Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*

Daniel S. Miller†

EDITOR’S NOTE

While this Comment was in proofs, the Supreme Court’s opinion in Secretary of the Interior v. California, 52 U.S.L.W. 4063 (1984), was announced, reversing the Ninth Circuit decision discussed in the Comment. Relying on a debatable interpretation of the Coastal Zone Management Act’s original legislative history and the 1978 amendments to the Outer Continental Shelf Lands Act, and explicitly declining to consider later expressions of Congress’ intent, Justice O’Connor, writing for a five vote majority, held that Outer Continental Shelf oil lease sales do not directly affect adjoining states’ coastal zones. Thus, the Secretary of the Interior need not determine whether the sales are consistent with federally approved state coastal management plans. The opinion went on to imply that no federal activity landward or seaward of the coastal zone may ever directly affect it, a much narrower interpretation of “directly affecting” than even the Interior Department had sought. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, vociferously dissented. The dissent’s reading of the legislative history is similar to the analysis developed in the Comment.

The bulk of the Comment discusses the standard of consistency that federal activities directly affecting a state’s coastal zone must meet, that of “consistency to the maximum extent practicable” with state coastal plans. The author proposes a definition of the standard that differs from the rather loose definition proposed in dicta by the Ninth Circuit. Since the Supreme Court held that OCS lease sales do not directly affect the coastal zone and hence did not reach the Ninth Circuit’s consistency dicta,
the proper definition of the term is unresolved and the Comment's argument remains current.

Within days of the Court's decision, legislation was introduced in Congress to reverse it. H.R. 4589 would apply the federal consistency requirement to federal activities outside the coastal zone, define "directly affecting" broadly, and codify a strict definition of "consistent to the maximum extent practicable." S. 2324 would require that any federal activity directly affecting a state's coastal zone be subject to consistency review by the state. It would also define actions "directly affecting" the zone broadly, including federal actions, such as lease sales, that initiate series of events that will affect the coastal zone, and change the standard of consistency review from "to the maximum extent practicable" to "maximum extent possible. Hearings on bills are scheduled for March of 1984. The Court's decision, although contrary to the substantive argument of this Comment, corroborates the Comment's thesis that federal courts have tended to be more nationalistic than Congress in matters of offshore federalism. Accordingly, this thesis would predict that Congressional efforts to overturn the decision will be successful.

INTRODUCTION

Regulatory power over the submerged lands adjacent to the nation's coast has long been jointly exercised by the states and the federal government. Beginning in 1947 when the Supreme Court stripped the states of title to the submerged lands of the marginal sea in *United States v. California,* the federal/state balance of power has shifted several times. Most recently, the United States Court of Appeals for the Ninth Circuit held in *California v. Watt* that a federal oil and gas Lease Sale in the Outer Continental Shelf (OCS) "directly affects" an adjoining state's coastal zone. Consequently, under the federal Coastal Zone Management Act, an OCS Lease Sale must be conducted consistently "to the maximum extent practicable" with the adjoining state's approved Coastal Management Program. Between those two court decisions, several pieces of national legislation shaped the evolution of "offshore federalism." This Comment traces the several stages in that evolution.

The first stage followed the 1845 Supreme Court case of *Pollard's*
Lessee v. Hagan\textsuperscript{6} and its progeny, which strongly supported the proposition that, as an incident of sovereignty, the states held title to the submerged land of all navigable waters, including the marginal sea. The second stage arose when the federal government, at the urging of Secretary of the Interior Harold Ickes, challenged state title to the seabed of the marginal sea. This stage ended with the decisions in \textit{United States v. California} which denied not only the states’ claim of ownership, but also that the issue was one of title at all. The Supreme Court formulated instead the “paramount powers” doctrine, which gave the federal government title to and plenary power over the marginal sea.

\textit{United States v. California} prompted the Congressional response which formed the third stage in the evolution of offshore federalism. In 1953 Congress enacted both the Submerged Lands Act\textsuperscript{7} and the Outer Continental Shelf Lands Act (OCSLA).\textsuperscript{8} The first returned to the states title to, and management authority over, the marginal sea’s submerged lands;\textsuperscript{9} the second declared that the subsoil and seabed of the Outer Continental Shelf “appertain to the United States and are subject to its jurisdiction, control, and power of disposition.”\textsuperscript{10} The OCSLA set up a scheme for federal leasing of OCS oil and gas resources; it allowed the states neither participation in leasing decisions, nor assistance to cope with the onshore impacts of OCS development.\textsuperscript{11} These statutes created a geographic dual federalism, with the states retaining control over the marginal sea’s resources and the United States possessing paramount power over the OCS.

This situation persisted until 1972, when the Coastal Zone Management Act (CZMA)\textsuperscript{12} replaced “geographic dual federalism” with “cooperative federalism.”\textsuperscript{13} The CZMA allows states to develop coastal management plans which, when approved by the federal government, bind applicable federal policies unless explicitly overruled by another federal law. The 1976 amendments to the CZMA\textsuperscript{14} and the 1978 amendments to the OCSLA\textsuperscript{15} reaffirmed this cooperative relation-

\begin{itemize}
  \item \textsuperscript{6} 44 U.S. (3 How.) 212 (1845).
  \item \textsuperscript{9}  43 U.S.C. § 1311(a) (1976).
  \item \textsuperscript{10}  \textit{Id.} § 1332(a).
  \item \textsuperscript{11}  \textit{See infra} notes 80-85 and accompanying text.
  \item \textsuperscript{12}  Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-64 (1982)).
  \item \textsuperscript{13}  For a fuller explanation of these terms, see D. \textsc{Walker}, Toward a Functioning Federalism 46-47, 65-67 (1981).
\end{itemize}
ship and strengthened the states' role in OCS development.

The fifth, and current, stage in offshore federalism is marked by Carter and Reagan administration attempts to reduce state influence. The perceived need to reduce American dependence on foreign oil, as well as the desire to enhance short-term federal revenues, has encouraged the federal government to try to overrule or ignore coastal state environmental policies. The Department of the Interior, primarily responsible for developing and managing OCS resources, has spearheaded these administration attempts. California v. Watt arose when the state of California judicially challenged the Interior Department's refusal to comply with its request that certain lease tracts be deleted from a proposed federal OCS oil and gas lease sale. California had sought the deletion to protect marine resources and environmentally sensitive animal habitat areas.

The Ninth Circuit's opinion in California v. Watt is an important development in offshore federalism because it construes the CZMA's "federal consistency" provisions for the first time. The court's holding, that an OCS Lease Sale "directly affects" California's coastal zone and thus must be conducted consistently with California's coastal management plan, accords with the CZMA's brand of federalism. However, the opinion also contains dicta defining the phrase "consistent to the maximum extent practicable" in a way that weakens the states' role in the CZMA consistency process and which is contrary to the Congressional intent found in the CZMA and the 1978 amendments to the OCSLA.

This Comment's main thesis is that the asymmetrical distribution of Outer Continental Shelf oil and gas development costs and benefits causes coastal states to be generally more responsive than the federal government to the environmental concerns posed by such development. Typically, students of federalism and environmentalists have believed that the federal government is more protective of these sorts of

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16. See infra notes 164-210 and accompanying text.


18. Certainly the responsiveness to environmental concerns is affected by the ideology of the decisionmakers in the state and federal government. But the dispute in California v. Watt is far from a simple struggle between an environmentally-oriented California governor (Jerry Brown) and a development-oriented Secretary of the Interior (James Watt). California's original challenges to Lease Sale 53 and to the 5-year OCS leasing schedule were brought against Secretary Andrus, a member of Governor Brown's party. See infra notes 219-234, 256-265 and accompanying text. California's new governor, George Deukmejian, although a supporter of Secretaries Watt and Clark and a foe of California's Coastal Commission, has sought and obtained several environmentally protective conditions for Lease
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concerns than are the states. However, the recent history of OCS development,¹⁹ and in particular, the respective positions of California and the Interior Department in *California v. Watt*, refutes this proposition. Within the federal government itself, the Congress has generally favored a strong state role in offshore federalism, while the executive and judicial branches have been relatively nationalism.²⁰ Finally, the Comment concludes that the CZMA's cooperative federalism, if properly interpreted, is more protective of environmental concerns than either exclusive state or federal control of Outer Continental Shelf resources.

The Supreme Court granted certiorari on both the Ninth Circuit's "directly affecting" holding and its consistency dicta in *California v. Watt*.²¹ Oral argument was on November 1, 1983, and a decision is expected in early 1984. The Court's disposition of the case could strengthen coastal environmental protection by requiring that OCS development be consistent with state coastal planning. On the other hand, the Court could issue a nationalistic opinion which would undermine Congress' intent to give the states the leading role in determining OCS policies that affect their coastal areas. Such a nationalistic decision could well have seriously adverse consequences for the environment and natural resources of the nation's coastline.

I

OFFSHORE FEDERALISM — THE EARLY STAGES

A. Before the Tidelands Controversy

Until 1937, state ownership of adjacent tide and submerged lands, to a distance of three miles from shore, was virtually unquestioned.²² The conventional wisdom, reinforced by a line of Supreme Court decisions, beginning with *Pollard's Lessee*, maintained that the original thirteen colonies became sovereign and independent entities and succeeded to the rights and title of the Crown at the time of the revolu-

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¹⁹. For example, the Santa Barbara oil spill of 1969 would likely have been avoided if instead of federal drilling regulations, the more stringent state regulations had been in force. 
²⁰. See infra notes 25-27 and accompanying text.
²². See *Pollard's Lessee*.
Among these rights was jurisdiction over the marginal sea—the three-mile wide belt of water adjoining a coastal nation. While title resided in the states, the federal government was not without some powers in the marginal sea. Both the national defense and commerce clauses authorized limited federal power, including the right to take private property below the mean low tide line without compensation in aid of navigation. These necessary federal powers could be and were exercised without title to the marginal seabed vesting in the federal government.

The states' claim to the marginal sea's submerged lands was widely accepted, even at the federal level. The federal government accepted various grants made by California and its subdivisions in the marginal sea's submerged lands; the Interior Department refused to issue federal mining permits in the marginal sea off California's coast because it believed title to that soil vested in the state; Congress failed to assert any national rights in the submerged lands, even though it was aware the states were exploiting the submerged lands' resource potential.

The claims of the later states (except Texas) to ownership of the marginal sea's submerged lands derived from that of the original thirteen states and relied on the "equal footing" doctrine: since the later states were admitted to the Union on an equal footing with the original states, and since the original states possessed title to the adjoining tide and submerged lands as an attribute of sovereignty, the later states must also possess title to the submerged lands off their shores. The later states relied on the doctrine set forth in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), for this proposition. That case held that ownership of the beds of navigable waters is an element of state sovereignty. Pollard was not squarely on point with the situation in United States v. California, since the lands at issue in Pollard were under inland waters, not under the marginal sea. However, cases following Pollard indicated that the pertinent distinction was between navigable and non-navigable waters, not between inland and international waters. See, e.g., United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908), where the Court held that the bed of a navigable river that formed part of the U.S.-Canadian border belonged to Michigan, not the United States. Under the ruling in Chandler-Dunbar, the states' claim to the marginal sea appeared to be on solid ground.

23. E. Bartley, The Tidelands Oil Controversy 29-31 (1953); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). The states' claim to title rested on the validity of two postulates. First, at the time of the revolution, the states became independent nations prior to the formation of the national government. Thus, these states, rather than the national government, succeeded to the rights of the Crown at the time of the revolution. Second, the concept of a territorial marginal sea must have existed at the time of the Revolution, or else there would have been no proprietary interest to which the states could succeed. In fact, it was not clear in 1776 whether the concept of a "marginal sea" had a territorial component, either in the English courts or as a matter of international law. E. Bartley, supra, at 19-22. The unsettled nature of the concept at the time of the Revolution was a key factor in the Supreme Court's decision in United States v. California. See infra text accompanying notes 38 and 46.

27. Id. at 99.
The controversy over who possessed title to the bed of the marginal sea seems to have originated largely with one man—Secretary of the Interior Harold Ickes. In 1937 Ickes asked Senator Nye of North Dakota to introduce a bill declaring the marginal seabed within the national domain. The states successfully orchestrated opposition to the Nye resolutions, and Congress made no claim to the marginal sea's submerged lands.

Ickes had more success within the executive branch. In 1945 he persuaded President Truman to overrule Attorney General Tom Clark's objections and bring suit against California under the original jurisdiction of the Supreme Court. The federal government sought a declaration of its rights in the marginal sea and an injunction against further leasing of offshore oil tracts by California. Moreover, President Truman issued a proclamation declaring that the subsoil and seabed of the continental shelf appertained to the United States and were subject to its jurisdiction and control. While the proclamation did not affect title to submerged lands within the three-mile zone, it effectively foreclosed any future state claims to the Outer Continental Shelf.

C. United States v. California

The arguments in United States v. California focused nearly exclusively on the question of title. The United States urged that the territorial concept of the marginal sea did not arise until after the revolution; hence, there was no existing property right for the states to succeed to at the time of independence. The United States also argued that if ownership of submerged lands was an attribute of sovereignty, ownership of the submerged lands under the marginal sea was an attribute of national, not state, sovereignty. The argument had

28. Id. at 101.
29. Id. at 120. Resolutions were introduced and hearings held in both the House and Senate. Id.
30. Id. at 102-03. Neither the House nor Senate resolution was passed. Id.
31. Id. at 138. Earlier lobbying efforts by Ickes had resulted in a lawsuit filed against the Pacific Western Oil Company, holder of a California lease. Ickes was dissatisfied with this defendant, however, because he felt that the question of ownership and control could only be settled by moving directly against California.
34. E. Bartley, supra note 23, at 142.
36. U.S. Brief, supra note 25, at 115-43. The U.S. also urged that the Pollard doctrine not be extended to include the marginal sea. Id. at 71. See supra note 23.
37. The U.S. offered other reasons why the Pollard rule should not be extended. First, the original states never made any claim to the submerged lands of the marginal sea, as indeed they could not since the concept lacked territorial content at the time of the Revolution. U.S. Brief, supra note 25, at 92-142. Second, the U.S. argued that ownership of sub-
two main propositions. First, since the marginal sea is a creature of international law, rights arising under it should accrue to the sovereign through which they are derived—the national sovereign.\textsuperscript{38} Second, the United States argued that the distribution of powers under the Constitution determines which level of government is best suited to assume control of the marginal sea.\textsuperscript{39} Since the marginal sea is susceptible of continuous control and occupation and is not inexhaustible, it should be treated as the territory of the littoral nation for the purpose of safeguarding the security of the coasts and safety of the nation, protecting and advancing commerce, controlling immigration, enforcing customs and revenue laws, and sustaining the population.\textsuperscript{40}

The United States' brief then illustrated how the Constitution places responsibility for each of these purposes in the national government, not the states.

The United States' argument was significant not only because the Court adopted a large part of it, but also because it addressed the normative federalism question—which level of government, federal or state, should appropriately exercise control over the marginal sea? California attacked the United States' first proposition—that since the marginal sea is a concept of international law, rights under it should accrue to the national government—by arguing that the marginal sea's three-mile limit merely recognized the exclusive sovereignty of the coastal nation over that area \textit{vis-a-vis} other nations.\textsuperscript{41} Nothing in merged lands was not an attribute of sovereignty at all and that the rationale of the \textit{Pollard} case was unsound. \textit{Id.} at 143-53.

\textsuperscript{38} Since the time of the revolution, the U.S. argued, national sovereignty has been completely vested in the United States. \textit{Id.} at 74-77. The U.S. relied heavily on United States v. Curtis Corp., 299 U.S. 304 (1936), for this conclusion. For an extended historical analysis of this point, see Morris, \textit{The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds}, 74 COLUM. L. REV. 1056 (1974).

\textsuperscript{39} U.S. Brief, \textit{supra} note 25, at 82.

\textsuperscript{40} \textit{Id.} at 82-83. The final theoretical basis of the marginal sea, "sustaining the population," is the only factor directly concerning resource development. The U.S. argued that the national government could best further this interest because only the national government can prevent foreign exploitation of the marginal sea. \textit{Id.} at 87. The U.S. gave examples of agreements it had made limiting foreign encroachment of fisheries. \textit{Id.} However, the U.S. did not indicate which Constitutional provisions made the national government the appropriate entity to develop and exploit offshore resources, as distinct from preventing foreign encroachment.

Conspicuous by its absence was any reference to oil. Given that a respectable argument can be made for national control of offshore oil production on the grounds that a steady supply of oil is necessary to "fuel the engines of war" and provide for the national defense, that absence becomes more striking. A partial explanation lies in the understandable reluctance of the U.S. to draw attention to the fact that it was effectively attempting to expropriate very valuable resources from the states without compenstating them. Moreover, the argument proves too much: it could not easily be limited to offshore oil, and without such a limit, the opposition of the inland states would have been aroused. \textit{See infra} note 62.

\textsuperscript{41} Brief for the State of California in Opposition to Motion for Judgment 186-87, United States v. California, 332 U.S. 19 (1947).
that international law concept disposed of title within the coastal state. Rather, this disposition was left to the nation’s domestic law.\textsuperscript{42} To the argument that the constitutional allocation of powers in the federal system, viewed in light of the purposes served by the marginal sea, made it appropriate that the federal government rather than the states own the marginal sea’s submerged lands, California responded very briefly that these Constitutional functions did not carry with them a grant of title to the marginal sea.\textsuperscript{43}

The Supreme Court’s opinion in \textit{United States v. California} greatly surprised those involved in the dispute. Although both parties had argued the question of title for well over a thousand pages,\textsuperscript{44} the Court, through Justice Black, quickly moved beyond that issue.\textsuperscript{45} Finding that the territorial concept of the marginal sea was but a “nebulous suggestion” at the time of the Revolution, the Court disposed of California’s claim to title.\textsuperscript{46} Justice Black found the United States asserted rights “in two capacities transcending those of mere property owner.”\textsuperscript{47} The real question was thus “whether the state or the Federal government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soils of the marginal sea, known or hereafter discovered, may be exploited.”\textsuperscript{48} To Justice Black, the role accorded the United States by the Constitution and its status as a member of the family of nations required that the national government have unencumbered power to control and use the marginal sea. The Court thus gave the federal government more than it had asked for—unlike a grant of title, which would have had legal and constitutional limits, “paramount powers” are potentially limitless.

The Court stated that this “paramount powers” doctrine was not inconsistent with earlier holdings.\textsuperscript{49} Justice Black distinguished \textit{Pollard’s Lessee}\textsuperscript{50} because the submerged lands in that case were under inland waters, and, therefore, local considerations supported state control. In the marginal sea, however, local considerations are replaced by considerations of external sovereignty which compel federal control.\textsuperscript{51}

\begin{flushright}
42. \textit{Id.}
43. \textit{Id.} at 191.
44. California’s answer to the complaint alone was a three-volume, 822 page tome weighing 3 pounds, 9 ounces. E. Bartley, \textit{supra} note 23, at 163.
45. The first substantive sentence of the opinion reads: “The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea.” 332 U.S. at 29.
46. \textit{Id.} at 32.
47. \textit{Id.} at 29.
48. \textit{Id.}
49. \textit{Id.} at 36-39.
50. \textit{See supra} note 23.
51. 332 U.S. at 34-35.
\end{flushright}
The state's police power over the marginal sea does not "detract from the Federal Government's paramount rights in and power over this area." The Court concluded by holding that "full dominion over the resources of the soil under [the marginal sea], including oil," is an incident of the federal government's "paramount rights." The paramount powers doctrine was subsequently reaffirmed.

**D. Congressional Response to United States v. California—The Submerged Lands Act and the Outer Continental Shelf Lands Act**

The outcome of United States v. California prompted Congress to enact the Submerged Lands Act and the Outer Continental Shelf Lands Act (OCSLA) in 1953. The former essentially quitclaimed title to the marginal sea's submerged lands to the adjacent coastal states. The latter both declared that the seabed and resources of the OCS were subject to the United States' jurisdiction and control, and provided a mechanism for leasing those resources.

**1. The Submerged Lands Act**

The Submerged Lands Act vests the states with title to the sub-

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52. *Id.* at 36.
53. *Id.* at 38-39.
57. 43 U.S.C. § 1301 (1976). Congress had made several previous attempts to quitclaim to the states the marginal sea's submerged lands. President Truman vetoed the first of these in 1946, ostensibly because the question of title was pending before the Supreme Court. 42 CONG. REC. 10,660 (1946). However, when substantially identical legislation was submitted to the President in 1952, he again vetoed it "because it would turn over to certain States, as a free gift, very valuable lands and mineral resources of the United States as a whole." 98 CONG. REC. 6351, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 908. The President also criticized the lack of provisions for developing OCS resources, claiming such development was crucial for the national defense. *Id.* at 912.
merged lands and resources of the marginal sea, including the “right and power to manage, administer, lease, develop and use” them.\textsuperscript{59} Although it reasserts the United States' paramount powers over the area, the Act specifically excludes resource development from the scope of those powers.\textsuperscript{60} However, if required for the national defense, the United States has first purchase rights to offshore oil and other resources, or can exercise the power of eminent domain to acquire or use any submerged lands, upon payment of just compensation.\textsuperscript{61} Thus, Congress returned to the states what the Supreme Court had taken away, repudiating the Supreme Court's nationalistic view of federalism in the marginal sea.\textsuperscript{62}

The Submerged Land Act's legislative history reveals two strongly differing views on which level of government would best guard the marginal sea's resources. The majority committee reports praised the states' performance in managing offshore oil resources. The Senate committee dismissed as absurd charges that the states were acting as the "stooges" of the oil industry. It noted that the states had received higher royalties on their oil leases than the federal government could have under the Federal Mineral Leasing Act.\textsuperscript{63} The House committee found "nothing in the record to justify a conclusion that State control is wasteful or improvident."\textsuperscript{64} Nor did the record disclose any federal criticism of state management activities or conservation regulations.\textsuperscript{65}

However, the minority reports accompanying the Submerged Lands Act charged that the Act was a "giveaway" to California, Louisiana, and Texas of vast resources which belonged to the United States and would set a precedent for future giveaways of federal lands and resources.\textsuperscript{66} The minority viewed transfer of national control over off-

\textsuperscript{59} Id. \textsection 1311(a).
\textsuperscript{60} Id. \textsection 1314(a).
\textsuperscript{61} Id. \textsection 1314(b). The provision for compensation is a Congressional limitation on the paramount powers doctrine.
\textsuperscript{62} The Senate report concluded:
The committee submits that the enactment of Senate Joint Resolution 13, as amended, is an act of simple justice to each of the 48 States in that it reestablishes in them as a matter of law that possession and control of the lands beneath navigable waters inside their boundaries which have existed in fact since the beginning of our Nation. It is not a gift; it is a restitution. By this joint resolution the Federal Government is itself doing the equity it expects of its citizens.


\textsuperscript{63} Id. at 8, 1953 \textsc{U.S. Code Cong. \& Ad. News} at 1481.
\textsuperscript{65} Id.

shore oil not as an isolated incident, but as one of many attempts to
derm control of the public domain from the government and place it in
private hands. The legislation undermined the conservation movement
of the early twentieth century, which had reversed the wasteful explo-
Ition of the country's natural resources and had affirmed that the
wealth of those resources belonged to all the people. According to the
minority, giving control of offshore oil to the littoral states risked
wasteful exploitation, since the states did not have a "unified set of
regulations and standards for the extraction of this wealth." 68

To the minority, relinquishing federal control also conflicted with
the ideal that public domain resources belonged to all the people, since
the citizens of inland states would not share in the wealth of offshore
oil. More importantly, giving states control over the marginal sea effec-
tively transferred the wealth of its resources to private hands, since
there was "no assurance that special interests cannot at some time press
through hasty or wasteful methods to despoil the great treasure." 69
The minority's view appears to be premised on the Madisonian belief that
the states are more susceptible to the influence of special interest groups
than is the federal government because of their smaller constituencies
and narrower range of interests. 70

One thoughtful student of federalism, Professor Grant McConnell,
has similarly argued that the larger a constituency, the more likely it is
to be responsive to "public interest" concerns, such as conservation of
public domain resources. Because there is less diversity of interest in
the small constituency, he argues there is less mutual checking of inter-
ests, and elected representatives of the constituency owe their positions
to narrower, more extreme interests. This accentuates unequal power
distribution and weakens the position of minorities and diffuse public
interests. 71

The Submerged Lands Act minority's premise and McConnell's
argument may be valid for a geographic region divided into many
small constituencies on the one hand, or a few large ones on the other.
However, it does not seem valid when applied to a relatively small geo-
graphic constituency facing a much larger constituency—a coastal state
and the United States. The argument fails to recognize that the spatial

68. Id. at 39, 1953 U.S. CODE CONG. & AD. NEWS at 1574.
69. Id.
70. This premise is consistent with Madison's argument that a republican government
guards against the tyranny of faction better than a democracy because the republic takes in
more territory, citizens, and interests. The resulting interplay of these different groups
decreases the odds of obtaining a stable majority and thus increases the likelihood of compro-
mise. THE FEDERALIST NO. 10 (J. Madison).
distribution of development externalities is the same whether the federal government or the states own the oil. They are borne disproportionately by the adjacent coastal state. Thus, even if the states, with their "smaller constituencies," own offshore oil, they will likely be more responsive to the public environmental interest and have a greater interest in minimizing the adverse effects of offshore oil development.\textsuperscript{72}

2. \textit{Outer Continental Shelf Lands Act}

The Outer Continental Shelf Lands Act (OCSLA)\textsuperscript{73} established that the "subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition."\textsuperscript{74} It invested the Secretary of the Interior with authority and broad discretion to administer OCS development. The Act authorized the leasing of OCS oil and gas resources\textsuperscript{75} and gave the Secretary complete discretion to promulgate leasing regulations, including those aimed at the "prevention of waste and conservation of natural resources."\textsuperscript{76} The Secretary also had the power to regulate the size, timing, and location of all leases.\textsuperscript{77} The statute did not require any balancing of competing policy considerations. Rather, it simply authorized the Secretary to issue leases "[i]n order to meet the urgent need for further exploration and development of the oil and gas deposits"\textsuperscript{78} of the OCS.

The OCSLA was enacted because the federal government had lacked authority to issue OCS leases.\textsuperscript{79} In providing this authority, Congress created a strongly nationalistic but, at the time, noncontro-
versial leasing regime. Congress gave the states virtually no role in OCS resource development, even though that development would greatly affect them. Furthermore, the OCSLA excluded the states from sharing in lease revenues. Prior to passage of the Submerged Lands Act, there had been some support for OCS revenue sharing with the coastal states. Apparently, Congress mandated complete national control over OCS resources as compensation for the alleged "give-away" of the marginal sea in the Submerged Lands Act.

The OCSLA's only recognition of a state interest in OCS development was a requirement that existing state laws not inconsistent with federal law be applied to activities on the OCS. However, the federal government would administer these state laws. The states were also not permitted to extend their taxing jurisdiction to the OCS.

E. Offshore Federalism Following the Submerged Lands Act and the OCSLA

The Submerged Lands Act and the OCSLA created a "geographic dual federalism." Within the marginal sea's three-mile zone, the states' role was predominant, though not exclusive. Coastal states made all the resource management decisions, and they retained all the benefits of resource development. The United States retained its constitutionally delegated powers and "paramount powers" over the area. But Congress made clear that, except in extraordinary cases precipitated by national defense needs, the federal role in the marginal sea would be limited to immigration control, customs enforcement, navigation, and similar functions.

Essentially the reverse situation held for the OCS. Some state law applied to the OCS, but the federal government administered and enforced that law. Responsibility for managing OCS oil and gas lay with the Secretary of the Interior. The Secretary was not required to consult

80. It appears that the struggle over the Submerged Lands Act left little energy for Congressional or public concern over the OCSLA's provisions. Christopher, supra note 57, at 23-24.


83. Christopher, supra note 57, at 30 n.33.


with the coastal states in making his management decisions. The OCSLA’s only policy guidance concerning OCS oil and gas development was the “urgent need” to explore and develop those resources.

This geographic dual federalism failed to adequately address the states’ important interest in protecting their citizens and resources from the adverse effects of offshore oil development. For example, federally authorized OCS activity off the Louisiana coast during the last 20 years caused the dredging and filling of approximately 500 square miles of environmentally valuable wetlands. One study estimated that Louisiana sustained a net fiscal loss of $38 million in 1972 from federal OCS activities. Yet neither the OCSLA nor the Submerged Lands Act gave the states an opportunity to require those benefitting from OCS activities to mitigate their effects. Nor did they adequately protect the public trust in the OCS and the coastal zone because the United States played conflicting roles of both trustee and proprietor/beneficiary.

II
COASTAL ZONE MANAGEMENT: COOPERATIVE FEDERALISM

A. The CZMA — Purpose and Policies

Congress created the next significant shift in offshore federalism by enacting the Coastal Zone Management Act of 1972 (CZMA). Congress found that the increasing and competing demands placed on the coastal zone were causing adverse impacts to ecological, cultural, aesthetic, and recreational resources. Existing state and local plan...
ning and regulatory frameworks were inadequate to prevent irreparable damage to coastal resources. Congress thus declared that the “effective management, beneficial use, protection, and development of the coastal zone” was a national interest. The CZMA encourages but does not require coastal states to adopt comprehensive land use planning and management programs to guide coastal zone development. While the Act’s procedural requirements assure that states recognize and incorporate particular national interests in their planning, it leaves substantive policy and management decisions to the states. Because state participation is voluntary, two inducements to participation are offered. First, grants to defray state management program development and administration costs are available. Second, once its coastal management program is approved by the Secretary of Commerce, the state is empowered to require that certain federal actions affecting its coastal zone be conducted consistently with that program.

A regime of “cooperative federalism” to manage the coastal zone, extending in important respects to the development of OCS resources, was thus created. For while the CZMA strengthened the federal government’s role in coastal management, the states’ ultimate authority over their coastal zones was strengthened even more. The CZMA’s cooperative federalism is far different from the co-optive federalism of most federal environmental legislation.

As of September 1983, the Secretary of Commerce had approved

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pollutants into the water column, thus potentially reducing fish stocks. Disposal of dredging wastes also creates problems; in a perverse double blow to the environment, these wastes are sometimes used to fill wetlands. *Id.*

92. *Id.* § 1451(a).
93. The term includes states bordering on the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one of the Great Lakes. *Id.* § 1453(3).
94. *Id.* § 1453(12) defines management program as:
   including, but not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.
95. *Id.* § 1453(3) defines the coastal zone as:
   the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shoreline of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.
96. See infra notes 108-131 and accompanying text.
coastal management plans of 28 (out of 35 eligible) states and territories. These approved programs cover approximately 90 percent of the United States' shoreline.

B. Federal Grants

Section 305 of the CZMA provides annual grants for states to develop coastal management programs; section 306 provides annual grants to assist in administering approved programs. Grants are limited to 80 percent of annual program costs to assure conscious state involvement in the program. No grants are made directly to local or regional governments. However, subject to the Secretary's approval, a state may pass through funds to such entities in delegating its management responsibilities. Thus, in contrast to many federal programs


99. Eliopoulus, Coastal Zone Management: Program at a Crossroads, Env't Rep. (BNA), Monograph No. 30, at 14 (Sep. 17, 1982).

100. 16 U.S.C. § 1454(c) (1982).

101. Id. § 1455.

102. Id. §§ 1454(c), 1455(a).


The planning problem was particularly severe in the “frontier” areas of the Alaskan coast. Local planning capabilities in Alaskan coastal areas are limited, to say the least. For instance, the city of Yakutat, a potential staging area for Gulf of Alaska OCS activity, had a 1973 population of approximately 600—mostly Tlingit Indians engaged in fishing, timbering, and tourism. Its annual city budget was $95,000. S. Rep. No. 277, 94th Cong., 1st Sess. 12-14, reprinted in 1976 U.S. Code Cong. & Ad. News 1769, 1780-82. Needless to say, Yukatat did not have a planning department capable of predicting and addressing the impacts associated with major OCS activity. See also H.R. Rep. No. 878, 94th Cong., 2d Sess. 46 (1976).

104. 16 U.S.C. §§ 1454(g), 1455(f) (1982). The Senate committee report explains the reason for allowing this delegation:

It is the intent of the Committee to recognize the need for expanding State participation in the control of land and water use decisions in the coastal zone. The Committee has adopted the States as the focal point for developing comprehensive plans and implementing management programs for the coastal zone. However, there may be instances where a city or group of local municipalities, or area-wide agencies or interstate agencies may contain sufficient resources to be delegated this authority by the coastal State with the approval of the Secretary.
which bypass the states entirely,\textsuperscript{105} the CZMA envisions a clear federal-state partnership.

\section*{1. Allowing State Flexibility: Procedural Grant Conditions}

Conditional rather than block grants are authorized by the CZMA. The conditions imposed, however, are primarily procedural. For example, management programs must define permissible land and water uses in the coastal zone having a direct and significant impact on coastal waters,\textsuperscript{106} and must contain broad guidelines on priorities of uses in particular areas.\textsuperscript{107} In both cases, however, the states make the substantive decisions on what uses to permit. These grants implement the Act's goal of establishing the states as the lead actors in comprehensive coastal zone management. The \textit{quid pro quo} for state freedom to determine substantive policy is the CZMA requirement that states address national concerns during the development of their coastal plans. Each state must provide a full opportunity for participation by relevant federal agencies, along with local governments and other interested parties.\textsuperscript{108} Even though states need not incorporate federal agency comments in their management programs,\textsuperscript{109} the Secretary of Commerce may deny program approval if he or she finds the state failed to adequately consider federal agency concerns.\textsuperscript{110} Thus, the CZMA allows the states broad discretion to tailor their coastal management programs to address local conditions, provided they address certain issues of national concern.\textsuperscript{111}

California's and Alaska's coastal management programs illustrate the freedom the grant provisions give the states to design program to meet individual needs. California faces intense recreational pressure on its coastline. Yet, excluding military holdings, only 42 percent of the state's 1,072 mile coast is publicly owned, much of it unavailable for public use.\textsuperscript{112} Consequently, California's coastal management program emphasizes public access.\textsuperscript{113}

\begin{flushleft}
\textsuperscript{105} In 1980, 25 to 30 percent of all federal aid to localities bypassed the states completely, compared with eight percent in 1960. D. Walker, \textit{supra} note 13, at 176.
\textsuperscript{107} Id. § 1454(b)(5).
\textsuperscript{108} Id. §§ 1455(c)(1), (3).
\textsuperscript{110} 16 U.S.C. § 1456(b) (1982).
\textsuperscript{111} See \textit{infra} notes 123-141 and accompanying text.
\textsuperscript{113} CAL. PUB. RES. CODE § 30212 (West Supp. 1983) provides:
\begin{quote}
[\textbf{P}ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal
\end{quote}
\end{flushleft}
By contrast, Alaska does not face these recreational pressures to the same extent, and its coastal program contains only a passing reference to public access. However, subsistence hunting and fishing uses are important in parts of Alaska's coastal zone, and the coastal program requires appropriate safeguards to insure that subsistence usage is preserved.

The CZMA's most intrusive grant conditions are those requiring the state to establish a comprehensive regulatory program which will effectively control activities affecting the coastal zone. For example, the Act requires that states or their delegated agencies assume the power to administer land and water use regulations and ensure local compliance with state management programs. The state must select one or a combination of three general regulatory schemes, but is allowed broad flexibility in program design.

The California and Alaska coastal management programs again provide examples of the regulatory diversity these procedural conditions allow. Since 1972, California has required a state coastal permit in addition to other state and local approvals before any development may occur in the state's coastal zone. As local governments develop coastal programs which are certified as being consistent with the state's program, the bulk of regulatory authority is returned to the local government. However, most local decisions remain subject to administrative appeal.

Alaska, on the other hand, has no separate state coastal permit. Instead, it requires state agencies and local governments to consider coastal program policies when authorizing activities in the coastal zone. Essentially, these policies are "piggybacked" onto the requirements for existing state and local permits.

resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected.

114. "[Coastal resource] districts and state agencies shall give high priority to maintaining, and where appropriate, increasing public access to coastal water." ALASKA ADMIN. CODE, tit. 6, § 80.060 (Oct. 1981), reprinted in ENV'T REP. (BNA) 1106:2542.

115. Id. § 80.120, ENV'T REP. (BNA) 1106:2542-2543.


117. Id. § 1455(d).

118. Id. § 1455(e).


120. Id. § 30519 (West Supp. 1983). California's Coastal Act was amended in 1981 to return permit authority to local governments following state certification of the policy element of Local Coastal Programs. Cal. Stats. 1981, c. 1173, § 20 (codified at CAL PUB. RES. CODE § 30600.5 (West Supp. 1983)).


122. ALASKA ADMIN. CODE, tit. 6, § 80.010(b) (Oct. 1981), reprinted in ENV'T REP. (BNA) 1106:2541.
2. Recognizing National Concerns: Substantive Grant Conditions

The CZMA as enacted in 1972 required state management programs to provide for "adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature."123 Because of the 1973 oil embargo and ensuing energy crisis, the Act was amended in 1976 expressly to require state planning for coastal energy facility siting124 and state procedures for anticipating and managing their impacts.125 Congress intended these amendments to ensure that states develop planning mechanisms for OCS-related activity.126 Although these requirements are substantive, the actual siting and mitigation decisions remain within the state. Furthermore, as the National Oceanic and Atmospheric Administration (NOAA), the federal agency responsible for implementing the CZMA, noted: "[A]dequate consideration of the national interest in these facilities must be based on a balancing of these interests relative to the wise use, protection and other development of the coastal zone."127 In other words, the national interest in energy facility siting is simply another factor which the state balances in its planning process.

Thus, state coastal management programs accommodate national energy interests in two ways. First, states develop their programs in coordination with affected federal agencies and must substantively consider each agency's concerns. The Secretary of Commerce must find that the state has provided federal agencies opportunity for full participation prior to approving its management program.128 Second, state management programs must provide procedures that allow for consideration of the national interest in energy facility planning and siting. Consequently, the Secretary's approval of a state management program implies a finding that the program adequately balances state and national interests.129 The CZMA assures continued recognition of the national interest by providing for Secretarial review of the management program and the state's performance.130 Unjustified failure to adhere

129. This fact is important in light of the Ninth Circuit's dicta in California v. Watt. See infra text accompanying notes 252-254.
to the approved program may result in withdrawal of approval and termination of financial assistance.\textsuperscript{131}

\textbf{C. 1980 Amendments—A Slight Nationalistic Shift}

The Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries held CZMA oversight hearings in 1979. These hearings revealed broad support for continuation of the program.\textsuperscript{132} However, the subcommittee also found “considerable diversity in, and wide variations in the quality of, state CZM programs.”\textsuperscript{133} Granting the states broad autonomy to develop their own coastal programs had achieved flexibility in addressing their individual needs, but at the expense of national uniformity. Environmentalists, concerned that some state programs did not adequately protect the national interest in the coastal zone, supported adjustments to the CZMA.\textsuperscript{134}

The Coastal Zone Management Improvement Act of 1980\textsuperscript{135} embodied the Committee’s recommendations. The Act clarifies the CZMA’s definition of national purpose and ties the level of program administration funding to a state’s improved performance in addressing the national purpose. The Secretary is now authorized to reduce program administration funding by up to 30 percent if he determines that “the coastal state is failing to make significant improvement in achieving the coastal management objectives specified in [the 1980 amendments].”\textsuperscript{136}

Although some of these national objectives are procedural,\textsuperscript{137} others address substantive policies, including public access to the coast,\textsuperscript{138} protection of natural resources,\textsuperscript{139} and redevelopment of deteriorating urban waterfronts and ports.\textsuperscript{140} Consistent with the CZMA’s overall philosophy, however, inclusion of these policies are suggested,
not required. \textsuperscript{141} State failure to include them will reduce federal funding, but will not affect the approved status of a management program. This distinction has significance because approved status is the prerequisite for application of the federal consistency provisions. Further, the 1980 amendments establish no national criteria for achieving national policy objectives; it is up to the states to determine how, and to what extent, they will be met. Thus, while the amendments effect a slight nationalistic shift in the CZMA by specifically defining certain national interests in the coastal zone, the reins of control over coastal zone management remain with the states.

\textit{D. Coastal Energy Impact Program}

In an effort to achieve energy self-sufficiency following the 1973 oil embargo, the United States embarked on a program of accelerated OCS oil and gas leasing. \textsuperscript{142} Recognizing that this acceleration would place great burdens on affected coastal states, Congress created the Coastal Energy Impact Program (CEIP) in the 1976 amendments to the CZMA. Federal assistance under this program was intended to alleviate adverse effects of OCS development on coastal states, \textsuperscript{143} and, in part, to prevent delay or disruption of federal OCS leasing plans. \textsuperscript{144}

As amended in 1978, \textsuperscript{145} the CEIP offers states three types of assistance: impact grants, loan and bond guarantees, and formula grants. Impact grants \textsuperscript{146} may include planning grants if the Secretary of Commerce finds that the state is, or is likely to be, significantly affected by the construction or operation of new or expanded energy facilities. They are also available to carry out the state's responsibilities under the amended OCSLA. The second category of assistance includes loans and bond guarantees for public facilities or services required by coastal energy activities. \textsuperscript{147}

The third form of assistance under the CEIP is a formula grant based on the level of OCS activity which occurred adjacent to the state

\textsuperscript{141} This same philosophy is evident in the evolution of 16 U.S.C. § 1455(i), first added by the 1980 amendments. This section encourages states to inventory and designate areas containing coastal resources of national significance, and to set enforceable policies to protect those resources. As originally introduced, this section would have allowed the Secretary of Commerce to make those designations and to set standards for federal activities. However, the Committee concluded that such a provision would inappropriately mandate participation in the CZM program. H.R. REP. No. 1012, 96th Cong., 2d Sess. 43, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4362, 4391.

\textsuperscript{142} See supra note 103.

\textsuperscript{143} H.R. REP. No. 1298, 94th Cong., 2d Sess. 23 (1976).

\textsuperscript{144} Id. at 24.


\textsuperscript{146} 16 U.S.C. § 1456a(c) (1982).

\textsuperscript{147} Id. § 1456a(d).
in the preceding fiscal year.\textsuperscript{148} These formula grants must be used to retire bonds guaranteed under the CEIP, provide new public facilities or services required by OCS energy activity, or prevent or mitigate losses to valuable environmental and recreational resources due to coastal energy activity.\textsuperscript{149} CEIP grants are available only to states which have approved CZM programs, are receiving program development grants, or are otherwise making satisfactory progress toward development of a management program that is consistent with the CZMA's policies.\textsuperscript{150}

The CEIP sets up dual incentives. First, it encourages states to participate in the CZM program by conditioning grant eligibility on participation. Second, it encourages states to assist in the expeditious development of OCS resources by utilizing a grant formula based on the state's share of total OCS activity in the preceding fiscal year.\textsuperscript{151} The second incentive may act as a buy-out of state opposition to an accelerated federal OCS leasing program. In fact, the Reagan administration apparently sees this as the primary purpose of the CEIP. A 1981 Office of Management and Budget document recommended termination of the coastal energy impact loan program because "there is no evidence that the provision of coastal energy impact assistance minimizes resistance to offshore oil and gas development."\textsuperscript{152} Limiting the use of formula grants to mitigation of OCS impacts would reduce the "bribe" effect of these funds.

Efforts are currently underway in Congress to devise a genuine OCS revenue sharing bill.\textsuperscript{153} The administration has divided on the issue, with the Interior Department favoring a bill that would discourage states from using their power under the federal consistency provisions to oppose OCS development,\textsuperscript{154} and the Office of Management and Budget seeking to reduce federal expenditures by retaining federal control over OCS revenues.\textsuperscript{155}

The outcome of the revenue sharing debate may be critical in determining the extent to which coastal states heed environmental concerns when evaluating OCS development. If revenue sharing funds exceed the amount necessary to compensate the states for impacts arising from OCS-related activity, the funds will act as an incentive for the

\textsuperscript{148} Id. § 1456a(b)(2).

\textsuperscript{149} Id. § 1456a(b)(5).

\textsuperscript{150} Id. § 1456a(g).

\textsuperscript{151} OCS activity is measured by the state's share of total acres leased, total oil produced, and total oil landed that is first landed in the state. 16 U.S.C. §§ 1456a(b)(2)(A), (B), (C) (1982).

\textsuperscript{152} Quoted in Eliopoulus, supra note 99, at 8.

\textsuperscript{153} Currently, the CEIP is funded out of general Treasury funds. 16 U.S.C. § 1456a(h) (1982).

\textsuperscript{154} Eliopoulus, supra note 99, at 10.

\textsuperscript{155} Id.
states to assist in exploiting OCS resources. This incentive will, however, be tempered by the states' interest in protecting their natural resources from undue degradation. Restricting use of OCS revenue-sharing funds to coastal related purposes only may reduce the damage to coastal resources. However, depending on the wording of the restriction, even conditioned funds may be used, not for coastal resource protection and enhancement, but for coastal facilities such as port development projects. The revenue sharing bills currently in Congress vary in the conditions attached to the use of shared revenues, but each appears to provide more money than necessary simply to mitigate OCS activity impacts.

E. Consistency Provisions

The CZMA's consistency provisions, which give coastal states power over certain federal actions affecting their coastal zones, is the second incentive for state participation in the CZM program. These provisions are at the heart of the controversy in California v. Watt. The provisions are divided into four main categories, three of which have relevance here: sections 307(c)(1) and (2), which control direct federal activities, and section 307(c)(3), which controls nonfederal applicants for federal licenses and permits.

I. Permit Consistency Provisions

Section 307(c)(3), the "permit consistency" provision, applies to nongovernmental applicants for federal licenses or permits who wish to conduct activities which will affect land or water uses in a state's coastal zone. An applicant must first assess its proposed activity to determine whether it is consistent with the affected state's approved coastal management program. The applicant must certify to the federal licensing agency that its proposed activity complies with the state management program and will be conducted consistently with it. The state then re-

156. See supra text accompanying notes 71-72.
157. See infra note 158.
158. For example, S. 872 (Sen. Hollings) provides an initial cap of $400 million (S. 872, 98th Cong., 1st Sess. § 4 (1983)), while H.R. 5 (Rep. Jones (N.C.)) provides an initial cap of $300 million (H.R. 5, 98th Cong., 1st Sess. § 3 (1983)). S. 800 (Sen. Stevens) has no initial cap (S. 800, 98th Cong., 1st Sess. § 4 (1983)). Senator Hollings' bill requires that at least 15 percent of revenues be passed through to local government, but places no restriction on the use of those funds. Senator Stevens' bill, by contrast, requires that 40 percent of revenues be passed through to local governments, but restricts the use of those funds to coastal-related purposes, including providing "capital infrastructure necessitated by coastal energy development activities." S. 800, 98th Cong., 1st Sess. § 6 (1983)). No legislation was passed before Congress adjourned in 1983, but will likely be acted upon early in 1984. INSIDE ENERGY/WITH FEDERAL LANDS, Nov. 21, 1983, at 14.
159. Section 307(d) concerns federal grants to states and local governments under other federal programs. 16 U.S.C. § 1456(d) (1982).
160. Id. § 1457(c)(3) (1982).
views the proposed activity and notifies the federal agency within six months whether it concurs with or objects to the applicant’s certification. The federal agency may not issue the license or permit until the state concurs or the six month period expires, unless the Secretary of Commerce overrides the state objection and finds that the activity is consistent with the objectives of the CZMA, or is otherwise necessary in the interests of national security.

In 1976, Congress strengthened the states’ ability to influence OCS development activities by adding to the permit consistency provision a subparagraph dealing explicitly with OCS exploration, development, and production plans. The House and Senate committee versions of the bill both would have added the word “lease” to the phrase “license or permit” wherever it appeared in section 307(c)(3). The reports indicate that the 1972 legislation intended leases to be subsumed in the phrase “license or permit,” and that the amendment was a technical one to clarify that point.

The House committee bill was amended on the floor to strike the word “lease” in the permit consistency provision. Congressman DuPont, a cosponsor of the bill, offered the deleting amendment not because he thought leases should be excluded from the consistency requirements, but because more time was needed to evaluate the amendment. He explained:

*I feel very strongly that leases should be included*, but the language is also in the Senate bill, and because of the confusion that has arisen over the effect this would have, we frankly would like a little bit more time to come to an understanding of exactly what we are doing here. . . . [W]e will be giving ourselves a little bit of flexibility in the conference to either adopt the language as the Senate put it in or adopt some other language we feel would be more beneficial and at the same time protect the rights of the States.

Thus, the language was deleted to allow more time for consideration, and not to exempt the lease stage from state review.

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161. *Id.* § 1456(c)(3)(B). The applicant, in making its consistency determination, must review any activity which is proposed in its exploration, development, or production plans and which affects any land or water use in the coastal zone. This procedure both provides the state with needed information on OCS activities on a timely basis, and expedites the OCS process by providing that once the plan is certified as consistent (and the state concurs or is conclusively presumed to concur), any activity described in the plan that requires a federal license or permit is presumed to be consistent. *H.R. REP. No. 1298, 94th Cong., 2d Sess. 30* (1976). The amendment also requires state concurrence with or objection to a consistency certification within three months, rather than six. Alternatively, the state may preserve the six month review and the basis for delay. If no statement is issued, concurrence is conclusively presumed.


Sections 307(c)(1) and (2), the "federal consistency" provisions, require that federally conducted coastal activities be consistent, to the "maximum extent practicable," with approved state management programs. The two subsections establish different applicability thresholds. Section 307(c)(1) applies to federally conducted or supported "activities" which "directly affect" a state's coastal zone. Both activities occurring within the coastal zone and those outside the zone but with spillover effects in the coastal zone are covered. Section 307(c)(2), on the other hand, applies only to federal "development projects" in a state's coastal zone. NOAA's regulations define a federal development project as a subset of federal activity. Thus, section 307(c)(2) effectively creates a presumption that federal development projects conducted within a state's coastal zone will directly affect the coastal zone, while no such presumption exists regarding other types of federal activities conducted in the coastal zone, or for any federal activity conducted outside the coastal zone.

The CZMA itself provides no procedure for determining consistency, nor does it state the effect of a determination that a federal activity is inconsistent with a state's approved management program. Moreover, the statute defines neither the threshold "directly affecting" nor the standard "consistent to the maximum extent practicable." This legislative oversight led to the controversy in California v. Watt. The CZMA's legislative history and NOAA's regulations do, however, shed light on these crucial terms.

a. Legislative History

The 1971 Senate report to a prior version of the CZMA provides the only pre-enactment indication of what constitutes a "direct effect." The 1971 bill required that federal agencies conducting or supporting activities in a state's coastal zone administer their programs

164. 16 U.S.C. § 1456(c) (1982). The section provides that:
(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.
(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

165. The term "federal activity" does not include the issuance of a federal license or permit, or a grant of federal assistance to a state or local government. 15 C.F.R. § 930.31(c) (1983).

167. Id. § 1456(c)(2).
168. 15 C.F.R. § 930.31(b) (1983).
169. See id. §§ 930.33(b), (c).
consistently with approved state management programs, except in cases of overriding national interest.\textsuperscript{171} Even though the bill applied the consistency requirement only to federal activities in the coastal zone, the Senate report stated that activities on federal lands or waters in or adjacent to the coastal zone which

the Federal agency determines. . . have a functional interrelationship

from an economic, social, or geographic standpoint with lands and waters within the coastal and estuarine zone, should be administered consistent with approved State management programs.\textsuperscript{172}

This text apparently evolved into the extension of the consistency requirements to federal activities which are outside the coastal zone, but which "directly affect" it.

The 1972 CZMA legislative history provides guidance in defining "consistent to the maximum extent practicable." The House report states that except in rare instances, federal agencies conducting or supporting activities in the coastal zone must do so without deviating from approved state management programs.\textsuperscript{173}

While Congress amended the permit consistency provision in 1976 to clarify and reaffirm the states' power to affect the course of OCS activities,\textsuperscript{174} it did not amend the federal consistency provisions. The conference committee withheld action pending oversight hearings.\textsuperscript{175} However, both the House and Senate reports to the 1976 amendments stress the vital function the consistency provisions play in mitigating impacts from OCS development, and the incentive they provide for state participation in the CZM program.\textsuperscript{176} As the House report notes:

\textsuperscript{171} The President would determine cases of overriding national interest. S. 582, 92d Cong., 1st Sess. § 313(b)(1) (1971).

\textsuperscript{172} S. REP. No. 526, supra note 170, at 30 (emphasis added).

\textsuperscript{173} Subsection (c) provides that once a State management program has been approved pursuant to the procedures set forth in the bill, it is expected that each Federal agency in conducting and supporting activities in the coastal zone will see that those activities are consistent with the program. Under the procedures established, the Secretary is required to consult with all cognizant Federal agencies prior to approval of a program. It is anticipated that during this process any aspect or phases of the proposed program which are deemed by any agency to be impracticable to carry out or support will be brought to the attention of the Secretary and steps will be taken at that point to iron out whatever difficulties appear to be established. There may, however, arise, after approval of the program, some circumstances not foreseen at the time of its approval which may present a Federal agency with an obstacle or situation unforeseen at the time of its approval which as a practical matter may prevent complete adherence to the approved program. For that reason, the committee felt some leeway should be written into the statute. . . . It is not anticipated that there will be any considerable number of situations where as a practical matter a Federal agency cannot conduct or support activities without deviating from approved State management programs.


\textsuperscript{174} See supra text accompanying notes 161-162.

\textsuperscript{175} H.R. REP. No. 1298, 94th Cong., 2d Sess. 31 (1976).

\textsuperscript{176} H.R. REP. No. 878, 94th Cong., 2d Sess. 52 (1976); S. REP. No 277, 94th Cong., 1st Sess. 37 (1975).
"One major encouragement [to state participation] has been the belief that in the future, the impacts which flow from federal Outer Continental Shelf leasing will have to conform to state and local prescriptions about the best location for energy support and industrial facilities."177 The Senate report contains similar language.178

The Subcommittee on Oceanography of the Merchant Marine and Fisheries Committee held CZMA oversight hearings in late 1979 and early 1980. The House report to the 1980 CZMA amendments summarized Subcommittee Chairman Gerry Studd's distillation of the oversight hearings:

Mr. Studd's testified that he felt section 307, the Federal consistency provision, is a major incentive and accomplishment of the CZM Act. Most witnesses declared that this section is critical for the effective implementation of State management programs. Since the consistency provisions appeared to be working, the subcommittee chairman stated that he felt changes to this section of the act were not now needed.179

The House committee did not recommend any changes in the federal consistency provisions, even though it was aware of a dispute between California and the Interior Department over whether the consistency provisions applied to a federal OCS lease sale—the same issue that later arose in *California v. Watt.*180

The committee, finding that with the exception of the dispute mentioned above, "[g]enerally, all consistency provisions have been properly construed," chose to allow the NOAA to continue administering

178. The Senate report states:

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

180. Id. at 34, 1980 U.S. Code Cong. & Ad. News at 4382. The dispute arose in the course of OCS Lease Sale No. 48. During that dispute, the parties attempted unsuccessfully to mediate under section 307(h)(2) of the CZMA. 16 U.S.C. § 1456(h) (1982). Because California and the Interior Department had no substantive dispute regarding the conduct of the lease sale, the state did not file suit at that time. Moreover, the federal mediator agreed with California's position that an OCS lease sale directly affects the coastal zone. Memo from C. L. Haslam, General Counsel of the U.S. Department of Commerce, to the Secretary of Commerce (Jan. 25, 1980), reprinted in H.R. Rep. No. 1012, 96th Cong., 2d Sess. 82-84 (1980), and in 1980 U.S. Code Cong. & Ad. News 4415-18.

As a result of the unsuccessful mediation, the Secretary of Commerce directed NOAA to issue new regulations defining "directly affecting" so as to preclude such disputes in the future. H.R. Rep. No. 1012, supra note 179, at 34, 1980 U.S. Code Cong. & Ad. News at 4382.
the consistency provisions. The committee adopted the 1971 Senate report's definition of "directly affecting." Applying the "functional interrelationship" test, the committee found that the consistency requirements apply "when a Federal agency initiates a series of events of coastal management consequence." Finally, the committee concluded that an "expansive interpretation of the threshold test is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act." Congress followed its committee's recommendations and did not amend the consistency provisions.

Given the CZMA's policy of encouraging the states to take a lead role in coastal zone management, rather than act as administrative agencies to carry out federal policy, this strict performance standard for the federal consistency requirement is appropriate. The strict standard is necessary if the states are to fulfill the Act's goal of comprehensive coastal zone management, since the federal government is such a pervasive actor in the coastal zone. If the states could not require federal compliance with their coastal management programs, those programs would, in many instances, achieve only piecemeal planning. And as the 1972 House report notes, national concerns are addressed during program development, thus ensuring that federal compliance with an approved state program will not impose a great burden on federal agencies.

b. NOAA Regulations

In large part, the National Oceanic and Atmospheric Administration (NOAA) consistency regulations flesh out the skeletal structure of the statutory provisions. They establish a procedure for making consistency determinations, define a standard of performance, and spell out the consequences of failure to meet that standard. In accord with the CZMA's cooperative spirit, they also provide for federal agency and state coordination in deciding what types of activities will be subject to consistency review.

First, the federal agency determines whether its proposed activity
will directly affect a state's coastal zone. If so, the agency determines whether the activity will be conducted consistently, to the maximum extent practicable, with the state's approved management program and notifies the state of its consistency determination at the earliest practicable time, but in no case less than 90 days before final approval of the activity. The consistency determination "must be based upon an evaluation of the relevant provisions of the [state] management program" and include a detailed description of the activity, its associated facilities, and their coastal zone effects. NOAA strongly encourages the federal agency to involve the state in its consistency review process, indicating once again the emphasis the CZMA places on federal/state cooperation.

NOAA rejected an earlier proposal to allow federal agencies and states to negotiate criteria for assessing consistency of federal actions because of its concern that the negotiated criteria would vary from approved management program standards. Thus, while the federal agency decides whether its activity is consistent, it must base that decision on state-established criteria, and not on external considerations. For example, in making a consistency determination for an OCS lease sale, the Interior Department must not balance the result indicated by the affected state's coastal program policies against the need to develop domestic energy resources.

Within 45 days of receiving the federal agency's consistency determination, the state may disagree with that determination or request an extension to further review the matter. If the state disagrees with the federal agency's determination, it must provide reasons, supporting information, and alternatives which would allow the activity to be conducted consistently with the state's program. The remaining 30 (or more) days before final federal approval of the activity provide an opportunity to resolve disagreements between the state and the federal agency. If the dispute is not resolved in that time, the federal agency

188. Id. § 930.33.
189. Id. § 930.34.
190. Id. § 930.39(a).
191. Id. § 930.21 defines associated facilities as those "(a) [w]hich are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a Federal action (e.g., activity, development project, license, permit, or assistance), and (b) [w]ithout which the Federal action, as proposed, could not be conducted." This section also provides that all consistency requirements relating to review of Federal activities also apply to development projects.
194. 15 C.F.R. § 930.41(a) (1983). The federal agency must allow extensions up to 15 days, and may allow longer ones where appropriate. Id. § 930.41(b).
195. Id. § 930.42(a).
may proceed with the activity. Mediation conducted by the Secretary of Commerce is available if both parties request it. Thus, while the regulations encourage resolution of any disagreement, the federal agency may proceed with the activity in spite of state objection, subject only to judicial review.

NOAA's regulations define the standard "consistent to the maximum extent practicable" as the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations.

The comment to this regulation adds: "The word 'practicable' within this definition means capable of being done. When modified by the phrase 'to the maximum extent,' the complete term means to the fullest degree permitted by existing law." This definition correctly reflects both legislative history and the CZMA's purpose of establishing state-led coastal zone management.

No definition of the "directly affecting" threshold currently exists. The history of regulations attempting to define it reveals the lack of guidance provided in the original legislation. In its proposed consistency regulations, first issued in September 1976, NOAA did not define the thresholds "directly affecting" or "affecting" the coastal zone. Instead, it stated that "these terms will speak for themselves and difficulties will be addressed on a case by case basis." NOAA received many comments requesting clarification of these terms and, in response, again noted that a precise definition was impossible. However, based on the legislative history of an analogous term ("direct impact")

196. This result is implicit. See Comment to 15 C.F.R. § 930.42(c). 44 Fed. Reg. 37,149 (1979). For the view that the federal-state cooperation envisioned by the CZMA is unrealistic and perhaps unworkable, see Comment, supra note 125.


198. Id. § 930.32(a) (emphasis added). The regulation continues:

The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). [Section 307(e) states that nothing in the CZMA diminishes state or federal jurisdiction, responsibility, or rights in the areas of planning, development, and control of water resources, navigable waters, or submerged lands; nor does the act repeal, modify, or supersede existing laws applicable to federal agencies.] The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.


200. See supra text accompanying note 169.

used in defining the coastal zone boundary, as well as the origin of the phrase "directly affect" in proposed national land use planning legislation, \(^{202}\) NOAA defined "directly affecting" as causing significant changes in the quality, manner of use, or limitations on the range of uses of coastal zone resources. \(^{203}\) NOAA adopted a different threshold definition for the permit consistency provision. \(^{204}\)

NOAA issued final consistency regulations on March 13, 1978. These regulations consolidated the two consistency thresholds because the proposed definitions were similar and the legislative history gave some support for a "significance" threshold. \(^{205}\) The threshold definition finally adopted was "significantly affecting the coastal zone." \(^{206}\)

As a result of a dispute between the Departments of Interior and Commerce over whether the federal consistency provisions applied to OCS pre-lease activities, the Justice Department issued an opinion interpreting the consistency provisions. Justice agreed with Commerce that Interior's pre-lease activities were subject to the consistency determination requirement. However, it disagreed with NOAA's "significantly affects" definition, stating that the plain language of the statute should control. The Justice Department opined that the issue—under what circumstances an activity "directly affects" the coastal zone—was essentially one of fact. \(^{207}\) To conform to the Justice Department's opinion, NOAA returned to its original stance, that the "directly affecting" threshold should be addressed on a case-by-case basis. \(^{208}\) In the preamble to the final rule amending the March 1978 rules, NOAA stated that while the legislative history on the matter was quite general, the 1971 Senate report did give some guidance in making case by case determinations. That report contained the "functional interrelationship" test discussed above. \(^{209}\) NOAA adhered to this position until after California filed for a preliminary injunction in *California v. Watt*, when the agency, under Reagan administration appointees, abruptly reversed


\(^{204}\) The permit consistency definition was based on the definition for "directly affecting," but allowed the states to expand the scope of "significant effect" to cover a broad range of resource, social, and economic effects. Proposed 15 C.F.R. § 950.53(a). 42 Fed. Reg. 43,601 (1977). The preamble stated that the legislative history indicated the three phrases in § 307(c)(3) and (d) (16 U.S.C. §§ 1457(c)(3), (d) (1982)) (i.e., "affecting land or water uses in the coastal zone," "affecting any land or water use in the coastal zone," and "affecting the coastal zone") were interchangeable. 42 Fed. Reg. 43,590 (1979).


\(^{206}\) This test was met if an action would cause significant "[c]hanges in the manner in which land, water, or other coastal zone natural resources are used; [l]imitations on the range of uses of coastal zone natural resources; or [c]hanges in the quality of coastal zone natural resources." Proposed 15 C.F.R. § 930.21(b). 43 Fed. Reg. 10,519 (1978).

\(^{207}\) For a discussion of the Justice Department opinion, see 44 Fed. Reg. 37,142 (1979).

\(^{208}\) Id.

\(^{209}\) See supra notes 170-172 and accompanying text.
its position.\textsuperscript{210}

\section*{F. Summary Analysis of the CZMA}

The CZMA declares a national interest in the wise management of our coastal resources. It encourages the coastal states to take the leading role in protecting this national interest. Within broad federal guidelines, it gives states autonomy to establish coastal management policy. Even where a substantive national interest is expressed, such as public access to the shoreline, the CZMA does not mandate national standards. Rather, the state determines how best to address the national concern. Federal agencies are encouraged to participate in the development of state management programs, but this participation is voluntary and advisory. Except for the case of direct federal activities, the state applies its own coastal policies in making land use decisions. When the federal government proposes an activity, it ultimately makes the approval decision, but in so doing it must apply state-established coastal management policies unless they conflict with another federal law. Federal agencies may not issue permits or licenses for activities affecting land or water uses in the coastal zone without state concurrence that the licensed or permitted activity is consistent with the state’s coastal management policy. However, the Secretary of Commerce may override the state’s objection.

The Secretary of Commerce reviews state implementation of approved coastal management programs. The federal government and the states share the costs of the CZM program, with the level of federal funding depending in part on state progress in addressing issues of national concern, such as shoreline erosion and coastal access. Additionally, separate grants are available to states with approved management programs to alleviate impacts arising from OCS oil and gas development.

The functional allocation of control in this offshore federalism scheme has clear implications for OCS oil and gas development. The CZMA explicitly and implicitly recognizes that coastal states have important interests at stake in OCS development, and it gives the states the power to preserve these interests. CZMA’s comprehensive planning mechanism is a powerful tool in avoiding or mitigating the adverse impacts of OCS development. Section 307’s federal consistency and permit consistency provisions are intended to give binding power to the state’s coastal management policies.

Should the Supreme Court affirm the Ninth Circuit’s nationalistic interpretation of the federal consistency provisions in \textit{California v. Watt}, it could greatly reduce the effectiveness of state coastal planning.

\textsuperscript{210} See infra notes 297-304 and accompanying text.
Since the federal debt crisis makes continued federal funding for the CZM program uncertain, a nationalistic resolution of the case could remove the program's only remaining participation incentive, making state participation unattractive. In providing the cooperative federalism built into the CZMA, Congress has already placed itself in opposition to the Ninth Circuit's nationalistic posture. The Supreme Court should heed Congress' intent.

III
THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978

While Congress gave short shrift to state concerns in enacting the nationalistic OCSLA in 1953, the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA) significantly increased the states' role in regulating OCS development. The original Act had delegated authority to administer OCS oil and gas development carte blanche to the Secretary of the Interior. The 1969 Santa Barbara, California, oil spill revealed two of the statute's serious shortcomings. First, it failed to protect the public interest in wise management of offshore resources. The Santa Barbara spill probably would not have occurred had California's drilling regulations, rather than the Interior Department's, been in force. Second, the Act failed to involve the states in the OCS development process. Leasing decisions were made behind closed doors by the Secretary and the oil industry.

In passing the OCSLAA, Congress sought to remedy these defects by imposing a detailed OCS lease decisionmaking process on the Secretary of the Interior, and by providing affected states the opportunity to influence lease decisions at both the programmatic stage (during development of a five-year leasing schedule) and the individual lease sale stage. At the programmatic level, the Secretary's decisions must be based in part on considerations of affected states' laws and policies, including their coastal management programs. At the lease sale level, the Secretary must consider state recommendations and accept them if they provide for a reasonable balance of national and state concerns.

213. See supra note 19.
217. Id. § 1345(c).
The OCSLAA clearly expresses Congress’ intent to give the states a leading role in the OCS lease decisionmaking process. The 1953 Act’s declaration of policy was amended to read:

States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf; . . . the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect marine, human, and coastal environments through such means as regulation of land, air, water uses, of safety, and of related development and activity should be considered and recognized.218

A. State Input During Lease Scheduling

The OCSLAA amended the original Act’s leasing schedule provision and now requires the Secretary of the Interior to develop and revise five-year schedules of “proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity.”219 Congress designed the rigidly-structured decisionmaking process because:

Federal administration of the leasing program and Federal regulation of offshore oil and gas development have been essentially a closed process involving the Secretary of the Interior and the oil industry. . . . Decisionmaking for the development of offshore oil and gas must be opened so that the coastal and other States affected by offshore oil and gas activities may participate in the process on a regular basis and so that affected local communities and the public at large may have an opportunity to be heard. Another purpose of H.R. 1614, [then], is to provide statutory mechanisms that will open the decisionmaking process to a wide variety of views.220

The leasing schedule provision requires that the Secretary’s decision on the timing and location of exploration, development, and production of OCS resources be based on a number of factors.221 Among them are “an equitable sharing of developmental benefits and environmental risks among the various regions,”222 and the “laws, goals, and policies of affected States which have been specifically identified by the

218. Id. §§ 1332(4)(B), (5).
219. Id. § 1344(a).
220. H.R. REP. NO. 590, supra note 212, at 54, 1978 U.S. CODE CONG. & AD. NEWS at 1461. For an interesting discussion of the OCSLAA as an effort to achieve Madisonian federalism in OCS development (as well as a unique discussion of permits as an art form), see Ball, Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf, 12 ENVTL. L. 623 (1982).
222. Id. § 1344(a)(2)(B).
Governors of such States as relevant matters for the Secretary's consideration, including approved CZM programs and policies. Even though the statute refers to timing and location of post-lease sale events (exploration, development, and production), the Secretary must consider these factors in developing the five-year lease schedule. Because many of these factors involve interregional comparisons, the Secretary can give them proper consideration only at the programmatic stage.

The OCSLAA also provides an explicit method for state participation in the leasing schedule development process. The Secretary must "invite and consider" suggestions from governors of affected states following preparation of a proposed schedule. The Secretary must then either comply with state modification requests or state his or her reasons for rejecting those requests.

Taken together, the leasing schedule provision's criteria and the statutory procedure for state comments demonstrate that the Secretary must seriously consider state concerns during the programmatic stage. To the extent state input is consistent with the national interest, it must be reflected in the five-year leasing schedule. Although specific state recommendations are not binding, they form part of the administrative record before the Secretary.

The states of California and Alaska, Alaska's North Slope Borough, the Natural Resources Defense Council, and other environmental groups successfully challenged the first OCSLAA five-year leasing schedule in the D.C. Circuit. Secretary Andrus had proposed 36

223. *Id.* § 1344(a)(2)(F).
226. *Id.* at 1306.
227. 43 U.S.C. § 1344(c) (Supp. V 1981). The House report states that "reasonable recommendations . . . by a state or local government, are to be accepted. If, however, the Secretary has valid reasons not to accept them, he may reject the request by explaining those reasons, subject, of course, to congressional oversight and judicial review." *H.R. REP. NO. 590,* supra note 212, at 150-51, 1978 U.S. CODE CONG. & AD. NEWS at 1457.
228. 43 U.S.C. § 1344(c)(1) (Supp. V 1981). After preparing the schedule, and at least 60 days before publishing it in the Federal Register, the Secretary must submit a copy to governors of affected states for review. The Secretary must give a written response to state comments requesting modification of the proposed program received at least fifteen days before publication of the lease schedule. *Id.*
229. *Id.* § 1344(c)(2).
230. *Id.* The House report notes that a "major purpose of [the amendments] is to involve the states and affected local areas within the States in the entire exploitation process to a greater degree." *H.R. REP. NO. 590,* supra note 212, at 50, 1978 U.S. CODE CONG. & AD. NEWS at 1457.
lease sales for the period June 1980 to May 1985. These and other plaintiffs also challenged Secretary Watt’s later revision of the Andrus schedule, this time unsuccessfully. Secretary Watt’s revised schedule accelerated the Andrus schedule, with 41 sales scheduled from July 1982 to June 1987. The necessity of the lawsuits, along with the number of states participating, indicates that the Interior Department has resisted compliance with the OCSLAA’s federal/state cooperation requirement.

Notably, the OCSLAA provides that when the Court of Appeals reviews a challenge to the Secretary’s approval of a five-year leasing schedule, it must apply the substantial evidence standard of review. Nonetheless, in the suit challenging Secretary Andrus’ five-year leasing schedule, the D.C. Circuit found that the statute envisioned a hybrid standard. In reviewing findings of “ascertainable fact,” the court applied the substantial evidence test. But when reviewing policy decisions, “including . . . predictive and difficult judgmental calls,” the court chose to apply the less demanding “arbitrary or capricious” standard. The court noted that most, if not all, of the leasing schedule provision’s factors require predictive or judgmental decisions by the Secretary. Thus, the D.C. Circuit has effectively rewritten the OCSLAA to provide a less searching standard of judicial review. Con-

232. The regional distribution was as follows: 11 in the Gulf of Mexico, 6 in the Atlantic, 4 off California, 10 off Alaska, and 5 reofferings of tracts not previously leased. 668 F.2d at 1300.

233. California v. Watt, 712 F.2d 584 (D.C. Cir. 1983). According to the court, petitioners’ challenge was limited to the adequacy of Secretary Watt’s analysis in developing the five-year schedule. Thus, the court applied the “arbitrary or capricious” standard of review, sealing the fate of petitioner’s challenge. Id. at 590-91. See infra notes 235-238 and accompanying text. Petitioners’ request for a rehearing en banc was denied. INSIDE ENERGY/WITH FEDERAL LANDS, Nov. 28, 1983, at 11.

234. While the Submerged Lands Act’s opponents in 1953 felt that the federal government would be relatively immune from oil industry influence, the 1977 House report indicates that in fact the oil industry wielded a great deal of influence over the Interior Department’s management of OCS resources. See supra text accompanying note 220. In spite of Congress’ efforts to reform the leasing process in the OCSLAA, Secretary Watt continued to exclude state and environmental concerns in his administration of the program. At the risk of oversimplifying, this was the crux of petitioners’ complaint in the second leasing schedule lawsuit. See Brief for Petitioners 105-50, California v. Watt, 712 F.2d 584 (D.C. Cir. 1983).


236. 668 F.2d at 1300.

237. Id. at 1302.

238. Id. at 1309.

239. The D.C. Circuit consequently affirmed Secretary Watt’s revision of the Andrus schedule because Watt’s policy judgments were not clearly arbitrary or capricious. California v. Watt, 712 F.2d 584 (D.C. Cir. 1983). See infra note 233. Partially in response to the court’s OCSLAA interpretation, legislation has been introduced in Congress to amend the OCSLAA. The bills would explicitly require the court to apply the “substantial evidence” standard of review, instead of an “arbitrary or capricious” standard, in assessing the Secretary’s actions. They would also require the Secretary to accept a governor’s recommenda-
sequently, there is less assurance that the laws, goals, and policies of affected states will receive the serious consideration that Congress envisioned.

B. State Input During Lease Sales

Section 19 of the OCSLAA\(^{240}\) establishes a mechanism for state and local input into individual lease sale decisions. According to the Conference report, this section “is intended to insure that Governors of affected States, and local government executives within such States, have a leading role in OCS decisions and particularly as to potential lease sales and development and production plans.”\(^{241}\) State governors may submit comments and recommendations regarding the size, timing, and location of a proposed lease sale within 60 days of receiving notice of the proposed lease sale.\(^{242}\) The Secretary must provide the commenting governor with a written statement of reasons for accepting or rejecting the state recommendations.\(^{243}\)

The Secretary must accept state and local recommendations\(^{244}\) if he or she determines “that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.”\(^{245}\) The Secretary determines the national interest “based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies of this Act.”\(^{246}\) Those policies include Congress’ express grant to the affected states of a leading role in OCS decisionmaking.\(^{247}\)

The Secretary’s determination that state recommendations do or do not provide for a “reasonable balance” will only be judicially invalidated if it is found to be arbitrary or capricious.\(^{248}\) The House report on the OCSLAA indicates the weight that a court should give to a governor’s recommendations:

The Committee did not believe that any State should have a veto power over OCS oil and gas activities. The Committee fully expects, however, that the advice of the Governor be given full and careful consideration, and be incorporated into the ultimate decision of the Secretary, insofar as

\(^{243}\) Id. § 1345(c).
\(^{244}\) Local government recommendations must be channeled through the governor, but the Secretary is not required to accept them. Id. §§ 1345(a), (c).
\(^{245}\) Id. § 1345(c).
\(^{246}\) Id.
\(^{247}\) Id. § 1802(6); H.R. CONF. REP. NO. 1474, 95th Cong., 2d Sess. 106 (1978).
they are [sic] not inconsistent with the balanced approach to OCS leasing set out in this Act.249

Arguably, the Secretary must defer to a governor's recommendation which strikes a different balance than his own, provided it does, in fact, balance the OCSLAA's competing environmental, coastal zone, and energy concerns.

Except as expressly provided, the OCSLAA does not amend, modify, or repeal any provision of the CZMA.250 On the contrary, the OCSLAA must be interpreted in light of the CZMA, especially its consistency provisions. Since federal approval of a CZM program is contingent upon the state providing an "equitable balance" of national and state interests, recommendations based on an approved program already provide for a reasonable balance of national and state interests. This is especially so for OCS activities, since CZM programs must specifically provide for adequate consideration of the national interest in planning for and siting of energy facilities.251 Consequently, the Secretary should be required to give great weight to state recommendations based on approved CZM programs. This increased weight should, in fact, be a presumption that the recommendations provide the reasonable balance called for in the lease sale section.

The OCSLAA's legislative history supports this argument. The House report notes that state comments become part of the record for any judicial review of the Secretary's decision.252 Further, the committee stated that "certain OCS activities including lease sales and the approval of development and production plans must comply with the 'consistency' requirements as to [approved] coastal management plans."253 The committee specifically noted that "nothing [in the OCSLAA] is intended to alter procedures under [the CZMA] for consistency once a State has an approved Coastal Zone Management Program."254

The committee report implies that a court, in reviewing the Secretary's decision to accept or reject a state's comments, should consider that state comments based on an approved CZM program may well bind the Interior Department under the CZMA's consistency provisions. In fact, the OCSLAA's goals of expedited OCS resource devel-

251. See supra notes 124-127 and accompanying text. But see Comment, supra note 125.
252. "[W]eight can and should be attached to the recommendations, and the reasons for rejection, as part of the total record before the court." H.R. Rep. No. 590, supra note 212, at 153, 1978 U.S. Code Cong. & Ad. News at 1559.
254. Id.
opment and increased state involvement in OCS decisionmaking would be furthered by giving great weight to a state's CZM-based comments during the lease sale planning stage. Early consideration would reduce the chances of delay arising from state disagreement with a federal consistency determination. Therefore, a reviewing court should presume that state comments based on approved coastal management programs provide for a reasonable balance of state and national concerns.

C. Offshore Federalism after the OCSLA

The OCSLA's legislative history evinces a clear intention to provide states with a leading role in OCS decisionmaking. However, the statute's specific provisions fall short of achieving that goal. The OCSLA does provide for state input at the programmatic and individual lease sale levels. But Congress did not intend the state role to encompass a veto power, and the statute gives the Secretary discretion to accept or reject state comments at both the programmatic and lease sale levels. Consequently, the Secretary's ability to override state concerns may be great enough to effectively remove the states from their leading role, placing them in a mere advisory position. Neither the leasing schedule nor lease sale sections provide clear criteria to guide the Secretary in deciding whether to accept or reject a state's recommendations. Thus, there are no clear criteria by which a reviewing court can evaluate the weight given to these recommendations. Additionally, the D.C. Circuit has removed the procedural protection that the statute's "substantial evidence" standard of review gave to states' laws, goals, and policies, by effectively substituting an "arbitrary or capricious" standard of review at the programmatic level.255

On the other hand, the OCSLA does not reduce the states' powers under the CZMA's consistency provisions. Moreover, there is support for the argument that the OCSLA should be interpreted in light of the CZMA, and that state lease sale comments based on approved coastal management programs are entitled to a presumption that they reasonably balance national and state concerns. In sum, the OCSLA clearly intends "denationalization" of OCS oil and gas development. The degree to which this occurs, however, will depend on how the Secretary of the Interior exercises his or her considerable discretion.

IV
CALIFORNIA V. WATT

A. Factual Background

California v. Watt is essentially a dispute over the geographic extent of OCS Lease Sale 53, an offering of 243 tracts situated in five

255. See supra notes 235-238 and accompanying text.
different oil-bearing basins off the central and northern California coast. In November 1977 the Interior Department issued a Call for Nominations for specific tracts to be included or excluded from the sale. In October 1978 Interior tentatively selected tracts in all five basins for inclusion in Lease Sale 53.

On July 6, 1980, the California Coastal Commission, the state agency charged with administering California's coastal management program, requested that Secretary Andrus submit to the state a CZMA consistency determination on the lease sale. Despite the federal mediator's opinion in Lease Sale 48 and clear Congressional expression to the contrary, the Interior Department continued to maintain that a federal OCS lease sale did not directly affect the coastal zone. The Secretary issued the Proposed Notice of Sale on October 16, 1980, and followed it with a "negative determination" (consistency review not required) six days later. The Proposed Notice of Sale offered 115 tracts, all of which were located in the Santa Maria Basin. On December 16, 1980, the Coastal Commission resolved that 29 tracts would need to be deleted before the sale would be consistent with California's approved management program. On December 24, Governor Brown recommended deletion of 32 tracts in his OCSLAA comment to Secretary Andrus.

Following the change in administrations, Secretary Watt issued a revised Proposed Notice of Sale on February 10, 1981. The revision made no deletions from the Santa Maria Basin and reincluded four northern basins dropped by Secretary Andrus. Governor Brown's re-

256. 683 F.2d 1253, 1258 (9th Cir. 1982), cert. granted, Watt v. California, 103 S. Ct. 2083 (May 16, 1983) (Nos. 82-1326, 82-1327, 83-1511). OCS tracts contain up to 5760 acres (three square miles) of submerged land. 43 C.F.R. § 3314.2 (1982).
257. The OCS leasing procedure during the relevant time period consisted of several stages. During the Call for Nominations, industry, states, and other interested parties nominated tracts to be included or excluded from the sale. Based on this information and its own geological data, the Interior Department then made a tentative tract selection and began preparing an environmental impact statement (EIS). Interior amended the tracts to be offered based on the response to the draft and final EIS's. Following release of the final EIS, Interior issued a Proposed Notice of Sale. 90 days later, after the states had an opportunity to comment, the Final Notice of Sale was issued. 44 Fed. Reg. 38,279-80 (1979). Secretary Watt recently streamlined these procedures. 47 Fed. Reg. 25,967-72 (1982) (codified at 43 C.F.R. subpt. 3315 (1982)).
258. 683 F.2d at 1258.
259. Id.
260. Id.
261. See supra note 180.
262. 683 F.2d at 1258-59.
263. See supra note 187.
264. 683 F.2d at 1259.
265. Id. at 1258. The Santa Maria Basin extends from Point Conception in Santa Barbara County north to Point Sur in Monterey County.
266. Id. at 1259.
267. Id.
sponse to Secretary Watt's proposal again recommended deletion of 32 tracts in the Santa Maria Basin. The Coastal Commission unanimously resolved that deletion of the four northern basins and 31 tracts in the Santa Maria Basin would be necessary to make Lease Sale 53 consistent with California's coastal management program.

On April 10, Secretary Watt divided Lease Sale 53 into two sales, postponing the four northern basin offerings but retaining all 115 tracts in the Santa Maria Basin. The Final Notice of Sale for Lease Sale 53 was published on April 27, 1982. On April 29, California, joined by several other plaintiffs and intervenors, filed suit in federal district court, claiming violations of five federal statutes. On May 1, Secretary Watt notified Governor Brown of the basis for his rejection of the Governor's recommendations.

On May 27, Judge Mariana Pfaelzer of the Central District of California issued a preliminary injunction preventing the Interior Depart-

268. Id.

269. California Coastal Comm'n, Staff Recommendation of Position Statement on Revised Proposed Notice of Sale for OCS Lease Sale #53, at 1 (Mar. 31, 1981). Among other considerations, the Coastal Commission found that the lease sale would be inconsistent with the state's coastal management policies concerning protection of both marine resources (CAL. PUB. RES. CODE § 30230 (West 1977)) and environmentally sensitive habitat areas (id. § 30240), and concerning crude oil spills (id. § 30232). The Commission objected to the leasing of tracts within the boundaries of proposed and existing federal marine sanctuaries and near key marine mammal and seabird breeding and nesting areas. California Coastal Comm'n, supra, at 7-8. It found that existing oil spill cleanup and containment technology could not adequately protect marine resources in the four northern basins. Further, the Commission determined that a large oil spill in the Santa Maria Basin could jeopardize a population of threatened southern sea otters. Id. at 8-9. The Commission's recommendations would have allowed leasing of over 80 percent of the oil and gas resources in the proposed sale. Id. at 15.

270. 683 F.2d at 1258.

271. Id. at 1259.

272. Id.

273. California v. Watt, 520 F. Supp. 1359 (C.D. Cal.), aff'd, 683 F.2d 1253 (9th Cir. 1982), cert. granted, Watt v. California, 103 S. Ct. 2083 (May 16, 1983) (Nos. 82-1326, 82-1327, 82-1511). Plaintiffs include the State of California, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation. A companion case, Natural Resources Defense Council v. Watt, was consolidated with California v. Watt. Intervening as plaintiffs in California v. Watt are the counties of Humboldt, Mendocino, Sonoma, Marin, San Mateo, Santa Clara, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, and San Diego, and the cities of Brisbane, Los Angeles, San Luis Obispo, Santa Cruz, Santa Monica, and Seaide. By the time the case reached the Ninth Circuit, intervenors also included the Cities of Capitola, Carmel-by-the-Sea, Morro Bay, Pismo Beach, Santa Barbara, and the City and County of San Francisco.


275. 683 F.2d at 1259.
ment from acting on any lease sale bids. Judge Pfaelzer granted summary judgment on August 18, agreeing with California’s claim that the Interior Department violated the CZMA, and enjoining the Interior Department from taking further action until the Department complied with the CZMA’s consistency requirements. The court ruled against plaintiff’s other four statutory claims.

B. Plaintiffs’ OCSLAA Claim

California contended that Secretary Watt violated the OCSLAA’s mandate to accept a governor’s recommendations regarding the size, timing, and location of a proposed lease sale. It claimed that Governor Brown’s comments provided for a reasonable balance of national and state interests. Noting that the Secretary’s decision was not subject to reversal unless “arbitrary or capricious,” the court “consider[ed] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” The court found that Secretary Watt gave sufficient consideration to the relevant factors to meet the vague requirements of the statute. It concluded that “the Secretary’s extremely limited consideration of . . . the ‘well-being of the citizens of the affected State,’ barely suffices to meet the plaintiff’s challenge.”

Plaintiffs also challenged the adequacy of consultation between the Secretary and the governor and the fact that the Secretary’s response to the state’s recommendations came four days after publication of the Final Notice of Sale. Again applying the arbitrary or capricious standard, the court found that the minimal written correspondence met the “bare technical requirements of the statute.” The district court also pointed out that the statute does not impose a requirement that the Secretary’s response precede announcement of his decision to proceed with the sale. Judge Pfaelzer concluded that “[a]lthough the Secretary quite clearly violated the spirit of the Act,

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276. 520 F. Supp. at 1367.
277. Id at 1389.
278. Id. A discussion of the court’s decision on the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Policy Act claims is beyond the scope of this Comment.
279. Id. at 1384.
281. See supra note 255 and accompanying text.
282. 520 F. Supp. at 1384.
283. Id.
284. Id. at 1385. Excluding the Call for Nominations and the May 1, 1981, letter notifying California of Interior’s rejection of the state recommendations, the court found that Interior had made “at least three” separate written communications with the state regarding the disputed tracts. Id. at 1367.
285. Id.
giving due deference to his judgment, it cannot be said that his determination to reject the recommendation submitted by Governor Brown was legally 'arbitrary and capricious.'”286 On appeal, the Ninth Circuit affirmed the district court’s OCSLAA holding, but refrained from levying the same sort of criticism on the Secretary.287

C. Plaintiff’s CZMA Claim

The specific CZMA issue before the district court was whether the Final Notice of Sale for OCS Lease Sale 53 was a federal activity directly affecting California’s coastal zone.288 Judge Pfaelzer analyzed the purposes, policies, and legislative history of the CZMA in great detail289 and concluded:

Clearly, the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone. Any other interpretation would thwart the purposes of the Act.290

The court went on to examine Secretary Watt’s claim that the OCSLAA’s lease sale section precluded application of the CZMA’s consistency requirement to OCS lease sales. The Secretary argued that applying the federal consistency requirement to lease sale decisions would allow the state to substitute its judgment for his own.291 The district court looked to the language of the OCSLAA292 and correctly determined that it does not affect the CZMA’s applicability to OCS decisions.293

The district court declined to hold that an OCS lease sale would always affect a state’s coastal zone. Rather, it agreed with NOAA and the Justice Department opinion that this issue must be resolved on a case by case basis.294 The court noted, however, that the possibility of an OCS lease sale which will not directly affect a state’s coastal zone “probably could only be posed as a hypothetical.”295 The court then discussed some of Lease Sale 53’s direct effects on California’s coastal zone and concluded that the threshold test had been met without difficulty.296

Two weeks after plaintiffs filed suit, NOAA amended its interpretation of “directly affecting,” proposing a definition that was com-

286. Id. at 1385-86.
287. 683 F.2d at 1269.
288. See supra notes 164-210 and accompanying text.
289. 520 F. Supp. at 1369-74.
290. Id. at 1374 (emphasis added).
291. Id.
293. 520 F. Supp. at 1375.
294. See supra notes 207-208.
295. 520 F. Supp. at 1380.
296. Id. at 1380-82.
pletely at odds with its earlier constructions. The agency, in fact, offered the same definition that Secretary Watt urged in the Lease Sale 53 preliminary injunction briefs and oral argument. Under the new definition, a federal activity would directly affect the coastal zone only if "the conduct of the activity itself produces a measurable physical alteration in the coastal zone or . . . initiates a chain of events reasonably certain to result in such alteration, without further required agency approval." The comment to this proposed regulation stated that a federal OCS lease sale would not directly affect a state's coastal zone. The rule became final on July 2, 1981. In late July and early August, members of both houses of Congress introduced resolutions disapproving the new definition.

The district court rejected this new definition. It reviewed the history of the term "directly affecting" in NOAA's regulations and concluded that the proposed regulation was inconsistent both with the agency's longstanding interpretation and the purposes of the statute. After the district court decision, and following a House Merchant Marine and Fisheries Committee vote to disapprove the new regulations, NOAA suspended their effective date and moved to withdraw them.

D. Analysis of the Ninth Circuit Opinion

The Ninth Circuit concurred with the district court's CZMA ruling and apparently adopted the "functional interrelationship" test, which first appeared in the 1971 Senate report, as the correct interpretation of "directly affecting." However, the court went on to weakly define "consistent to the maximum extent practicable," even though the definition was not at issue in the case, was superfluous to the court's holding, and had not been briefed by the parties. The court premised its discussion of the term on a strained interpretation of the district court's order, which required the federal government to comply with the

300. Id. at 26,660.
302. 683 F. 2d at 1262.
303. 520 F. Supp. at 1378. The Ninth Circuit agreed. 683 F.2d at 1263.
304. 46 Fed. Reg. 50,976 (1981); 683 F.2d at 1262-63.
305. See supra notes 170-172 and accompanying text.
306. 683 F.2d at 1260.
307. Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc 1, California v. Watt, 683 F.2d 1269 (9th Cir. 1982). Because the Interior Department had not made a consistency determination, the court addressed the question in a factual vacuum.
CZMA by “conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California’s Coastal Management Plan.”

Assuming arguendo that the district court order required the federal government’s activities be consistent with the state’s interpretation of its coastal management plan, the Ninth Circuit stated that such a result would be tantamount to a state veto over OCS activities. Rereasoning that since the CZMA permit consistency provision allows the Secretary of Commerce to override state objections to later private drilling activity, the Act’s federal consistency provisions could not be interpreted to give the states veto power over federal activities at the earlier lease sale stage. The court also found that one of the OCSLAA’s purposes was to expedite OCS oil and gas development, and noted that its lease sale provisions give the Secretary of Interior discretion to accept or reject state comments, provided his decision is not arbitrary or capricious. Thus, state veto power over federal OCS activity would frustrate OCSLAA’s vitally important goal of accelerating OCS oil and gas development.

Accordingly, the court interpreted “consistent to the maximum extent practicable” to preclude the states from interfering with federal OCS activity. The court’s definition went far beyond prohibiting a state veto, however. In making the consistency determination for an OCS lease sale, the court opined, the Secretary may take into account that further consistency determinations will be made at the exploration, development, and production stages. The lease sale need not be configured so as to preclude any possible future inconsistency from arising as development proceeds.

Further, in determining whether the federal activity is consistent to the maximum extent practicable, the federal agency may consider not only the state’s coastal management program, but also “the extent to which leasing, exploration, development, drilling, and production would be hampered or proscribed by conformity; the reasonableness of the state plan; as well as the terms of the particular lease sale.”

This interpretation of the CZMA’s federal consistency provisions is squarely at odds with the legislative history and purposes of the Act. The legislative history clearly shows that Congress intended federal agencies, except in rare instances, to conduct or support coastal activities—including OCS activities—consistently with a state’s approved

308. 520 F. Supp. at 1389.
309. 683 F.2d at 1264.
310. Id.
311. Id. at 1265.
312. Id.
313. Id. (emphasis added).
314. Id.
coastal management program. This requirement is essential if states are to assume the lead role in comprehensive coastal zone management, as Congress intends them to do. Congress amended the consistency provisions in 1976 to strengthen the states' roles in OCS development. Both the 1976 and 1980 committee reports, as well as the OCSLAA's legislative history, confirm the view that a state's approved coastal management program gives it authority over federal OCS activities, including lease sales.

The court's entire discussion of the consistency performance standard is based on the "imaginary horrible" of a state veto over federal OCS activities. Yet, federal consistency with approved state coastal management plans (absent conflicting federal law) does not equal a state veto. In considering the 1980 amendments to the CZMA, Congress pointed out the fallacy of the state veto notion:

A concern was raised at the hearing that section 307 may be used by the States to override Federal authority in OCS leasing activities. This has not been borne out by the record to date. It may be useful to note that State coastal zone management plans are approved under section 306, and are the direct result of, and must continue to be responsive to, a set of federally mandated goals set out in the Coastal Zone Management Act, in order for Federal consistency to be applicable at the State level.

These mandates include, of course, the CZMA's requirements that states provide federal agencies an opportunity to participate in state program development and that the state programs address the national interest in energy facility siting. Because these requirements assure that an approved program strikes a reasonable balance between the national interest in offshore energy development and the state's interest in protecting its citizens and resources, no absolute veto over OCS activities is possible.

The Ninth Circuit's opinion would return control over the OCS to the exclusive federal regime established in the 1953 OCSLA. In fact, noting that the 1953 OCSLA gave the federal government "exclusive proprietary control over 'the soil and seabed of the Continental Shelf,'" the court found that the CZMA "was not intended to change [the OCSLA's] division of control." The analysis developed in this Comment disputes that assertion. While the CZMA did not give the states a proprietary interest in the OCS, it did give them some control over OCS activities.

Moreover, the court's statement ignores altogether the extensive

315. See supra notes 173-183 and accompanying text.
316. See supra notes 162-161, 252-254 and accompanying text.
318. 683 F.2d at 1264.
1978 amendments to the OCSLA. While expeditious development of OCS resources is one of the purposes of the OCSLAA, it is not the sole purpose. Another major purpose of the OCSLAA is to alter the OCSLA's balance of authority by giving the states a leading role in OCS decisionmaking.319

State recommendations based on approved coastal management plans do not conflict with the OCSLAA, since the Act seeks development of OCS resources in a balanced manner, taking account of environmental and coastal zone consequences as well as the need for developing domestic oil and gas resources. As the court itself noted, the OCSLAA explicitly states that it does not amend, modify, or repeal any provision of the CZMA.320

The court of appeals also ignored or overlooked NOAA's consistency regulations, even though it earlier cited the regulations in discussing the meaning of "directly affecting." Most conspicuous by its absence is NOAA's definition of "consistent to the maximum extent practicable." This definition, clearly supported by the legislative history and purpose of the CZMA,321 and implicitly approved by Congress when it declined to amend the consistency provisions in 1980,322 requires federal agency compliance with approved coastal management programs unless compliance is prohibited by another federal law.323 NOAA's consistency regulations provide that the federal agency is to look only to the state's management program policies in making its consistency determination.324 By contrast, the Ninth Circuit's interpretation allows the Secretary to balance away state policies by invoking the national need to develop domestic energy resources.

Should the Supreme Court affirm the Ninth Circuit's dicta, the practical effect is unclear. NOAA is reportedly considering amending its definition of "consistent to the maximum extent practicable" to conform to the Ninth Circuit opinion. Should it do so, Congress may well take action. Both the denial of appropriations to fund the leasing of tracts in basins off California, Florida, and Massachusetts,325 and the House committee resolution disapproving NOAA's short-lived redefinition of "directly affecting," demonstrate opposition in both Houses to Secretary Watt's refusal to involve the states in OCS decisionmaking. Indeed, legislation has been introduced in the House of Representatives that would, if passed, make the state's role under the

319. See supra text accompanying note 241.
321. See supra notes 167-173 and accompanying text.
322. See supra text accompanying notes 181-184.
323. See supra notes 198-200 and accompanying text.
324. See supra notes 190-192 and accompanying text.
The history of offshore federalism reflects the interplay of the divergent views held by the federal courts and the executive branch on the one hand, and those held by Congress on the other. When the Supreme Court upheld the United States' claim to the marginal sea's submerged lands in *United States v. California*, Congress returned control of that area to the states via the Submerged Land Act. Although Congress did assert national control over the OCS in the OCSLA, it did so in the absence of any existing state claim to the area. Increasing competition for limited coastal zone resources and the threatened destruction of those resources led Congress to enact the CZMA. The act gives states the lead role in establishing coastal zone management policy. This role includes the ability to avoid or mitigate OCS adverse effects by requiring the federal OCS leasing process to be conducted consistently, to the maximum extent practicable, with approved state coastal management programs. The Santa Barbara oil spill in 1969 and the energy crisis in 1973 demonstrated that the federalism created by the OCSLA was largely unresponsive to environmental and social needs. Consequently, Congress substantially amended that law in 1978 to give the states a leading role in OCS decisionmaking.

Recent federal court decisions interpreting the CZMA and the OCSLAA may push offshore federalism back toward nationalism. In particular, the Ninth Circuit's dicta in *California v. Watt*, if affirmed by the Supreme Court, may greatly reduce state influence over federal OCS leasing decisions. Under that dicta, the Secretary of the Interior may balance federally approved state coastal management program policies against other considerations, and is therefore under no obligation to conduct the OCS leasing program in a manner that is consistent with those programs. By classifying an approved coastal management program as "unreasonable," the Interior Secretary may effectively overrule the Commerce Secretary's decision to approve a state's coastal management program. The practical result of the Ninth Circuit's dicta is thus clearly at odds with Congress' intent in enacting the CZMA's consistency provisions and the OCSLAA's provisions requiring a leading state role in OCS oil and gas development.

In 1953, opponents of the Submerged Lands Act feared that relinquishing federal control of the marginal sea's submerged lands to the states would betray the public trust in those lands. Their fears were misdirected. The federal government and the Interior Department have been quite susceptible to oil industry influence. This is illustrated

326. *See supra* note 233.
by the "closed process" of decisionmaking which existed between the oil industry and the Secretary of the Interior from the time of the OCSLA's passage until its amendment in 1978, and by Secretary Watt's proposed "fire sale" of one billion acres of OCS resources at a time of falling oil prices and demand. The opponents of state control of offshore oil resources also overlooked the concentrated external costs of offshore oil development which burden only adjacent coastal states, insuring that the states take a greater interest than the federal government in minimizing those costs. Thus, the states, rather than the federal government, are generally more protective of coastal resources when regulating offshore oil development.

From an environmental viewpoint, the type of offshore federalism established by a proper interpretation of the CZMA is even more likely to protect the public trust in coastal resources than either exclusive federal or state control of the OCS. The federal government's role as the proprietor of OCS revenues conflicts with its role as guardian of the public trust in coastal resources. Its incentives, reinforced by political considerations of massive federal budget deficits, tip toward rapid exploitation of OCS resources. On the other hand, the coastal states bear the brunt of the adverse impacts associated with OCS development, but receive few of its benefits. Their incentives strongly favor protection of public trust resources. By requiring federal OCS activities to be conducted consistently with approved state coastal management programs (except where this would conflict with another federal law), the CZMA ensures that OCS production will occur in a manner that will protect those resources.

Thus, a proper interpretation of the CZMA is necessary to protect both the states' role in OCS development and the public trust in coastal resources. The dispute over the CZMA's federal consistency provisions that appeared to be an isolated incident in 1980 has grown in dimension. If the states are to retain the lead role in coastal management assigned them by the CZMA, as well as a leading role in OCS decision-making, further Congressional elaboration of the consistency provisions may be necessary. The federal courts, as of yet, have not been willing to protect these roles.

327. See supra notes 71-72 and accompanying text.