The Outer Continental Shelf Lands Act Amendments of 1978: Balancing Energy Needs with Environmental Concerns?

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THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978: BALANCING ENERGY NEEDS WITH ENVIRONMENTAL CONCERNS?

The continental shelf of the United States is a vast, relatively untapped storehouse of natural resources, the most valuable of which are oil and gas. The energy potential of this area, if realized, could bring the United States much closer to energy self-sufficiency and its attendant benefits. However, the shelf and surrounding coastal environment is important for a variety of other commercial, ecological and aesthetic reasons. Development and production of off-

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1. The continental shelf is the relatively shallow extension of the continental land masses which stretches outward from the shore gradually to an average depth of 660 feet. At its edge the seabed takes a steep decline, known as the continental slope. The gentler gradient which marks the merger of the slope with the deep seabed is the continental rise. The shelf, slope, and rise are referred to collectively as the continental margin. SPECIAL SUBCOMM. ON THE OUTER CONTINENTAL SHELF OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 91ST CONG. 2D SESS., REPORT ON THE OUTER CONTINENTAL SHELF 222 (Comm. Print 1970), reprinted in L. JUDA, OCEAN SPACE RIGHTS: DEVELOPING U.S. POLICY 193-94, app. G. (1975).

2. The United States Geological Service (USGS) estimates the undiscovered recoverable oil and gas resources on the continental shelf to be 26 billion barrels of oil and 109 trillion cubic feet of natural gas. CONG. RESEARCH SERVICE, EFFECTS OF OIL AND GAS DEVELOPMENT ON THE COASTAL ZONE, 94TH CONG., REPORT ON THE OUTER CONTINENTAL SHELF 64-66 (Comm. Print 1976).

3. Of all domestic oil and gas produced at present, some 17 percent comes from the continental shelf—about 18 percent of our oil and 15 percent of our natural gas. However, the prospects are that the continental shelf can be the largest domestic source of oil and gas between now and the 1990's. H.R. REP. NO. 95-590, 95th Cong., 2d Sess. 74 (1978), reprinted in U.S. CODE CONG. & AD. NEWS 1481 (1978) [hereinafter cited as HOUSE REPORT].

4. In testimony before the House Appropriations Subcommittee on Interior and Related Agencies in 1974, Undersecretary of the Interior John C. Whitaker emphasized three reasons to lessen dependence upon foreign energy supplies: (1) The importance of a secure oil and natural gas supply to an independent foreign policy and to national security; (2) Compelling economic pressures including the need to avoid the inflation that results when domestic goods must be exported to offset the potential trade imbalance produced by massive oil imports; and (3) The likelihood that domestic oil and gas production will be more economical than importation at current and foreseeable world market prices. Hearings before the House Appropriations Subcomm. on Interior and Related Agencies, 93rd Cong., 2d Sess. 1-2 (1974) (remarks by John C. Whitaker, Undersecretary of the Interior). See generally FEDERAL ENERGY ADMINISTRATION, PROJECT INDEPENDENCE REPORT (1974).

5. Uses include swimming, surfing, skin diving, pleasure boating, sport and commercial fishing, and other related recreational and commercial activities. Additionally, marine organisms abound in the coastal environment. The biological productivity of most estuarine areas is fifteen to thirty times that of the open ocean and up to twice that of the best inland agricultural areas. Hildreth, The Coast: Where Energy Meets the Environment, 13 SAN DIEGO L. REV. 253, 247-59 (1976). See generally B. KETCHUM, THE WATER'S EDGE: CRITICAL PROBLEMS OF THE COASTAL ZONE (1972).
shore oil and gas, with the accompanying risk of oil spills, pose a threat to the existing coastal environment which supports these other uses of coastal areas. In 1978 Congress amended the Outer Continental Shelf (OCS) Lands Act, the primary vehicle by which OCS lands are leased and regulated, in order to expedite the development and production of OCS oil and gas and to provide adequate protection to the coastal environment. This comment will discuss and analyze the manner in which the amendments seek to accomplish these dual goals.

Background: A Conflict of National Interests

Offshore drilling for oil and gas began as early as the late 1890's but was initially confined to shallow nearshore waters because of the limited technology available. As technology advanced, allowing deeper depths to be penetrated, state and federal governments became increasingly interested in offshore lands. By the 1930's several coastal states had passed legislation controlling the exploration and development of offshore areas. On September 28, 1945, President Truman issued a "Proclamation on the Continental Shelf," claiming all offshore areas to be subject to federal control. Its primary objective was to facilitate development of OCS petroleum resources. The Proclamation was later codified by the Geneva Convention on the Continental Shelf. The Convention recognized the rights of coastal nations in the continental shelf as being "exclusive [and] sovereign for the purposes of exploring it and exploiting its natural resources."

The Truman Proclamation was followed by Supreme Court decisions in 1947 and 1950 in which the Court upheld federal control of the entire continental shelf. In 1953 Congress responded to these decisions by passing the Submerged Lands Act, which gave to the

8. Id. at 675-77.
9. Id.
13. Id. at art. 2, paras. 1-2.
coastal states exclusive rights to resources in the area extending out to three geographical miles from their coastlines.17

Shortly after enactment of the Submerged Lands Act, Congress enacted the OCS Lands Act in order to assert federal jurisdiction over lands lying seaward of the three-mile coastal zone given to the states.18 The statute gave the Secretary of the Interior the responsibility to supervise OCS lands and, more importantly, the authority to lease OCS lands for mineral exploitation.19 The Act also gave the Secretary broad authority to prescribe rules and regulations necessary to administer leasing of the OCS.20

The OCS leasing process was executed, under regulations promulgated by the Secretary,21 in an orderly, efficient, and relatively uncontroversial manner in the 1950's and 1960's. Between the passage of the OCS Lands Act in 1953 and the year 1968, the Department of the Interior conducted twenty-three oil and gas lease sales, covering almost six and one-half million acres.22 However, OCS leasing became an increasingly complex and controversial issue in the 1970's.

17. 43 U.S.C. § 1312 (1970). The Act also allowed extension to the "historical boundary" of states that could prove that such boundary existed at the time of admission of the state into the Union or had otherwise been confirmed by act of Congress, but in no event more than three marine leagues (about 10.35 land miles). However, only the boundaries of Texas and Florida have been extended to this distance. See United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960). This issue was recently litigated by states on the Atlantic coastline in United States v. Maine, 423 U.S. 1 (1975). Note, States' Rights in the Outer Continental Shelf Denied by the United States Supreme Court, 30 U. MIAMI L. REV. 203 (1975).
18. 43 U.S.C. § 1332(a) (1970). The term "Outer Continental Shelf" was defined as all submerged lands under American jurisdiction which lie seaward of the area granted to the states in the Submerged Lands Act. 43 U.S.C. 1331(a) (1970).

For a discussion of the somewhat "murky" seaward limits of the OCS, see Schoenberger & Walsh, Outer Continental Shelf Leasing, in LAW OF FEDERAL OIL AND GAS LEASES 303, 304-05 (1978).


21. 43 C.F.R. §§ 330 (1977); 30 C.F.R. § 250 (1977). The Department of the Interior has published two booklets containing information regarding OCS regulations: POLICIES, PRACTICES, AND RESPONSIBILITIES FOR SAFETY AND ENVIRONMENTAL PROTECTION IN OIL AND GAS OPERATION ON THE OUTER CONTINENTAL SHELF (June 1977); REGULATIONS PERTAINING TO MINERAL LEASING OPERATIONS AND PIPELINES ON THE OUTER CONTINENTAL SHELF (December 1976).

22. HOUSE REPORT, supra note 3, at 74.
The first major difficulty arose in the wake of the blowout of a drilling rig in the Santa Barbara Channel in 1969, which resulted in the largest oil spill in United States history. Shortly after the blowout, the Secretary of the Interior suspended all activities on the lease upon which the blowout occurred and certain other leases in the area, pending the completion of environmental studies. In September, 1971, after completion of the studies, the Secretary announced that the suspension would continue. The affected lessees filed suit, questioning the authority of the Secretary to take such action.

The district court in *Gulf Oil Corp. v. Morton* held that the 1953 Act did not authorize the Secretary to suspend leases for environmental purposes. However, the Ninth Circuit Court of Appeals reversed, finding the following language of the statute to be sufficient authority: "The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf..." Because the OCS Lands Act did not define "natural resources," the court turned to the Submerged Lands Act, which defines natural resources to include not only oil, gas, sulphur, and other minerals, but also all marine animal and plant life. Thus, the Secretary's suspension of leasing came within his power to provide for the conservation of natural resources.

In a subsequent case, *Union Oil of California v. Morton,* the ninth circuit again upheld the Secretary's authority to suspend operations, but attempted to place some limits on that authority. The court ruled that an open-ended, indefinite suspension would constitute a taking of private property for which just compensation would be required under the fifth amendment of the United States Constitution. Moreover, the court declared that Congress had not

23. See generally L. Dye, Blowout At Platform A (1971); A. Nash, Oil Pollution and the Public Interest: A Study of the Santa Barbara Oil Spill (1972); Baldwin, The Santa Barbara Oil Spill, 42 U. Colo. L. Rev. 33 (1975); Walmsley, Oil Pollution Problems Arising Out of Exploitation of the Continental Shelf: The Santa Barbara Disaster, 9 San Diego L. Rev. 514 (1972).


25. Id.


27. 493 F.2d 141 (9th Cir. 1973).


29. 493 F.2d at 145.

30. 512 F.2d 743 (9th Cir. 1975).

31. Id. at 751. The court held that such a taking by interference with private property rights was within the constitutional power of Congress, but subject to compensation to the affected lessees.
authorized suspensions requiring compensation and that any such suspension was therefore beyond the Secretary's power. 2

Besides generating the first major litigation under the OCS Lands Act, the Santa Barbara blowout also fostered the first significant resistance to OCS leasing by coastal states and environmentalists. Through the medium of television, millions of Americans witnessed the effects of this major oil spill, which ultimately resulted in the loss of over ten million dollars to the city of Santa Barbara and the state of California in tourist-oriented business and in diminution of land values, in addition to causing indeterminable damage to the marine environment. 8

The Santa Barbara spill was a major catalyst of the general environmental movement which swept the country in the early 1970's. 34 Americans realized that our modern industrialized society has been causing a gradual deterioration in the environment. Congress reacted, and in many instances overreacted, by passing a plethora of statutes designed to protect the environment, several of which affected OCS leasing. 8 Three of these acts, the National Environmental Policy Act, the Clean Air Act, and the Coastal Zone Management Act, have particular significance for the OCS leasing Program; their impact on the leasing program is summarized below.

National Environmental Policy Act (NEPA)

The National Environmental Policy Act 36 has been referred to as the "Sherman Act of environmental law." 37 It was enacted in order
to compel federal agencies to examine environmental factors before approving federal actions. The heart of NEPA is section 102 which requires federal agencies to prepare an environmental impact statement (EIS) for all proposed "major federal actions significantly affecting the quality of the human environment." An EIS must contain a detailed discussion of the environmental impact of the proposal, any adverse and unavoidable environmental effects, short-term consumption as compared to long-term productivity, any irreversible and ir- retrievable commitments of resources which would be involved in the proposed action, and any feasible alternatives that might exist. The EIS accompanies the proposed action through the reviewing process of the federal agency, thereby ensuring that environmental impacts are considered at all stages before approval.

To the extent that leasing activities by the Department of the Interior are "major federal actions significantly affecting the quality of the human environment," they are subject to the prescriptions of NEPA. Although NEPA is not a substantive impediment to OCS leasing activities, a leasing project on the OCS may be delayed until an EIS prepared by the Department of Interior complies fully with NEPA.

Coastal Zone Management Act (CZMA)

Congress enacted the CZMA in 1972 in recognition of the many

39. 42 U.S.C. § 4332(2)(c) (1970). The Council on Environmental Quality (CEQ) promulgated final regulations on August 1, 1973, as guidelines for the preparation of an EIS. 40 C.F.R. § 1500 (1973). The CEQ advises that the term major federal action significantly affecting the environment [is] to be construed by agencies with a view to the overall cumulative impact of the action proposed . . . . Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared.
40. 40 C.F.R. § 1500.6(a) (1973).

As might be expected, federal courts faced with these vague threshold considerations have construed the provision in a wide variety of ways. For a discussion of the judicial response, see F. ANDERSON, supra note 36, at 57-141; McGarity, supra note 36.
41. See, e.g., National Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (injunction affirmed preventing OCS lease sale off Louisiana coast because the EIS did not adequately consider alternatives to offshore leasing).
42. Id.
conflicting demands made upon shoreline resources. The Act provides incentives to coastal states to provide for the orderly development and protection of the lands and waters of their coastal zones. It provides for a two-step funding program administered by the Secretary of Commerce. States are initially granted funds to aid in the development of state coastal zone management plans. After the plan is approved by the Secretary, additional funds are awarded to aid the state in the implementation and operation of the program. Once a state's management plan has been approved, the CZMA contains consistency provisions requiring the federal government to conform its activities and those of its lessees and permittees to the state's plan.

A 1976 amendment to the CZMA clarified the relationship between state coastal zone management programs and OCS leasing activities. The Act now requires OCS lessees who submit a plan to the Secretary of the Interior for the exploration, development, or production of an OCS tract to attach a certification stating that each activity described in the plan which affects any land or water use in the coastal zone of a state complies with the affected state's coastal zone management plan. Normally, a license or permit may not be granted for any activity described in the plan until the state concurs with the certification. However, a license or permit may be obtained

44. 16 U.S.C. § 1451 (1976). The Act was prompted by an increasing population growth in coastal areas which has placed progressively greater commercial, residential, and recreational demands upon these ecologically fragile areas. In 1971, 53 percent of all Americans lived within 50 miles of the coast and estimates predict that by the year 2000, coastal population will reach 200 million. The development generated by population growth threatens natural systems such as estuarine and marsh areas. Yahner, supra note 43, at 260.


47. 16 U.S.C. § 1456(c) (1978). Without the Act's consistency requirements, federal activities would be immune from state coastal zone regulation under the property and supremacy clauses of the United States Constitution. U.S. Const. art. IV, § 3, art. VI, cl. 2.

Waiver of intergovernmental immunity is a common feature in modern environmental statutes. See generally Murchison, Waivers of Intergovernmental Immunity in Federal Environmental Statutes, 62 Va. L. Rev. 1177 (1976). For a general discussion of federal consistency and state coordination under the CZMA, see Brewer, Federal Consistency and State Expectations, 2 Coastal Zone Management J. 315 (1976); Hershman & Folkenroth, Coastal Zone Management and Intergovernmental Coordination, 54 Ore. L. Rev. 13 (1975).


without certification if the Secretary of Commerce finds that each activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.\textsuperscript{51}

Although the CZMA was enacted in 1972, by 1978 only a few state management plans had been approved.\textsuperscript{52} As a result, the actual effect of the CZMA upon OCS leasing and its interrelationship with the OCS Lands Act was uncertain prior to the enactment of the 1978 amendments to the OCS Lands Act.

\textit{Clean Air Act (CAA)}

The CAA\textsuperscript{53} was enacted to protect and enhance the quality of the nation's air resources in order to promote public health and welfare.\textsuperscript{54} Basically, the CAA requires the Administrator of the Environmental Protection Agency (EPA) to promulgate national ambient air quality standards for any air pollutant which the Administrator determines has an adverse effect on public health and welfare and for which air quality criteria have been established.\textsuperscript{55} The Act delegates to the states the primary responsibility for attaining and maintaining these standards through the adoption of state implementation plans (SIP's) containing emission limitations and other measures deemed necessary to ensure attainment and maintenance of the national standards.\textsuperscript{56} If a state fails to submit an implementation plan or if portions of the plan are inadequate to attain or maintain national ambient air quality standards, the Administrator is required to promulgate substitute regulations.\textsuperscript{57}

On its face, the CAA does not appear to apply to OCS facilities. The Act makes no mention of its application beyond the territorial

\textsuperscript{51} 16 U.S.C. § 1456(c)(3)(B) (1978). However, the Act does not provide guidelines as to when a finding "in the interest of national security" is appropriate.

\textsuperscript{52} The plans of Washington, Oregon, and California and a portion of Puerto Rico's plan have recently received approval. Ten additional states are expected to submit plans during 1978 and 1979. [1978] EN. USERS REP. (BNA), No. 242, at 23.


\textsuperscript{56} 42 U.S.C. §§ 7408-10 (1977).

limits of the various states. However, the Administrator recently determined that SIP's will be applied to OCS facilities to the extent that the emission may affect air quality in a coastal state.\textsuperscript{44} To justify this decision, the Administrator turned to the OCS Lands Act.\textsuperscript{45} Section 203\textsuperscript{w} of that Act provides that the laws of the United States are applicable to the soil and seabed of the OCS and all artificial islands and fixed structures located thereon and that the laws of each adjacent state are applicable to activities on the OCS to the extent that the state law is not inconsistent with the OCS Lands Act or other federal law. This determination was made on April 18, 1978, and consequently, its ultimate effect upon OCS leasing was still uncertain prior to the enactment of the amendments.

\textit{The Energy Shortage}

Just as the Santa Barbara spill served as the catalyst which awakened the public's concern for preservation of the environment, the Arab oil embargo of 1973 was the catalyst which awakened Americans to the realization that domestic production of oil and gas must be expedited. After the embargo, President Nixon declared increased self-sufficiency in energy production to be a national goal.\textsuperscript{46} In 1974, when President Nixon greatly accelerated the proposed acreage of OCS leasing by ordering the Secretary of the Interior to lease ten million acres the following year, opposition to OCS leasing increased accordingly.\textsuperscript{47} OCS leasing quickly became a battleground for two competing national interests: protection of the environment and rapid development of domestic energy resources.\textsuperscript{48}

The battles were fought by environmentalists and coastal states using environmental statutes which, unlike the OCS Lands Act, allowed suits by citizens to question compliance with the various acts.\textsuperscript{49} Numerous lawsuits were filed to oppose OCS leasing, the ma-

61. \textsc{House Report, supra note 3, at 89.}
62. Yahner, \textsc{supra note 43, at 270.}
63. \textsc{House Report, supra note 3, at 89.}

\textit{NEPA does not contain a citizen suit provision. However, courts have consistently allowed private parties to enforce the Act by relying upon the provisions of the Administrative Procedure Act, 5 U.S.C. § 702 (1966), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to a judicial review thereof."}
majority of which sought compliance with NEPA. This resulted in a significant slowdown in the leasing process. The presence of voluminous regulations and permit requirements under the several environmental statutes applicable to OCS leasing also contributed to the delay.

By 1978 the inadequacy of the existing OCS leasing process was clearly evident. From 1973, when increased self-sufficiency in energy production became a national goal, to 1978, the percentage of foreign oil utilized by American industry and consumers increased from thirty-five percent to over fifty percent. A 1978 study by the United States Geological Survey indicated that the total time required after a lease sale to attain peak production would be in the range of seven to fourteen years. Further, the uncertainty created by lawsuits brought lower bids for leases by the oil companies.

The future looked even gloomier. The threat of NEPA litigation, the Secretary’s questionable authority to suspend leasing activities, the uncertainties involved in applying the CAA to the OCS, and the unpredictable use of the CZMA by coastal states, all promised to create additional problems in the OCS leasing process. Congress realized that in the face of these difficulties neither preservation of the environment nor efficient developments of OCS oil and gas could be accomplished without amending the outdated OCS Lands Act of 1953.


66. See authorities cited at note 65, supra.

67. The regulations and permit requirements are detailed in House Report, supra note 3, at 2870-78; Cowles, supra note 36; Kellough & Martin, supra note 35, at 899-900.26(6).

68. House Report, supra note 3, at 90. Although six domestic lease sales were scheduled for 1975, only four were conducted. Six sales were also planned for 1976, and again only four were held. Additionally, another sale was temporarily invalidated. Id.

69. Id. at 61.

70. Id. at 90.

71. See notes 23-32, supra, and accompanying text.

72. See notes 43-52, supra, and accompanying text.

73. See notes 53-60, supra, and accompanying text.

74. See Jackson, Rational Development of Outer Continental Shelf Oil and Gas, 54 Ore. L. Rev. 587 (1975). In spite of delays and other problems regarding OCS leasing, the oil industry did not desire new legislation. It feared new legislation would further delay OCS development because of more regulations, consultations, and citizen suits. Oil & Gas J., Sept. 25, 1978, at 68.
The 1978 Amendments to the OCS Lands Act

The OCS Lands Act amendments of 1978, the final product of four years of Congressional effort, are a response to the failure of the 1953 Act to consider adequately environmental concerns, as well as a response to the failure of the Act to provide for rapid development of OCS oil and gas within the confines imposed by an environmentally-conscious public. The findings, purposes, and policies of the amendments reveal that the amendments are intended to achieve a balance between the need for expedited development in the OCS and protection of the coastal environment. In its attempt to combine these seemingly incompatible national policies, Congress has placed balancing mechanisms in the Act so that administrative officials can balance environmental and energy factors in their decision-making capacities under the Act. These provisions will be discussed as they relate to the three stages of the leasing process: site-selection, management, and enforcement.

Stage One: Site-Selection

Site-selection encompasses all leasing decisions and activities which occur prior to actual development of and production from a lease. Balancing mechanisms in the site-selection stage are designed to help agency officials make rational choices among the competing values to ensure that areas from which oil and gas are produced will

75. 43 U.S.C. §§ 1702 & 1801-02 (1978). Note particularly section 1802 which states that the purposes of the amendments are to: (1) Establish policies and procedures for managing the oil and natural gas resources of the OCS which are intended to result in expedited exploration and development of the OCS in order to achieve national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade; (2) Preserve, protect, and develop oil and natural gas resources in the OCS in a manner which is consistent with the need (A) to make such resources available to meet the nation's energy needs as rapidly as possible, and (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments.

76. The following is a simplified version of the steps involved in the site-selection stage prior to the amendments: (1) Preparation of lease planning schedule; (2) Request for tract nominations; (3) Tentative tract selection made from information received in the request for tract nominations; (4) Draft EIS prepared and made available for public review, then submitted to the Council on Environmental Quality (CEQ); (5) Public hearing held for the draft EIS in the vicinity of the proposed sale; (6) Final EIS prepared; (7) Secretary of the Interior decides whether the sale is to be made, and if so, upon which tracts and under what lease terms; (8) Notice of sale published in the Federal Register; (9) Lease sale conducted; (10) Oil and gas lease contract signed; (11) An exploratory drilling plan prepared and submitted by the lessee to the United States Geological Survey (USGS), after securing the necessary permits from the Corps of Engineers and the EPA; (12) Drilling permits issued. House Report, supra note 3, at 2874-78.
be those which are likely to produce the greatest economic gains and the least amount of environmental damage. However, balancing is a complex procedure, requiring difficult analysis and a careful understanding of both the economic and environmental effects of leasing. There must be tract-by-tract judgment on whether a particular energy deposit is valuable enough to justify the probable environmental costs of extracting it. The amendments provide balancing mechanisms at several points in the site-selection process.

**OCS Leasing Program.** Section 18 of the amendments directs the Secretary of the Interior to prepare a five-year leasing program in which he is required to select the timing and location of leasing to obtain a proper balance among the potentials for environmental damage, for discovery of oil and gas, and for adverse impact on the coastal zone. The balance is to be reached upon a consideration of the following factors:

1. existing information concerning the geographical, geological and ecological characteristics of such regions;
2. an equitable sharing of developmental benefits and environmental risks among the various regions;
3. the location of such regions with respect to, and the relative needs of, regional and national energy markets;
4. the location of such regions with respect to other uses of the sea and seabed;
5. the interest of potential oil and gas producers in the development of oil and gas resources;
6. laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;
7. the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and
8. relevant environmental and predictive information for different areas of the outer Continental Shelf.

**Exploration and Development.** After leasing locations are selected, a balancing will again take place both prior to exploration of each tract and prior to development and production. This balanc-

78. *Id.*
79. *Id.*
82. The question of whether environmental factors should be reviewed after a tract has already been leased was the subject of extensive litigation prior to the
ing will be accomplished through the evaluation of plans submitted to the Secretary by OCS lessees.

Under section 206(11) of the amendments, lessees must prepare exploration plans which are to include a schedule of anticipated activities, a description of the equipment to be used, the general location of each well to be drilled, and other information deemed pertinent by the Secretary. The Secretary must approve an exploration plan within thirty days of its submission, unless he determines that the proposed activity under the plan will result in serious harm or damage to life, including fish or other aquatic life, to property, to any minerals in areas leased or not leased, to national security or defense, or to the environment.

Section 25 of the amendments requires lessees to submit development and production plans to the Secretary once the lessee decides to commence major development on a tract. These plans must include a description of the specific work to be performed, a description of all facilities and operations located on the OCS, a statement of environmental standards to be met and the manner in which such standards are to be met, an estimate of the rate of development and production and a time-table for performance, and any other relevant information required by the Secretary. The lessee is additionally required to submit a statement describing facilities and operations which will be constructed or conducted onshore as a consequence of the OCS activity.

All lessees in the Gulf of Mexico are exempted from compliance amendments. Environmentalists contended that the EIS prepared pursuant to NEPA prior to a lease sale could not adequately predict onshore and environmental impacts of later production activity, the extent of which would depend entirely upon the amount of oil and gas found. See Kesterman & Hay, Domestic Offshore Drilling and U.S. Energy Options, 5 J. MAR. LAW 701, 709 (July 1974). In 1976, the failure to provide for such a procedure led, in part, a district court to invalidate an entire lease sale. New York v. Kleppe, 9 ENVIR. REP. 1978 (E.D.N.Y. 1977). The second circuit reversed, primarily upon the assumption that the Secretary of the Interior would amend OCS regulations to require a second review prior to development of a tract. County of Suffolk v. Secretary of the Interior, 562 F.2d 1388, 1378 (1977), discussed in HOUSE REPORT, supra note 3, at 164. New regulations were issued on January 27, 1978, which are quite similar to the Exploration Plan and Development and Production Plan requirements included in the amendments. 43 Fed. Reg. 3880 (1978).

85. 43 U.S.C. § 1351(a)(1) (1978). The House Ad Hoc Committee noted that in many cases there is no true separation between exploration and production. However, there is a point in time when a lessee has to decide whether or not he is going to order a drilling platform, seek related onshore support facilities, and commence substantial development and production in an area. At this point the development and production plan must be prepared and submitted. HOUSE REPORT, supra note 3, at 165.
with this procedure. Congress excepted the Gulf because it was deemed inappropriate to apply these requirements in areas which have already undergone substantial leasing activity.

The Secretary must disapprove a development and production plan if the lessee fails to demonstrate that it complies with the requirements of the Act or other applicable federal law, or if the operations threaten national security or national defense. The Secretary must also disapprove plan if he determines that because of exceptional circumstances, implementation of the plan would probably cause serious harm or damage to life, property, mineral deposits, national security or national defense, or the environment; that the threat of harm or damage will not disappear or decrease to an acceptable extent; and that the advantages of disapproving the plan outweigh the advantages of development and production.

State and Local Government Participation. Balancing mechanisms have also been incorporated in the amendments to allow state and local governments to participate in the leasing process without undue delay to OCS leasing. State and local governments were particularly displeased with the 1953 Act because they felt they were not given a right to meaningful participation in site-selection decisions, nor were they given any of the revenues generated by OCS lease sales. They argued that they were entitled to participate because it was their beaches and estuaries damaged by oil spills and their towns and communities coping with the problems of rapid onshore expansion and development, the progeny of OCS leasing.


89. House Report, supra note 3, at 165. The House amendment required only lessees in "frontier areas" in which no prior exploration and production activities had taken place to submit development and production plans. This would have exempted several areas outside the Gulf, including the Santa Barbara Channel. See H.R. Rep. No. 1474 95th Cong., 2d Sess. 115 (1978), reprinted in U.S. Code Cong. & Ad. News 3080 (1978) [hereinafter cited as CONFERENCE REPORT]. Assuming the rationale for exempting the Gulf is correct, there is no logical reason for not exempting all "non-frontier areas."


92. Oil-related developments are likely to require large numbers of construction workers for four to six years. A platform fabrication plant may employ up to 2,000 workers for two years. An oil refinery may require 2,000 workers for construction, but only 300 for operation. Construction for commercial enterprises occurs over a longer period of time. A Louisiana study estimates that each offshore job produces 1.7 jobs in oil and gas-related onshore activities and that each of these jobs generates 2.1 jobs in the service sector. Hildreth, supra note 5, at 256-66. See Breeden, Federalism and the Development of Outer Continental Shelf Resources, 28 Stan. L. Rev. 1107, 1107-08 (1976).
To a certain extent, the CZMA was enacted to respond to these arguments. As noted earlier, it provides coastal states with funds to combat the consequences of OCS leasing and requires OCS lessees to certify that their activities which affect the coastal zone of a state will be conducted in a manner consistent with the state's coastal zone management plan. If a state refuses to certify an activity, such activity can only be conducted if the Secretary of Commerce finds that it is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security. The OCS Lands Act amendments incorporate these certification procedures into the OCS Lands Act. Lessees are required to comply with the certification procedures under the CZMA before the Secretary may approve an exploration plan or a development and production plan.

The amendments go further than the CZMA and provide coastal states a more direct means to participate in OCS leasing decisions. Under the OCS Leasing Program, the governor of any affected state may identify any laws, goals, and policies of his state which he deems to be relevant matters for the Secretary of the Interior's consideration. These laws, goals, and policies are to be among the factors considered by the Secretary in the selection and timing of lease sales.

In addition, governors and local officials are encouraged to submit comments and recommendations prior to the approval of the OCS Leasing Program. Section 19 of the amendments attempts to ensure that these comments are given adequate consideration. Under section 19, the Secretary is obligated to accept the recommendations of a governor if he determines they provide a reasonable balance between the national interest and the well-being of the citizens of the affected state. The determination of national interest is to be based on the desirability of obtaining oil and gas.


93. See notes 43-52, supra, and accompanying text.
94. See text at notes 44-47, supra.
95. See text at notes 48-51, supra.
100. 43 U.S.C. § 1345(c) (1978).
supplies in a balanced manner and on the findings, purposes, and policies of the Act.\textsuperscript{102} A similar procedure has been combined with the requirements of NEPA to ensure adequate state and local government participation prior to final approval of development and production plans. Ordinarily approval of each development and production plan submitted by lessees will not be a "major federal action" which will require preparation of an EIS. However, the amendments require the Secretary to declare the approval of a development and production plan to be a "major federal action" for purposes of preparing an EIS in accordance with NEPA, at least once in each region of the OCS.\textsuperscript{103} Preparation of an EIS will ensure a more thorough consideration of environmental impacts and feasible alternatives upon an individual tract at least once in each region.\textsuperscript{104} A draft EIS will be transmitted to the governor of any affected state and upon request, to local state executives.\textsuperscript{105} When approval of a development and production plan has not been designated to be a "major federal action" by the Secretary, the governors of affected states, plus executives of affected local governments, may submit comments and recommendations.\textsuperscript{106}

\textit{OCS Information Programs}. Because a balancing approach calls for a tract-by-tract decision-making process, it demands an enormous amount of information, both as to prospective amounts of oil and gas and as to likely environmental effects.\textsuperscript{107} The amendments provide for the establishment of an Environmental Studies Program and an OCS Oil and Gas Information Program to provide the requisite data.

Under the provisions for Environmental Studies,\textsuperscript{108} the Secretary will conduct studies of any area or region included in an oil and gas lease in order to establish information needed for assessment and

\textsuperscript{102} 43 U.S.C. § 1345(c) (1978). The Secretary's determination is final, and shall only be a basis for invalidation of a proposed lease sale or development and production plan by a citizen suit if found to be arbitrary and capricious. 43 U.S.C. § 1345(d) (1978).
\textsuperscript{103} 43 U.S.C. § 1351 (1978). Ordinarily, approval of a development and production plan will not be a "major federal action significantly affecting the environment" and would therefore not be subject to NEPA. See notes 36-42, supra, and accompanying text.
\textsuperscript{104} Although the requirements of a development and production plan are similar to those of an EIS prepared pursuant to NEPA, an EIS is prepared by a federal agency rather than a lessee, and requires a broader perspective which includes consideration of feasible alternatives. See notes 37-43, supra, and accompanying text.
\textsuperscript{106} 43 U.S.C. § 1351(g) (1978). Section 19, which requires the Secretary to accept comments from the governor of an affected State if they provide a reasonable balance between the national interest and the well-being of the citizens of the affected states, is applicable in this instance.
\textsuperscript{107} INSTITUTE FOR CONTEMPORARY STUDIES. supra note 77, at 227.
management of environmental impacts on the OCS and coastal areas. Subsequent to leasing, the Secretary is required to conduct additional studies and to monitor the environment in order to identify any significant changes in its quality and productivity. The Oil and Gas Information Program complements these Environmental Studies by requiring lessees to provide the Secretary access to all processed, analyzed and interpreted information obtained from leasing activities.

Provisions are included which permit the public and affected state and local governments to benefit from these information programs. The Secretary will make available to the general public an assessment of the cumulative effect of leasing activities on the environment at the end of each fiscal year. Affected states are entitled to receive copies of all relevant programs, plans, reports, EIS's, and other lease sale information; they are also entitled to receive a summary of data prepared by the Secretary which is designed to assist in planning for onshore impacts of possible oil and gas development and production.

Evaluation. The implementation of balancing mechanisms at several stages in the site-selection process is an ideal method by which energy and environmental conflicts may be resolved. The effectiveness of the Secretary's balancing efforts will be enhanced by input from state and local governments and data provided by the information programs. However, balancing is an intricate process, and certain aspects of the site-selection provisions militate against achieving the results desired at this stage.

To a certain extent, Congress has used the balancing approach to relegate to the Secretary of the Interior (and ultimately, to the courts) its responsibility for making fundamental policy decisions on values which will set the country's course for the future. The

110. 43 U.S.C. § 1346(d) (1978). Note that information obtained by this program will be almost identical to the information required to prepare an EIS under NEPA. Hopefully, information obtained through the OCS Information Program and NEPA will be utilized in such a manner as to avoid unnecessary and costly duplication.
112. 43 U.S.C. § 1352(a)(1)(A) (1978). Because much of this information may be privileged or proprietary information, the amendments authorize the Secretary to prescribe regulations and take other measures to assure that confidentiality will be maintained at all times. 43 U.S.C. § 1352(c) to (h) (1978).
115. 43 U.S.C. § 1352(b) (1978). Note also that development and production plans must include a statement describing facilities and operations which will be constructed onshore, which will give affected states other important information. See text at note 87, supra.
amendments skirt the difficult question of relative weights to be
given to environmental values and energy needs. As a result, Con-
gress has given the Secretary of the Interior much discretion and
little substantive guidance in the balancing process.

Another problem is the fragmentation of the balancing process
between the secretaries of the Interior and of Commerce. Conflic-
ting policy directives given to each secretary by Congress compound
the problem. The overriding concern of the Secretary of Commerce
under the CZMA is protection of the coastal environment from
adverse impact caused by OCS development. On the other hand, the
Secretary of the Interior's concern under the OCS Lands Act is to
proceed with development of the outer continental shelf while
minimizing environmental impacts. As a result, the two secretaries
are empowered to make decisions regarding the same subject mat-
ter under separate acts whose objectives are not entirely consistent.
To the extent that these objectives differ, achieving the desired
balancing under the OCS Act may be thwarted.116

Finally, even if an effective balance is possible in the site-
selection process, the goal of expedient development of OCS energy
resources may not be reached. Congress has not only failed to
streamline the site-selection process, but has added other time-
consuming steps.117 Only the exemptions of the Gulf of Mexico from
development and production plans and the time limits for the
preparation of exploration and development and production plans
reveal congressional concern with expedient development.

Stage Two: Management

Management involves the regulation of OCS activities conducted
pursuant to OCS leases. The question here is not whether predicted
energy dividends will exceed environmental costs, but whether
regulations promulgated to protect the environment in the operation
of offshore platforms will unreasonably delay production of OCS oil
and gas or make such production economically unfeasible for OCS
lessees. Under the 1953 Act the Secretary was given unrestricted
authority to promulgate regulations deemed to be necessary to
manage OCS activities.118 In the amendments the Secretary retains
much of his former rule-making autonomy. The amendments do not
contain a balancing mechanism to be utilized in general management
decisions per se, but the Secretary is explicitly required to consider

116. For a detailed discussion of the problem of fragmentation created by the con-
sistency provisions of the CZMA, see Shaffer, supra note 43.
117. See notes 80-115, supra, and accompanying text.
118. See notes 19-21, supra, and accompanying text.
available relevant environmental information in developing appropriate regulations for OCS lessees. Additionally his decisions should be influenced by the dual aims of the amendments as articulated by Congress through its “Findings and Purposes.” The amendments do require the Secretary to issue specific regulations in the three instances discussed below.

Suspension and Cancellation of Leases. As noted earlier, litigation followed the Santa Barbara oil spill questioned the authority of the Secretary to suspend activities on OCS leases and raised questions regarding compensation for lost use of leases. The amendments dispel all doubts regarding the Secretary’s authority to suspend leases and also give him the authority to cancel leases. The Secretary is authorized to adopt regulations to provide for the suspension or temporary prohibition of OCS activities at the request of the lessee, in the national interest, to facilitate proper development of a lease, or to allow for the construction or negotiation for use of transportation facilities. Further, he is authorized to enact regulations to provide for the suspension of OCS activities if he determines there is a threat of serious, irreparable, or immediate harm or damage to human or aquatic life, to property, to any mineral deposits, or to the environment.

After a suspension or temporary prohibition has been in effect for five years, the Secretary may conduct a hearing to determine whether a lease should be cancelled. If he determines, after the hearing, that continued activity pursuant to such lease would probably cause serious harm or damage to human or aquatic life, to property, to any mineral, to the national security or defense, or to the environment; that the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and that the advantages of cancellation outweigh the advantages of continuing the lease in force, he may cancel the lease.

These provisions provide an effective balance between environmental and energy goals. To suspend leasing activity only one of several factors must be present. This allows the Secretary to halt leasing activity for any of a variety of reasons which may threaten the environment. He may then carefully plan any future course of conduct. On the other hand, to cancel a lease each of several factors

121. See notes 22-33, supra, and accompanying text.
must be present, one of which consists of a finding that the environmental advantages of cancellation outweigh the economical advantages of maintaining the lease in force.

The amendments provide for compensation to the lessee in the event a lease is cancelled. The lessee is entitled to either (1) the lesser of the fair value of the cancelled rights as of the date of cancellation, taking account of both anticipated costs and revenues, or (2) the excess, if any, over the lessee's revenue from the lease of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease.126

This compensation clause is arguably unconstitutional. As noted earlier, in *Union Oil of California* the ninth circuit held that an absolute suspension is tantamount to a taking.127 A cancellation is clearly a permanent suspension and a taking. A long line of Supreme Court cases requires that the owner or lessee receive reasonable value for the property or right lost, measured at the time of the taking.128 Under the act, in the case of a profitable lease where investment costs have been fully amortized, the lessee may be entitled to nothing.129

*Air Emission Standards and the Clean Air Act.* The amendments authorize the Secretary of the Interior to promulgate regulations which provide for the compliance of OCS activities with the national ambient air quality standards established pursuant to the

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Special compensation provisions are provided in instances where a lease is cancelled or suspended because the lessee did not submit an approvable exploration and production plan. If a plan is disapproved because the lessee fails to show that he can comply with the requirements of the Act, or because of no concurrence with a state consistency certificate, and the lease was issued after approval of a coastal zone management program, the lessee will not receive compensation. However, if a plan is disapproved because it threatens national security, is a threat to life or other resources, or fails to get coastal zone management plan consistency concurrence for a lease issued prior to the approval of a state coastal zone management plan, which plan is submitted to the Secretary, the term of the lease will be duly extended and at any time within five years, the lessee can reapply to the Secretary with a new plan. At the end of the five years, the Secretary must cancel the lease if he has not yet approved the plan and the lessee will be entitled to receive compensation in the normal manner. 43 U.S.C. § 1351(h)(2) (1978).

127. See notes 30-32, supra, and accompanying text.


129. This argument was presented to Congress by Congressman Wiggins. 124 Cong. Rec. H302 (daily ed. Jan. 26, 1978). Apparently, supporters of the provision felt the constitutional right to fair compensation may be waived if such a waiver is included in future leases. House Report, supra note 3, at 305-06.
Comments by the Conference Committee indicate that if an approved state implementation plan has ambient air quality standards which are more stringent than the national standards, the Secretary shall ensure that OCS operations do not prevent attainment of those standards. The Conference Report indicates that the regulations to be promulgated by the Secretary pursuant to this section need only apply to the air above or near an offshore facility, in order that emissions from each source may be controlled to prevent a significant effect on the air quality of the adjacent shore area.

This provision strikes an effective balance between environmental and energy concerns. Regulations promulgated by the Secretary can be less stringent than those of adjacent states and of the CAA and need only apply to OCS facilities located near the three-mile coastal zone of the states. However, the provision leaves many unanswered questions. The act does not define the term “significantly affect,” does not direct the Secretary to sources for analysis of this important term, and fails to clarify when and where the policies of the CAA apply. Furthermore, the Conference Committee Report states that this provision of the amendments is not intended to supersede the CAA or the responsibilities of the Administrator of the EPA. This may lead to confusion and inconsistent sets of regulations because the amendments apparently intend to authorize two departments to regulate air quality in the OCS.

Improvement of Drilling Technology. Section 21 of the amendments provides that the Secretary of the Interior and the Coast Guard, in exercising their respective responsibilities for installations on the OCS, must require the use of the best available and safest technologies determined to be economically feasible on new drilling and production operations, whenever failure of equipment would have a significant effect on safety, health, or the environment. These requirements also apply to existing operations whenever the

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131. CONFERENCE REPORT, supra note 89, at 85-86.
132. Id.
133. Id.
134. These questions and others have been raised by the Secretary of the Interior. 43 Fed. Reg. 60, 612 (1978).
135. CONFERENCE REPORT, supra note 89, at 85-86.
Secretary determines they are practical.\textsuperscript{138} However, these requirements are balanced against economic considerations. In either instance, use of the best available and safest technologies will not be required if the Secretary of the Interior or the secretary of the department under which the Coast Guard is operating determines that the incremental benefits are clearly insufficient to justify the incremental cost of utilizing such technologies.\textsuperscript{139}

\textit{Evaluation.} Congress has wisely left management of the OCS primarily under the control of the Secretary of the Interior. This allows the Secretary flexibility to change management regulations to reflect the changing nature of technology and economics upon a proper balancing of the conflicting national interests. Congress made inroads upon this authority only where necessary to clarify existing problems. However, as discussed previously, in answering these problems, Congress has created other problems. Only the drilling technology requirements appear to create a process in which effective balancing can be achieved without further legislation or litigation.

\textit{Stage Three: Enforcement}

Enforcement concerns the following controversial issues: (1) Who will be allowed to question compliance with the OCS Lands Act, and the regulations promulgated thereunder and (2) In what manner is this enforcement to be accomplished? In the enforcement stage, the primary concern is to provide methods which will ensure compliance with the Act by both federal agencies and OCS lessees, without delaying the production of oil and gas in the OCS. The amendments include two modes of enforcement, one by federal agencies and the other by citizen suits, and they also provide an Oil Spill Liability Fund intended to compensate injured parties for losses incurred as the result of oil pollution.

\textit{Enforcement by Federal Agencies.} Federal agencies are, of course, the traditional enforcers of federal acts. The amendments seek to increase the effectiveness of this means of enforcement by expanding the investigatory powers of the involved agencies and by increasing penalties for violations of the Act.\textsuperscript{140} The former has been accomplished by requiring lessees to allow prompt access to all inspectors to the site of any operations subject to safety regulations.\textsuperscript{141} Upon request, inspectors must be provided with documents and records that are pertinent to occupational or public health, safety, or

\begin{itemize}
\item \textsuperscript{138} 43 U.S.C. § 1347(b) (1978).
\item \textsuperscript{139} 43 U.S.C. § 1347(b) (1978).
\item \textsuperscript{140} 43 U.S.C. § 1348 (1978).
\item \textsuperscript{141} 43 U.S.C. § 1348(a)(3) (1978).
\end{itemize}
environmental protection.142 Scheduled onsite inspections are to be conducted at least once a year on all OCS facilities, and other inspections are to be conducted periodically without advance notice, to assure compliance with environmental and safety regulations.143

Penalties under the 1953 Act were rendered totally inadequate by years of inflation. Under the 1953 Act a knowing and willful violation was a misdemeanor punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or both.144 Each day of violation was deemed a separate offense.145 A similar violation under the 1978 amendments may be punishable by a fine of not more than $100,000, or by imprisonment of not more than ten years, or both.146

The amendments further provide a civil penalty of $10,000 per day for a failure to comply with the Act and accompanying regulations, after notice of such failure and the expiration of a reasonable time for corrective action.147 Liability under the Act is extended to officers and agents of corporations. Whenever a corporation is subject to prosecution for a knowing and willful violation, an officer or agent of the corporation or entity who knowingly and willfully authorized, ordered, or carried out the proscribed activity is subject to the same fines or imprisonment.148

The expanded investigatory powers of the Secretary of the Interior and the Coast Guard, as well as the increased penalties, should adequately deter violations of OCS safety and environmental regulations and thereby prevent damage to the environment. It may be questioned whether multi-billion dollar oil corporations will be adequately deterred from violations by fines of $10,000 a day, when these corporations might willingly risk fines when higher profits could probably be made through noncompliance. However, even assuming some corporations would operate in this manner, the officers who knowingly authorize such proscribed activity are also subject to fines and imprisonment under the amendments. Few individuals will find intentional noncompliance to be a feasible alternative under these circumstances. Of course, the diligence with which the Secretary and the Coast Guard undertake enforcement will ultimately determine the effectiveness of these enforcement procedures.

Enforcement by Citizens. Citizen suit provisions have become a common, and very controversial, feature of recent environmental statutes.\(^\text{149}\) The merits and drawbacks of citizen suit provisions have been elaborately discussed elsewhere.\(^\text{150}\) It should suffice for purposes of this comment to say that citizen suits are valuable in that they expose questionable decision-making approaches in federal agencies to public view and subject such approaches to judicial scrutiny. However, they are also extremely costly and provide a means by which litigious individuals can harass federal agencies and engender great delays in land-use programs.\(^\text{151}\)

Congress, despite much internal opposition,\(^\text{152}\) included a liberal citizen suit provision in the amendments. Under section 23 of the amendments, any person having a valid legal interest which is or may be adversely affected has the right to commence a civil action on his own behalf to compel compliance with the OCS Lands Act or regulations promulgated thereunder.\(^\text{153}\) The House Report indicates that the term "valid legal interest" is to be interpreted broadly to include not only those individuals who have an economic interest, or who have suffered or will probably suffer tortious injury, but also those who may have a definable aesthetic or environmental interest.\(^\text{154}\)

These broad standing requirements are subject to restriction in only a few instances. Suits regarding actions by the Secretary to approve a leasing program, an exploration plan, or development and production plan may only be brought by a person who (1) participated in the administrative proceedings related to these actions,

\[\text{149. See note 64, supra.}\]
\[\text{151. DiMento, supra note 150.}\]
\[\text{154. HOUSE REPORT, supra note 3, at 161. The Report notes that "the Committee intends that this includes persons who meet the requirement for standing to sue set out by the Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972)." HOUSE REPORT, supra note 3, at 161. In that case the Court established very broad standing requirements, holding that persons may obtain standing for judicial review of federal agency action if they allege that the challenged action caused them injury in fact, and if the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated. 405 U.S. at 733.}\]
(2) is adversely affected or aggrieved by the action, (3) files a petition for review of the Secretary's action within sixty days after the date of such action, and (4) promptly transmits copies of the petition to the Secretary and to the Attorney General. Beyond these minor restrictions, Congress made no attempt to limit or discourage the bringing of citizen suits by parties who might use the provision for purposes of harassment and delay. One manner in which this could have been accomplished is the inclusion of provisions for the imposition of court costs. However, Congress left the decision regarding court costs entirely within the discretion of the federal courts by allowing them to "award fees to any party, whenever the court determines such award to be appropriate." This provision allows a court to award costs to either party, regardless of the ultimate outcome of the suit.

**Oil Spill Liability and Recovery.** Title III of the amendments provides a long-awaited remedy for parties economically injured by oil pollution; through the establishment of the Oil Spill Liability

The *Sierra Club* case was decided under the Administrative Procedure Act (APA). 5 U.S.C. § 702 (1966). See note 64, supra. Subsequent cases under the APA seem to indicate that the Supreme Court may be applying a stricter standard today. For example, in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court determined that a plaintiff's alleged injury must be sufficiently concrete and immediate in order to provide a basis for standing. In another case, *United States v. Richardson*, 418 U.S. 166 (1974), the Court denied the plaintiff standing, relying in part on its determination that the plaintiff was seeking admission to a federal court merely to air his generalized grievances. These cases did not involve environmental issues; however, recent district court decisions have followed the Supreme Court's trend toward a more stringent application of the doctrine's limitations in environmental cases. See, e.g., *Sadler v. 218 Housing Corp.*, 417 F. Supp. 348 (N.D. Ga. 1976); *Concerned About Trident v. Schlesinger*, 400 F. Supp. 454 (D.D.C. 1975); *Citizens for Food and Progress, Inc. v. Musgrove*, 397 F. Supp. 397 (N.D. Ga. 1975). See Note, *supra* note 64.


156. Congressmen Fish introduced an unsuccessful amendment during the debates on the 1978 OCSLA amendments which would have required the courts to award costs to an opposing party upon a finding that the litigation was frivolous, or brought primarily for the purpose of delay. 124 CONG. REC. H569 (daily ed. Feb. 2, 1978) (remarks of Congressman Fish). Under this amendment the decision to award costs would still be in the hands of the courts, but it would give the courts a clear policy directive to discourage all frivolous litigation.


158. Under regulations promulgated pursuant to the 1953 Act, 30 C.F.R. § 250.43(b) (1977), platform operators were strictly liable for cleanup costs resulting from spills on
Fund, Title III provides an efficient and orderly method to allow recovery for both cleanup costs and damages resulting from oil spills.

Under title III, injured parties may assert claims for economic losses arising out of oil pollution for removal costs, injury to real or personal property or natural resources, and for the loss of profits or impairment of earning capacity due to injury to real or personal property or natural resources. There are limitations placed upon the assertion of some of these claims. A claim for injury or destruction of natural resources can only be asserted by the President or by a state. Additionally, only those claimants who derived at least twenty-five percent of their earnings from an activity which utilized real or personal property or natural resources damaged by a spill may recover for loss of profits or impairment of earning capacity resulting from the spill.

The amendments impose liability upon the owners and operators of vessels or offshore facilities which are the source of oil pollution. These individuals are responsible for all cleanup costs incurred by federal, state, and local governments regardless of the circumstances under which the oil spill occurred. However, limitations of liability and certain defenses, such as causation of the spill by negligence of a third party or causation by a grave natural disaster, may be asserted in response to claims for actual damages created by a spill.

The Oil Spill Liability Fund is an alternative to recovery of cleanup costs and actual damages through court action, which is often prolonged and expensive. It is to be established and maintained by the imposition of a fee, not to exceed three cents per barrel, upon oil obtained in the OCS and by subrogation of the Fund to the rights of governmental agencies and private parties who recover from the Fund.

The Fund serves two basic functions. First, it is immediately

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OCS waters, with no limit placed upon the amount of liability, but were not liable for actual damages created by such spills.

Title III applies only to spills from any offshore facility in the OCS and any transportation device, while in OCS waters, including vessels for the delivery of the oil and gas from the offshore facility. Comprehensive legislation, which would apply to all spills in the marine environment, will probably be enacted in the near future. House Report, supra note 3, at 178.

available to governmental agencies to finance the removal of spilled oil and efforts to minimize a spill's impact on public property. Second, it is available to claimants for actual damages recoverable under title III without regard to any legitimate defenses of limitation of liability which might be successfully asserted by the polluter in court. In both instances, the Fund is subrogated to the claimant's recovery rights in court, and is therefore subject to liability limits and defenses which may be asserted by defendants.

Evaluation. The problem regarding balancing of environmental interests and oil production in this stage is that of providing for effective enforcement without disturbing the balance sought in the earlier OCS leasing. The expanded enforcement powers of the Secretary of the Interior and the Coast Guard, combined with the citizen suit provisions, appear to encourage compliance with the Act. However, by failing to limit the use of citizen suits, Congress has left an aspect of the amendments in the hands of the courts, who have the potential to negate the benefits of balancing. Furthermore, the amendments expressly leave all remedies under the citizen suit provisions of NEPA, the CAA, and other environmental statutes to aggrieved parties.

Title III, which establishes the Oil Spill Liability Fund, consists perhaps more of a remedy than an enforcement procedure, although theoretically the imposition of stricter standards of liability will alter the conduct of owners and operators of vessels or offshore facilities. Establishment of the Fund provides an efficient and equitable way to compensate all parties for oil-spill-related injuries, while also allowing polluters to assert fault-related defenses.

Conclusion

Oil and gas are our only realistic short-term sources of energy, and the outer continental shelf contains our largest remaining domestic reserves of these resources. To prevent an ever-increasing dependence upon unreliable and costly foreign sources of these minerals, the United States must expedite its production of domestic oil and gas, especially from the continental shelf. Some damage to the valuable coastal environment is inevitable, but

167. 43 U.S.C. § 1817 (1978). The amendments also contain a Fisherman's Contingency Fund, 43 U.S.C. §§ 1841-47 (1978), which functions in a manner similar to the Oil Spill Pollution Fund, to provide reasonable compensation for damages to fishing gear and economic loss due to OCS activities.
169. Shaffer, supra note 43, at 621.
through a proper balancing of energy needs and environmental factors, increased production can occur with minimal environmental damage.

As has been pointed out in this comment, certain aspects of the amendments militate against the achievement of proper balancing. For the most part the deficiencies are not so substantial as to impair totally the achievement of a proper balance between energy and environmental values. Both values will be considered at several points in the leasing process prior to actual production. Once production has started management procedures are designed to achieve the highest amount of environmental protection economically feasible; additionally, broader, stricter means of enforcement have been implemented to assure compliance with these management procedures. If oil pollution should occur the Oil Spill Pollution Fund is designed to provide for efficient cleanup and to compensate fully parties who suffer losses or damage.

But, the amendments have one glaring deficiency: the failure to expedite OCS production. A balancing process which achieves a proper balance only after years of delay will defeat the purpose of the amendments. Time is of the essence. As President Carter noted in his State of the Union message on January 19, 1978:

Every day we spend more than $120 million for foreign oil. This slows our economic growth, it lowers the value of the dollar overseas, and it aggravates unemployment and inflation here at home. Now we know what we must do: increase production, we must cut down on waste, and we must use more of the fuels which are plentiful and more permanent.\(^\text{170}\)

A study made in 1977 by Professor John Moroney, a microeconomist at Tulane University, estimated that the amendments could create additional delays of up to six years in developing OCS resources.\(^\text{171}\) Advocates of the amendments in Congress dismissed this study as producing “scare-figures,”\(^\text{172}\) and asserted that opening up the OCS decision-making process to affected states, local governments, and the public will eliminate dissatisfaction with OCS


leasing, the primary cause of leasing delays.\textsuperscript{173} The validity of this assertion is certainly subject to challenge. Outside participation by interested persons is an important aspect of the balancing process, and the amendments should diminish dissatisfaction with OCS leasing by providing an effective means by which such participation will be allowed; but to assume that affected states, local governments, and environmentalists will not readily turn to all available citizen suit provisions to test determinations adverse to their interests does not seem realistic. Those individuals who will not tolerate any significant environmental damages, regardless of economic and other related benefits, will not be satisfied with, nor appeased by the new balancing procedures.\textsuperscript{174} One wonders how Congress could rely so totally upon this assumption in a matter which is essential to our nation's economy and security.

Moreover, the amendments do not even address another major cause of delays, excessive regulatory procedures. In fact, the amendments may create as many as forty new sets of regulations, which will further complicate, rather than expedite, OCS leasing.\textsuperscript{175}

As a result, this legislation may seriously hinder our nation's attempt to reduce dependency upon foreign sources of oil and gas. The courts and affected federal agencies do have an opportunity to mitigate the ill effects of the amendments. The courts may do so by discouraging citizen suits intended only for delay. This may be accomplished by strictly construing the standing requirements of all environmental statutes affecting the OCS, by awarding court costs to the government and oil companies, and by giving greater deference to decisions by federal agencies. Affected federal agencies may reduce the ill effects of the amendments by working together to maximum extent possible under the numerous environmental


\textsuperscript{174} INSTITUTE FOR CONTEMPORARY STUDIES, \textit{supra} note 77, at 226-30. Kesterman and Hay explain such an attitude as follows:

Traditionally, the energy crisis is viewed by environmentalists as a crisis of unjustified energy demand—not a crisis of need. We cannot, they maintain, equate demands with needs nor our standard of living with current levels of energy consumption. Fossil fuels are a finite resource, that is rapidly being depleted to feed our present “oil binge” at an incalculable cost to our environment and to future generations. We can, they affirm, get along with less energy without a catastrophic effect on our lifestyle. This can be achieved through energy conservation . . . .

Kesterman & Hay, \textit{supra} note 82, at 708-09.

statutes to rid the leasing process of excessive and duplicative regulations and permit requirements. If the courts and involved federal agencies do not take such measures, the following statement by Senator Hatch of Utah may haunt Congress in the years to come:

Most of us in this Chamber at least pay lip service to the need for increased energy production, and express dismay at the energy shortages under which our country suffers. But all we have to do is look at the graphs . . . to see how consistently legislation passed by this Congress has reduced and eliminated energy production . . .

When the lights grow dim more frequently, and the wheels of industry turn more and more slowly, and our people huddle in their dark and unheated houses, let us remember that those who vote for the final passage of this bill today are responsible.\textsuperscript{176}

\textit{Gordon L. James}

\textsuperscript{176} 123 CONG. REC. S11982 (daily ed. July 15, 1977).