

CIVIL RIGHTS FACT SHEET

DEPARTMENT OF JUSTICE

January 20, 1981 to September 30, 1982

The President and the Attorney General have committed this Administration to the full and fair enforcement of the civil rights laws. These laws, which reach across a broad spectrum of American life, constitute the will of the Congress that discrimination on the basis of race, creed, color, national origin, sex and handicap shall be purged from our national life. These laws provide that where the evidence establishes a violation, the courts, at the instance of the Attorney General, will provide the required relief.

The Administration is pledged to enforce these laws because, as a legal matter, it is the responsibility of the Executive Branch to see that the laws are faithfully executed. But, even more significantly, we accept this responsibility willingly because we believe that these laws are right. We have no intention of seeking to repeal or dilute through non-enforcement any civil rights law that is now on the books.

At the same time, and in the same spirit, we will not hesitate to suggest and seek approval in court of ways to improve

this national effort when the need for improvement has been demonstrated. Opponents seize upon some of our innovations and claim that they belie our commitment and reveal a hidden agenda to sabotage the country's civil rights effort. In an attempt to buttress their allegations of such an effort, critics have made various claims unrelated to our innovations; claims which are demonstrably false in whole or in major part. We earnestly call upon all those genuinely interested in civil rights enforcement to join us in the continuing to search for the most effective legal tools to combat unlawful discrimination; at the same time, we urge that those who disagree with us to cast their criticism in constructive terms that will serve to advance responsible public debate.

As The Wall Street Journal editorialized recently
(October 4, 1982, p. 32):

In areas like the current busing debate, with the issues so complex and the law so manifestly muddy, it is immensely offensive to have the activists contend that there is one clear version of the law, that they own it, and that anyone disagreeing with them is a lawbreaker. * * * Let's stop the name-calling and scandal-mongering and start having some sensible policy discussions.

The material which follows is designed to demonstrate that the Department of Justice, through its Civil Rights

Division, has an effective, ongoing enforcement program in each of the fields of law which Congress has entrusted to it. It is hoped that such information -- some of which has received scant media attention -- will dispel once and for all the notion repeatedly floated by our critics, that this is an insensitive, do-nothing Administration which is content to preside over the erosion of hard-won gains achieved during the last 25 years.

Our efforts to enforce these laws are set forth below in summary form.

Voting Rights

The level of enforcement of the Voting Rights Act is at an all-time high. We have:

- ° Entered objections to 85 discriminatory voting changes by covered jurisdictions, including statewide redistricting objections in 9 states, and thereby prevented dilution or impairment of voting rights of black and Hispanic voters.
- ° Reviewed a record of 15,850 voting changes contained in 3,777 separate submissions by covered jurisdictions.
- ° Successfully defended in court all contested objections including purposefully discriminatory proposals for new congressional districts in Georgia and Mississippi.

- ° Actively enforced the newly revised Section 2 in three cases, including one involving discriminatory redistricting of the Chicago City Council.
- ° Used federal examiners to register voters in two counties and federal observers to monitor election fairness, including a record number of 461, in Alabama 1982 primary.
- ° Established a new Section 2 Enforcement Unit in the Division's Voting Section to bring litigation to enforce that Section as revised in Congress.

School Desegregation

The Administration has continued the effort to require school districts which classify and assign students or teachers on the basis of race to adopt effective desegregation plans; to maximize effectiveness, we no longer seek a mandatory busing plan to achieve racial balance, but try to emphasize quality educational opportunities through use of magnet schools and other techniques. Our activities include the following:

- ° We are currently involved in 24 school cases that are in active litigation and have another 20 matters under investigation.
- ° So far we have conducted over 50 evidentiary hearings, negotiated 9 consent decrees, obtained 4 decrees after hearings, and are preparing 4 more cases for trial in the near future.
- ° Among our active or settled cases are 4 that were commenced at the very close of the prior administration; (Charleston, South Carolina; Marshall, Texas; Lima, Ohio; and Yonkers, New York); we independently reviewed each one and determined to proceed with the litigation. One has been settled (Marshall); two are involved in settlement negotiations (Charleston and Lima); and one is being prepared for trial (Yonkers).

- ° We have put in place successful desegregation plans emphasizing open enrollment and voluntary attendance at magnet schools rather than mandatory busing in Shreveport, Louisiana, Odessa, Texas and Chicago, Illinois.
- ° By consent decree, we succeeded in obtaining a desegregation plan for all of the state-supported colleges in Louisiana and are negotiating similar plans in Alabama and Mississippi.

Discrimination in Housing

Enforcement of the congressionally mandated right to be free from discrimination in the sale, rental or occupancy of housing on the basis of race, ethnicity or sex has continued to be a high priority.

- ° We are currently reviewing 59 housing discrimination cases for potential litigation; 3 cases have been tried; 2 new cases have been brought; and 8 cases settled by consent decrees.
- ° Indictments in 8 cases have been obtained charging the forceful interference with housing rights because of race.
- ° We successfully argued in the Supreme Court that "testers" be granted standing to challenge discrimination in the sale, rental or financing of housing.

Criminal Prosecutions

The investigation, indictment, trial and conviction of criminal violations of the civil rights laws are proceeding at a record pace. Cases in this area involve such offenses as racial violence, police brutality, Klan interference with individual civil rights, enslavement of migrant workers, and the like. The Department has since January, 1981:

- ° Carried out over 5451 FBI investigations resulting in 54 indictments, 8 informations, 55 trials and 4 re-trials during this period.

- ° Included among the above statistics are such cases of national importance that have been indicted and tried as: Joseph Paul Franklin convicted of killing Utah joggers and tried for shooting Vernon Jordan; INS employees tried for abusing Cuban refugees; Klansmen tried for interference with rights; migrant crew leaders and others charged for involuntary servitude.

Employment Discrimination

The Administration has vigorously continued to seek and obtain relief against public employers who discriminate on the basis of race, sex or national origin; rather than arbitrary quotas, relief in such cases now focuses on enhanced recruiting, nondiscriminatory hiring and promotion decisions and full relief to all actual victims.

- ° During the past 21 months the Division has been actively involved in 36 affirmative employment discrimination suits, including 9 new cases filed; 17 consent decrees have been obtained and there are ongoing 17 investigations of employment discrimination involving 28 state or local government agencies.
- ° We obtained the largest backpay award in the history of the Department in a suit against a public employer -- \$2,750,000 on behalf of 685 victims of discrimination. Another award of \$1,300,000 was obtained in the Nassau County, New York police case.
- ° Indications from our monitoring of already entered consent decrees -- decrees -- that do not depend on racial quotas -- are that they will be as successful as any quota plan.

Co-ordination and Review of Federal Regulations

The Department is successfully executing its highly technical job of issuing co-ordination regulations under various statutes and of co-ordinating and reviewing the efforts of federal agencies to adhere to them. In this regard, the Civil Rights Division has:

- ° Negotiated civil rights implementation plans with 23 separate agencies, requiring long-range objectives and interim steps.
- ° Required submission, reviewed and approved final section 504 (handicapped) regulations for 10 agencies.
- ° Drafted and distributed to these relevant agencies, a preliminary co-ordination regulation on implementation of section 504 in federally conducted programs.
- ° Worked further on review of all federal statutes and regulations for vestiges of sex discrimination, and forwarded to the Cabinet Council on Legal Policy the First Quarterly Report on that activity.
- ° Developed a draft co-ordination regulation establishing standards for enforcement of 65 civil rights statutes; draft is presently being reviewed at OMB and should be published for comment soon.

Rights of Institutionalized Persons

The Administration is actively engaged in enforcement activity under the Civil Rights of Institutionalized Persons Act (CRIPA) as well as continuing to participate actively in ongoing litigation. Our efforts include:

- ° Nineteen CRIPA investigations involving 23 state and local institutions of every type covered by the Act.
- ° Active participation in 30 ongoing cases, including 2 new filings.
- ° In a landmark case involving the Texas prison system, we won a major decision in the Court of Appeals for the Fifth Circuit and have succeeded through negotiations in reaching a settlement on a significant portion of the case.

Appellate Activity

The Department has represented the interests of minorities and women in a large number of cases in the Supreme Court and Courts of Appeals.

- In the Supreme Court's 1981-82 term, we were involved on the merits in a record 16 civil rights cases.
- In 9 of these cases, significant protections against discriminatory behavior were upheld by the Supreme Court in response to our arguments. */
- In the courts of appeals, we have in the past 21 months successfully defended desegregation plans, criminal convictions, fair housing decrees, rights of the institutionalized and Department of Education requirements under Title IX (sex discrimination).

*/Crawford v. Bd. of Educ. of the City of Los Angeles, _____ U.S. _____ (1982), 50 U.S.L.W. 5016 (No. 81-38, June 30, 1982)

General Telephone Co. of the Southwest v. Falcon, _____ U.S. _____ (1982), 50 U.S.L.W. 4638 (No. 81-574, June 14, 1982)

Hathorn v. Lovorn, _____ U.S. _____ (1982), 50 U.S.L.W. 4664 (No. 81-451, June 15, 1982)

Havens Realty Corp. v. Coleman, _____ U.S. _____ (1982), 50 U.S.L.W. 4232 (No. 80-988, February 24, 1982)

North Haven Board of Education v. Bell, _____ U.S. _____ (1982), 50 U.S.L.W. 4501 (No. 80-986, May 17, 1982)

Plyler v. Doe, _____ U.S. _____ (1982), 50 U.S.L.W. 4650 (Nos. 80-1538 and 80-1934, June 15, 1982)

Polk Co. v. Dodson, _____ U.S. _____ (1981), 50 U.S.L.W. 4077 (No. 80-824, December 14, 1981)

Sumitomo Shoji America, Inc. v. Avigliano, _____ U.S. _____ (1982), 50 U.S.L.W. 4643 (Nos. 80-2070 and 81-24, June 15, 1982)

Zipes v. Trans World Airlines, Inc., _____ U.S. _____ (1982), 50 U.S.L.W. 4238 (Nos. 78-1545 and 80-951, February 24, 1982)

Similar successes at the jurisdictional stage include Blanding v. DuBose and Johnson v. Board of Education of the City of Chicago.

Pendleton = helpful if a compendium of Admin activity were sent to Civ Rts Comm'n
= prob is that we need to ^{look} fwd, but many want to continue to look back

Comm'n to be reauth'd in 1983 = suggest'n to announce early
suggests staggered terms of app'tees =

Pres. : Bot Jones case


← DOD assistance to wk w/ DOS & Int, on marijuana eradication
on public lands.

Washington, D.C. 20530

December 9, 1982

MEMORANDUM

TO: Carol E. Dinkins
Assistant Attorney General
Land and Natural Resources Division

FROM: B. D. Daniel
Special Litigation Counsel

SUBJECT: Review of OCS Sale 53 Decision

You have indicated that there is some reluctance to seek review of the Ninth Circuit's decision in California v. Watt, 683 F.2d 1253 (9th Cir. 1982). This memorandum will review the reasons why review is critical in this case and also address the reasons for not seeking review that are currently advanced.

PERTINENT BACKGROUND

OCS Sale 53, to offer OCS tracts off Central California, was first announced in 1977. After following preliminary procedures, including complying with NEPA, Secretary Watt announced the final contours of Sale 53 in April 1981, and a final notice of sale was published pursuant to the OCSLA. On May 28, 1981, the lease sale was conducted.

The State of California, among others, challenged the lease sale in the Central District of California. That court held that Interior had complied with all legal provisions except the Coastal Zone Management Act. It held that a lease sale is a federal "activity directly affecting the coastal zone" under Section 307(c)(1) of CZMA. Because Interior had not conducted the consistency determination required under Section 307(c)(1), the district court blocked activities connected with the lease sale and cancelled the leases.

The Ninth Circuit largely agreed with the district court. It confirmed that Interior had complied with NEPA and OCSLA. It likewise held that an OCS lease sale is governed by Section 307(c)(1). It concluded that by referring to

"activities directly affecting the coastal zone," Congress really meant activities that "[establish] the first link in a chain of events which could lead to" subsequent activities that might impact the coastal zone. It speculated, however, that the consistency determination required under CZMA at the lease sale stage was not so imposing as (1) CZMA quite clearly requires, (2) California argued, (3) the CZMA regulations do require, and (4) we fear. Even at this point, the panel admitted it could not "properly delineate" what that determination would require. Last, the Ninth Circuit countermanded the lower court order cancelling the leases, but agreed that activities should remain enjoined until the CZMA procedures were followed.

REASONS FOR SEEKING REVIEW

There are four independent reasons why review of the Ninth Circuit's decision is critical:

- (1) the Ninth Circuit decision to read the phrase "directly affecting" out of CZMA is yet another in a disturbing line of lower court decisions that, under the guise of "expansive interpretation," in fact attempt to redraft environmental legislation to impose more stringent requirements on federal action than those contemplated by Congress;
- (2) the Ninth Circuit's scheme for consistency review--to be conducted at the lease sale stage to further the policy of early state involvement in decisions concerning the coastal zone--was explicitly rejected by Congress when it amended OCSLA in 1978;
- (3) the Ninth Circuit's suggestion that CZMA's consistency requirements cannot be "properly delineated" will guarantee prolonged CZMA litigation for every OCS lease sale, which will cost the federal treasury enormous sums of money and will seriously delay critical OCS development;
- (4) the Ninth Circuit's decision threatens confrontation and litigation under the CZMA over any federal action that could conceivably concern a coastal state, and in particular would grant states veto power over vital federal projects, including national security and military projects, that could foreseeably impact the coastal zone.

Each of these four reasons, moreover, aligns with a conservative policy goal of this Administration:

- (1) the Attorney General has as a matter of conservative policy called for judicial restraint in his most important public addresses, the Chief Justice has agreed with the Attorney General on this point in his own public speeches, and the Burger Court has been quick to correct "judicial legislation" as a matter of conservative jurisprudence;
- (2) it is a central conservative tenet espoused by this Administration and the conservative members of the Court to leave policy decisions to elective, representative, legislative consideration;
- (3) rapid development of the Outer Continental Shelf to help reduce our dependence on foreign oil has been a keystone of this administration's energy policy; and
- (4) whatever this administration's desire to increase federalism may be, one clear overriding policy is that vital federal decisions like national security and military decisions are matters for resolution at the national level by the President.

More than that, each of these reasons are backed by considerations of "good government" in conservative terms:

- (1) Chief Justice Burger himself has expressed fears that ever-expanding litigation--and especially environmental litigation--is already overburdening our federal judicial system and frustrating effective judicial decision-making;
- (2) Congress must be encouraged to use plain language in statutes, to mean what it says, and not to leave critical policy decisions for a federal judiciary populated largely by Carter appointees;
- (3) federalism notwithstanding, the federal government must be free, at least, to manage its own property largely as it sees fit.

- (4) federalism notwithstanding, vital national issues like national security and military decisions must be resolved by the federal government.

In these circumstances, any one of these four reasons alone would warrant this administration's seeking review of California v. Watt. Considered together, these four reasons amount to an absolutely compelling case for seeking review.

SUGGESTED REASONS FOR NOT SEEKING REVIEW

It has been suggested that we not seek review because:

- (1) we should not risk losing the Ninth Circuit's favorable discussion of CZMA's consistency requirements; and
- (2) the Ninth Circuit's decision merely encourages state/federal cooperation and is therefore consistent with the move toward increased federalism.

Even taken at face value, these concerns do not come anywhere near carrying the weight of the compelling reasons for seeking review listed above. Moreover, when examined closely, these supposed "reasons" appear insubstantial.

The Ninth Circuit's discussion of the consistency requirements for OCS lease sales will be no help to us except in this case. The Ninth Circuit admitted it was not deciding a live issue; to address the issue, the panel had to "[assume] arguendo" that the lower court had required a more stringent consistency review. 683 F.2d at 1264 (emphasis in original). The Ninth Circuit formulation is entirely inconsistent with Commerce Department regulations on the subject, which in later cases will no doubt be entitled to deference when the issue is addressed directly. The panel's analysis also suffers from the same error committed in the discussion of "directly affecting"; the analysis in effect redrafts CZMA to suit the Ninth Circuit's own purposes. And the Ninth Circuit has given Commerce a role it has no desire to undertake: acting as an appeal tribunal for consistency determinations. For these reasons, it is highly unlikely that there is anything at all favorable in this decision to be saved by avoiding review.

Even if there were something more favorable than this analysis shows, it is not clear how seeking review on the "directly affecting" issue will put the consistency resolution at risk. Even if California were to cross-petition

for review of the consistency ruling, the Court would not be likely to grant review. All except the first of the four reasons for granting review on "directly affecting" would counsel heavily against review of the consistency ruling. In addition, the consistency language is too open-ended and speculative to justify review. It also would not be necessary for the Court to discuss the details of the consistency review process in resolving the "directly affecting" point. If California raises the issue in opposition, we need not admit California is correct; we can say that if they are indeed correct, that is even more reason why the Ninth Circuit's "directly affecting" analysis was wrong. Quite simply, whether or not the consistency ruling is worth saving, seeking review just does not put that ruling at risk.

It is not clear that this administration considers federalism an especially worthy goal in matters of environmental decisionmaking. Even if it did, it would be clear that federalism in the context of CZMA is one-sided and will work to thwart the substantive goals of this administration, but would not contribute to state involvement in the resource management decisions of other administrations. CZMA requires consistency with a state's environmental decisions. If a state is more pro-environment while the administration is more pro-development, CZMA will come into play and give the state a role. If the state is pro-development and the federal administration pro-environment, however, CZMA does not force federal action to be consistent with the state's pro-development policy. CZMA, therefore, creates federalism only during this administration and will give states a role only in delaying and blocking this administration's resource development policies. To support the Ninth Circuit's ruling would therefore be to support a notion of federalism run amok, to support a use of CZMA that ensures confrontation with this administration rather than future state/federal cooperation.

On close inspection, the supposed reasons for not seeking review fade quickly. The Ninth Circuit's consistency ruling is at best a Pyrrhic victory. The panel's decision on the "directly affecting" issue as a practical matter permits states to override crucial federal decisions and policies through litigation and does not contribute to an even-handed notion of federalism.

CONCLUSION

In my judgment, California v. Watt is the most critical environmental decision in the federal courts since Calvert Cliffs subjected the federal government to a decade of NEPA litigation. I have not seen any more important adverse ruling in this Division, nor could I imagine one.

C.E. Dinkins
P.R. Steenland, Jr.
A.S. Almy
90-4-146

Washington, D.C. 20530

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: State of California v. James G. Watt, 9th Cir.
Nos. 81-5699, 5700, 5701, 5811, 5812, 5813,
5814, 5815, 5720, 5822

RECOMMENDING CERTIORARI. (The Department of
the Interior and the General Litigation Section
recommend certiorari.)

Time: The opinion (and hence judgment) was issued on
August 12, 1982. The State of California filed
a petition for rehearing on August 26, 1982

Judges: Sneed, Tang, Pregerson

ISSUE PRESENTED

Whether Section 307(c)(1) of the Coastal Zone Management
Act requires the Secretary of the Interior to precede every OCS
lease sale with a detailed examination of all potential effects of
leasing, exploration, production and development upon
a state's coastal zone on the ground that those subsequent activi-
ties are direct effects of the decision to conduct a lease sale.

STATUTE INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act, 16
U.S.C. 1456(c)(1):

Each federal agency conducting or supporting
activities directly affecting the coastal zone
shall conduct or support those activities in
a manner which is, to the maximum extent prac-
ticable, consistent with approved state manage-
ment programs.

STATEMENT

On April 29, 1981, the State of California, local governments and environmental organizations sued to enjoin portions of OCS Lease Sale 53 involving an area of the outer continental shelf off the central California coast known as the Santa Maria Basin. On May 27, 1981, the district court found that the plaintiffs were likely to prevail on the merits of their claim that the Secretary had erred as a matter of law in concluding that there were no direct effects upon California's coastal zone that were attributable to Lease Sale 53. Accordingly, the district court held that Secretary Watt had violated the Coastal Zone Management Act by failing to prepare a consistency determination as provided for in Department of Commerce regulations, 15 C.F.R. Part 930, which implement Section 307(c)(1) of the CZMA, 16 U.S.C. 1456(1). On August 18, 1981, the district court issued a final judgment holding that the Secretary had violated the CZMA.

The major issue between the parties was the proper definition of the term "directly affecting the coastal zone" as used in Section 307(c)(1) of the CZMA. Under the statute and implementing regulations, a consistency determination has to be prepared only if a federal activity has direct effects on the coastal zone. The federal government's position was that the direct effects of an OCS lease sale are those which have an identifiable effect on the coastal zone and are part of, or immediately authorized by, a lease sale. Direct effects of lease sales, in our view, do not include the potential effects of activities at the exploration, development and production stages of the OCS process. Activities at these stages are subject to subsequent approval by the Secretary of the Interior as well as a separate consistency certification process which must be satisfied before exploration, or development and production plans may be approved. Federal approval of the plans, moreover, is explicitly subject to judicial review in the appropriate court of appeals.

The plaintiffs contended that the direct effects of a lease sale were all the potential effects of oil and gas exploration, development and production activities which might eventually take place on the leased tracts. The district court adopted the plaintiffs' expansive view, and found that the OCS lease sale was an activity directly affecting the coastal zone because "leasing sets in motion the entire chain of events which culminates in oil and gas development" (D. Ct. slip op. at 16). According to the district court, the direct effects attributable to Lease Sale 53 included not only the state's specific claim that leasing would ultimately result in an oil spill endangering the habitat of the southern sea otter, but also encompassed all of the potential

adverse events listed in the Environmental Impact Statement (EIS) and Secretarial Issue Document (SID) prepared for that lease sale (D. Ct. slip op. 39-41).

On appeal, the Ninth Circuit adopted the district court's reasoning and holding, and affirmed on August 12, 1982. It ruled that an OCS lease sale directly affects the coastal zone because it establishes "the basic scope and charter for subsequent development and production" (Cir. Ct. slip op. at 13). It found the lease sale to be a significant link in the chain of events leading to development and production of oil and gas "because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale * * *." (Id.) The court of appeals adopted the district court's list of direct effects developed from the EIS and SID (id.).

Having adopted the State's legal position on the threshold test for when a consistency determination must be prepared, the court attempted, in dicta, to temper its holding by providing a limitation on what would result once such a determination was prepared (Cir. Ct. slip op. 21-25). Interpreting the remainder of Section 307(c)(1), the court declared that, for those activities directly affecting the coastal zone, requiring such activities be consistent to the maximum extent practicable with the State's coastal management program did not mean that the "federal activity must be [as] consistent with the plan as is possible" (Cir. Ct. slip op. 21, emphasis original). Indeed, in making a consistency determination "the lease sale need not be configured so as to preclude any possible future inconsistency from arising as development proceeds." Id. at 24. The court stated that the Secretary simply "must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in light of the then available knowledge." Id. Finally, the court indicated that disputes over consistency should be resolved by the Secretary of Commerce who, in the court's view, has the power "to reconcile the paramountcy of the national interest with the concerns of the state." Id. at 25.

On August 26, 1982, the State filed a petition for rehearing and rehearing en banc. In that petition the State argued with substantial justification, that the court's treatment of the term "maximum extent practicable" was inconsistent with the Commerce Department regulation defining the term, 15 C.F.R. 930.32, as well as the legislative history of Section 307(c)(1). It also argued that the Secretary of Commerce had no power to resolve consistency disputes on the basis of paramount national interest, and that Congress had rejected such an override authority in enacting the CZMA. Accordingly, the petition for rehearing requested that the court of appeal delete from the opinion all the dicta concerning

the meaning and content of a consistency determination, and confine its opinion to the threshold question litigated by the parties of when such a determination is required.

SUMMARY OF DISCUSSION

The proper definition of "directly affecting the coastal zone" in the CZMA is an important question not only for the high priority federal OCS oil and gas program but for all activities of the federal government. The Ninth Circuit decision expansively defining the term thus threatens to disrupt not only this country's efforts to obtain energy self-sufficiency but a wide variety of federal programs and projects. Due to commitments to members of Congress by the Department of Commerce to promulgate interpretative regulations when this case is over, the present opportunity is the only one in which an independent Supreme Court review of the disputed term will be possible.

The substantive limits of the CZMA's consistency requirements offer the states an unparalleled opportunity to thwart federal action with which they disagree. This is particularly true at the early stages of the OCS oil and gas program because the effects of future OCS activities cannot be predicted with any accuracy. In the 1978 Amendments to the OCSLA, Congress dealt with this uncertainty by creating a step-by-step decisionmaking process for the OCS. To complement this, Congress provided for CZMA consistency review of exploration, development and production activities when those stages are reached in the OCS process. The Ninth Circuit's compromise ruling creates a new consistency review procedure for these activities at the lease sale stage, in excess of that provided for by Congress. With no clear standards governing its implementation, the Ninth Circuit's suggested procedure will inevitably result in CZMA challenges to, and preliminary injunctions against, OCS lease sales for many years in the future.

DISCUSSION

Introduction. -- This case is the culmination of years of controversy concerning the proper application of the consistency requirements of the Coastal Zone Management Act, 16 U.S.C. 1451 et seq. (CZMA), to oil and gas lease sales held pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 et seq. (OCSLA). This dispute has been ongoing since 1974 when efforts began to amend both the CZMA and the OCSLA to accommodate the plan to accelerate OCS oil and gas development in response to the energy crisis and an Arab oil embargo. Since that time, the Interior Department has taken the position that the proper time at which oil and gas exploration and development activities on the OCS are to be reviewed for consistency

with an adjacent state's coastal management program is when plans setting out those activities are submitted for approval. Interior's opponents (some coastal states, and environmental groups) have claimed that consistency review should be performed for exploration, production and development activities earlier, at the lease sale stage of the OCS process. Interior's view prevailed in Congress in 1976, the contrary view prevailed briefly in Commerce Department regulations in 1978, but those regulations were withdrawn in 1979 after the Office of Legal Counsel (OLC) ruled them to be unauthorized by the CZMA. In this case, the Ninth Circuit has attempted a compromise to that dispute, ruling that consistency review of exploration, production and development activities must be performed at the lease sale stage, but that consistency for these activities need not be absolutely assured. In order to reach this result, however, the Court failed to address the statutory language of the CZMA, ignored existing Commerce Department regulations, and read into the statute an override provision that does not exist. Because the portions of the Ninth Circuit opinion which favor Interior are dicta and clearly contrary to existing legislative and regulatory provisions, we believe that the court of appeals' attempt to achieve a "reasonable compromise" in this dispute is fatally flawed and will not survive. Moreover, the court's resolution is certain to engender endless litigation in the years ahead.

1. Supreme Court review of this case is necessary and important; there never will be another opportunity to address the definition of the term "directly affecting the coastal zone" in the CZMA. -- Normally, given the favorable dicta in the Ninth Circuit opinion, we would be inclined to accept a partial victory and wait until the problems we foresee develop in future cases. This option, however, is not open to us in the circumstances presented here. First, many of the most promising OCS lease sales in the near future will take place adjacent to states located in the Ninth Circuit. We have no option but to follow the court of appeals decision and attempt consistency determinations for those sales. The only sale where consistency is liable to be raised and likely to be litigated outside the Ninth Circuit in the near future is the Georges Bank North Atlantic OCS Sale 52 now scheduled for late fall of 1982. An attempt to preserve our litigating position by failing to prepare a consistency determination on OCS Sale 52 will result, given the Ninth Circuit opinion, in an injunction against all or part of that sale in the district court. Put simply, if a consistency determination is prepared for an OCS sale off Alaska, it is wishful thinking to expect New England judges to require anything less for a lease sale in the middle of the Nation's largest fishing area. The last time a Georges Bank sale was enjoined by the district court, it took two years, and involved two proceedings before the district court, four appearances before the court of appeals, and several stay applications to the Supreme Court before the sale was allowed to occur. In good conscience, we cannot advise Interior to place an OCS lease sale in such jeopardy, simply to preserve our litigating position

in the hope that we will eventually and ultimately prevail in obtaining a split in the circuits. In other words, we either seek certiorari in this case, or forgo forever a vindication of the federal government's interpretation of the statute.

The second factor dictating against waiting for another case is that, absent a petition for certiorari, the Commerce Department will promulgate regulations incorporating the Ninth Circuit's opinion of the term "directly affecting the coastal zone." In 1981, Commerce had issued regulations adopting our position in this litigation. Those regulations were withdrawn after they encountered a hostile reception among some committee members in Congress. At that time, Commerce pledged to some Senators to start over and promulgate new regulations. The Department has been holding off, pending the outcome of this case but if no petition for a writ of certiorari is filed, Commerce will have to go ahead. The Department would have little choice but to promulgate regulations defining "directly affecting the coastal zone" consistent with the Ninth Circuit's opinion in this case. ^{1/} The regulations would undoubtedly be applauded by California's allies on the Hill. As a result, even if we attempt to preserve our litigating position in another case, we would be faced with the insurmountable barrier of a court opinion, agency regulations, and congressional statements all against our interpretation of the Act.

The Commerce regulations, of course, would apply not only to OCS lease sales but also to a wide variety of other important federal activities. The expansive definition that the Ninth Circuit adopted of the term "directly affecting the coastal zone" potentially subjects federal activities with no substantial relationship to the coastal zone to consistency limitations. See. p. 23, fn. 7, infra. If the Commerce Department adopts the definition in the opinion, this case represents the last real opportunity to limit the application of the consistency requirements of the CZMA to federal activities that have some direct and immediate connection with resources of the coastal zone.

While Commerce does not presently have an interpretative regulation defining "directly affecting the coastal zone," it does

^{1/} If Commerce promulgated inconsistent regulations, California would simply sue and have them set aside. The State filed suit against the 1981 regulations in the central district of California, which was dismissed when Commerce withdrew the regulations.

have one defining "maximum extent practicable." The regulatory definition, however, does not conform to the statements in the Ninth Circuit. 15 C.F.R. 930.32 (see pages 22-23 *infra*). If, in light of the Court's opinion, Commerce were to alter this regulatory definition to conform to the Ninth Circuit's suggestion, the rulemaking would be vulnerable to legal challenge in other courts. The likelihood of an adverse result in such litigation is substantial because, as California correctly points out in its petition for rehearing, the Ninth Circuit's *dicta* is contrary to the legislative history of the CZMA. Thus, it is far preferable to seek a writ of certiorari in this case, where we have a solid case on the merits, rather than to hope for revised, favorable Commerce regulations whose merits will be highly dubious.

Finally, the Outer Continental Shelf oil and gas leasing program is an extraordinarily important national activity. It is the cornerstone of this Nation's effort to reduce our dependence on foreign sources of energy. Aside from potential resources within Alaska, the OCS contains the most promising remaining areas under the jurisdiction of this Nation in which large oil and gas resources may be discovered. Pursuant to Section 18 of the OCSLA, 43 U.S.C. 1344, a program for oil and gas leasing has been developed which calls for 40 lease sales in the next five years. The court of appeals decision places a large number of those sales in jeopardy of delays and injunctions on CZMA claims. Such a result is not tolerable for a program that was designed to "result in expedited exploration and development of the Outer Continental Shelf * * *." 43 U.S.C. 1802(1).

The OCS oil and gas program, moreover, is important not only to the goal of energy independence but also to the vital effort to reduce federal deficits. The program ranks second to the overall efforts of the Internal Revenue Service as a source of federal revenue. See H.R. Rep. No. 97-269, 97th Cong., 1st Sess. 19 (1981). The high bids in OCS Sale 53, at issue in this case, exceeded \$2 billion; the bids on the 19 tracts enjoined by the district court amounted to \$220 million. In all, the federal budget projections call for \$15 to \$20 billion annually from the oil and gas leasing program on the OCS. Interference with OCS leasing, through delays associated with preliminary injunctions because of uncertainties of fulfilling CZMA obligations, thus implicates the highest priority interests of this Nation. For all these reasons, pursuing a writ of certiorari in the present case is both necessary and important.

2. The Outer Continental Shelf leasing is a unique federal program where interests of the Nation and the states are in conflict; the states will persist in their attempts to impose their will through the substantive limitations of the CZMA. -- To fully understand the issue presented in this case, three important considerations must be

kept in mind. First, unlike most other litigation concerning environmental laws, states and their political subdivisions, rather than environmental organizations acting alone, are invariably plaintiffs in OCS lease sale cases. In the past five years, the States of Maine, Massachusetts, New York, New Jersey, North Carolina, Alaska and California, as well as some of their political subdivisions, have filed suit against lease sales. While often couched in terms of environmental statutes, these suits are, at bottom, about the states' desire to control federal activities on the OCS according to their own policies. Short of federal capitulation to state demands, no compromise, mediation or administrative procedure will avoid litigation. An OCS lease sale represents a stark conflict between local and national interests and the states. The latter, so far, have not seen fit to abandon their local concerns to the dictates of national policy. Thus, the laws guiding the OCS leasing program cannot be interpreted to "accommodate" all the many and varied interests of the coastal states. Secretaries of the Interior have two choices: either secure a favorable statutory interpretation of the measures affecting OCS leasing so that there is at least a fair chance to avoid preliminary injunctions against lease sales, or abdicate their duty to control federal leasing by offering only those tracts acceptable to the various state bureaucracies. 2/

The second consideration is that the Outer Continental Shelf Oil and Gas program is an highly unusual, if not unique, federal activity. The overriding reality of this program is that the government, industry and the states cannot determine what actual oil and gas production activities (platforms, pipelines, tankers etc.) will take place on the OCS until long after the process has been initiated through leasing. Unlike a dam, road or waterway project, the final contours of the completed activity cannot be predicted at the outset. For this reason, normal planning procedures, designed to avoid problems which may be encountered as the project progresses, are of limited value in the OCS program. Indeed, these

2/ Short of not leasing certain areas at all, it is hard to see how Interior could accommodate certain vital interests. In Massachusetts, for example, the Attorney General is a separately elected official, entitled to initiate litigation on behalf of the Commonwealth. In the last Georges Bank lease sale, Interior and the Governor reached an accommodation on leasing, but the Attorney General, for a variety of reasons, maintained that litigation regardless. Similarly, Interior could reach a reasonable determination on future leasing with the (next) Governor in California or the Governor in Alaska, only to still confront a suit for preliminary injunction by the State, filed at the behest of a state coastal commission or some other similar organization.

procedures may be counterproductive since decisions to eliminate possible risks may also eliminate potentially important hydrocarbon resources. The only way to determine whether the risks or resources will be encountered, or both, is to begin the process through an OCS lease sale and exploration.

In enacting the 1978 Amendments to the Outer Continental Shelf Lands Act, 92 Stat. 629, Congress recognized this reality and created a special decisionmaking structure for the OCS. Under a system of phased decisionmaking, the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed at later exploration, or development and production stages. Thus, unlike many other federal activities, an initial determination to go forward does not necessarily mean the project will ultimately be completed. As a result, in contemplating the OCS program, one must put aside many ideas on wise, forward-looking, problem-avoiding administrative practice, and learn to evaluate the issues in the step-by-step fashion prescribed by the statute.

Thirdly, it must be remembered that the provisions of Section 307(c)(1) are a substantive limitation on federal actions. Although the document called for by the Ninth Circuit -- the consistency determination -- may appear to be another relatively harmless paperwork requirement, that impression is incorrect and dangerously misleading. Unlike the National Environmental Policy Act and the environmental impact statement requirement contained therein, Section 307(c)(1) is not a procedural measure. Once it is determined that a federal activity "directly affects" a State's coastal zone, the federal agency is obligated to tailor its activities in a manner that, to the maximum extent practicable, will be consistent with the State's plan for that area. The consistency determination itself is a recitation of how compliance will be achieved, and to what extent compliance is possible. Like NEPA and EIS, it could be subject to attack for inadequacy, but unlike NEPA, the underlying federal action is also subject to judicial examination.

These three factors -- power, uncertainty and the substantive role of the CZMA -- color the actual dispute between the parties in this case: the definition of "directly affecting the coastal zone" in Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1456(c)(1). Because the ultimate effects of any OCS lease sale are inherently speculative, each side is free to characterize the outcome in a way it chooses and attempt to enforce its view in the courts. In our estimation, the only method to inject some certainty into this legal quagmire is to restrict consistency review of the OCS lease sales to activities and events that are part of, or immediately caused by, the sale. Only the effects of such limited activities can be estimated with a fair degree of

accuracy at the lease sale stage and tested against the dictates of a state's coastal zone management program.

3. The 1978 Amendments of the OCSLA were designed to prevent premature decisions on OCS activities based on inadequate or speculative information. -- Congress originally enacted the OCS Lands Act, 67 Stat. 462, in 1953 to authorize oil and gas leasing on the portion of the Outer Continental Shelf retained by the United States after granting the bed underlying the territorial sea (generally three miles) to the coastal states. 3/ During the ensuing 20 years, areas of the OCS, largely in the Gulf of Mexico, were leased under that Act. Then, in response to the Arab Oil Embargo, President Nixon announced a program of expedited oil and gas leasing in hitherto untouched "frontier" areas of the OCS. See H.R. Rep. No. 95-590, 95th Cong. 1st Sess. 75, 89 (1977). Fearing that the rather general terms of the original OCSLA were inadequate to control such a drastic program, Congress began in 1974 to overhaul the Act. The resulting 1978 Amendments to the OCSLA were the product of much compromise and attempts to reconcile numerous, often conflicting interests: development of oil resources; protection of the environment; recovery of fair market value and distribution of the burdens of development among all regions of the Nation. See generally Watt v. Energy Action Educational Foundation, No. 80-1464 (December 1, 1981) slip op. at 12 & n.16.

From the very start of the amendatory process, however, Congress proposed to separate the federal decision to explore for oil and gas on the OCS from the decision to develop an area on the OCS for oil and gas production. See Joint Hearings Before the Committee on Interior and Insular Affairs and Commerce, United States Senate, 94th Cong., 1st Sess. 3 (1975); H.R. Rep. No. 94-284, 94th Cong., 1st Sess. 4 (1975). The reason underlying this fundamental concept was that the extent of hydrocarbon resources, and hence, the impacts of exploiting them, cannot be determined prior to exploration.

3/ The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 et seq., ceded to the states submerged lands "seaward to a line three geographic miles distant from the coastline of each" state together with "the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable state law * * *." Section 9 of the Submerged Lands Act, 43 U.S.C. 1302, as well as Section 3(1) of the OCS Lands Act, 43 U.S.C. 1332(1), however, declare that the subsoil and seabed seaward of the territorial sea appertain to the United States and are under its jurisdiction and control.

The final House Report explained the purpose of prescribing these separate, staged federal decisions:

Section 25 is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.

The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds oil and gas. The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known. In fact, the failure to have this procedure has led, in part, at least one court to invalidate an entire lease sale.

H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 164 (1977).

Thus, Congress dealt with the perceived problem of lack of information about resources, and environmental and socioeconomic effects of OCS oil and gas development by altering the structure of federal decisionmaking. In the future, not all decisions would be made at the outset of the lease sale stage, but would be made at later, specifically identified stages when the maximum amount of information would be available. In particular, the OCSLA Amendments of 1978 broke down the OCS leasing process into four discrete steps, and each of these steps is subject to its own array of substantive and procedural requirements.

Step One - The Five-Year Leasing Schedule. -- The first step is to prepare a five-year leasing program pursuant to Section 18, 43 U.S.C. 1344, to provide an overall framework and schedule for OCS lease sales based on a consideration of congressionally prescribed factors. The statute directs the Secretary to solicit comments from federal agencies and state governors in preparing the program, 43 U.S.C. 1344(c)(1); and requires a proposed program to be published in the Federal Register for a ninety-day comment period so that "any state, local government or other person may submit comments and recommendations as to any aspect of such proposed programs." 43 U.S.C. 1344(c)(3); 1344(d)(1). After a Section 18 program is approved, OCS leasing must proceed in conformity with its provisions. 43 U.S.C. 1344(d)(3).

The District of Columbia Circuit recently considered the leasing program stage of the OCS process in California v. Watt, 663 F.2d 1290 (D.C. Cir. 1981). It interpreted Section 18 to create "a process which will permit the Secretary of the Interior to weigh" the relevant benefits and risks in scheduling lease sales. Id. at 1297. The court refused to prescribe the result to be reached by the Secretary. "The Act does not mandate any particular balance but vests the Secretary with discretion to weigh the elements * * *." Id. at 1317. Interestingly, California argued that the Secretary could not schedule sales in some areas off its coasts because of alleged inconsistency with its coastal zone management program. Id. at 1310. The D.C. Circuit rejected that argument, stating that consistency problems were best addressed in "conjunction with specific proposed activities." Id. at 1310.

Step Two - The Lease Sale. -- Once a leasing program is approved, the next step is the OCS lease sale. 43 U.S.C. 1337(a) authorizes the Secretary to grant leases to the highest responsible qualified bidders at a lease sale. In preparation for a sale, the Department of the Interior takes a series of discrete actions: information gathering, call for both positive nominations and exclusions of tracts, identification of tracts for further review, proposed notice of lease sale, final notice of sale, and sale. See 43 C.F.R. 3310 et seq. An environmental impact statement is normally prepared, and consultation may be initiated under Section 7(a) of the Endangered Species Act, 16 U.S.C. 1536(a), if listed species may be affected.

Under Section 19 of the OCSLA, 43 U.S.C. 1345, the Governor of an affected state, together with appropriate local governments, are given a formal opportunity to submit recommendations regarding "the size, time and location" of a proposed lease sale. 43 U.S.C. 1345(a). The Secretary is directed to accept the Governor's recommendations only if he determines that they provide a reasonable balance between the national interest and the well-being of the citizens of the affected state. 43 U.S.C. 1345(c).

After a lease sale is held, and leases awarded, only extremely limited activity may be undertaken without further federal approval under the Act. In particular, a lessee may only conduct "preliminary activities" prior to submission and approval of an exploration plan. These are defined as:

[G]eophysical and other surveys necessary to develop a comprehensive exploration plan. Such preliminary activities are those which do not result in any physical penetration of the seabed of greater than 300 feet of unconsolidated formations, or 50 feet of consolidated formations, and which do not

result in any significant adverse impact on the natural resources of the OCS.

30 C.F.R. 230.34-1. The information necessary to guide the later exploration and development stages is gained through these preliminary activities.

The lease stage provides the lessees and the Secretary with a chance to amass data which will inform future proposals and decisions. For example, * * * testing as well as * * * sampling might be absolutely essential for the lessees' decision regarding the appropriate commitment of their resources in light of the area's development potential. Similarly, the data generated by testing activity will also permit the Secretary to exercise and form judgment in balancing the dual public interests of protecting the environment and enhancing oil-production capacity.

North Slope Borough v. Andrus, 642 F.2d 589, 594 (D.C. Cir. 1980). More extensive activity is subject to the lessees' compliance with the procedures and substantive requirements of the next stage: exploration.

Step Three - The Exploration Stage. -- Section 11 of the OCSLA, 43 U.S.C. 1340(c), requires lessees to submit exploration plans to the Secretary for approval "prior to commencing exploration * * *." The plan must be consistent with the provisions of the OCSLA, and regulations promulgated thereunder. 43 U.S.C. 1334. In addition, any person submitting a plan must attach a certification that the activity described in the plan affecting any land use or water use in the coastal zone of a state is consistent with the state's approved coastal zone management program. See, 43 U.S.C. 1340(c)(2), and 16 U.S.C. 1456(c)(3)(B). The Secretary is expressly prohibited from granting any license or permit for any activity described in an exploration plan until the state concurs with the certification of compliance, or a determination of consistency or necessity is made by the Secretary of Commerce. Id.

The Secretary of the Interior is authorized to require modifications to an exploration plan to achieve conformity with the provisions of the OCSLA and regulations promulgated pursuant to 43 U.S.C. 1334(a). The Secretary must disapprove a plan if the activity "would probably cause serious harm or damage" to life, property or to the marine, coastal or human environment. 43 U.S.C. 1340(c)(1). Any action of the Secretary to approve, require modification of, or disapprove, an exploration plan is subject to review in the United States Court of Appeals in which an affected state is located. 43

U.S.C. 1349(c)(2). After an exploration plan is approved, drilling permits and other necessary licenses may be issued to allow exploration activities.

Step Four - The Development and Production Stage. -- If commercially valuable hydrocarbon resources are discovered, the final stage of the OCS leasing process is development and production. Prior to development and production, the lessee must submit a development and production plan to the Secretary for approval. 43 U.S.C. 1351(a)(1). Under 43 U.S.C. 1345(a), the governor of any affected state may make recommendations concerning the size, timing or location of a development and production plan. These recommendations are to be accepted by the Secretary if he determines that they provide for a reasonable balance between the national interest and the well-being of the affected state. 43 U.S.C. 1345(c). In addition, the Coastal Zone Management Act requires a person who submits such a plan to attach a certification of compliance with the coastal zone management plan of any affected state. 16 U.S.C. 1436(c)(3)(B). As with exploration plans, approval of development and production plans depend upon further approval of the consistency certification. 43 U.S.C. 1351(h)(1)(B). The plan must also be in compliance with the Act and regulations. 43 U.S.C. at 1351(h)(1)(A). If the plan is disapproved either for failure to comply with regulations or failure to obtain approval of the consistency certification, the lessee is not entitled to compensation. 43 U.S.C. 1351(h)(2)(A).

In contrast, a lessee is entitled to compensation in other circumstances. Specifically, the statute directs the Secretary to disapprove a development and production plan if exceptional geological conditions, marine or coastal resource values, or other exceptional circumstances dictate disapproval despite compliance with the Act and regulations. 43 U.S.C. 1351(h)(1)(D). If these circumstances cannot be cured or mitigated in a five-year period, the lease will be cancelled and the lessee will be entitled to compensation. 43 U.S.C. 1351(h)(2)(C).

43 U.S.C. 1351(f) and (g) require the Interior Department to prepare an Environmental Impact Statement on the plan or to notify the governor of any affected state in advance that an EIS will not be prepared. In addition, consultation may be necessary pursuant to Section 7(a) of the Endangered Species Act, 16 U.S.C. 1536(a), at the development and production stage. Any action of the Secretary to approve, require modification of, or disapprove a development or production plan is subject to judicial review in the appropriate court of appeals. 43 U.S.C. 1349(c)(2).

Thus, the OCSLA, as amended in 1978, creates a system of phased, sequential decisionmaking; the determinations at each stage were structured in order not to commit the federal government to approve the lessee's plans at the next stage. Indeed, Congress added a number of technical provisions to enhance the Secretary's

ability to make meaningful decisions at the post-lease sale stages. There are provisions, for example, making regulations promulgated after a lease sale applicable to existing leases, 43 U.S.C. 1334; specifically authorizing denial of development and production plans if sensitive environmental resources are endangered, 43 U.S.C. 1351; and for extension of lease terms if adverse conditions can be mitigated over time. Id.

This phased decisionmaking structure is crucial to the implementation of the OCS oil and gas program. As the D.C. Circuit noted, "[m]andatory stage-by-stage review prevents the telescoping of any and every projected hazard to * * * the environment into one overwhelming statutory obstacle. The OCSLA standards are not less strict, they simply rely more on achieving compliance than on exacting proscription." North Slope Borough v. Andrus, supra, 642 F.2d at 609. The special OCS decisionmaking structure permits decisions to be made at the time when the maximum amount of information is available to support them. Premature decisions to limit activities, based on inadequate or speculative data, will necessarily be erroneous and, as a result, sacrifice the Nation's interest in locating, identifying and developing potentially valuable oil and gas resources without conferring any benefit to competing interests.

When other statutes apply to activities on the OCS, the task is to integrate the other statutory requirements into the special decisional structure of the OCSLA, without sacrificing either the purpose of those other statutes or the OCS process. Recognizing this, other courts of appeals, in connection with the Endangered Species Act and NEPA, have sought to mold those statutory obligations to the OCS process. County of Suffolk v. Secretary of the Interior, 562 F.2d 1358 (2d Cir. 1977), cert. denied, 434 U.S. 1068 (1978) (NEPA); North Slope Borough v. Andrus, supra, 642 F.2d 589 (Endangered Species Act); Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979) (ESA). In the present case, involving the Coastal Zone Management Act, this task is easy because Congress specifically addressed the problem of integrating the consistency requirements of the CZMA into the OCS process. As we show below, Congress' answer was not that of the Ninth Circuit.

4. Congress has specifically provided for consistency review of exploration, development and production activities on the OCS when plans are submitted and rejected review of these activities at the leasing stage. -- The Coastal Zone Management Act, 16 U.S.C. 1451 et seq. was enacted in 1972 to induce states to plan for both preservation and development of resources in the coastal zone. In the CZMA, the coastal zone was defined to extend only to the limit of the territorial sea, 16 U.S.C. 1453(1). Hence, activities on the OCS, by definition, take place outside the coastal zone. As a result, in 1972, the needs and consequences of OCS oil and gas activity were not specifically addressed in the CZMA. Instead, the Act authorized funding to states to develop coastal zone management

programs. 16 U.S.C. 1454. Once these programs had been developed and approved by the Secretary of Commerce, funding was provided to administer them. 16 U.S.C. 1455. Approval of a state coastal zone management program also triggered the Act's consistency requirements for various types of federal actions. As discussed below, the original CZMA prescribed a consistency certification procedure for issuance of federal licenses or permits which authorize activities which affect a land or water use in the coastal zone. See Section 307(c)(3) of the CZMA. For federal activities generally, however, the CZMA merely provides that the substantive result of consistency with the plan be achieved to "the maximum extent practicable" for activities "directly affecting the coastal zone."

The term "activities directly affecting the coastal zone" was created in conference in 1972 apparently as a compromise between House and Senate versions of the bill. The CZMA bill passed by the Senate defined the "coastal zone" as excluding federal property. See S. Rep. No. 92-753, 92d Cong., 2d Sess. 8-9, 45 (1972). The House bill, however, included federal property within the definition of "coastal zone." See H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 2 (1972). Both bills, moreover, provided for consistency only for federal activities "in" the coastal zone. At conference, the conferees decided to exclude federal property from the coastal zone, but to apply a limited consistency requirement to "use of such lands. H.R. Rep. No. 92-1544, 92d Cong., 2d Sess. (1972). The focus of congressional attention in this dispute was onshore federal property -- such as parks and military installations -- located in coastal areas. See H.R. Rep. No. 92-1544, supra at 14. The House version would have subjected all uses of such federal lands in the coastal zone to consistency requirements; the Senate version would have exempted all such uses from consistency by defining the coastal zone to exclude federal lands. The Conference compromised by subjecting some but not all activities on federal lands to consistency with a State's coastal zone management program: those "directly affecting the coastal zone."

While this history does not go far to illuminate the meaning of the term "directly affecting" in the OCSLA context, it does establish that Congress selected the term to limit the consistency obligations of federal agencies carrying on actions in areas like the OCS, over which the federal government has plenary jurisdiction and control. The Ninth Circuit's contrary conclusion (slip op. at 13) that the term was selected to expand the federal government's consistency obligations is totally unsupported by the legislative history.

As noted above, Section 307(c)(1) of the CZMA does not prescribe any procedural duties for federal agencies; it just requires a certain substantive result to be achieved. The consistency determination was created by the Commerce Department to implement that statutory directive. In its purest form, it is simply a

statement by the federal agency that a proposed action has been compared with the state's program and that the direct effects of the action on the coastal zone will be consistent with the program to the maximum extent practicable. The consistency determination does not reveal new information about the impacts of the proposed action. ^{4/} Instead, it is a statement of compliance with the substantive limit imposed on federal activities by Section 307(c)(1). If the state disagrees with the conclusion of the consistency determination, the regulations provide that it may ask the Secretary of Commerce to mediate the disagreement or it may seek to enforce its views in court against the federal agency. Neither the statute nor the regulations authorizes the Secretary of Commerce to override a state's disagreement for reasons of the paramount interests of the Nation or for consistency with the objectives of the CZMA. ^{5/}

Such override authority does rest with the Secretary under statutory consistency obligations created for federal licensees and permittees in Section 307(c)(3) of the Act. Under that section, an applicant for a license or permit must submit to the State a certification that its activities which affect a land or water use in the coastal zone will be consistent with the state plan. If the state objects to the certification, the license or permit may not be issued unless the Secretary of Commerce determines "that the activity is consistent with the objectives [of the CZMA] or is otherwise necessary in the interests of national security." Section 307(c)(3), 16 U.S.C. 1456(c)(3).

In 1974, parallel to the efforts to amend the OCSLA to respond to the energy crisis, Congress initiated efforts to amend the CZMA to accommodate energy related activities including expedited OCS oil and gas leasing. At the outset of this amendatory process, there was disagreement over whether the term "license or permit" in Section 307(c)(3) covered leases under the OCSLA. S. Rep. No. 94-277, 94th Cong., 1st Sess. 19 (1975).

To clarify this matter, the bills reported out of committees in both the House and Senate proposed inserting the term "lease

^{4/} The regulations require that the consistency determination must itself describe the effects of the proposed action but state that an Environmental Impact Statement (EIS) may satisfy that requirement, 15 C.F.R. 930.34.

^{5/} In fact, a paramount interest override to be exercised by the President was proposed in a version of 307(c)(1), but was deleted in favor of the term "maximum extent practicable."

into Section 307(c)(3), 16 U.S.C. 1456(c)(3). Addition of the term "lease" to Section 307(c)(3) would mean:

[I]n practical terms, * * * that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies.

S. Rep. No. 94-277, 94th Cong., 1st Sess. 19-20 (1975). See also H.R. Rep. No. 94-878, 94th Cong., 1st Sess. 52-53 (1976). The Administration, however, opposed this proposed amendment for the same reason that motivated Congress into amending the OCSLA: lack of information at the lease sale stage. An official of the Department of the Interior testified:

Our concern is that people may construe this as a requirement that the lease applicant prove Federal consistency before he is physically able to do it. If he does not know what he is going to find out there and he has no way of quantifying what he intends to bring ashore, there may be, if this requirement is placed in amendment to the Coastal Zone Management Act, a legal bar to us issuing a lease. It is like a chicken-and-egg situation, from our point of view.

Hearings on Coastal Zone Management Before the Subcommittee on Oceanography of House Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 204 (1975).

As a result, although the amendment as proposed passed the Senate, the House deleted the amendment to 307(c)(3). 122 Cong. Rec. 6128 (1976). The expressed purpose for this floor action was to permit the Conference Committee to study the impact of the amendment. Id. At Conference, the Committee did not restore the deleted amendment; instead it created a new provision as a subsection of 307(c)(3) that would subject exploration plans and development and production plans to consistency certification requirements. Section 307(c)(3)(B), 16 U.S.C. 1456(c)(3)(B). The Conference Report explained:

The conference substitute * * * 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. This provision will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans.

S. Conf. Rep. No. 94-987, 94th Cong., 2d Sess. 30 (1976); H.R. Rep. No. 94-1298, 94th Cong., 2d Sess. 30 (1976). The Conference substitute was enacted by Congress and this special consistency provision for oil and gas leases on the OCS, 16 U.S.C. 1456(c)(3)(B), was subsequently expressly integrated into the 1978 Amendments to the OCSLA, 43 U.S.C. 1340(c)(2), 1351(d).

In our view, the 1976 Amendment to the consistency provisions of the CZMA represents a congressional rejection of the idea that consistency review of activities associated with exploration, development and production of oil and gas on the OCS should take place at the lease sale stage. Like most who first encounter the issue, the congressional committees in 1976 initially thought that consistency review at the leasing stage for such activities was appropriate. And the initial committee reports in 1976, one of which is quoted by the Ninth Circuit (slip op. at 15), reflect that first judgment. But, when acquainted with the practical consequences of such a requirement and the impossibility of satisfying it in a meaningful manner, Congress ultimately rejected that approach. Instead, it substituted special consistency requirements specifically design to mesh with the structure of the forthcoming amendments to the OCSLA. It required consistency review of exploration activities when exploration plans are submitted for approval, and review of development and production activities when those plans are submitted. This structure of consistency obligations leaves only OCS activities which occur before an exploration plan is submitted to be reviewed at the lease sale stage: those activities that are part of, or immediately authorized by, the lease sale.

The consistency provisions of Section 307 have not been amended since 1976. However, in 1978, the Department of Commerce turned its attention to promulgation of regulations to implement the consistency requirements of Section 307 of the CZMA, and, in particular, to define the terms of Section 307(c)(1). The definition of the term, "directly affecting the coastal zone" in those regulations equated direct effects with those that were significant, including primary, secondary and cumulative effects. 43 Fed. Reg. 10512, 10518-10519. After the Department of the Interior protested on the ground that such an application of Section 307(c)(1) would require a consistency determination on all potential effects for every final notice of sale, the matter was referred to the Office of Legal Counsel for resolution. There, that Office rejected

both Interior's then-held view that Section 307(c)(1) was never applicable to pre-lease activities and Commerce's regulations that would have required a consistency determination for every lease sale. OLC concluded that Commerce's definition was unduly expansive, obliterating the distinction drawn by Congress between the "directly affecting" threshold of Section 307(c)(1) for federal activities and the "affecting" criteria of Section 307(c)(3) for lessees and permittees. It also ruled that OCS pre-lease and lease sale activities were potentially subject to Section 307(c)(1) if, in fact, they "directly affect the coastal zone." The Opinion stated that whether such activities did so affect the coastal zone was a question of fact which should be resolved on a case-by-case basis. The Department of Commerce thereupon withdrew the 1978 definition of "directly affecting." See 44 Fed. Reg. 37142 (1979).

As a result of this Opinion and an inconclusive mediation effort before the Department of Commerce involving California's request for a consistency determination for Lease Sale 48, that Department pledged to promulgate new regulations authoritatively defining "directly affecting the coastal zone." These regulations were proposed on May 14, 1981, 46 Fed. Reg. 26658, and issued in final form on July 8, 1981. 46 Fed. Reg. 35253. The regulations encountered a hostile reception among some of the members of Congress, and efforts began to adopt a legislative veto.

The House Committee on Merchant Marine and Fisheries, on a sharply divided (18-15) vote, approved a resolution of disapproval. See H.R. Rep. No. 97-269, 97th Cong., 1st Sess. (1981). Before any further action was taken, the Administration, unwilling to encounter a major legislative battle and, possibly, another legislative veto lawsuit, again withdrew the regulatory definition. 47 Fed. Reg. 20110 (1982). Renewed efforts to promulgate a new interpretive regulation defining the disputed term have been awaiting the outcome of this lawsuit.

In 1980, after the dispute had arisen concerning the definition of the term "directly affecting the coastal zone" in the OCS context, but before the promulgation of the 1981 Commerce regulations, Congress again addressed the Coastal Zone Management Act. The principal purpose for the 1980 CZMA Amendments was "to provide for five full years of authorization for Section 306, a section which provides funds to coastal states to implement approved coastal zone management programs." S. Rep. No. 96-783, 96th Cong., 2d Sess. 1 (1980). Significantly, the 1980 Amendments did not address -- through reenactment or amendment -- any of the consistency provisions of the CZMA contained in Section 307(c), 16 U.S.C. 1456(c). The House and Senate Reports, however, did contain language concerning the ongoing dispute regarding the definition of the term "directly affecting the coastal zone" in Section 307(c)(1). Both

the Senate and House Committee Reports acknowledged that the disputed term would be clarified by the then-forthcoming Department of Commerce regulations. H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. at 34 (1980); S. Rep. No. 96-783, supra, at 11 (1980). The House Report, however, did suggest that the term meant "whenever a Federal activity has a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies," or "when a Federal agency initiates a series of events of coastal management consequence." H.R. Rep. No. 96-1012, supra at 34. These attempts at a definition, however, were effectively repudiated on the floor of the House prior to the passage of the 1980 CZMA Amendments. When queried on the floor, Representative Studds, Chairman of the Oceanography Subcommittee, confirmed that the Report language was not intended to "further modify the term directly affecting" but was intended to leave the definition as "essentially one of fact as the Justice Department has previously concluded." 126 Cong. Rec. H 10111-10112 (September 30, 1980, daily ed.).

In our view, the attempts since 1978 to impose consistency review of exploration, development and production activities at the lease sale stage through an expansive definition of "directly affecting the coastal zone" are designed to obtain indirectly what the Congress refused to enact directly in 1976. Undoubtedly, the states, environmental groups, and even some members of Congress, were unhappy with the decision to forego consistency certification for those activities at the leasing stage. See, e.g., Remarks of Senator Tunney (June 29, 1976), reprinted in A Legislative History of the Coastal Zone Management Act, 94th Cong., 2d Sess. at 1046 (1976). Nevertheless, Congress did reject their position in 1976, and so, wisely, because a meaningful consistency review of exploration, development and production activities cannot be performed at the lease sale stage. The Ninth Circuit, therefore, was required to perform major surgery on the concept of a consistency determination in order to impose a requirement of consistency review in this case. What the court developed is a new administrative burden on the OCS leasing program which can serve no purpose other than to postpone, delay and thwart OCS lease sales.

5. The Ninth Circuit's compromise rests on erroneous legal rulings and does not serve the purpose of a consistency determination. -- The Ninth Circuit's compromise, requiring a consistency determination but not requiring it to assure consistency, appears reasonable on its face. However, the solution ignores the existing statutory and regulatory framework for consistency under the CZMA in the name of policy concerns that do not exist. Put bluntly, the Ninth Circuit appears to believe that it can design an improved consistency procedure for OCS lease sales

that neither Congress nor the Commerce Department saw fit to establish. In doing so, the court of appeals made a number of legal rulings that are erroneous and threaten a large number of federal programs.

First and foremost, the issue in this case was the proper definition of the term "directly affecting the coastal zone" within the meaning of Section 307(c)(1) of the CZMA. The Ninth Circuit held that an OCS lease directly affects the coastal zone because it establishes "the basic scope and charter for subsequent development and production" which "influence" activities which may affect the coastal zone (Cir. Ct. Op. at 13). It held that the "direct" effects of a lease sale are those listed in the district court's opinion: disclosures of effects, direct and indirect, as listed in the EIS. See 40 C.F.R. 1502.16. 6/ The Ninth Circuit's ruling thus gives no content to the statutory modifier "directly" in Section 307(c)(1). As the term "directly affecting" was developed to limit the consistency obligations of federal agencies, this result is unacceptable. In fact, the Ninth Circuit approach resurrects the old Commerce definition of equating direct effects with significant effects, an approach that encompasses primary, secondary and cumulative impacts. As noted earlier, this approach was proposed in 1973 and rejected, as unauthorized, by OLC.

Such an expansive interpretation of the term "directly affecting the coastal zone" has significant adverse results for a wide range of federal programs. Hardly a federal project, program or regulatory scheme exists that does not, through a chain of events,

6/ The CEQ regulations implementing NEPA, 40 C.F.R. 1500 et seq., require an EIS to discuss both "direct" and "indirect" effects of a federal action. 40 C.F.R. 1502.16 (1980). The regulations define the term "effects" to include:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. * * *

40 C.F.R. 1508.8

influence activities that may have an effect on the coastal zone. 7/ Therefore, the federal government must insist that the term "directly" be given some content in any interpretation of Section 307(c)(1). The definition proposed by the government in this litigation, that direct effects are those which are part of, or immediately authorized by a lease sale and which have an identifiable effect on the coastal zone, is well supported by appropriate authorities. It conforms to the plain meaning of the term "direct," see Webster's New International Dictionary, 3d Ed., Unabridged (1971), the definition established by the CEQ for NEPA purposes, see p. 21, n.6 supra, and court rulings in other contexts, see Carter v. Carter Coal Co., 298 U.S. 238, 307-308 (1936). In the absence of any other definition proposed by the parties that gives some meaning to the term "directly," our view should have been adopted by the court.

The second legal ruling likely to present problems for the federal government is the Ninth Circuit's treatment of the term

7/ For example, consider the following circumstances under which opponents of various federal actions could interpose a demand for a consistency determination, and maintain at least an arguable claim that the Act's substantive provisions be applied. They include: Coal-leasing permits by the Department of the Interior, where the coal may possibly be transported by coal slurry pipeline to a Gulf Coast port (discharge of coal wastewater directly affects a coastal zone); decision by the Department of Defense to abandon the M-X missile concept in favor of a submarine-based nuclear deterrent (expansion of Trident submarine bases at Bremerton, Washington and in other coastal zones); federal approval of rate changes for bulk commodities affording one mode of transportation a competitive edge over another (favorable barge rates will shift traffic from railroads causing growth in coastal maritime facilities); adoption by the Department of Commerce of import quotas or other restrictions on foreign steel (increased United States production will require more iron ore mining, taconite deposits and pollution in Great Lakes area, which is within the "coastal zone"); resolution by the Department of State of the North Atlantic boundary dispute with Canada (relinquishment of United States' claims to a portion of the disputed seabed would allow Canadian authorities to institute all manner of activities in that area, including OCS leasing, with potential effects on Maine's coastal zone); FAA approval of planning grants for airport improvement or extension projects (potential ultimate construction in, or effects upon, coastal zone arising from changes in airport operations in places such as Boston, J.F. Kennedy and La Guardia, Philadelphia, Norfolk, Charleston, Pensacola, Mobile, San Diego, Los Angeles, San Francisco and Honolulu); promulgation by the Environmental Protection Agency of regulations governing acid-rain problem allegedly caused by midwest utilities (impacts on air and water quality 600 miles away, in the acid-rain fallout areas including coastal zones).

"maximum extent practicable" (Cir. Ct. at 21). The court stated "The statute does not provide that a state's plan take precedence when it would preclude a federal activity, or even that the federal activity must be as consistent with the plan as is possible." Id. The Commerce Department's interpretation of the term, however, contradicts this statement. 15 C.F.R. 930.32 has two subsections. The first subsection, part (a), states that a federal activity must be consistent unless consistency is barred by Federal law. This definition is similar to the judicial interpretation of "fullest extent possible" in NEPA. See Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1115 (1971), and is duplicative of Section 307(e)(2) which provides:

- (e) Nothing in this section shall be construed - * * *.
- (2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies * * *.

Under this subsection, a federal action must be fully consistent with a state plan unless a federal statutory mandate directs that inconsistent action be taken. The second part of the current regulatory definition, however, permits some leeway for discretionary federal action in limited circumstances. It permits a federal agency to "deviate" from a coastal zone management program when justified by "unforeseen circumstances arising after approval" of the program which "present the federal agency with a substantial obstacle * * *." 15 C.F.R. 930.32(b). Put together, the term "maximum extent practicable" has been defined to require federal actions to be as consistent as possible with state management programs, given applicable federal law, unless unforeseen events occurring after the approval of a state program create substantial problems.

The regulatory definition is obviously a narrow one: it does not permit divergence from coastal zone management programs for discretionary federal actions except in unforeseen circumstances. Nevertheless, it rests solidly on the legislative history of the provision in the CZMA. The language in the Act was added in the House. The Senate bill provided for an exemption to the consistency upon a determination of overriding national interest by the President. See Legislative History of the CZMA at 242. This exemption procedure was changed in the House to consistency "to the maximum extent practicable." See Legislative History at 323. The House Report states that it expected that aspects or phases of a coastal zone program deemed impracticable by federal agencies would be "iron[ed] out" by review prior to approval by the Secretary of Commerce. Id. Congress acknowledged, however,

There may, however, arise, after the approval of the program, some circumstances not foreseen at the time of its

approval which may present a federal agency with an obstacle or situation which is a practical matter may prevent complete adherence to the approved program.

Id. Thus, the language "to the maximum extent practicable" was added to provide some "leeway * * * with respect to activities of Federal agencies in connection with approved programs." Id. That leeway, however, was expected to be restricted to circumstances "not foreseen at the time" of approval of the state plans. Id.

While some flexibility can be introduced into the term "maximum extent practicable" by defining unforeseen circumstances expansively, the Ninth Circuit's wholesale redefinition of the term is unsupported by the legislative history and vulnerable to legal challenge. It is too thin a reed on which to support the entire OCS leasing program.

Finally, the purposes the consistency requirements of the CZMA would not be served by the consistency review process proposed by the court of appeals. The consistency requirements are not a planning tool to aid the state in creating the coastal zone management program. The program must be created and approved prior to the application of the consistency requirement of the Act. Instead, the consistency requirements are a federal commitment that, once the program has been established, federal activities will not directly interfere with the attainment of its goals and policies. In other words, Section 307(c) is concerned with the result of consistency; it is not concerned with the federal planning process by which that result is achieved.

The federal government's interpretation of the Act in this litigation effectively serves the purposes of the consistency requirements of the CZMA because it insures that every activity that takes place on the OCS will be reviewed to determine whether it affects the coastal zone, and if so, whether its effects on the zone will be consistent. This review takes place in each case before activities are authorized but at a time when the maximum amount of information about those activities is available to inform the decision. The court's projected consistency review will not serve the purposes of the Act because it does not ensure that the activities considered will be consistent with the state program. Instead it merely invites a speculative controversy over whether future activities will be able to satisfy the applicable consistency requirements at the appropriate time.

Nor does premature consistency review serve an interest in the state's "anticipating and managing" impacts from energy facilities (Cir. Ct. Slip Op. at 14). A consistency determination does not necessarily provide information concerning the impacts of proposed activities additional to that provided by already existing procedures: i.e., NEPA. In the present case, the state never pointed to one single element of information, presently available, that had not already been provided to it through the extensive public procedures leading to a lease sale: resource reports, calls for nominations and comments, preparation and comments of the EIS as well as the unique opportunity provided in Section 19 of the OCSLA, 43 U.S.C. 1345, for formal state and local recommendations on the "size, timing, and location" of a lease sale.

The asserted policy interest in reviewing the consistency of a lease sale for comprehensive and cumulative effects of OCS activities is also a chimera. The effects of OCS activity on the coastal zone are those associated with development and production of commercially valuable oil and gas resources discovered on the OCS. The configuration of an individual lease sale bears little or no relationship to the extent of these activities that will actually take place. For example, historically, only 41% of tracts offered for lease in an individual sale result in leases. Of those leases, only a portion are explored by an industry lessee. Of those explored, only those tracts with geological formations containing commercially recoverable oil and gas resources will be proposed for development and production activities. The cumulative effects of the OCS oil and gas program, then, depend not on the configuration of an individual lease sale but on the discovery of oil and gas resources.

An individual lease sale may lead to no commercial discovery. This was the result of the 1972 sale in the eastern Gulf of Mexico, known as the MAFLA (Mississippi, Florida and Alabama) sale, which was considered in Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975). On the other hand, there were several commercial discoveries on widely separated tracts leased in the 1968 Santa Barbara Channel Sale, and these have resulted in a number of production units covering one to seventeen leased tracts. Indeed, a geological formation discovered through exploration of a tract leased in one individual lease sale may extend to many other tracts not leased in that sale. Production units may cover portions of tracts leased in two or more lease sales. E.g., Carpinteria Off-shore Field off California and the Eugene Island Block 330 Field in the Gulf. In fact, the Eugene Island Block supports a half dozen production units covering a series of geological formations underlying four tracts leased in two different lease sales.

In sum, the configuration of a lease sale does not necessarily determine the scope or location of future OCS activities which

may affect the coastal zone. At most, the configuration of a lease sale may indicate the outer boundaries within which exploratory activity may take place. As a result of that exploration, no, little or much development and production activity may eventually take place, both within and without, the original lease sale confines. Consistency review of the cumulative effects of such activities at the lease sale stage would be an exercise in futility, conducted at the expense of jeopardizing the sale itself.

6. Even if the Ninth Circuit's dicta survives, the suggested consistency procedure will inevitably result in preliminary injunctions against lease sales because neither the Secretary's obligations, the states' coastal zone plans, nor future OCS activities can be definitely determined in advance. -- The uncertainties about the actual development and production activities that will occur subsequent to a lease sale are complemented by the non-specific character of coastal zone management programs. In California, for example, the coastal zone management program is generally implemented through a permitting process presided over by the California Coastal Commission, Section 30600. This program does not set out a zoning map nor does it provide for firm limitations for development in the coastal zone. For example, Section 30262 of the California plan provides "Oil and Gas Development shall be permitted * * * if * * * (b) New or expanded facilities related to such development are consolidated, to the maximum extent feasible and legally permissible, unless consolidation will have adverse environmental consequences * * *." If this standard is not met, new petrochemical facilities may nevertheless be permitted by the Commission if "it is found that not permitting such development would adversely affect the public welfare * * *." Section 30263. No one can make any form of reasoned decision on whether the coastal zone impacts of OCS development and production activities will be consistent with such policy statements prior to establishing the location, type and quantity of hydrocarbon resources on the OCS as well as the facilities industry proposes to install for their exploitation.

Nevertheless, California claimed in this litigation that sale of the northern 29 tracts in OCS Sale 53 would be inconsistent with the "enforceable policies" of its coastal zone management program on the basis of this provision. Its reasoning was as follows: another provision of the program, Section 30230, generally provides for protection of marine resources:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a

manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

In the State's judgment, leasing the northern 29 tracts created an unacceptable risk that an oil spill would adversely affect sea otters which inhabit nearby coastal areas. This, it asserted, was a violation of the general marine resource protection provision of its plan. ^{8/} Because development of oil resources on these tracts would be, in its view, contrary to the plan, a permit to allow associated petrochemical facilities on land within the coastal zone would be contrary to the public welfare and thus would be denied. Because a permit would be denied, leasing the contested tract was inconsistent with the coastal zone management plan. Of course, there is no assurance at the lease sale stage that oil, rather than natural gas will be discovered on these tracts, that any new facilities in the coastal zone will be necessary to produce hydrocarbons for these tracts, or that, if new facilities are required, they cannot be located in complete conformity with the coastal plans "consolidation" standard. Nevertheless, California is free to argue, under its projected scenario of future events, that it would not issue permits for facilities in the coastal zone necessary for development of the resources on these tracts. Given the deference the courts are likely to afford the State in interpretation of its coastal zone management program, convincing a court that it is better to wait and see if the problem develops may be difficult.

The foregoing analysis of the actual claim of the State of California is merely illustrative of the difficulties and mischief produced by the Ninth Circuit decision. The district court, as affirmed by the court of appeals, required the consistency determination to cover all the possible effects of exploration, production and development activities disclosed in the EIS. These include impacts ranging from effects on water quality to the migration of labor and population into the coastal region. See 520 F. Supp. at 1381. Any one of these disclosed potential effects is subject to the type of hypothetical scenario-building by the State that the sea otter claim engendered. In response, the federal government can only state that the effects the state postulates may not occur; we can never absolutely assure that they will not happen.

^{8/} The State never explained how this provision would be violated if natural gas rather than oil was discovered on the contested tracts.

As difficult as this may appear, the Secretary's problems will be greatly exacerbated when, pursuant to the new accelerated leasing schedule adopted under Section 18 of the OCSLA, the Department makes the imminent transition to area-wide leasing. Under this new regime, the Department will no longer employ its present tract-specific pre-leasing process. Instead, vast areas of the OCS will be available for bid if industry is interested. The coastal states, virtually unanimous in their opposition to this form of leasing, are certain to employ the CZMA in an effort to thwart future lease sales conducted in this ambitious fashion. Moreover, the difficulties confronting Interior in assuring consistency for a discrete number of readily identifiable tracts ninety days before a sale are minimal when compared to the task it will face within the next year under area-wide leasing.

As a result, the consistency review process outlined by the Ninth Circuit is likely to result in amorphous controversies with the states concerning speculation about possible future events. Because of the rather vague and case-by-case nature of coastal zone management programs, it will be impossible to differentiate in advance between tracts on the OCS as being capable of creating more or less consistency problems in the future. Leasing of virtually any tract on the OCS is capable of creating consistency problems if a worst case scenario is examined. The State is free to choose its targets and construct its hypotheticals at will. The federal choice then will be either to capitulate to state demands or face an action for injunctive relief in the district court.

As stated at the outset, the OCS lease sale represents a fundamental conflict between national and local interests. In our judgment, nothing will prevent states from suing to enjoin lease sales off their coasts. The objective of this Division, then, is to avoid, not the suit, but the issuance of a preliminary injunction by the district court. In lease sale litigation, the district court has, at maximum, 30 days from the filing of the complaint to the lease sale to rule on a motion for preliminary injunction. Our efforts to convince district courts that, because of the unique structure of the OCSLA, no irreparable injury is created by a sale have been unavailing. The hydrocarbons have been there for eons, and few district judges have been persuaded, on the first round of litigation, to deny a preliminary injunction that would merely delay the lease sale, so that claims of irreparable injury and success on the merits can be examined more closely. Therefore, it is imperative for us to demonstrate convincingly that the government will prevail on the merits of the case. The only way we can make such a showing in the short time available in the district court is if the statutory duties required for the lease sale decision are clear and certain.

The procedure for consistency review outlined by the Ninth Circuit does not provide the requisite clarity. Indeed, even the court of appeals was unable to suggest a verbal formula for determining whether the Secretary of the Interior had adequately performed his consistency duties (slip op. at 24-25). Thus, even if the procedural suggestions contained in Ninth Circuit's dicta survive future legal attacks in other courts, the almost inevitable result will be preliminary injunctions in the district courts. We may eventually win the cases on the merits or in the courts of appeals after much, perhaps years, of effort. But, in the meantime, the congressional purpose to "expedite" oil and gas development on the OCS will be frustrated.

After all, one of the purposes underlying the Congressional determination to segment federal decisionmaking in the OCS oil and gas program was to avoid "extensive litigation prior to lease sales." H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 164 (1977) see p.9 supra. Even after the enactment of the 1978 Amendments to the OCSLA, Congress noted that litigation was a major obstacle to success of the plan to expedite oil and gas exploration and development on the OCS:

Most agree that the main reason for delays in OCS development here [sic] been the lawsuits which even when successful [for the federal government] have led to extensive stays of activities.

H.R. Rep. No. 1835, 95th Cong., 2d Sess. 20 (1979). Therefore, the Ninth Circuit's compromise, however, reasonable it may appear on its face, is fatally defective: its most certain result will be to subject future lease sales to litigation delays contrary to the national interest.

* * *

Finally, I must add one other thought about a concern which transcends our need to provide protection to the OCS leasing program. This Ninth Circuit decision should be reviewed by the Supreme Court because a failure to do so is virtually certain to open the federal courts to a host of CZMA-based suits which otherwise would probably not be filed. In a sense, we find ourselves in the same position with regard to the CZMA in 1982 as was true in 1971 with regard to NEPA. Following several preliminary skirmishes, an appellate court has provided a threshold test for the application of a major piece of environmental legislation. As was true of the D.C. Circuit's opinion in Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (1971), the Ninth Circuit has provided a broad, sweeping, yet ambiguous test for when and how this measure is to be applied. In Calvert Cliffs, no one sought Supreme Court

review in the belief that "the government could live with the decision." As a result, we lived with a decade of NEPA litigation, arguing cases that had to be fought until the scope and dimension of that procedural measure were firmly settled.

We are in that position again. Unless we attempt to curtail and clarify when and how the substantive provisions of the CZMA come into play, we expose countless federal programs to the threat of disruption by judicial interdiction. The parallel to our experience with NEPA is clear; our obligation as the government's litigators is equally straight-forward.

CONCLUSION

For these reasons, a petition for a writ of certiorari should be filed.

Respectfully submitted,

A handwritten signature in cursive script, reading "Carol E. Dinkins".

CAROL E. DINKINS
Assistant Attorney General
Land and Natural Resources Division

December 20, 1982

Honorable James G. Watt
Secretary
Department of the Interior
Washington, D.C. 20240

Dear Mr. Secretary:

In the very near future the federal government must decide whether to seek Supreme Court review of the Ninth Circuit's decision in California v. Watt (OCS Lease Sale 53). Recently the Solicitor General sought your views on the question. I want to take this opportunity to provide you with my thoughts concerning this important case and hope that they will prove useful in preparing your response.

As you know, I consider the Ninth Circuit's holding one of the most pernicious rulings in the area of environmental law in the past decade. Should we elect to let it stand, I am confident that it will impose a substantial and onerous burden on OCS development and other critical federal programs and projects. Moreover, there is little to lose by seeking a reversal at this time. Some take consolation in the Ninth Circuit's ruling on the scope of consistency determinations, but that language is advisory and disavows any specific standards. No matter how it resolves the threshold question of "directly affecting," the Supreme Court will not likely address this secondary issue on review.

I strongly urge that we seek Supreme Court review on the basis of four considerations. First, the Ninth Circuit has engaged in precisely the sort of judicial activism condemned by the President and rejected by the Supreme Court in Vermont Yankee in substituting its judgment for that of the Congress. Second, in practical terms, the decision will leave the OCS program hostage to the broad-ranging and multi-faceted interests of states, local governments and environmental groups. Third, the Ninth Circuit's broad application of the Coastal Zone Management Act (CZMA) will wreak havoc with a whole host of other federal activities that have little or no impact on the coastal zone. Last, the opinion undercuts the system for federal/state cooperation that was carefully designed by Congress in CZMA and the Outer Continental Shelf Lands Act (OCSLA).

In requiring a speculative consistency determination at the lease sale stage the Ninth Circuit in effect read the words "directly affecting" out of Section 307(c)(1) of the CZMA to fulfill what it considered the "purposes and policies" of the Act. Time after time we have succeeded in obtaining

reversals of judicial decisions founded on wistful policy notions instead of the plain language adopted by Congress. Only recently, the Supreme Court, at our urging, reversed the rulings in Energy Action Education Foundation v. Watt (bidding systems for OCS Sales) and Catholic Peace Action Foundation v. Weinberger (storage of top-secret nuclear weapons). This case requires a similar effort.

From a more practical standpoint the Ninth Circuit decision poses extreme danger to the OCS Leasing Program. Over the last five years, lawsuits to enjoin OCS lease-sales have been filed by the States of Alaska, California, Maine, Massachusetts, New Jersey, New York, and North Carolina, as well as by their political subdivisions. This decision is also a potent new weapon for OCS leasing opponents, including the Sierra Club, NRDC and other environmental organizations found by the Ninth Circuit to have standing. Even though Interior is preparing consistency determinations for upcoming lease sales, these opponents of the program will merely shift their attack and contend that the determinations themselves are inadequate. I fear that just as the courts invalidated scores of impact statements in the 1970's for various alleged imperfections, they similarly will find fault with the first generation of consistency determinations. There is no consolation in the Ninth Circuit's prescription for an adequate consistency determination. It is advisory only and not the law outside of the Ninth Circuit. Consistency determinations for the upcoming Georges Bank lease sale and others will not avoid litigation. Rather than defend the adequacy of those determinations using the uncertain dicta of the Ninth Circuit, I would prefer a Supreme Court ruling that no determination is required at the lease sale stage. Even if that favorable ruling does not come for a year, forcing us to defend our consistency determinations in the interim, knowledge that the Supreme Court has agreed to consider whether determinations must be prepared at all should inhibit lower courts from creative decisions finding them inadequate.

I truly believe that if we fail to take this case to the Supreme Court, we face a decade of CZMA litigation -- similar to that involving NEPA during the 1970's -- which threatens any federal activity tenuously impacting a coastal zone. In 1972, the federal government failed to challenge Judge Skelly Wright's interpretation of NEPA in the Calvert Cliffs case. Scores of federal projects were delayed or cancelled as a result of the widespread judicial acceptance of that opinion. Similarly, the Ninth Circuit rationale for requiring a consistency determination at the OCS lease sale stage potentially jeopardizes federal coal leasing, timber sales, MX basing and steel import quotas, among others. That is why we have obtained support for Supreme Court review from several other federal agencies including the Departments of the Army and Navy. I do not believe that you would want your decision on this case to be the basis for opening new and promising legal vistas for the environmental movement.

Far from fulfilling this Administration's commitment to cooperative federalism, the Ninth Circuit's decision unravels the careful system for federal/state cooperation that Congress intended in CZMA and OCSLA. Section 19 of the OCSLA provides the governors with an opportunity to make recommendations to you on the size, timing and location of sales. Other provisions of that Act require virtually continuous communication with state leaders throughout the entire OCS process. In contravention of this cooperative scheme, the Ninth Circuit's expansive reading of CZMA grants governors a practical veto over your lease sale decisions. The nation's need for a greater supply of domestic oil and gas and the revenue contribution to the Treasury made by OCS lease sales should not be thwarted by the speculative concerns of a coastal state or the insistent demands of the environmental movement.

Each of these factors alone would weigh heavily in favor of seeking Supreme Court review; taken together, they make a compelling case for review. Moreover, as we have noted, because the downside risks of Supreme Court review are minimal, we have everything to gain and nothing to lose by seeking certiorari.

As you know, I am fully committed to the OCS program. I have consistently assigned the highest priority to OCS litigation and work closely with our most experienced litigators to defend the program. While we will defend interim consistency determination issues during the pendency of this case to protect pending sales, I am fearful that, in the long term, we will have erected an insurmountable hurdle if we allow the Ninth Circuit's decision to stand unchallenged.

I have taken the liberty of sending a copy of this letter to the Solicitor General; both he and I would appreciate the opportunity to meet with you to discuss our course of action in this case. Please let me know if I can be of further assistance.

Sincerely,

Carol E. Dinkins
Assistant Attorney General
Land and Natural Resources Division

- 4 -

cc: Honorable Donald P. Hodel
Secretary
Department of Energy
Washington, D.C. 20545

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

Honorable William H. Coldiron
Solicitor
Department of Interior
Washington, D. C. 20240



U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

December 14, 1982

MEMORANDUM TO: Jim Cicconi
Special Assistant to the
President
FROM: David Hiller *DH*
Associate Deputy Attorney General

Thank you again for this noon's luncheon. It was most kind of you to have me over to the White House mess.

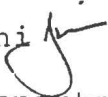
I am enclosing the Washington anecdote concerning limiting the size of our standing army, which the President may wish to put in his arsenal of anecdotes. Its relevance to the nuclear freeze is apparent.

THE WHITE HOUSE

WASHINGTON

June 28, 1982

MEMORANDUM FOR CRAIG FULLER

FROM: Jim Cicconi 
SUBJECT: Justice Department's Record on Civil Rights

At a recent lunch I had with Ken Starr, he made the point that the Justice Department's record on civil rights issues, including enforcement, is actually quite good. He said they were beginning an effort to get their story out before the public.

Subsequently he forwarded the attached: a speech on civil rights by Ed Schmults, and a list of facts concerning the Department's enforcement activity. I thought it appropriate to send this material to you since there may be others who would find it interesting.

In particular, please note the reference to DOJ's Community Relations Service on page two of Schmults' speech. This section is headed by Gil Pompa, one of our higher-level Hispanic appointees. As we previously discussed, DOJ has some ideas they plan to submit to you on giving Pompa added visibility.



Office of the Attorney General
Washington, D. C. 20530

June 25, 1982

MEMORANDUM FOR: JAMES W. CICCONI
SPECIAL ASSISTANT TO THE PRESIDENT AND
ASSISTANT TO THE CHIEF OF STAFF

FROM: KENNETH W. STARR *KWS*
COUNSELOR TO THE ATTORNEY GENERAL

RE: CIVIL RIGHTS ENFORCEMENT ACTIVITIES

In our recent conversations, I indicated that we have been working hard within the Department to articulate more effectively important facts about our civil rights enforcement record. The Attorney General, for example, gave a major civil rights speech here in Washington before a group of approximately 1000 people. While the speech received network coverage, the Washington Post elected not to cover the speech at all. Ed Schmults similarly gave a strong speech before the D. C. Bar Association recently. We have also been addressing civil rights issues in lower-profile speeches by Department officials and emphasizing our strong enforcement record in interviews with reporters and in visits to editorial boards across the country.

Here are the facts.

-- In 1981, this Administration brought more criminal civil rights cases than any other Administration in any single year. Those cases involve instances of racially motivated violence, police brutality, and involuntary servitude.

-- Enforcement of the Voting Rights Act was at a high water mark in the Administration's first year. Over 8400 submissions were reviewed by the Civil Rights Division in 1981, and objections were filed as to reapportionment and redistricting plans in a number of States, including Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, and Texas. Even New York City did not escape this rigorous review, as the Department objected to the City's proposed city council redistricting plan.

-- Activity under the Institutionalized Persons Act was at an all time high in 1981. The Department is currently involved in twenty-two active investigations under the Act, which is designed to protect individuals in custody in state and local institutions.

-- The Department carefully reviewed the four major school desegregation cases filed in the waning days of the prior Administration, and based upon that review, the Civil Rights Division has proceeded with all four cases. One case (Marshall, Texas) has been amicably resolved pursuant to a court approved consent decree. The other three cases are still in litigation. As to the other school desegregation cases, the Department is participating in more than 500 such cases across the country. At least 100 of these cases are currently active.

-- The Department has been very active in the employment discrimination area. Employment discrimination cases were successfully brought against the States of Vermont, New Hampshire and Rhode Island, as well as the New York City Fire Department. Recently, the Department secured the largest monetary award in its history in an employment discrimination case brought against Fairfax County, Virginia. The Civil Rights Division is participating in almost 100 such cases across the country.



U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 18, 1982

MEMORANDUM FOR: James A. Baker III
Chief of Staff and Assistant
to the President

Michael Deaver
Assistant to the President
and Deputy Chief of Staff

Edwin Meese III
Counsellor to the President

FROM: Edward C. Schmitt
Deputy Attorney General

I was distressed to see the Newsweek article this week regarding the Attorney General. I would fully expect the Washington Post owned Newsweek to continue the Post's articles but I did not expect to see White House staff giving the Attorney General "poor marks" on his management of the Department of Justice. The juxtaposition of these statements with the front page article in the Los Angeles Times written by Ron Ostrow is simply too ironic to let pass. Ron Ostrow has covered the Department for 18 years and his point is:

"More than any of its predecessors in at least 20 years, the Reagan Administration's Department of Justice is making profound changes in the way federal laws are administered and enforced—changes that ultimately will affect millions of Americans."

The constant carping by White House people needs to be stopped, not only for the good of the Attorney General but for the success of the President and the Administration.

It seems to me that people who have over the years been watching the Department of Justice, as Ron Ostrow has, may be in a better position to evaluate our performance than some of the neophytes who are talking to the press at the White House. I know you share my concern and hope that you can remind the White House staff that we rise or fall together as one Administration.

The A.G.'s Own Tax Shelter

As the nation's chief law-enforcement officer, a U.S. Attorney General is cast as Caesar's wife. And given the indiscretions of other attorneys general in recent years, coffee cups were rattled all over Washington last week when The Washington Post reported in front-page stories that millionaire Attorney General William French Smith had invested in two adventurous tax shelters—one allowing him to deduct \$66,000 from his 1981 Federal taxes, after investing only \$16,500 up front. Smith and his fellow partners joined that venture, the Post reported, even after a Los Angeles law firm warned that there were "risks and uncertainties" in the deal—uncertainties that experts said would almost certainly be challenged by the IRS.

In fact, the disclosures raised more questions about ethics than about the law. Many tax-shelter schemes eventually come under IRS scrutiny; participation is not, on the face of it, evidence of wrongdoing. More troubling was the propriety of a top government official's playing the tax laws for private gain. A 1965 Executive order urges government officials to "avoid action which . . . might adversely affect the confidence of the public and the integrity of the government." Coming in the same week that Labor Secretary Raymond Donovan testified before a Federal grand jury in Brooklyn amid new allegations that his New Jersey construction firm washed money for alleged Mafia figures, the Smith revelations did little to en-

hance the Reagan Cabinet's reputation.

Smith's most recent tax shelter involved Yale-Quay Energy Partners, an oil- and gas-drilling venture in Oklahoma that has yet to strike a successful well. Smith—one of 34 limited partners—invested \$16,500 in late 1981 and another \$16,500 in early 1982 for what will be a total deduction of \$99,000 over the two years. To reach that unusually high write-off, Smith took on \$66,000 in unsecured personal liability to guarantee royalty payments, some of which need not be made until 1993—an arrangement tax-shelter experts said was certain to raise questions at the IRS. Even more questionable was the practice of writing off the entire 1982 liability in 1981. Current IRS policy holds that the deduction should have been only a prorated fraction of that sum, and expert opinion is divided on the issue. Robert Martin, a tax lawyer who advised the investors, said they hoped to win the case if challenged by the IRS. "It's my opinion that the risks [of losing the case] are less than 50 percent," he said. "This sounds like a very shoddy deal," sniffed another tax expert.

Fee: As Attorney General, Smith theoretically is charged with representing the IRS in litigation, a relationship that could raise conflict-of-interest charges. Another area of possible concern is that Smith made the Yale-Quay investment outside of the blind trust that controls \$1.1 million of his assets. By law such investments must be scrutinized to ensure that the public official does not make policy rulings that could affect his holding. Jackson Walter, director of the Office of Government Ethics, says Smith's shelter poses no such problems. In a routine review, the office did find an unusual \$50,000 severance fee a California firm gave Smith when he resigned from its board upon becoming Attorney General that may prompt further investigation.

Thomas DeCair, a spokesman for Smith, said the Attorney General had relied on the advice of his tax experts and knew little about the details of the Yale-Quay venture. "He did it to make money," DeCair said bluntly, adding that "by investing in the drilling operations, he is putting people to work." But other officials said the incident

served to underline charges that Smith is insensitive to the nature of his office. (He drew fire earlier for refusing to resign from two private clubs that exclude women and for partying with Frank Sinatra while the singer was under investigation for allegedly consorting with underworld figures.) The disclosures also come at a time when the IRS is cracking down on abusive tax-shelter schemes, which rob the Federal government of an estimated \$3.6 billion annually. Such ventures "drain our country of a resource that's even more precious," IRS Commissioner Roscoe Egger said last fall, "respect for the American tax system."

Poor Marks: White House aides were casual about the Smith disclosures. "More of the same rich-man, poor-man stuff," said one. "If I had his money, I'd be looking for those kinds of shelters, too," said another. Had Ronald Reagan been asked about the matter in his press conference last week, aides said he was prepared to express full confidence in Smith's integrity. But though they refused to concede any impropriety in Smith's tax-shelter scheme, senior White House officials do give him poor marks on managing the Justice Department. Should the California lawyer decide to ride west after the 1982 elections, aides said, nobody would beg him to stay.

MELINDA BECK with DIANE WEATHERS in Washington and RON GIVENS in New York

Justice Dept. Sharply Alters Legal Policies

By RONALD J. OSTROW,
Times Staff Writer

WASHINGTON—More than any of its predecessors in at least 20 years, the Reagan Administration's Department of Justice is making profound changes in the way federal laws are administered and enforced—changes that ultimately will affect millions of Americans.

And the changes, which seek to imprint President Reagan's philosophical and political views on national legal policy, are particularly far-reaching in business and economic areas that may have important consequences, yet attract relatively little public attention.

The Reagan Justice Department is also pursuing the kind of hard line on law-and-order issues that the Nixon Administration attempted with little success. And on a broad spectrum of other issues—from its controversial shifts on civil rights enforcement to the unprecedented use of the armed forces against drug traffickers, department officials are working to change long-established policies and practices.

Criticism From Liberals

Some of these shifts have drawn angry criticism from liberals, especially in the area of civil rights. "No longer can those suffering from discrimination depend on the federal government for relief," charges the Committee for Public Justice, a New York-based organization of prominent liberals that monitors Justice Department activities. "In his first year as President, Ronald Reagan has more than fulfilled his promise to bring about change."

Administration defenders, on the other hand, see the department's actions as a long-overdue effort to bring balance to government policies and to restrain uncalled-for intervention by Washington.

"I like what they're doing, but I just wish they would go further," says Laurence H. Silberman, deputy attorney general in the administrations of both Richard M. Nixon and Gerald R. Ford. "In civil rights, I wish they would drive the stake through the heart of any use of quotas—for determining whether a vi-

olation occurred or for remedying it."

Controversial as the Administration's initiatives in criminal law and civil rights may be, what is likely to be most significant in the future is the effort to reshape important parts of the basic legal environment in which the nation's economy functions.

"In antitrust," says Robert Pitofsky, a law professor at the Georgetown University Law Center and a former member of the Federal Trade Commission, "the center of gravity was already moving toward more reliance on market forces and less on some kinds of government enforcement. The new Department of Justice has taken this movement toward a more discriminating enforcement policy and moved it much further to the right at an accelerated pace."

Many of the most important changes have attracted scant public notice, partly because they involve arcane, technical matters, and partly because Atty. Gen. William French Smith has a public style that spreads a blanket of blandness over otherwise controversial matters.

"Blandness has its own rewards," said one department policy-maker, referring to Smith's affable manner and flat style of delivering sharply worded speeches.

Nevertheless, workers, consumers, businessmen—all will find basic differences in the world they inhabit if the Administration's initiatives prove to be lasting policy. They include:

—Enlisting the FBI in the war against drugs, regarded now as a root cause of the nation's violent crime problem. If bureaucratic rivalries can be overcome, the FBI's growing knowledge of the workings of organized crime should meld with the street expertise of Drug Enforcement Agency operatives to make a "substantial dent" in illegal heroin traffic within three years, department strategists believe.

—Attaining greater involvement of non-Justice Department agencies, notably the State Department and the Pentagon, in the anti-drug campaign.

—Extending the Carter Administration's initial success in prosecution of higher-echelon organized crime figures. Last year, this resulted in the indictment, and in some instances the conviction, of 15 bosses of the 25 families of organized crime known to be active in the United States. "We've never been close to that," says Jules J. Bonavolonta, No. 2 man in the FBI's organized crime section.

—Moving with real prospects of success to rewrite the nation's immigration law with a combination of amnesty for millions of illegal aliens already here and sanctions against employers who hire illegals. Even if the legislative effort fails, as the Carter Administration's did, the department already has taken steps that have cut the flow of illegal immigrants, notably those from Haiti.

—Beginning to enforce 400 existing consent decrees under which companies accused of polluting the water or the air agreed in an order signed by a federal judge not to do so. Carol E. Dinkins, assistant attorney general for land and natural resources, said there has been no concerted enforcement effort to assure adherence to the decrees until now. As a result, she said, "a number of companies are not in compliance." When they realize that Dinkins and her attorneys mean business, "it will scare the socks off them," she predicted.

—Concentrating Civil Division resources on collecting hundreds of millions of dollars of debts owed the government in student loans and other aid programs.

—Shedding the "hostile attitude and knee-jerk reaction toward mergers" between corporations that William F. Baxter, assistant attorney general for antitrust, claims has dominated the department for too many years.

—Halting "excessive interference" with so-called vertical controls under which, for example, manufacturers require sellers to maintain certain prices. Baxter contends that "totally untenable conclusions" about the competitive effects of such controls have done "truly enormous damage" to the economy over the last 75 years.

—Concentrating enforcement activity against tax protesters and developers of fraudulent schemes to avoid paying income taxes. Glenn L. Archer Jr., the assistant attorney general who heads the Tax Division, sees the crackdown as yielding two benefits: Dealing with "increasing non-compliance and a breakdown of our self-assessment system" that he thinks is worse now than at any time since the federal income tax became law in 1913, and also giving tax-paying citizens assurance that others are paying their fair share, too.

Some of the new emphasis seems at first glance to be of interest chiefly to lawyers and lawbreakers seeking to figure out the government's strategy. But closer examination shows the changes could have broad impact.

The shifts in antitrust enforcement provide an example. Baxter contends that the prices of goods and services in America are higher than they need to be because of excessive enforcement and restrictions federal authorities have imposed under antitrust laws. Secondly, he says that whole categories of goods, particularly complex ones, are not brought to market because of excessive enforcement.

As an example, which he acknowledges is not entirely hypothetical, Baxter cites a manufacturer of sophisticated hi-fi equipment who wants to sell only to retailers willing to install acoustically baffled sound rooms in which the equipment maker believes his product will be truly appreciated. But antitrust enforcers attack his attempt to restrict the distribution solely to such retailers.

As a result, Baxter says, price-conscious consumers listen to the hi-fi equipment in a sound room of a willing retailer, but then walk down the street and buy the item from a discount house or order it from a catalogue. Soon the number of willing retailers shrinks and the maker takes his product off the market—or, in some cases, chooses never to bring it to market, knowing of the likely antitrust consequences.

Critics contend the department's newly adopted open mind toward mergers fosters concentration of economic power in fewer and fewer corporations. Baxter rejects the argument, contending there has been "no significant change in the degree of aggregate concentration in the U.S. economy since the 1950s."

Moreover, he says there is "not the slightest truth" to the correlation drawn between a reduced number of complaints and the political clout they wield.

From the start, Atty. Gen. Smith has placed priority on the department's criminal work, where Associate Atty. Gen. Rudolph W. Giuliani, a youthful, aggressive ex-prosecutor, reigns supreme.

Giuliani says the department,

recognizing "that you cannot expand the rights of the criminally accused for nothing," is for the first time applying "a cost-benefit analysis to thinking about the Bill of Rights."

Until now, the nation's criminal justice system "had practically reached the point where it was thought that we could achieve an unlimited extension of rights (of the accused) without paying any price," Giuliani said.

"Why not have a system where the slightest violation of a right will result in the dismissal of a case?" Giuliani asked.

"What we didn't consider was that by applying the rule excluding evidence on a technicality to a person who has committed a violent crime and that person is set free, the price you pay is the number of people who will be victimized by the criminal before he is caught again."

Talk of "restoring balance" to the criminal justice system, of course, did not originate with the Reagan Administration. But earlier efforts, chiefly during the Nixon Administration, accomplished little.

This time, Giuliani insists, "the whole political climate has changed." Despite the recent shelving by the Senate of the Administration's efforts to reform the federal criminal code, Giuliani thinks Congress will enact provisions to reform bail procedures by letting judges consider how dangerous a suspect may be in deciding whether he should be set free pending trial, to cut back on the rule for excluding illegally gathered evidence and to limit the number of conviction reviews available to a defendant.

To illustrate his claim of a change in climate, he tells of taking part in a debate at New York University last November on "Preventive Detention and the Presumption of Innocence."

"I began by saying the debate should be called 'Reasonable Bail Reform' to make it less loaded, and I ended with about half the audience supporting my view. Five years ago, I would have been thrown out of the auditorium as some creep who wanted to arbitrarily punish people accused of crime," Giuliani says.

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