California Coastal Commission v. Norton: A Coastal State Victory in the Seaweed Rebellion

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I.
INTRODUCTION

There has been a great deal of federal-state conflict regarding outer continental shelf (OCS) energy development, which is known as the Seaweed Rebellion.[2] California, which has experienced eleven OCS lease sales off its coast since 1961,[3] has been a leader of the Seaweed Rebellion. California has been involved in litigation regarding the tidelands controversy,[4] the disposition of section 8(g) revenues under the Outer Continental Shelf Lands Act (OCSLA),[5] and the development of the Department of Interior's (Interior's) five-year OCS leasing programs pursuant to section 18 of the OCSLA.[6] This article examines California's utilization of the Coastal Zone Management Act (CZMA) to influence OCS energy development. A brief history of the conflicts between California and the federal government regarding OCS energy development is set forth. The Ninth Circuit's decision in

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2. *See* EDWARD A. FITZGERALD, THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFFSHORE ENERGY DEVELOPMENT (2001).

3. *See* MINERALS MGMT. SERV., U.S. DEP'T OF INTERIOR, FEDERAL OFFSHORE STATISTICS: 1995, at 7 (1995), *available at* http://www.mms.gov/itd/pubs/1997/97-0007/fos95.htm (last visited Mar. 3, 2004).

4. *See* Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209 (1988).

5. *See* Edward A. Fitzgerald, *The Seaweed Rebellion: The Battle Over Section 8(g) Revenues*, 8 J. ENERGY L. & POL'Y 253 (1988).

6. *See* Edward A. Fitzgerald, California v. Watt*: Congressional Intent Bows to Judicial Restraint*, 11 HARV. ENVTL. L. REV. 147 (1987); *see also* Edward A. Fitzgerald, Natural Res. Def. Council v. Hodel*: The Evolution of Interior's Five Year Outer Continental Shelf Oil and Gas Leasing Program*, 12 TEMP. ENVTL. L. & TECH. J. 1 (1993).

the latest battle, *California Coastal Commission v. Norton*,[7] is analyzed. The article concludes that the Ninth Circuit was correct in holding that the suspension of thirty-six OCS leases off California are subject to state consistency review pursuant to section 307(c)(1) of the CZMA. Furthermore, the Ninth Circuit properly determined that Interior should not have categorically excluded the OCS lease suspensions from National Environmental Policy Act (NEPA) analysis because the suspensions constituted extraordinary circumstances. Finally, the current Bush administration and congressional efforts regarding OCS energy development and the California leases are examined.

II.

OCS CONFLICTS OFF CALIFORNIA'S COAST REGARDING THE CZMA

The CZMA of 1972 establishes a "national policy . . . to preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone."[8] Coastal states are encouraged to assume planning and regulatory functions over their coastal zones. The CZMA accomplishes this in two ways. First, the coastal states receive grants to develop and administer coastal zone management programs.[9] Second, federal activities that affect the coastal zone must be conducted in a manner that is consistent "to the maximum extent practicable with state coastal zone management programs."[10] The California Coastal Commission (Commission), which was established by the California Coastal Act in 1972,[11] regulates activities along the California coast. The Commission developed the California Coastal Management Program (CCMP) that was submitted to the National Oceanic and Atmospheric Administration (NOAA) for approval.[12] In September 1977, several petroleum groups and companies brought suit, challenging NOAA's approval of the CCMP. The petroleum industry alleged that the program lacked specificity and did not adequately consider the national interest in en-

7. 311 F.3d 1162 (9th Cir. 2002).

8. 16 U.S.C. § 1452 (2004).

9. *See id.* §§ 1454, 1455.

10. *Id.* § 1456.

11. *See* Alfred E. Yudes, *Coastal Zone Impacts of Offshore Oil and Gas Development: An Accommodation Through the California Coastal Act of 1976*, 8 PACIFIC L.J. 783 (1977).

12. *See* Symposium, *Coastal Futures: Legal Issues Affecting the Development of the California Coast*, 2 STAN. ENVTL. L. 1 (1979).

ergy facility siting. The federal district court upheld NOAA's approval, declaring that the program did not have to "include detailed criteria establishing a sufficiently high degree of predictability to enable a private user of the coastal zone to say with certainty that a given project must be deemed 'consistent' therewith."[13] The industry's contention that the "affirmative accommodation of energy facilities was made a quid pro quo" for program approval was rejected.[14] The Ninth Circuit affirmed.[15]

The controversy regarding state consistency review of OCS lease sales began in 1979.[16] The Commission requested a consistency determination for lease sale forty-eight, asserting that the Final Notice of Sale (FNOS) "directly affected the California coastal zone by conclusively establishing the size of the lease sale, the location of the tracts to be leased, the timing of the lease sale, and lease stipulations."[17] Interior refused, arguing that federal pre-leasing activities did not directly affect the coastal zone. The dispute was referred to the Department of Justice (DOJ), which concluded that the issue is a factual question to be decided on a case-by-case basis.[18] Interior still refused to conduct a consistency determination, but took steps to meet California's objections. The Commission requested mediation by the Secretary of Commerce (SOC),[19] who determined that the pre-lease activities directly affected the coastal zone, and thus were subject to section 307(c)(1).[20]

President Reagan came to office in 1981. The Reagan administration urged the reinvigoration of federalism, but was hostile to the coastal state concerns regarding OCS energy development. The battle over consistency review of OCS lease sales continued. After Interior refused to conduct a consistency determination for

13. Am. Petroleum Inst. v. Knecht, 456 F. Supp. 889, 919, 924-27 (C.D. Cal. 1978).

14. *Id.*

15. Am. Petroleum Inst. v. Knecht, 609 F.2d 1306 (9th Cir. 1979).

16. For a complete discussion of the Lease Sale 48 controversy, *see* Karen L. Linsley, *Federal Consistency and OCS Oil and Gas Leasing: The Application of the "Directly Affecting" Test to Pre-Lease Sale Activities*, 9 B.C. ENVTL. AFF. L. REV. 431 (1981).

17. 43 C.F.R. § 3315.4(a) (1979).

18. Memorandum from Leon Ulman, Deputy Asst. Att'y Gen., U.S. Dept. of Justice, to Leo M. Krulitz, Solicitor, Dept. of Interior (Apr. 20, 1979) (on file with author) [hereinafter DOJ Opinion].

19. *See* 16 U.S.C. § 1456(h) (2004).

20. *See* Memorandum from C.L. Haslam, General Counsel, Department of Commerce, to Phillip M. Klutznick, Secretary of Commerce (Jan. 25, 1980), *reprinted in* H.R. REP. NO. 96-1012, at 82-84 (1980).

lease sale fifty-three off central and northern California, California brought suit to enjoin the sale of twenty-nine tracts in the Santa Maria Basin. In May 1981, the federal district court issued an injunction preventing Interior from taking any action on the disputed leases.[21] In August 1981, the federal district court concluded that the FNOS directly affected California's coastal zone and was subject to consistency review pursuant to section 307(c)(1).[22] After the Ninth Circuit concurred,[23] Interior appealed to the Supreme Court. During the interim, lease sale sixty-eight off southern California was halted by the federal district court, which held that a consistency determination was required.[24] Lease sale seventy-three off central California was also delayed because the consistency determination was inadequate.[25]

In 1984, the Supreme Court issued a narrow five to four decision in *Secretary of Interior v. California*, which held that only federal activities occurring within the geographical boundaries of the coastal zone can directly affect the coastal zone.[26] Examining the legislative history, the Court determined that the conference committee's substitution of "directly affecting" for "in" the coastal zone was a "simple compromise" over the definition of the coastal zone that was not meant to expand the scope of section 307(c)(1).[27] Four proposals extending the CZMA to activities conducted beyond the coastal zone had been rejected in 1972.[28] The Court maintained that section 307(c)(3), which deals with federally approved actions, not section 307(c)(1), which addresses federal actions, was "more pertinent" to OCS lease sales.[29] Finally, the Court held that the enactment of the OCSLA Amendments in 1978, which divided OCS development into four distinct stages, clearly separated the lease sale from the issuance of subsequent permits.[30] The lease sale only entitled the lessee to

21. *See* California v. Watt, No. 81-2080, 1981 WL 15495 (C.D. Cal. May 27, 1981).
22. *See* California v. Watt, 520 F. Supp. 1359, 1378 (C.D. Cal. 1981).
23. *See* California v. Watt, 683 F.2d 1253 (9th Cir. 1982).
24. *See* California v. Watt, 17 ERC 1711, 1715-17 (C.D. Cal. 1982); *see also* Theodora Berger & John A. Saurenman, *The Role of the Coastal States in OCS Oil and Gas Leasing: A Litigation Perspective*, 3 VA. J. NAT. RES. L. 35, 61-66 (1983); Susan Harvey, *Federal Consistency and OCS Oil and Gas Development: A Review and Assessment of the "Directly Affecting" Controversy*, 13 OCEAN DEV. & INT. L. 481, 501 (1984).
25. *See* Clark v. California, 464 U.S. 1304 (1983).
26. *See* 464 U.S. 312, 312 (1984).
27. *Id.* at 323.
28. *See id.* at 325.
29. *Id.* at 332-33.
30. *See id.* at 335-41.

priority in the submission of subsequent plans and did not directly affect the coastal zone. The carefully delineated OCS development process would not be upset "by a superficially plausible but ultimately unsupportable construction of two words in CZMA § 307(c)(1)."[31] Congressional efforts to reverse the Court's decision failed in 1984 and 1985.[32]

The battle over consistency review and the aggressive OCS leasing program of the Reagan administration caused Congress to establish moratoria on leasing in OCS planning areas off northern, central, and southern California from 1982 through 1985.[33] The moratoria off California ceased in 1985 because an agreement between Interior and California only permitted leasing in 150 of the 6460 tracts that had been included in the moratoria since 1982.[34] Secretary Hodel backed out of the agreement in September 1985, alleging that too much promising acreage had been eliminated. Secretary Hodel claimed that there had been no agreement, just a proposal that was subject to change.[35] The 1986 Interior appropriation bill did not provide for any moratoria off California, but instructed the Secretary "to make every effort during the balance of FY 1986 to resolve the outstanding conflicts with respect to future leasing" off California.[36] In 1986, Congress continued to encourage federal state negotiations, authorized Interior to accept the state's proposals, and delayed leasing off California until 1989.[37] The OCS moratoria off the

31. *Id.* at 343.

32. *See* Edward A. Fitzgerald, Secretary of Interior v. California*: Should Continental Shelf Lease Sales be Subject to Consistency Review?*, 12 B.C. ENVTL. AFF. L. REV. 425, 469-71 (1985) [hereinafter Fitzgerald, Secretary of Interior v. California]; *see also* FITZGERALD, *supra* note 2, at 129-31.

33. *See* FITZGERALD, *supra* note 2, at 197-201.

34. *See $4.1 Billion Interior Appropriation Bill Approved by House Panel with Oil Lease Ban*, 16 ENVT. REP. (BNA) 471 (July 19, 1985); *Industry Comments Lead Hodel to Consider Changing California Oil Leasing Agreement*, 16 ENVT. REP. (BNA) 745 (August 30, 1985).

35. *See Hearing on OCS Leasing Process Before House Merchant Marine and Fisheries Comm.*, 99th Cong. 296-519 (1985); *Hodel Backs Out of California Agreement on Lease Sales; Panetta to Seek Bans Again*, 16 ENVT. REP. (BNA) 869 (Sept. 13, 1985).

36. Department of the Interior and Related Agencies Appropriations Act 1986, Pub. L. No. 99-190, 99 Stat. 1185 (1985); *see also* Natural Res. Def. Council v. Hodel, 865 F.2d 288, 316 n.28 (1988) ("Congress designated . . . a special negotiating team to negotiate with the Secretary to resolve the ongoing conflict over California OCS leasing.").

37. *See* H.R. REP. NO. 99-1002, at 41 (1986).

coast of California were restored in 1986 and continued throughout the remainder of the Reagan administration.[38]

President Reagan came to office seeking to reduce the federal deficit by terminating the funding for many vital ocean and coastal programs, including the CZMA. Despite coastal state assertions, the Reagan administration argued that coastal states would continue the programs if federal funding was stopped. Congress initially went along with the administration and cut the funding for the CZMA. During this time Congress began to consider OCS revenue-sharing proposals as an alternative means to fund vital ocean and coastal programs.[39] An OCS block grant proposal failed in 1984, but Congress restored CZMA funds and reauthorized the CZMA in 1985.[40]

There was another battle between California and the federal government regarding the scope of state authority pursuant to section 307(c)(3)(B).[41] In 1983, Exxon, the designated operator of a quadrant in the Santa Barbara Channel, submitted an exploration plan and environment report to Interior and the CCC, seeking approval for three wells. In July 1983, the Commission objected to Exxon's consistency certification, asserting that Exxon's exploration activity would interfere with thresher shark fishing, which occurred from May through December. California fishermen used drift gill nets, which required the fishermen to drift with the current pulling nets as long as 6000 feet. The ships were not under power and could collide with drill rigs. After drift gill netting was prohibited from January through April because of whale migration, the Commission approved drilling of well A, which would occur before thresher shark fishing season. After the Commission rejected Exxon's plans for wells B and C, Exxon appealed to SOC.[42] When the SOC refused to overturn the Commission objections, Exxon brought suit against the Commission.

The Ninth Circuit, reversing the district court, determined that the Secretary had acted in a judicial capacity and decided a legal issue.[43] The Secretary found that Exxon's activities affected land

38. *See* FITZGERALD, *supra* note 2, at 197-201.

39. *See* Edward A. Fitzgerald, *OCS Revenue Sharing: A Proposal to End the Seaweed Rebellion*, 5 UCLA J. ENVTL. L. AND POL'Y 1 (1985).

40. *See id.* at 21-29.

41. *See* Edward A. Fitzgerald, Exxon v. Fischer: *Thresher Sharks Protect the Coastal Zone*, 14 B.C. ENVTL. AFF. L. REV. 561 (1987) [hereinafter Fitzgerald, Exxon v. Fischer].

42. *See* FITZGERALD, *supra* note 2, at 165-76.

43. *See* Exxon v. Fischer, 807 F.2d 842 (9th Cir. 1986).

and water uses in the coastal zone. This presumed that the Commission's objection was valid and the interests asserted were protected by the statute. Otherwise, there was nothing to which the Secretary could have legitimately subordinated Exxon's concerns. Exxon was not required to appeal to the Secretary before litigating the Commission's objection. Since the Secretary had adjudicated the issue, Exxon could not relitigate the issue in a collateral proceeding. Exxon's proper recourse was to challenge the Secretary's decision.[44]

After the CZMA was reauthorized in 1985, the Reagan administration pursued an administrative strategy to limit state coastal zone programs. Section 312 of the CZMA requires the SOC to "conduct continuing review of the performance of coastal states with respect to coastal management."[45] Section 306 allowed a state's administrative grant to be reduced by 30% if the state is "failing to make significant improvement in achieving" certain national objectives.[46] One of these objectives requires "priority consideration [to be] given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation. . . ."[47] The Secretary can withdraw approval and financial assistance if the state is deviating from its program or the terms of its administrative grant and refuses to remedy the situation.[48]

In June 1986, President Reagan instructed the Secretary to "immediately begin a review of State coastal zone management programs to advance the national interest in energy security."[49] NOAA wanted to ensure that state regulations did not present "undue procedural delays in energy exploration, development, and production."[50] NOAA decided to treat routine program

44. *See id.* at 845-47. The DOJ applied for rehearing before the entire Ninth Circuit *en banc*. In July 1987, the Ninth Circuit *en banc* upheld the three judge panel. *See* John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., Jan. 23, 1987 (on file with author); John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., Jan. 29, 1987 (on file with author).

45. 16 U.S.C. § 1458(a) (2004).

46. *Id.* § 1458 (1986), *amended by* 16 U.S.C. 1458 (1990).

47. *Id.* § 1452(2)(D) (2004).

48. *See id.* § 1458(c), (d).

49. White House, Office of Press Secretary, Statement of the President (June 26, 1990), (cited in House Interior and Insular Affairs Committee, Hearings: Review of Offshore Oil and Gas Programs and Laws 310-21 (May 1990)).

50. *President Seeks Reduced Regulatory Barriers in Directive on Energy Development, Production*, 17 ENVT. REP. (BNA) 267 (June 27, 1986); *See also* Jack H. Archer & Joan Bondareff, *Implementation of the Federal Consistency Doctrine: Lawful and Constitutional*, 12 HARV. ENVTL. L. REV. 115 (1988); Scott C. Whitney et al.,

changes as amendments to state plans that would require the same procedures as program approval. Two noted commentators, Tim Eichenberg and Jack Archer, concluded that "NOAA is now more frequently viewed as opposed to state actions under the CZMA, if not hostile to coastal management itself."[51]

The Exxon litigation prompted the Reagan administration to take steps to limit the Commission's authority. In the spring of 1987, NOAA began to prepare the fifth evaluation of the CCMP pursuant to section 312. Interior officials demanded that NOAA exercise greater authority over the Commission, whose actions were jeopardizing OCS energy development. Interior complained that the Commission was demanding mitigation measures from applicants for activities that did not affect land and water uses in the coastal zone; intruding upon federal agencies OCS authority; mandating specific mitigation measures from OCS operators as conditions for approval of exploration plans; utilizing unauthorized policy statements and other staff documents for consistency determinations; treating projects with similar impacts differently; and requiring questionable payments from oil companies. Interior suggested that NOAA decertify the CCMP.[52]

In August 1987, NOAA issued a draft evaluation report, which identified several problems regarding permit monitoring and enforcement, the clarification of mitigation measures, delays in local coastal plan certification, public participation, and coordination with state and federal agencies. NOAA suggested that the Commission adopt guidelines and standards explicitly detailing the policies and submit them for approval. The Commission criticized the draft as a smoke screen to justify opening the California coast to energy development. Nevertheless, the draft report indicated that the Commission's administrative funding, which was scheduled to expire in September, was in danger.[53]

State Implementation of the CZMA Consistency Provisions – Ultra Vires or Unconstitutional?, 12 HARV. ENVTL. L. REV. 67 (1988).

51. Tim Eichenberg & Jack Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14 ECOLOGY L.Q. 9, 12-13 (1987).

52. *See* John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., June 11, 1987 (on file with author).

53. *See* John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., Aug. 6, 1987 (on file with author); John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., Aug. 27, 1987 (on file with author); John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., Sept. 3, 1987 (on file with author).

The Commission implemented some of the suggestions, but refused to alter the consistency process. The Commission alleged that precise guidelines would be too rigid and the current case-by-case negotiations were preferable. In September 1987, NOAA approved the California grant for fiscal year 1988, but only released one twelfth of the funding. The remainder of the funding would await further progress in resolving the dispute. Another one twelfth was released in both October and November. In November 1987, NOAA issued its final evaluation, which declared that the Commission was not in compliance with the CCMP. The Commission was instructed to adopt specific standards for policies and mitigation measures and expedite the certification process for local plans or face the withdrawal of funding and possible decertification of the program.[54]

This conflict attracted congressional attention. Senators Wilson (R-Cal.) and Cranston (D-Cal.) attached an amendment to the Department of Commerce appropriation bill, which prevented NOAA from using any funds to decertify the CCMP before February 1, 1988.[55] NOAA then broke off negotiations and signed the grant documents for the CCMP, which required the Commission to use $500,000 of its $1.9 million grant to develop and adopt specific standards regarding permit applications for energy projects and have them approved by NOAA or lose the remainder of its funding.[56] The Commission accepted the administrative grant under protest, then brought suit to halt NOAA's action. California asserted that NOAA was attempting to compel an unauthorized alteration of the CCMP.[57]

In April 1988, the federal district court held that NOAA's instruction to the Commission to develop guidelines regarding state consistency determinations constituted an amendment to the CCMP that was not authorized by the CZMA.[58] The structure and logic of the CZMA, as well as NOAA regulations, indicated that NOAA lacked authority to condition significant improvement grants on a program change. The CZMA only per-

54. *See* FITZGERALD, *supra* note 2, at 176-78.

55. *See* 133 CONG. REC. S14, 381-82 (1987).

56. *See California Must Accept Recommendations or Face Possible Enforcement, OCRM Says*, 18 ENVT. REP. (BNA) 1835 (Dec. 11, 1987).

57. *See* John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., Mar. 10, 1988 (on file with author).

58. *See* California v. Mack, 693 F. Supp. 821, 822-24 (1988); *see also* John K. Van de Kamp & John A. Saurenman, *OCS Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVTL. L. REV. 73, 111-12 (1990).

mitted decertification if the state unjustifiably deviated from its program. NOAA could not decide that an approved program no longer complied with the CZMA, but could only ensure that the program was implemented as approved. NOAA could not use its control of the funding to accomplish indirectly what it could not do directly. Only the coastal state could make decisions regarding program changes; otherwise a state's program would always be subject to revision. The court also found that the regulations required the coastal state, not NOAA, to take initiatives regarding significant improvements. NOAA could make suggestions, but could not hold the state program hostage pending state modification.[59] This frustrated the Reagan administration's last effort to control the Commission.

President George H.W. Bush came to office promising a "kinder, gentler America."[60] During the presidential campaign, then-Vice President Bush, seeking to distance himself from the Reagan policies, promised to halt OCS leasing off California.[61] Fulfilling his campaign promise, President Bush called for the indefinite postponement of three OCS lease sales—lease sale ninety-one off northern California, lease sale ninety-five off southern California, and lease sale 116—part 2 in the Gulf—while a special task force reviewed their environmental impacts.[62]

In March 1989, the OCS Leasing and Development Task Force was established.[63] The National Research Council (NRC) provided the task force with a report dealing with the environmental information regarding OCS oil and gas decisions off the coast of California.[64] The NRC concluded that the physical oceanographic information was adequate for northern California, but inadequate for southern California. The ecological information was adequate for both northern and southern California, but the socioeconomic information was inadequate for both regions. The NRC suggested that Interior address the environmental impacts

59. *See* John R. Botzum & Diane K. Garner, NAUTILUS: COASTAL ZONE MGMT., Apr. 20, 1988 (on file with author); *Mack*, 693 F. Supp. at 824-28.

60. Fitzgerald, *supra* note 2, at 213-14.

61. *Id.*

62. NATIONAL RESEARCH COUNCIL, THE ADEQUACY OF ENVIRONMENTAL INFORMATION FOR OUTER CONTINENTAL SHELF OIL AND GAS DECISIONS: FLORIDA AND CALIFORNIA (1989), 1-8.

63. *Id.* The task force consisted of Secretary of Interior Manuel Lujan (chair), Secretary of Energy James Watkins, EPA Administrator William Reilly, NOAA Administrator John Knauss, and OMB Director Richard Darman. *Id.*

64. *Id.*

before proceeding with leasing off California. The NRC concluded that the cumulative impacts of each sale would produce unacceptable changes in the local environments unless mitigation measures were instituted. The Secretary was urged to undertake specific studies prior to making any leasing decisions and revise the NEPA process to improve information assessment.[65]

After studying the recommendations, President Bush announced his decision on June 20, 1990. First, all leases pending off California would be cancelled. No further leasing would occur before 2000 and the completion of the NRC recommended studies. However, eighty-seven tracts off the coast of California, which were close to energy producing areas, could be considered for OCS activities after the completion of the NRC recommended studies. This excluded 99% of the federal OCS areas off California from leasing until the next century. Second, the Monterey Bay National Marine Sanctuary off the coast of California would be approved and oil and gas activities within the sanctuary would be prohibited. Third, air quality concerns and better oil spill responses would be addressed. Fourth, an OCS revenue sharing program and greater coastal state authority in the OCS decision-making process would be investigated. Finally, the OCS program would be restructured to ensure the availability of adequate information regarding resource potential and environmental effects; to preclude OCS development in areas where the risks outweighed the benefits; and to prioritize development in areas with the greatest resource potential and smallest environmental risks. President Bush stated, "Although I have today taken these strong steps to protect our environment, I continue to believe that there are significant offshore areas where we can and must go forward with resource development."[66] A bipartisan group of California congresspersons applauded the decision.[67]

The CZMA was reauthorized in 1990. Section 307(c)(1) was amended, specifically overturning the Court's decision in *Secretary of Interior v. California*. The triggering mechanism for section 307(c)(1) was changed from "directly affecting" to "affects

65. *Id.*

66. White House, Office of Press Secretary, Statement of the President (June 26, 1990), (cited in House Interior and Insular Affairs Committee, Hearings: Review of Offshore Oil and Gas Programs and Laws 310-21 (May 1990)).

67. *Scheduled Oil, Gas Lease Offerings Off California, Florida Coasts Cancelled*, 21 ENVT. REP. (BNA) 413, 414 (June 29, 1990), *Decision on Outer Continental Shelf Plan Pleases Environmentalists, Angers Industry*, 21 ENVT. REP. (BNA) 433 (July 6, 1990).

any land or water use or natural resource of the coastal zone."[68] The conference committee stated that the term "affecting" should be interpreted broadly. This issue is a factual question to be answered on case-by-case basis by the federal agency. The determination includes "effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects." The term "affecting" includes "direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable."[69]

Section 312 was amended to deal with problems raised in *California v. Mack*. The Secretary is required to ensure public involvement in the evaluation of state coastal programs and provide written comments. Federal funding can be temporarily suspended if the Secretary finds that the state is not adhering to its program. However, a suspension cannot occur until after the state governor has been apprised of the problems and granted the opportunity to take corrective action. If no action is taken, the Secretary can withdraw the funding and decertify the program.[70] The conference committee noted that "the disapproval of a management program . . . is an extraordinary step and has not been a useful tool for NOAA in correcting mild or moderate problems in state program administration."[71]

When President Clinton came to office, he promised to "stop the crusade for new offshore drilling" and restrict OCS energy development to the Gulf of Mexico and Alaska.[72] In 1998, President Clinton extended and expanded President Bush's moratoria by executive order until 2012. Virtually all the Pacific region was excluded from leasing.[73] California asserted that the moratoria

68. H.R. CONF. REP. NO. 101-964, at 968-75 (1990).

69. *Id.* at 970-71. *See also* Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388. *See generally* Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711, 732 (1991).

70. *See* 16 U.S.C. § 1458 (2004).

71. H.R. CONF. REP. NO. 101-964, at 974 (1990).

72. WILLIAM J. CLINTON & ALBERT GORE, PUTTING PEOPLE FIRST 89-99 (1992).

73. *See* John M. Broder, *President Clinton Extends for 10 Years, Until 2002, Moratoria on Oil and Gas Drilling*, N.Y. TIMES, June 13, 1998, at A1. *See also* BILIANA CICIN-SAIN & ROBERT W. KNECHT, THE FUTURE OF OCEAN POLICY 228-29 (1999); Alex Barnum & Michael McCabe, *Clinton to Extend Ban On Oil Drilling Until 2012*, S.F. CHRON., June 12, 1998, at A1.

did not go far enough. Governor Wilson and California congresspersons requested a permanent ban on any OCS activities.[74]

The Clinton administration decided to allow the suspension of activities requested by lessees on thirty-six leases off the coast of California.[75] California officials strenuously objected to the suspensions, which became tied up in presidential politics. Vice-President Gore stated that he would ban development on the thirty-six leases. Governor Bush declared that he would review each one on a case-by-case basis, and be guided by a strong deference to local control.[76] The lease suspensions became the subject of litigation in *California Coastal Commission v. Norton*.[77]

III.

CALIFORNIA COASTAL COMMISSION V. NORTON

Between 1968 and 1984, Interior conducted eight OCS lease sales off the coast of California, none of which was subject to state consistency review. Petroleum companies paid approximately $1.25 billion for forty leases located between Channel Islands National Marine Sanctuary and Monterey Bay National Marine Sanctuary, which contain many species sensitive to oil spills.[78] Most of the leases are adjacent to Santa Barbara and San Luis Obispo Counties.[79]

The undeveloped leases are dispersed through an area where production has occurred for the past thirty years.[80] Within the boundaries of the leaseholds at issue, there have been thirty-eight exploratory wells that have resulted in seventeen discoveries, the most recent in 1989.[81] About 120,000 barrels of oil and

74. *See* Zachary Coile, *For Ocean's Sake*, S.F. EXAMINER, June 13, 1998, at A1.

75. *See New Oil Drilling off California Delayed at Last Minute*, Assoc. Press State & Local Wire (June 26, 1999); *At California's Request, Interior Extends OCS Lease Suspensions*, INSIDE ENERGY/WITH FEDERAL LANDS, Aug. 23, 1999, at 17.

76. *See* Jane Kay, *Offshore Drilling is Litmus Test for Candidates*, VENTURA COUNTY STAR, Nov. 15, 1999, at A3.

77. 150 F. Supp. 2d 1046 (N.D. Cal. 2001).

78. The contested leases were issued in lease sales P-4 (1968), forty-eight (1979), fifty-three (1981), sixty-eight (1982), RS-2 (1982), and eighty (1984).

79. Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1168-69 (9th Cir. 2002).

80. Currently, there are ninety-two active leases in the OCS offshore California, encompassing 465,126 acres. Of the eighty-five active leases offshore the Tri-County Area (San Luis Obispo, Santa Barbara, and Ventura), forty-three are producing wells and forty-two are nonproducing wells. The remaining seven leases are located in the Los Angeles and Orange County Planning Area. *See* CAL. RESOURCES AGENCY, CALIFORNIA'S OCEAN RESOURCES: AN AGENDA FOR THE FUTURE 5E-3 to 5E-4 (1997).

81. *Id.*

208 million cubic feet of gas per day are currently produced from forty-three federal OCS leases in the area.[82] One billion barrels of oil reserves and 500 billion cubic feet of natural gas are estimated to underlie the undeveloped regions. There has been no production on the contested forty leases, which would have expired except for the suspensions. The undeveloped leases are organized into nine units and one non-unitized lease.[83] All but one of the units have approved exploration plans. The non-unit lease has an approved development/production plan. The plans have all been certified as consistent with the CCMP.[84]

Activities on the leases were suspended at the request of the lessees. In October 1992, the Interior Minerals Management Service (MMS) directed suspensions to conduct the *California Offshore Oil and Gas Energy Resources Study*.[85] When the directed suspensions were about to end in May 1999, the lessees requested additional suspensions. California objected to the suspensions, asserting that circumstances had changed so new consistency determinations should be done. In June 1999, the MMS continued the suspensions until August 1999 to review the suspension proposals. In July 1999, the Commission advised the MMS that the suspensions were subject to state consistency review pursuant to section 307(c)(3) because of the age of the leases, poor quality of oil, proximity of the leases to new marine sanctuaries, and changed environmental circumstances, which included the expansion of the threatened southern sea otter territory into the area. The MMS informed California that additional environmental analysis would occur before any drilling activities, but the state would only be able to conduct consistency review if the existing exploration and development/production plans were revised.[86]

In August 1999, Secretary Babbitt declared that OCS lease suspensions would not be subject to state consistency review be-

82. *See* Brief for Federal Government at 14, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

83. A unit is number of leases grouped into a single management entity to prevent waste, conserve natural resources, and protect Federal royalty interests.

84. *See* Brief for Federal Government at 15, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

85. MINERALS MGMT. SERV., U.S. DEP'T OF INTERIOR, FINAL CALIFORNIA OFFSHORE OIL AND GAS ENERGY RESOURCES STUDY (2000), *available at* http://www.mms.gov/omm/pacific/enviro/COOGER/cooger.pdf (last visited Mar. 3, 2004).

86. *See* Brief for Federal Government at 15-19, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002). *See also* Cal. Coastal Comm'n v. Norton, 150 F. Supp. 2d 1046, 1049-50 (N.D. Cal. 2001).

cause the suspensions did not affect the coastal zone. He then directed the suspension of thirty-six of the forty contested leases (four of the leases had expired) for ninety days to ensure that the lease development work conformed to the CZMA. In November 1999, the MMS granted the lessees suspensions from nineteen to forty-five months. The MMS required each lessee to undertake certain milestone activities, including drilling a well, providing a description of proposed projects, and submitting revised exploration and development/production plans to continue the suspensions.[87] California brought suit.

The federal district court held that the lease suspensions affected the coastal zone and were subject to state consistency review pursuant to section 307(c)(1) of the CZMA.[88] Furthermore, Interior was required to explain why it categorically excluded the lease suspensions from NEPA analysis.[89] In July 2001, MMS set aside its approval of the November 1999 suspensions and all activities on the leases ceased.

After the district court decision, the federal government made an offer to settle the case, but there is dispute about the nature of the offer. The federal government asserts that the offer was to buy back twenty leases and allow drilling on sixteen leases using a long distance drilling technique that funnels pipelines several miles from shore. California alleges that the federal government only offered to buy back thirteen leases in exchange for permitting drilling on twenty-three leases.[90] California rejected the offer because Governor Davis pledged not to allow any more drilling.[91]

The Ninth Circuit, affirming the district court decision, held that the milestone activities, such as the three-dimensional seismic surveys, the use of underwater explosives, and the spudding of wells by the last day of the suspensions, affect land and water uses and natural resources in the coastal zone, and thus are subject to consistency review pursuant to section 307(c)(1).[92] The

87. *See* Brief for Federal Government at 18-19, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002). *See also* Cal. Coastal Comm'n v. Norton, 150 F. Supp. 2d at 1050-51, 1053-54.

88. *See* Cal. Coastal Comm'n v. Norton, 150 F. Supp. 2d at 1054.

89. *See id.*

90. *See* Zachary Coile, *State Drilling Ban Won't Be Appealed*, SAN FRAN. CHRON., Apr.1, 2003, *at* A3.

91. *See* Don Thompson, *California's Governor Rejects Proposed Settlement of Offshore Drilling Suit*, Associated Press State & Local Wire (Jan. 14, 2002).

92. *See* Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1172 n.5 (9th Cir. 2002).

Ninth Circuit rejected the federal government's contention that state consistency review is limited to the exploration and development/production plans. This position had been supported by the Supreme Court in *Secretary of Interior v. California*, but Congress reversed the decision by amending section 307(c)(1) in 1990.[93] The Ninth Circuit noted that circumstances regarding the leases, which had not been subject to state consistency review, had changed.[94] The federal government's contention that the MMS had conducted a negative consistency determination was rejected because the MMS never analyzed the pertinent facts.[95] The Ninth Circuit held that section 307(c)(1), not section 307(c)(3), was applicable because the effect of the suspensions was analogous to a sale. Revised or new exploration and development/production plans might be subject to section 307(c)(3) review, but section 307(c)(1) was available at this point.[96] The Ninth Circuit noted that if the leases had been subject to section 307(c)(1) review, state consistency review of the suspensions might not be allowed.[97] The Ninth Circuit also held that the MMS had to explain why it categorically excluded the OCS lease suspensions from NEPA analysis.[98]

After the Ninth Circuit decision, Governor Davis declared that "the court's ruling is essentially a big stop sign to Washington. They should take the hint and halt further attempts to exploit California's spectacular coastal resources. Today's decision is a victory for all Californians, the environment and states' rights."[99] Natural Resources Defense Counsel attorney Drew Caputo stated, "The threat to the coast from these oil leases is serious. In order to protect the coast, these leases need to go away."[100]

A. *Statutory Interpretation: CZMA*

When interpreting a statute the court must examine the text, intent, and purposes of the statute. This technique, which is known as originalism, recognizes the statute as a command of the sovereign that must be interpreted by other governmental agen-

93. *See id.* at 1172-73.
94. *See id.* at 1173.
95. *See id.* at 1173 n.7.
96. *See id.* at 1174.
97. *See id.* at 1174-75.
98. *See id.* at 1175-78.
99. David Kravets, *Ruling Blocking California Offshore Drilling is Upheld*, Assoc. Press State & Local Wire (Dec. 3, 2002).
100. *Id.*

cies.[101] Originalism presumes that the democratically elected legislature has the constitutional responsibility for making policy and the legislative command is supreme. The court acts as the agent of the legislature and determines the legislative mandate. The court, which is not accountable to the electorate, has some discretion, but is constrained to act within the parameters of the statute to carry out its purposes. Originalism is consistent with the constitutional principles of popular sovereignty, majoritarianism, separation of powers, checks and balances, and federalism.[102]

The Ninth Circuit's decision was consistent with the text, intent, and purposes of section 307(c)(1) of the CZMA, as well as the NOAA regulations and the OCSLA. The Ninth Circuit properly examined the lease suspensions under section 307(c)(1), rather than section 307(c)(3), because the California lease suspensions were analogous to a lease sale for several reasons.[103] First, the suspensions are federal activities.[104] Second, the suspensions grant the same rights as a lease sale, the right for subsequent exploration and development/production.[105] Third, the federal action in aggregate—the suspension of the thirty-six undeveloped leases off central California—is similar in scope to a lease sale. Finally, all the leases in question were issued prior to 1990, so they were not subject to state consistency review.[106]

1. Text

Statutory interpretation begins with examination of text, which has been enacted into law through the constitutionally prescribed process. The text, which is known to the litigants, is evidence of the legislative intent. Reliance on the text narrows the court's

101. *See* William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL L. REV. 803, 805 (1994); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 467 (1989).

102. *See* Sunstein, *supra* note 101 at 467.

103. *See* Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1174 (9th Cir. 2002).

104. *See id.* at 1171-75; Cal. Coastal Comm'n v. Norton, 150 F. Supp. 2d 1046, 1053 (N.D. Cal. 2001).

105. *See Cal. Coastal Comm'n*, 311 F.3d at 1174; *Cal. Coastal Comm'n*, 150 F. Supp. 2d at 1052-53.

106. *See Cal. Coastal Comm'n*, 311 F.3d at 1174-75; *Cal. Coastal Comm'n*, 150 F. Supp. 2d at 1053.

inquiry, increases the possibility of obtaining judicial consensus, and provides for certainty and predictability in the law.[107]

Section 307(c)(1) states that federal activity inside or outside of the coastal zone affecting land or water uses or natural resources in the coastal zone must be consistent to the maximum extent practicable with state coastal zone management programs. Congress instructed agencies to interpret the text liberally to consider direct and indirect effects and reasonably foreseeable effects.[108]

OCS lease suspensions are a federal activity.[109] The regulations define a federal activity as "any function[ ] performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities."[110] OCS lease suspensions are authorized by OCSLA.[111]

The meaning of "affects" is crucial to the decision. The common definition of "affect" is "to produce an effect or change in."[112] The term "affects" in the CZMA means to set in motion a series of events of coastal zone significance.

The meaning of "directly affecting" was central to the controversy over whether OCS lease sales are federal activities subject to consistency review under section 307(c)(1).[113] The federal district court rejected Interior's assertion that the plain meaning of section 307(c)(1) was "effects resulting from an activity without an intervening cause."[114] The court held that OCS lease sales are federal activities that directly affect the coastal zone.[115] OCS prelease activities are crucial planning decisions which establish the

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107. *See* T. Alexander Alenikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23-24 (1988); Karen M. Gebbia-Pinetti, *Statutory Interpretations: Democratic Legitimacy and Legal System Values*, 21 SETON HALL LEGIS. J. 233, 320 (1997).

108. *See* H.R. CONF. REP. NO. 101-964, at 970-71 (1990); Malone, *supra* note 69, at 732.

109. *See Cal. Coastal Comm'n*, 150 F. Supp. 2d at 1053.

110. 15 C.F.R. § 930.31 (2004).

111. The MMS can suspend leases "at the request of a lessee . . . to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities." 43 U.S.C. § 1334(a)(1)(A) (2004); *see also id.* § 1337(b)(5). The MMS can suspend the leases at its own initiative "if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits . . . or to the . . . environment." *Id.* § 1337(b)(5); *see also id.* § 1334(a)(2)(B). *See generally* 30 C.F.R. §§ 250.168-177 (2004).

112. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1968).

113. *See* Fitzgerald, Secretary of Interior v. California, *supra* note 32, at 426.

114. California v. Watt, 520 F. Supp. 1359, 1378 (C.D. Cal. 1981).

115. *See id.* at 1382.

parameters of subsequent development.[116] The lease sale sets in motion a series of events leading to development. If participation is restricted to post-sale activities, the state will be "relegated to the defensive role of objecting to the proposals of individual lessees as they are presented."[117] This will frustrate the orderly decision-making process and comprehensive planning scheme envisioned by Congress.[118]

The Ninth Circuit concurred and recognized that federal preleasing decisions, which become final upon issuing the FNOS, "establish the basic scope and charter for subsequent development and production."[119] The lease sale is "the first link in a chain of events which could lead to production and development. . . ." The lease sale is the only time each multistage process is evaluated in its entirety and the only stage when the cumulative effects of offshore development on state coastal resources are considered.[120] The court asserted that a broad definition of "directly affecting" should be adopted to strengthen the state's ability to influence the events set in motion by OCS lease sales and to enhance the state's ability "to protect the coastal zone."[121]

The Supreme Court reversed the Ninth Circuit.[122] Justice O'Connor, finding no definition for "directly affecting" in the CZMA, turned to the legislative history.[123] Justice O'Connor found that in the bills passed by the House and Senate in 1972, only federal activities occurring in the coastal zone were subject to consistency review.[124] However, the two bills defined the coastal zone differently. In the Senate bill, federal lands were excluded from the coastal zone, whereas federal territory within the three-mile coastal zone was included in the House definition.[125] Justice O'Connor inferred that the most plausible definition for the conference committee's substitution of "directly affecting" for "in" the coastal zone was a simple compromise over the definition of the coastal zone.[126] The substitution was not meant to

116. *See id.* at 1371.
117. *Id.*
118. *See id.*
119. California v. Watt, 683 F.2d 1253, 1260 (9th Cir. 1982).
120. *See id.*
121. *Id.*
122. Secretary of the Interior v. California, 464 U.S. 312 (1984).
123. *See id.* at 321.
124. *See id.* at 322.
125. *See id.* at 322-23.
126. *Id.* at 323-24 ("The implication seems clear: 'directly affecting' was used to strike a balance between two definitions of the 'coastal zone.'").

expand the scope of section 307(c)(1) to federal activities occurring outside the coastal zone, such as OCS lease sales.[127] Instead, the substitution simply allowed the conference committee to retain the Senate's narrower definition of coastal zone, while making federal activities occurring on federal lands physically within the coastal zone subject to consistency review, as urged by the House.[128]

Justice Stevens' dissent offered a better interpretation. He found nothing in the plain language of section 307(c)(1) to distinguish between federal activities occurring inside or outside of the coastal zone, stating "it is the effect of the activities rather than their location that is relevant."[129] Since the CZMA is designed to encourage federal-state cooperation, activities occurring outside the coastal zone must be subject to consistency review. The substitution of "directly affecting" for "in" the coastal zone ensures that "if an activity outside the zone has the same kind of effect on the zone as if it had been conducted in the zone, it [would be] covered by § 307(c)(1)."[130] Section 307(c)(1) was amended in 1990 to overturn the Court's erroneous decision; Congress endorsed the dissent's textual analysis and went even further by eliminating "directly" and retaining only "affects."[131]

The federal activity must affect land and water uses in the coastal zone. Land and water uses in the coastal zone include a diverse range of activities occurring on the shores and in the waters of the coastal zone. Section 302 of the CZMA provides examples of land and water uses in coastal zone that include industrial and commercial activities, residential development, recreation, mining, transportation and navigation, waste disposal, and fishing.[132] Further, Congress declared a national policy to achieve the "wise use of the land and water resources of the coastal zone" by considering "ecological, cultural, historic and esthetic values as well as the needs for compatible economic development. . . ."[133] Consequently, the state can review federal activities that affect natural and physical resources of the coastal zone, as well as those that affect a broad class of economic, so-

127. *See id.* at 324.
128. *See id.* at 330.
129. *Id.* at 345.
130. *Id.* at 348.
131. *See* H.R. CONF. REP. NO. 101-964, at 970-71 (1990).
132. *See* 16 U.S.C. § 1451 (2004).
133. *Id.* at § 1452.

cial, cultural, historic, and aesthetic values inherent in the multitude of land and water activities that occur in the coastal zone.

The lease suspensions at issue set in motion a series of events that "produce[d] an effect or change in" land and water uses or natural resources in the coastal zone, and thus are subject to state consistency review pursuant to section 307(c)(1) of the CZMA. The milestone activities have direct effects,[134] which include three-dimensional seismic testing, the spudding of wells, noise, and impacts on marine mammals and sensitive species. The indirect effects are those resulting from the continuation of the leases, including exploration and development/production activities.

Many of the direct and indirect effects had been considered by California when it approved the exploration and development/production plans. However, there has been a major change in circumstances since the state's initial approvals, such as the expansion of the sea otter range, the establishment of the Monterey Bay National Marine Sanctuary, the discovery of heavy oil that will be shipped by tanker rather than pipeline, and the implementation of new local zoning restrictions. In light of these changes, California wants to revisit its former consistency determinations. Otherwise, the OCS activities will go forward without adequate state input.

Interior claimed the suspensions will not affect the coastal zone because they do not authorize any actions. Interior claimed the milestone activities do not authorize any actions; they just require lessees to follow due diligence.[135] The Ninth Circuit properly disagreed with this conclusion and held that activities undertaken during suspensions will directly affect the coastal zone.[136]

Interior asserted that consistency review at this point will duplicate later review. Lessees will submit new exploration and development/production plans. Interior will do Environmental Assessments (EA) regarding the changes. If the circumstances have changed, the state will have the right to conduct a consistency determination pursuant to section 307(c)(3). If there are no significant changes, there will be no consistency review of the re-

134. *See* Cal. Coastal Comm'n v. Norton, 150 F. Supp. 2d 1046, 1053 (N.D. Cal. 2001).

135. *See id.* at 1052-53.

136. *See* Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1171 n.5 (9th Cir. 2002); *see also Cal. Coastal Comm'n*, 150 F. Supp. 2d at 1053.

vised exploration and development/production plans. This means that California's ability to examine the exploration and development/production plans for consistency with CCMP will be conditioned on Interior's discretion.[137] California wants to review the exploration and development/production plans for consistency in light of the changed circumstances. Only by reviewing the suspensions pursuant to section 307(c)(1) will this be assured.

Section 307(c)(1) requires the federal agency to make the determination whether the activity affects land and water uses or natural resources in the coastal zone. If there is a negative determination, no consistency determination is required. The federal agency must briefly state the reasons supporting its finding.[138] Interior claimed that it conducted a negative determination in the August 13, 1999 letter. Both the federal district court and Ninth Circuit rejected Interior's claim. The federal district court found that the letter did not explain the MMS findings that the lease suspensions did not expand the authority of lessees to conduct activities that affect the coastal zone The letter did, however, indicate that the MMS directed the suspension of leases to provide the states with the opportunity to evaluate the leases under the appropriate statutes The letter indicated that the MMS was assessing whether the passage of time and changed circumstances might require a reevaluation of the leases.[139] The Ninth Circuit noted that the August 13 letter was directed at a different group of lease suspensions that were not part of this litigation. In addition, the earlier June 25 letter was not a negative determination because it contained no factual findings and simply asserted that lease suspensions were not subject to consistency review.[140]

2. Intent

The text is generally not conclusive for several reasons. First, the text is often ambiguous, vague, or incomplete. Words do not have clear meaning outside of their context, so reference to external sources is required.[141] Second, the text is not designed to carry out legislative purpose. Instead, particular language is iso-

137. *See Cal. Coastal Comm'n*, 150 F. Supp. 2d at 1054.

138. *See* 15 C.F.R. § 930.35(d), *quoted in Cal. Coastal Comm'n*, 150 F. Supp. 2d at 1054.

139. *Cal. Coastal Comm'n*, 150 F. Supp. 2d at 1054.

140. *Cal. Coastal Comm'n*, 311 F.3d at 1173 n.7.

141. *See* J.A. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624, 625 (1954); William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 341-42 (1990).

lated from the legislative enterprise of which it is a part. Congress often sends messages to the courts about statutory meaning. Blind adherence to the text precludes this avenue of communication.[142] Third, there is no support for the assumptions that legislators know and follow the canons of statutory interpretation, prior judicial precedents, and the existing statutory terrain or that legislators write clear text. Given the problems with textualism, the court must search through the "ashcans of the legislative process"[143] to discover how the original legislature would have resolved the question. A careful reading of the legislative history provides the most accurate view of intent.[144]

William Eskridge provides a hierarchy of legislative sources based on their comparative reliability. First, the most reliable sources are the committee reports, which represent the "collective understanding of those congressmen involved in drafting and studying the proposal." The reports show areas of agreement and issues of disagreement between the House and Senate that are resolved by the conference committee. Second, the "statements by sponsors and/or floor manager," who know the language, intent, and purposes of the statute, are important because other congresspersons defer to their judgment. Third, rejected proposals are important because they show that "Congress considered an issue and chose not to adopt a specified policy." Fourth, the statements of legislators made in committee hearings and on the floor, while not as authoritative as sponsors, are generally not important unless "the statute was a careful compromise" or "there is virtually no other evidence." Finally, legislative silence and subsequent history are accorded little weight, unless "the precise intent of the enacting Congress is obscure."[145] Respecting legislative intent places the court in the proper deferential framework regarding the legislature and es-

142. *See* Eskridge, *supra* note 101, at 683; Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO .WASH. L. REV. 718, 727-28 (1987); Barry R. Weingast et al., *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 738 (1992); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Towards a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1311-15 (1990).

143. CHARLES CURTIS, IT'S YOUR LAW 52 (1954).

144. *See* Aleinkoff, *supra* note 107, at 22-23; Eskridge, *supra* note 101, at 679-80; Redish & Chung, *supra* note 101, at 813-15; Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 246-47 (1983).

145. Eskridge, *supra* note 101, at 636-40.

tablishes a criterion of reliability that helps the court select and weigh elements of the language and legislative context.[146]

The legislative history indicates that Congress intended to provide the states with broad consistency authority that encompasses any federal activities having a functional interrelationship with the coastal zone. Congress recognized that the "competing demands . . . occasioned by population growth and economic development" were destroying the coastal environment.[147] One of the circumstances leading to the enactment of the CZMA in 1972 was the Santa Barbara oil spill in 1969, which was caused by a federally authorized oil well.[148] Congress realized that state and local authorities were presently incapable of comprehensively "planning and regulating land and water uses" in the coastal zone.[149] It was necessary "to encourage the states to exercise their full authority over the lands and waters in the coastal zone" to protect the coastal zone.[150]

The CZMA is designed to encourage and assist the states to assume comprehensive planning and regulatory functions over the coastal zone. This is accomplished by providing grants to the coastal states to develop and implement coastal zone management programs[151] and mandating that federal activities affecting the coastal zone be conducted in a manner consistent "to the maximum extent practicable" with state coastal zone management programs.[152] A Senate bill in 1971 contained the first consistency language, which declared, "All federal agencies conducting or supporting activities in the coastal zone . . . shall administer their programs consistent with approved State management programs."[153] The Senate report noted that the consistency requirement extended to any federal activity having "a functional interrelationship from an economic, social, or geographic standpoint" with the coastal zone.[154]

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146. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 71-79, 85-86 (1975).

147. 16 U.S.C. § 1451 (2004).

148. *See* Secretary of the Interior v. California, 464 U.S. 312, 348 n.5 (1984).

149. *See* 16 U.S.C. § 1451(h).

150. *Id.* § 1451(i).

151. *See id.* §§ 1454, 1455.

152. *Id.* § 1456(c)(2).

153. S. 582, 92d Cong. (1971). *See generally* Fitzgerald, Exxon v. Fischer, *supra* note 41, at 575-76.

154. S. REP. NO. 92-526, at 30 (1971).

Congress renewed consideration of the CZMA in 1972. The consistency language in the Senate bill pertaining to federally supported or conducted activity in the coastal zone remained the same.[155] The consistency language in the House version was the same as the Senate bill,[156] so the functional interrelationship test was applicable. There were specific provisions in both the House and Senate bills that extended state authority beyond the coastal zone.[157] The conference committee rejected these specific proposals,[158] but accomplished the goals of deleted sections, which were to harmonize OCS activities with state coastal zone management programs, by substituting "directly affecting" for "in" the coastal zone. The substitution required federal activities "directly affecting" the coastal zone to be certified as consistent with state coastal zone management programs. Since nothing in the conference report limited the scope of section 307(c)(1) or contradicted the 1971 Senate report, the functional interrelationship test continued to define section 307(c)(1). As a result, federal activities having a direct or functional interrelationship with the coastal zone, whether inside or outside of the coastal zone, were subject to consistency review under section 307(c)(1).[159]

Subsequent congressional action supports this position. In 1976, Congress enacted amendments to the CZMA to deal with impacts of OCS development. The amendments contained two major revisions. First, the Coastal Energy Impact Program (CEIP) was established to provide funds to state and local communities to deal with the impacts of OCS energy development.[160] Second, section 307(c)(3) was modified to expedite OCS development.[161] The original language was retained as section 307(c)(3)(A). A new section was added that granted the affected coastal states the right to review lessee's exploration and devel-

155. *See* S. 3507, 92d Cong., § 314(b)(1) (1972).

156. *See* H.R. 14,146, 92d Cong., § 307 (1972).

157. Section 312 of the original House bill allowed the coastal states to establish estuarine sanctuaries in the coastal zone that could extend to the OCS. Section 313 of the original House bill allowed the Secretary of Commerce, in coordination with the Secretary of Interior, to develop a multi-purpose management plan for OCS areas adjacent to the coastal zone twelve miles from shore. Several proposals were offered during the Senate debates that granted the coastal governors a veto over OCS lease sales and called for an investigation of the environmental hazards regarding offshore development in the Atlantic. Both proposals were rejected. *See* Fitzgerald, Secretary of Interior v. California, *supra* note 32, at 451-59.

158. *See* H. CONF. REP. NO. 92-1544, at 30-31 (1972).

159. *See* Secretary of the Interior v. California, 464 U.S. 312, 330 (1984).

160. *See* 16 U.S.C. § 1456(a) (2004).

161. *See* H. CONF. REP. NO. 94-1298, at 30-31 (1976).

opment/production plans for each OCS tract to ensure that the activities do not interfere with the state's coastal zone management program.[162]

The CZMA was reauthorized in 1980. The committee reports recognize broad state authority pursuant to section 307(c)(1).[163] The House report states that consistency review under section 307(c)(1) is mandated "whenever Federal activity had a functional interrelationship from an economic, geographic or social standpoint with a State's coastal program's land and water use policy."[164] The Senate report concludes that intergovernmental coordination begins as soon as "Interior sets in motion a series of events which have consequences in the coastal zone" and "must continue during the crucial exploration, development, and production stages."[165] Generally, subsequent legislative history is not relevant regarding the original intent of Congress.[166] However, two of the seven members of the 1972 conference committees and four of the eleven members of 1976 conference committees were still on the relevant committees in 1980. The Ninth Circuit noted that subsequent legislative statements should be attributed importance because they better serve the purposes of act.[167]

The Supreme Court in *Secretary of Interior v. California* ignored the legislative language that recognizes broad coastal zone authority. Instead, the majority narrowly interpreted the "directly affecting" language to confine consistency review to federal activities occurring inside the geographic limits of the coastal zone. There was a quick congressional response. Several bills were introduced to reverse the Court's decision, but were only discussed in committee.[168] Both bills declared that "federal activity shall be treated as one that directly affects the coastal zone if the conduct or support of the activity either a) produces identifiable physical biological, social, or economic consequences on the coastal zone, or b) initiates a chain of events likely to result in any of such consequences."

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162. *See* 16 U.S.C. § 1456(c)(3)(b) (2004).

163. *See* H.R. REP. NO. 96-1012, at 28 (1980); S. REP. NO. 96-783, at 11 (1980).

164. H.R. REP. NO. 96-1012, at 28 (1980).

165. S. REP. NO. 96-783, at 11 (1980).

166. *See* Eskridge, *supra* note 101, at 636-40.

167. *See* 683 F.2d at 1262.

168. *See* S. REP. NO. 98-512 (1984). *See generally* Fitzgerald, Secretary of Interior v. California, *supra* note 32, at 469-71.

After the 1984 elections, efforts to amend section 307(c)(1) began anew. In 1985, Representatives Studds (D-Mass.) and Panetta (D-Cal.) introduced a bill that would amend section 307(c)(1) to require each federal agency conducting or supporting an activity directly affecting the coastal zone, whether inside or outside, to ensure that the activity is consistent with approved state management programs to the maximum extent practicable. Senator Packwood resubmitted a bill that substituted "significantly affecting" for "directly affecting." The words were to be broadly interpreted, not limited to the geographic location of the activity, and should include the reasonably foreseeable consequences of the federally conducted or supported activity. Action, however, ceased after proponents realized that any change in the consistency language might jeopardize CZMA reauthorization in 1985.[169]

The CZMA was scheduled for reauthorization in 1990. Coastal states were extremely dissatisfied with the *Secretary of Interior* decision and its expansion by federal agencies to preclude consistency review of other activities, including ocean incineration, the designation of dredge and fill disposal sites, the sale of surplus government property in the coastal zone, and the permitting of actions under the Clean Water Act. A coalition of coastal states, environmental groups, academics, and congressional staffers was organized to revitalize the CZMA in a favorable political environment.[170] President Bush did not support changes in consistency provisions, but supported CZMA reauthorization. Representative Jones (D-N.C.), the chair of the House Merchant Marine and Fisheries Committee, was under pressure because plans to conduct exploratory drilling on Outer Banks off North Carolina generated a great deal of opposition in his district.[171] Senator Kerry (D-Mass.), the vice-chair of the National Ocean

169. *CZMA Reauthorization Bill Approved By House Panel Without Consistency Change*, 16 ENVT. REP. (BNA) 48, 49 (May 10, 1985), *Stevens Says Consistency Wording Change in CZMA May Encourage 'Economic Blackmail'* 16 ENVT. REP. (BNA) 49 (May 10, 1985); *Senate Panel Approves Bill Reauthorizing CZMA at Levels Appropriated in Fiscal 1985*, 16 ENVT. REP. (BNA) 126, 127 (May 17, 1985); *House Passes Bill to Reauthorize CZMA After Adding Amendment to Freeze Funding*, 16 ENVT. REP. (BNA) 549 (Aug. 2, 1985).

170. *See* Jack H. Archer, *Evolution of the Major 1990 CZMA Amendments: Restoring Federal Consistency and Protecting Water Quality*, 1 TERR. SEA J. 191, 191-95 (1991).

171. *See generally* Edward A. Fitzgerald, Conoco v. U.S.: *Sovereign Authority Undermined By Contract Obligations on the Outer Continental Shelf*, 27 PUB. CONT. L.J. 755 (1998).

Policy Study (NOPS), endorsed reauthorization and changes in consistency provisions.

In 1990, the House passed a CZMA reauthorization bill.[172] The debates on the House floor indicated support for broad state consistency authority. Eskridge points out that the statements of proponents are important because other members rely on their views.[173] Representative Panetta (D-Cal.) stated that the effect of an activity, not its location, was crucial regarding state consistency authority, which included reasonable foreseeable indirect effects.[174] Representative Jones said that "the effects test should be broad construed to include the direct and indirect effects of a federal activity."[175]

Eskridge asserts that statements of opponents of the bill are generally not the most reliable indicators, but they can provide some insight into legislative intent.[176] Representative Shumway (R-Cal.), an opponent of the CZMA reauthorization, pointed out that the bill expands the consistency provisions to cover many federal activities whether inside or outside of the coastal zone, which "goes considerably beyond the original intent of the coastal zone plan. . . ."[177]

The Senate Commerce Committee reported a bill sponsored by Senator Kerry that broadened section 307(c)(1),[178] but was

172. *See* Archer, *supra* note 170, at 200-02.

173. *See* Eskridge, *supra* note 101, at 636-40.

174. *See* 136 CONG. REC. H8080 (daily ed. Sept. 26, 1990).

175. *Id.* at 8081. Representative Hertel declared that "OCS lease sales and any other federal activity that may have an effect on the coastal zone" are subject to consistency review. *Id.* at 8081 (statement of Rep. Hertel). Representative Anderson stated that the bill "makes needed legislative clarifications regarding key statutory provisions, especially those related to the requirement for cons with a state management plan. California's ability to ensure Federal compliance with its coastal program policies would be clarified and strengthened." *Id.* at 8082 (statement of Rep. Anderson). Representative Studds noted that "the issue boils down to a very simple proposition: That Federal agencies should be required to tailor their activities to mesh as much as possible with State efforts to protect the coast. No more, no less." *Id.* at 8083 (statement of Rep. Studds). Representative Dyson supported the change in the consistency provision, which "is necessary to protect sensitive coastal areas from the potentially harmful effects of oil and gas exploration and drilling on the OCS." *Id.* at 8084 (statement of Rep. Dyson). Representative Pelosi declared that, "the committee substitute strengthens the original law by stating clearly that Federal activities inside or outside of the coastal zone must be consistent with State coastal management plans." *Id.* at 8087 (statement of Rep. Pelosi).

176. *See* Eskridge, *supra* note 101, 636-40.

177. 136 CONG. REC. H8083 (daily ed. Sept. 26, 1990).

178. *See* Archer, *supra* note 170, at 198-200, 202-03. *See generally* S. REP. NO. 101-445 (1990).

not brought to the Senate floor. When CZMA reauthorization became stalled in the Senate, proponents in the House played budgetary politics. They attached the House CZMA reauthorization bill to a deficit reduction package and requested a conference committee. The conferees approved the Coastal Zone Reauthorization of 1990, which was included in the Omnibus Budget Reconciliation Act of 1990.[179]

Section 307(c)(1) was amended to reverse the Court's decision in *Secretary of Interior v. California*. The triggering mechanism was changed from "directly affecting" to "affects any land or water or natural resource in the coastal zone," establishing the same trigger for all federal consistency sections. The issue of whether a federal activity affects land or water uses or natural resources in the coastal zone is a factual question that is to be answered on a case-by-case basis by the federal agency. The determination includes "effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects." The term "affecting" is to be broadly interpreted to include direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. There is a limited exemption for consistency "if the president determines that the activity is in the paramount interest of the U.S."[180]

The legislative history indicates the broad scope of coastal state consistency authority over federal activities whether inside or outside of the coastal zone.[181] Congress was concerned with direct and indirect effects of federal activities, as long as they are reasonably foreseeable. The lease suspensions directly affect the coastal zone through seismic testing and the spudding of wells. The indirect, but reasonably foreseeable, effects are future exploration and development/production activities.[182]

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179. *See* Archer, *supra* note 170, at 203-06.

180. H.R. CONF. REP. NO. 101-964, at 968-75 (1990).

181. The CZMA was reauthorized in 1996, but there was no call for any change in the consistency provisions. *See generally* FITZGERALD, *supra* note 2, at 255-56.

182. Thirty-two Democratic members of the California congressional delegation filed an amicus brief in the case supporting the Commission. Nine of the members were in Congress in 1990: Senator Boxer and Representatives Miller, Waxman, Pelosi, Lantos, Matsui, Stark, Condit, and Berman. Representative Waxman was a member of the House Commerce Committee that reported the 1990 CZMA Amendments. H.R. REP. NO. 101-964, at 1220-25.

3. Purposes

An originalist interpretation is also guided by the statutory purposes, which are the ultimate motive of the legislature. Hart and Sacks assert that "every statute must be conclusively presumed to be a purposive act."[183] The legislative purpose is the best justification that can be attributed to the statute in terms of its relationship with the set of legal norms operating at the time of the court's decision. The legislative purpose, which is more abstract than intention, helps the court to determine the legislative intent, directs the court when the intent is unclear, and allows the court to keep the statute in harmony with contemporary values.[184]

Hart and Sacks conclude that the attribution of purpose does not grant the court unbridled discretion. The court is constrained by the words of the statute and must be careful not to give the words "a meaning that they will not bear." The words are not empty vessels into which the court pours meaning, but have a dual role "as guides to the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed." The words must not be given "a meaning which would violate any established policy of clear statement." The court must "try to put itself in imagination in the position of the legislature which enacted the measure" and assume that the "legislature was made up of reasonable persons pursuing reasonable purposes reasonably." The Court asks "why would reasonable men, confronted with the law as it was, have enacted this new law to replace it." The court looks to the "mischief" in the prior statute and "the true reason of the remedy" provided by the new statute. The legislative history must be examined "for the light it throws on the general purposes."[185] Farber and Frickey note that "Hart and Sacks were not so much panglossian empiricists as savvy normativists – crafters of assumptions that provide useful judicial and administrative side-constraints upon the less attractive features of politics."[186]

183. HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS 1124 (1994); *see also* DICKERSON, *supra* note 146, at 86-112.

184. *See* Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 463 (1987).

185. HART & SACKS, *supra* note 183, at 1374-80.

186. Daniel A. Farber & Philip P. Frickey, *Forward: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 475 (1992).

Subjecting the suspension of old leases to consistency review realizes the purposes of CZMA, which support expansive state authority, protection of the environment, federal-state cooperation and consultation. The CZMA was enacted "to preserve, protect, develop, and where possible, to restore or enhance" the coastal environment.[187] Coastal states were encouraged to develop plans to manage and protect the coastal zone. Federal, state and local governments, as well as regional agencies, were encouraged to cooperate and coordinate their activities to effectuate these goals.[188] Congress recognized that many demands on the valuable coastal zone were putting stress on coastal ecosystems. Coastal states were encouraged to exercise their full authority over lands and waters in the coastal zone to protect the natural systems of the coastal zone.[189] State control was superior to federal authority because the coastal states possessed the "resources, administrative machinery, enforcement powers, and constitutional authority on which to build sound coastal management programs."[190] The coastal states already had control over coastal resources, possessed inherent zoning authority, and were closer to regional problems than the federal government.[191]

The 1976 amendments to the CZMA were designed to "improve and strengthen coastal zone management . . . and to coordinate and further the objectives of national energy policy."[192] Congress recognized that there could be a disruption of OCS energy development if the coastal states were not granted needed assistance to deal with coastal zone impacts. Congress stated that strengthening coastal state authority was essential to "the protection and proper management of irreplaceable coastal resources and is the best means of dealing with impacts from new or expanded coastal energy activity."[193] Coastal states and localities, which are more aware of the impacts, "should make the basic decisions" regarding new or expanded energy activities. The dis-

187. 16 U.S.C. § 1452(1) (2004).

188. *See id.* § 1452(4), (5).

189. *See id.* § 1451.

190. Jeffrey L. Beyle, *A Comparison of the Federal Consistency Doctrine Under the FLPMA and the CZMA*, 9 VA. ENVTL. L.J. 207, 207-09 (1989).

191. *Id.*

192. H. CONF. REP. NO. 94-1298, at 23 (1976).

193. *Id.* at 24.

cretion of the SOC and other federal officials "should be correspondingly limited."[194]

In 1980, Congress expanded the purposes of the CZMA and focused on program implementation. Congress continued to stress the protection of the natural resources within the coastal zone; consultation and coordination with affected federal agencies; the notification of and opportunities for public and local governmental participation in coastal zone decision making; and assistance to support comprehensive planning, conservation, and management of living marine resources.[195]

The purposes of CZMA were again expanded in 1990 to acknowledge the importance of the coastal states in the management of the territorial sea and Exclusive Economic Zone.[196] Environmental protection continued to be stressed.[197] There was also specific concern with federal activities, such as OCS lease sales, that occur outside the coastal zone and affect the coastal zone.[198]

The courts have relied on the purposes of CZMA to assess the nature and scope of coastal state authority. In *California v. Watt*, the district court held that the CZMA provided for comprehensive, coordinated, long-term federal-state planning to protect the coastal zone.[199] OCS pre-lease decisions establish the parameters of subsequent development. The lease sale sets in motion a series of events leading to development. If participation is restricted to

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194. *Id.*

195. *See generally* H.R. REP. NO. 96-1012 (1980); S. REP. NO. 96-783 (1980). Pub. L. No. 96-454 (1980); FITZGERALD, *supra* note 2 at 115-16.

196. The findings declare that

> [C]oastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs.

16 U.S.C. § 1451(m) (2004).

197. Congress found that "[t]he habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." *Id.* § 1451(d). Moreover, declares national policy for state coastal programs to manage "coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters. . . ." *Id.* § 1452(2)(C). *See also* Martin J. LaLonde, *Allocating the Burden of Proof to Effectuate the Preservation and Federalism Goals of the CZMA*, 92 MICH. L. REV. 438, 463-64 (1993).

198. *See* H.R. CONF. REP. NO. 101-964, at 968-70 (1990).

199. *See* California v. Watt, 520 F. Supp. 1359, 1369-71 (C.D. Cal. 1981).

post sale activities, the state will be "relegated to the defensive role of objecting to the proposals of individual lessees as they are presented."[200] This will frustrate the orderly decision-making process and comprehensive planning scheme envisioned in the CZMA.[201]

The Ninth Circuit concurred and found that a broad definition of "directly affecting" should be adopted to strengthen the state's ability to influence the events set in motion by an OCS lease sale and enhance the state's ability to protect the coastal zone.[202] The Ninth Circuit held that the fundamental purpose of the CZMA is to foster effective state protection of coastal resources.[203]

Justice O'Connor in *Secretary of Interior v. California* ignored the statutory purposes. However, Justice Stevens in his dissent maintained that a broad construction of section 307(c)(1) better accomplishes the purposes of the CZMA.[204] Subjecting OCS lease sales to consistency review ensures federal-state cooperation in the protection of the coastal zone.[205] Early review puts the states on notice as to any state objections to development, thereby ensuring better planning.[206]

4. Regulations

The Ninth Circuit, relying on the existing regulations, properly determined that the lease suspensions are subject to state consistency review pursuant to section 307(c)(1).[207] The history of the section 307(c)(1) regulations demonstrates expansive coastal state authority that includes OCS lease suspensions. In the first proposed regulations in 1976, NOAA did not define "directly affecting." Instead, NOAA "adopt[ed] the 'causal' terms of the Act."[208] Federal activities would have to be evaluated on a case-by-case basis to determine if they directly affected the coastal zone.[209]

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200. *Id.* at 1371.

201. *See id.*

202. *See* California v. Watt, 683 F.2d 1253, 1260 (9th Cir. 1982).

203. *See id.* at 1263-66.

204. *See* Secretary of Interior v. California, 464 U.S. 312, 355-59 (1984) (Stevens, J., dissenting).

205. *See id.* at 356-57 (Stevens, J., dissenting).

206. *See id.* at 357 n.14 (Stevens, J., dissenting).

207. *See* Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1171-75 (9th Cir. 2002).

208. Federal Consistency with Approved Coastal Zone Management Programs, 41 Fed. Reg. 42,878, 42,880 (Sept. 28, 1976).

209. *Id.*

In 1977, NOAA amended the proposed regulations.[210] The new proposed regulations defined the individual threshold tests to identify activities requiring consistency review. NOAA explained that "directly affecting" should be defined "in terms of the significance of the effects upon coastal resources."[211]

In 1978, the final regulations adopted a single liberal interpretation for each of the five threshold tests in section 307(c).[212] All federal activities that "significantly affect[ed]" the coastal zone would be subject to consistency review.[213] The term "significantly" was broadly defined.[214] The "significantly affecting" test was modeled on the threshold test in NEPA. The "significantly affecting" test in the regulations replaced the "directly affecting" test of section 307(c)(1).

In 1979, the Department of Justice issued an opinion regarding the applicability of the CZMA to OCS pre-lease activities regarding lease sale forty eight. The DOJ maintained that section 307(c)(1) established a factual test that should be applied on a case-by-case basis. The DOJ rejected NOAA's substitution of the "significantly affecting" test for the statutory "directly affecting" test in section 307(c)(1). The DOJ determined that Congress intended that different threshold requirements should be applied to different activities that were subject to consistency review.[215]

NOAA responded by issuing revised regulations,[216] which established individual threshold tests for the activities subject to consistency review. The "directly affecting" test was reinstated for section 307(c)(1), but "directly affecting" remained undefined. NOAA, however, encouraged federal agencies to "construe liberally the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review."[217]

Two weeks after the complaints were filed in *California v. Watt* in 1981, NOAA issued a notice of proposed rule making that nar-

210. Federal Consistency with Approved Coastal Zone Management Programs, 42 Fed. Reg. 43,586 (Aug. 29, 1977).

211. *Id.* at 43,590.

212. Federal Consistency with Approved Coastal Zone Management Programs, 43 Fed. Reg. 10,510 (Mar. 13, 1978).

213. *Id.* at 10,512.

214. *Id.* at 10,518-19.

215. DOJ Opinion, *supra* note 18, at 13-14.

216. Consistency for Department of the Interior Outer Continental Shelf (OCS) Prelease Sale Activities and for Other Federal Activities Directly Affecting the Coastal Zone, 44 Fed. Reg. 37,142 (June 25, 1979).

217. *Id.* at 37,146-47.

rowed the scope of "directly affecting."[218] The proposed regulation provided that federal activity directly affected the coastal zone only if "the conduct of the activity itself produces a measurable physical alteration in the coastal zone or [if] . . . the activity initiates a chain of events reasonably certain to result in such alteration, without further required agency approval."[219]

The proposed change generated immediate negative reactions. California brought suit challenging the regulation. The federal district court found NOAA's post-litigation regulatory change suspect and self-serving. The change did not represent a well-established principle and was at odds with CZMA policies and NOAA's prior interpretation.[220] The court refused to rubber stamp a decision that was not consistent with the statute.

Bipartisan resolutions were also introduced in Congress.[221] After the House Merchant Marine and Fisheries Committee voted to veto the regulation,[222] NOAA withdrew the regulation.[223] NOAA announced that there would be no revisions of the regulations until the litigation was concluded.

In *Secretary of Interior v. California*, the Court dismissed NOAA regulations in a footnote, stating that "in construing § 307(c)(1) the agency has walked a path of such tortured vacillation and indecision that no help is to be gained in that quarter."[224] NOAA narrowly interpreted the Court's decision to exclude only OCS lease sales from section 307(c)(1), but require consistency review for all other federal activities that directly affected the coastal zone.[225]

In 1990, Congress enacted amendments to the CZMA, which expressly reversed the Court's decision in *Secretary of Interior v. California* and strengthened the consistency requirements. The

218. *See Interpretation of the Federal Consistency Term*, 46 Fed. Reg. 26,658 (May 14, 1981).

219. *Id.* at 26,659.

220. *See* State of California v. Baldridge, Civ. No. 81-3760 (1981), dismissed as moot (C.D. Cal. Oct 9, 1981). *Commerce Withdraws Consistency Rule Rejected By House Panel in Veto Attempt*, 12 ENVT. REP. (BNA) 711 (Oct. 9, 1981).

221. *Resolutions Introduced in Congress to Reject New Consistency Regulations*, 12 ENVT. REP. (BNA) 522 (Aug. 21, 1981). *States See New Rules Causing Lawsuits; Administration Says They Assist Program*, 12 ENVT. REP. (BNA) 609 (Sept. 18, 1981).

222. *See* H. Rep. No. 269, 97th Cong., at 7-8 (1981).

223. 46 Fed. Reg. 50,976 (1981).

224. Secretary of Interior v. California, 464 U.S. 312, 321 n.6 (1984).

225. *See* H.R. REP. No. 101-535, at 16-17 (1990). Other federal agencies, including the Department of Justice, Corps of Engineers and EPA, took a broader view of the Court's decision.

"directly affecting" test was replaced by the broader "affects" test. Federal activities regardless of their location are subject to state consistency review if they affect land and water uses or natural resources in the coastal zone. According to Jeff Benoit, then director of NOAA's Office of Coastal Zone Management, "these changes reflect an unambiguous Congressional intent to eliminate any 'categorical exemptions' from CZMA consistency review, and instead establish a uniform threshold standard requiring a case-by-case factual determination of reasonably foreseeable effects on the coastal zone."[226]

While the *Norton* litigation was underway, NOAA issued amended regulations.[227] NOAA acknowledges that the 1990 CZMA amendments subject federal activities that affect land and water uses or natural resources in the coastal zone, regardless of their location, to consistency review pursuant to section 307(c)(1). This determination includes the effects on the coastal zone that the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. "Affecting" is to be broadly construed to include direct effects, which are caused by the activity and occur at the same time and place, and indirect effects, which may be caused by the act and are later in time and farther removed in distance, but are reasonably foreseeable. All federal activities are subject to consistency review if they affect the coastal zone. NOAA did not list actions subject to consistency review because such a list might not be all-inclusive.[228]

NOAA, however, declared that OCS lease suspensions are generally federal licenses and permits that are subject to consistency review pursuant to section 307(c)(3).[229] NOAA informed the Commission of this, but did not determine if the suspensions in question had coastal effects requiring a consistency determination. NOAA noted that if a state reviews a lease suspension for consistency, the state's review is limited to the effects of the suspension itself and any related cumulative effects. The state will not be allowed to review the underlying lease. NOAA concluded that as a general matter lease suspensions do not affect coastal

226. *Hearings on CZMA Reauthorization Amendments of 1990 Before the House Merchant Marine and Fisheries Committee*, 103d Cong. 28, 33 (1994) (statement of Jeffrey R. Benoit, Director, Office of Ocean and Coastal Resource Management).

227. Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124 (Dec. 8, 2000) (to be codified at 15 C.F.R. pt. 930).

228. *See id.* at 77,131-43.

229. *See id.* at 77,144.

uses or resources and do not generally authorize activities that can be reasonably expected to affect coastal uses or resources.[230] However, NOAA stated that it "cannot completely rule out the possibility that a lease suspension or set of lease suspensions could affect the uses or resources of a State's coastal zone, and thus the CZMA bars NOAA from categorically exempting suspensions from consistency."[231]

The Ninth Circuit did not address NOAA's comments, which were made after the district court decision.[232] Even if NOAA's comments were considered, it would not have changed the decision. When reviewing an agency's legal interpretation, the court utilizes the two step conceptual framework provided in *Chevron v. Natural Resources Defense Council*.[233] The court first asks "whether Congress has directly spoken to the precise question at issue."[234] If Congress has not addressed the issue, the court must determine whether "the agency's answer is based on a permissible construction of the statute."[235] The court must defer to "a reasonable interpretation made by the administrator of an agency."[236] The courts, however, employ *Chevron* in both a strong and a weak manner.[237] A strong reading of *Chevron* requires the court to defer to the agency's legal interpretation unless Congress has specifically addressed the issue. A weak reading stresses the continued use of the tradition tools of statutory interpretation.[238] The selective application of *Chevron* [239] indicates that the courts continue to have an important role to play in statutory interpretation.[240] *Chevron* is a judicially-imposed

230. *See id.*

231. *Id.*

232. Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1167 n.2 (9th Cir. 2002).

233. 467 U.S. 837 (1984).

234. *Id.* at 842.

235. *Id.* at 843.

236. *Id.* at 844.

237. *See* Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 367 (1987).

238. *See id.*; *see also* Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373, 377-79 (1986).

239. *See* Peter H. Schuck & E. Donald Elliott, *To the Chevron Station*, 1990 DUKE L.J. 984 (1990); Peter L. Strauss, *One Hundred Fifty Cases Per Year*, 87 COLUM. L. REV. 1093, 1122 (1987); Patricia M. Wald et al., *The Contribution of the D.C. Circuit to Administrative Law: An Empirical Study of Federal Administrative Law*, 40 ADMIN. L. REV. 507, 530 (1988).

240. Justice Stevens, the author of *Chevron*, later stated that a "pure question of statutory construction [is] for the courts to decide [by] employing traditional tools of statutory construction." INS v. Cardozo-Fonseca, 480 U.S. 421, 446 (1987).

prudential concern that should be applied in a flexible manner.[241] The traditional tools of statutory interpretation indicate that NOAA's current position is questionable and possibly unreasonable.

Section 307(c)(1), not section 307(c)(3), is most applicable. The Ninth Circuit noted that just because section 307(c)(3) is available at the appropriate time, review pursuant to section 307(c)(1) is not precluded.[242] NOAA regulations assume broad section 307(c)(1) authority.[243] The suspension deals with thirty-six leases in a particular region, so there are cumulative effects. The leases were issued over twenty years ago and were not subject to consistency review. The leases were the subject of litigation and were issued under circumstances that have changed. California still opposes development. The unique circumstances presented in this case are analogous to lease sale, not individual permits.

Furthermore, the California lease suspensions will cause unique direct and indirect effects, which are reasonably foreseeable. There will be impacts from seismic testing and drilling activities, an increase in air emissions, effects on water quality from the discharge of drill muds and cuttings, an increase in vessel traffic, oil spills, the degradation of visual quality, as well as detrimental outcomes on local communities, marine sanctuaries, endangered and threatened species, recreation, and tourism and fishing.

California did approve exploration and development/production plans on the leases. The circumstances on which these approvals were based have changed, so they are subject to reexamination. NOAA regulations recognize that if an activity has substantially changed since a consistency determination, a later-phased consistency determination should cover the changes or a new supplemental determination may be necessary.[244] If the proposed activity previously reviewed, but not yet begun, will

241. *See* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1296-97 (1991); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1002 (1992); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 9 (1986).

242. *See* Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1174-75 (9th Cir. 2002).

243. *See* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,131-43 (Dec. 8, 2000) (to be codified at 15 C.F.R. pt. 930).

244. *See* 15 C.F.R. § 930.46 (2000).

have coastal effects substantially different than originally described, a supplemental determination should occur. Since the consistency test depends on whether coastal effects are reasonably foreseeable, not the nature of the activity, substantially new coastal effects trigger the consistency requirement. This is an affirmative duty on the part of federal agencies and applicants, which is analogous to a Supplemental Environmental Impact Statement under NEPA.[245] There have been many changes since original consistency approval that include the approval of Channel Islands and Monterey Bay National Marine Sanctuaries, the discovery of heavy oil that will require tankers, the expansion of the sea otter range, the establishment of local zoning restrictions regarding onshore support facilities, new air and water quality standards, new technologies, better information on hard bottom habitat communities, impacts of drill muds and cuttings, new information on underwater noise, and delegation of air quality standards to local officials. These changes require a reconsideration of California's prior consistency determinations.

5. OCSLA

The judicial interpretation of a statute must be vertically and horizontally coherent. Vertical coherence focuses on the text, intent, and purposes of the statute, as well as the implementing regulations. Horizontal coherence mandates that the court's interpretation be consistent with other statutes. The court must weave the statute into the general fabric of the law.[246] The two statutes that overlap in this case are the OCSLA and CZMA.

The OCSLA was enacted in 1953 to establish federal jurisdiction over the OCS.[247] The Secretary of Interior was delegated broad statutory authority to develop OCS energy resources.[248] A closed administrative process developed between Interior and the petroleum industry, which ended with emergence of the envi-

245. *See* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. at 77,143.

246. *See* WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 423-24 (1995); HART & SACKS, *supra* note 183, at 1377.

247. *See* 43 U.S.C. §§ 1331-56 (2004); *see also* Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953).

248. The OCSLA has been described as "essentially a carte blanche delegation of authority to the Secretary of Interior." H.R. REP. NO. 95-590, at 54 (1977).

ronmental movement in the 1970s.[249] The Santa Barbara oil spill in 1969 legitimized the concerns of environmental groups and focused national attention on OCS development.[250] The Santa Barbara oil spill also generated litigation by petroleum companies that questioned the Secretary's authority to suspend and cancel OCS leases.[251] Congress responded by enacting statutes that require Interior to consider environmental factors in the OCS decision-making process, such as the NEPA, CZMA, Marine Sanctuaries Act,[252] and Endangered Species Act.[253] At the same time, the courts were sympathetic to public law litigation,[254] which focuses on policy implementation. The courts were aware of agency capture and sought to open up the administrative process to diverse interests.[255] Numerous suits brought by state and local governments and environmental groups pursuant to environmental statutes demonstrated problems with the OCSLA.[256]

After a long struggle, major amendments to the OCSLA were enacted in 1978.[257] The OCS process is divided into four distinct stages: 1) the five-year OCS leasing program,[258] 2) the lease sale,[259] 3) exploration,[260] and 4) development and production.[261] Coastal state and local governments, as well as groups, can par-

249. *See* James S. Bowman, *The Environmental Movement: An Assessment of Ecological Politics*, 5 ENVTL. AFF. 649, 650, 652 (1976).

250. *See id.*; G. Kevin Jones, *Understanding the Offshore Oil and Gas Controversy*, 17 GONZ. L. REV. 221, 243 n. 94 (1982).

251. *See* Pauley Petroleum, Inc. v. United States, 591 F.2d 1308 (Cl. Ct. 1979); Sun Oil Co. v. United States, 572 F.2d 786 (Cl. Ct. 1978); Union Oil v. Morton, 512 F.2d 743 (9th Cir. 1975); Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973); Gulf Oil Corp.v. Morton, 345 F. Supp. 685 (C.D. Cal. 1972). See also, Western Oil and Gas Assoc. v. Andrus, 12 ERC 1129 (C.D. Cal. 1978).

252. 16 U.S.C. § 1431 et seq. (2004).

253. *Id.* § 1536.

254. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

255. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

256. *See* County of Suffolk v. Secretary of Interior, 562 F.2d 1368 (2d Cir. 1976); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975); Natural Res. Def. Council v. Morton, 458 F.2d 827 (D.C.Cir. 1972); California ex rel. Younger v. Morton, 404 F. Supp. 26 (C.D.Cal. 1975); Alaska v. Kleppe, 9 ERC 497 (D.D.C. 1976).

257. *See* John M. Murphy & Martin H. Belsky, *OCS Development: A New Law and a New Beginning*, 7 COASTAL ZONE MGMT. J. 297 (1980).

258. *See* 43 U.S.C. § 1344 (2004).

259. *See id.* § 1345.

260. *See id.* § 1340.

261. *See id.* § 1351.

ticipate in the process and challenge Interior's decisions in the courts.[262]

The CZMA and OCSLA are complementary statutes. The OCSLA is concerned primarily with OCS development, while the CZMA focuses on environmental protection.[263] NOAA reviewed the relationship between the OCSLA and CZMA in 1984 and concluded that the consistency provisions were working well.[264] Recently, the Department of Commerce pointed out that the states have concurred with 93% of the OCS consistency determinations.[265]

There was one major controversy regarding OCS lease sales which became the subject of litigation. In *California v. Watt*, the federal district court held that the application of section 307(c)(1) to OCS lease sales does not interfere with OCSLA.[266] Even though the CZMA and OCSLA have different concerns, their mandates are not incompatible.[267] Both statutes simply present the Secretary of Interior with the difficult task of balancing energy development and environmental protection.[268]

The Ninth Circuit concurred,[269] but the Supreme Court reversed.[270] The Court held that prior to the enactment of OCSLA Amendments, it could be argued that an OCS lease sale triggered section 307(c)(3) because the lease sale presumed federal approval of subsequent exploration and development/production. The OCSLA did not specify the consequences of sale. The 1978 OCSLA Amendments specifically separate the lease sale from subsequent steps. Since lease sale only entitles the lessee to priority in submission of subsequent plans, there are no direct effects on the coastal zone because no activity is authorized that will have a physical impact on the coastal zone. If subsequent plans are rejected, no further development will occur.[271]

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262. *See id.* § 1349.

263. *See* Massachusetts v. Andrus, 594 F.2d 872, 880 (1st Cir. 1979).

264. NOAA concluded that the states concurred with approximately 93-95% of the approximately 400-500 activities reviewed by the federal government pursuant to section 307(c)(1) and (2) during fiscal 1983. *See* Tim Eichenberg & Jack Archer, *supra* note 51.

265. *See* Procedural Changes to the Federal Consistency Process, 67 Fed. Reg. 44,407, 44,408 (July 2, 2002) (to be codified at 15 CFR Part 930).

266. *See* California v. Watt, 520 F. Supp. 1359, 1374-76 (C.D. Cal. 1981).

267. *See id.* at 1375.

268. *See id.* at 1377.

269. California v. Watt, 683 F.2d 1253, 1260 (9th Cir. 1982).

270. Secretary of Interior v. California, 464 U.S. 312, 320 (1984).

271. *See id.* at 334-341.

The Court understated the significance of lease sale, which assumes subsequent development and establishes the parameters of development by identifying the tracts and stipulations. It is the only time the multistage process and cumulative effects of offshore oil and gas development on state coastal resources can be considered. The Court ignored the direct effects of the lease sale on the coastal zone that were identified by the DOJ,[272] the district court,[273] and the Ninth Circuit.[274] Furthermore, the Court's decision was contrary to the statutory purposes.[275]

In 1990, Congress reversed the Supreme Court's erroneous decision and held that OCS lease sales are subject to consistency review.[276] Congress ended the geographic limitation of federal activities subject to consistency review pursuant to section 307(c)(1). Congress mandated that all federal activities "whether inside or outside of the coastal zone" that set in motion a series of events affecting land and water uses or natural resources in coastal zone are subject to consistency review.[277]

The OCSLA establishes an orderly process for OCS energy development. The California OCS lease suspensions are analogous to a lease sale and pose direct and consequential effects on the coastal zone. Precluding the suspensions from state consistency review would be contrary to the text of the OCSLA, which

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272. DOJ Opinion, *supra* note 18 at 10-12.

273. The district court held that the FNOS contained ten stipulations, specifying actions permitted or prohibited by lessees affecting the coastal zone. The SID and EIS listed multiple effects of the sale on the coastal zone, including "impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreation and sportfishing, navigation, cultural resources, and socioeconomic." 520 F. Supp. at 1380-82.

274. 683 F.2d at 1260.

275. The purposes of the OCSLA are to

> (4) provide States. . .impacted by OCS oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;
> (5) assure that states. . .have timely access to information regarding activities on the OCS, and opportunity to review and comment on decisions relating to such activities in order to anticipate, ameliorate, and plan for the impacts of such activities;
> (6) assure that States. . .directly affected by exploration, development, and production. . .of oil and natural gas are provided an opportunity to participate in the policy and planning decisions relating to management of the resources of the OCS;
> (7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and recovery of other resources such as fish and shellfish. . .

H.R. REP. NO. 95-1474, at 4-5 (1978).

276. *See* H.R. CONF. REP. NO. 101-964, at 968-75 (1990).

277. *Id.*

states, "Nothing in this Act shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972."[278] Granted, California already approved several exploration plans and one development/production plan as being consistent with CCMP, but these approvals occurred a long time ago. Circumstances have since changed, so new consistency determinations are required.[279]

B. *Statutory Interpretation: NEPA*

The NEPA establishes a national commitment by the federal government to protect the environment. The purposes of NEPA are to

> encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[280]

This commitment is backed with action forcing requirements.[281] When a federal agency contemplates a major federal action that significantly affects the environment, the agency must prepare an environmental impact statement (EIS), which discusses the environmental impacts, any unavoidable adverse environmental effects, alternatives, the relationship between local short term uses and maintenance of long term productivity, and any irreversible commitment of resources.[282] The EIS ensures that the agency has considered the environmental factors in its decision-making process and informs the public and other political actors about the potential consequences of the federal activity.[283]

The NEPA mandate and role of the courts were articulated in *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy*

278. 43 U.S.C. § 1866(a). The House report states, "Specifically, nothing is intended to alter procedures under the [the CZM] Act for consistency once a State has an approved Coastal Zone Management Plan." H.R. REP. NO. 95-590, at 153 (1977).

279. *See* 15 C.F.R. § 930.31(e) (2004); *see also id.* § 930.51(e) (2004).

280. 42 U.S.C. § 4321 (2004).

281. *See id.* at § 4332(C) (2004).

282. *See id.*

283. *See* Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

Commission.[284] The D.C. Circuit declared that NEPA "makes environmental protection a part of the mandate of every federal agency and department."[285] Federal agencies must use a "systematic, interdisciplinary approach to environmental planning and evaluation in decisionmaking which may have an impact on man's environment"[286] and also must "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."[287] NEPA requires a "finely tuned and systematic balancing analysis"[288] be included in the EIS, which covers "the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative measures which might alter the costbenefit equation."[289] The EIS is designed "to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action."[290] Further, the NEPA requirement that federal agencies comply "'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."[291] Judge Skelly Wright stated, "Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[292]

The courts view NEPA as a procedural, rather than substantive, statute.[293] NEPA is an environmental full disclosure law, which does not require a federal agency to choose the most environmentally benign course of action.[294] NEPA compliance is ex-

284. *Id.*
285. *Id.* at 1112.
286. *Id.* at 1113 (citation omitted).
287. *Id.* (citation omitted).
288. *Id.* (citation omitted).
289. *Id.* at 1114.
290. *Id.*
291. *Id.* (citing 42 USC § 4332).
292. *Id.* at 1111.
293. *See, e.g.*, Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 233, 227-28 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978).
294. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). The Court stated

The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "hard look" at environmental consequences, and that provide for broad dissemination of relevant

amined under the Administrative Procedure Act to determine if the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."[295] Furthermore, the agency's decision is entitled to a "presumption of regularity. But that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review."[296]

Interior did not discuss the environmental impacts of the California lease suspensions, alleging that they were categorically excluded from NEPA analysis.[297] Categorical exclusions are actions which require no further NEPA requirements because they do not affect the environment. The agency, however, must "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."[298] The Ninth Circuit correctly held that the categorical exclusion did not apply to the California OCS lease suspensions because California made

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environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.

Id. (citation omitted).

295. 5 U.S.C. § 706(2)(A), (D). The Court explained that

> To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted).

296. *Overton Park*, 401 U.S. at 415.

297. Interior categorically excludes lease suspensions on the grounds that they do not significantly impact the environment. *See* Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1175 (9th Cir. 2002). MMS has created exceptions to categorical exclusions for which the preparation of environmental documents for actions is required. These exceptions include actions that may:

> [h]ave adverse effects on such unique geographic characteristics as . . . ecologically significant or critical areas. . .; [h]ave highly controversial environmental effects. . .; [h]ave highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks. . .; [e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects. . .; [b]e directly related to other actions with individually insignificant but cumulatively significant environmental effects. . .; [h]ave adverse effects on species listed or proposed to be listed on the List of Endangered or Threatened Species, or have adverse effects on designated Critical Habitat for these species. . .; [t]hreaten to violate a Federal, State, local or tribal law or requirement imposed for the protection of the environment.

Revised Implementing Procedures, 49 Fed. Reg. 21,437, 21,439 (May 21, 1984).

298. 40 C.F.R. § 1508.4 (year). See generally DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 7.04[2] (2d ed. 1992).

a prima facie case that the OCS lease suspensions constituted an extraordinary circumstance and Interior never explained why the categorical exclusion was invoked.[299] The Ninth Circuit noted that if there is erroneous reliance on categorical exclusion, the question is not whether there is a significant impact, but whether the decision path is correct in light of NEPA requirements.[300]

Interior must explain why the California lease suspensions are categorically excluded from NEPA consideration. Interior cannot simply rely on its own conclusions, but must demonstrate why the suspensions qualify for categorical exclusion.[301] Formal findings are not necessary, but some explanation is required.[302] For example, in *Alaska Center for the Environment v. U.S. Forest Service*, the Ninth Circuit declared that the "agency must supply a convincing statement of reasons why potential effects are insignificant" when the agency invokes a categorical exclusion.[303] The courts generally defer to agency decisions regarding categorical exceptions,[304] but this is not always the case.[305]

The principles of administrative law also require the agency to show that it "considered the relevant factors and articulated a rational connection between the facts found and choices made" in the decision-making process.[306] There is no indication that Interior properly evaluated the facts and that its evaluation was re-

299. *See Cal. Coastal Comm'n*, 311 F.3d at 1175-78.

300. *See* West v. Dep't of Transp., 206 F.3d 920, 929 (9th Cir. 2000).

301. In *Jones v. Gordon*, the Ninth Circuit rejected an agency's reliance on a categorical exclusion and held that "an agency must provide a reasoned explanation for its decision." 792 F.2d 821, 828 (9th Cir. 1986). Federal district courts have also rejected agencies' attempts to hide behind categorical exclusions, rather than conduct the required environmental analysis. *See* Environmental Defense Center Brief at 25, California Coastal Commission v. Norton, 311 F.3d 1162 (9th Cir. 2002); Comm. for Idaho's High Desert v. Collinge, 148 F. Supp. 2d 1097, 1102-03 (D. Id. 2001); Alaska State Snowmobille Ass'n v. Babbitt, 79 F. Supp. 2d 1116, 1136-39 (D. Ak. 1999); Edmonds Inst. v. Babbitt, 42 F. Supp. 2d 1, 18 (D.D.C. 1999); Anacostia Watershed Soc'y v. Babbitt, 871 F. Supp. 475, 481 (D.D.C. 1994); Fund for the Animals v. Espy, 814 F. Supp. 142, 151 (D.D.C. 1993).

302. *See Alaska State Snowmobile Ass'n*, 79 F. Supp. 2d at 1137.

303. *See* Alaska Ctr. for Env't v. U.S. Forest Service, 189 F.3d 851, 859 (9th Cir. 1999).

304. The Ninth Circuit stated that "an agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with terms used in the regulation." *Id.* at 857.

305. *See* West v. Dept. of Transp., 206 F.3d 920, 931 (9th Cir. 2000); *Comm. for Idaho's High Desert*, 148 F. Supp. 2d at 1103.

306. Natural Res. Def. Council v. Dept. of Interior, 113 F.3d 1121, 112 (9th Cir. 1997); *see also* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989).

lated to its decision. Interior failed to take a hard look at the environmental consequences of the suspensions.[307]

Interior relied on *Bicycle Trails v. Babbitt*[308] to support its reliance on the categorical exclusion.[309] The National Park Service (NPS) determined that closing certain areas off from bikes was categorically exempt from NEPA. The Ninth Circuit rejected Interior's reliance on *Bicycle Trails* because the NPS analyzed the facts, applied the law to the facts in the case, and found no significant environmental impacts. Interior failed to conduct a similar analysis in this case.[310]

The MMS approved the suspensions, which continued leases off the coast of California without conducting the necessary environmental review. The suspensions committed Interior and the lessees to specific actions and milestones, which posed environmental consequences. Interior required lessees to meet a schedule with actions to obtain the suspensions. This included the drilling of a development well for the Rocky Point Unit by June 2001; the spudding of a delineation well for the Gato Canyon Unit by May 1, 2003; the spudding of a delineation well within the Sword Unit by August 1, 2003; the spudding of a delineation well within the Bonito Unit by May 1, 2000; beginning the three-dimensional seismic survey permit process and spudding an exploration well within the Cavern Point Unit by July 1, 2002; submitting reinterpreted seismic data and a revised exploration plan and spudding a delineation well for the Point Sal Unit by November 1, 2002; submitting reinterpreted seismic survey data and a revised exploration plan and spudding a delineation well for the Purisima Point Unit by February 1, 2003; and submitting a plan for reunitizing the Santa Maria Unit, Lion Rock Unit and Lease OCS P 0409 by July 2000.[311]

NEPA review must occur early enough to contribute to the decision-making process and not just serve as a post hoc rationali-

307. Earlier, the Ninth Circuit stated that "[t]he statement of reasons is crucial" for deciding whether the agency took a "hard look" at the potential environmental impact of a project. Steamboaters v. Federal Energy Reg. Comm'n, 759 F.2d 1382, 1393 (9th Cir. 1985); *see also* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

308. 82 F.3d 1445 (9th Cir. 1996).

309. *See* Cal. Coastal Comm'n v. Norton, 311 F.3d 1162, 1175 (9th Cir. 2002).

310. *See id.* at 1175-76.

311. Brief for California at 11-12, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002). Counties' Brief at 11, California Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

zation.[312] Environmental consideration must be timely, done in objective good faith, and must not be a subterfuge for decisions already taken. NEPA documents must be prepared before there is an irreversible and irretrievable commitment of resources.[313] Federal agencies must "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values."[314]

The MMS postponed the required environmental analysis until after critical decisions were made. Interior required the lessees to submit a schedule of activities that would be performed during the suspension period. Interior knew the number of wells, their location, and method of drilling when the suspensions were granted. Drilling was the quid pro quo for the suspensions. If there were no suspensions, there would be no drilling. Nevertheless, Interior did not conduct any environmental analysis of the thirty-six suspensions. Interior promised that no action would occur until further environmental analysis. Interior's delay of the requisite environment analysis until later in the process meant the analysis would only serve as a post hoc rationalization to allow drilling. This contravenes NEPA, Council of Environmental Quality (CEQ) regulations, and the case law that require the environmental impacts to be evaluated prior to commitment of resources to ensure that environmental damage will not be overlooked or tolerated.[315]

The CEQ regulations permit categorical exclusions, but acknowledge extraordinary circumstances when normally excluded

312. The timing of NEPA analysis was the focus of *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000). The Makah Indian Tribe hunted the gray whale until it became endangered due to commercial whaling. After the gray whale was removed from the endangered species list, the Makah wanted to resume the hunt. The Makah and U.S. government, acting through NOAA, entered an agreement to seek approval by the International Whaling Commission (IWC) to recommence whaling. One year later, NOAA issued a draft Environmental Assessment (EA). The final EA was issued one day before the IWC met to consider the request. The Ninth Circuit held that NOAA did not properly comply with NEPA. NOAA did not consider the environmental impacts of the proposed action until long after it agreed to support the Makah whaling request. When the EA was finished, "the die had already been cast" and "the point of commitment to this proposal clearly had come and gone." *Id.* at 1144 (citation omitted); *see also* Save the Yaak Comm. v. Block, 840 F.2d 714, 718-19 (9th Cir. 1988).

313. *See* 40 C.F.R. § 1502.5 (2004); *Metcalf*, 214 F.3d at 1142.

314. Andrus v. Sierra Club, 442 U.S. 347, 351 (1979).

315. *See* Idaho Sporting Cong. v. Alexander, 222 F.3d 562, 567 (9th Cir. 2000); *Save the Yaak Comm.*, 840 F.2d at 718.

activities have significant environmental effects.[316] The CEQ regulations declare that the context and intensity of the action are crucial when determining whether the action significantly affects the environment.[317] The high energy seismic surveys, delineation wells, and physical activities resulting from the suspensions pose uncertain and potentially significant environmental effects that constitute extraordinary circumstances.[318]

The MMS adopted a NEPA policy document, "Policy and Guidelines for Categorical Exclusion Reviews (CER) and Environmental Assessments (EA)" that requires an explanation for the reliance on categorical exclusions. This ensures that the action does not constitute an extraordinary circumstance that requires the preparation of an EA or EIS. OCS lease suspensions are listed as exempted activities. The CER establishes a four-step process. First, the proposal is reviewed for significant impacts on the environment. Second, the Regional Supervisor determines the effects that will occur if the proposal goes forward. Third, the effects must not fall within any of the exceptions. Finally, mitigation measures may be proposed to minimize the environmental impacts.[319] If the MMS followed the CER procedures, it would have found that the OCS lease suspensions fell within several of the extraordinary circumstance exceptions to the categorical exclusions.

There are several extraordinary circumstances which preclude reliance on the categorical exclusions and require further environmental analysis.[320] First, activities that "[h]ave adverse effects on such unique geographic characteristics as . . . ecologically significant or critical areas" cannot be categorically excluded.[321] The

316. *See* 40 C.F.R. § 1508.4 (2004).

317. These factors include the degree to which effects on quality of human environment are likely to be highly controversial; the degree to which possible effects on human environment are highly uncertain or involve unique or unknown risks; the degree to which an action may establish a precedent; whether an action is related to other actions which are individually insignificant but cumulatively significant; and the degree to which the action may adversely affect an endangered or threatened species or its habitat. *See* 40 C.F.R. § 1508.27 (b)(4)-(7), (9) (2004).

318. Counties' Brief at 13, California Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002). *See also* High Sierra Hikers' Ass'n v. Powell, 150 F. Supp. 2d 1023, 1043 (N.D. Cal. 2001).

319. Counties' Brief at 13-14, California Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002). *See also* Implementing Procedures for Minerals Management Service, 51 Fed. Reg. 1855, 1856-57 (Jan. 15, 1986).

320. *See* Revised Implementing Procedures, 49 Fed. Reg. 21,437, 21,439 (May 21, 1984).

321. *Id.*

OCS lease suspensions and subsequent activities pose a threat to two marine sanctuaries off the coast of California: the Monterey Bay and Channel Islands National Marine Sanctuaries, which are ecologically significant and critical areas.[322]

The Marine Protection, Research, and Sanctuaries Act of 1972 authorizes the Secretary of Commerce to designate and manage marine sanctuaries, which are areas of special national significance due to their conservation, recreational, ecological, historical, research, educational, or aesthetic qualities.[323] The program got off to a slow start during the Nixon and Ford administrations; only two marine sanctuaries were established. After President Carter identified the program as an environmental priority, numerous nominations came forward. In 1981, two marine sanctuaries were designated off the California coast: the Channel Islands[324] and Gulf of Farallones Marine Sanctuaries.[325]

These marine sanctuaries support the world's largest and most diverse pinniped community. They are the breeding grounds for nine species of marine birds, the home of 160 species of marine birds, and a major stopping ground for migratory birds. Endangered species, such as the Guadalupe fur seal and California least

322. *See* Environmental Defense Center Brief at 27-28, California Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002). The federal district court rejected Interior's reliance on categorical exclusion for CRADA. Interior alleged that CRADA was "day-to-day research and resource management" and was not a "major federal action." The court declared that Interior acknowledged "the ecological significance of Yellowstone's thermal features." Edmonds Inst. v. Babbitt, 42 F. Supp. 2d 1, 18-19 (D.D.C. 1999)

323. *See* 6 U.S.C. §§ 1431-1434 (2004).

324. The Channel Islands Marine Sanctuary, which borders the Santa Barbara Channel, includes the waters around Anacapa, Santa Cruz, Santa Rosa, San Miguel, and Santa Barbara Islands, extending from the mean high tide to six nautical miles offshore around each of the islands. *See* Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 ECOLOGY L.Q. 71, 108 (2002).

325. *See* Channel Islands and Point Reyes-Farallon Islands National Marine Sanctuaries, 47 Fed. Reg. 18,588 (Apr. 30, 1982) (to be codified at 15 C.F.R. pts. 935, 936); Channel Islands and Point Reyes-Farallon Islands National Marine Sanctuaries, 46 Fed. Reg. 23,924 (Apr. 29, 1981) (to be codified at 15 C.F.R. pts. 935, 936); Channel Islands and Point Reyes-Farallon Islands National Marine Sanctuaries, 46 Fed. Reg. 19,227 (Mar. 30, 1981) (to be codified at 15 C.F.R. pts. 935, 936). In 1980, the Western Oil and Gas Association filed suit, challenging the designation of the Channel Islands Sanctuary for prohibiting petroleum development. *See* W. Oil and Gas Ass'n v. Byrne, No. CV-2 5034 AHS (C.D. Cal. April 19, 1985); *see also* Porter Hoagland, *Federal Ocean Management: Interagency Conflict and the Need for a Balanced Approach to Resource Management*, 3 VA. J. NAT. RES. L. 1, 11, 15-16, 27 (1983); H.R. REP. NO. 100-739, pt. 1, at 15 (1988); Robert W. Knecht et al., *National Ocean Policy: A Window of Opportunity*, 19 OCEAN DEV. & INT. L. 113, 126 (1988).

tern, depend on these relatively uninhabited and untouched areas of the coast to recover from the negative impacts of human harassment and competition. Endangered whale species live in or migrate through the channel area.[326] More than 200 fish species can be found in these waters, which contain 40% of the kelp in southern California.[327] The Channel Islands Sanctuary surrounds the Channel Islands National Park which has been designated as a United Nations World Biosphere Reserve.[328]

After the Marine Sanctuaries Act was reauthorized in 1988, Congress established a timetable for the creation of several new marine sanctuaries, including Monterey Bay.[329] Facing the 1992 presidential elections, President Bush designated the Monterey Bay National Marine Sanctuary (MBNMS), which is largest marine sanctuary extending from Marin County to San Louis Obisbo County.[330] The MBMNS encompasses a shoreline length of 276 miles and covers an area of 5320 square miles, extending an average distance of thirty miles from shore.[331] The Sanctuary is next to the Gulf of Farallones National Marine Sanctuary, which is adjacent to the Cordell Bank National Marine Sanctuary.[332] Oil and gas development is prohibited in all of the marine sanctuaries off California.

The MBNMS is a haven for sea otters, seals, shorebirds, squid, sardines and other species, including many that are threatened or endangered. The seafloor holds a wealth of historical and cultural treasures. Approximately 1276 vessels rest on bottom along the central and northern coast. There are kelp forests, where commercial fish thrive. At the heart of the sanctuary is Monterey

326. *See* Elizabeth R. Kaplan, *California: Threatening the Golden Shore*, in THE POLITICS OF OFFSHORE OIL 9-10 (Joan Goldstein ed., 1982); Brax, *supra* note 324, at 108-09.

327. *See* Brax, *supra* note 324, at 108.

328. *See* Brief of Amicus Curiae Defenders of Wildlife at 12, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

329. Monterey Bay was considered as an active candidate for sanctuary designation on August 10, 1979. On December 14, 1983, NOAA removed Monterey Bay as an active site. On November 7, 1988, Congress instructed NOAA to designate the Monterey Bay National Marine Sanctuary. *See* Monterey Bay National Marine Sanctuary Regulations, 57 Fed. Reg. 43,310 (Sept. 18, 1992) (to be codified at 15 C.F.R. pt. 944).

330. *See id.*

331. *See* Amicus Brief, Defenders of Wildlife at 10, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

332. *See* H.R. REP. NO. 100-739, pt. 1, at 26 (1988); Charles N. Ehler & Daniel J. Basta, *Integrated Management of Coastal Areas and Marine Sanctuaries: A New Paradigm*, 36 OCEANUS 6, 12 (1993).

Canyon, which is more than 10,000 feet deep at its seaward end. Each spring and summer, cold fertile waters nourish the MBNMS in a process called upwelling. These nutrient rich waters feed phytoplankton—tiny plants that are the basis for the wealthy web of marine life in the area.[333] Offshore energy development will threaten the MBNMS.[334]

The environmental impacts of exploration and development/production activities on the leases have not been evaluated for NEPA purposes since the last lease sale in 1984. Two of the lease sales occurred prior to the establishment of the Channel Islands National Marine Sanctuary[335] and all were prior to the creation of the MBNMS. The environmental impacts on these marine sanctuaries, which are ecologically significant areas, represent extraordinary circumstances that must be evaluated.

OCS energy development near the marine sanctuaries also violates the California Coastal Act, which calls for the protection of marine resources.[336] California protects areas and species of special biological or economic significance in order to sustain biological productivity and maintain healthy populations of species for long term commercial, recreational, scientific, and educational

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333. NOAA, NATIONAL MARINE SANCTUARY, MONTEREY BAY 9 (1992).

334. The Department of Commerce regulations recognize that the threats from oil and gas activities to Sanctuary resources and qualities warrant prohibition. Threats include not only catastrophic events such as oil spills associated with blowouts, rupture of pipelines or loading of tankers but also long-term chronic events such as discharge of drilling fluids, cuttings and air emissions. Monterey Bay National Marine Sanctuary Regulations, 57 Fed. Reg. at 43,311. The regulations also acknowledge the threat from oil and gas development outside the Sanctuary:

> The resources and qualities of the Monterey Bay area, particularly sea otters, sea birds, and pinnipeds that use the haul-out sites, kelp forests and rocks along the Monterey Bay coast, and the high water quality of the area, are especially vulnerable to oil and gas activities in the area. A prohibition on oil and gas activities within the Sanctuary boundary will provide partial protection from oil and gas activities for the resources and qualities within the boundary. Only partial protection would be provided due to the remaining threat from oil and gas activities outside of the Sanctuary boundary and from vessel traffic. . . .

Id. at 43,320.

335. The Channel Islands Sanctuary was created after the 1968 Cavern Point sale. Part of the Cavern Point unit is located within the Sanctuary. *See* Amicus Brief, Defenders of Wildlife at 12, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

336. The California Coastal Commission declared that "leasing within six nautical miles of existing or proposed marine sanctuaries or of marine resource areas indicated below, or within 12 miles of the range of the sea otter would not be consistent with the CCMP and would be contrary to the national interest." *Hearing on Offshore Leasing: Department of Interior Oversight Before House Comm. on Gov't Operations*, 97th Cong. 47-48 (1981) [hereinafter *Hearing on Offshore Leasing*].

purposes.[337] OCS energy exploration and development will adversely impact the Channel Islands and Monterey Bay National Marine Sanctuaries, which assure there are areas off California's coast that are used primarily for undisturbed and unthreatened feeding, resting, traveling and breeding of marine mammals and seabirds. Development should not occur where spills might threaten marine sanctuaries.[338]

There are also sensitive coastal resources in the vicinity of Santa Maria Basin that include rocky intertidal areas, seal haul-out areas, sea otter habitat, roosting areas and estuaries, high recreational use areas, and national natural landmarks. Oil spills, cleanup activities, and onshore facilities will have an adverse impact on these areas that must be considered.[339]

Second, activities that "have highly controversial environmental effects" cannot be categorically excluded.[340] Controversial effects are defined as the existence of "a substantial dispute . . . as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use."[341] In *Jones v. Gordon*, the Ninth Circuit rejected the NMFS reliance on categorical exclusions concerning the taking of 100 killer whales.[342] The court noted that a federal agency cannot rely on a categorical exclusion when the record reveals the "arguable existence of

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337. *Id.* The California Coastal Act states

> Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

California Coastal Act, CAL. PUB. RES. CODE § 30230 (Deering 2004).

338. *Hearing on Offshore Leasing*, *supra* note 336, at 47-48.

339. *Id.* at 49, 277, 555. The California Coastal Act declares that "[e]nvironmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." CAL. PUB. RES. CODE § 30240(a). Moreover, "[d]evelopment in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas." *Id.* § 30240(b).

340. *See* Revised Implementing Procedures, 49 Fed. Reg. 21,437, 21,439 (May 21, 1984).

341. Found. for N. Am. Wild Sheep v. Dep't of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982). The Second Circuit noted that the federal government's funding of moose hunting did not qualify as a categorical exclusion because of the "highly controversial environmental effects" of the financed activity. . . ." Fund for Animals v. Babbitt, 89 F.3d 128, 133 (2d Cir. 1996).

342. 792 F.2d 821, 823 (9th Cir. 1986).

public controversy based on potential environmental consequences."[343]

California has consistently opposed OCS development off its coast, arguing that the environmental and economic risks of development outweigh any of the potential benefits. The unacceptable risks of development include navigational risks from the increased number of platforms, exploratory rigs, and support vessel activity; the impact of drill mud, cuttings, and produced waters on water quality and bottom communities in the vicinity of drilling platform;[344] air quality impacts from existing development;[345] oil spills and the lack of effective methods for cleaning up those spills;[346] ecosystem degradation caused by additional oil and gas development;[347] and cumulative impacts on air quality, commercial fisheries, scenic quality, marine resources, vessel traffic safety, and land resources from development.[348]

Almost all of the lease sales off the coast of California have been controversial.[349] There was public opposition to lease sale P-4 in the Santa Barbara Channel in 1968. Santa Barbara County opposed leasing, which threatened the sixteen mile long, three mile wide state marine sanctuary along the Santa Barbara shore. In 1967, county officials asked Interior for a one year moratoria,

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343. *Id.* at 828 (citation omitted).

344. Drill mud lubricates drill bits and maintains downhole pressure. Drill cuttings are pieces of rock retrieved from the wells along with the mud. The average amount of drill mud and cuttings, which are discharged into the water, are 180,000 gallons per well. The drill mud and cuttings contain toxic metals, such as mercury, lead, and cadmium, which are found in high concentrations around well sites. Produced waters are brought up from the wells along with the mud and cuttings. Each platform generates millions of gallons of produced waters daily. Produced waters contain toxic materials, such as arsenic, benzene, lead, naphthalene, toluene, and zinc, as well as radioactive materials. *See Oversight Hearings on Domestic Natural Gas Supply and Demand: The Contribution of Public Lands and OCS Before House Res. Comm.*, 107th Cong. 47-48 (2001) (testimony of Lisa Speer, Natural Resources Defense Council) [hereinafter *Hearings on Domestic Natural Gas Supplies*].

345. Drilling an average exploration well produces fifty tons of NOx, thirteen tons of CO, six tons of SO2, and five tons of VOC. Each OCS platform generates more than fifty tons/year of NOx, eleven tons of CO, eight tons of SO2, and thirty-eight tons of VOC. *Id.*

346. There have been seventy-three incidents between 1980 and 1999 that have resulted in the spillage of three million gallons of oil from OCS operations. *Id.*

347. OCS pipelines in the coastal wetlands of the Gulf of Mexico have destroyed more coastal salt marsh than can be found from New Jersey to Maine. *Id.*

348. *See* CAL. RESOURCES AGENCY, *supra* note 80, at 5E-2 to 5E-3, 5E-12.

349. California consistently argued that "the size of the past lease offerings were too large, the locations were often too close to environmentally sensitive areas, the pace of the offerings were too rapid to adequately assess the impacts, and the lease sales were inappropriate in the absence of a national energy strategy." *Id.* at 5E-4.

fearing aesthetic problems from drilling rigs marring the ocean vista. Interior bowed to local concerns and announced no leasing would occur in the two mile buffer zone next to state sanctuary. The county requested further delays and other restrictions, but Interior proceeded to offer one-half million acres of channel lands in December.[350] The extent and timing of the Santa Barbara lease sale was motivated in large part by the fiscal needs of the federal government at the time.[351] A tract was leased in this sale where Union Oil's Platform A blew out, spilling 70,000 barrels of oil onto the beaches of Santa Barbara in 1969.[352] A federal ecological preserve was established in the region, which became the stimulus for the marine sanctuaries program.[353]

California opposed lease sale thirty-five. California brought suit challenging the Programmatic EIS for accelerated leasing announced by President Nixon in 1971 and 1973.[354] California asserted that an EIS had to be composed at every step in the leasing process; the Programmatic EIS should have been completed before moving ahead with lease sale thirty-five because it could affect the tracts to be offered; and the Final Programmatic EIS was inadequate because the regional costs and benefits of the program had not been discussed.[355] The federal court refused to grant an injunction halting the accelerated leasing schedule, declaring that it would not "involve itself into a political policy-making question" and "serve as critic of the EIS that is properly prepared."[356] Several days later, California brought suit challenging lease sale thirty-five on various statutory grounds;[357] the suit was eventually dismissed.[358] Lease sale thirty-five occurred on schedule and the federal government received $417 million in bonus bids.[359]

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350. *See* Kaplan, *supra* note 326, at 4-5.

351. *See* Robert B. Krueger, *An Evaluation of the Provisions and Policies of the OCSLA*, 10 NAT. RES. J. 763, 767 (1970).

352. *See* FITZGERALD, *supra* note 2 at 57-58; Van de Kamp & Saurenman, *supra* note 58, at 73.

353. *See* Hoagland, *supra* note 325, at 13.

354. *See* JOHN C. WHITTAKER, STRIKING A BALANCE: ENVIRONMENTAL AND NATURAL RESOURCE POLICY IN THE NIXON-FORD YEARS, 269-81 (1976).

355. *See* John E. McDermott, *Expanded Offshore Leasing and the Mandates of NEPA*, 10 NAT. RES. LAW. 531, 546 (1977).

356. California *ex rel.* Younger v. Morton, 404 F. Supp. 26, 32 (C.D. Cal. 1975).

357. *See* California v. Kleppe, 431 F. Supp. 1344 (C.D. Cal. 1977); S. Cal. Ass'n of Gov'ts v. Kleppe, 413 F. Supp. 563 (D.D.C. 1976).

358. *See* California v. Kleppe, 604 F.2d 1187 (9th Cir. 1979).

359. The General Accounting Office (GAO) later determined that this sum did not represent the fair market value for these leases. *See* COMPTROLLER GENERAL OF

Lease sale forty-eight, the second southern sale following the Santa Barbara spill, was scheduled to occur in May 1977.[360] San Diego County brought suit seeking to halt the sale on NEPA grounds.[361] In August 1977, the federal district court dismissed the suit. Secretary Andrus, recognizing strong public opposition, postponed the sale for fifteen months.[362] Negotiations continued between Interior and California regarding the sale, particularly state consistency review.[363] Even though Interior met most of California's demands regarding tract deletions and stipulations, California requested an advisory opinion from the Attorney General and mediation through the Secretary of Commerce.[364] The Justice Department concluded that a lease sale was subject to state consistency review, if the sale did in fact directly affect the coastal zone.[365] The Secretary of Commerce agreed with the state's position, but Interior still refused to conduct a consistency determination.[366] The controversy over lease sale forty-eight, which occurred in 1979, was the precursor to the lease sale fifty-three litigation, which has been extensively discussed.

Lease sale sixty-eight involved another conflict over consistency review.[367] Governor Brown of California requested the deletion of thirty-one tracts in four areas: eight tracts in Santa Barbara Channel Ecological Preserve, twelve tracts adjacent to the mouth at the Santa Monica Bay, two tracts in the Coast Guard Precautionary Area at entrance to the Port of Los Angeles and Long Beach, and nine tracts offshore Orange County.[368] The Commission requested the deletion of twenty-four tracts in the same four areas: eight tracts in Santa Barbara Channel Ecological Preserve, ten tracts adjacent to Santa Monica Bay, two

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THE UNITED STATES, No. EMD-77-19, OUTER CONTINENTAL SHELF SALE #35—PROBLEMS SELECTING AND EVALUATING LAND TO LEASE (1977).

360. Comptroller General of the United States, No. EMD-81-59, Issues in Leasing Offshore Lands for Oil and Gas Development, (1981), at 39-44, 76.

361. Id.

362. *See* Linsley, *supra* note 16, at 431.

363. *See id.* at 456-74.

364. *See* DOJ Opinion, *supra* note 18, at 2, 10-14; *see also* Van de Kamp & Saurenman, *supra* note 58, at 85-86.

365. *See* DOJ Opinion, *supra* note 18, at 2, 10-14.

366. *See* Van de Kamp & Saurenman, *supra* note 58, at 85-86 n.63.

367. Interior deferred the leasing of twenty-eight tracts which surrounded the Channel Islands in lease sale forty-eight, but reoffered many of them in lease sale sixty-eight. Interior also decided to lease tracts that served as a buffer to the Santa Barbara Ecological Preserve in lease sale sixty-eight. *See* Hoagland, *supra* note 325, at 10-11.

368. *See* California v. Watt, 17 ERC 1711, 1714 (C.D. Cal. 1982).

tracts in precautionary area at entrance to Ports of Los Angeles and Long Beach, and four tracts off Orange County.[369] Interior rejected most of the recommendations, but eight tracts in the Santa Barbara Ecological Preserve were not offered.[370] The court halted the sale on the grounds that Interior violated consistency requirements of the CZMA and failed to adequately consider the governor's comments pursuant to section 19 of the OCSLA.[371] Lease sale seventy-three off central California was also delayed because the consistency determination was inadequate.[372] Lease sale eighty in 1984 was the only recent noncontroversial sale off the coast of California.

Third, activities that "[h]ave highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks" cannot be categorically excluded.[373] The environmental impacts have not been evaluated since the lease sales. Much of the prior analysis is outdated.[374] The lease suspensions will allow exploration and development, which pose dangers from seismic testing, the risk of spills, threats to marine sanctuaries, and harm to air and water quality.[375]

The impacts from seismic testing, which would be done during the suspensions, are controversial and uncertain. Seismic testing involves air guns that emit shock waves directed at the seabed to provide information about subsurface formations and the likely location of oil.[376] The shock waves can destroy fish air bladders, harm nearby larvae, and disrupt migratory patterns of fish species.[377] Studies show fish catch rates are reduced during and after seismic testing.[378] Fishermen complain about the loss of fishing time while tests are underway.[379] Seismic tests pose a potential threat to whales, "which depend on acoustics for feeding, com-

369. *See id.*

370. *See id.*

371. *See id.* at 1714-15. *See also* Berger & Saurenman, *supra* note 24, at 61-66; Harvey, *supra* note 24, at 501. *Appeals Court Refuses To Stay Injunction; Watt May Not Receive Bids On 24 OCS Tracts*, 13 ENVT. REP. (BNA) 200 (June 18, 1982).

372. *See* Clark v. California, 464 U.S. 1304, 1305 (1983).

373. Notice of Revised Instructions, 49 Fed. Reg. 21,437, 21,439 (May 11, 1984). *See also* Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986).

374. *See* Greenpeace v. National Marine Fisheries, 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

375. Living Oceans Society, *Seismic Testing*, *at* http://www.livingoceans.org/oil-seismic.htm (last visited Feb. 29, 2004).

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

munication, reproduction and their complex social interactions."[380] Seismic testing also affects their migratory patterns.[381]

The impact of oil spills on the region is unknown. An oil spill will cause damage to beaches, recreational fishing grounds, harbors, marinas, rocky intertidal zones and diving spots.[382] This will endanger tourism in the region and result in substantial economic losses.[383] Regarding lease sale fifty-three, 3.29 large oil spills of 1,000 barrels, as well as 200 to 290 spills of less than 1000 barrels, were predicted throughout the life of oil development in the Santa Maria Basin. There is no effective oil spill containment to deal with conditions in the Santa Maria Basin.[384] Local meteorological conditions and current patterns will bring an oil spill onshore, impacting critical habitats of threatened species and sensitive coastal areas and resources. There is a high concentration of such sensitive areas located at the northern and southern ends of Santa Maria Basin.[385]

There is a danger of visual intrusion if development occurs near tourist areas. Platforms as far as seventeen miles offshore can be seen from shore and will detract from the visual quality. There will be additional onshore visual impediments from onshore support facilities, equipment storage, heliports, communication and naval equipment, vehicular traffic, and construction activities.[386]

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380. *Id.*

381. *See id.*

382. *See Hearing on Offshore Leasing*, *supra* note 336, at 256, 294, 352. In 1992, tourism and recreation along the California coast generated $9.9 billion. This included $6.6 billion from direct spending and $3.3 billion in indirect spending. *See* CAL. RESOURCES AGENCY, *supra* note 80, at 2-2 (discussing CALIFORNIA RESEARCH BUREAU, ECONOMIC ASSESSMENT OF OCEAN-DEPENDENT ACTIVITIES (1993)).

383. In 1998, tourism generated $60 billion in California. In 1997, visitors spent $394 million in San Luis Obispo County. This would be jeopardized by offshore energy development. *See* San Luis Obispo Chamber of Commerce, *The Costs of Oil and Gas Development off the Coast of San Luis Obispo County*, www.slochamber.org/business/COOGER.html (1988). *See also Hearing on Offshore Leasing*, *supra* note 336, at 294, 553.

384. *Hearing on Offshore Leasing*, *supra* note 336, at 245, 298.

385. *Hearing on Offshore Leasing*, *supra* note 336, at 49, 245, 256

386. *Hearing on Offshore Leasing*, *supra* note 336, at 50, 259-60. The California Coastal Act states

> The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan pre-

There is a lack of information regarding the complexity of geological hazards existing within the area.[387] There is a need for more geophysical surveys and data on distribution of microearthquake epicenters along and near major faulting areas. Additional information is needed on the physical properties of sediments in slump and landslide areas.[388]

The impact of OCS energy development on commercial fishing, which is important to the local economies, is not known.[389] San Luis Obispo County was particularly worried about the loss of fishing grounds due to pipelines and debris; the interference with trawling activities by platform and pipeline locations; the impact of drill muds, cuttings, and formation waters on marine habitat; the loss in fish habitat; and the increase in offshore vessel traffic.[390]

The impacts on local economies resulting from land-based support activities are not known. Such impacts include traffic problems, harbor overcrowding, air pollution, housing shortages, and displacement of current coastal businesses.[391]

The general lack of information regarding development in the region was recognized by the National Research Council (NRC) in 1989. The NRC determined that the ecological information is sufficient for leasing, but physical, oceanographic and socioeconomic aspects of scientific and technical information available for the southern California OCS area are inadequate or not sufficiently reliable for a leasing decision. Furthermore, additional in-

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pared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

California Coastal Act, CAL. PUB. RES. CODE § 30251 (Deering 2004). *See generally* CAL. RESOURCES AGENCY, *supra* note 80, at 5E-6 to 5E-9.

387. *Hearing on Offshore Leasing*, *supra* note 336, at 245, 557.

388. *Hearing on Offshore Leasing*, *supra* note 336, at 50, 260-61, 283-86. The California Coastal Act provides that "[n]ew development shall . . . [m]inimize risks to life and property in areas of high geologic, flood, and fire hazard." CAL. PUB. RES. CODE § 30253(1).

389. In 1992, California's commercial fishermen landed approximately 294 million pounds of fish and invertebrates worth over $131 million. *See* CAL. RESOURCES AGENCY, CALIFORNIA'S OCEAN RESOURCES: AN AGENDA FOR THE FUTURE 5E-3 to 5E-4 (1997).

390. *See Hearing on Offshore Leasing*, *supra* note 336, at 246, 287-89, 293, 302, 353, 556-57. *See also* CAL. RESOURCES AGENCY, CALIFORNIA'S OCEAN RESOURCES: AN AGENDA FOR THE FUTURE 5E-3 to 5E-4 (1997).

391. *See Hearing on Offshore Leasing*, *supra* note 336, at 353. An ongoing study researches impacts of development from currently leased oil and gas tracts in the coast off San Luis Obispo, Santa Barbara, and Ventura Counties. *See* MINERALS MGMT. SERV., U.S. DEP'T OF INTERIOR, *supra* note 85. For a criticism of the study, see San Luis Obispo Chamber of Commerce, *supra* note 383.

formation in all three scientific disciplines will be needed for development/production decisions.[392]

California asserted that the cumulative impact of oil and gas development on existing tracts "has never been thoroughly understood or evaluated."[393] Such analysis is difficult because it requires an evaluation of existing, approved, proposed project development and determining how these developments would together affect a variety of resources. Questions requiring answers include the potential impact on "California's tourist industry, which contributed $9.9 billion to the state's economy in 1992, or the commercial fishing and mariculture industry, which contributed 17,000 jobs and $554 million to the state's economy in 1992." Cumulative impact analysis will also necessitate "a through inventory and comprehensive evaluation of air quality degradation, drilling muds toxicity, vessel traffic hazards, oil spill probability, visual quality disruption, and impacts to local communities . . . where onshore support facilities . . . would potentially have to be developed."[394]

Fourth, activities that "establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects" cannot be categorically excluded.[395] The MMS only grants suspensions when "there is a firm commitment to diligently develop the discovered resources."[396] This commitment includes a schedule leading to production in a timely and expeditious manner with measurable milestones, including the demonstration of physical activities on the lease. The suspension approvals required the lessees to meet certain milestones, including spudding wells and other activities. The suspensions, which will lead to subsequent exploration and development/production, constitute a precedent for future action.[397]

Fifth, activities that are "directly related to other actions with individually insignificant but cumulatively significant environ-

392. *See* NATIONAL RESEARCH COUNCIL, *supra* note 62, at 4.

393. CAL. RESOURCES AGENCY, *supra* note 80, at 5E-5.

394. *Id.*

395. *See* Revised Implementing Procedures, 49 Fed. Reg. 21,437, 21,439 (May 21, 1984); *see also* Edmonds Inst. v. Babbitt, 42 F. Supp. 2d 1, 19 (D.D.C. 1999).

396. Revised Implementing Procedures, 49 Fed. Reg. 21,437, 21,439 (May 21, 1984).

397. *See* Alaska State Snowmobile Ass'n v. Babbitt, 79 F. Supp. 2d 1116, 1136-39 (D. Ak. 1999).

mental effects" cannot be categorically excluded.[398] The suspension of the thirty-six leases has a cumulative impact. Each request is related to the others. The area is already experiencing OCS development, so activities on these leases will have significant environmental impacts in the area, many of which are unknown.

Sixth, activities that have an adverse effect on endangered or threatened species or their habitat cannot be categorically excluded.[399] Exploration and development activities on the thirty-six leases will pose a risk to the threatened sea otter.[400] The population of sea otters in California has risen from less than 100 individuals to over 2300.[401] The current range of the sea otter, which has expanded since the lease sales, is 200 miles off the coast between Soquel Point in Santa Cruz County and Pismo Beach in San Luis Obispo. The U.S. Fish and Wildlife Service, the California Department of Fish and Game, the CCC, and Governor Brown expressed reservations about energy development in the region because of the risk to the sea otter prior to lease sale fifty-three.[402] There is the danger that an oil spill will adversely impact the threatened sea otter by contaminating the shellfish, its major food source.[403] Oil on the otter's fur can cause hypothermia and is particularly dangerous to the pups.[404]

Between 1987 and 1990, the FWS released 140 southern sea otters at San Nicholas Island and established a management (no otter) zone south of Point Conception. The purpose of the translocation program was to preclude any single catastrophe, such as an oil spill, from adversely affecting a substantial portion of the southern sea otter population.[405] Since 1996, there has been a decline in the sea otter population. During this time, the sea otter has expanded its southern range into OCS oil and gas development areas off Santa Barbara and San Louis Obispo Counties.

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398. Revised Implementing Procedures, 49 Fed. Reg. at 21439.

399. *Id.*

400. *See* Endangered and Threatened Wildlife and Plants, 42 Fed. Reg. 2968 (Jan. 14, 1977). *See also Hearing on Offshore Leasing*, *supra* note 336, at 245, 273-76, 553-54.

401. See CAL. RESOURCES AGENCY, *supra* note 80, at 4-7.

402. *See Hearing on Offshore Leasing*, *supra* note 336, at 276-77, 311. Fitzgerald, Secretary of Interior v. California, *supra* note 32, at 432-33.

403. The NFWS predicted one or more spills of 1000 barrels or more will occur during the lifetime of the project. *See Hearing on Offshore Leasing*, *supra* note 336, at 273-74.

404. *See Hearing on Offshore Leasing*, *supra* note 336, at 275.

405. *See* Notice of Policy Regarding Capture and Removal of Southern Sea Otters, 66 Fed. Reg. 6649 (Jan. 22, 2001).

The FWS Biological Opinion in 1990 regarding the containment of the sea otters in the management zone concluded that the "reversal of the southern sea otter population decline and expansion of the southern sea otter's population distribution are essential to its survival and recovery."[406] The restriction of the sea otter to the area north of Point Conception will jeopardize its existence. Activities on the suspended leases will occur in the area necessary for sea otter survival and recovery.[407]

Gray whales migrate through the region close to shore.[408] Oil spills, vessel traffic, and noise generated by exploration activities will adversely impact the whales. The potential effects of oil pollution include the fouling of feeding mechanisms, disruption of respiratory functions, reduction of food supplies through contamination of habitat, irritation of skin and eyes, and modification of migratory routes. The NMFS noted that additional time was necessary to study the cumulative impacts of development on the whales.[409]

OCS energy development will also pose a threat to the birds in the area of San Luis Obispo and northern Santa Barbara, which depend on sandy beaches, rocky intertidal zones, and estuaries for roosting , nesting, and feeding. Important species include cormorants, pigeon guillemots, snowy plovers, least terns, and migratory brown pelicans. Oil arriving onshore will have a particularly negative impact during breeding time. Many of these endangered birds are protected by a treaty with Mexico.[410]

Seventh, activity that "[t]hreaten[s] to violate a Federal, State, local or tribal law or requirement imposed for the protection of the environment" cannot be categorically excluded.[411] Exploration and development activities on the thirty-six OCS leases will violate the pipeline requirement of the California Coastal Act. Only heavy oil has been discovered in the area. Given its low profitability, the heavy oil will have to be brought on shore by

406. *Id.* at 6651.

407. *See* Amicus Brief, Defenders of Wildlife at 13-15, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

408. Other cetaceans known to occur in the areas include several species of whale (humpback, sperm, endangered Pacific Right, fin, and north Pacific Pilot), Dall porpoise, and Pacific White Sided dolphin. *See Hearing on Offshore Leasing*, *supra* note 336, at 273. The area is also frequented by migrating whales, sea lions, harbor seals, elephant seals, and some rare fur seals. *See id.* at 48.

409. *See id.* at 272-73, 553

410. *See id.* at 279-82, 553-54.

411. Revised Implementing Procedures, 49 Fed. Reg. 21,437, 21,439 (May 21, 1984).

tankers, not pipelines. Tanker transport is not favored under the California Coastal Act.[412] Recently, the California legislature enacted a bill that required all new offshore oil be shipped onshore by pipeline, not tankers.[413]

Since the lease sales, the coastal counties have developed extensive local plans, general plans, and zoning ordinances. Onshore support facilities include oil and gas pipelines, processing plants, storage facilities, and marine terminals.[414] Many onshore activities are now prohibited by local ordinances.[415]

After the OCS moratoria failed in 1985, local groups took steps to stop leasing off California by enacting ordinances that prohibited the siting and development of onshore facilities.[416]

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412. In 1984, the California legislature amended the California Coastal Act to proclaim that pipeline transportation of crude oil "is generally both economically feasible and environmentally preferable to other forms of crude oil transport." California Coastal Act, CAL. PUB. RES. CODE § 30265 (Deering 2004). *See also* Brief for California at 53, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002); CAL. RESOURCES AGENCY, *supra* note 80, at 5E-5 to 5E-6.

413. *See* Nancy Vogel & Carl Ingram, *Bill Bans Use of Barges for Offshore Oil*, L.A. TIMES, Aug. 26, 2003, at B5.

414. *See* Brief for Counties at 3, Cal. Coastal Comm'n v. Norton, 311 F.3d 1162 (9th Cir. 2002).

415. Ventura County's Save Open-Space and Agricultural Resources Ordinance ("SOSAR") limits the conversion of agricultural land and open spaces to other uses, such as onshore support facilities. The County Board of Supervisors' ability to amend General Plan provisions or modify land use designations of agricultural or open space is limited. SOSAR requires public notice and simple majority approval to amend the General Plan that would modify change in agricultural or open spaces, although minor changes do not need approval. SOSAR does not apply to pipelines, which are covered by the General Plan. *See* MINERALS MGMT. SERV., U.S. DEP'T OF INTERIOR, *supra* note 85, at 2-13 to 2-14.

> Santa Barbara County's Measure A96 provides that any measure to allow development of offshore oil and gas facilities off the southern coast of Santa Barbara County (Pt. Arguello to Ventura County) shall not be final until approved by majority vote on next ballot. It applies to onshore support facilities [but] does not apply to activities planned in two South coast "consolidation" located at Las Flores Canyon and at Gaviota. It also does not apply to northern portion of Santa Barbara County.

Id. at 2-14.

San Luis Obispo municipal code mandates that there will be no onshore support facility for oil and gas development until city council passes the proposal, and the proposal is voted on by town. *Id.* at 2-14 to 2-15.

416. Under the California Coastal Act, local governments propose Local Coastal Plans (LCP) to the Coastal Commission. The LCP includes land use plans, zoning ordinances, zoning district maps, implementation acts for the Coastal Act (unincorporated townships county areas are controlled by county comprehensive plan, LCP, and zoning ordinances). Local governments control the LCP. The Commission reviews the LCP to ensure compliance with the Coastal Act. Once certified, permitting authority is granted to the local government. There is a paradox because the federal government can reject the LCP as an amendment to the coastal zone plan, but the

These ordinances took the form of outright bans or a requirement for a voter referendum.[417] There were fourteen city and county restrictions by 1987 and twenty-six by 1990.[418] The Western Oil and Gas Association brought suit challenging local ordinances. The Ninth Circuit held that the challenges were not ripe for review because it was not known if development would occur and trigger the ordinances.[419] Such development was too speculative regarding the six county and five local plans.[420]

The suspensions will permit actions that will affect coastal air quality.[421] Most of the OCS platforms off the coast of California (seventeen of the twenty-three) are in the Santa Barbara Channel. Santa Barbara and Ventura Counties are federal and state non-attainment areas for ozone.[422] Many of the ozone precursors are produced from offshore platforms.[423] New sources of emissions can only be established if a corresponding amount of pollutants from pre-existing sources are reduced or offset.[424] Offshore

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state cannot object. If the LCP is amended, California Coastal Commission approval is necessary. If there is no amendment, no approval is necessary. *See generally id.* at 2-11 to 2-13.

417. *See* Breck C. Tostevin, *"Not on My Beach": Local California Initiatives to Prevent Onshore Support Facilities for Offshore Oil Development*, 38 HASTINGS L.J. 957 (1987); Van de Kamp & Saurenman, *supra* note 58, at 118-22; Robert B. Wiygul, *The Structure of Environmental Regulation on the OCS: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES AND ENVTL. L. 75, 148-50 (1992).

418. *See* Sierra B. Weaver, *Local Management of Natural Resources: Should Local Governments Be Able to Keep Oil Out?*, 26 HARV. ENVTL. L. REV. 231, 245 (2002).

419. *See* Western Oil and Gas Ass'n v. Sonoma County, 905 F.2d 1287 (9th Cir. 1990).

420. The counties were: Sonoma County, San Mateo County, Monterey County, County of Santa Cruz, County of San Francisco, and County of San Luis Obispo. The cities were: San Francisco, Santa Cruz, Monterey, Morro Bay, and San Luis Obispo. *See id.* at 1289 n.1. Only the San Luis Obispo ordinance was ripe because Shell's effort to establish offshore service was denied. Shell has moved its support base to Santa Barbara County. The issue was remanded back to district court. *See id.* at 1289-90. *See also* Van de Kamp & Saurenman, *supra* note 58, at 118-22.

421. *See Hearing on OCS Oversight Before House Merchant Marine and Fisheries Comm.*, 97th Cong. 58-61, 331-32 (1981). *See also Hearing on Offshore Leasing*, *supra* note 336, at 261.

422. San Luis Obispo County is a state non-attainment area for ozone. Santa Barbara, San Luis Obispo, and Ventura Counties are state non-attainment areas for particulate matter. *See* MINERALS MGMT. SERV., U.S. DEP'T OF INTERIOR, *supra* note 85, at A.5-3.

423. *See* Santa Barbara Air Pollution Control Dist. v. U.S. Envtl. Prot. Agency, 31 F.3d 1179, 1181-83 (D.C. Cir. 1994).

424. Santa Barbara Air Pollution Control District's offset policy requires that every ton of new emissions be offset by a decrease of 1.2 tons. There is a loss of

energy development will jeopardize and cause violations of onshore air quality standards.[425]

The control of air emissions from OCS platforms has been an ongoing source of conflict between California and Interior. Initially, the EPA regulated air quality standards. The OCSLA Amendments in 1978 granted Interior authority to prescribe regulations "for compliance with national ambient air quality standards pursuant to the Clean Air Act" (CAA).[426] In May 1979, Interior published draft regulations, which "deviate[d] from EPA's standards, criteria and requirements in some instances."[427] Interior only controlled emissions from OCS facilities that affected the State Implementation Plan (SIP), whereas the EPA regulated all OCS facilities according to the SIP. California brought suit challenging Interior's action. In 1979, the Ninth Circuit determined that Interior had exclusive authority to regulate air emissions from OCS facilities.[428]

In 1980, Interior promulgated final regulations controlling air pollution from OCS facilities.[429] California again brought suit, alleging that the regulations would not prevent the deterioration of onshore air quality, but no substantive rulings were issued. In 1989, Interior published a proposed rule regarding the control of air emissions from OCS facilities off the coast of California.[430] Despite EPA criticism, Interior promulgated the regulation, which required an operator seeking an exploration or development/production permit to furnish sufficient information so that Interior could determine whether the emissions would deteriorate the onshore air quality.[431]

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distance factor that increases the ration the farther the offset is from the source to encourage nearby offsetting. *Id.* at 1181-82.

425. *Hearing on Offshore Leasing*, *supra* note 336, at 261, 551-52. The Coastal Act requires that new development "be consistent with requirements imposed by an air pollution control district or the State Air Resources Control Board." California Coastal Act, CAL. PUB. RES. CODE § 30253 (Deering 2004).

426. 43 U.S.C. § 1334 (a)(8) (2004). *See also* H.R. REP. NO. 95-1474, at 85-86 (1978).

427. Oil and Gas and Sulphur Operations in the Outer Continental Shelf, 44 Fed. Reg. 27,448, 27,450 (May 10, 1979).

428. *See* California v. Kleppe, 604 F.2d 1187 (9th Cir. 1979); *see also* Leon C. Harmon, California v. Kleppe, 10 ENVTL. L. 685 (1980); Dennis M. Hughes, California v. Kleppe*: Who Regulates Air Quality Over the Outer Continental Shelf*, 29 CATH. U. L. REV. 461 (1980).

429. *See* 30 C.F.R. § 250.44-.46 (2004).

430. 54 Fed. Reg. 1846 (1989).

431. *See* 30 C.F.R. § 250.44-.46 (1990). *See also* Wiygul, *supra* note 417, at 155.

The CAA Amendments of 1990 reauthorized the EPA to regulate air pollution from offshore facilities, except in the Western Gulf of Mexico. Offshore facilities within twenty-five miles of the coast are required to meet the same standards as onshore facilities. New sources are required to meet the standards immediately, while existing sources are granted twenty-four months to comply. Furthermore, any adjacent coastal state can propose regulations for the implementation and enforcement of emission standards. If approved, the state will be delegated authority to implement and enforce the regulation.[432]

Congress was particularly concerned with OCS facilities, especially those in the Santa Barbara Channel and Santa Maria Basin off California, which emit significant amounts of pollutants that adversely affect state air quality. The same standards were established for both on and offshore facilities regarding "emission control requirements for new, modified, and existing facilities; offset requirements for new and modified facilities; and permitting, monitoring, reporting, enforcement, and fee requirements."[433] Responsibility was transferred from Interior to EPA to ensure consistent implementation of air quality laws and regulations for both on and offshore facilities.[434] Interior's approach of regulating only those emissions from OCS facilities that caused significant adverse impacts on onshore air quality was specifically rejected.[435]

IV.

POLITICAL REACTION

The Ninth Circuit decision did not end the institutional dialogue regarding OCS development and the California leases. Judicial decisions are "political resources" that are "best viewed as the beginning of a political process."[436] Dissatisfied groups attempt to enlist the support of the Executive and Congress to

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432. *See* 42 U.S.C. § 7627(a)(1), (3) (2004).

433. The Senate report, which was accepted in lieu of the House report, states that preventing the degradation of onshore air quality would be accomplished by applying "the same air quality protect requirements as would apply if the OCS sources were located within the corresponding onshore area." S. REP. NO. 101-228, at 76-78 (1990). The EPA was instructed not to "write a unique set of requirements for the OCS but should adopt by reference the same requirements. . .as would apply if the OCS source was located in the corresponding onshore area." *Id.*

434. *Id.*

435. *See id.*

436. STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE 85 (1974).

have judicial decisions changed. Judicial decisions provide strong support for the status quo,[437] but can also stimulate congressional action. The Executive and Congress are well aware of judicial decisions regarding statutory interpretations and their policy implications.[438] The institutions of government act as rational actors and pursue strategies to have their policy preferences prevail.[439] The partisan alignment of the institutions is crucial.[440]

Despite California's success in the litigation, it may only be a pyrrhic victory. There are efforts to reduce the role of the coastal states in the OCS energy development process, which are being fueled by an impending natural gas shortage. In Congress, there are provisions in the energy bill supported by the Bush administration which could undermine the OCS moratoria. The petroleum industry is complaining about the consistency provisions, which could interfere with the reauthorization of the CZMA. The Bush administration is seeking to minimize the coastal state's role pursuant to the CZMA through a regulatory change. California is seeking to prohibit drilling off California and have the federal government buy back the leases. The petroleum industry has brought suit against the federal government regarding the California leases arguing breach of contract.

A. *The Energy Bill and OCS Moratoria*

There is an impending natural gas shortage. The OCS accounts for 26% of the domestic natural gas production, but there are doubts whether this level of production can continue.[441] In 1998,

437. *See* Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 444, 453 (1983).

438. *See id.* at 447-53. *See also* William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Beth M. Henschen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J.L.& POL'Y 685 (1989); Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493, 501 (1989); James L. Walker & Michael E. Solomine, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992).

439. *See* Farber & Frickey, *supra* note 186, at 462-63.

440. From 1993 through 2002, the Republicans' pro-environmental score ranged from 9 to 19% in the Senate and from 16 to 32% in the House. The Democrats achieved higher environmental scores, ranging from 75 to 84% in the Senate and from 68 to 81% in the House. *See* League of Conservation Voters, *Past National Environmental Scorecards*, *at* http://www.lcv.org/scorecard/scorecardList.cfm?c=25 (2002).

441. *See Oversight Hearings on Estimated Oil and Gas Resource Base on Federal Land and Submerged Land Before House Res. Comm.*, 107th Cong. 22-27 (2001) (testimony of Carolita Kallaur, MMS).

Interior's OCS Policy Committee pointed out that U.S. imports of natural gas are essential to support domestic natural gas consumption.[442] In 1999, the National Petroleum Council conducted a study, which found that domestic sources of natural gas will be sufficient to meet the growing demand if restrictions on resource development are removed.[443] The Department of Energy released a report in 1999 that concluded current technology will allow for the environmentally benign production of natural gas.[444] The impending shortage stimulated calls by the petroleum industry to inventory natural gas supplies in OCS moratoria areas and remove any impediments to energy development.[445] Environmental groups countered that violating the moratoria is not necessary because 80% of the "untapped economically recoverable OCS gas is located in areas already open to leasing."[446]

President Bush came to office advocating a comprehensive energy policy.[447] The Republican energy bills introduced in 2001 called for an expansion of the energy supply.[448] The bills authorized an inventory of OCS oil and gas resources, including those in areas under moratoria, and a study of impediments to offshore oil and gas development.

In the spring of 2001, Interior's OCS Policy Committee recommended a study of potential natural gas resources on the OCS. The committee suggested that Interior choose the five best sites

442. The Committee found that in 1998 the United States consumed 21 trillion cubic feet (tcf) of natural gas, but produced only 18.7 tcf. Imports from Canada accounted for the remainder. *See Oversight Hearing on Short-Term Solutions for Increasing Energy Supply From the Public Lands Before House Res. Comm.*, 107th Cong. 43 (2001) [hereinafter *Hearing on Short-Term Solutions*].

443. *See id.* at 33-34. The NPC estimated a 30% increase in the demand for natural gas by 2010. *See* NATIONAL PETROLEUM COUNCIL, MEETING THE CHALLENGES OF THE NATION'S GROWING NATURAL GAS DEMAND (1999), *available at* http://www.npc.org/reports/ng.html (1999); *Hearings on Domestic Natural Gas Supplies*, *supra* note 344, at 15-17 (2001).

444. *See* OFFICE OF FOSSIL ENERGY, U.S. DEPARTMENT OF ENERGY, ENVIRONMENTAL BENEFITS OF ADVANCED OIL AND GAS EXPLORATION AND PRODUCTION TECHNOLOGY (1999), *available at* http://www.fossil.energy.gov/programs/oilgas/publications/environmentalbenefits/env_benefits.pdf (1999); *see also Hearing on Short-Term Solutions*, *supra* note 442, at 33-34.

445. *See Hearing on Short-Term Solutions*, *supra* note 442, at 41-46 (testimony of Tom Fry, National Ocean Industries Association).

446. *Hearings on Domestic Natural Gas Supplies*, *supra* note 344, at 47-49 (testimony of Lisa Speer, Natural Resources Defense Council).

447. *See* Chuck McCutcheon, Energy Policy Gains Urgency, CQ Weekly 106-107 (Jan. 13, 2001).

448. *See* Chuck McCutcheon, Democratic Bills Stress Energy Conservation: Bush Presses Case for Enhancing Production, CQ Weekly 667-69 (Mar. 14, 2001).

for natural gas development in moratoria areas and conduct studies that would lead to potential exploration.[449] Secretary Norton defended the OCS Policy Committee's recommendation, but declared that only one-third of the total estimated OCS oil and gas are in the moratoria areas.[450] The committee recommendation, coupled with the OCS provisions in the energy bills, generated resolutions in both the House and Senate by California congresspersons that supported the retention of the existing OCS moratoria until 2012.[451] California congresspersons are leery of President Bush's effort to circumvent both the moratoria and his own campaign promise.[452]

Opponents removed the OCS provisions from the energy bills. Representative Capps (D-Cal.), along with Representatives Miller (D-Fla.) and Davis (D-Fla.), eliminated the provisions in the House. Senator Kerry (D-Mass.) and Senator Boxer (D-Cal.) were also successful in the Senate. Nevertheless, no agreement was reached on an energy bill in the 107th Congress, which had a Democratic Senate majority and a Republican House majority.

There was no change in the congressionally imposed OCS moratoria in 2001 and 2002.[453] There were efforts in 2002 to prevent any OCS activities off California through appropriation restrictions.[454] Representative Capps and Senator Feinstein successfully attached such a limitation to Interior's appropriation

449. *See Oversight Hearings on a National Energy Policy Before House Res. Comm.*, 107th Cong. 254-55 (2001) [hereinafter *Hearings on a National Energy Policy*]. *See also* Pamela Najor, *Norton Promises House Committee to Uphold Bans on Offshore Exploration*, 32 ENVT. REP. (BNA) 1137 (June 8, 2001).

450. *Hearings on a National Energy Policy*, *supra* note 449, at 213.

451. *See* S. Con. Res. 39 (May 17, 2001); H. Con. Res. 136 (May 16, 2001).

452. *See* Steve Cook, *Bush Pledges to Uphold Moratorium On Exploration in California Offshore Areas*, 32 ENVT. REP. (BNA) 1086 (June 1, 2001); Pamela Najor, *California, Florida Lawmakers Promise Fight If Bush Pushes Exploration in Offshore Areas*, 32 ENVT. REP. (BNA) 956 (May 18, 2001).

453. *See* Department of the Interior and Related Agencies Appropriations Act 2002, Pub. L. 107-63, 115 Stat. 414 (2001); Department of the Interior and Related Agencies Appropriations Act 2001, Pub. L. No. 106-291, 114 Stat. 942 (2000).

454. For an analysis of politics and the appropriations process, *see* Neal A. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389 (1988); Neal A. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 460-65 (1987).

bill.[455] However, the provision was dropped in the final Consolidated Appropriations Resolution of 2003.[456]

Republican sponsored energy bills with similar OCS provisions reemerged in the 108th Congress, which is entirely controlled by the Republicans. Representatives Capps, Davis, and Miller again were successful in deleting the OCS provisions in the House.[457] However, the chair of the House Energy and Commerce Committee, Representative Tauzin (R-La.), supported the study.[458] Senator Graham (D-Fla.) and Senator Feinstein (D-Cal.) sponsored a similar amendment in the Senate.[459] Senator Graham noted that "the study will require seismic surveys, dart core sampling and other exploration techniques, which are inconsistent with the current moratoria." He declared that "the impacts of these kinds of technologies do not constitute an innocuous study of oil and gas resources since they would negatively impact coastal and marine areas, some of which are not even available for drilling."[460] Senator Feinstein pointed out that there is no reason for another inventory, which Interior does every five years. The inventory will only "undermine the moratoria which is in place."[461] Spurred on by a fear of an impending natural gas shortage,[462] the Senate defeated efforts to strip the OCS provisions from the bill by a vote of fifty-four to forty-four.[463] The Senate, however, was not able to pass a Republican energy bill. Instead, an earlier Democratic version of the energy bill, which did not contain the OCS provisions, was passed in order to bring

455. *See Congress Gearing up to Block California Offshore Drilling*, S.D. UNION-TRIB., Sept. 12, 2002, at A7; Ryan Kim, *House OKs End to Funds for Offshore Drilling*, S.F. CHRON., July 18, 2002, at A3; Kenneth R. Weiss, *Old Tactic Revived in Bid to Block Oil Drilling*, L.A. TIMES, July 14, 2002, at B8.

456. *See* Consolidated Appropriations Resolution 2003, Pub. L. 108-7, 117 Stat. 11, 238-39 (2003).

457. *See* 149 CONG. REC. H3309 (daily ed. Apr. 11, 2003).

458. *See id.* at H3310-11.

459. *See* 149 CONG. REC. S7741 (daily ed. June 12, 2003).

460. Jim Magill & Gerry Karey, *Coastal Senators Want OCS Inventory Proposal Stricken from Energy Bill*, INSIDE ENERGY/WITH FEDERAL LANDS, May 19, 2003, at 3.

461. 149 CONG. REC. S7747-48 (2003) (statement of Sen. Feinstein).

462. *See id.* at S7746 (statement of Sen. Landrieu). *See also Some on Hastert Gas Panel See Feds as Barrier*, INSIDE ENERGY/WITH FEDERAL LANDS, July 28, 2003, at 5; Matt Spangler, *GOP Gas Task Force Witnesses Call for More Drilling on Public Lands*, INSIDE ENERGY/WITH FEDERAL LANDS, Aug. 18, 2003, at 3.

463. There were thirty-three Democrats, ten Republicans, and one Independent who voted in favor of the Graham-Feinstein amendment. *See* 149 CONG. REC. at 7750.

an energy bill to conference committee.[464] Senate Energy and Natural Resources Committee Chair Domenici (R-N.M.) and House Energy and Commerce Committee Chair Tauzin will control the conference. Senator Domenici promised to revive "the production, diversity, and research provisions."[465] Senate majority leader Frist (R-Tenn.) declared the bill that will emerge from conference "will be in essence a Bush-Domenici-Tauzin energy bill."[466]

The OCS inventory and impediments study provisions, along with a limitation on state consistency review,[467] have been included in the conference discussion draft.[468] Representative Jim Davis (D-Fla.) declared, "It's outrageous that the conference committee is even considering an inventory since this language was shut down in the House and left out of the Senate energy bill."[469] Representative Capps submitted a nonbinding motion that instructed the conferees to drop these provisions, which passed the House by a 229 to 182 margin.[470] The OCS provisions were not in the final comprehensive energy bill, which included revisions in the consistency provisions.[471] The bill required the Secretary of Commerce to make decisions on consistency appeals within 120 days. The Secretary was not authorized to review evidence provided by the state when deciding the case.[472] The comprehensive energy bill was not enacted by Congress in 2003.

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464. *See* Pamela Najor and Stephanie M. Ingersoll, *Senate Republicans Use Maneuver to Send Comprehensive Energy Bill to Conference*, 34 ENVT. REP. (BNA) 1780 (Aug. 8, 2003).

465. *Id.*

466. *Id.*

467. The provision establishes unreasonable deadlines on the Secretary of Commerce when resolving appeals regarding state consistency determinations.

468. *See* Michael Collins, *Offshore Drilling Battle Resurfaces*, VENTURA COUNTY STAR, Sept. 26, 2003, at B1; Richard Simon, *Bush Faces Tough Call on Offshore Drilling Survey*, L.A. TIMES, Sept. 30, 2003, at A14.

469. Bill Kaczor, *Offshore Drilling Foes Rallying Against Energy Bill Draft, at* http://www.kansas.com/mld/kansas/2003/08/30/business/6852203.htm (Sep. 24, 2003).

470. *See* Michael Collins, *House States Objection to Oil Survey*, VENTURA COUNTY STAR, Oct. 16, 2003, at A10.

471. *See* Michael Collins, *Energy Bill Raises Concerns About Drilling*, VENTURA COUNTY STAR, Nov. 18, 2003, at B1.

472. *See* Reauthorization of the Coastal Zone Management Act: Oversight Hearing before the Subcommittee on Fisheries Conservation, Wildlife and Oceans of House Resources Committee, 107th Cong., 1st Sess. (May 24, 2001).

B. *CZMA Reauthorization*

There are additional efforts to decrease state authority over OCS decisions. Congress is considering the reauthorization of CZMA.[473] The petroleum industry has been complaining that the consistency provisions are undermining the OCSLA. Lessees experience compliance costs caused by unexpected interpretations of vague policies in coastal zone plans, delays caused by lengthy appeals before the Department of Commerce, and the possible loss of leasing rights without compensation because of changing state requirements. The industry has proposed several changes in the CZMA. First, the coastal states' enforceable policies should be limited to their own territory. One state should not be able to use its consistency authority to affect activities in another state. Second, a single consistency determination should be performed for all OCS activities, such as air and water permits. State consistency review of each permit causes unwarranted delays. Third, the Secretary of Interior should determine the extent of the information required for consistency determinations. States are always demanding more information as part of a political delaying strategy. Fourth, the Secretary of Interior, who possesses the requisite subject matter expertise, should conduct the consistency appeals. Fifth, there should be timely review of appeals.[474] These efforts so far have been futile, but CZMA has not yet been reauthorized.[475]

C. *Regulatory Change*

The Bush administration is also pursuing a regulatory strategy to limit coastal state OCS authority. In May 2001, Vice President Cheney released the National Energy Policy (NEP),[476] which recommended that the Secretary of Interior consider economic incentives for environmentally sound offshore oil and gas

473. *Id.*

474. *See id.* at 85-91 (testimony of Craig Wyman representing American Petroleum Institute).

475. The House Resources Subcommittee on Fisheries reported out(?) bill that provides for no change in consistency provisions, but authorizes $1 million to study federal/state conflicts and interagency battles over offshore energy development. *See* CZMA Reauthorization Act of 2003, H.R. 1028, 108th Cong. (2003); *see also* Mary Helen Yarborough, *House Panel Votes Renewal of Coastal Zone Law: Next Step Unclear*, INSIDE ENERGY/WITH FEDERAL LANDS, Feb. 11, 2002, at 17.

476. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY (2001), *available at* http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.

development and explore the opportunities for the reduction of royalties and risks associated with production in frontier areas, deep water, and small formations. The NEP suggested that the Secretaries of Interior and Commerce reexamine the current federal regime to determine if changes are necessary for energy related activities in the coastal zone and on OCS. Finally, it recommended that the Secretary of Interior continue OCS petroleum leasing and the approval of exploration and development plans on predictable schedules.[477]

During the California litigation in 2002, NOAA began investigating changes in consistency regulations, which had been promulgated at the end of the Clinton administration in 2000.[478] Echoing the concerns of the petroleum industry, NOAA published an advance notice of proposed rulemaking regarding the consistency regulations.[479] Despite the fact that the states have concurred with 93% of all federal actions reviewed,[480] NOAA is concerned with the scope of information needed by the states and Interior to complete consistency reviews, the establishment of deadlines for consistency appeals, the coordination of environmental reviews, the scope of negative determinations, the criteria for determining if actions in federal waters affect the coastal zone, and the consolidation of the approvals for exploration and development plans.[481]

Most coastal states, including California, Florida, Maine, Delaware, and Alaska, oppose the proposed changes in the consistency process.[482] Many congresspersons are wary that the proposals will "open the door to allow potentially harmful changes to be made to the existing federal consistency review regulations—regulations which were revised less than two years ago at the culmination of five years of deliberate and active consultation with the coastal states and other stakeholders, including

477. *See id.* at 5-7 to 5-8.

478. *See* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124 (Dec. 8, 2000) (to be codified at 15 C.F.R. pt. 930).

479. *See* Procedural Changes to the Federal Consistency Process, 67 Fed. Reg. 44,407 (July 2, 2002).

480. *See id.* at 44,408. For a comprehensive review of state consistency appeals regarding OCS energy development, see David W. Kaiser, The Coastal Zone Management Act Furthers Offshore Oil and Gas Development and Supports a National Energy Policy, 54 Institute for Oil and Gas Law 13-1, 13-8 through 13-9 (2003).

481. *See id.* at 44,407-10.

482. *See* Mary Helen Yarborough, *Industry Cites Problems with Offshore Consistency Process*, INSIDE ENERGY/WITH FEDERAL LANDS, Oct. 21, 2002, at 12.

industry."[483] They fear proposed changes will "serve only to endanger the very successful foundation of the CZMA federal-state partnership that has insured the protection of coastal resources and communities for thirty years."[484] Opponents are also concerned that the proposed changes will overturn the Norton decision; shift CZMA authority to the MMS and allow the fox to guard the henhouse; limit requests for information to the first three months of the six month review period; constrain state review of certain federal actions; and generate additional litigation.[485]

D. *The California Leases*

There have been efforts to buy back the California leases, which are influenced by the federal government's decision to buy back controversial leases off Florida. In February 2003, Congress declared that

> It is the sense of the Congress that no funds made available by this Act or any other Act for any fiscal year should be used by the Secretary of Interior to approve any exploration, development, or production plan for, or application for a permit to drill on, the 36 undeveloped leases in the southern California planning area of the outer Continental Shelf during any period in which the lessees are engaged in settlement negotiations with the Secretary of Interior for the retirement of the leases.[486]

In 2002, Senator Boxer and Representative Capps introduced legislation that provided for a permanent ban on development in the offshore California area, which would become a 360 square mile ecological site.[487] The fourteen oil companies holding the

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483. *Id.*

484. *Id.*

485. *See id.* Senators McCain (R-Az.), Snowe (R-Me.), Hollings (D-N.C.), and Kerry (D-Mass.) oppose any changes and urged the reauthorization of the CZMA. Governor Davis, California congresspersons, and environmental groups, including the Natural Resources Defense Council and the Environmental Defense Fund, also oppose any changes in the regulations. Industry groups support the regulatory changes, including the American Petroleum Institute, Domestic Petroleum Council, International Assoc. of Drilling Contractors, Independent Petroleum Assoc. of America, Natural Gas Supply Assoc., Natl. Ocean Ind. Assoc., and U.S. Oil and Gas Assoc. *Id.* For a complete review of the comments, see Craig Wyman, *Coastal Zone Management Consistency Determinations in Oil and Gas Development on the OCS*, 54 INST. ON OIL & GAS L. & TAX'N 12-1, 12-14 through 12-24 (2003).

486. Making Continuing Appropriations for Fiscal Year 2003, 108th Cong., 1st Sess. 238 (2003).

487. *See* California Coastal Protection and Louisiana Energy Enhancement Act, S. 1952, 107th Cong. (2002). *See generally* Carolyn Whetzel, *Boxer Measure Would*

California leases would be granted $1 billion to $2.8 billion in credits that could be used in Western or Central Gulf sales, or sold. The companies would drop the breach of contract suit.[488] Representative Capps stated, "If we get these companies to leave California, where they're unwanted, and allow them to become part of communities that embrace them, then it's good for all of us."[489]

The federal government's decision regarding several controversial leases off the coast of Florida in the summer of 2002 provided an incentive to California.[490] There was a long-standing controversy over OCS leasing and development off the coast of Florida. President Bush decided to help his brother Governor Jeb Bush's re-election in 2002 and his own re-election in 2004 by buying back several controversial leases off Florida for $115 million.[491] California wanted a similar deal.[492] Representative Capps stated, "We've been asking the federal government for a long time, not just this administration, for buybacks, and we think we should have equal time and equal rights."[493]

Initially, Secretary Norton was leery of the buyback. The Secretary stated, "Florida opposes coastal drilling and California does not."[494] The Secretary also stressed that the Florida litigation was more advanced and a legal dispute involving California state law and oil lease suspensions complicated the issue. Gover-

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Allow Trading of California, Louisiana Offshore Leases, 33 ENVT. REP. (BNA) 410 (Feb. 22, 2002).

488. *See* Jane Kay, *California-Louisiana Oil-Drill Swap Proposed*, S.F. CHRON., Feb. 15, 2002, at A4.

489. Ryan Alessi, *Senators Propose Swap of 36 Offshore Leases*, VENTURA COUNTY STAR, Feb. 15, 2002, at A1.

490. *See* Edward A. Fitzgerald, *The Seaweed Rebellion: Florida's Experience with Offshore Energy Development*, 18 J. LAND USE & ENVTL. L. 1, 62-69 (2002).

491. *See id.*; Elisabeth Bumiller & Carl Hulse, *U.S. May Buy Back Florida Oil Rights*, N.Y. TIMES, May 30, 2002, at A1. Press Release, Department of Interior, Interior Reaches Agreement to Acquire Mineral Rights in the Everglades, Settles Litigation on Offshore Oil and Gas Leases in Destin Dome (May 29, 2002) *available at* http://www.doi.gov/news/020529.html.

492. *See* Erica Werner, *Bush Oil Drilling Block in Fla. Sparks Calls for Same in Calif.*, Associated Press State & Local Wire (May 31, 2002).

493. James Sterngold, *Bush's Decision on Oil Angers Californians*, N.Y. TIMES, May 31, 2002, at A14.

494. Glen Martin, *Davis Rebuffed on Oil Leases*, S.F. CHRON., June 8, 2002, at A1. Since 1991, California has approved 152 new wells in its waters. All but four have been drilled in the Wilmington area north of Long Beach. Furthermore, the state authorized the redrilling of 231 wells and shut down 399 wells. *See* Ryan Alessi, *Davis Skipped Talks on Offshore Oil*, VENTURA COUNTY STAR, June 12, 2002, at A12.

nor Davis retorted, "With all due respect, the secretary fundamentally misunderstands the legal issues in California's long fight about offshore oil drilling."[495] He noted that "[w]hat is good for Florida's coast is good for California's."[496]

The election of Governor Schwarzenegger, who opposes offshore energy development,[497] may prove advantageous to ending offshore drilling in California. President Bush may want to help the reelection possibilities of Governor Schwarzenegger, as well as his own 2004 presidential fortunes, by buying back the California leases. Governor Schwarzenegger may become the terminator of the contentious leases.

The fate of the California leases has become tied up in presidential politics. In February 2003, Senator Kerry called for the federal buy back of the California leases. He stated, "When I'm president one of the first things I'm going to prove is that a president doesn't need to have a brother in a tough election to protect a state's coastline. . . the federal government is going to buy back the oil and gas leases off the shores of California and keep your coastline safe."[498] In March 2003, after President Bush decided not to appeal to the Supreme Court, Secretary Norton stated, "the administration supports the moratorium on new leasing off the California shore and respects the wishes of the people of California. We believe our efforts will be better spent in negotiation rather than in continued litigation."[499] The Secretary called upon California to contribute to the buy back because the state shared in the royalties from the thirty-six leases, which amounted to $62 million over twenty years. Governor Davis responded that the federal government should cover the entire cost. He stated, "I think California deserves the same generous treatment that Florida received."[500] Meanwhile, California has enacted legislation

495. Martin, *supra* note 494.

496. *Id.*

497. *See* David Thompson, *Hummers vs. Gas Sippers: Candidates Turn Shades of Green*, *at* http://www.montereyherald.com/mld/montereyherald/6870161.htm (Sept. 26, 2003).

498. Beth Fouhy, *Presidential Candidate Kerry to Call for Oil Lease Buyback off California Coast*, Associated Press State & Local Wire (Feb. 26, 2003).

499. James P. Sweeney, *Bush Administration Abandons Legal Fight over Offshore Oil Lease*, Copley News Service (March 31, 2003). For a criticism of this type of actions, see Fitzgerald, Secretary of Interior v. California, *supra* note 32.

500. Jennifer Coleman, *White House Won't Fight Ban on New Calif. Offshore Drilling*, *at* http://www.sfgate.com/cgi-bin/article.cgi?f=/News/archive/2003/03/31/state2011EST0116.DTL (Mar. 31, 2003).

that bans the use of barges and requires the use of pipelines for the transport of new offshore oil and gas.[501]

After Interior informed the lessees that no consistency determination pursuant to section 307(c)(1) would occur until after the Ninth Circuit decision, the petroleum companies holding the forty leases off California brought suit, alleging breach of contract.[502] The companies are seeking reimbursement of $1.25 billion for bonuses and unspecified damages including the drilling of forty exploration wells, which could amount to $3 million to $10 million per well.[503]

V.
CONCLUSION

The Ninth Circuit decision in *California Coastal Commission v. Norton* is a victory for California in the Seaweed Rebellion. The Ninth Circuit correctly determined that the California OCS lease suspensions are subject to state consistency review pursuant to section 307(c)(1). The suspension of the thirty-six California leases is analogous to a lease sale.

The Ninth Circuit decision is vertically coherent. Section 307(c)(1) requires any federal activity that affects the coastal zone to be consistent with the state coastal zone management program. The text was changed from the narrower "directly affecting" threshold to the broader "affects" threshold in response to an erroneous Supreme Court decision, which held that "directly affecting" implies no intervening cause. Congress enacted amendments which reversed the decision and altered the threshold test. The term "affects" means to set in motion a series of events of coastal zone significance.

The legislative history from 1972, 1976, 1980, and 1990 clearly indicates that Congress intended broad coastal authority for each state pursuant to section 307(c)(1). The Court restricted the scope of 307(c)(1) to federal activities occurring inside the coastal zone and narrowly defined "directly affecting." Congress amended section 307(c)(1) to eliminate any geographical limitation and expand the scope of state authority. Congress specifi-

501. *See* Nancy Vogel & Carl Ingram, *Bill Bans Use of Barges for Offshore Oil*, L.A. TIMES, Aug. 26, 2003, at B5.

502. Complaint filed in Amber Resources Co. v. United States at 21 (2002) (No. 02-30C).

503. *See* Mary Helen Yarborough, *Lawyer to Seek Refund for Offshore Calif. Leaseholders*, INSIDE ENERGY/WITH FEDERAL LANDS, Dec. 16, 2002, at 7.

cally noted that a broad definition of "affects" should be adopted in order to include direct and indirect effects.

The purposes of the CZMA demonstrate that the statute is designed to expand coastal state authority, protect the environment and natural systems of coastal zones, and promote federal-state cooperation and consultation.

The suspension of the California OCS leases affects the coastal zone. The direct effects of the OCS lease suspension are produced by the three-dimensional seismic testing, the spudding of wells, noises, and impacts on marine life. The indirect effects are those resulting from subsequent exploration and development/production. These include an increase in air emissions; effects on water quality from the discharge of drill mud and cuttings; an increase in vessel traffic; oil spills; the degradation of visual quality; as well as detrimental outcomes on local communities, marine sanctuaries, endangered and threatened species, recreation, tourism, and fishing.

Earlier, California determined that the exploration and development/production plans were consistent with the state management program, but the circumstances have changed. There has been an expansion in the range of the threatened sea otter, a discovery of heavy oil requiring tanker transport, and the implementation of local land use restrictions, which require new consistency determinations.

The Ninth Circuit decision is consistent with NOAA regulations, which assume broad state consistency authority. NOAA's only effort to narrowly define the scope of section 307(c)(1) occurred during the Reagan administration, which was extremely hostile to the coastal management program, and was rejected by Congress. Otherwise, NOAA has repeatedly recognized broad coastal state consistency authority pursuant to section 307(c)(1). In 2000, NOAA declared that OCS lease suspensions are generally subject to section 307(c)(3) review, not section 307(c)(1) review. NOAA's position is inconsistent with the text, intent, and purposes of the CZMA. NOAA, however, acknowledged that in some cases OCS lease suspensions can be subject to section 307(c)(1) review. Section 307(c)(1) is more appropriate in this case because the suspension of the thirty-six California leases is analogous to a lease sale.

The Ninth Circuit decision is also horizontally coherent. The OCSLA establishes an orderly process for OCS energy development and provides for OCS lease suspensions. The OCSLA spe-

cifically states that the Act will not interfere with the provisions of CZMA.

The Ninth Circuit correctly held that the MMS should have explained why it relied on the categorical exclusion for the OCS lease suspensions. The case law and principles of administrative law require some explanation. The MMS should not have relied on the categorical exclusion because the OCS lease suspensions constitute extraordinary circumstances for several reasons. First, the OCS exploration activities during the lease suspensions will affect several marine sanctuaries, including the Channel Islands and Monterey Bay National Marine Sanctuaries, which are areas of ecological significance. Second, exploration and development/production off the coast of California are very controversial. Most of the recent lease sales off California have generated litigation. California continues to oppose energy development in federal and state waters off its coast for ecological and economic reasons. Third, there is a great deal of uncertainty about exploration off the California coast, which includes the impacts of seismic testing, the ability to contain oil spills, the effects on state and local economies, uncertain geological hazards, adverse impacts on commercial fishing, and unknown cumulative impacts. Fourth, the OCS suspensions constitute a precedent for future exploration and development/production activities. Fifth, the exploration activities on the thirty-six leases will have a cumulative effect on the area. Sixth, exploration and development/production activities pose a threat to endangered and threatened species, including the southern sea otter, gray whale, and migratory birds. Seventh, local communities have enacted restrictions on the location of onshore support facilities. Energy development will necessitate tanker transport of the petroleum, which is not favored or allowed by state law. OCS activities will threaten onshore air quality.

Despite California's victory, a major assault on coastal state authority regarding OCS energy development is underway by the Republican Congress and the Bush administration. Congress is considering a new energy bill. The Republicans are attempting to authorize a study of OCS oil and gas resources and impediments to oil and gas development. The study is a Trojan horse because Interior already knows the extent of OCS oil and gas re-

sources.[504] There is a growing awareness of an impending natural gas shortage. If the study occurs, it will be used as a political tool. In the event of a natural gas shortage, there will be a demand to find and exploit new sources. Proponents of offshore energy development will turn to the study to support OCS development. This will undermine the moratoria that have been in place since the 1980s, were supported by President George H. W. Bush, and were expanded by President Clinton.[505] This cannot occur until the next five-year OCS leasing program,[506] but the groundwork is being laid for such an assault. In the short term, the study of the impediments to oil and gas development will provide fuel for the Bush administration proposal to change the consistency regulations and reduce coastal state OCS authority.

The push to eliminate the OCS moratoria and undermine coastal state consistency authority will reinvigorate the Seaweed Rebellion. The coastal states will use their power in the institutions of government to halt leasing, exploration, and development. A future administration and Congress may not want to foster coastal state hostility, endanger the environment, and risk their reelection possibilities. History demonstrates that when a coastal state adamantly opposes offshore development, it is not likely to occur. Even if the Republican Congress and Bush administration are able to break the moratoria and undermine coastal state authority, development on the leases will still be problematic. This will frustrate the petroleum companies, who will bring suits alleging breach of contract. The Supreme Court has held that the federal government is subject to the same contract obligations as a private party.[507] The federal government will be forced to buy back the leases at a very high cost, as evi-

504. In 2000, Interior concluded that 21% of the undiscovered oil and 17% of the undiscovered natural gas lie under moratoria areas. *See Hearings on a National Energy Policy*, *supra* note 449.

505. House Republicans have drafted a plan to end the moratoria. States will be given the right to decide if development will occur up to 100 miles from their coasts and will share in the production royalties. *See* Michael Collins, *House States Objection to Oil Survey*, VENTURA COUNTY STAR, Oct. 16, 2003, at A10; Editorial, *Baiting States to Drill*, S.F. CHRON., Oct. 20, 2003, at A20.

506. The current 2002-2007 Five Year OCS Program includes sales in the Gulf and off Alaska. Two Eastern Gulf sales, 189 and 197, are scheduled in 2003 and 2005. U.S. DEPT. OF THE INTERIOR, PROPOSED FINAL OUTER CONTINENTAL SHELF OIL & GAS LEASING PROGRAM 2002-2007 3 (2002).

507. *See* Mobil Oil Exploration & Producing S.E., Inc v. U.S., 530 U.S. 604, 621 (2000); *see also* Robin K. Craig, *Mobil Exploration, Environmental Protection, and Contract Repudiation: It's Time to Recognize the Public Trust in the Outer Continental Shelf*, 30 ENVTL. L. REP. 11,104 (2000); Fitzgerald, *supra* note 490, at 49-59.

denced in North Carolina, Florida, and possibly California. Taxpayer dollars will be spent to buy back leases that should not have been offered. The Republican Congress and Bush administration should abandon these policies, which will only increase litigation, generate greater federal-state hostility, endanger the environment, and cost the taxpayers millions of dollars. As George Santayana noted, "Those who cannot remember the past are condemned to repeat it."[508]

508. COLUMBIA BOOK OF QUOTATIONS 409 (Robert Andrews ed., 1993).