Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations Be Consistent With State Coastal Zone Management Programs?

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Section 307(c)(1) of the Coastal Zone Management Act requires federal activities directly affecting the coastal zone to be consistent with state coastal zone management programs to the "maximum extent practicable." This article analyzes the applicability of that section to federal decisions concerning the location of and conditions imposed upon offshore oil and gas development. The author argues that proper statutory interpretation, recent legislative history and sound policy considerations all support the conclusion that these federal decisions are within the scope of section 307(c)(1).

Plans to increase oil and natural gas production on the Outer Continental Shelf (OCS) have provoked conflict between coastal states and the federal government over how and where that development should take place. Scientists believe that submerged offshore lands offer the most promising opportunities for increasing domestic oil and gas production.[1] For that reason, the

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[1] Many scientists predict that the Outer Continental Shelf (OCS) will be the largest domestic source of newly discovered oil and gas through the 1990's.

federal government has opened new areas to exploration and development in recent years off the coasts of Alaska, California and the Eastern Seaboard.[2] These federal efforts to accelerate offshore oil and gas development have kindled persistent opposition from coastal states.[3] The respective roles of the states and the national government[4] in controlling this development is an

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H.R. REP. No. 95-590, 95th Cong., 2d Sess. 74 (1978). Indeed, some estimate that offshore lands may produce as much as one-third to one-fourth of the total United States domestic production by 1985. *Id.*

The latest U.S. Geological Survey estimates available put undiscovered OCS oil in a range of 12.5 to 38 billion barrels (a barrel is equivalent to 42 gallons), and undiscovered OCS natural gas in a range from 61.5 to 139 trillion cubic feet. These are preliminary estimates, and a more comprehensive report was scheduled for publication in the summer of 1980. Oil & Gas J., March 17, 1980, at 85. No subsequent report is yet available from the U.S. Geological Survey at this writing.

Mobil and Exxon estimate that over 60 percent of U.S. domestic oil and gas yet to be discovered is located on the OCS. U.S. DEP'T OF ENERGY, FEDERAL LEASING AND OUTER CONTINENTAL SHELF ENERGY PRODUCTION GOALS 2-3 (1979).

[2] The latest in a series of attempts to accelerate offshore oil and gas development came in President Carter's Energy Message of April 6, 1979, in which the President ordered the Secretary of the Interior to increase the federal OCS acreage then scheduled to be offered for exploration and development. PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY-1979 333 (1979). The Interior Department announced a five-year leasing schedule implementing the President's directive on March 28, 1980.

President Nixon ordered an increase in federal OCS oil and gas leasing from one million acres per year to three million acres per year on April 18, 1973. H.R. REP. No. 95-590, 95th Cong., 2d Sess. 75 (1978). Nine months later, on January 23, 1974, Nixon ordered another increase to a level of ten million acres per year. *Id.* at 76.

The most extensive offshore development to date in the United States has occurred in the relatively shallow areas of the Gulf of Mexico. U.S. Geological Survey figures indicate that approximately 75 percent of the offshore oil production and 98 percent of the offshore natural gas production in 1977 was from the Gulf of Mexico. *See* U.S. DEP'T OF THE INTERIOR, GEOLOGICAL SURVEY, CONSERVATION DIVISION, OUTER CONTINENTAL SHELF STATISTICS 98-99 (1979).

[3] H.R. REP. No. 95-590, 95th Cong., 2d Sess. 89-90 (1978). *See, e.g., San Francisco Chronicle,* April 2, 1980, at 8, col. 1; *Sacramento Bee,* May 2, 1980, at A8, col. 1.

[4] Under international law, the United States has the right to exploit the natural resources of the seabeds off its coasts to whatever depths technology makes exploitation possible. Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578 (April 29, 1958).

In United States v. California, 332 U.S. 19 (1947), the U.S. Supreme Court held that the federal government had paramount rights in the submerged

underlying issue in this controversy.

The California Coastal Commission directly raised this issue in 1978.[5] California takes the position that section 307(c)(1) of the Coastal Zone Management Act (CZMA)[6] requires federal decisions concerning the location of offshore oil and gas development (tract selection) and the conditions imposed on such development (lease stipulations) to be consistent with a state's Coastal Zone Management Program to the maximum extent practicable.[7] The U.S. Department of the Interior, the federal agency with primary responsibility for managing federal OCS lands, disagrees with this position and efforts to resolve the dispute have been unsuccessful.[8] This article examines whether sec-

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lands seaward of the coast. The Submerged Lands Act, Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301-1315 (1976)), granted the states ownership of either the seabed resources within three geographical miles of their coastline or all the resources underlying waters subject to their sovereignty when they entered the Union, whichever is greater. As a result, most states control resources within three miles of their shorelines. *See, e.g.*, United States v. Maine, 420 U.S. 515 (1975); United States v. California, 382 U.S. 448 (1966). For historical reasons, Texas and Florida have jurisdiction over submerged lands within three marine leagues (approximately ten and one-half miles) of their coastlines in the Gulf of Mexico. United States v. Florida, 363 U.S. 121 (1960); United States v. Louisiana, 363 U.S. 1 (1960). The federal government retains control of submerged lands from the limit of state jurisdiction to the limit of national jurisdiction under international law. The Submerged Lands Act, Pub. L. No. 83-32, 67 Stat. 29 (1953) (codified at 45 U.S.C. §§ 1331-1333 (1976)).

[5] Letter from Michael L. Fischer, Executive Director of the California Coastal Commission, to President Jimmy Carter (December 5, 1978)(on file at U.C. Davis L. Rev.).

[6] 16 U.S.C. §§ 1451-1464 (1976).

[7] Letter from Michael L. Fischer, Executive Director of the California Coastal Commission, to Juanita Kreps, Secretary of Commerce (June 15, 1979) (on file at U.C. Davis L. Rev.).

[8] Michael L. Fischer's letter to President Jimmy Carter noted that the Interior Department disagreed with the U.S. Department of Commerce, the federal agency with primary responsibility for administering the CZMA, on the application of the CZMA to federal OCS leasing. Letter from Michael L. Fischer, Executive Director of the California Coastal Commission, to President Jimmy Carter (December 5, 1978), *supra* note 5. California took the same position as the Commerce Department, *i.e.*, that federal leasing decisions (including tract selection and lease stipulation decisions) are subject to the consistency requirements of the CZMA. The issue was submitted to the Justice Department for resolution, with memoranda from the Commerce Department and the Interior Department supporting their respective positions. Letter from William K. Skidmore, Acting General Counsel, Department of Commerce, and Frederick

tion 307(c)(1) of the CZMA applies to the tract selection and lease stipulation decisions and suggests a resolution of the problem.

I. BACKGROUND

The Interior Department regulates oil and natural gas-related activities on federal offshore lands under the authority of the Outer Continental Shelf Lands Act (OCSLA).[9] That Act autho-

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N. Ferguson, Deputy Solicitor, Department of the Interior, to John M. Harmon, Assistant Attorney General (March 23, 1979)(on file at U.C. Davis L. Rev.). The Justice Department concluded that Congress intended the CZMA to apply to pre-leasing activities but characterized the question of which pre-leasing activities are subject to the Act as a factual one. Memorandum from Leon Ullman, Deputy Assistant Attorney General, Office of Legal Counsel, to C. L. Haslam, General Counsel, Department of Commerce, and Leo M. Krulitz, Solicitor, Department of the Interior (April 20, 1979)(on file at U.C. Davis L. Rev.) [hereinafter cited as Justice Dep't Op.]. The Department of Justice stated that the key factual question is whether a particular pre-leasing activity *directly affects* the coastal zone, and declined to express any view regarding specific activities. *Id.* California and the Interior Department soon reached an impasse over the applicability of § 307(c)(1) to tract selection and lease stipulations, and they requested the Secretary of Commerce to mediate the dispute pursuant to 16 U.S.C. § 1456(h) (1976). Letter from Michael L. Fischer, Executive Director of the California Coastal Commission, to Juanita Kreps, Secretary of Commerce (June 15, 1979)(on file at U.C. Davis L. Rev.). The mediation efforts did not resolve the dispute, but the Commerce Department plans to develop new regulations designed to clarify the application of the CZMA to offshore oil and gas leasing. Letter from Philip M. Klutznick, Secretary of Commerce, to Michael L. Fisher, Executive Director, California Coastal Commission (February 27, 1980)(on file at U.C. Davis L. Rev.); *see* Memorandum from Philip M. Klutznick, Secretary of Commerce to Richard A. Frank, Administrator, National Oceanic and Atmospheric Administration (February 27, 1980), *reproduced in* H.R. REP. No. 96-1012, 96th Cong., 2d Sess. 78 (1980).

[9] 43 U.S.C. §§ 1331-1356 (Supp. II 1978). For a detailed explanation of the federal OCS leasing and management process, *see* CONGRESSIONAL RESEARCH SERVICE, STUDY FOR HOUSE AD HOC COMM. ON THE OUTER CONTINENTAL SHELF, EFFECTS OF OFFSHORE OIL AND NATURAL GAS DEVELOPMENT ON THE COASTAL ZONE, 94th Cong., 2d Sess. (1976); D. KASH, *et al.*, ENERGY UNDER THE OCEANS (1973); OCS PROJECT TASK FORCE, GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, OFFSHORE OIL AND GAS DEVELOPMENT: SOUTHERN CALIFORNIA (1977); U.S. DEP'T OF THE INTERIOR, LEASING AND MANAGEMENT OF ENERGY RESOURCES ON THE OUTER CONTINENTAL SHELF (1976).

All of these sources are dated because they were published before passage of the OCS Lands Act Amendments of 1978, Pub. L. No. 95-372, 95th Cong., 2d Sess., 92 Stat. 629 (1978) (codified in scattered sections of 43 U.S.C.), but the basic framework of the leasing and management process remains the same. For

rizes the Secretary of the Interior to offer offshore tracts for competitive bidding at lease sales, where oil companies submit sealed bids for development rights to specific tracts.[10] Oil companies may bid alone or jointly with other oil companies for individual tracts.[11]

Acquisition of a federal oil and gas lease entitles lessees to "explore, develop and produce the oil and gas contained within the lease area. . . ."[12] In addition to any conditions or stipulations in the lease, lessees are subject to the provisions of the OCSLA and all other applicable federal laws and regulations.[13] The Interior Department uses lease stipulations as its primary method of imposing restrictions on operations which are tailored to the conditions on specific tracts. These stipulations are often designed to protect the particular non-fuel resources on or near a tract (such as estuaries, scenic beaches, or fisheries) potentially threatened by oil and gas operations on that tract.[14]

After acquiring the rights to develop a lease tract or tracts,[15] oil companies drill exploratory wells into subsea geologic structures thought likely to hold oil and gas.[16] Drilling proceeds ac-

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a discussion of the 1978 amendments see Jones, Mead & Sorenson, *The Outer Continental Shelf Lands Act Amendments Of 1978*, 19 NAT. RESOURCES J. 885 (1979); Kreuger & Singer, *An Analysis Of The Outer Continental Shelf Lands Act Amendments Of 1978*, 19 NAT. RESOURCES J. 909 (1979).

[10] 43 U.S.C. § 1337(a) (Supp. II 1978).

[11] *See id.*

[12] 43 U.S.C. § 1337(b)(4) (Supp. II 1978).

[13] 43 U.S.C. § 1334(d) (Supp. II 1978).

[14] *See, e.g.*, U.S. Dep't of Interior, Outer Continental Shelf, Southern California; Oil and Gas Lease Sale No. 48, 44 Fed. Reg. 30,770 (1979), Lease Stipulation Nos. 4, 7, 9, 10, 12, 14, 15, at 44 Fed. Reg. 30,775-30,777.

[15] A number of lease tracts are sometimes operated under a "unit agreement" and developed by a single oil company (acting as unit operator) in the same manner as a single tract is developed. This often minimizes costs by making possible the consolidation of necessary facilities. For example, a single production platform or pipeline can often serve several tracts. It also minimizes disputes between companies over their respective rights to oil or gas from fields underlying tracts with different leases, since lessees are granted rights to all the oil and natural gas contained within their lease tract. *See* note 12 and accompanying text *supra;* U.S. DEP'T OF THE INTERIOR, LEASING AND MANAGEMENT OF ENERGY RESOURCES ON THE OUTER CONTINENTAL SHELF 34-35 (1976).

[16] Interior Department policy has been to forbid any drilling to discover oil and gas before a tract is leased. As a result, prelease estimates are based on geophysical and geologic data permitting only the identification of geologic structures that *may* hold oil and gas. In fact, those structures often contain

cording to an exploration plan, which must be approved by the Secretary of Interior before drilling may begin.[17] If sufficient oil and gas are discovered to make recovery of those resources profitable, the lessees drill additional wells and install production facilities pursuant to a development and production plan. This plan must also be approved by the Secretary of the Interior.[18]

The CZMA,[19] enacted in 1972, contains three provisions relating to federal-state cooperation in OCS oil and gas development. Section 307(c)(1) requires federal agencies conducting or supporting any activities directly affecting the coastal zone[20] to do so in a manner consistent, to the maximum extent practicable,

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little or no oil and gas. For example, three major oil companies paid $632.4 million for six leases covering part of a promising geologic structure, the Destin Dome, off the west coast of Florida. One of the companies, Exxon, spent an additional $15 million drilling seven dry holes. No commercial discoveries have yet been made on the Destin Dome. U.S. DEP'T OF ENERGY, FEDERAL LEASING AND OUTER CONTINENTAL SHELF ENERGY PRODUCTION GOALS 45 n. 3 (1979).

[17] 43 U.S.C. § 1340(c) (Supp. II 1978). An exploration plan describes in detail all planned operations and facilities. It includes both a description of anticipated impacts on the onshore and offshore environment and plans to mitigate such effects. *See* 30 C.F.R. § 250.34-1 & -3(a) (1980). Lessees must certify that exploration plans are consistent with state coastal zone management programs. 43 U.S.C. § 1340(c) (Supp. II 1978); 16 U.S.C. § 1456(c)(3)(B) (Supp. II 1978); 30 C.F.R. 250.34-1(a)(6)(ii) (1978).

[18] 43 U.S.C. § 1351(d) (Supp. II 1978). A development and production plan describes in detail all planned operations and facilities for this phase of offshore development, just as the exploration plan does for the exploration phase. Thus, it also includes a description of anticipated impacts on the onshore and offshore environment and plans to mitigate such effects. *See* 30 C.F.R. § 250.34-2 & -3(b) (1980). Lessees must also certify that development and production plans are consistent with state coastal zone management programs. 43 U.S.C. § 1351(d) (Supp. II 1978); 16 U.S.C. § 1456(c)(3)(B) (Supp. II 1978); 30 C.F.R. § 250.34-2(a)(6)(ii) (1980).

[19] Pub. L. No. 92-532, 86 Stat. 1280 (1972) (codified at 16 U.S.C. §§ 1451-1464 (1976 & Supp. II 1978)).

CZMA authorizes grants to the states for the preparation of management programs for the coastal zone. 16 U.S.C. § 1454 (1976). State coastal zone management programs are reviewed by the Secretary of Commerce. 16 U.S.C. §§ 1455-56 (1976 & Supp. II 1978). Program approval brings the consistency provisions into effect, among other things. 16 U.S.C. § 1456 (1976).

[20] "The term 'coastal zone' means the coastal waters . . . and the adjacent shorelands . . ., strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches." 16 U.S.C. § 1453(1) (1976). It does not include submerged lands within federal jurisdiction. *Id.*

with approved state coastal zone management programs.[21] Section 307(c)(2) requires federal agencies undertaking development projects within a state's coastal zone to insure that such projects are consistent with approved state plans to the maximum extent practicable.[22] Congress amended section 307(c)(3) in 1976, redesignating the original provision as subsection (A) and adding a new subsection (B).[23] Section 307(c)(3)(A) requires applicants for a federal license or permit to certify that any proposed activity affecting the coastal zone complies with and will be carried out in a manner consistent with the approved state program.[24] The new section, 307(c)(3)(B), is intended to expedite the process of obtaining licenses and permits for drilling wells and installing production facilities on the OCS.[25] It allows federal agencies to issue the necessary licenses and permits without the consistency determination otherwise required by section 307(c)(3)(A) where the proposed offshore operation was described in detail in a exploration or development and production plan and any of these three things have occurred: (1) the coastal state involved concurred in the applicant's certification that the exploration or development and production plan is consistent with the state management program; (2) the state is conclusively presumed to concur with the applicant's certification of the plan's consistency for failure to object to the certification within six months of receiving notice; or (3) the Secretary of Commerce has declared the exploration or development and production plan consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.[26]

II. Interpreting the Statute as It Stands

Since section 307(c)(1) does not expressly apply to tract selection and lease stipulation decisions, it is necessary to examine the legislative intent behind this section.[27] This requires an anal-

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[21] 16 U.S.C. § 1456(c)(1) (1976).

[22] 16 U.S.C. § 1456(c)(2) (1976).

[23] Pub. L. No. 94-370, § 6, 90 Stat. 1013 (1976) (codified at 16 U.S.C. § 1456(c)(3) (Supp. II 1978)).

[24] 16 U.S.C. § 1456(c)(3)(A) (Supp. II 1978).

[25] H.R. Rep. No. 94-1298, 94th Cong., 2d Sess. 30-31 (1976).

[26] 16 U.S.C. § 1456(c)(3)(B) (Supp. II 1978).

[27] Legislative intent is the controlling factor in the interpretation of statutes. *See, e.g.*, United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50

ysis of the language of the statute and of the effects of the CZMA Amendments of 1976[28] and the OSCLA Amendments of 1978.[29]

A. The Language of Section 307(c)(1)

Section 307 (c)(1) applies to "[e]ach federal agency conducting or supporting activities directly affecting the coastal zone. . . ."[30] This language is broad enough to include tract selection and lease stipulation decisions made by Interior Department officials and suggests no intent to exclude them from its scope.[31] Thus, section 307(c)(1) should apply to tract selection and lease stipulation decisions if, within the meaning of the statute, those are activities "directly affecting the coastal zone." Unfortunately, neither case law, legislative history nor administrative findings provide a ready answer to this question.[32]

Although tract selection and lease stipulation decisions have no immediate physical impact on coastal resources, foreseeable physical effects flow directly from the legal consequences of these decisions. A lease entitles lessees to develop and produce the oil and gas resources of OCS lease tracts subject to the conditions in the lease. If a tract is not offered for lease, no oil and gas development will take place on that portion of the OCS. On the other hand, a lease tract will be brought into production if sufficient resources are discovered to make recovery profitable. A tract selection decision thus determines whether a particular

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(1941); Wisconsin Cent. R.R. v. Forsythe, 159 U.S. 46 (1895). "Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law." 73 AM. JUR. 2D *Statutes* § 145, citing Jones v. N.Y. Guar. & Indem. Co., 101 U.S. 622 (1879); Indianapolis & St. Louis Ry. Co. v. Horst, 93 U.S. 291 (1876); Raymond v. Thomas, 91 U.S. 712 (1875); United States v. Hartwell, 73 U.S. 385 (1867).

[28] Pub. L. No. 94-370, 90 Stat. 1013 (1976). *See* notes 22-25 and accompanying text *supra*.

[29] Pub. L. No. 95-373, 92 Stat. 629 (1978).

[30] 16 U.S.C. § 1456(c)(1) (1976).

[31] The words of a statute are to be given their plain and ordinary meaning where such construction does not conflict with the purpose of the statute. Helvering v. Hammel, 311 U.S. 504 (1940); Lincoln v. Ricketts, 297 U.S. 373 (1936). Where the general language of a statute is broad enough to include a particular subject matter, any intent to exclude it from the operation of a statute must be express. Choteau v. Burnett, 283 U.S. 691 (1931).

[32] The U.S. Department of Justice characterized this question as a factual issue but did not express any view. Justice Dep't Op. *supra* note 8, at 2, 14.

part of the coastal zone will be exposed to the potentially harmful effects of oil and gas development[33] on nearby OCS lease tracts. Imposing a lease stipulation on offshore oil and gas operations means those operations will be conducted in a prescribed manner, or, alternatively, not be conducted at all on that tract. Lease stipulations directly affect the physical environment of the coastal zone because they prescribe or prohibit the conduct of offshore oil and gas operations on federal OCS lease tracts adjacent to the coastal zone.

Furthermore, a narrow reading of section 307(c)(1) would conflict with congressional policy as declared in section 303 of the CZMA, which encourages cooperation between federal, state and local governments.[34] Such a reading would put tract selection and lease stipulations outside the CZMA's consistency requirements, thereby engendering conflict—rather than cooperation—between federal and state governments.

To construe section 307(c)(1) narrowly, therefore, ignores the true significance of tract selection and lease stipulation decisions. Such decisions directly affect the coastal zone by determining where and how OCS oil and gas development will occur. Requiring these decisions to be consistent with approved state coastal zone management programs will advance the CZMA's stated policy of furthering federal-state cooperation. Tract selection and lease stipulation decisions should be held to come within the purview of section 307(c)(1).

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[33] Harmful effects include oil spills, air pollution from hydrocarbon emissions generated by loading of barges or tankers with oil, obstruction of shipping channels, adverse effects of energy production related industrial facilities on scenic coastal areas with tourist-based economies and fouling of fishing gear on underwater pipelines and other facilities.

[34] "The Congress finds and declares that it is the national policy . . . (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this chapter. . . ." 16 U.S.C. § 1452 (1976). The words of statutes should be interpreted to promote the policy of the legislature in the fullest manner. *See, e.g.*, United States v. American Trucking Ass'n, 310 U.S. 534 (1939); Nardonne v. United States, 308 U.S. 338 (1939); Ash Sheep Co. v. United States, 252 U.S. 159 (1920); United States v. Hartwell, 73 U.S. 385 (1867). Amendments to § 303 pending in Congress at this writing would leave the subsection quoted above intact. *See* H.R. REP. No. 96-783, 96th Cong., 2d Sess. (1980).

B. Effect of the CZMA Amendments of 1976

The Interior Department has argued that the legislative history of the CZMA Amendments of 1976[35] demonstrates that Congress intended section 307(c)(3)(B) to be the exclusive provision relating to offshore oil and gas development.[36] Since there is nothing to this effect expressed in the 1976 amendments, the Department's interpretation necessarily relies on the doctrine of repeal by implication.[37]

As discussed above,[38] the 1976 Amendments changed section 307(c)(3) by making the original provision subsection (A) and adding a new subsection (B). Both the House and Senate committees reported bills which would have added the word "lease" to the original section 307(c)(3).[39] Such an addition would have explicitly required OCS leases to be consistent with approved state coastal zone management programs. Although the Senate passed the bill with this amendment intact, it was deleted from the House bill during consideration by the whole House.[40] The Interior Department has contended that Section 307(c)(3)(B) as ultimately enacted is a compromise which provides for review of exploration and development activities but repeals (by implication) consistency determinations from all other phases of the off-

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[35] Pub. L. No. 94-370, 94th Cong., 2d Sess., 90 Stat. 1013 (1976).

[36] The Interior Department made this argument to the Justice Department, but the Justice Department's opinion on this issue rejected it. *See* note 8 *supra*. As a result, the Interior Department no longer takes this position publicly, though others may assert it in the future.

[37] *See* Justice Dep't Op. *supra* note 8, at 10.

[38] *See* note 23 *supra*.

[39] Both committee reports expressly state that the committees believed the original § 307(c)(3) had always applied to leasing. See S. REP. No. 94-277, 94th Cong., 1st Sess. 19, 36-37, 53 (1976); H.R. REP. No. 94-878, 94th Cong., 2d Sess. 52 (1976).

[40] The amendment was deleted from the House bill on the motion of Representative Dupont (Del.). Dupont felt that striking the amendment in the House bill and leaving it in the Senate bill would provide flexibility for the conference committee to consider the issue "longer." 122 CONG. REC. 6128, quoted in Justice Dep't Op., *supra* note 8, at 8.

Representive Murphy (N.Y.), the chairman of the legislative subcommittee that reported the bill and manager of the bill on the House floor, accepted Dupont's motion. Murphy stated that even if a permit applicant acquired a lease, the consistency requirements of § 307(c)(3) would clearly apply to those licenses and permits necessary to drill exploratory wells and install production facilities. *Id.*

shore development process.[41] The Department based its argument on conference committee discussions[42] and a statement by Senator Tunney (Cal.) when the conference report was passed on the Senate floor.[43]

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[41] U.S. Interior Dep't Memorandum, "Application of the Consistency Requirements of the Coastal Zone Management Act to the Department of the Interior's Outer Continental Shelf Oil and Gas Leasing Program: The Position of the Department of the Interior," March 1979, at 15 (on file at U.C. Davis L. Rev.) [hereinafter cited as Interior Dep't Memorandum].

[42] Representative Breaux (La.) and congressional staff members engaged in the following discussions:

> Mr. Breaux: It is your interpretation we are extending that [consistency requirement of § 307(c)(3) of the CZMA] to leases?
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> Mrs. Baldwin [of the Senate Staff]: We are extending it to development plans.
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> Mr. Hussey [of the Senate Staff]: This typically excludes lease (sic).
>
> Mr. Breaux: I don't want to take up the committee's time, but what what (sic) happens if a state says no to an exploration plan? What happens to the lease somebody bought and paid for?
>
> Mrs. Baldwin: Nothing would happen to the lease. It would have to be modified as any other provision would have to be.
>
> Mr. Kitsos [of the House Staff]: The Secretary of Commerce can declare in the interest of national security consistency is presumed. He can override the state in that process.
>
> Mr. Hussey: Of course, you realize states have to get an approved section 306 program prior to the specific provision taking place (sic).
>
> Mr. Breaux: It is clearly the intent that it doesn't extend to leases.
>
> Mrs. Baldwin: Only to activity covered in the plans.
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> Transcript available at the offices of the Senate Committee on Commerce, at 29, as quoted in Interior Dep't Memorandum, *supra* note 38, at 16-18.

One staff member made these statements:

> The Administration . . . does have serious concerns about applying [§ 307(c)(3)(B)] to leases because of the potential for delay in the leasing process. . . . Also, most of the states wouldn't be able to take advantage of it at that time because they won't have approved coastal management programs at the time of the lease sale. . . . In light of this, and in light of the suggestions from the Department of the Interior, the staff is suggesting that the conferees consider making [consistency] available at the plan approval stage.

Transcript at 21-22 as quoted in Interior Dep't Memorandum, *supra* note 41, at 15-16.

[43] Senator Tunney was a member of the Senate committee that reported the 1976 CZMA amendments, a member of the conference committee and a spon-

A basic tenet of statutory construction disfavors repeal by implication.[44] Instead, the intent to repeal must be clear and manifest.[45] Certainly, nothing in section 307(c)(3)(B) or its legislative history indicates any clear or manifest intent to repeal section 307(c)(1) as to offshore oil and gas development. Indeed, the express language of the conference report suggests just the opposite:

> The conference substitute follows the Senate bill in amending the Federal consistency requirement to section 307(c)(3) of the Coastal Zone Management Act of 1972. The Senate bill required that each federal lease (for example, offshore oil and gas leases) had to be submitted to each state with an approved coastal zone management program for a determination by that state as to whether or not the lease was consistent with its own program. The conference substitute further elaborates on this provision and specifically applies the consistency requirement to the basic steps in the OCS leasing process — namely, the exploration, development and production plans submitted to the Secretary of the Interior. . . .[46]

When viewed in light of these statements from the conference report, the Interior Department's argument, based as it is on conference committee discussions and the floor statement by Senator Tunney, is not persuasive.[47]

If two laws bear on the same subject, the general rule is to give effect to both if possible.[48] There must be a positive repug-

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sor of that legislation in the Senate. The statement of a sponsor of legislation deserves great weight when interpreting a statute, FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976), and the weight accorded to any particular congressman's views varies with the legislator's familiarity with and participation in shaping the legislation. United States v. Oates, 460 F.2d 545 (2d Cir. 1972).

Senator Tunney made this statement upon passage of the conference report: "I had hoped that federal consistency requirements would be more explicitly extended to include lease sales on the Outer Continental Shelf. The conference report has compromised on this issue due to the threat of a presidential veto of the entire bill." 122 CONG. REC. 10941, as quoted in Interior Dep't Memorandum, *supra* note 41, at 18-19.

[44] *See, e.g.*, United States v. Borden, 308 U.S. 188 (1939).

[45] *Id.*

[46] H.R. REP. No. 94-1298, 94th Cong., 2d Sess., at 30 (1976).

[47] "It is especially true that opinions expressed by individual members of Congress are not to be taken as persuasive of the congressional intention in the enactment of the statute, where such opinions are in conflict with explicit statements, with respect to the meaning of the statute, made in committee reports. . . ." 73 AM. JUR. 2d Statutes §173, citing United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942).

[48] *See, e.g.*, United States v. Borden, 308 U.S. 188 (1939).

nancy between the two provisions for repeal by implication to occur, and even then the older law is repealed only to the extent of the repugnancy.[49] Because section 307(c)(3)(B) applies only to post-leasing exploration and development, applying section 307(c)(1) to activities such as tract selection and lease stipulation decisions, which occur prior to leasing, would not conflict with section 307(c)(3)(B). There is, therefore, no positive repugnancy between these two sections, and both can be given effect. Consequently, the most logical view, in light of the entire legislative history of section 307(c)(3)(B), is that the new subsection is intended to operate in lieu of section 307(c)(3)(A) to expedite post-leasing exploration and development.[50] The Justice Department reached the same conclusion in a recent opinion:

> There is nothing explicit or implied in the 1976 [CZMA] Amendments to the effect that the procedure set forth in Section 307(c)(3)(B) provides the only consistency requirement for the entire Outer Continental Shelf Land (sic) leasing process. Paragraph (B) is designed to relieve the lessee of the burdens and delays resulting from successive consistency determinations for the many license and permit applications that may follow the grant of a lease and the approval of an exploration, development, or (sic) production plan . . . . It has no bearing on the consistency requirements antedating that stage of the leasing process. . . . It is our opinion that with respect to preleasing activities Section 307(c)(1) and Section 307(c)(3)(B) can both be given effect and accordingly that the enactment of Section 307(c)(3)(B) does not disclose any clear and manifest legislative intent to supersede, and does not supersede, the application of Section 307(c)(1) to those preleasing activities of

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[49] *Id.*

[50] To this effect, the conference report stated:

> [U]nder the substitute, any subsequent OCS Federal license or permit required for activities specified in any exploration, development and production plan are presumed to be consistent once the plan is certified as being consistent. *This important change will significantly expedite OCS oil and gas development.* Under present Department of Interior regulations, Federal permits are required for a large number of individual activities, including geophysical exploration, bottom sampling, well drilling for exploration and development or production, pipeline right-of-way, structure placement, waste discharge, and dredging and filling operations. *Thus, separate consistency determinations on each activity, described in detail in an exploration, development or (sic) production plan, will not be necessary.*
>
> (Emphasis added.)

H.R. REP. No. 94-1, 94th Cong., 2d Sess. 30-31 (1976).

the Secretary of the Interior relating to the Outer Continental Shelf Lands which come within the scope of that section.[51]

C. Effect of the OCS Lands Act Amendments of 1978

The Interior Department has also argued that the legislative history of the 1978 amendments to the OCS Lands Act[52] demonstrates that Congress "never intended to impose a consistency review during the preleasing or leasing phases" of the offshore development process.[53] Since several provisions of the 1978 amendments relate to consistency review under the CZMA or to federal-state relations generally, some of these provisions arguably supersede all other consistency reviews of lease sale decisions.[54] However, the statute itself and the House committee report demonstrate that Congress did not intend to supersede the consistency determinations which would otherwise occur pursuant to the CZMA.

The 1978 amendments contain the following provision: "Except as otherwise expressly provided in this Act, nothing in this Act shall be construed to modify or repeal any provision in the Coastal Zone Management Act of 1972. . . ."[55] Since the 1978 amendments do not expressly manifest congressional intent to exclude the oil and gas development process from section 307(c)(1), this disclaimer should be given effect according to its plain and ordinary meaning.[56] Furthermore, legislative history cannot be used to compel construction of a statute at variance with its plain words.[57]

In addition, the House Committee Report shows the 1978 amendments were not intended to alter the consistency require-

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[51] Justice Dep't Op., *supra* note 8, at 10-11.

[52] Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified in scattered sections of 43 U.S.C.).

[53] Interior Dep't Memorandum, *supra* note 38, at 25. The Interior Department no longer takes this position publicly because the Justice Department rejected it. *See* note 8 *supra*.

[54] *See, e.g.*, Pub. L. No. 95-372, 95th Cong., 2d Sess., §§ 206 & 208, 92 Stat. 629 (1978) (codified at 43 U.S.C. §§ 1340(c) & 1345 (Supp. II 1978)).

[55] *Id.* § 608(a) (codified at 43 U.S.C. § 1866(a) (Supp. II 1978)).

[56] The words of a statute are to be given their plain and ordinary meaning where such construction does not conflict with the purpose of the statute. Helvering v. Hammel, 311 U.S. 504 (1940); Lincoln v. Ricketts, 297 U.S. 373 (1936).

[57] *See, e.g.*, Kuehner v. Irving Trust, 299 U.S. 445 (1937).

ments of the CZMA:

> The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. §§ 1451, et seq.), certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Titles IV and V of the 1977 Amendments, [58] *nothing in this Act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency once a State has an approved Coastal Zone Management Plan.*[59]

The language and legislative history of the OCS Lands Act Amendments of 1978 thus fail to support the Interior Department's contention that Congress repealed section 307(c)(1) by implication as it applies to tract selection and lease stipulation decisions. The Justice Department's analysis makes the same conclusion.[60]

III. Which Result Best Serves the Public Interest?

Applying section 307(c)(1) to tract selection and lease stipulation decisions is consistent with sound public policy. Both the national interest in increased energy production and local concern with offshore development would be weighed within a balanced policy framework. This would aid the identification and resolution of conflicts early in the development process and thereby prevent undue delay in offshore oil and gas development.

The current federal offshore oil and gas leasing process provides state and local governments with many opportunities to express their views on proposed developments,[61] but gives them little actual influence or control. Federal policy determines where development will occur and the conditions under which it

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[58] The House Committee Report was filed in 1977. The amendments in Titles IV and V do not affect the consistency provisions of the CZMA.

[59] H.R. Rep. No. 95-590, 95th Cong., 1st Sess., at 153 n. 52 (1977) (emphasis added).

[60] Justice Dep't Op., *supra* note 8, at 12.

[61] For example, state and local governments may comment on the five-year leasing schedule, tract nominations for lease sales, exploration plans and development and production plans. *See* 1 OCS Project Task Force Report, Governor's Office of Planning and Research, State of California, Offshore Oil and Gas Development: Southern California 114-21 (1977).

will proceed. Federal agencies regulate industry exploration, development and production. While offshore oil and gas development and production plans often include onshore facilities (for processing and transportation) subject to state and local controls, oil companies can build these facilities in federal waters offshore—beyond state and local jurisdiction—if they object to restrictions imposed by state and local governments.[62] While the national interest should not be wholly subservient to particular region's concerns, neither should the national interest ride roughshod over local concerns. The longstanding principle of comity "entails concern for the functioning of the state and national systems of government within the delicate framework of federalism."[63]

In any event, increasing domestic production of oil and gas is not the only important national goal. There is a national, as well as local, interest in minimizing air pollution,[64] potential damage from oil spills,[65] and harm to fish and wildlife from offshore oil and gas activities.[66] In addition, there is both a national and local interest in protecting the tourist-based economies of coastal communities and protecting fisheries threatened by offshore oil and gas development.

Applying section 307(c)(1) to tract selection and lease stipula-

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[62] Oil produced from Exxon's Platform Hondo in the Santa Barbara Channel has been processed on and shipped from a floating facility less than a quarter mile beyond California's jurisdiction in order to circumvent state environmental regulations. *See* 2 OCS PROJECT TASK FORCE, GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, OFFSHORE OIL AND GAS DEVELOPMENT: SOUTHERN CALIFORNIA 781-89 (1977). Exxon and the State of California and Santa Barbara County signed a memorandum of agreement in early 1980 covering the continued operation and future development of oil and gas activities in that part of the Santa Barbara Channel. Among other things, the agreement provides that the offshore processing facility will continue in operation and that Exxon will install air emission control devices costing more than $11 million. Letter from H.W. Longwell, Western Division Production Manager, Exxon Company, U.S.A., to Robert L. Hedlund, Chairman, Santa Barbara County Board of Supervisors, and David M. Yager, Chairman, Santa Barbara Air Pollution Control Board (February 12, 1980) (on file at U.C. Davis L. Rev.).

[63] Dome Condominium Ass'n v. Goldberg, 442 F. Supp. 438, 440 (S.D. Fla. 1977).

[64] *See* Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. II 1978).

[65] *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. II 1978).

[66] *See* Fish and Wildlife Act of 1956, 16 U.S.C. § 742a (1976).

tion decisions would provide an institutional and legal means of evaluating and balancing the national and local interests in offshore oil and gas development. Under section 307(c)(1), federal agencies are required to conduct their activities in a manner consistent with approved state programs only to "the maximum extent practicable."[67] The "maximum extent practicable" standard is less rigorous than the standard of "complete consistency" required by section 307(c)(1) for issuance of a federal permit or license.[68] This standard provides sufficient flexibility to achieve a proper balance between the national interest in increased offshore oil and gas production and state and local interests in maintaining the quality and productivity of the local environment.

Moreover, existing safeguards in the CZMA insure that states do not formulate coastal zone programs that disregard the national interest in increased production of offshore oil and gas. Before a proposed state coastal zone management program may be approved, the Secretary of Commerce must find that the plan was developed "with the opportunity of full participation by relevant federal agencies" (including the Interior Department and the U.S. Department of Energy) and, in addition, that the program "provides for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature."[69] A state management program may not be approved "unless the views of federal agencies principally affected by such program have been adequately considered."[70] The Interior Department and the Department of Energy should therefore continue to carefully scrutinize state programs as they are submitted, evaluating their potential effects on offshore oil and gas development. The state and federal governments should then work to resolve any conflicts before a program is approved so that areas with high oil and gas potential are not precluded from development without careful consideration.

The alternative to requiring a consistency determination under section 307(c)(1) before leasing is to rely on a consistency determination under section 307(c)(3)(B) at the exploration or

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[67] 16 U.S.C. § 1456(c)(1) (1976).
[68] 16 U.S.C. § 1456(c)(3) (Supp. II 1978).
[69] 16 U.S.C. § 1455(c) (1976).
[70] 16 U.S.C. § 1456(b) (1976).

development plan stages. Admittedly, more is known about the oil and gas reserves at the exploratory drilling and the development and production stages than prior to leasing since more and better geological data is available. Better estimates of the oil and gas in place aids in planning the location and size of facilities necessary to develop a particular tract. Nonetheless, seabed and shoreline topography and the location and capacities of existing oil and gas facilities are also primary factors in the design and placement of facilities to exploit new discoveries of oil and gas. Since these factors are known at the time of tract selection, reasonable estimates are possible regarding how and where development will occur if oil and gas are discovered.

Determining consistency before lease rights vest would also save both the federal government and the oil companies effort and capital. Postponing a consistency determination until after development rights vest could be very costly should it appear that a tract could not be developed consistently with an approved state program, or be developed only with undue risk to nearby coastal resources. The Secretary of the Interior might then be forced to cancel the lease and compensate the lessee at a cost of millions or billions of dollars (depending on what was spent to acquire and develop the lease up to the time of cancellation).[71] If a conflict did occur a state would be under great pressure to amend its plan to allow development to proceed. By applying section 307(c)(1) to tract selection and lease stipulation decisions to indentify potential conflicts early in the process—before development rights vest—these problems could be avoided or mitigated.

Finally, applying section 307(c)(1) to tract selection and lease stipulation decisions should not unduly delay offshore oil and gas development. Federal agencies, not states, determine consistency under section 307(c)(1). Thus, Interior Department officials would review proposed tract selections and lease stipulations and decide whether the "maximum extent practicable" standard of section 307(c)(1) had been met. Mediation of any dispute would be available from the Secretary of Commerce in cooperation with the Executive Office of the President.[72] If mediation failed, the Interior Department could nevertheless proceed with the lease sale, and the only redress available to a

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[71] *See* 43 U.S.C. § 1334(a)(2)(c) (Supp. II 1978).

[72] 16 U.S.C. § 1456(h) (1976).

coastal state would be through litigation. Before a coastal state could obtain any judicial relief, it would have to make the difficult showing that the Interior Department had abused its administrative discretion by declaring that the tract selections and lease stipulations satisfied the statutory standard for consistency.[73] Accordingly, requiring a consistency determination under section 307(c)(1) of tract selection and lease stipulations should result in little or no delay of OCS oil and gas development.

IV. Conclusion and Proposal

Proper statutory interpretation of the CZMA demonstrates that tract selection and lease stipulation decisions are within the scope of section 307(c)(1). Consequently, such decisions must, to the maximum extent practicable, be consistent with approved state coastal zone management programs. The institutional and legal framework of section 307(c)(1) neatly balances the national interest in developing new sources of oil and gas with the interests of coastal residents of coastal states and communities in minimizing adverse environmental and economic effects of offshore oil and gas development.

The applicability of section 307(c)(1) to pre-leasing activities has sparked persistent controversy between the federal government and state and local governments, between the Commerce Department and the Interior Department and between the oil industry and citizens of coastal states. To resolve this controversy, Congress should amend section 307(c)(1) to expressly apply to tract selection and lease stipulation decisions.[74] Such an amendment should be a definite statement of policy, ending the current ambiguity and controversy over the application of section 307(c)(1) to federal OCS oil and gas leasing and development.

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[73] *See* 5 U.S.C. § 706 (1976).

[74] Amending the OCS Lands Act to conform to § 307(c)(1) is preferable to amending § 307(c)(1) itself. It would be unwieldly to list every federal activity covered in § 307 in the CZMA. Inevitably some federal activities which clearly affect the coastal zone would be left off such a list, raising new questions about the applicability of § 307 to those activities.