Watt v. California: Supreme Court Sinks Consistency Review of Offshore Oil Leases

I. The Policy Conflict: Pouring Oil Over Troubled Waters

As the United States Department of the Interior ("Interior") attempts to offer areas of the Outer Continental Shelf (the "OCS") for exploration and development by the private oil industry, it taps a simmering policy conflict between federal and state governments over control of offshore natural resources.[1] According to the Submerged Lands Act of 1953 (the "SLA"),[2] coastal states own lands under the navigable waters for three geographical miles from their coastlines.[3] The corollary of this Act,

1. After minimal OCS leasing in the 1950's and 1960's, development was accelerated in 1974, when the Department of the Interior offered a record 10 million acres for bids in response to the alarm created by the tremendous rise in prices for foreign oil. H.R. Rep. No. 590, 95th Cong., 2d Sess. 76-77, 89, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1450, 1484-85, 1496. In 1980, Secretary of the Interior Andrus increased the figure to 55 million acres. Jones, *The Development of Outer Continental Shelf Energy Resources*, 11 Pepperdine L. Rev. 9, 10-11 (1983). The federal government's offshore leasing program provoked much controversy in 1981 when former Interior Secretary Watt approved a five-year leasing schedule offering one billion acres between August 1982 and June 1987. *Id.* at 10-11 n.6. That is twenty-five times the amount of acreage offered from the beginning of the program in 1953 through 1980. *Id.* Only 18 million acres of the OCS were actually leased during the first term of the Reagan administration, however. This appears to have been due to both a lack of interest by the oil industry and a Congressional moratorium on oil leasing in wide regions of the OCS along both the Atlantic and Pacific coasts. *See Hodel Plans to Reduce Scope of Offshore Oil Leasing Program*, N.Y. Times, Mar. 12, 1985, at A22, col. 2-6. *See also infra* note 94 and accompanying text (regarding Congressional moratorium on offshore leasing).

In an apparent effort to reduce the conflict over OCS leasing, newly-appointed Interior Secretary Hodel announced his intention to submit a new five-year plan that will further limit the OCS acreage offered for oil leasing, and to seek greater input from state and local governments in deciding which tracts to lease. *Hodel Plans to Reduce Scope of Offshore Oil Leasing Program*, N.Y. Times, Mar. 12, 1985, at A22, col. 2.

2. Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 10 U.S.C. §§ 7421-7426; 43 U.S.C. §§ 1301-1303, 1311-1315 (1982)).

3. 43 U.S.C. § 1311(a) (1982). The SLA grants coastal states "title to and ownership of" submerged lands within a three-mile coastal zone boundary, and specifies that states have "the right and power to manage, administer, lease, develop, and use" resources located within that boundary. *Id.* The seaward boundary of the SLA's grant of submerged lands to coastal states is three marine leagues on the Gulf of Mexico and three geographical miles on the Atlantic and Pacific oceans. *Id.* § 1301(b).

the Outer Continental Shelf Lands Act of 1953 (the "OCSLA"),[4] grants the federal government jurisdiction over submerged lands of the continental shelf seaward of this mark.[5]

Congress' establishment of the boundaries of state and federal jurisdiction, however, did not resolve the conflict over ownership of underwater resources.[6] In response to competing demands from federal and state governments for control of coastal resources, Congress enacted the Coastal Zone Management Act of 1972 (the "CZMA")[7] to promote cooperation between federal and state agencies engaged in activities affecting coastal areas. Congress declared a national policy for federal agencies to "cooperate and participate with state and local governments" in preserving, protecting and developing the coastal zone's resources.[8]

To accomplish this objective, the CZMA provides federal funding to aid states in developing comprehensive coastal management plans.[9] Once a state's plan is approved by the Secretary of Commerce, section 307(c)(1) of the CZMA requires 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 maximium extent practicable, *consistent* with approved state management programs."[10] The CZMA de-

4. Outer Continental Shelf Act of 1953, ch. 345, 67 Stat. 462, (codified as amended at 10 U.S.C. §§ 7421-7426, 7428-7438; 43 U.S.C. §§ 1331-1343 (1982)).

5. 43 U.S.C. § 1333(a)(1) (1982). The "OCS" refers to those submerged lands subject to the jurisdiction of the United States that lie seaward of the three-mile mark. Watt v. California, —— U.S.——, 104 S. Ct. 656, 658 (1984). OCSLA gives the federal government express authority to lease the OCS for resource development. 43 U.S.C. § 1337(a)(1) (1982).

Before these statutes were enacted, the United States Supreme Court determined that the federal government had "paramount rights" to all lands under United States territorial seas as an incident of national sovereignty. United States v. California, 332 U.S. 19 (1947). These paramount rights included the right to dispose of submerged lands. Alabama v. Texas, 347 U.S. 272 (1954). *See also* United States v. Maine, 420 U.S. 515 (1975).

6. Jones, *supra* note 1, at 40. For example, the state of Maine issued permits for oil and gas exploration in submerged lands beyond its three-mile limit, prompting the United States to file suit. *Id.* at 40-41; *see* United States v. Maine.

7. Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1982)).

8. Pub. L. No. 92-583, § 303, 86 Stat. 1280, 1281 (1982) (codified as amended at 16 U.S.C. § 1452 (1982)).

9. The federal government provides grants for up to 80 percent of the cost of developing and administering state coastal management programs. 16 U.S.C. §§ 1454(a), 1455(a) (1982). Additional funding is available through the Coastal Energy Impact Program. *Id.* § 1456(a).

10. *Id.* § 1456(c)(1) (emphasis added). The rest of section 307(c), as amended by the Coastal Zone Management Act Amendments of 1976, Pub. L. 94-370, § 6 (3), 90 Stat.

fines the "coastal zone" to include state lands near the shorelines of the coastal states, and submerged lands three miles seaward of the shoreline.[11]

As a "carrot of federal consistency,"[12] section 307(c) measurably strengthens the states' role in the formulation of coastal resource policies. Pursuant to regulations promulgated by the Department of Commerce under section 307(c)(1), a federal agency must provide a coastal state with a "consistency determination" for any federal activity that will "directly affect" the coastal zone.[13] The consistency determination must identify the "direct effects," and indicate how the activity is consistent with the state's program.[14] If the state disagrees with the federal agency's consistency determination it has the right to request additional information, and ultimately, mediation.[15] The CZMA's theory of resource management requires federal agencies to respond to state guidelines.[16] The state should be the arbiter of

1013, 1018 and the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. 95-372, § 504, 92 Stat. 629, 693 provides in pertinent part:

> (2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.
>
> (3)(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 to the licensing or permitting agency 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 . . . .

16 U.S.C. § 1456(c) (1982).

11. *Id.* § 1453(1).

12. Babbitt, *Federalism and the Environment: An Intergovermental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 860 (1982) (Governor Babbitt of Arizona suggesting that the CZMA can be used as a model for legislation supporting a stronger role for states in all resource management decisions).

13. 15 C.F.R. §§ 930.33, .34 (1984).

14. *Id.* §§ 930.34, .39.

15. *Id.* §§ 930.42, .43.

16. Babbitt, *supra* note 12, at 860. The author notes that this paradigm for resource management grants the states "considerable leverage" over the federal government. *Id.*

land use decisions, unless a matter of national security is at issue.[17]

However, the United States Supreme Court decided in *Watt v. California*[18] that the consistency review provisions of section 307(c) are inapplicable to federal offshore oil and gas lease sales. This decision has severely limited the states' ability to influence resource management decisions. Unless Congress or the voluntary practice of federal agencies effectively overrules the decision,[19] states will have only token input into the crucial early stage of the OCS development process where the real control of offshore resources is asserted—the lease sale stage.[20]

17. 16 U.S.C. § 1456(d) (1982) provides that, where state and local governments apply for federal assistance for projects that affect the coastal zone, "Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security."

18. 104 S. Ct. 656 (1984). The 5-4 decision was written by Justice O'Connor, who was joined by Chief Justice Burger and Justices Rehnquist, Powell, and White. The dissenting opinion, authored by Justice Stevens, was joined by Justices Brennan, Marshall, and Blackmun.

19. Legislators in both the House of Representatives and the Senate have responded to the decision by introducing bills that describe federal activities covered by the section 307(c)(1) consistency review. A bill introduced in the Senate provides that "[e]ach Federal agency conducting or supporting an activity significantly affecting the natural resources or land or water uses in the coastal zone shall conduct or support that activity in a manner which is fully consistent with the enforceable, mandatory policies of approved State management programs. . . ." S. 2324, 98th Cong., 2d Sess. (1984).

The companion House bill states:

> (A) Federal agency activity shall be treated as one "that directly affects the coastal zone" if the conduct or support of the activity either—
>
> (i) produces identifiable physical, biological, social, or economic consequences in the coastal zone; or (ii) initiates a chain of events likely to result in any of such consequences.

H.R. 4589, 98th Cong., 2d Sess. (1984).

Former Secretary Clark indicated that regardless of what Congress did, he would voluntarily communicate with officials of the states and other affected areas and interests before a lease sale began. *Clark Seeks More Input on Coastal Leases*, L.A. Times, Jan. 13, 1984, at 1, col. 3. However, such voluntary actions would be merely a matter of policy. The states would still have no legal power to block the federal sale of leases on the OCS.

20. State and local governments have some opportunity to express their views on proposed federal activities. Federal agencies generally must solicit input from the states in preparing the environmental impact statements required under the National Environmental Policy Act for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c) (1982). OCS lease sales are subject to this provision. *See, e.g.*, Conservation Law Found. v. Andrus, 623 F.2d 712 (1st Cir. 1979).

II. Analysis of the Case

Oil development on the OCS occurs in four stages. First, Interior prepares a leasing program.[21] Second, it solicits bids and sells leases.[22] Third, lessees submit exploration plans to Interior for approval.[23] If Interior approves the plans, lessees can begin exploration activities on their tracts.[24] Fourth, lessees submit development and production plans to Interior for approval.[25] If Interior approves these plans, lessees can begin full scale oil and gas production.[26]

California developed a coastal management plan that was approved in 1977 by the Secretary of Commerce. In 1978, Interior announced its intent to offer 243 tracts of the OCS for lease in Lease Sale No. 53. In 1980, Interior issued a Draft Environmental Impact Statement. The California Coastal Commission promptly informed Interior that it considered Lease Sale No. 53 to be an activity "directly affecting" the California coastal zone within the meaning of the CZMA, and demanded that Interior show the proposed lease sale to be consistent with the state's federally-approved coastal management plan.[27]

Interior rejected California's demand, stating that the sale would not "directly affect" California's coastal zone, but removed 128 tracts from the proposed lease sale. It then issued a Final Environmental Impact Statement and published a proposed notice of sale in 1980. The California Coastal Commission demanded that thrity-one additional tracts located near sensitive marine mammal and seabird breeding areas be removed from the proposed lease sale. Interior again rejected California's demand on the ground that lease sales were not subject to the section 307(c)(1) consistency review requirement, and issued a final notice of sale.[28]

The state of California and several environmental groups (the "respondents") filed separate but similar suits in the federal dis-

21. 43 U.S.C. § 1344 (1982).
22. *Id.* § 1337(a).
23. *Id.* § 1340(c)(l).
24. *Id.* § 1340(b), (c).
25. *Id.* § 1351(a)-(c).
26. *Id.* § 1351(h).
27. 104 S. Ct. at 659.
28. *Id.* at 659-60.

trict court to enjoin the sale of twenty-nine tracts.[29] The respondents argued that Interior unlawfully ignored the consistency review requirement of section 307(c)(1), because lease sales "directly affect" the coastal zone within the meaning of section 307(c)(1) by initiating a chain of events that culminate in oil and gas development.[30]

The District Court granted a summary judgment for the respondents. The Ninth Circuit affirmed the District Court's holding that Interior was required to undertake a consistency determination before making the sale.[31]

The Supreme Court reversed, holding that federal oil and gas lease sales on the OCS are not subject to the consistency requirements of section 307(c)(1). The Court made three alternative findings to support its conclusion. First, the Court found that Congress intended the "directly affecting" provision of section 307(c)(1) to reach only those activities on federal lands situated within the three-mile mark but excluded from the CZMA definition of "coastal zone."[32] Second, the Court found that lease sales are not an activity "conduct[ed] or support[ed]" by a federal agency within the meaning of section 307(c)(1).[33] Third, the Court found that even if lease sales are "conduct[ed] or support[ed]" by a federal agency, effects of OCS development on the coastal zone are not "direct effects" of leasing because federal approval is required after the lease sale stage, before exploration or development can proceed.[34]

The Court's statutory construction is so narrow that it may jerk back the "carrot" held out to the states to establish coastal zone management plans in the first place.[35] As a result of this decision,

29. *Id.* at 660. Several local governments subsequently intervened as plaintiffs in the state's case. *Id.* at 660 n.3.

30. *Id.* at 660.

31. *Id.*

32. *Id.* at 661-66.

33. *Id.* at 667-68.

34. *Id.* at 671-72.

35. *See* 130 CONG. REC. H.8 (daily ed. Jan. 23, 1984) (statement of Rep. Panetta). The Congressman stated:

> Under [this] decision, coastal states will be unable to use the act's provisions to formally object to those first stages of Federal activities which occur outside the coastal zone but which are inconsistent with the implementation of federally assisted programs. In effect, the recent decision exempts Federal agencies from heeding State concerns over the impact of agencies' activities upon State coastal zones and coastal protection programs, while leaving unaffected the act's provisions for funding those worthwhile affected coastal programs.

coastal states have no real power at the leasing stage to determine where private offshore development will occur, regardless of the eventual impact of such development on the coastal zone.[36]

A. *The Dictionary Debate*

The parties defined the primary issue to be the meaning of "directly affecting," which is not defined in the CZMA.[37] Interior contended that the phrase meant "[h]av[ing] a [d]irect, [i]dentifiable [i]mpact on [t]he [c]oastal [z]one."[38] The respondents defined the term as "[i]nitiat[ing] a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence."[39] Justice O'Connor, writing for the majority, concluded that both parties' definitions were "superficially plausible" constructions of the term's plain meaning, but were not supported by the CZMA itself.[40]

In his dissent, Justice Stevens criticized the majority for ignoring the term's plain meaning, and pointed out that "directly affecting" logically applies to federal activities conducted outside as well as inside the coastal zone, because it focuses on an activity's effects, not its location.[41]

The majority examined the legislative history of the 1972 Act, but refused to consider the legislative history of the Act's amendment and reauthorization in 1980.[42] Justice O'Connor's discus-

36. *See* Deller, *Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations Be Consistent with State Coastal Zone Management Programs?* 14 U.C.D. L. REV. 105, 119 (1980). The article, published four years before the Supreme Court's decision, argues that both the legislative intent and public interest require that section 307(c)(1) be applied to federal leasing decisions.

37. 104 S. Ct. at 661.

38. Brief for Federal Petitioners at 20, 104 S. Ct. at 661 (1984). Before the Court of Appeals, Interior conceded that section 307 (c)(1) applied at the lease sale stage, but argued that the "direct effects" of a lease sale were limited to those effects which were "part of, or immediately authorized by, a lease sale." California v. Watt, 683 F.2d 1253, 1260 (9th Cir. 1982).

39. Brief for Respondents at 10; 104 S. Ct. at 661. California successfully urged the Ninth Circuit to adopt a definition encompassing "reasonably anticipate[d]" effects of lease sales. 683 F.2d at 1260. A proposed amendment to the CZMA sponsored by the House adopts a definition of "directly affecting" similar to that proposed by the respondents. *See supra* note 19.

40. 104 S. Ct. at 661.

41. *Id.* at 673-74 (Stevens, J., dissenting). The threshold triggering consistency review had been understood by Congress to be "a function of the extent to which a Federal activity affects the coastal zone, not of the activity's geographical location." 130 CONG. REC. H.8 (daily ed. Jan. 23, 1984) (statement of Rep. Panetta).

42. 104 S. Ct. at 661 nn.7 & 8, 666 n.15. Citing a line of Supreme Court precedents, the dissent noted that the legislative history of reauthorization "qualifies as the view of a

sion of the legislative history of section 307(c)(1) centered on the origin of the "directly affecting" language. Both the original Senate and House versions of the CZMA required consistency review of federal activities "in the coastal zone." The bills differed, however, in their definitions of "coastal zone." The Senate bill excluded federal enclaves within the three-mile mark, such as federal parks, military installations, and Indian reservations, while the House bill included them.[43] Both definitions excluded submerged lands seaward of the three-mile mark. The Conference Committee ultimately adopted the Senate's narrower definition. Without explanation, it also replaced "in the coastal zone" with the broader language "directly affecting the coastal zone."[44]

From this legislative history, the Court concluded that the final text of section 307(c)(1) applied only to activities "on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act"—i.e., activities inside the three-mile mark.[45] The Court surmised that the conferees replaced "in the coastal zone" with "directly affecting the coastal zone" as part of a compromise: the narrower definition of "coastal zone" was adopted, but the reach of consistency review was extended to include some activities on federal lands within the three-mile mark.[46]

The Court concluded that the progression from the original bills to the current version shows that Congress intended to exclude OCS leasing from the consistency review requirements. This conclusion is unwarranted. Had this been the intent of the conferees, they could have merely adopted the House bill's definition and left "in the coastal zone" untouched. A more plausible interpretation is that the conferees' replacement of "in the coastal zone" with "directly affecting the coastal zone" indicates an intent to broaden the coverage of consistency review. As Justice Stevens points out, Congress' intent to prevent adverse effects to the coastal zone could not be achieved by limiting consistency re-

subsequent Congress and is not without persuasive value." *Id.* at 688 n.36 (Stevens, J., dissenting) (citations omitted). *Cf. infra* text accompanying note 74, where the majority relies on post-enactment legislative history to support its arguments.

43. *Id.* at 662.

44. *Id.*

45. *Id.* at 666.

46. *Id.* at 662, 666.

view to federal activities on only one side of the three-mile mark.[47]

The Court then concluded that, because the OCS was excluded from the definition of "coastal zone" in both bills, OCS leasing was excluded from the consistency review requirements of both bills, and thus was not encompassed by the final version of section 307(c)(1).[48] Justice Stevens took exception to the majority's conclusion, pointing out that both of the original bills recognized the potential effect on the coastal zone of activities outside it. For example, the original House bill's section 313 required the Secretary of Commerce to develop for federal OCS activities a management program consistent with state management programs.[49] Section 312 permitted the Secretary of Commerce to extend the boundaries of coastal zone marine sanctuaries created by state management plans into the OCS in order to protect the coastal zone adequately.[50] Neither of these provisions was included in the CZMA as enacted. Justice Stevens concluded that the House relinquished these provisions because the "directly affecting" provision adopted by the conferees achieved the same result of subjecting OCS activities to consistency review.[51]

The 1980 Senate Report also concludes that Congress originally intended to include OCS leasing in consistency review:

> The Department of Interior's activities which preceded OCS lease sales were to remain subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone.[52]

The majority dismissed these legislative guidelines as ex post facto interpretations of the CZMA.[53]

The Court also relied on legislative history of other sections of the original CZMA bills. It characterized the conferees' elimina-

47. *Id.* at 674 (Stevens, J., dissenting).

48. *Id.* at 662.

49. *Id.* at 675 (Stevens, J., dissenting).

50. *Id.* at 675-76. (Stevens, J., dissenting). *See id.* at 676-77, for Justice Stevens' conclusion that the Senate bill was intended to require consistency reviews for activities on the OCS.

51. *Id.* at 677 (Stevens, J., dissenting).

52. S. REP. No. 783, 96th Cong., 2d Sess. 11 (1980).

53. 104 S. Ct. at 675 n.7, 679 n.15. *But see, supra* note 42 (Justice Stevens' dissent).

tion of sections 313 and 312 of the House bill from the final text as congressional rejection of the concept of consistency review for OCS oil and gas leasing.[54] It also relied on congressional rejection of two other proposals.[55] One provision required federal agencies to obtain state approval of OCS construction, licensing, and leasing proposals. The other authorized a study of environmental hazards resulting from drilling on the Atlantic OCS.[56] As Justice Stevens noted, however, the first provision was rejected not because it required consistency review of OCS activity, but because it granted a veto power to state governors. The second was deleted simply because it was considered "nongermane" to the bill.[57]

The Court's definition of "directly affecting" essentially "draws lines on water" by distinguishing between federal activities that occur inside a state's three-mile coastal zone and those that occur outside it.[58] The Court's decision limits state authority abruptly at the three-mile mark and fails to recognize events that will not respect a hypothetical boundary, such as oil spills.[59]

B. *Purpose of the CZMA*

The Court's interpretation seriously undermines the purpose of the CZMA. Congress' findings and declaration of policy set out in sections 302 and 303 of the CZMA clearly show its intent to protect the coastal zone through federal-state cooperative planning.[60] For example, the first seven paragraphs of section 302 as originally enacted describe the coastal zone's value to the nation

54. *Id.* at 664. *See supra* text accompanying notes 49-50 for a description of sections 313 and 312.

55. *Id.* at 665.

56. *Id.* at 665 n.14.

57. *Id* at 678 n.13 (Stevens, J., dissenting). *But see id.* at 665 n.14 (majority's interpretation that amendment considered nongermane because Congress did not intend the CZMA to cover any activities conducted on the OCS).

58. *See* Ball, *Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf,* 12 ENVTL. L. 623, 630-37 (1982) (characterizing the fictitious boundaries of the coastal zone as "lines drawn on water").

59. For example, a massive release of oil and gas from a high pressure deposit on the OCS near Santa Barbara resulted in the largest oil spill in United States history in 1969. The resulting oil slick covered 800 square miles of the surface waters of the ocean and severely damaged the local ecology for forty miles along the California coast. *See generally* Walmsley, *Oil Pollution Problems Arising out of Exploitation of the Continental Shelf: The Santa Barbara Disaster,* 9 SAN DIEGO L. REV. 514 (1972).

60. Pub. L. No. 92-583, §§ 302, 303, 86 Stat. 1280, 1280-81 (1972) (codified as amended at 16 U.S.C. §§ 1451-1452 (1982)).

and vulnerability to destruction through development.[61] The eighth paragraph concludes that

> [t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over [this area] by assisting the states, in cooperation with Federal and local governments . . . in developing land and water use programs. . . .[62]

Justice Stevens interpreted these provisions to indicate Congress' preference for long-range cooperative planning, which would require consistency review at the lease sale stage.[63]

This conclusion promotes efficient resource development. Early identification and resolution of federal-state conflicts through consistency review at the leasing stage would save time in the development process. If subsequent exploration and development could not be conducted consistently with both state and federal requirements, early identification of this fact would benefit oil companies. They would be able to modify their plans and proceed without risking the costs of delay due to federal-state skirmishing. An early determination of consistency would provide certainty and security for oil companies and would increase the value of OCS tracts to the federal government—and ultimately to the public.[64] It is possible that consistency review at the lease sale stage might increase the amount of time needed to make tracts available for bidding, thereby delaying the day of freedom from foreign oil. However, it has been estimated that a review under section 307(c)(1) would hold up lease sales by only a few months in most cases, and perhaps not at all if the consistency review process commenced as soon as the environmental impact statement was released.[65]

The majority considered it "clear beyond peradventure" that the CZMA's purposes do not require consistency review of federal activities conducted outside the coastal zone.[66] However, its

61. *Id.* § 302(a)-(g).

62. *Id.* § 302(h).

63. 104 S. Ct. at 679.

64. *Id.* The dissent noted that if lessees must ultimately conform to state resource management programs, "it is difficult to understand why Congress would not have wanted the original planning that preceded the lease sales also to be consistent with the approved program." *Id.* at 680 n.17.

65. Gendler, *Offshore Oil Power Plays: Maximizing State Input into Federal Resource Decision Making*, 12 NAT. RESOURCES J. 347, 360.

66. 104 S. Ct. at 666-67.

conclusion was based on its assumption that neither of the original CZMA bills required consistency review of federal OCS activities.[67]

C. *Private License or Federal Activity*

Based on its view of the respective roles of the federal government and private industry in the OCS leasing process, the Court ruled alternatively that OCS lease sales are not "conduct[ed] or support[ed]" by a federal agency. The leasing process starts when the government opens tracts for bidding, develops an Environmental Impact Statement ("EIS"), and then publishes a final notice of lease sale. An oil company responds to the government's call by submitting a bid, proposing a development plan and, if its bid is accepted by Interior, posting a bond.[68]

The Court examined the first and third paragraphs of section 307(c) and arrived at the startling conclusion that "[p]lainly, Interior's OCS lease sales fall into [paragraph (3)]," but that paragraph (3) "definitely does *not* require consistency review of OCS lease sales."[69] The Court's decision permits lease sales to evade the consistency review requirements of both paragraphs.

The first paragraph of section 307(c) refers to activities "conduct[ed] or support[ed]" by a federal agency. The Court found this paragraph inapplicable to OCS lease sales because "drilling for oil or gas on the OCS is neither 'conduct[ed]' nor 'support[ed]' by a federal agency."[70] But drilling and leasing are separate stages in OCS development. Although federal agencies might not conduct or support OCS drilling, the federal government actively "conducts" lease sales by offering tracts and evaluating proposals. As Justice Stevens points out,

> [t]he *only* Federal activity that ever occurs with respect to OCS oil and gas development is the decision to lease; all other activities in the process are conducted by lessees and not the Federal Government. If the leasing decision is not subject to consistency requirements, then the intent of Congress to apply con-

67. *Id.* at 667. *See supra* text accompanying notes 48-51.

68. 43 U.S.C.§ 1337(a)(1)-(8) (1982). *See also* Jones, *supra* note 1, at 49-58, for an overview of the leasing process.

69. *Id.* at 667. *See supra* note 10 and accompanying text for the text of the three paragraphs of § 307(c).

70. *Id.*

> sistency review to federal OCS activities would be defeated and this part of the statute rendered nugatory.[71]

The third paragraph of section 307(c) as enacted in 1972 required consistency review of federally-authorized activities of private parties. Applicants for federal permits and licenses were required to certify that their activities would be consistent with state plans.[72] The Court characterized section 307(c)(3) as "more pertinent" to OCS lease sales than paragraph (1), but rejected its applicability because it did not explicitly require consistency review for lease sales.[73]

The Court then referred to Congress' 1976 addition of section 307(c)(3)(B) to the CZMA, which expressly requires consistency in lessees' exploration, production and development plans. The Court characterized Congress' rejection of proposals to include lease plans expressly in section 307(c)(3)(B) as indicative of its intent to exclude lease sales from consistency review.[74]

The Court also described at length the 1978 amendments to the OCSLA that, according to the Court, indicate Congress' intent to keep the four stages of OCS oil and gas development distinct. The Court seems to conclude from the four distinct stages concept that, had Congress wanted to require consistency review for the lease sale stage, it would have so indicated by using the word "lease."[75] In contrast, Justice Stevens concluded from the legislative history that the reason lease sales were omitted from section 307(c)(3) was that Congress already considered leasing to be subject to section 307(c)(1).[76]

71. *Id.* at 680 (Stevens, J., dissenting).

72. *See supra* note 10 for text of § 307(c)(3), codified as amended at 16 U.S.C. § 1456(c)(3)(A).

73. 104 S. Ct. at 667-68. The first subparagraph requires the maximum practicable consistency, while the third requires complete consistency. *See supra* note 10 and accompanying text.

The less stringent standard of section 307(c)(1) has been suggested to be more appropriate for lease sales, as it 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." Deller, *supra* note 36, at 121.

74. *Id.* at 668. *See supra* note 10 for the text of section 307(c)(3)(B). Note the majority's reliance on post-enactment history here, after its refusal to do so at *supra* notes 42 and 53 and accompanying text.

75. *Id.* at 668-71.

76. *Id.* at 685 (Stevens, J., dissenting).

D. *Effects Flowing from Leasing*

The Court's final alternative holding was that any effects on the coastal zone that flow from leasing decisions cannot be considered "direct" because federal approval is required after the lease sale stage before exploration and production can proceed.[77]

The parties agreed that the preliminary activities such as surveys and geophysical tests that are permitted upon purchase of a lease in themselves have no significant effect on the coastal zone.[78] However, the parties also agreed that direct effects on the coastal zone could result from the exploration and production stages that follow the lease sale stage.[79] Some of these effects were described in the Secretarial Issue Document (the "SID"), and the Environmental Impact Statement that were prepared in connection with Lease Sale No. 53.[80] For example, the SID, prepared by Interior, indicated a fifty-two percent probability that an oil spill would occur that would affect the sea otter range.[81] The EIS concluded that certain stipulations attached to this lease sale would have unavoidable adverse effects on the commercial spot prawn fishing industry, the tourist industry and recreational interests, and on the quality of surrounding waters.[82] The determination of whether a particular lease sale "directly affects" the coastal zone should be based on not only the immediate effects of a lease sale, but also on the *foreseeable* effects that flow directly from the decisions surrounding a lease sale.[83] In Justice Stevens' view, these results of exploration and development are "direct effects"

77. *Id.* at 671-72. Lessees may conduct geophysical tests that penetrate the seabed to a depth no greater than 300 feet. 30 C.F.R. § 250.34-1 (1984).

78. 104 S. Ct. at 661.

79. 104 S. Ct. at 671.

80. California v. Watt, 520 F. Supp. 1359, 1381 (C.D. Cal. 1981).

81. Both documents contain estimates of the probability of oilspills during the life of the leases. *Id.*

82. *Id.* The SID also found that pipelines could disturb historical artifacts and aboriginal archaelogical sites in the area. The EIS predicted changes in population and employment levels as labor migrated into the area. *Id.* From the numerous impacts discovered at this stage, the district court found the requirement of consistency review to be manifest. 520 F. Supp. at 1381-82. Consideration of the effects on the shore is appropriate, since the "coastal zone" extends inland "to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters." 16 U.S.C. § 1453(i) (1982).

83. Deller, *supra* note 36, at 112-13. This is essentially the interpretation urged by California. *See supra* note 39.

of leasing, because exploration and development are the "natural and expected" consequences of leasing.[84]

In addition to these effects that flow from the lease sale stage, some actions taken during the preparatory and lease sale stages have effects that must be considered "direct" because they can never be adequately reviewed at any other stage.[85] Decisions that cannot be easily undone are made both before and at the lease sale stage. For example, early in the process,

> critical decisions are made as to the size and location of the tracts [of the OCS to be put up for bidding], the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction . . . [A]t this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(1).[86]

CONCLUSION

Where offshore resources are concerned, federal and state interests frequently collide. The development of the consistency doctrine suggests that "the consensus, or occasionally the desperation, which led us to accept relatively uncomplex federally-dominated systems" has eroded.[87] But the Supreme Court's holding in *Watt v. California* has boosted federal interests and diminished the authority of the states. Because the federal viewpoint often coincides with that of the oil industry,[88] a judicial grant of carte blanche to federal interests at the leasing stage may not serve the public interest. Such a grant ignores principles of comity and

84. 104 S. Ct. at 687 (Stevens, J., dissenting).

85. *Id.* at 682 (Stevens, J., dissenting).

86. *Id.* (citing California v. Watt, 683 F.2d at 1260).

87. Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 980 (1982).

88. Jones, *supra* note 1, at 45-46. A university study in 1973 found that, before any provisions for state input into the leasing program were passed,

> [i]n the case of making and administering OCS policy, direct, continuous participation has largely been limited to the petroleum industry and government. . . . Since government and industry have had almost identical policy objectives, policy has been made and administered with extraordinary ease. . . . It is clear that the pattern of government-industry relationships which has been developed has produced a very closed system for making and administering OCS policies.

Id. at n.184 and accompanying text.

comprehensive planning, thereby reducing the likelihood that limited resources will be efficiently allocated.[89]

Embracing a dominant federal government in the context of offshore leasing may reduce long-range predictability for state planning as federal policies bend with political pressure.[90] In addition, the Court's first holding sweeps so broadly that states may be restricted in their ability to seek consistency reviews for federal activities other than lease sales, such as waste dumping, deep-sea mining, and nuclear-powered submarine movements.[91] Even if the legislative response ultimately weakens the majority's decision, the case may stand as a precedent to curtail joint state and federal decisionmaking in the management of other coastal concerns.[92]

The Court's grant of power to Interior, coupled with Interior's decision to increase drastically the number of tracts to be offered,[93] led Congress to impose a moratorium on the leasing of

89. *See* Deller, *supra* note 36, at 120; DiMento, *Improving Development Control Through Planning: The Consistency Doctrine*, 5 COLUM. J. ENVTL. L. 1, 45 (1978) (arguing that the comprehensive planning process promotes efficient allocation of resources).

Relations between Interior and state governments have grown increasingly strained as the current administration ignores state recommendations on how much acreage off their coastal shores should be leased. For example, Louisiana, a state which has traditionally sought offshore leasing, filed suit to enjoin a federal lease sale in April 1984. L.A. Times, Apr. 26, 1984, at 1, col. 2.

90. The actions of the National Oceanic and Atmospheric Administration (the "NOAA"), the federal agency responsible for administering the CZMA, illustrate how political influences can affect resource management. In 1977, NOAA declined to rule on whether section 307(c)(1) applied to lease sales. Three years later, it took the position that OCS lease sales required consistency review. However, two weeks after the instant case was filed the agency decided that lease sales do not "directly affect" the coastal zone. This ruling was then vetoed by the House Committee on Merchant Marine. As a result, the Supreme Court found that the NOAA had "walked a path of such tortured vacillation and indecision" that the agency provided no reliable guidance for the Court in interpreting the statute. 104 S. Ct. at 661 n.6.

91. The Senate Committe on Commerce, Science and Transportation expressed this concern in rejecting the Court's view. S. REP. No. 512, 98th Cong., 2d Sess. 7 (1984). *See States Lose Ruling on Offshore Leases*, L.A. Times, Jan. 12, 1984, at 1, col. 4. The Court's decision includes broad language that "Congress expressly intended to remove the control of OCS resources from CZMA's scope." 104 S. Ct. at 663.

92. In Chevron, U.S.A. v. Hammond, 726 F.2d 483 (9th Cir. 1984), the court of appeals cited the instant case in holding that under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982), "the federal/state partnership in pollution regulation applies only to waters within the states' jurisdiction." 726 F.2d at 489. The court identified the three-mile demarcation as the point where states are pre-empted from regulating the dumping of wastes under the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-1444 (1982).

93. L.A. Times, Apr. 26, 1984, at 1, col. 2.

over 35 million acres of offshore land.[94] However, a moratorium cannot resolve the conflict. Ultimately, consistency review provides the fulcrum on which the competing interests of the coastal states and the federal government can be properly balanced.

The Court's narrow interpretation of the CZMA restricts state input into critical early decisions regarding offshore resource management. The wall which the Court has erected between federal and state decisionmaking will result in suboptimal development of resources, from both economic and environmental standpoints. Only through cooperative planning, beginning early in the development process, can rational management of fragile coastal resources be achieved.

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94. Congress has placed extensive bans on sensitive areas in response to the Reagan administration's efforts to lease almost the entire coastline. In California alone, the number of acres included in the moratorium has grown from 700,000 acres in 1983 to 35 million in 1984. *Id.*