CZMA Consistency Review: The Supreme Court's Attitude Toward Administrative Rulemaking and Legislative History in Secretary of the Interior v. California


INTRODUCTION

Section 307(c)(1) of the Coastal Zone Management Act (CZMA) mandates that "[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone" do so in a manner consistent with a state's coastal management plan. To ensure that the requisite degree of consistency is achieved, the regulations implementing the CZMA provide that federal agencies meeting the "conducting or supporting" criterion are required to undertake a consistency review. This review entails identifying direct effects on the coastal zone and enumerating how the activity is consistent with a state plan previously approved by the Secretary of Commerce.

In July 1980, California requested a consistency review of oil and gas lease sales on the Outer Continental Shelf (OCS) off the California coast pursuant to section 307(c)(1). The United States Department of the Interior, the federal agency responsible for mineral leasing on the OCS, refused to conduct such a review.

Secretary of the Interior v. California originated when California filed suit in district court in April 1981 in response to the Department of the Interior's refusal to conduct a consistency review. California won favorable decisions before the district court and, on appeal, before the Ninth Circuit Court of Appeals. However, on January 11, 1984, the United States Supreme Court reversed the lower court holdings in a five-to-four decision. The question before the Court was whether lease sales...

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5. California v. Watt, 683 F.2d 1253 (9th Cir. 1982).
are an "activity 'directly affecting' the coastal zone within the meaning of the statute" and are thus subject to the consistency review requirement of section 307(c)(1). The Supreme Court held that "Congress did not intend § 307(c)(1) to mandate consistency review at the lease sale stage." The majority's reading of section 307(c)(1) turns almost exclusively on an interpretation of the legislative history of the CZMA and the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA), with passing reference to the Outer Continental Shelf Lands Act of 1953. Extending back to 1953, the history of these statutes reflects both the ebb and tide of competing state and federal claims for control of coastal resources and a growing environmental awareness in the United States. The interplay of these forces forms the backdrop against which the issue of consistency review has developed. The controversy over the meaning of the phrase "directly affecting" and the applicability of the consistency review requirement did not begin to simmer, however, until the late 1970's. And it was not until April 1981 that the dispute turned litigious when the State of California filed suit to block OCS Lease Sale No. 53, the specific action at issue in Secretary of the Interior v. California.

The controversies over control of offshore mineral resources, the applicability of the CZMA to OCS resource development, and the Supreme Court decision itself have produced a substantial literature. Many of the commentators have framed their discussions in terms of federalism-states' rights issues. In contrast, this Note focuses primarily on the text concerning the latter's refusal to conduct a consistency review, pursuant to the requirements of section 307(c)(1), prior to the Final Notice of Sale for Outer Continental Shelf (OCS) Lease Sale No. 48. The absence of controversy prior to the late 1970's is accounted for, at least in part, by the fact that only three state coastal plans had received federal approval prior to 1978. By comparison, 23 state plans received approval between 1978 and 1980. These 26 states comprise 87% of the nation's coastline. Harvey, Federal Consistency and OCS Oil and Gas Development: A Review and Assessment of the "Directly Affecting" Controversy, 13 OCEAN DEVELOPMENT & INT'L J. 481, 515 & 525 n.64 (1984).

11. During the first quarter of 1979, a dispute developed between California and Interior concerning the latter's refusal to conduct a consistency review, pursuant to the requirements of section 307(c)(1), prior to the Final Notice of Sale for Outer Continental Shelf (OCS) Lease Sale No. 48. The absence of controversy prior to the late 1970's is accounted for, at least in part, by the fact that only three state coastal plans had received federal approval prior to 1978. By comparison, 23 state plans received approval between 1978 and 1980. These 26 states comprise 87% of the nation's coastline. Harvey, Federal Consistency and OCS Oil and Gas Development: A Review and Assessment of the "Directly Affecting" Controversy, 13 OCEAN DEVELOPMENT & INT'L J. 481, 515 & 525 n.64 (1984).

of the Court's opinion. Analyzing the Court's reasoning, it suggests that the majority unjustifiably departs from standard judicial deference to administrative agency rulemaking. In addition, this Note contends that the Court misconstrued the legislative history of the CZMA.

I

LEGISLATIVE BACKGROUND

In 1953, Congress passed two acts designed to avert, or at least to diminish, federal-state skirmishing over control of coastal waters and resources and to provide a national policy for coastal resource development. The Submerged Lands Act defines the coastal areas subject to state and federal control: states have jurisdiction over the waters and submerged lands extending three miles from the shoreline (the territorial sea), while federal jurisdiction encompasses the adjacent nine-mile wide "contiguous zone." The corollary Outer Continental Shelf Lands Act (OCSLA) granted the Secretary of the Interior express authority and broad discretion to lease the federally controlled OCS for energy resource development.

By the late 1960's, a heightened environmental awareness and a recognition of the increasing pressures for commercial, industrial, and recreational development of coastal areas led to congressional consideration of several coastal protection measures. Fears about the effects of develop-


13. The conflict over control began in 1945 when the federal government asserted jurisdiction over the submerged offshore lands adjacent to and extending three miles out from a state's coastline, reversing its policy of recognizing state ownership of these lands. In response to the Supreme Court’s decisions in the "Submerged Lands Cases" (United States v. California, 332 U.S. 19 (1947), United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950)) upholding federal jurisdiction over these offshore lands, Congress and newly elected President Dwight D. Eisenhower succeeded in returning jurisdiction to the states through enactment of the Submerged Lands Act (SLA), Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1982 & Supp. 11 1984)). Although the SLA defined the respective boundaries of federal and state jurisdiction over coastal areas, id. § 1312, it did not authorize federal leasing of OCS oil and gas resources. Hence, Congress enacted OCSLA "concurrent with and as a corollary to the SLA" to provide for the leasing of OCS mineral resources by the federal government. Jones, supra note 12, at 42. See id. at 34-47 for a thorough historical review of the developments during this period. See also Offshore Federalism, supra note 12, at 405-14.

15. Id. § 1312.
17. Id. §§ 1334-1343. See Jones, supra note 12, at 45 for a description of later congressional appraisals of the authority granted the Secretary under OCSLA. See also Miller, supra note 12, at 413. The largely unfettered control given the Secretary was significantly circumscribed by the 1978 OCSLA Amendments. See infra note 46 and accompanying text.
18. Harvey, supra note 11, at 483. See also 16 U.S.C. § 1451(c).
ment pressures, especially the potential threat engendered by OCS leasing, were confirmed in 1969 by the devastating oil spill from a drilling platform off the coast of Santa Barbara, California. Gushing forth at a rate of nearly 1000 gallons per hour, the spill blackened Santa Barbara’s beaches with a two-inch layer of crude oil and eventually produced an oil slick covering 800 square miles of ocean.\(^{19}\) Perhaps as a result of the Santa Barbara spill, legislative concerns about coastal zone protection finally crystallized, prompting passage of the CZMA in 1972.\(^{20}\)

Congress sought through the CZMA to promote federal-state cooperation in both the protection and the development of coastal resources.\(^{21}\) To accomplish this goal, the Act provides funds for the development of state coastal zone management plans\(^ {22}\) and enumerates certain minimum federal standards the plans must incorporate\(^ {23}\) to obtain the federal approval required before receiving administrative funding.\(^ {24}\) As an additional inducement to conform to the federal standards, the CZMA grants a state a measure of control over the conduct of specified activities affecting the coastal zone, once the state’s coastal plan is approved, by requiring that these activities be consistent with the plan.\(^ {25}\)

Section 307 of the CZMA, entitled “Coordination and Cooperation,” specifies five types of activity subject to consistency review. This section also establishes the threshold coastal zone impacts that activate the review requirement (i.e., the circumstances that render consistency review necessary), and the degree of consistency required for the five types of activity. Section 307(c)(1), under which California brought suit against Lease Sale No. 53, provides that “[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.”\(^ {26}\) Section 307(c)(2) applies the “maximum extent practicable” consistency requirement to federal agencies “undertak[ing] any development project in the coastal zone.”\(^ {27}\) Sections 307(c)(3)(A) and (B), re-

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19. Walmsley, *Oil Pollution Problems Arising out of Exploitation of the Continental Shelf: The Santa Barbara Disaster*, 9 SAN DIEGO L. REV. 514, 516, 556-57 (1972). Walmsley also notes other consequences such as the death of whales and the destruction of mollusks and lobsters. *Id.* at 556-59.
20. Justice Stevens notes in his dissent that the Santa Barbara incident was referred to numerous times during the debate on the CZMA. 464 U.S. at 348 n.5.
23. The Act sets out nine goals for which a state’s coastal management plan “should at least provide.” 16 U.S.C. § 1452(2). It also details “requirements” that each state “shall include” in its coastal plan. 16 U.S.C. § 1454(b).
25. The question before the Court in large measure concerned the degree of state control authorized by the statute.
27. 16 U.S.C. § 1456(c)(2) (emphasis added). The text of this section in its entirety reads:
spectively, pertain to federally licensed and permitted activities, and plans for the "exploration or development of, or production from, any area . . . leased under the Outer Continental Shelf Lands Act." Activities or plans within these categories affecting land or water uses in the coastal zone must comply with the state coastal plan and be conducted "in a manner consistent with the program." Finally, section 307(d) requires that all state and local projects for which federal funding is sought cannot be "inconsistent with a coastal state's management program."

In 1976, Congress added several amendments to the CZMA. Their overall effect "broadened the nature of the CZMA from a statute perceived as being concerned primarily with environmental protection to one seeking balanced development of coastal resources." One amendment that plays a central role in the Supreme Court's opinion in Secretary of the Interior extended consistency review to the OCS exploration, production, and development plans of federal oil tract lessees.

Throughout this same period, Congress was considering comprehensive amendments to OCSLA. In 1978, Congress amended OCSLA

"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."

29. 16 U.S.C. § 1456(c)(3)(A) and (B). In pertinent part these sections read:
   (A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application . . . a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program . . . .
   (B) After the management program of any coastal state has been approved by the Secretary . . . any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act . . . shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program . . . .

These two sections also permit a state to block proposed licenses, permits, or plans by withholding concurrence to the consistency determination, unless the Secretary of Commerce finds the proposed actions are consistent with the purposes of the CZMA or are in the interest of national security. 16 U.S.C. § 1456(d). As noted infra in the text accompanying note 33, section 1456(c)(3)(B) was added when 16 U.S.C. section 1456(c)(3) was amended in 1976, and plays an important role in the majority's analysis.

30. Id § 1456(d). This section was not involved in the controversy, but is included for completeness.
32. Harvey, supra note 11, at 488.
34. 43 U.S.C. §§ 1801-1866. See also Harvey, supra note 11, at 489: "Congressional
to restrict the previously expansive discretion of the Secretary of the Interior to lease OCS mineral resources.\textsuperscript{35} Congress established procedures and standards for the development of OCS resources that balanced environmental and developmental concerns and provided for state participation in OCS resource policy and planning.\textsuperscript{36}

II

THE CASE: GENESIS AND JUDICIAL HISTORY

California’s coastal management plan received federal approval in 1977.\textsuperscript{37} California thus was entitled to exercise its rights pursuant to CZMA section 307 when the Department of the Interior tentatively announced one year later the OCS areas to be included in Lease Sale No. 53. The tentative proposal, released in October 1978, encompassed five basins and 242 tracts comprising 1.315 million acres.\textsuperscript{38} Shortly after Interior’s release of a draft environmental impact statement for this lease sale in April 1980, the California Coastal Commission\textsuperscript{39} invoked section 307(c)(1), requesting that the Secretary of the Interior issue a consistency determination at the time of the proposed notice of sale.\textsuperscript{40}

When the Department of the Interior issued the proposed notice of sale on October 16, 1980, it had significantly reduced the scope of Lease Sale No. 53.\textsuperscript{41} The Department had eliminated all but one basin from the proposal—the Santa Maria Basin stretching from Santa Barbara to Point Sur and encompassing only 115 tracts. Accompanying this announcement, however, was Interior’s decision that no consistency determination was required because the preleasing activities associated with the sale had no “direct effect” on the California coastal zone.\textsuperscript{42} The Coastal Commission responded to Interior's negative determination by

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\textsuperscript{35} See Jones, supra note 12, at 47-70, especially at 58-61.

\textsuperscript{36} See 43 U.S.C. § 1802(2)-(6), declaring five main policy objectives of the OCS program. These include swiftly developing OCS petroleum resources, balancing OCS development with protection of the environment, and providing coastal states the opportunity to participate in planning decisions related to OCS development.

\textsuperscript{37} 454 U.S. at 317.

\textsuperscript{38} 520 F. Supp. at 1366 n.1. A basin is a geological formation defined as a “synclinal structure (a downwarped, trough-shaped configuration of folded, stratified rocks) in the subsurface, formerly the bed of an ancient sea. Because it is composed of sedimentary rock and because its contours provide traps for petroleum, a basin is a good prospect for [oil] exploration.” \textsc{Dictionary of Petroleum Terms} 8 (2d ed. 1979). A tract, on the other hand, merely refers to an area of land administratively designated by means of geographical coordinates.

\textsuperscript{39} The California Coastal Commission (CCC) is the state agency responsible for administering California's coastal management plan.

\textsuperscript{40} 520 F. Supp. at 1366.

\textsuperscript{41} See id.

\textsuperscript{42} See id. at 1366-67.
adopting a resolution calling for the elimination of an additional twenty-nine tracts so as to make Lease Sale No. 53 consistent with California's coastal plan. Subsequently, then-Governor Edmund G. Brown, Jr., recommended the deletion of thirty-four tracts pursuant to his authority under OCSLA section 19(a).

The Lease Sale No. 53 controversy intensified following the inauguration of Ronald Reagan as President in January 1981. President Reagan's newly appointed Secretary of the Interior, James Watt, revised the proposed notice of sale to include the four basins previously deleted by former Secretary Andrus. Although the "vehement reaction of California" made this revision short-lived, the reaction failed to impede the publication of the final notice of sale on April 27, 1981 for the 115 tracts located in the Santa Maria Basin.

On April 29, 1981, California filed suit in the District Court for the Central District of California seeking to enjoin the proposed sale. A separate but similar action was filed in the same court by a coalition of environmental groups including the Natural Resources Defense Council, the Sierra Club, and Friends of the Earth. Both complaints alleged that Interior had violated section 307(c)(1) of the CZMA. The district court issued a preliminary injunction on May 27, 1981 and on July 10 heard arguments in the consolidated cases on cross motions for summary judgment.

At the district court hearing, California and the environmental groups argued that leasing initiates a chain of events that culminates in oil and gas development and that it therefore "directly affects" the

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43. The district court noted that four tracts were combined into two for sale purposes. Thus, although the CCC actually requested the deletion of 31 tracts, the request applied to only 29 tracts in the notice of sale. Id. at 1367.
44. Id.
45. As with the CCC's request, Governor Brown's request that 34 tracts be deleted applied to only 32 tracts because four tracts were combined into two for sale purposes. Id. The degree of overlap between the Governor's proposal and the CCC's resolution is unclear.
46. The 1978 OCSLA Amendments conferred on Governor Brown the authority to intervene in the situation. Section 1345(a) provides that the governor of the affected coastal state may make specific recommendations to the Secretary of the Interior regarding the "size, timing, or location of a proposed lease sale" or regarding a proposed development and production plan.
47. 520 F. Supp. at 1367.
48. Harvey, supra note 11, at 496.
49. See 520 F. Supp. at 1367.
50. Id.
51. 464 U.S. at 319 n.3.
52. Id. at 319. The complaints also alleged violations of OCSLA, the National Environmental Policy Act, the Endangered Species Act, and the Marine Mammal Protection Act, but the district court found for the defendants on these claims. 520 F. Supp. at 1366, 1382-89. This judgment was affirmed by the Ninth Circuit and was not appealed to the Supreme Court. 464 U.S. at 319 n.4.
53. 520 F. Supp. at 1367.
coastal zone within the meaning of section 307(c)(1). According to the plaintiffs, Interior's refusal to conduct a consistency review thus violated the statutory requirement.

The district court agreed, based on its review of the CZMA's purpose, its legislative history, related statutes, the responsible agency's interpretation, the dictionary definition, an opinion letter by the Department of Justice, and the "direct effects" of Lease Sale No. 53. The court thus enjoined Interior from taking any further

54. California concluded that "[i]t is the Federal [leasing] decision which sets in motion all of the OCS activities which follow and their significant coastal zone impacts" in its Notice of Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof, 520 F. Supp. 1359 (C.D. Cal. 1981) (Nos. 81-2080 MRP (MX) and 81-2081 MRP (MX)) at 17.

55. 520 F. Supp. at 1369-71. Examining the national objectives declared in the CZMA, see supra note 23, and the program of incentives Congress established to gain the states' cooperation in attaining them, Judge Pfaelzer found it would be "anomalous" to attribute to Congress the intent to exclude the states from a decisionmaking stage that defined and established the basic parameters of the subsequent stages of development and production. Id. at 1371.

56. Id. at 1371-74. Judge Pfaelzer discussed three aspects of the legislative history: the insertion of the "directly affecting" language in section 307(c)(1) at the time of its initial enactment; the 1976 amendment of section 307(c)(3) by the addition of section (3)(B); and the congressional reauthorization of the CZMA in 1980. All of these events were later addressed by Justice O'Connor's majority opinion for the Supreme Court. See infra notes 101-17, 144-63, & 118-25, respectively, and accompanying text.

57. Id. at 1374-76. The defendants argued that the provision for governors' recommendations included in section 19 of OCSLA superseded the applicability of CZMA section 307(c)(1) to OCS leasing activities. Judge Pfaelzer was unpersuaded, however, in large measure because OCSLA contains a "savings clause" (43 U.S.C. § 1866).

58. Id. at 1376-78. Congress delegated responsibility for administering the CZMA to the Department of Commerce, vesting in the Secretary of Commerce the power to authorize developmental and administrative grants to the states, and to approve proposed coastal management programs. 16 U.S.C. §§ 1454-1455. In turn, Commerce charged the National Oceanic and Atmospheric Administration (NOAA) with responsibility for promulgating regulations and procedures to effectuate the CZMA's provisions. 15 C.F.R. § 930 (1986). Judge Pfaelzer recounted the history of NOAA's rulemaking in some detail and concluded that the Agency's "longstanding interpretation of the consistency requirements" was entitled to deference. 520 F. Supp. at 1378. See infra notes 75-98 and accompanying text for a discussion of the rulemaking history.

59. Id. at 1378-80. Judge Pfaelzer rejected as "subterfuge" the defendant's argument that the plain meaning of "directly" is "effects resulting from an activity without an intervening cause." Id. at 1378. She found it did not comport with any of the dictionary definitions cited by the defendants and that following it "would produce an unreasonable result." Id. at 1379. Compare the majority and dissenting opinions' treatment of the statute's plain language, infra notes 99-100 & 114 and accompanying text.

60. Id. at 1380. In the earlier dispute between Commerce and Interior over the meaning of the consistency provisions of § 307(c)(1), referred to supra note 11, both departments had requested the Department of Justice to address the issue. 44 Fed. Reg. 37,142 (1979).

61. Id. at 1380-82. Judge Pfaelzer declined to "hold that the final notice of lease sale is a generic category of federal activity which directly affects the coastal zone within the meaning of § 307(c)(1)." Id. at 1380. Instead, she found that a determination regarding the effects of a lease sale must be assessed on the basis of each individual case. Applying this test to Lease Sale No. 53, Judge Pfaelzer found evidence of the direct effects in the notice itself, in the Secretarial Issue Document (a study prepared by Department of the Interior staff to assist the Secretary of Interior in making his decision), and in the Environmental Impact Statement.
action regarding the contested tracts until it complied with the consistency review requirement of the CZMA and "conducted all activities on these tracts in a manner consistent with California's Coastal Management Plan." The Court of Appeals for the Ninth Circuit, guided by the district court's thorough review of the issues, upheld that court's finding that Interior was required to undertake a consistency review before proceeding with the sale. Notably, the Interior Department conceded on appeal that section 307(c)(1) applied at the lease sale stage. Rather than reargue that issue, Interior focused on the claim that only those effects that "are part of, or immediately authorized by, a lease sale" are covered by the phrase "directly affecting."

III

THE SUPREME COURT DECISION

Only one issue confronted the Supreme Court on appeal. In the words of the majority opinion, "[w]e must determine whether the sale [of oil and gas leases on the outer continental shelf off the coast of California] is an activity 'directly affecting' the coastal zone under § 307(c)(1) of the Coastal Zone Management Act (CZMA)." The majority concludes at the outset of the opinion that the sale "is not an activity 'directly affecting' the coastal zone within the meaning of the statute." The direct effects included a 52% probability that an oil spill would impact on the sea otter range, the "degradation of water quality in the area," the disruption of marine life, and adverse onshore impacts such as substantial population influx. Id. at 1381.

62. Id. at 1389.
63. 683 F.2d at 1263. The Ninth Circuit considered the purposes of the CZMA, its legislative history, the NOAA regulations promulgated pursuant to it, and its relationship to OCSLA. The court also ruled on the degree of consistency mandated by the language "to the maximum extent practicable," 16 U.S.C. § 1456(c)(1), even though, as Miller notes, "the definition was not at issue in the case, was superfluous to the court's holding, and had not been briefed by the parties." Miller, supra note 12, at 445. The Supreme Court opinion declined to address this issue, 464 U.S. at 320 n.5, thus leaving in force the Ninth Circuit's interpretation that section 307(c)(1) does not require a lease sale to "be configured so as to preclude any possible future inconsistency from arising as development proceeds." 683 F.2d at 1265 (emphasis in original). The court's related assertion that the Secretary of the Interior's consistency determination "may take into account that further consistency determinations will be made at the exploration, development, and production stages, when more complete information will be available," id., foreshadows two aspects of the Supreme Court majority's analysis. See infra notes 166-68 and accompanying text.
64. See 683 F.2d at 1260.
65. Id.
66. The question presented by the Secretary of the Interior reads "[w]hether an outer continental shelf lease sale ... is a federal activity 'directly affecting the coastal zone' within the meaning of Section 307(c)(1)." Brief for Petitioners at 1. Similarly, California's question presented reads "whether, using that ['directly affecting the coastal zone'] test, the lower courts properly determined that Outer Continental Shelf Lease Sale 53 is a federal activity directly affecting the California coastal zone." Brief for Respondents at 1.
67. 464 U.S. at 315.
68. Id.
The majority supports its conclusion with four distinct, yet related, arguments. Surprisingly, however, only one of these discusses the meaning of "directly affecting," and it is added at the end of the opinion almost as an afterthought. First, the majority spurns the normal judicial practice of deferring to the responsible administrative agency's interpretation of a statute. The Court refuses to accord weight to the National Oceanic and Atmospheric Administration's (NOAA) rulemaking, despite the Agency's delegated authority to promulgate rules to implement the CZMA.69 The majority next analyzes the legislative history of the CZMA and finds that Congress intended section 307(c)(1) to apply only to those "activities conducted or supported by federal agencies on federal lands physically situated in the [three-mile-wide state] coastal zone"; in other words, the Court finds that the geographical scope was limited to activities physically located within the boundaries of the state coastal zone as defined in the CZMA.70 In contrast to this asserted geographical limitation, the majority's third argument alleges a functional limitation. According to this analysis, section 307(c)(1) is inapplicable to the dispute because "lease sales are a type of federal agency activity not intended to be covered by § 307(c)(1) at all."71 Finally, the majority concludes that lease sales can "no longer aptly be characterized as 'directly affecting' the coastal zone" because further separate federal approval is required before exploration, development or production can begin.72 In that it only advances this conclusion assuming arguendo that section 307(c)(1) does apply to lease sales, however, the majority arguably fails to reach the essential issue presented by the appeal—whether oil and gas leasing "directly affects" the coastal zone.73

A. NOAA's Administrative Regulations

The majority briefly recounts the history of the NOAA's role in construing section 307(c)(1), compressing it into a single footnote.75 In doing so, however, the Court fails to distinguish the separate issues of

69. See id. at 320 n.6. See supra note 58 for a brief discussion of NOAA's rulemaking function.

70. Id. at 330. See id. at 321-30 for the majority's argument in support of this claim. See infra text accompanying notes 99-143.

71. 16 U.S.C. § 1453(1).

72. 464 U.S. at 332. See id. at 331-41 for the full argument. See infra text accompanying notes 144-63.

73. Id. at 342. The Court’s discussion occurs at id. at 342-43. See infra text accompanying notes 164-72.

74. See 14 ENVTL. L. REP., supra note 12, at 10,164: "[T]he organization of the opinion, the Court’s statement that it based its decision on the geographical limits of § 307(c)(1), and its failure to address specifically the district court’s factual finding of direct effects all support the conclusion that this reasoning [on pages 342-43] is dictum." See also id. at 10,166: "The Court declined to adopt a definition [of “directly affecting”], since it ruled that § 307(c)(1) did not apply to OCS leasing."

75. See 464 U.S. at 320 n.6.
NOAA's stance on (1) the applicability of section 307(c)(1) to lease sales and (2) whether lease sales "directly affect" the coastal zone. Bearing in mind this distinction and the full historical detail of NOAA's rulemaking, it became apparent that the majority's summary dismissal of the Agency's position is unwarranted.

With regard to the applicability of section 307(c)(1) to the leasing process, the majority notes that in 1977 NOAA "expressly declined to take a position on the applicability of § 307(c)(1) to the leasing process."\(^7\) The Court fails to mention, however, that NOAA did tender a preliminary assessment of the matter. NOAA stated that it was "considering a position which treats... [Interior's] pre-lease sale decisions... as a 'Federal activity' subject to the requirements of Section 307(c)(1) of the CZMA."\(^7\) Nor does the Court explain that the Agency refrained from taking a firm position at that time because of an ongoing dispute over the issue between the Departments of the Interior and Commerce.\(^7\)

When NOAA published its final regulations interpreting section 307(c)(1) in 1978,\(^7\) and its amended regulations in 1979,\(^8\) it set forth a broad view of which federal activities fall within the purview of the consistency review requirement of section 307(c)(1), specifically including the "OCS pre-lease sale stage."\(^8\) NOAA also expressly supported a broad view in a 1980 letter to State Coastal Management Program Directors: "In our view Federal consistency requirements subject final notices of OCS sales to consistency determinations."\(^8\) Finally, as Justice Stevens points out in dissent, NOAA regulations in effect throughout the litigation over OCS Lease Sale No. 53 specified that federal activities on the OCS were subject to the consistency review requirement.\(^8\) Contrary to the impression created by the majority opinion, therefore, NOAA consistently adopted a broad view of the applicability of section 307(c)(1) to OCS lease sales.

NOAA did alter its interpretation of the phrase "directly affecting" in 1981.\(^8\) But both the history of NOAA's interpretation prior to that

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\(^7\) Id.
\(^8\) See id.
\(^8\) 683 F.2d at 1262 (citing Letter from NOAA to State Coastal Management Program Directors (April 9, 1980)).
\(^8\) See 464 U.S. at 359 n.18 (citing the NOAA regulation: "Federal activities outside of the coastal zone (e.g., on excluded Federal lands, on the Outer Continental Shelf, or landward of the coastal zone) are subject to Federal agency review to determine whether they directly affect the coastal zone." 15 C.F.R. § 930.33(c) (1986)).
date and the circumstances surrounding the change challenge the majority's characterization that NOAA "has walked a path of . . . tortured vacillation" in construing this phrase. The 1978 final regulations issued by NOAA adopted a liberal construction of "directly affecting," with the Agency substituting the phrase "significantly affecting" in an effort to clarify the legislative language. NOAA's subsequent reincorporation of the exact language of the CZMA in 1979, in response to an opinion letter from the Department of Justice, did not represent NOAA's rejection of the "directly affecting" language as suggested by the majority. Rather, as indicated in its commentary on this revision, NOAA continued to encourage "[f]ederal agencies to construe liberally the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review." 

Furthermore, contrary to the implication in the majority's summary that the Justice Department's Office of Legal Counsel had rejected NOAA's broad view, the opinion letter only rejected the use of the phrase "significantly affecting" in place of the literal statutory language, "directly affecting." The opinion letter refrained from endorsing a position on the meaning of "directly affecting" because the "question whether particular pre-leasing activities affect the coastal zone is one of fact [that] the Department was not authorized to answer." 

Approximately two weeks after California sued the Department of the Interior over Lease Sale No. 53, NOAA proposed the adoption of a new definition of "directly affecting" that signaled a sharp reversal from its previous interpretation of this language. Not only did the new formulation narrowly define the meaning of "directly affecting," essentially

85. 464 U.S. at 320 n.6.
87. 44 Fed. Reg. 37,142.
88. See 464 U.S. at 320 n.6. See supra note 60.
90. Cf. Harvey, supra note 11, at 525 n.59, discussing the opinion letter: "According to DOJ, Congress intended that different standards should apply to the various consistency categories. No need existed, therefore, to remove the differences by applying the 'significantly affecting' definition as the uniform threshold test;" cf. also 683 F.2d at 1262: "NOAA deleted this [significantly affecting] definition in 1979 in response to a Department of Justice opinion taking issue with that portion of the definition . . . ."
91. 520 F. Supp. at 1380 (citing Department of Justice, Legal Memorandum to Department of Commerce and Department of Interior, April 20, 1979). Neither did the opinion letter reject the view that section 307(c)(1) is applicable to the lease-sale stage. Justice in fact concluded that "pre-leasing activities of the Secretary of Interior are subject to the conformity requirement of § 307(c)(1)." Id.
conforming to the definition urged by Interior,93 but in its commentary, the Agency specified “lease award” as an example of activity that does not “directly affect” the coastal zone.94 NOAA’s revision of its regulations evoked such an immediate outpouring of state and congressional response that the Agency suspended the revision95 and proposed its revocation96 within four months of the issuance of the Notice of Final Rulemaking.97 Both lower courts refused to accord this short-lived revision any weight in their considerations. They did so because the new regulation so clearly contrasted with the Agency’s earlier position and because the timing of the announcement revealed it as a self-serving attempt to influence the outcome of the Lease Sale No. 53 controversy.98

The Supreme Court, by comparison, finds NOAA’s revision significant enough to warrant disregarding the Agency’s interpretation of CZMA section 307(c)(1). The Court fails to see that NOAA’s aborted attempt to revise the definition of “directly affecting” subsequent to the initiation of litigation is relevant, if at all, only to the question of the definition of “directly affecting,” and not to the applicability of section 307(c)(1) to lease sales. The majority opinion commingles these two distinct issues by implying that the change in NOAA’s interpretation of “directly affecting” also relates to the applicability question, thereby creating the impression of overall indecisiveness in NOAA’s rulemaking. This impression legitimates the majority’s refusal to grant deference to NOAA’s position on either issue. Yet the Agency had consistently construed section 307(c)(1) as applicable to the lease-sale stage and interpreted the “directly affecting” threshold requirement broadly, except for the short-lived revision. Moreover, the majority focuses its analysis on the applicability of section 307(c)(1), an issue on which NOAA was

93. See 46 Fed. Reg. 26,659. The proposed revision specified that a federal activity directly affects the coastal zone only “if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, without further required agency approval.” Id. Compare the argument in the brief petitioners submitted to the Supreme Court: “An OCS lease sale does not directly affect the coastal zone because it does not authorize any activities that, prior to further federal approval and review, will have a physical impact upon that zone.” Brief for Petitioners at 21.


96. Id. at 50,976-77.

97. See Harvey, supra note 11, at 526 n.72; which lists fifteen state agencies and offices that commented negatively on the proposed rule change. Harvey also recounts the congressional response, which included the introduction of disapproval resolutions by several legislators. Id. at 499-500, and in the accompanying notes. She further points out, citing a memorandum from the General Counsel to the Secretary of Commerce, that the Administration withdrew the regulation without awaiting the outcome of the legislative process because it perceived that "a successful disapproval resolution would hamper efforts to overturn the district court's ruling." Id. at 499.

98. See 520 F. Supp. at 1378; 683 F.2d at 1263.
wholly consistent. Thus, the majority's facile dismissal of the history of NOAA rulemaking as a guide to its deliberations is insupportable.

B. The Legislative Compromise over "Directly Affecting"

The majority quickly disposes of the alternative "plain language" arguments urged on the Court by the parties before considering the legislative history of section 307(c)(1). Although it finds both parties' interpretations "superficially plausible," the majority concludes that neither is supported by "the Act itself."

The majority then turns to a two-stage analysis of the relevant legislative history: the first stage examines the origin of the "directly affecting" threshold standard of section 307(c)(1); the second considers the "history of other sections of the original CZMA bills." In the CZMA bills originally passed by the House and Senate, section 307(c)(1) applied the consistency review requirement to "federal activities 'in' the coastal zone." This language was altered to "directly affecting the coastal zone" without explanation by the Conference Committee. The majority explains the change as a compromise between the different definitions of "coastal zone" contained in the House and Senate bills. The Senate had defined "coastal zone" to exclude lands under federal jurisdiction physically within the three-mile-wide state coastal zone created by the Submerged Lands Act, while the House included these lands. Neither of these bills defined "coastal zone" to encompass any lands beyond the three-mile point.

The final text of the CZMA incorporates the Senate's definition of "coastal zone" and the threshold language "directly affecting." Because the OCS had not been included in either the House's or Senate's definition of "coastal zone," the majority surmises that these concurrent changes represented a compromise intended "to reach at least some activities conducted in those federal enclaves excluded from the Senate's definition of the 'coastal zone'." On the basis of this interpretation,

99. See supra note 93 for the definition supported by Interior. California claimed that an activity meets the "directly affecting" threshold requirement when it "initiates a series of events of coastal management consequence." Brief for Respondents at 10.
100. 464 U.S. at 321.
101. Id. at 324.
104. 464 U.S. at 322 (emphasis added).
105. Id.
106. See id. at 322-24.
109. See S. 3507 § 304(a), supra note 107, and H.R. 14,146 § 304(a), supra note 108.
110. 464 U.S. at 323. Cf. id. at 323-24: "The implication seems clear: 'directly affecting' was used to strike a balance between two definitions of the 'coastal zone.' "
and citing the Conference Committee's Report\textsuperscript{111} and congressional remarks,\textsuperscript{112} the majority further concludes that OCS leasing also falls outside the intended coverage of the Conference's compromise.\textsuperscript{113}

Several difficulties inhere in the majority's explanation. First, as Justice Stevens points out in dissent, the "plain language" of section 307(c)(1) provides more direction than the majority acknowledges.\textsuperscript{114} The phrase "directly affecting" refers to causal relations, while the term "in" refers to locational relations. The Conferees' substitution of "directly affecting" for "in" therefore creates a strong presumption that they sought to describe the class of activities subject to consistency review under section 307(c)(1) in "causal" terms—the nature and degree of impact an activity has on the coastal zone—not in terms of the geographic location of an activity relative to the coastal zone. This substitution by its very terms encompasses a broader scope of activities than did the initial definition. Common sense dictates that, having chosen the broader causal criterion, the Conferees did not exclude federal lands physically within the state coastal zone from the CZMA definition of "coastal zone" because they wanted to limit the "directly affecting" requirement to activities on these federal lands.

Had the Conferees intended to so circumscribe the application of the newly adopted "directly affecting" criterion, as the majority suggests, they could have easily done so by expressly limiting the consistency review requirement of section 307(c)(1). The statutory threshold language might then have read: "Each federal agency conducting or supporting activities on federally controlled lands physically within the coastal zone that directly affect it . . . ." No such express geographical limitation is incorporated in section 307(c)(1), however. Absent such a limitation, the majority's reading of the Conferees' intent in drafting section 307(c)(1) seems improbable.

Rejecting the majority's explanation does not leave the Conferees' adoption of the Senate's definition of "coastal zone" unexplained. The Conference Report the majority cites in support of its account, for example, states: "The Conferees . . . adopted the Senate language . . . which made it clear that federal lands are not included within a state's coastal zone. As to the use of such lands which would affect a state's coastal zone, the provisions of Section 307(c) would apply."\textsuperscript{115} Nothing in these remarks suggests that the provisions of section 307(c) are intended to


\textsuperscript{112} See 118 CONG. REC. 35,548 (1972) (statement of Representative Mosher). See \textit{infra} text accompanying note 116 for the text of the cited remark.

\textsuperscript{113} 464 U.S. at 324.

\textsuperscript{114} See id. at 345-46.

\textsuperscript{115} H.R. CONF. REP. NO. 1544, \textit{supra} note 111, at 12.
apply only to those federal lands physically located within yet definition-ally excluded from the state’s coastal zone. The Report’s emphasis on the adoption of the Senate language manifests the Conferees’ attempt to clarify the scope of federal jurisdiction over federal lands physically within the coastal zone. The reference to the applicability of section 307(c) to these lands simply expresses the purpose of the CZMA to promote federal-state cooperation in managing the coastal zone notwithstanding jurisdictional boundaries. This interpretation is consonant with the majority’s citation to remarks of Representative Mosher: “The final version in no way affects the jurisdictional responsibilities of . . . [Interior] in regard to the administration of Federal lands . . . .”116 It also comports with the passage from the Conference Report quoted by Justice Stevens: “[A]s to Federal agencies involved in any activities directly affecting the state coastal zone . . . , the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management programs.”117

The majority’s refusal to consider the 1980 House118 and Senate119 Reports issued in conjunction with the reauthorization of the CZMA120 is also unwarranted.121 Clearly, not any and all subsequent comment on statutory meaning should be accepted as relevant, much less disposi-tive.122 Legitimate questions are raised regarding which ex post facto expressions of legislative intent should be accorded deference by concerns about the possibility of a minority of members sitting as a committee subsequently nullifying the legislative enactments of the full Congress.123

116. 118 Cong. Rec. 35,548, supra note 112.
121. The dubious nature of the majority’s stance toward these manifestations of legislative intent is all the more pronounced when considered in light of its own use of postenactment legislative history. The majority employs its discussion of the 1976 amendment of section 307(c)(3) (16 U.S.C. § 1456(c)(3)) to buttress its reading of section 307(c), as originally en-acted, by suggesting that Congress was merely preserving the exclusion of lease sales from consistency review. See 464 U.S. at 333 n.16, 334-35. For a discussion of the majority’s analysis of this issue, see infra notes 151-57 and accompanying text.

Justice Stevens devotes significant space to the contents of the reports in the text of his dissent, although he directly criticizes the majority’s refusal to do so only in a footnote. See id. at 375 n.36. However, he contends that even if the majority was correct, precedent establishes that the 1980 legislative history at least “qualifies as the view of a subsequent Congress and is not without persuasive value.” Id.

122. Although not exactly analogous, compare, for example, the district court’s concern over the validity of NOAA’s rulemaking reversal: “There is the ever-present danger that regu-lations proposed subsequent to the initiation of the litigation are self-serving; thus, they are generally suspect.” 520 F. Supp. at 1378.
123. 464 U.S. at 330 n.15. This seems to be the main concern of the majority: “Legislative
On such grounds, the majority may be justified in rejecting committee reports issued in conjunction with the 1976 CZMA Amendments and the 1978 OCSLA Amendments as "of little help in construing the intent behind the law actually enacted." These reports comment retrospectively on the intent of the 1972 legislators in drafting section 307(c)(1), a section the 1976 and 1978 legislators chose not to amend.

Unlike the 1976 and 1978 Amendments, the 1980 legislative action involved reauthorization of the CZMA. The 1980 House and Senate Reports, therefore, were not "post-enactment legislative history," but an expression of the reauthorizing Congress's understanding of the legislation under consideration. As such, they are as legitimate a source of legislative intent as legislative reports accompanying the original enactment of the CZMA. Congress' articulation of the statute's scope and purpose and its reasons for not making any amendments, as expressed in the 1980 reports, thus are crucially relevant in construing the legislative intent behind the CZMA. Both the 1980 House and Senate reports unequivocally manifest, as the lengthy passages quoted by Justice Stevens in dissent confirm, that "when Congress reauthorized the CZMA it intended § 307(c)(1) to be applied to OCS leasing decisions."

The majority acknowledges the "less than crystalline" quality of its reading of the scope of section 307(c)(1) and its legislative history standing alone. Hence, to support its contention that Congress never intended the CZMA to reach into the OCS, the majority turns to other sections of the original CZMA bills. The majority focuses on sections Committees' desires to reaffirm positions they have taken that were rejected by the full Congress are understandable enough, but of little help in construing the intent behind the law actually enacted." Id. at 332 n.15. Apparently, this concern would be mitigated if the ex post facto articulations of legislative intent occurred in the context of the amendment process: "[O]ther sections of CZMA . . . have been significantly amended since 1972. But § 307(c)(1) has not been changed since its enactment. Our decision must therefore turn principally on the language of § 307(c)(1) and the legislative history of the original, 1972 CZMA." Id. at 321 n.8. But see infra notes 151-57.

124. Id. at 332 n.15. Accepting the majority's contention ignores questions raised by its use of such materials for its own interpretative purposes, as discussed supra note 121.


The Senate Report addressed both issues as well. "The Department of Interior's activities which preceded OCS lease sales were to remain subject to the requirements of section 307(c)(1) . . . as the Department of Interior sets in motion a series of events which have consequences in the coastal zone." S. REP. No. 783, supra note 119, at 11.

Section 312 would have permitted the Secretary of Commerce to extend state-created "estuarine sanctuar[ies] seaward beyond the coastal zone" when requested by the adjacent coastal state. Section 313 would have authorized the development of a management program for the area "outside the coastal zone and within twelve miles of the [coast]." The Conference Committee deleted both of these provisions from the final text of the CZMA. As for the Senate amendments, one mandated state approval before federal agencies proceeded with construction, licensing, leasing, or approval of construction in the OCS. This amendment was withdrawn on the floor. The other amendment, providing for an investigation of the environmental hazards of drilling in the Atlantic OCS, was adopted and then deleted without comment in conference. The majority concludes that the failure of these provisions to make it into the final version of the CZMA demonstrates that "Congress deliberately and systematically insisted that no part of CZMA was to reach beyond the 3-mile territorial limit."

Justice Stevens, citing the legislative history, challenges the majority's argument concerning the legislative intent underlying the original CZMA bills. He suggests that the inclusion of sections 312 and 313 in the original bill signifies the House's recognition that "activities outside the coastal zone could have a critical impact upon the coastal zone," and its desire to encompass these activities within the scope of the CZMA. Justice Stevens explains their exclusion by the Conferees as part of a compromise involving the adoption of the "directly affecting" language of section 307(c)(1). He finds evidence of the Senate's concern in the fact that the Senate Report on the 1971 version of the CZMA

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127. See id. at 324.
128. H.R. 14,146, 92d Cong., 2d Sess., § 312(b) (1972).
129. Id. § 313.
131. 118 CONG. REC. 14,183-84 (1972).
133. 464 U.S. at 324. This conclusion points to another questionable aspect of the majority's use of the legislative history. The majority infers that the full Congress "emphatically rejected," id. at 331-32 n.15, attempts to expand the reach of section 307(c)(1) on the basis of its acquiescence to the House-Senate Conferees' deletion of sections 312 and 313; an acquiescence evidenced by Congress's enactment of the reported bill. Disregarding Justice Stevens's challenge to this reading of the legislative history, infra notes 134-42 and accompanying text, the majority infers from this inaction a more reliable guide of legislative intent than an inference from the 1976 Committee Reports explaining why no amendment of section 307(c)(1) was proposed, or the 1980 House and Senate Reports. See supra notes 120-19, 126-24 and accompanying text.
134. 464 U.S. at 349.
135. Id. at 349-51.
136. See id. at 353-354 & n.13. The Conferees' reasons for rejecting sections 312 and 313 cited by the majority do not offer clear support for the majority's reading. The fact that sec-
Secretary of the Interior v. California

Secretary of the Interior v. California construes language virtually identical to that employed in the 1972 Senate bill to apply to “federal activities in waters outside of the coastal zone which functionally interact with the zone.”

At the same time, he dismisses the majority’s reading of the Conferees’ rejection of the two amendments as indicating the latter’s refusal to extend the scope of the CZMA.

To support his reading of the legislative history, Justice Stevens examines the purposes of the CZMA, an examination conspicuously absent from the majority’s analysis. Stevens stresses that the findings incorporated in section 302 of the Act manifest congressional concern over the environmental degradation of the coastal zone caused by “ill-planned development.” The declaration of national policy in section 303, in turn, expresses the congressional belief that coordinated planning and cooperation between the local, state, and national levels of government is imperative to effective stewardship of the coastal zone.

Because the majority’s interpretation of section 307(c)(1) eliminates the only consistency review of federal OCS activity and so discourages rather than promotes intergovernmental planning and cooperation, Stevens contends that it is “squarely at odds” with the CZMA’s purposes.

On the whole, the evidence mustered by the dissent outweighs that offered by the majority. Moreover, critical aspects of the majority’s analysis are internally inconsistent. Its assertion that “it is clear beyond peradventure that Congress believed that CZMA’s purposes could be adequately effectuated without reaching federal activities conducted outside the coastal zone,” is at best an overstatement.

C. Section 307(c)(1) Compared to Section 307(c)(3)

The third argument advanced by the majority in finding that lease sales need not be consistent with a state coastal management plan begins with a “plain language” analysis. Section 307(c)(1), notes the majority, applies to activities “conducted or supported” by a federal agency, whereas 307(c)(3) concerns the activities of “private parties authorized

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137. Id. at 352. See generally id. at 351-52 & nn.10-12.
138. See id. at 354-55 n.13. Justice Stevens notes that the amendment pertaining to state approval was rejected by the Senate because it gave the states veto power over federal activities. He asserted that the environmental hazards study amendment was excluded by the conferees solely because it was not germane, and he admonished the majority for misstating the nature of the objections to it.
139. The majority discusses the CZMA’s overall purpose only at the end of the opinion, summarily dismissing it.
140. 464 U.S. at 356.
141. Id. at 356-57.
142. Id. at 357.
143. Id. at 331-32.
by a federal agency's issuance of licenses and permits." Reasoning that oil and gas drilling "is neither "conducted" nor "supported" by a federal agency" but rather by "third parties," the majority concludes that section 307(c)(3), not section 307(c)(1), is the provision applicable to lease sales.

The majority only reaches this surprising conclusion by characterizing OCS development as though it consisted of a single stage. Thus, the majority finds that section 307(c)(1) is irrelevant to OCS lease sales "if only because drilling for oil or gas on the OCS is neither "conducted" nor "supported" by a federal agency." Having collapsed the development process into a single stage, the Court can easily claim that the activity is neither "conducted" nor "supported" by a federal agency—the federal agency itself does not drill the well. This description, however, squarely contradicts the majority's later argument that lease sales must be distinguished from exploration, production, or development because lease sales entail no consequences for these latter stages and hence constitute a separate and identifiable stage in the developmental process.

The terms the majority uses to describe the "reach" of the various provisions of section 307(c) also undercut its analysis. According to the majority, sections 307(c)(1) and (2) "reach activities in which the federal agency is itself the principal actor, [whereas section 307(c)(3)] reaches the federally approved activities of third parties." A brief overview of the lease sale process reveals, however, that it is not the activity of a "third party." The sale of leases involves several preparatory steps "including the call for nominations, the publication and circulation of an environmental impact statement, and the publication of a final notice of lease sale." The actual lease sale occurs when oil companies submit bids in response to the final notice of sale. These bids, if accepted, give the companies priority in submitting development plans for the leased tract. Although each of these steps affects the interests of outside parties, some of them even calling for these parties' direct input, the entire process is initiated and coordinated by governmental agencies.

144. Id. at 332. See supra text accompanying notes 26 & 28-29 for the text of these provisions.
145. Id. at 332-33.
146. Id. at 332.
147. Id.
148. 520 F. Supp. at 1371.
149. Jones, supra note 12, at 49-53 provides an overview of the process as it existed at the time this litigation originated. In a revision to the OCSLA-mandated five-year plan adopted by the Carter Administration, the Reagan Administration substantially altered the leasing process by instituting a program known as "areawide" leasing. Under this program, whole planning areas are made available for leasing, not just selected tracts within these areas. 46 Fed. Reg. 22,468, 22,469 (1981) (proposed April 17, 1985). For the statutory scheme governing OCS leasing, see 43 U.S.C. section 1337(a) (1982).
150. The district court provided a chronology of the first three steps leading to Lease Sale
The majority proceeds from the weak conclusion that section 307(c)(3) is the pertinent provision of the CZMA, to find that because this section did not contain the term "lease" either as enacted in 1972, or as amended in 1976, it "definitely does not require consistency review of OCS lease sales." Intent on pointing out the absence of the term "lease," however, the majority describes section 307(c)(3) in a manner belying its relevance to lease sales. Section 307(c)(3), states the majority, "addresses the requirements to be imposed on federal licensees whose activities might affect the coastal zone." Both the original and amended versions of the section place responsibility on the lessee to make the required consistency determination. Only then does the state review the determination to ensure its adequacy, with the final power to review and resolve disputes between the private parties and the states vested in the Secretary of Commerce.

As for the absence of the term "lease" from the amended section 307(c)(3)(B), the majority relies on the Conference Report in concluding that, by not adopting it, Congress intended to exempt the lease sale stage from consistency review. Its reliance on this Report is misplaced, though, because, as the language of the Report indicates, the provision was intended to provide information about the plans of the oil industry, not those of the federal government. The more plausible

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151. See generally 464 U.S. at 333-35.
152. Id. at 333 (emphasis in original).
153. Id. The majority cited the text of the original section 307(c)(3), the amended section 307(c)(3)(B), and congressional remarks made during the 1976 "amendment debates" in support of its assertion that this section applies to federal agencies. Id. at 333 n.16. These references fail to corroborate the majority's interpretation. The consistency requirements of both the original and amended sections apply to the proposed activities of private parties, not federal agencies. In the case of section 307(c)(3)(B), both the Secretary of the Interior and the Secretary of Commerce receive copies of the consistency determination prepared by the private party, but only the Secretary of Commerce plays any role in the evaluation of the determination's adequacy, and this only as a party of last resort.

The cited congressional remarks are even less effective. In fact, both comments seem to support a conclusion contrary to that drawn by the majority. Each suggests that the addition of the term "lease" to section 307(c)(3) would establish or make clear that federal agencies must conduct their activities in accordance with the CZMA's consistency provisions. It follows that the members did not consider the original section 307(c)(3) applicable to federal agencies, but only to private parties. This view of the section's scope is consistent with the view emphasized in the preceding paragraph.

155. 464 U.S. at 334-35 & n.18.
156. The report concludes: "This provision [section 307(c)(3)(B)] will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans." H.R. CONF. REP. NO. 1298, supra note 154 at 30, 1976 U.S. CODE CONG. & AD. NEWS at 1768, 1827-28. It may seem strained to read this sentence so narrowly. Such a reading is supported, however, by the discussion supra note 153 and by the much stronger role
explanation why the Conferees did not insert the term "lease" in section 307(c)(3)(B), as supported by the remarks of numerous Senators and Representatives referred to by Justice Stevens, is that they believed section 307(c)(1) already applied to federal leasing activity on the OCS.157

Having insisted on the distinction between a lease and other procedures associated with the development of OCS oil wells in its analysis of section 307(c)(3)(B), the majority reviews the history of OCSLA to find confirmation for this distinction.158 It finds support by comparing the 1953 version of the Act with the Act as amended in 1978. As originally enacted, OCSLA "did not define the terms 'exploration,' 'development,' or 'production,' " and its definition of the phrase "mineral lease" did not "specify what, if any, rights to explore, develop, or produce were transferred to the purchaser of a lease."159 The 1978 amendments to OCSLA, however, defined "four distinct statutory stages to developing an offshore oil well."160 The majority describes in great detail the procedures and rights acquired under each stage, both to justify its earlier reliance on what may have seemed an "excessively fine" distinction,161 and to lay the groundwork for its argument against the claim that lease sales "directly affect" the coastal zone. Foreshadowing its final argument, the majority emphasizes that none of the litigants suggest the "preliminary activities"162 authorized by the lease sale "in themselves 'directly affect' the coastal zone." Moreover, a lease sale itself does not authorize oil exploration, development, or production that would trigger the consistency review requirement of section 307(c)(3)(B).163

D. The Meaning of "Directly Affecting"

Only at the very end of its opinion does the majority address the question of whether lease sales "directly affect" the coastal zone. Based on the 1978 OCSLA amendments' clear definition of "four distinct statutory stages to developing an offshore oil well," the majority concludes that lease sales are not subject to the consistency review requirements of section 307(c)(1) of the CZMA.164

Unfortunately, the majority's analysis is conclusory. It does not de-

157. See 464 U.S. at 368 n.25. For Justice Stevens' discussion of this issue, see generally id. at 364-70 and accompanying notes.
158. See id. at 335-41.
159. id. at 336.
160. id. at 337.
161. id. at 335-36.
162. id. at 338-39.
163. id. at 339.
164. Id. at 342.
fine, much less explore, the meaning of the phrase "directly affecting." Implicit in its discussion, however, are the criteria proposed and then retracted by NOAA in 1981—whether the "federal activity itself produces an identifiable physical alteration in the coastal zone or . . . the federal activity initiates a chain of events reasonably certain to result in such alteration without further required agency approval." That these criteria structure the majority's approach is evident both from its emphasis upon the preliminary nature of the activities authorized by lease sales under the 1978 OCSLA scheme and from the stress it places on the fact that further governmental approval is required before exploration, development, and production occur. The "preliminary activities" argument is persuasive only if "directly affecting" is defined as requiring the production of "an identifiable alteration in the coastal zone." Similarly, the "further approval" argument makes sense only if "directly affecting" is also defined as requiring a "chain of events reasonably certain to result in [identifiable physical . . . alteration without further required agency approval." Not surprisingly, the majority concludes that these considerations preclude characterizing as direct the "possible effects . . . that may eventually result from the sale of a lease."

The majority opinion thus treats as a mere policy dispute the litany of "direct effects" both lower courts and the dissent cite in support of their conclusion that lease sales trigger the section 307(c)(1) consistency review requirement. The Ninth Circuit explains the close relationship of lease sales to later stages of development: "[D]ecisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production." As such, they constitute decisions that can only be adequately reviewed at this stage. These are not "direct effects," however, according to the definition implicitly adopted by the majority. Because they are not, and hence do not fall within the ambit of the statutory language, they are relevant solely as policy arguments for earlier consistency review. But, the majority reasons, because Congress already made the policy choice to postpone consistency review until later stages of OCS planning when it enacted the 1978 OCSLA amendments, the Court cannot interfere.

166. See 464 U.S. at 342.
167. See id.
168. Id.
169. See 464 U.S. at 360-64; 683 F.2d at 1260; 520 F. Supp. at 1380-82.
170. 683 F.2d at 1260 (emphasis added).
171. See 464 U.S. at 363 n.19 and accompanying text.
172. Id. at 343.
CONCLUSION

Precisely assessing the implications of the Court’s decision is difficult. On the one hand, the actual holding of the case appears quite narrow: section 307(c)(1) consistency review requirements do not apply to the sale of OCS oil and gas leases. Indeed, the majority expressly declines to decide whether “any OCS activities other than oil and gas leasing might be covered by § 307(c)(1).” The Court’s argument concerning the limited geographical application of section 307(c)(1), on the other hand, suggests that its consistency review requirements would not apply to any federally conducted or supported activities physically located outside of the state coastal zone, regardless of the nature of the effects of the activities.

The Court’s opinion thus leaves unresolved whether section 307(c)(1) applies to such varied activities as (1) development and approval of fishery management plans under the Magnuson Fishery Conservation and Management Act; designation of ocean dumping or hazardous waste incineration sites under Title I of the Marine Protection, Research and Sanctuaries Act; or (3) prelease or lease-sale activities pertaining to OCS resources other than oil and gas under OCSLA. Neither does the opinion settle arguments over the meaning of the

173. See 464 U.S. at 315.
174. 464 U.S. at 324.
175. See supra Section III.B, “The Legislative Compromise over ‘Directly Affecting’.”
177. 16 U.S.C. §§ 1431-1434 (1982 & Supp. II 1984), 33 U.S.C. §§ 1401-1445 (1982). Here, too, the Department of Justice advanced an equivocal analysis in comparison with NOAA’s position. See NOAA/CZMA Hearings, supra note 189, at 585-86 (Brady letter). In response to the same questions addressed to the Department of Justice, NOAA urged that such site designations were subject to consistency review pursuant to § 307(c)(1), following the testimony of Peter Tweedt, Director of NOAA’s Office of Ocean and Coastal Resource Management. Id. at 581-82.
178. Representing the Department of Justice before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries at hearings on June 26, 1984, Deputy Attorney General Carol E. Dinkins testified that the decision in Secretary of the Interior v. California only pertained to oil and gas leasing. CZM Federal Consistency: Hearings on H.R. 4389 Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine
phrases "directly affecting" or "to the maximum extent practicable."\textsuperscript{179}

These issues were either administratively resolved or deferred when NOAA published the final form of the revised rule it was adopting to conform section 307(c)(1) consistency regulations to the Court's holding. NOAA's final ruling was "limited to those changes clearly necessitated by the Supreme Court's decision";\textsuperscript{180} in other words, federal agencies would still be required to review their non-OCS oil and gas lease sale activities for consistency, if they determined these activities directly affected the coastal zone. As for the meaning of "directly affecting" and "to the maximum extent practicable", NOAA elected to defer acting until it completed a comprehensive review of the federal consistency process.\textsuperscript{181}

Legislative resolution, not surprisingly, has proved far more elusive. Less than two weeks after the announcement of the Court's decision, a bill overturning it had been introduced in the House.\textsuperscript{182} Approximately one month later, an almost identical measure was introduced in the Senate.\textsuperscript{183} The House bill, H.R. 4589, would have reversed the Court's finding that Congress did not intend any part of the CZMA to reach beyond the three-mile territorial limit. It also would have explicitly defined "directly affecting," essentially combining the alternative definitions...
proposed by the parties in their briefs,\textsuperscript{184} and defined “maximum extent practicable” as “fully consistent.” The House bill, however, was never reported out by the full committee. The Senate bill, S. 2324, would have accomplished the same results, but, although favorably reported,\textsuperscript{185} never was acted on by the full Senate.

The first session of the Ninety-Ninth Congress witnessed new attempts in both the House and Senate to overturn the Court’s holding by amending the CZMA. Once again the House led the way with the introduction of H.R. 1445 on March 6, 1985.\textsuperscript{186} More narrowly drafted than its predecessor, H.R. 4589, this bill left unchanged the “directly affecting” and “maximum extent practicable” language of section 307(c)(1). It made explicit, however, that activities on federal lands excluded from the coastal zone such as the OCS, “including oil and gas leasing,” were subject to consistency review requirements if they were determined to directly affect the coastal zone. Consolidated hearings were held in the House on this proposed amendment and on bills reauthorizing the Act.\textsuperscript{187} By comparison, Senate bill S. 1057, introduced May 2, 1985,\textsuperscript{188} replicated its predecessor, S. 2324, as it had been reported to the full Senate of the Ninety-Eighth Congress. No action was taken on this bill following its introduction, although the Senate did hold hearings on a bill reauthorizing the CZMA.\textsuperscript{189}

Neither the House nor the Senate amendments to the consistency provisions of section 307(c)(1) were part of the reauthorization bills reported out by the responsible committees.\textsuperscript{190} Nor were any changes effected on the floor of either chamber during the consideration of H.R. 3128, the Consolidated Omnibus Budget Reconciliation Act of 1986, to which the CZMA reauthorization bill was appended.\textsuperscript{191}

With the signing of this Act by President Reagan on April 7, 1986,\textsuperscript{192} it seems clear that another session of Congress will fail to legislate a reversal of the Court’s decision in \textit{Secretary of the Interior v. California}. The Administration’s adoption of a narrow interpretation of the

\textsuperscript{184} See \textit{supra} notes 93 and 99 for the definitions proposed by the parties.
\textsuperscript{185} See \textit{S. REP. No. 512, 98th Cong., 2d Sess. (1984)}.
\textsuperscript{188} S. 1057, 99th Cong., 1st Sess., 131 CONG. REC S5293 (1985).
\textsuperscript{191} See H.R. 3128, 99th Cong., 2d Sess. (1986).
Court's holding, as manifested in the rulemaking of NOAA, may well have been critical in sufficiently allaying congressional fears to avert legislative action.

Two and a half years after the announcement of the Court's decision, many of the questions that it raised still have not been decisively resolved. The enactment of one-year moratoria on the leasing of extensive offshore areas for four successive years beginning in 1981, followed by the recent collapse in the oil market, has temporarily relieved the pressure for offshore oil development and, concomitantly, has diminished the motivation for litigation. The potential for extensive litigation, however, remains great.

Only when development pressures begin mounting again will the real impact of the decision be felt. The restriction of state input at the crucial early stages of OCS oil and gas development will impede efforts to manage the coastal zone in an environmentally sound manner: first, because a close relationship exists between the oil industry and the federal government; second, because the alleged protections at the exploration, development, and production stages referred to by the majority are virtually meaningless. If we learn anything from oft-repeated lessons, we should learn that once money is spent and operations commenced, changing the course of further offshore development is nearly impossible.

Eric Esler


194. See Jones, supra note 12, at 45-46.