It would appear that the statute as interpreted is at odds with Congress' expressed intent "to enhance State authority by encouraging and assisting the States to assume planning and regulatory powers over their coastal zones."\(^{68}\) However, it does not appear like-

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65. See 43 Fed. Reg. 10,509, 10,513 (1978). "A number of States reiterated their argument that Federal agencies should be required by regulation to suspend action on Federal activities in the event of a State objection. NOAA has rejected this argument on the basis that the act does not mandate the recommended suspension." Id.
66. Of course, the state would bear the burden of proof in these proceedings. "Ironically this is the program which is to be an incentive for states, [and] the burden of proof is still on the states." National Advisory Committee on Oceans and Atmosphere, Transcript of Ocean Use Panel Meeting 45 (July 21, 1978).
ly that Congress will alter the present interpretive scheme of section 307(c)(1). 69

Only those federal activities with a "direct effect" on the coastal zone must comply with section 307(c)(1). The question of what constitutes a "direct effect" and thereby triggers the consistency requirement has presented considerable difficulty. NOAA has struggled since 1976 to provide a workable interpretation for section 307(c)(1)'s threshold test, and the regulations applicable to the "directly affecting" language have undergone a series of changes. In 1977, NOAA attempted in proposed regulations to supply individual definitions for the threshold standards of each of the consistency provisions. 70 However, NOAA's final regulations, issued in 1978, adopted a uniform threshold test for applying the consistency requirement to all five types of federal action. Under the uniform definition all federal activities "significantly affecting" the coastal zone were subject to consistency review. 71

69. See note 63 supra.
70. NOAA issued the first proposed regulations on September 28, 1976. 41 Fed. Reg. 42,878-79 (1976). NOAA did not define "directly affecting," but stated that the regulations would adopt the "causal" terms of the act. "[T]hese terms will speak for themselves and difficulties will be addressed on a case by case basis." Id. at 42,880.

In a second set of proposed regulations issued on August 29, 1977, NOAA supplied individual definitions for the threshold tests of the five consistency provisions, in response to comments requesting clarification of the statutory language. 42 Fed. Reg. 43,585, 43,590-91 (1977). NOAA provided a comprehensive interpretation of section 307(c)(1)'s "directly affecting" test:

(a) The term "directly affecting the coastal zone" describes the coastal zone effect caused by a Federal activity which is sufficient to trigger Federal agency responsibility for making a consistency determination and notifying the State agency of such determination.

(b) A Federal activity will directly affect the coastal zone if the activity causes significant (i) changes in the manner in which waters, lands or other coastal zone resources are used, (ii) limitations on the range of uses of coastal zone resources, or (iii) changes in the quality of coastal zone resources. The significance of the effect on the coastal zone shall be considered in terms of the primary, secondary and cumulative consequences of the activity. A Federal activity which causes significant changes in or limitations on coastal zone resources directly affects the coastal zone even when the activity causes both beneficial and detrimental effects, and on balance the Federal agency determines that the effect will be beneficial.

Id. at 43,598.

After noting that a precise definition of "directly affecting" would be "impossible to develop," NOAA drew an analogy between the section 307(c)(1) standard and the threshold test for effects on the coastal zone which Congress considered when it formulated the boundaries for the coastal zone. Id. at 43,590. Congress included within the meaning of the term "coastal zone" those "shorelands the use of which have a 'direct impact' on coastal waters." Id. Congress indicated that "the phrase 'direct impact' is intended to include only those impacts of a 'significant' nature." Id. (emphasis added). Therefore, NOAA considered it ap-
In 1979, NOAA’s interpretation of “directly affecting” was changed once again, this time in response to a legal opinion issued by the Department of Justice which rejected NOAA’s uniform “significantly affecting” test. The opinion stated that there was not sufficient justification in the legislative history of the CZMA or elsewhere for eliminating the statutory distinctions between the provisions. The Department of Justice concluded that the plain language of the statute should control, and that with respect to section 307(c) (1), the “directly affecting” test should be applied on a case-by-case basis and determined as a question of fact. The current NOAA


71. 43 Fed. Reg. 10,510-11 (1978). The uniform definition, patterned on NEPA’s threshold test, applied to all five federal consistency provisions. Under this test a federal activity triggered the applicable consistency provision when it caused “significant” effects on the state coastal zone.

Under the uniform definition, an effect was “direct” when it caused significant:

(1) Changes in the manner in which land, water, or other coastal zone natural 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.

Id. at 10,519.

The regulations further provided that:

The significance of the changes or limitations caused by the 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 limitations on 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.

Id.

NOAA justified its deviation from the statutory distinctions in the threshold tests “[i]n light of the similarity among the various definitions, and in view of the legislative history which supports the ‘significance’ test.” NOAA stated that “[t]he legislative history is replete” with statements indicating that Congress did not intend to create separate requirements for each subsection, and that the statutory terms are “interchangeable and synonymous.” Id. at 10,511.


73. DOJ Opinion, supra note 72, at 13-14.

74. Id. at 14.
regulations, amended in June, 1979, reflect the Justice Department opinion. Thus, the "directly affecting" threshold test of section 307(c)(1) is at present undefined by the regulations. However, NOAA favors a liberal application of the "directly affecting" test: "given the benefits to be derived from this [consistency] process, federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases to favor inclusion of Federal activities subject to consistency review." 

NOAA's present regulations specify that federal activities related to the OCS leasing process which take place before a lease sale are subject to consistency review under section 307(c)(1) if they have the requisite "direct effect" on the coastal zone. The Department of the Interior's application of the "directly affecting" test to its pre-lease sale activities has generated considerable controversy. Interior concluded that its activities prior to Lease Sale No. 48 had no "direct effect" on the California coastal zone, and the California Coastal Commission sharply disagreed. The facts of this dispute as well as the legal and policy arguments of the parties will be discussed in detail in the following section. This controversy illustrates the problem of applying section 307(c)(1)'s threshold test, resulting from the ambiguity of the language of the statute and the absence of helpful interpretative guidelines in the regulations.

III. THE PROBLEM WITH THE APPLICATION OF THE "DIRECTLY AFFECTING" TEST TO OCS PRE-LEASE ACTIVITIES

A. OCS Pre-lease Sale Procedures

The OCSLA authorizes the Secretary of the Interior to lease OCS tracts for mineral development. Within the Department of the In-

75. 15 C.F.R. § 930.33 (1979); 44 Fed. Reg. 37,141-42 (1979) (supplementary information). As this article goes to print, NOAA has issued proposed regulations for section 307(c)(1) which provide a detailed definition for the term "directly affecting." This most recent interpretation provides that a "direct effect" means "a measurable physical alteration in the coastal zone produced by the conduct of the federal activity itself or by a chain of events, initiated by the federal activity, which is reasonably certain to result in such alterations without further required agency approval." 46 Fed. Reg. 26,658, 26,660 (1981). In addition, the regulations provide a series of examples of the types of federal activities which would cause a "direct effect" on the coastal zone. Id. at 26,660.


77. 44 Fed. Reg. 37,146-47 (1979) (comment to 15 C.F.R. § 930.33 (1979)).

78. 44 Fed. Reg. 37,154 (1979) (comment to 15 C.F.R. § 930.31(a) (1979)). But see note 156 infra.

79. 43 U.S.C. § 1334(a) (Supp. III 1979). The federal government has sole jurisdiction over
terior the Director of the Bureau of Land Management (BLM) administers the OCS leasing process under the direction of the Secretary. The OCSLA authorizes the Secretary of the Interior to grant oil and gas leases for tracts on the OCS not exceeding 5,760 acres (three miles by three miles). A lease entitles the lessee to explore, develop, and produce the oil and gas contained within the lease area. A lease is valid for a period of five to ten years and will be extended the OCS and all leasing activities conducted thereon. 43 U.S.C. § 1332(1) (Supp. III 1979). Prior to 1947, however, it was presumed that each state owned the submerged lands adjacent to its respective coastline. [1953] U.S. Code Cong. & Ad. News 1385, 1417; Note, States’ Rights in the Outer Continental Shelf Denied by the United States Supreme Court, 30 U. Miami L. Rev. 203-04 (1975). This presumption was based on Supreme Court rulings that the title to submerged lands passed at the time of the American Revolution from the English Crown to the states as sovereigns rather than to the United States. See, e.g., Martin v. Waddell, 41 U.S. 367 (1842). However, in response to the gradual recognition of the potentially valuable mineral resources of the OCS, President Harry S. Truman issued a proclamation on September 28, 1945 stating that the United States regarded the “natural resources of the subsoil and seabed of the continental shelf beneath the high seas contiguous to the coasts of the United States as subject to its jurisdiction and control.” Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-48 Compilation), reprinted in 59 Stat. 884 (1945).


In United States v. Maine, 420 U.S. 515 (1975), the Supreme Court confirmed sole federal jurisdiction over the OCS and made it clear that the states had no right to participate in the decision-making aspects of resource development beyond the three mile limit nor would they share in lease bonuses or royalties. It appears that the Maine decision effectively forecloses further state challenges to federal jurisdiction by the OCS. A more detailed discussion of the history of the jurisdictional dispute over offshore lands may be found in Note, States’ Rights in the Outer Continental Shelf Denied by the United States Supreme Court, 30 U. Miami L. Rev. 203 (1975); Breedan, Federalism and the Development of Outer Continental Shelf Mineral Resources, 28 Stan. L. Rev. 1107 (1976); Jurisdiction over the Seabed: Persistent Federal-State Conflicts, 12 Urban L. Ann. 291 (1976).
for as long as the tract continues to produce in paying quantities.\textsuperscript{82}

The Secretary of the Interior initiates the OCS leasing process by preparing a comprehensive five-year leasing program.\textsuperscript{83} In selecting areas for OCS development the Secretary must balance the potential for environmental damage and adverse impact on the coastal zone with the potential for the discovery of petroleum.\textsuperscript{84} A proposed program is submitted to the governors of affected coastal states and their local governments for review and comment.\textsuperscript{85} Before the Secretary can give final approval to the five-year leasing schedule, the plan, together with all comments received from the coastal states must be submitted to Congress for review.\textsuperscript{86} The OCSLA requires

\begin{itemize}
\item \textsuperscript{82} 43 U.S.C. § 1337(b)(2) (Supp. III 1979).
\item \textsuperscript{83} Id. § 1344; 43 C.F.R. § 3310.2(a)(1) (1979).
\end{itemize}

The program must consist of "a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity . . . ." 43 U.S.C. § 1344(a) (Supp. III 1979). The OCSLA mandates that consideration be given to a series of factors in the formulation of the five-year leasing plan, many of which address environmental concerns:

\begin{itemize}
\item Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of—
\item (A) existing information concerning the geographical, geological, and ecological characteristics of such regions;
\item (B) an equitable sharing of developmental benefits and environmental risks among the various regions;
\item (C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;
\item (D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sea-lanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;
\item (E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;
\item (F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;
\item (G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and
\item (H) relevant environmental and predictive information for different areas of the outer Continental Shelf.
\end{itemize}

43 U.S.C. § 1344(a)(2) (Supp. III 1979). In addition, the Secretary must consider the policies and objectives of approved state coastal management programs in making tract selections. Id. § 1344(f); 43 C.F.R. § 3310.4 (1979). BLM must prepare an environmental impact statement for the leasing program in accordance with NEPA prior to publishing the proposed program.

\begin{itemize}
\item \textsuperscript{84} 43 U.S.C. § 1344(a)(3) (Supp. III 1979). "Management of the program is to be balanced, considering all the economic, social and environmental impacts of oil and gas activities . . . ."
\item \textsuperscript{85} 43 U.S.C. § 1344(c) (2) (Supp. III 1979); 43 C.F.R. § 3310.2(a) (1) (1979).
\item \textsuperscript{86} 43 U.S.C. § 1344(c) (3) (Supp. III 1979); 43 C.F.R. § 3310.2(c) (1979). On June 16, 1980,
the Secretary to review the leasing program at least annually and he or she may update or reapprove the program without change.\textsuperscript{87}

After the Secretary gives final approval to a five-year leasing schedule, the United States Geologic Survey, a division of the Department of the Interior, conducts preliminary exploration, and prepares surveys and resource reports which analyze the potential oil and gas reserves contained in the areas included in the leasing schedule.\textsuperscript{88} The petroleum industry also participates in preliminary exploration, and may be required to provide BLM with access to geological and geophysical data obtained as a result of its exploratory activities.\textsuperscript{89} In addition, BLM requests resource reports from other

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Petitioners' challenge to the leasing program rests on the following contentions: (1) the Secretary's decisions regarding the timing and location of OCS development do not reflect adequate consideration of environmental factors as required by section 18 of the OCSLA. See note 89 supra; (2) the Secretary violated section 18(a)(3) of the OCSLA by failing to balance potential environmental damage and adverse coastal zone impacts with the potential for the discovery of petroleum; (3) the Secretary violated section 19 of the OCSLA by rejecting reasonable comments of affected coastal states concerning the size, timing, and location of future lease sales; (4) the Secretary violated section 4(c) of the Administrative Procedure Act, 5 U.S.C. \S\ 553(c) (1976), by failing to articulate the reasons for his decisions on the timing and location of OCS development; (5) the environmental impact statement prepared by the Department of the Interior with respect to the five-year leasing program violated the requirements of NEPA because it was not drafted until after the proposed program was published, and it failed to adequately assess the potential environmental hazards of the scheduled lease sales; and (6) the Secretary's designation of Lease Sales No. 73 and No. 80 simply as "California" violated the OCSLA requirement that the location of OCS lease sale areas be designated "as precisely as possible." Petitioners' Brief at 1-2, California v. Andrus, No. 80-1894 (D.C. Cir., filed August 1, 1980).

The case is presently pending and will receive expedited review in accordance with the requirements of the OCSLA. 43 U.S.C. \S\S\ 1349(c)-1349(d) (Supp. III 1979). The court will utilize the "substantial evidence" test to review the decisions made by the Secretary of the Interior. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Thus, the Secretary's findings if supported by substantial evidence on the record before him will be conclusive. 43 U.S.C. \S\ 1349(c)(6) (Supp. III 1979). In view of the deferential standard of review to be applied and the discretionary type of decisions at issue, it seems likely that the court will be unwilling to require modification of the five-year program.
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\textsuperscript{87} 43 U.S.C. \S\ 1344(e) (Supp. III 1979).
\textsuperscript{88} 43 C.F.R. \S\ 3312 (1979).
\textsuperscript{89} 30 C.F.R. \S\ 252.3 (1980); STAFF OF SENATE COMMITTEE ON COMMERCE, 93d Cong., 2d
interested federal agencies which describe known valuable resources or environmental concerns within the OCS area being considered for lease.\(^9^0\)

Following the preliminary exploration phase, BLM conducts a series of administrative proceedings which culminate in a lease sale pursuant to which individual tracts are auctioned by competitive bid to members of the petroleum industry. Under the OCSLA, Interior’s pre-lease activities include the following steps: (1) Call for Nominations and Comments; (2) tentative tract selection; (3) preparation of environmental assessment studies and environmental impact statements in accordance with the National Environmental Policy Act;\(^9^1\) (4) consultation with governors of affected states; and (5) issuance of the Final Notice of Sale.\(^9^2\)

The Call for Nominations and Comments provides the petroleum industry with an opportunity to indicate specific tracts which it is interested in developing.\(^9^3\) At the same time, any interested parties\(^9^4\) may make “negative determinations” which are formal indications of the tracts which they wish deleted from the lease sale.\(^9^5\) BLM utilizes the information submitted to make preliminary tract selections from the area subject to the Call.\(^9^6\) BLM then subjects the selected tracts to intensive environmental study and analysis. In accordance with the requirements of the National Environmental Policy Act and the guidelines promulgated thereunder,\(^9^7\) BLM prepares an environmental impact statement, which analyzes the envi-
ronmental risks associated with the proposed lease sale and presents reasonable alternative courses of action. During the preparation of this document BLM conducts an extensive hearings and commenting process through which interested federal and state agencies as well as members of the public may submit relevant information. The Secretary of the Interior then utilizes the environmental impact statement to select tracts for inclusion in the proposed Notice of Sale.

The proposed Notice of Sale tentatively sets forth the size, number, and location of the tracts to be offered for sale, as well as stipulations and conditions to be included in the individual leases. Pursuant to section 19 of the OCSLA, the governors of affected states have sixty days in which to submit comments on the proposed Notice of Sale and recommendations as to the size, location, and timing of the lease sale, as well as the adequacy of the proposed lease stipulations and conditions. The OCSLA mandates that the Secretary of the Interior must accept the recommendations of a state governor if the Secretary determines that they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." If the Secretary does not accept a state recommendation, he or she must issue a letter of explanation.

In the last pre-lease activity, BLM publishes the Final Notice of Sale in the Federal Register. The Final Notice of Sale conclusively establishes the size and location of the tracts to be offered, the

98. 40 C.F.R. §§ 1501.7, 1503, 1506.6 (1978). For example, prior to Lease Sale No. 53, see text at notes 157-67 infra, BLM held six scoping meetings in central and northern California in accordance with the requirement that there be "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to [the] proposed actions." 40 C.F.R. § 1501.7 (1978). See FEIS, supra note 5, at 1-4. The meetings were open to all interested parties. In addition, after the draft environmental impact statement was prepared, it was made available for public review, and BLM conducted eight days of public hearings on the content of the draft statement in affected California cities. Id. at 1-7.

99. BLM prepares a Secretarial Issue Document which incorporates the information contained in the environmental impact statement and describes the Secretary's various lease sale options. See, e.g., GAO REPORT, supra note 90, at 9.

100. 43 C.F.R. § 3315 (1979). Lease stipulations and conditions apply either to specific leases or to all leases issued pursuant to a lease sale. Lease conditions and stipulations generally address such concerns as cultural or biological resources, pipeline rights-of-way, disposition of drilling wastes and equipment identification. See, e.g., FEIS, supra note 5, at 1-27.


102. 43 U.S.C. § 1345(c) (Supp. III 1979); 43 C.F.R. § 3315.2(b) (1979).

103. 43 U.S.C. § 1345(c) (Supp. III 1979); 43 C.F.R. § 3315.2(c) (1979).

104. 43 C.F.R. § 3315.4(a) (1979).
timing of the lease sale, and the conditions and stipulations to be included in the leases. The Department of the Interior conducts the actual sale of leases by sealed competitive bid, and awards tracts to the highest responsible and qualified bidders. After the lease sale the United States Geologic Survey assumes administrative authority over OCS leasing operations, and oversees the exploration and development conducted by the lessees.

B. Current Procedures for State Review of OCS Lease Sales
Under the OCSLA and the CZMA

The OCSLA and the CZMA provide two methods by which a coastal state may review and comment upon a proposed lease sale. The procedures for OCSLA review, discussed in the immediately preceding section, occur at several pre-lease stages.

There are two stages at which the federal consistency provisions of the CZMA apply to OCS leasing operations. First, the Department of the Interior’s activities which precede the lease sale are subject to the requirements of section 307(c)(1). Therefore, if Interior determines that any of its pre-lease activities “directly affect” a state coastal zone, it must submit a consistency determination to the state agency which administers the coastal management program. The agency has forty-five days in which to review the determination and indicate its concurrence or disagreement.

A second consistency review takes place after the lease sale. Section 307(c)(3)(B) of the CZMA applies solely to OCS-related activities, and ensures the consistency of the post-lease sale operations of

105. Id.
106. 43 U.S.C. § 1337(a)(1) (1978); 43 C.F.R. § 3315.4 (1979). Mineral leases may only be held by (1) citizens and nationals of the United States; (2) aliens lawfully admitted for permanent residence in the United States in accordance with 8 U.S.C. § 1101(a)(20) (1976); private, public, or municipal corporations organized under federal or state law; or (4) associations of citizens, nationals, resident aliens, or private, public or municipal corporations, states or political subdivisions of states. 43 C.F.R. § 3316.1(b) (1979). For a discussion of OCS bidding procedures, see Jones, Mead, & Sorenson, The Outer Continental Shelf Lands Act Amendments of 1978, 19 NAT. RES. J. 885 (1979).
110. Id. § 930.41(a). See text at notes 43-48 supra.
OCS lessees which will affect any land use or water use in the coastal zone.111 Therefore, when an OCS lessee submits a plan for exploration and development to the Department of the Interior, it must include a certification, together with supporting documentation, that each activity described in the plan complies with the state coastal management program and will be conducted in a manner consistent with that program. No federal license or permit activity which is described in detail in the exploration and development plan may be issued unless the state concurs with the applicant’s consistency determination.112

The state’s power to pass upon consistency under section 307(c)(3)(B) is not, however, unfettered. The Department of Commerce may override a state’s objection to an OCS lessee’s certification of consistency on two grounds. First, Commerce may determine that the disputed federal license or permit activity is consistent with the objectives or purposes of the CZMA.113 Alternatively, Commerce may conclude that the federal license or permit activity, although inconsistent with the state program, is necessary in the interest of national security.114 The Department of Commerce has not yet invoked its override power in connection with the OCS leasing process.115

Thus far, state review of OCS leasing activities under the federal consistency provisions of the CZMA has been limited to review of post-lease sale activities under section 307(c)(3)(B). States have been unable to review pre-lease activities under section 307(c)(1) because the Department of the Interior has taken the position that its pre-lease activities “directly affect” a state’s coastal zone only in very limited circumstances.116 Thus, although it is potentially applicable

111. 16 U.S.C. § 1456(c)(3)(B) (1976). The CZMA was extensively amended in 1976 primarily in response to the increase in energy related development in coastal areas and the OCS as a result of the energy crisis. “[I]t was not until the Arab oil embargo occurred, exactly a year after passage of the Coastal Zone Management Act, that State governments realized the intensity of these developmental pressures on the coastal zone.” S. REP. No. 277, 94th Cong., 1st Sess. 9 (1975), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 735. Section 307(c)(3)(B) was added to “strengthen the States’ ability to cope with OCS impacts . . . .” Id. at 745. For a discussion of the 1976 CZMA amendments, see Note, The Coastal Zone Management Act Amendments of 1976, 1 HARV. ENVT’L. L. REV. 259 (1976).

112. 16 U.S.C. § 1456(c)(3)(B) (1976). “In practical terms, this [Section 307(c)(3)(B)] means that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies.” S. REP. No. 277, 94th Cong., 1st Sess. 20 (1975), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 746.


115. See note 117 infra.

116. Memorandum of the Office of the Solicitor of the Department of the Interior on the
to pre-lease activities, section 307(c)(1) has been ineffective so far as a means of involving the states in Interior’s decisionmaking prior to a lease sale.

With respect to post-lease sale activities, section 307(c)(3)(B) affords the states considerable leverage. The state, rather than the Department of the Interior, has the right to pass on the consistency of a lessee’s proposed development plan. The state can, therefore, object to exploration and development of a tract which was included in the lease sale despite a state recommendation under section 19 of the OCSLA that it be deleted, and with regard to which the state could not object under section 307(c)(1) because Interior had issued a negative determination. But a state’s attempt to halt OCS development by making an arbitrary or capricious finding of inconsistency would most likely fail; the objection must be premised on a violation of a provision of the state coastal plan. Otherwise, the state decision would probably be overridden by the Department of Commerce. It also seems unlikely that a state could successfully base a consistency objection under section 307(c)(3)(B) on a minor or technical inconsistency with a state coastal management program. In such a situation, the Department of Commerce might well exercise its override power, concluding that although the activity would be inconsistent with the state program, it nevertheless comported with the policies and objectives of the CZMA.
In the present procedures provided for state participation in the OCS leasing process under the CZMA and the OCSLA, the states are limited to advisory roles. The OCSLA amendments increase the level of state participation and provide many opportunities for the states to review and comment upon proposed lease sales. However, decision-making authority rests with the Department of the Interior. Similarly, under the CZMA, Interior makes the decisions as to consistency prior to a lease sale. The OCSLA and CZMA (as interpreted by NOAA) probably cast the federal agencies and states in the roles which Congress intended with respect to OCS development. While the respective roles may be properly assigned, the application of the state review procedure provided in section 307(c)(1) of the CZMA to OCS pre-lease sale activities is at the heart of the controversy between the Department of the Interior and the California Coastal Commission.

C. The Dispute Between California and the Department of the Interior

1. The Background Facts and Mediation Proceeding: Lease Sale No. 48

The pre-lease consistency controversy initially arose in connection with Lease Sale No. 48 which was held in Los Angeles on June 29, 1979. The Department of the Interior offered for sale 148 OCS tracts off southern California. The bids on 54 tracts were accepted, 47 of which were in the Santa Barbara Channel. The dispute between the Department of the Interior and the California Coastal Commission (CCC) in Lease Sale No. 48 turned on the question of whether the pre-lease activities conducted by Interior "directly affected" the California coastal zone, thereby triggering the requirement of section 307(c)(1) of the CZMA that they be consistent with the California Coastal Zone Management


119. See text at notes 41-48 supra.
120. See text at notes 56-78 supra.
122. GAO REPORT, supra note 90, at 11.
Program. California took the position that the Final Notice of Sale “directly affected” the coastal zone within the meaning of section 307(c)(1), while Interior maintained that its OCS activities conducted prior to Lease Sale No. 48 did not have any “direct effect.”

On December 5, 1978, the CCC wrote to the President of the United States and requested assistance in resolving the California-Interior disagreement. The Department of Commerce subsequently assumed responsibility for the matter due to its administrative authorization under the CZMA. On March 23, 1979, Commerce and Interior made a joint request to the Department of Justice


The California Coastal Act is patterned on the CZMA, and is thus far the most comprehensive state coastal protective legislation enacted. It establishes a two-tiered system in its coastal plan. The Act sets forth policies and framework for land use planning in the California coastal zone. CAL. PUB. RES. CODE §§ 30200-30264 (West 1977 & Supp. 1980). The California Coastal Commission oversees the implementation of the policies and objectives of the Act at the state level. However, the decision-making aspects of coastal area protection are largely the responsibility of the local governments. The Act requires each local government along the California coast to prepare and administer a local coastal program which incorporates its policies. CAL. PUB. RES. CODE § 30500 (West Supp. 1980). The Coastal Commission must approve each local coastal program before it becomes operative. CAL. PUB. RES. CODE §§ 30510-30522 (West 1977 & Supp. 1980). After it has been certified, the sole authority for issuance of coastal development permits reverts back to the local governments, as long as decision making conforms with the standards set forth in the local program. CAL. PUB. RES. CODE § 30600 (West 1977). For detailed discussions of the history of California coastal management legislation see Coastal Futures: Legal Issues Affecting the Development of the California Coast, 2 STAN. ENVTL L. ANN. (1979); Finnell, Coastal Land Management in California, A.B.A. FOUNDATION RESEARCH J. 647, 649 (1978); Note, Coastal Zone Impacts of Offshore Oil and Gas Development: An Accommodation Through the California Coastal Act of 1976, 8 PAC. L. J. 783, 799 (1977).

124. California Coastal Commission, Position of the California Coastal Commission that the Notice of Sale for Lease Sale No. 48 Directly Affects the California Coastal Zone (Paper presented at the Department of Commerce Mediation Hearing—Sept. 7, 1979) 3, reprinted in 1980 Oversight Hearings, supra note 56, at 303 [hereinafter cited as California Position Paper]. However, the CCC did agree that the terms of the Lease Sale No. 48 were in fact consistent with the California coastal program. See text at notes 141-43 infra.


126. 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 the attempt to resolve controversies arising under the Act. 16 U.S.C. § 1456(h) (1976).

that it issue a legal opinion addressing the merits of the Lease Sale No. 48 dispute. The Department of Justice responded on April 20, 1979. The opinion concluded that Interior's pre-lease activities which "directly affect" a state coastal zone are subject to the section 307(c)(1) consistency requirement. However, the Department of Justice refused to decide whether the pre-lease activities conducted by Interior prior to Lease Sale No. 48 "directly affected" the coastal zone. Justice concluded that the issue was one of fact which it was not authorized to consider.

Although the Department of Justice did not address the merits of the Lease Sale No. 48 dispute, the opinion clearly represented a major victory for supporters of California's position and federal consistency generally. The Justice Department opinion expressly rejected Interior's long-standing contention that its pre-lease activities were per se exempt from the consistency requirement of section 307(c)(1). Interior had argued to Justice that the CZMA and the OCSLA implicitly limited state review under the CZMA to the post-lease sale exploration and development stage, thereby exempting federal activities conducted prior to a lease sale from the consistency requirement of section 307(c)(1). The essence of Interior's position was that with respect to OCS activities, section 307(c)(3)(B), which explicitly requires post-lease sale consistency, superseded section 307(c)(1). The Department of Justice disposed of this argument by

128. 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 (March 23, 1979).
129. DOJ Opinion, supra note 72.
130. Id. at 12-14.
131. 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 (March 23, 1979).

Section 307(c)(3)(B) was enacted in 1976. See note 111 supra. Initially, however, Congress considered adding the word "lease" to the original section 307(c)(3). This amendment would have required OCS leases to be consistent with state coastal management programs. While the Senate passed a bill which included this amendment, it was deleted from the House bill. Section 307(c)(3)(B) which applies to OCS exploration and development plans rather than OCS leases, was ultimately adopted in lieu of the amendment to section 307(c)(3). See Deller, Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selection and Lease Stipulations Be Consistent with State Coastal Zone Management Programs? 14 U.C. Davis L. Rev. 105, 114-15 (1980).

The Department of the Interior relied upon this legislative history to argue that with respect to OCS activities, section 307(c)(3)(B) implicitly repealed the other federal consistency provisions. Department of the Interior, Application of the Federal Consistency Requirements of the Coastal Zone Management Act to the Department of the Interior's Outer Continental Shelf Oil and Gas Leasing Program: The Position of the Department of the Interior 15 (March, 1979).
concluding that the doctrine of repeal by implication was not applicable to the CZMA consistency provisions. Justice relied upon two Supreme Court pronouncements that repeals by implication are not favored. 132 The Supreme Court had held that there must be clear evidence of Congress’ intent to repeal the statutory provision in question in order to apply the doctrine; there must be a “positive repugnancy” between the statutes which cannot be reconciled. 133 Since nothing expressly or impliedly indicated that section 307(c) (3)(B) of the CZMA was intended to be the only consistency provision applicable to OCS activities, Justice concluded that the requisite “positive repugnancy” between the two provisions did not exist. 134

The Department of Justice also rejected Interior’s second contention that the OCSLA in effect superseded section 307(c)(1) as to OCS activities. Justice did acknowledge possible merit in the argument that section 19 of the OCSLA which requires pre-lease sale coordination between Interior and the governor of an affected state could by its specificity take precedence over section 307(c)(1). 135 However, since the OCSLA and its legislative history expressly provided that the Act was not intended to modify any aspect of the CZMA, Interior’s contention could not prevail. 136

The Department of the Interior indicated that it would abide by the Justice Department opinion, 137 but it soon became apparent that California was little closer to subjecting the Final Notice of Sale in Lease Sale No. 48 to a section 307(c)(1) consistency determination. By letter dated May 25, 1979, Interior informed the CCC that its pre-lease activities leading to Lease Sale No. 48 did not “significantly affect” 138 the California coastal zone and, therefore, no consistency

determination would be made. Not surprisingly, this negative determination prompted an outraged response from the CCC, and was termed "an ill-advised attempt to circumvent the Department of Justice legal memorandum."

Even though the CCC did not receive a consistency determination prior to the issuance of the Final Notice of Sale for Lease Sale No. 48, California conceded that the substantive aspects of Lease Sale No. 48 were generally consistent with its coastal management plan, due to Interior's responsiveness to the environmental study and review and comment procedures of the OCSLA. Of the initial 2,400 OCS tracts subject to the Call for Nominations, Interior included only 148 tracts in the Final Notice of Sale. California felt regulations to reflect Justice's conclusion at the time Interior issued the negative determination on Lease Sale No. 48. See text at notes 70-76 supra.

139. Id. Letter from Heather L. Ross, Deputy Assistant Secretary of the Department of the Interior, to Michael L. Fischer, Executive Director of the California Coastal Commission (May 25, 1979); 10 COASTAL ZONE MANAGEMENT J. 5 (May 30, 1979).

140. 10 COASTAL ZONE MANAGEMENT J. 6 (July 11, 1979) (statement of Michael L. Fischer, Executive Director of the California Coastal Commission).


142. GAO REPORT, supra note 90, at 6, 11. On July 16, 1976, BLM made its Call for Nominations and Comments for proposed Lease Sale No. 48. 41 Fed. Reg. 29,440 (1976). The Call area comprised 2,400 tracts which included the entire southern California OCS from Point Concepcion to the Mexican border. GAO REPORT, supra note 90, at 6. In response to the Call, petroleum companies nominated 970 tracts for inclusion in the sale. Almost 200 negative nominations were received. Id. at 6-8. On January 18, 1977, Interior announced its tentative selection of 217 tracts for inclusion in Lease Sale No. 48. Id. at 9. The environmental assessment study and EIS were prepared, therefore, for those 217 tracts. In response to the final EIS, Interior deleted 69 additional tracts from the proposed Notice of Sale, which it issued on March 3, 1979. The reasons for the deletion of the 69 tracts included: (1) the protection of valuable seabird and marine mammal habitats in the Santa Barbara Islands; (2) defense considerations; (3) prevention of hazards to navigation; (4) consideration of commercial and sport fishing; and (5) geologic hazards to petroleum development present in certain tracts. Id. at 11.

Pursuant to section 19 of the OCSLA, the Governor of California, Edmund G. Brown, Jr., submitted comments and recommendations on the proposed Notice of Sale by letter dated May 10, 1979. Letter from Edmund G. Brown, Jr., Governor of California, to Cecil D. Andrus, Secretary of the Interior (May 10, 1979). The letter voiced strong support for the proposed Notice of Sale and commended Interior's efforts to balance environmental and navigational safety standards with OCS development. With respect to tract selection, the Governor's letter requested only two alterations: (1) the deletion of tract No. 116, north of Santa Barbara Island to protect valuable seabird and marine mammal rookeries; and (2) the deletion of the lower third of tract No. 075 on the Ventura Flats in the eastern end of the Santa Barbara Channel. California wanted to preserve its option to consider that area as a siting for a future offshore liquified natural gas terminal. In addition, the letter requested alterations to a number of lease stipulations and conditions. Id.

Interior issued the Final Notice of Sale for Lease Sale No. 48 on May 29, 1979, which responded favorably to most of California's alteration requests. 44 Fed. Reg. 30,770 (1979). Interior included both tract No. 075 and tract No. 116 in the lease sale. Id. at 30,773. However, Interior added additional stipulations to the Notice of Sale which addressed California's con-
that only 2 of the 148 tracts should be deleted from the lease sale. Interior did not delete the 2 tracts but did add stipulations to the Final Notice of Sale which addressed California’s concerns with respect to those tracts.\footnote{143}

The CCC’s general approval of the substantive aspects of Lease Sale No. 48 did not diminish its conviction that a Final Notice of Sale should be subject to consistency review under section 307(c)(1).\footnote{144} Because of the certainty that future lease sales would be held in California, the CCC felt that Lease Sale No. 48 should be used to establish a precedent.\footnote{145} On June 23, 1979, a week before the lease sale, the CCC wrote to the Secretary of Commerce, and requested mediation of the “serious disagreement” between California and Interior.\footnote{146} On July 3, 1979, the Secretary of the Interior, Cecil D. Andrus, agreed to participate in the mediation process.\footnote{147}

... concerned about the two tracts. With respect to tract No. 075, stipulation No. 12 provided that no activity or permanent construction would be authorized on the southern one-third of the tract, unless the lessee demonstrated to Interior’s satisfaction that it would not interfere with a liquefied natural gas terminal. With respect to tract No. 116, stipulation No. 15 stated that OCS exploration and development activities would not be permitted within six miles of the California coastline. \footnote{143. See note 142 supra.}

Interior did not honor California’s request for inclusion in the lease sale of a condition that no surface structures be placed in or within 500 meters of vessel shipping lanes, and a stipulation that emissions related to OCS activities be reviewed by local air pollution agencies. Letter from Edmund G. Brown, Jr., Governor of the State of California, to Cecil D. Andrus, Secretary of the Interior (May 10, 1979). It appears that Interior’s failure to include the latter stipulation was appropriate in view of California v. Kleppe, 604 F.2d 1187 (9th Cir. 1979). In Kleppe the court addressed the problem of regulatory control of the air quality of OCS operations, and the conflicting grants of jurisdiction over air quality suits under the OCSLA and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. III 1979). The court held that the OCSLA granted to the Secretary of the Interior the sole authority to regulate OCS air quality, and therefore, the Environmental Protection Agency could not subject OCS activities to the requirements of the Clean Air Act. Kleppe was decided after Interior rejected California’s request for an air quality stipulation and is not necessarily dispositive of the consistency issue. However, the Kleppe affirmation of Interior’s sole authority over OCS air quality does provide strong support for Interior’s decision on the Lease Sale No. 48 air quality stipulation. For a discussion of this case, see California v. Kleppe, 10 ENVTL L. 685 (1980). [143. See note 142 supra.]

144. “The fact that the Secretary generally responded to California’s recommendations does not mean that the activity does not directly affect the coastal zone. It means that the activity is consistent with the [California coastal zone management program].” California Position Paper, supra note 124, at 8 [emphasis in original].


146. Section 307(h) of the CZMA provides that “[i]n 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 involved in such disagreement.” 16 U.S.C. § 1456(h) (1976).

147. 10 COASTAL ZONE MANAGEMENT J. 5 (July 11, 1979). Participation in the mediation
A public hearing was held in Los Angeles on September 7, 1979, in connection with the Lease Sale No. 48 controversy. The purpose of the hearing was to secure information related to the disagreement, and to provide the public with access to data possessed by the Department of the Interior and the CCC which related to the dispute. Much to the surprise and displeasure of many present at the hearing, Interior's principals in the Lease Sale No. 48 dispute did not attend. Instead, a West Coast representative of Interior made a statement that any questions raised at the hearing would be answered by Interior, if submitted to its Washington office in writing. In contrast, the CCC presented a lengthy and comprehensive paper at the hearing, which detailed the policies and legal basis in support of its position. In addition, several members of the CCC attended the public hearing to respond to questions.

A mediation conference was held in Washington, D.C. on October 19, 1979. Representatives of Commerce, Interior, the CCC, and NOAA attended. Each of the parties restated its position, while Interior provided a formal statement of its legal position for the first time. The parties considered the feasibility of defining the term "directly affecting." After more than five hours, however, the meeting was adjourned without resolution of the controversy.

The General Counsel to the Department of Commerce, who presided at the mediation conference submitted a memorandum to the Secretary of Commerce which reported on the proceeding. The process is entirely voluntary; neither the federal nor state agency can be compelled to mediate a disagreement arising under the CZMA. 15 C.F.R. § 930.112(b) (1979). During the course of mediation, either party may withdraw at any time. Id. § 930.115(b) (1979).

148. 10 COASTAL ZONE MANAGEMENT J. 2 (Aug. 15, 1979). Section 307(h) of the CZMA provides that "the process of such mediation shall, with respect to any disagreement ... include public hearings which shall be conducted in the local area concerned." 16 U.S.C. § 1456(h) (1976).

149. 10 COASTAL ZONE MANAGEMENT J. 3 (Sept. 19, 1979); Transcript of the Lease Sale No. 48 Mediation Hearing (Sept. 7, 1979) 24-25 (testimony of Michael L. Fischer, Executive Director of the California Coastal Commission); id. at 66 (testimony of Helene Linker, attorney for the Natural Resources Defense Council).

150. Transcript of the Lease Sale No. 48 Mediation Hearing (Sept. 7, 1979) 59-60 (testimony of Robert Conover, Field Solicitor, Department of the Interior).

151. 10 COASTAL ZONE MANAGEMENT J. 1 (Oct. 31, 1979). NOAA's regulations call for a mediation conference following the public hearing with representatives from Commerce, the disagreeing agencies, and any other parties deemed necessary by the Secretary of Commerce. 15 C.F.R. § 930.114(a) (1979).


153. Memorandum from C.L. Haslam, General Counsel to the Department of Commerce, to
memorandum recounted the history of the dispute, and concluded by expressing the opinion that the Final Notice of Sale in Lease Sale No. 48 was subject to the consistency requirement of section 307(c)(1). However, in the formal letters sent by the Secretary of Commerce to the parties involved in the mediation proceeding, the conclusions of the General Counsel were deleted. In light of the unsuccessful mediation of the Lease Sale No. 48 dispute the Secretary of Commerce requested NOAA to issue new regulations defining the term “directly affecting.”

2. The Subsequent Controversy: Lease Sale No. 53

The dispute between the Department of the Interior and the CCC unresolved in Lease Sale No. 48 resurfaced in October, 1980, in con-


154. In my opinion, the law comtemplates that pre-lease sale activities as in California be subject to a consistency determination, and moreover, that this would not impose an undue burden in a situation such as this one. The CZM program further contemplates that state plans be accorded substantial respect where consistency is at issue. DOI has, however, adopted an extremely narrow and restrictive definition of “directly affect.”

Id. at 84.

155. See Letter from Philip M. Klutznick, Secretary of Commerce to Cecil D. Andrus, Secretary of the Interior (Feb. 27, 1980), reprinted in H.R. Rep. No. 1012, 96th Cong., 2d Sess. 79-80 (1980). The CCC reacted angrily to Klutznick’s summation of the mediation, which Michael L. Fischer, Executive Director of the CCC, said excised “every sentence in the slightest way negative toward Interior.” See 11 Coastal Zone Management J. 2 (March 5, 1980). Fischer charged that Interior made an “intensive effort” to “quash” the General Counsel’s memorandum. Id.

156. See Letter from Philip M. Klutznick, Secretary of Commerce, to Cecil D. Andrus, Secretary of the Interior (Feb. 27, 1980), reprinted in H.R. Rep. No. 1012, 96th Cong., 2d Sess. 79-80 (1980). After more than a year of delay, NOAA issued proposed regulations for section 307(c)(1) on May 14, 1981, which provide a detailed definition for “directly affecting.” 46 Fed. Reg. 26,658 (1981). See note 76 supra. The proposed rules adopt a narrow and restrictive interpretation of the phrase, and represent a direct departure from NOAA’s prior directive that section 307(c)(1)’s threshold test be construed liberally to favor consistency review. Specifically excluded from the definition of “directly affecting” are those effects “identified by the federal agency as uncertain, speculative, remote or subject to further required agency approval.” Id. at 26,660. In an accompanying comment, NOAA gives as an example of a federal activity which does not directly affect the coastal zone “outer continental shelf oil and gas planning and leasing undertaken by the Department of the Interior in the normal course of decisionmaking and lease award . . . .” Id. Thus, the effect of this regulation is to preclude consistency review of Interior’s tract selections prior to OCS lease sales in all but extraordinary circumstances. This result is in direct contradiction not only of the prior position taken by NOAA on this issue, but also of the conclusion reached by the Secretary of Commerce in the Lease Sale No. 48 mediation, see note 154 supra and the conclusion of the Department of Justice. See text at notes 128-34 supra.

If NOAA’s proposed regulations for section 307(c)(1) are finalized, California will challenge
connection with Lease Sale No. 53. Interior scheduled this lease sale for
May, 1981, to auction OCS tracts in waters off Point Conception in
central California extending to waters off Humboldt Bay in northern
California. The area included in the Call for Nominations on Lease
Sale No. 53 comprised five distinct basin areas: Point Arena Basin,
Bodega Bay Basin, Santa Cruz Basin, Santa Maria Basin, and Eel
River Basin.

Prior to the election of Ronald Reagan, the scenario for this lease
sale paralleled that of Lease Sale No. 48. By letter dated July 8,
1980, the CCC requested that Interior submit a consistency deter­
mination at the time it issued the proposed Notice of Sale on Lease
Sale No. 53. Interior responded on August 14, 1980, and stated
that a consistency determination or a negative determination would
be made at the time the Secretary issued the proposed Notice of
Sale. On October 22, 1980, Interior made a negative determina­
tion on the pre-lease activities associated with proposed Lease Sale
No. 53 after concluding that none of them had a “direct effect”
within the meaning of section 307(c)(1). But while Interior de-

their validity on the basis that NOAA’s reversal of its prior position on the interpretation of
the provision is an abuse of discretion and therefore violative of section 706 of the Adminis­

157. 11 COASTAL ZONE MANAGEMENT J. 2 (Oct. 22, 1980); FEIS, supra note 5, at i.
158. FEIS, supra note 5, at xii.
159. Letter from Michael L. Fischer, Executive Director of the California Coastal Commissi­
on, to Cecil D. Andrus, Secretary of the Department of the Interior (July 8, 1980).
160. NOAA’s regulations provide that a consistency determination must be provided to the
appropriate state agency at least 90 days prior to the “final approval” of the federal activity.
15 C.F.R. § 930.34(b) (1979). Interior has taken the position that the Final Notice of Sale con­
istitutes “final approval” of an OCS lease sale within the meaning of the regulations. See
Letter from Heather L. Ross, Deputy Assistant Secretary of the Department of the Interior,
to Fram Ulmer, Office of the Governor of Alaska (March 7, 1980).

Therefore, the proper time to submit a consistency determination or negative determination
on an OCS lease sale is ninety days prior to the Final Notice of Sale. Ninety days prior to the
Final Notice coincides with the time for issuance of the proposed Notice of Sale. California’s
position is that it is the Final Notice of Sale which “directly affects” the California coastal
zone. California Position Paper, supra note 124, at 3. However, because of the ninety day
waiting period, the consistency determination or negative determination must be made at the
time of issuance of the proposed Notice of Sale. See Letter from Heather L. Ross, Deputy
Assistant Secretary of the Department of the Interior, to Fran Ulmer, Office of the Governor
of Alaska (March 7, 1980).

161. Letter from Cecil D. Andrus, Secretary of the Department of the Interior, to Michael
L. Fischer, Executive Director of the California Coastal Commission (August 14, 1980).
162. Letter from Larry E. Meierotto, Assistant Secretary of the Department of the In­
terior, to Michael L. Fischer, Executive Director of the California Coastal Commission (Oct.
22, 1980). “[W]e have assessed the possible effects of the Department’s pre-lease activities
associated with OCS Lease Sale No. 53 and found that none directly affects the California
coastal zone.” Id.
clined to issue a consistency determination to the CCC, former Secretary Andrus eliminated virtually a large part of the controversy as to the substantive aspects of Lease Sale No. 53; in response to the OCSLA environmental assessment studies, former Secretary Andrus deleted all of the tracts in four of the five basin areas from the lease sale.163 The new Secretary of the Interior, James G. Watt, initially indicated that he might revise the tract selections for Lease Sale No. 53, and include tracts in the four basins previously deleted by former Secretary Andrus. However, the Final Notice of Sale, issued on April 27, 1981, included only the 115 tracts in the Santa Maria Basin.164

Despite the deletion of the four controversial basin areas from Lease Sale No. 53, California did not agree with Interior’s decision to lease all of the 115 tracts in the Santa Maria basin. In contrast with Lease Sale No. 48, the consistency of the terms of Lease Sale No. 53 generated considerable dispute, which in turn triggered the first litigation as to the applicability of section 307(c)(1) of the CZMA to a Final Notice of Sale. The governor of California’s request for the deletion of the thirty-four northernmost tracts in the Santa Maria Basin was rejected by Secretary Watt on April 10, 1981; at the same time the Secretary declined to conduct a review of the consistency of the terms of the lease sale after concluding that the Final Notice did not “directly affect” the coastal zone within the meaning of section 307(c)(1).165

163. 11 COASTAL ZONE MANAGEMENT J. 2 (Oct. 22, 1980). In response to BLM’s Call for Nominations and Comments on November 29, 1977, 42 Fed. Reg. 60,794 (1977), in an area comprising 2,036 tracts, the petroleum industry nominated 1,743 tracts. FEIS, supra note 5, at 1-4. On October 10, 1978, BLM announced the tentative selection of 243 tracts for environmental study. Id. However, Secretary Andrus deleted more than half of the 243 tracts evaluated in the final EIS from the proposed Notice of Sale. 45 Fed. Reg. 71,139 (1980). Secretary Andrus’ decision to delete all of the tracts in the four basin areas was made in response to concern for the protection of commercial fisheries, seabird rookeries, and estuarine and wildlife habitat. 11 COASTAL ZONE MANAGEMENT J. 2 (Oct. 22, 1980).

164. 46 Fed. Reg. 23,674 (1981). On February 13, 1981, Secretary Watt had issued a new proposed Notice of Sale for Lease Sale No. 53 restoring the four basin areas for leasing consideration. 46 Fed. Reg. 12,435, 12,447-53 (1981). It appears that the subsequent decision not to lease tracts in the four basins may be short-lived. Secretary Watt announced that he may conduct a “second part” of Lease Sale No. 53 before July, 1981, which would include tracts in the four basin areas. See 12 COASTAL ZONE MANAGEMENT J. 2 (Apr. 15, 1981). It is expected that California would challenge the leasing of any of these tracts in court. See The Wall Street Journal, May 27, 1981, at 54, col. 1.

165. Boston Globe, Apr. 11, 1981, at 3, col. 5. The thirty-four tracts in question stretch from Morro Bay to Point Sal. The tracts lie directly seaward of a habitat of the southern sea otter and in the migratory path of the gray whale, both of which have been listed as endangered species under section 4 of the Endangered Species Act of 1973. 16 U.S.C. § 1533(a)(1) (Supp III 1979). The CCC had determined that the leasing of thirty-one of those tracts would be in-
In response, California together with a coalition of environmental concern groups filed suit in federal district court in Los Angeles seeking (1) a declaratory judgment that the Final Notice of Sale for Lease Sale No. 53 "directly affected" the California coastal zone and that Secretary Watt violated section 307(c)(1) by refusing to conduct the leasing in the Santa Maria basin in a manner which was consistent with the California coastal management plan; (2) a writ of mandamus ordering Secretary Watt to conduct a consistency review and submit a consistency determination to the CCC; and (3) a preliminary injunction to block the leasing of the thirty-four disputed tracts until ninety days after Interior submits a certification of consistency.166

On May 27, 1981, one day before the scheduled lease sale, Judge Mariana R. Pfaelzer issued a preliminary injunction which prevented Interior from granting leases for the disputed tracts on the basis that California had advanced arguments which indicated a very strong possibility of success on the merits of the alleged violation of section 307(c)(1).167

D. The Legal and Policy Arguments of the Parties in Lease Sale No. 48

1. California's Position168

California contended that the Final Notice of Sale in Lease Sale No. 48 "directly affected" the California coastal zone and, therefore, consistent with the California Coastal Zone Management Act. See 12 COASTAL ZONE MANAGEMENT J. 5 (Jan. 14, 1981). In rejecting all of the recommendations submitted by Governor Brown as to the size, timing, and location of the Lease Sale, Secretary Watt stated the environmental concerns were unwarranted because "offshore oil and gas activities have had an excellent environmental record." Boston Globe, Apr. 11, 1981, at 3, col. 5.

166. California v. Watt, No. 81-20-80 (C.D. Cal., filed Apr. 29, 1981); Natural Resources Defense Council v. Watt, No. 81-2081 (C.D. Cal., filed Apr. 29, 1981). The legal and policy arguments supporting California's position are substantially the same as those set forth in the following section of this article.

In addition to the alleged violations of section 307(c)(1) of the CZMA, the plaintiff's alleged that Secretary Watt failed to consider Governor Brown's comments on the terms of Lease No. 53 in accordance with the standard set forth in section 19 of the OCSLA, see text at notes 100-03 supra; violated NEPA by preparing an inadequate EIS for the lease sale; and violated section 7(a)(2) of the Endangered Species Act by failing to obtain adequate biological opinions to ensure that the lease sale would not jeopardize the southern sea otter and gray whale populations. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 2-8, California v. Watt, No. 81-2080 (C.D. Cal., filed Apr. 29, 1981).


168. California's position that a Final Notice of Sale requires a consistency determination
the Department of the Interior was required to submit a consistency determination in accordance with section 307(c)(1) of the CZMA. The basis for California's position was that the Final Notice of Sale represented the key planning decision for the lease sale because at that juncture Interior made its final determinations on both the number and location of the tracts to be auctioned, and on the conditions and stipulations to be included in the leases. The Final Notice of Sale, California reasoned, therefore established the basic parameters regarding where OCS development will be allowed to take place. California contended that the Final Notice of Sale set in motion a chain of events which ultimately impacted the coastal zone, and that section 307(c)(1) was applicable at the outset of the process. California further argued that Interior's decisions prior to the Final Notice of Sale obviously had a "direct effect" on the California coastal zone in that decisions to delete tracts resulted in no development on those tracts, while decisions to include tracts lead to exploration and often to actual development. California analogized Interior's decision to lease to a "massive subdivision" of the OCS. Support for the California position was largely policy oriented. California first relied on the policy enunciated in the language of the CZMA. The statute's declaration of policy calls for cooperation in coordination between federal and state agencies in order to protect the resources of the coastal zone. California argued that consistent-

has received the formal support of a number of groups: The National OCS Policy Committee of the OCS Advisory Board which advises Interior, The Natural Resources Defense Council, the Coastal States Advisory Committee, the Massachusetts Office of Environmental Affairs, and the Oregon Department of Land Conservation and Development. California Position Paper, supra note 124, at 4; see also 10 ENVIR. REP. (BNA) (curr. dev.) 1097 (Sept. 7, 1979). In addition, in a letter to former President Jimmy Carter, Senators Alan Cranston (D-Cal.) and Ernest F. Hollings (D-S.C.) urged him to require Interior to determine whether its pre-lease sale decisions are consistent with state coastal management programs. 11 ENVIR. REP. (BNA) (curr. dev.) 235 (June 13, 1980).

169. California Position Paper, supra note 124, at 3. However, because of the ninety day waiting period required by NOAA's regulations, Interior must make its determination of consisteny or negative determination at the time it issues the proposed Notice of Sale. See note 160 supra.

170. California Position Paper, supra note 124, at 4. California maintains that Interior's decision to offer leases to private industry for specific tracts "is the key activity that creates a right [in the lessees] to develop those leases." Id. at 3. While a lease sale itself would create the right to develop OCS tracts, it is difficult to find validity in California's argument that Interior's decision to lease creates any such right.

171. Id. at 4-5.

172. Id. at 4. California analogized OCS subdivision to subdivision in land use planning. As an example, California noted that when the National Forest Service decides to offer leases for timber harvesting in areas in or near the California coastal zone, it submits a consistency determination under section 307(c)(1) when it makes the decision. Id. at 3.

cy review of a proposed lease sale would achieve this goal. California also advanced several practical reasons for subjecting the Final Notice of Sale to the consistency requirement of section 307(c)(1). The most compelling argument is that the Final Notice stage generally provides the only opportunity under the CZMA to review the lease sale as a whole; post-lease sale consistency review under section 307(c)(3)(B) must be conducted “piecemeal” on a tract-by-tract basis.\textsuperscript{174} The earlier date is more appropriate, California reasoned, because early consistency review would minimize delays and potential litigation.\textsuperscript{175} If the terms contained in the Final Notice of Sale were consistent with the state’s coastal management plan, the consistency issue could not delay the lease sale, because the state could not petition for mediation or seek to enjoin the lease sale in court.\textsuperscript{176}

California further suggested that consistency review prior to the Final Notice of Sale would significantly benefit OCS lessees and the national interest in OCS development generally. A state’s concurrence with Interior’s consistency determination on the Final Notice would assure lessees that the tracts on which they bid would not later be found inconsistent with the state’s coastal management plan and that they are indeed suitable locations for exploration and development. Further, lessees would have knowledge of all stipulations and conditions on exploration and development activities which the state deems necessary to insure consistency with the state coastal program.\textsuperscript{177} In addition, if the state refused to concur with a consistency determination submitted by Interior and Interior proceeded with the lease sale without modification, the lessee would benefit by being put on notice of the state’s objection, the reasons for the objection, and the fact that the lessee may encounter later objections under section 307(c)(3)(B) consistency review.\textsuperscript{178}

2. The Department of the Interior’s Position

In contrast with that of California, the Department of the Interior’s legal analysis of the applicability of section 307(c)(1) to its pre-lease activities prior to Lease Sale No. 48 was devoid of policy

\textsuperscript{174} California Position Paper, \textit{supra} note 124, at 3.
\textsuperscript{175} \textit{Id.} at 6-7.
\textsuperscript{176} \textit{Id.} at 7.
\textsuperscript{177} \textit{Id.} at 6.
\textsuperscript{178} \textit{Id.} This argument presupposes a legitimate state objection, that there is in fact a significant inconsistency in the terms of the lease sale; otherwise the state objection to the section 307(c)(3)(B) determination would be subject to override by Commerce. See text at notes 113-14 \textit{supra}. 
considerations. Interior perceived the problem solely as one of statutory construction, the key issue being the legal definition of the term "directly affecting." Interior asserted that the plain meaning doctrine as enunciated by the Supreme Court controlled the interpretation of the words "directly affecting." As a general proposition, this rule provides that where the meaning of a statute is plain from the language used, a court may not go beyond it to find another meaning. Instead, the statute should be construed according to the intent expressed in the statutory provision itself. The purpose of this rule is to insure that when a statute is interpreted, the language of the provision in question takes precedence over extrinsic materials.

After determining that no useful legislative, judicial or administrative interpretation of "directly affecting" existed, Interior concluded that it should adopt a "simple and straightforward interpretation of the term . . . which reflects the plain meaning of the statutory language." Interior consulted the dictionary, and developed the following definitions for use in applying section 307(c)(1): "direct" means "without intervening cause," and "effect" means "produce an effect or change in." Interior therefore concluded that with reference to section 307(c)(1), a federal activity "directly affects" the coastal zone when the activity produces effects or changes in the land or water resources within the coastal zone without any intervening elements. Interior noted that it chose the phrase "without intervening cause" because it "captured the central meaning of [the] relevant dictionary definitions, thus complying with the 'plain meaning rule.' "

179. Mediation Conference Report, supra note 152, at 3.
180. Solicitor’s Opinion, supra note 116, at 8. Interior relied on Caminetti v. United States, 242 U.S. 470 (1917): “It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.” Id. at 485.
182. Id. § 46.01. See Lyman, The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation, 3 Manitoba L.J. 53 (1969).
187. Id. at 5.
188. Id. at 4.
Not surprisingly, in applying the above-described interpretation of the “directly affecting” threshold test, Interior concluded that none of its activities prior to Lease Sale No. 48 had the requisite “direct effect.” Interior does not contend that a Final Notice of Sale can never “directly affect” the coastal zone. But according to Interior, only when a pre-lease decision such as a stipulation contained in the Final Notice of Sale would bind a lessee to take or refrain from taking immediate action which would have a physical impact on the coastal zone, would a consistency determination be required. Since none of the stipulations contained in the Final Notice of Sale for Lease Sale No. 48 required or prohibited any activity which could have a physical impact on the California coastal zone, Interior concluded that a consistency determination was not required. With respect to the final selection of the size and location of the tracts to be offered for sale, Interior contended that such decisions could not “directly affect” the coastal zone, since no physical impact would occur without significant subsequent decisions and actions by the OCS lessees during the course of exploration and development. The actions of the OCS lessees would constitute intervening forces which, according to Interior’s interpretation of the “directly affecting” test, precluded a finding of directness.

189. Id. at 1.
190. Id. at 6. Since the issuance of the DOJ Opinion, see note 72 supra, Interior has made one pre-lease sale consistency determination in accordance with section 307(c)(1). Prior to the Final Notice of Sale for Lease Sale No. 49, 44 Fed. Reg. 64,751 (1979), which leased tracts in the Beaufort Sea off the northern coast of Alaska in 1979, Interior made a consistency determination with respect to lease stipulation No. 4, but found that no other part of the Final Notice directly affected the Alaska coastal zone. 10 COASTAL ZONE MANAGEMENT J. 1 (Oct. 31, 1979). Stipulation No. 4 prohibited solid waste disposal on artificial islands in marine waters within the lease area. Interior concluded that the stipulation could have a direct effect because: (1) the requirement imposed a legal restraint on the lessees, i.e. banning the disposal of waste “the effects of which could cause physical impacts in the coastal zone which are not negligible”; and (2) the requirement was effective immediately “without the necessity of any other Federal decision or activity occurring first.” Therefore, Interior submitted a determination letter to Alaska stating that stipulation No. 4 was consistent with the Alaska Coastal Zone Management Plan. Id.
191. Interior Position Paper, supra note 186, at 7. In support of its conclusion, Interior set forth and analyzed each of the fifteen stipulations in the Final Notice of Sale, and concluded that none would cause immediate physical impacts. Id. at 7-11.
3. The Petroleum Industry’s Position

During the course of the Lease Sale No. 48 dispute, the American Petroleum Institute (API) and the Western Oil and Gas Association (WOGA) represented the interests of the petroleum industry, and presented its views on the controversy. API is a national trade association representing some 350 companies and 7,000 individuals engaged in all sectors of the petroleum industry. WOGA is a trade association of companies and individuals representing more than 90 percent of the production, refining, and wholesale marketing of petroleum products in six western states, whose members are actively involved in OCS exploration and development off the California coast. The petroleum industry perceives the federal consistency provisions to be threatening to OCS development, and unnecessary as well. In recent hearings held in connection with the 1980 reauthorization of the CZMA, the petroleum industry proposed that the consistency provisions be amended to preclude their application to OCS activities. The petroleum industry stated its belief that a
jurisdictional conflict exists between the provisions of the CZMA and the OCSLA with respect to OCS development. The petroleum industry believed that the consistency provisions of the CZMA (section 307(c)(3)(B) in particular) upset the logical balance between the federal government, having jurisdiction over the OCS, and the states, having jurisdiction of the submerged lands extending seaward to the three mile limit. The petroleum industry reasoned that the OCSLA provides more than adequate protection of the environmental interests which the CZMA is intended to protect, specifically the coastal areas. Therefore, it concluded that the jurisdictional “conflict” inherent in the two statutes should be resolved by allowing OCSLA to prevail over the CZMA by eliminating the OCS-related consistency provisions.

As might be expected, the petroleum industry’s position as to the applicability of section 307(c)(1) to the Final Notice of Sale in Lease Sale No. 48 closely paralleled that of the Department of the Interior. It maintained that none of Interior’s activities prior to Lease Sale No. 48 “directly affected” the California coastal zone and, therefore, no consistency determination was required. The petroleum industry based its analysis of the applicability of section 307(c)(1) to pre-lease activities on a literal dictionary-derived interpretation of the phrase “directly affecting,” similar to that utilized by Interior. The

CZMA. API-WOGA Statement, supra note 193, at 283. API and WOGA appeared to take for granted that section 307(c)(1) is not applicable to OCS pre-lease activities and, therefore, no amendment to that section was necessary.

The petroleum industry has also challenged the federal consistency provisions in court. In American Petroleum Institute v. Knecht, 456 F. Supp. 889 (C.D. Cal. 1978), aff’d, 609 F.2d 1306 (9th Cir. 1979) the plaintiffs contended that states would abuse the federal consistency provisions. The court dismissed the claim for lack of ripeness: “Whether the state [California] will utilize its consistency powers improperly to retard or halt energy development are [sic] wholly speculative.” Id. at 903.

196. 1980 Oversight Hearings, supra note 56, at 347.
197. API-WOGA Statement, supra note 193, at 283.
198. Id.
199. Id.
petroleum industry’s position paper also examined judicial interpretation of the words “direct effects” to provide insight into section 307(c)(1)’s threshold test.201

In applying its interpretation of “directly affecting” to the Final Notice of Sale in Lease Sale No. 48, the petroleum industry concluded that the threshold test was not met because neither the requisite “directness” nor “effect” existed. It reasoned that a Final Notice of Sale at most creates a condition of affairs upon which the intervening actions of the future lessees must operate before any “direct” effect occurs.202 The petroleum industry’s interpretation of “effect” within the meaning of section 307(c)(1) required that there be physical impact;203 the Final Notice had no “effect” on the coastal zone, it concluded, because it caused no such impact.204

201. Id. at 326-33. The API-WOGA Position Paper cited Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979) (per curiam). That case involved an action to recover damages for alleged breaches of contracts for the sale of crude oil. Plaintiffs based their claim on a provision of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976), which allows an exception to foreign state immunity from suit in federal courts when an act takes place outside of the United States. Id. § 1605(a)(2). The court dismissed the case for lack of jurisdiction after determining that while the cancellation of the contract by the Libyan defendant affected the plaintiff, any effect was not direct but indirect. Carey v. National Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979). The petroleum industry also relied on Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), actions brought for wrongful death and personal injuries under the same statute. The court held that the harm suffered by the plaintiffs did not have the requisite directness: “[T]he common sense interpretation of a ‘direct effect’ is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.” The court dismissed the suit for lack of jurisdiction since the statute’s threshold test was not met. Id. at 266.


203. Id.

204. Id.

[T]he Secretary’s last pre-leasing activity is simply to issue a piece of paper, known as the Final Notice of Sale . . . . From a common-sense point of view, it is clear that
The petroleum industry's interpretation of section 307(c)(1)'s "directly affecting" test is even more literal than that of Interior. In contrast with Interior's view that certain lease stipulations in a Final Notice of Sale could have a "direct effect" on the coastal zone, the petroleum industry maintained that section 307(c)(1) can never be applied to OCS pre-lease activities; in its view the coastal zone can experience a "direct effect" only when exploratory drilling occurs on the leased tracts.205

E. An Analysis of the Merits of the "Directly Affecting" Dispute

1. The Department of the Interior and the Petroleum Industry's Interpretation of "Directly Affecting"

A strict and literal interpretation of the "directly affecting" threshold test of section 307(c)(1) would seemingly necessitate the conclusion propounded by the Department of the Interior that the issuance of a Final Notice of Sale does not require a consistency determination. Interior's plain meaning definition of "directly affecting," "producing a change or effect in without intervening cause" does in fact "capture the central meaning of those terms" as they are defined in the dictionary. Obviously a Final Notice of Sale causes no "direct effect" on the coastal zone in the sense of actual physical impact. Nor can the Final Notice be considered the proximate cause in a legal sense of any ultimate physical impact. Therefore, under Interior's interpretation, pre-lease activities would never have a "direct effect." A series of events and decisions made by the tract lessees and the federal and state agencies during the licensing and permitting proceedings would constitute intervening elements and preclude the earlier pre-lease activities from being "direct."

Interior's reliance upon the plain meaning rule, however, is misplaced. Both the courts and eminent authorities on statutory construction recognize an important caveat to the plain meaning doctrine. Assuming the language of the statute is in fact unambiguous,206 it is nevertheless widely held that a literal interpretation should not be utilized if it creates a result which is contrary to the ap-

205. Id. at 324.
206. Id. at 333.
206. The diversity of opinion as to the proper interpretation of "directly affecting," as reflected by the California-Interior dispute, leads one to wonder about the "plainness" of the
parent intent of the legislature and the words are capable of an interpretation which could effectuate legislative intent.\(^{207}\) "[T]he purpose of the statute should not be sacrificed to a literal interpretation of [the statutory provision]."\(^{208}\) Instead, one should consider the sense which the words were intended to convey.\(^{209}\)

The CZMA seeks to encourage states' participation in coastal zone management and to foster federal and state cooperation and coordination in order to protect and preserve coastal areas.\(^{210}\) Congress intended that the federal consistency provisions be the means of effecting cooperation and coordination between federal and state agencies.\(^{211}\) In its interpretation of section 307(c)(1), Interior adopted a dictionary definition of "directly affecting" without consideration of the purpose of the consistency provision and the purpose of the CZMA. Interior's literal interpretation of the threshold test ensures that a Final Notice of Sale as a whole will never have the requisite "direct effect" for purposes of section 307(c)(1). Cooperation and coordination can hardly be furthered where the federal agency utilizes a definition which will rarely, if ever, require it to make a consistency determination. Interior's emphasis on literalness thwarts the spirit and objectives of the CZMA. In such an instance, reliance upon the extreme, dictionary definition version of the plain meaning rule is inappropriate.

statutory provision. See note 56 supra. Where a dispute relates to the interpretation of a statute, one can logically argue that there cannot be a plain meaning, since there would then be no dispute. Lyman, The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation, 3 MANITOA L.J. 53 (1969).


209. J. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 230 (1975). Dickerson notes that the most extreme application of the plain meaning doctrine is the rule of literalness: "Statutory words must be given effect according to their relevant dictionary senses. So stated the rule is simple nonsense; to exclude consideration of context would be to ignore one of the basic principles of communication." Id. (quoting Willis, Statutory Interpretation in a Nutshell, 16 CANADA B. REV. i, 10 (1938)).


211. See, e.g., 118 CONG. REC. 26,479 (1972), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 370.

212. See note 201 supra.
The petroleum industry's analysis of section 307(c)(1) and OCS pre-lease activities similarly disregards the purpose of consistency review. Its position paper on Lease Sale No. 48 examines judicial interpretation of the term "direct effects" in a wide variety of contexts.\(^{212}\) However, all of the cases cited deal with issues far removed from coastal zone management and environmental law: Foreign Sovereign Immunities Act; regulation of interstate travel; wrongful death actions, and the like. It is well established that a troublesome statutory provision may be interpreted by analogy to the language of other statutes not specifically related but which apply to similar persons, things, or relationships.\(^{213}\) Even so, the probative value of analogy to similar but unrelated statutes is generally considered limited.\(^{214}\) Not only are the statutes and case law relied on by the petroleum industry totally unrelated to the CZMA, they do not even remotely relate to similar things or relationships. As such, the analogies drawn do not have the requisite connection with the CZMA, and therefore should have little bearing on the interpretation of section 307(c)(1).

2. California's Interpretation of "Directly Affecting"

In its request for a consistency determination prior to the Final Notice of Sale, the CCC seeks to participate at the decision-making stage of the leasing process, rather than being limited to determining the consistency of OCS-related activities after the lease sale has occurred. One of the many difficulties with the language of section 307(c)(1) of the CZMA is that it does not address the timing aspect of the determination of consistency. The only possible clue lies in the word "direct." The major problem with California's request for a consistency determination prior to the Final Notice of Sale is that a decision by its very nature cannot have a "direct" effect, if the literal "without intervening cause" interpretation is utilized. However, as discussed in the preceding section, there are persuasive arguments against the use of strict statutory interpretation in this instance.

While Interior's analysis focuses on the literal "direct effects" of the Final Notice of Sale, California examines the cumulative effect of the OCS leasing process on the coastal zone. It is a matter of common knowledge that the consequences of an OCS lease sale have


a profound and long-lasting effect on a state's coastal zone. Examples of coastal zone impacts include large-scale onshore development such as: pipeline landfalls, harbor supply bases, refineries, and deep-water ports;\(^{215}\) increases in coastal area population due to labor and staffing requirements of the energy-related facilities; hazards to marine and coastal resources posed by OCS exploration and drilling; and the dangers inherent in the transportation of recovered crude oil, notably the ever present threat of oil spills.\(^{216}\) California justifiably contends that a consistency determination should be made prior to the final decision which sets in motion the chain of events which ultimately cause the effect. A Final Notice of Sale, which conclusively determines the number and location of tracts to be leased as well as lease stipulations and conditions, does constitute the key decision in the OCS leasing process.

The application of section 307(c)(1) at the decision-making stage of a proposed federal activity, rather than at the point at which a literal effect results, best serves the stated policies and goals of the CZMA. The consistency provision is the vehicle which effects a planning relationship between the federal and state agencies. If the Department of the Interior were to conclude that its pre-lease activities "directly affected" the coastal zone, it would submit a consistency determination after reviewing its proposed activity in light of the state’s coastal management program. The state would review the consistency determination, and inform Interior of its agreement or disagreement with the determination. Such a procedure would achieve the coordination and cooperation which the CZMA contemplates. However, logic dictates that this procedure is meaningful only if it takes place at the planning stages of a proposed activity. It is hard to believe that Congress intended this planning relationship to arise only at the time when the activity literally affected the coastal zone.

California’s request for a consistency determination prior to a Final Notice of Sale necessitates a liberal interpretation of the term "directly affecting"; NOAA’s current regulations specifically call for such an interpretation of section 307(c)(1)'s threshold test. Although the regulations do not define "directly affecting," the pertinent sections and comments provide guidance as to the proper operation of section 307(c)(1). First, with respect to the applicability of section

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215. See note 12 supra.
216. See OFFICE OF COASTAL ZONE MANAGEMENT, REPORT TO THE CONGRESS ON COASTAL ZONE MANAGEMENT FOR FISCAL YEAR 1978, 42 (1979); S. REP. No. 277, 94th Cong., 1st Sess. 17 (1975), reprinted in CZMA LEGISLATIVE HISTORY, supra note 1, at 743.
307(c)(1), NOAA has stated that the threshold test should be "construed liberally" in order to "favor inclusion of federal activities subject to consistency review." Second, NOAA addresses the timing aspect of consistency review. Once a federal agency concludes that the activity in question will have a "direct effect" on the coastal zone, it should provide the consistency determination at the "earliest practicable time in the planning or reassessment of the activity," since the purpose of consistency review is to provide the state with an "opportunity to review and comment upon the proposed activity." In analyzing the merits of the contentions raised in the "directly affecting" dispute, it is important to consider the fact that if California litigates the issue of pre-lease consistency, NOAA's regulations will carry considerable weight. Because of its expertise within the sphere of coastal zone management, a court will examine the regulations promulgated by NOAA under the "arbitrary and capricious" standard of review. NOAA's construction of section 307(c)(1) will not be overruled unless clearly erroneous. The language of the regulations provides strong support for consistency review at the decision-making stage of a federal activity which will have a "direct effect" on the coastal zone. In contrast, the regulations contain no mention of the literal "intervening cause" interpretation of "directly affecting" propounded by Interior. In fact, Interior's rationale for the negative determinations on Lease Sale No. 48 and Lease Sale No. 53 seems to be the antithesis of the liberal application of the "directly affecting" test which the regulations call for.

The 1980 reauthorization and amendments to the CZMA did not alter any of the section 307 consistency provisions; both the House and Senate reports acknowledged the dispute between California and the Department of the Interior, but concluded that an amendment to section 307(c)(1) would be premature. However, both congressional reports provide considerable insight into Congress' cur-

218. 44 Fed. Reg. 37,146-47 (1979) (comment to 15 C.F.R. §§ 930.34(b), 930.33(c) (1979)).
219. 5 U.S.C. § 706(2)(A) (1976); American Petroleum Institute v. Knecht, 456 F. Supp. 889, 903-08 (C.D. Cal. 1978), aff'd, 609 F.2d 1306 (9th Cir. 1979). "A somewhat special situation is presented where an agency charged with implementing a new statute construes it. Courts tend to be more deferential to practical administrative interpretations of disputed provisions of the governing statute in such a case." Id. at 907.
220. Id. at 906.
rent thought on the interpretation of the term "directly affecting" in section 307(c)(1). Obviously, subsequent legislative history does not provide a basis for inferring legislative intent as of the enactment of the provision.²²³ Yet since there is no helpful interpretation of the threshold test in the original legislative history,²²⁴ it seems appropriate that NOAA give consideration to this factor. The 1980 legislative history provides strong support for the application of section 307(c)(1) at the decision-making stage of federal activities that will ultimately have a "direct effect" on the coastal zone.

The 1980 congressional reports suggest three interpretations for section 307(c)(1)'s threshold test, each of which is considerably broader than that urged by the Department of the Interior. First, the House report confirms a previous congressional statement that section 307(c)(1) applies "whenever a federal activity had a functional interrelationship from an economic, geographic or social standpoint with a state coastal program's land or water use policies."²²⁵ The House report suggests a second threshold interpretation stating that the consistency requirement should apply "when a Federal agency initiates a series of events of coastal zone consequence . . . ."²²⁶ It further provides that "an expansive interpretation of the threshold test is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act."²²⁷ A third interpretation of the threshold test is provided in the Senate report which perceives consistency review to be "an opportunity [for states] to plan for and respond to the effects of Federal activities which carry a direct link to impacts in the coastal zone."²²⁸ In addition, the Senate report specifically discusses the relationship between section 307(c)(1) and OCS prelease activities:

The Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone.²²⁹

²²⁴. See text at notes 51-53 supra.
²²⁶. Id. (emphasis added).
²²⁷. Id. at 35.
²²⁹. Id. at 11.
Congress' use of the words "interrelationship," "consequence," and "link" to describe section 307(c)(1)'s threshold test suggest a much less rigorous standard than that urged by the Department of the Interior. A Final Notice of Sale would easily satisfy each of these interpretations of section 307(c)(1). Moreover, the Final Notice represents the "earliest practicable time" to make the consistency determination. The Final Notice of Sale establishes the framework for the lease sale, and thereby initiates a series of events of "consequence" to the coastal zone. It is important to note that, as with NOAA’s regulations, nothing in the 1980 congressional reports supports Interior's interpretation of "directly affecting." Instead the reports reiterate NOAA’s directives that the threshold requirement should be construed liberally and that consistency review should take place early, in the planning stages of a proposed federal activity.

If Interior submits a consistency determination under section 307(c)(1) prior to a Final Notice of Sale, it affords the state a route for review of the terms of the lease sale in addition to that available under the OCSLA. It has been argued that as a practical matter no additional benefit is provided by the consistency review route because the OCSLA affords more than adequate environmental safeguards and, therefore, the application of section 307(c)(1) to pre-lease activities is duplicative and unnecessary. For example, had Interior made a consistency determination under section 307(c)(1) prior to Lease Sale No. 48, that action would have had little or no effect on the substantive terms of the lease sale. Since Interior reacted very positively to the environmental assessment studies of the proposed lease sale and the governor’s recommendations and comments under OCSLA section 19, California agreed that the terms of the lease sale were, with minor exceptions, consistent with the Califor-


The corollary to this argument is that section 307(c)(3)(B) obviates the need for pre-lease consistency determinations. Interior’s negative determination on Lease Sale No. 53 stated:

Through [its] authority under this section [307(c)(3)(B)], the California Coastal Commission (CCC) can, barring the exceptional case of an override by the Secretary of Commerce . . . , prevent or require modification of any of the federally permitted OCS operational activities, and their associated facilities, which affect any land use or water use in the coastal zone and are found to be inconsistent with the CCMP.

Letter from Larry E. Meierotto, Assistant Secretary of the Department of the Interior, to Michael L. Fischer, Executive Director of the California Coastal Commission (October 22, 1980). This second rationale appears to be extremely tenuous, in that it is a modified version of Interior’s argument that section 307(c)(3)(B) supersedes section 307(c)(1) with respect to OCS activities. The Department of Justice expressly rejected that argument. See text at notes 131-34 supra.
nia coastal management program. In fact, the circumstances sur-
rounding that lease sale appear to lend credence to the conten­tions
raised by the petroleum industry that pre-lease consistency review is
duplicative of the OCSLA state review procedures.

There are, however, several practical benefits afforded by requir­
ing that a Final Notice of Sale be subject to section 307(c)(1). Under
the OCSLA the state governor rather than the state agency charged
with the administration of the coastal management program submits
comments and recommendations on the terms of a proposed lease
sale. Although the governor would presumably seek the expert ad­
vice of the state coastal management agency prior to submitting
comments to Interior under section 19, the OCSLA imposes no such
requirement. It is possible that the governor’s views could differ
significantly from those of the coastal management agency. In addi­
tion, the governor is not required by the OCSLA to review the lease
sale terms; comments “may” be submitted. Moreover, the OCSLA
provides no objective criteria upon which a governor should base any
recommendations. In contrast, under the CZMA the state agency
which administers the coastal management program reviews a con­
sistency determination. The state agency reviews the terms of a pro­
posed lease sale for conformity with its approved coastal manage­
ment program, which embodies the CZMA’s comprehensive goals
and policies, and thereby provides the objective criteria which
review under the OCSLA lacks.

Both the CZMA and the OCSLA require Interior to consider the
impact of OCS development on the resources of the coastal zone.
However, the standard for assessment of environmental risks as set
forth in the OCSLA appears to be significantly less stringent than
that in section 307(c)(1) of the CZMA. Under the OCSLA, the
Secretary of the Interior must accept a state recommendation only if
he or she determines that the recommendation provides for a reason­
able balance between the national interest and the well-being of the
citizens of the affected states. Moreover, a court will review a
decision made by the Secretary with regard to a state recommend­
ation under the “arbitrary and capricious” standard. In contrast,
section 307(c)(1) of the CZMA provides that the federal activity must
be consistent with the state coastal management program to the

234. Id. § 1345(d).
maximum extent practicable, which has been interpreted by NOAA to mean that the activity must be consistent unless prohibited by law.286 Although section 307(c)(1) cannot be used to prevent Interior from proceeding with a lease sale the terms of which a state believes are inconsistent with its coastal management plan, the state could presumably enjoin the lease sale pending adjudication of the issue of consistency, assuming, of course, that the controversy meets the equitable requirements for the issuance of an injunction.286

286. See text at note 41 supra.

236. When considering requests for preliminary injunctions, courts have traditionally balanced four factors: (1) the likelihood that the plaintiff will ultimately prevail on the merits of the claim; (2) the extent to which the plaintiff will suffer irreparable harm if relief is not granted; (3) the extent to which the opposing party will be harmed if relief is granted; and (4) the public interest in granting the injunction. Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584, 625 (D. Minn. 1973), aff'd 498 F.2d 1314 (8th Cir. 1974). See generally 7 J. MOORE, FEDERAL PRACTICE ¶ 65.18[3] (2d ed. 1979). See also generally supra.

237. For example, in North Slope Borough v. Andrus, 486 F. Supp. 326 (D.D.C. 1979) the court acknowledged that the plaintiffs had made a substantial showing that Interior had failed to comply with certain provisions of the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1976 & Supp. III 1979), and NEPA. Nevertheless, the court denied the motion for preliminary injunction after concluding that the plaintiffs would not be irreparably harmed by the lease sale. North Slope Borough v. Andrus, 486 F. Supp. 326, 331 (D.D.C. 1979). A permanent injunction was subsequently issued on narrower grounds than those urged by the plaintiffs. North Slope Borough v. Andrus, 486 F. Supp. 326, 332 (D.D.C. 1980). However, the permanent injunction was vacated by the Court of Appeals. 14 ENVIR. REP. (BNA) (Envir. Rep. Cas.) 1001 (D.D.C. Feb. 1, 1980).

In Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979) the Court of Appeals for the First Circuit affirmed the district court's denial of a preliminary injunction prior to Lease Sale No. 42, which ultimately leased tracts on George's Bank. The court relied in part on North Slope Borough and held that the plaintiffs had not demonstrated that the alleged violations of the Endangered Species Act would prevail on the merits. Moreover, the court concluded that the plaintiffs would not suffer irreparable harm as a result of the lease sale. Id. at 720.

In each case the court relied on the lis pendens doctrine in reaching the conclusion that the plaintiffs would not suffer irreparable harm as a result of the lease sale. Stated broadly, this rule provides that a person who purchases property which is the subject of pending litigation takes the property charged with knowledge of the litigation and subject to any judgment subsequently rendered. See, e.g., County of Presidio v. Noel-Young Bond & Stock Co., 212 U.S. 58, 76 (1909). With respect to the two lease sales, the courts in North Slope Borough and CLF v. Andrus concluded that while a lease sale does vest property rights in the lessees, the plaintiffs' filing of suit acted as a lis pendens on the lease sale. The leases would be issued subject to the courts' later decision on the merits of the pending lawsuit. Accordingly, the courts concluded, the lease sale would not cause the plaintiffs irreparable harm and the denial of injunctive relief was appropriate. North Slope Borough v. Andrus, 486 F. Supp. 326, 331 (D.D.C. 1979); Conservation Law Foundation v. Andrus, 623 F.2d 712, 720 (1st Cir. 1979). For
While pre-lease consistency review would involve an additional procedural requirement for Interior, the burden would not be great\(^{237}\) and the application of section 307(c)(1) to OCS pre-lease activities would likely increase efficiency in the overall OCS development process. Section 307(c)(3)(B) insures that OCS operations cannot be conducted in a location or manner which the state coastal management agency deems inconsistent with its coastal program. If Interior submits a consistency determination and the state concurs, it is likely that later consistency review under section 307(c)(3)(B) would be considerably expedited. Since the post-lease sale OCS activities must be consistent under section 307(c)(3)(B), it seems practical that Interior cooperate early with the state, prior to the lease sale, in an attempt to develop consistent terms.\(^{238}\) If, however, Interior does not modify the lease sale terms in response to a state objection, at least lessees are made aware of potential consistency problems which may be encountered during review under section 307(c)(3)(B).

The inevitable acceleration of OCS development which will take place under the Reagan administration provides the most persuasive argument in favor of pre-lease consistency review. President Reagan’s policy on OCS development has been summed up as follows: “production, production, production!”\(^{239}\) The Reagan Energy Task Force in an as yet unpublished report has called for OCS oil and gas leases for the petroleum industry “on demand,” as part of a new national effort to accelerate energy development.\(^{240}\) Although former Secretary Andrus responded favorably to state recom-

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The willingness of the courts in *North Slope Borough* and *CLF v. Andrus* to utilize the *lis pendens* doctrine and avoid enjoining the lease sales does, therefore, cast doubt on the likelihood that a preliminary injunction could be obtained on the basis of a section 307(c)(1) violation, even if a court were to make an initial finding that the terms of the lease sale were inconsistent with a state’s coastal management program.

237. See text at notes 154-55 *supra*.

238. The Department of the Interior’s failure to review a Final Notice of Sale for consistency could result in the needless expenditure of federal funds. If a state were to conclude pursuant to section 307(c)(3)(B) that the development of a leased tract would be inconsistent with its coastal management program, Interior might be forced to cancel the lease and pay a considerable sum in damages to the lessee. This problem would be avoided if consistency were achieved before the lessee’s development rights vest. See Deller, *Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations Be Consistent with Coastal Zone Management Programs?* 14 U.C. DAVIS L. REV. 105, 122 (1980).


mendations and comments on Lease Sale No. 48 and Lease Sale No. 53, there is every indication that Secretary Watt will not be as receptive. In fact, one would be unrealistic not to expect the opposite, in view of his decision to reconsider for leasing the four northern California basin areas previously protected by Secretary Andrus. 241

The consistency requirement of section 307(c)(1) can provide an additional process for state review of OCS pre-lease activities, in the event that the Department of the Interior, under the leadership of new Secretary Watt 242 does not properly address environmental concerns in accordance with the requirements of the OCSLA. Thus far, California has argued for pre-lease consistency review to set a precedent for future lease sales which might be inconsistent with its coastal management program. Under the Reagan administration, the need for pre-lease consistency as exemplified by Lease Sale No. 53 has become a reality.

IV. A PROPOSED SOLUTION TO THE "DIRECTLY AFFECTING" PROBLEM

The basic problem with the threshold test of section 307(c)(1) is the statutory requirement that an effect be "direct." A literal interpretation of the word "direct" in and of itself precludes the liberal application of the threshold test called for by NOAA's regulations and the 1980 CZMA congressional reports. The interpretation problem would best be solved by amendment. Section 307(c)(1) should be amended to eliminate the word "directly" and substitute the word "significantly," thus adopting a threshold test to measure the effects of federal activities under the CZMA which is identical to that presently utilized under the National Environmental Policy Act (NEPA) for an environmental impact statement (EIS). 243 As the dispute between California and the Department of the Interior indicates, a primary problem with the application of section 307(c)(1) is the

241. See text at notes 164-67 supra.
242. Former Secretary of the Interior, Cecil D. Andrus, was noted for his attention to environmental concerns. See Boston Globe, Feb. 12, 1981, at 21, col. 1. However, new Secretary Watt has been sharply criticized for his lack of familiarity and sympathy with environmental law and for his antagonistic attitude toward environmental concern groups. See Sagebrush Rebel at Interior, NEWSWEEK, Jan. 5, 1981, at 17.
243. 43 U.S.C. § 4332(2)(C) (1976). NOAA's adoption of the "significantly affecting" threshold test for the federal consistency provisions was retracted after the Department of Justice Opinion made clear that it represented an unauthorized deviation from the language of the statute. See text at notes 70-76 supra. For this reason the "significance" standard should be adopted by legislative amendment.
dearth of useful guidance in the form of administrative or judicial interpretation of the present threshold test. In the absence of legislative history which indicates a purpose or benefit to be derived from the use of the word "directly," the adoption of a threshold test used in an environmental statute with a provision similar to that of section 307(c)(1) seems particularly appropriate.

Section 102(2)(C) of NEPA requires that an EIS be prepared for proposed "major Federal actions significantly affecting the quality of the human environment . . . ."244 The purpose of EIS preparation is to identify environmental issues and to compel federal agencies to consider all environmental consequences of a proposed federal action prior to final approval.245 NEPA's guidelines require that an EIS be prepared "early enough so that it can serve practically as an important contribution to the decision-making process," and not be used to rationalize or justify decisions already made . . . ."246 The Supreme Court has held that the proper time for the preparation of an EIS is when the project reaches the status of a proposal.247

With respect to the application of NEPA's threshold test, the guidelines set out a series of factors to consider in determining the "significance" of a proposed federal action.248 Most relevant to the OCS lease sale process are: (1) the degree to which the effects on the environment are likely to be controversial; (2) the degree to which

248. 40 C.F.R. § 1508.27 (1978). The guidelines set forth these factors as follows:

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
the action may establish a precedent for future actions with significant effects; and (3) whether the action is related to other actions with individually insignificant but cumulatively significant impacts. 249

The policies and purposes of NEPA and the CZMA are very similar; NEPA is designed to protect and preserve the quality of the environment, while the CZMA embodies the same goals with regard to the coastal zone. Section 102(2)(C) of NEPA and section 307(c)(1) of the CZMA are the vehicles for implementing those goals. EIS preparation forces federal agencies to consider the environmental consequences of proposed actions, while consistency review can ensure that federal agencies take cognizance of the coastal protective requirements of state management programs in the planning stages of their activities.

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
(2) The degree to which the proposed action affects public health or safety.
(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
(5) The degree to which the possible effects of the human environment are highly uncertain or involve unique or unknown risks.
(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
(10) Whether the action threatens a violation of Federal, State, or local law requirements imposed for the protection of the environment.

249. Id. § 1508.27(b)(4), (6)-(7). NEPA requires the cumulation of impacts for purposes of determining whether a federal activity has a significant effect under section 102(2)(C). Where a federal action, such as the issuance of the proposed Notice of Sale in an OCS lease sale, sets in motion a series of events which ultimately have a significant effect on the environment, EIS preparation is required at the outset, even though the initial action is remote with respect to the ultimate impact. Id. § 1508.27(b)(7).
With respect to the OCS leasing process, Interior prepares an EIS after tentative tract selection and prior to the proposed Notice of Sale.\(^{250}\) Thus, NEPA compliance is incorporated into the OCSLA requirements. Since the Department of the Interior must conduct a comprehensive analysis of the potential impacts of the proposed lease sale on the quality of the environment for EIS purposes, to conduct a review of the consistency of the terms of the lease sale at the same time would impose only a slight additional burden.

In the implementation of NEPA it has been well recognized that it is critical to undertake environmental review at the outset of a federal project.\(^{251}\) The adoption of the “significantly affecting” test for section 307(c)(1) would codify the requirement of federal consistency review at the decision-making stage of a proposed activity as presently contemplated by NOAA and the 1980 Congress. Considerable practical benefit could be derived from the amendment. NOAA could abandon the arduous and thus far unsuccessful attempt to define “directly affecting.” NOAA could pattern regulations for section 307(c)(1) of the CZMA on the guidelines currently promulgated for section 102(2)(C) of NEPA by the Council on Environmental Quality and thereby incorporate the requirement of a liberal application of the “significantly affecting” standard. Of particular benefit would be the large body of NEPA case law interpreting the “significantly affecting” test.

Consistency review under section 307(c)(1), like NEPA’s EIS requirement, can provide information of critical importance in achieving our national goal of swift and environmentally sensible OCS development. Like environmental information derived from EIS preparation, state input through use of the consistency provision will best serve that goal if received at the decision-making stage of a proposed lease sale. The adoption of the “significantly affecting” standard for section 307(c)(1) by legislative amendment would assure early consideration of the policies and objectives of the CZMA.

V. CONCLUSION

The development of the OCS is an essential element in this nation’s effort to increase energy self-sufficiency and to reduce dependence on foreign petroleum imports. It is equally essential that affected

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\(^{251}\) See text at notes 244-48 supra.
states be afforded ample opportunity to assess and plan for the complex and potentially hazardous impacts to which their coastal areas are subjected as a result of OCS development. The CZMA and the OCSLA each address and attempt to accommodate these competing concerns, but the overall objectives of the two statutes are at odds; the OCSLA seeks to promote rapid and orderly development of the OCS, while the primary goal of the CZMA is to protect and preserve coastal areas.

The OCSLA and the CZMA each provide procedures for state review of OCS lease sales. But although section 307(c)(1) of the CZMA has explicitly been found applicable to the pre-lease activities of the Department of the Interior which have a “direct effect” on the coastal zone, Interior has declined to make use of this federal-state planning device. Thus, state review of proposed lease sales has been limited to the procedures available under the OCSLA.

Congress intended that the federal consistency provisions of the CZMA give states leverage over federal activities affecting the coastal zone as an incentive to implement coastal management programs. However, any leverage gained as a result of section 307(c)(1) has been minimal. NOAA’s current regulations call for early consistency review and a liberal application of section 307(c)(1)’s threshold test. Yet the determination of whether an activity “directly affects” the coastal zone rests with the federal agency. The Department of the Interior’s position that OCS pre-lease activities will only rarely have a “direct effect” on the coastal zone illustrates the ability of a federal agency to interpret and apply section 307(c)(1) in a manner which effectively precludes the applicability of the provision to its activity. This result thwarts the purpose of the CZMA.

In essence, the problem with section 307(c)(1) is that early consistency review and a liberal application of the threshold test cannot be easily reconciled with the language of the provision. While the regulations and present congressional thought indicate that consistency determinations should be made at the decision-making stage of a proposed federal activity, a literal interpretation of the words “directly affecting” precludes consistency review at this stage since a decision by its very nature will not literally affect the coastal zone. The dispute between California and the Department of the Interior as to the proper application of the “directly affecting” test exemplifies this dichotomy.

The adoption of NEPA’s “significantly affecting” threshold test would insure early consistency review and best achieve coordination
and cooperation between federal and state agencies in protecting and preserving coastal areas. Since the Department of Justice has indicated that NOAA's definition of section 307(c)(1)'s threshold test cannot deviate from the language of the statute, the implementation of the "significantly affecting" standard would best be affected by legislative amendment.