

6-1-1984

Prospects for Increased State and Public Control over OCS Leasing: The Timing of the Environmental Impact Statement

Edward Corwin

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law of the Sea Commons](#)

Recommended Citation

Edward Corwin, *Prospects for Increased State and Public Control over OCS Leasing: The Timing of the Environmental Impact Statement*, 21 SAN DIEGO L. REV. 709 (1984).

Available at: <https://digital.sandiego.edu/sdlr/vol21/iss3/8>

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

PROSPECTS FOR INCREASED STATE AND PUBLIC CONTROL OVER OCS LEASING: THE TIMING OF THE ENVIRONMENTAL IMPACT STATEMENT

Federal statutory procedures provide local governments and the public various opportunities to provide input regarding oil and gas leases on the Outer Continental Shelf. However, these channels of input fall far short of facilitating effective participation by these groups in federal decisions concerning those leases. This Comment suggests that earlier public availability of the Draft Environmental Impact Statement may remedy some of the inadequacies of the current process.

INTRODUCTION

On July 15, 1981, former Secretary of the Interior James Watt announced plans to accelerate the five-year Outer Continental Shelf (OCS)¹ lease schedule prepared by former Secretary Andrus.² Over thirty-eight million acres of OCS lands have been offered for lease by the federal government since 1953.³ The Department of Interior, however, will offer oil and gas leases for an unprecedented *one billion acres* of federal offshore lands under the present plan.⁴

Coastal states, local governments, and environmental groups have become increasingly concerned with protecting their coastal and marine environments, and with the potential local economic impacts of prospective OCS activity.⁵ Conversely, the federal government, along with many scientists, energy experts, and economists, believes increased offshore development is a promising opportunity to meet

1. The OCS includes all submerged lands under United States jurisdiction lying seaward of the three-mile territorial sea granted to the states under the Submerged Lands Act, 43 U.S.C. §§ 1301(a)(2), 1331(a) (1976 & Supp. V 1981). The seaward distance of the OCS is limited by the Geneva Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578.

2. [12 Current Developments] ENV'T REP. (BNA) 371 (July 17, 1981).

3. [12 Current Developments] ENV'T REP. (BNA) 491, 492 (Aug. 14, 1981).

4. *Id.*

5. See, e.g., Yi, *Application of the Coastal Zone Management Act to Outer Continental Shelf Lease Sales*, 6 HARV. ENVTL. L. REV. 159, 160 n.13 (1982).

national energy needs.⁶

As the federal government and the oil industry continue to pursue this national interest, coastal states and public interest groups are demanding more input into the present OCS management process. Such attempts to influence the OCS oil and gas leasing process have generally met with federal agency resistance, and have led to numerous unsuccessful lawsuits⁷ against the Department of Interior (DOI).⁸

Three federal statutes provide for state and local government and/or public participation in the Department of the Interior's decision-making process.⁹ However, the current system for input is inadequate because (1) the Secretary of the Interior has broad discretion regarding OCS management,¹⁰ and is characteristically unreceptive to outside input; (2) direct local government and public input is severely restricted;¹¹ and (3) state, local and public participation is not provided early enough in the planning process to be effective.

One federal statute does provide the flexibility to allow earlier, and thus more effective, outside input to DOI's decision-making. The National Environmental Policy Act (NEPA)¹² requires the Department of the Interior to circulate a Draft Environmental Impact Statement (DEIS) to local governments and to the public "early" in the pre-leasing process.¹³ The purpose of the DEIS is to advise local governments and the public of the proposed leasing plan and its potential environmental effects, and to request their comments and suggestions.¹⁴ The current timing of the DEIS in the Department of the Interior's OCS pre-leasing process is inadequate because local governments and the public do not have the opportunity to respond to the draft impact statement until after several environmentally significant decisions are made.¹⁵

This Comment reviews the current opportunities for state, local

6. The OCS can be this country's largest source of domestic oil and gas by the 1990s (see 1978 U.S. CODE CONG. & AD. NEWS 1450, 1481), and the recoverable petroleum in the OCS is at least as large as reserves on United States lands. Franssen, *Oil and Gas in the Oceans*, 61 U.S. NAVAL WAR C. INT'L L. STUD. 338, 388 (1980).

7. See, e.g., *North Slope v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980); *California v. Andrus*, 608 F.2d 1247 (9th Cir. 1979); *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979); *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975).

8. See *infra* note 25. DOI has authority for the management of OCS resource leasing.

9. See *infra* notes 21-23 and accompanying text.

10. See, e.g., Jones, *Understanding the Offshore Oil and Gas Controversy*, 17 GONZ. L. REV. 221, 242 (1982).

11. See *infra* note 149.

12. 42 U.S.C. §§4321-4347 (1976 & Supp. V 1981).

13. See 40 C.F.R. §§ 1500.5, 1502.5 (1982); see also notes 139-141 *infra* and accompanying text.

14. See *infra* 116-119 and accompanying text.

15. See *infra* notes 153-156 and accompanying text.

government, and public influence on the Department of the Interior's OCS decisions, and suggests that earlier public availability of the DEIS may help cure some of the inadequacies of the current process.

LOCAL AND PUBLIC CONTROL OF OCS LEASING

Current Statutory Structure

Under international law, the United States has the right to exploit submerged lands off its coasts to whatever depths technologically possible.¹⁶ For many years, however, the federal government and the state of California have battled over the ownership of the submerged lands adjacent to that State's coast.¹⁷ In 1947, the Supreme Court held that the federal government owned all submerged lands seaward of the California coast.¹⁸ However, in 1953, Congress passed the Submerged Lands Act,¹⁹ granting states ownership of all submerged lands within three miles of their shores. Ownership of lands seaward of this three-mile territorial sea, to the limits of national jurisdiction²⁰—the Outer Continental Shelf—was retained by the federal government.

Three federal statutes control OCS resource development: the Outer Continental Shelf Lands Act (OCSLA),²¹ the Coastal Zone Management Act (CZMA),²² and the National Environmental Policy Act (NEPA).²³

The Outer Continental Shelf Lands Act governs all phases of activity relating to the OCS seabed and subsoil.²⁴ This Act gives the Department of the Interior authority for administering OCS leasing and for prescribing necessary rules and regulations regarding the leasing process.²⁵ OCSLA does not provide for direct public input

16. Convention on the Continental Shelf, *supra* note 1.

17. *See, e.g.*, *United States v. California*, 447 U.S. 1 (1980); *United States v. California*, 332 U.S. 19 (1947).

18. *United States v. California*, 332 U.S. 804, 805 (1947). Seaward of the coast means seaward of the ordinary low water mark on the coast. *Id.*

19. 43 U.S.C. §§ 1301-1356 (1976 & Supp. V 1981). The United States relinquished all lands beneath navigable waters within 3 miles of the states' coastlines. *United States v. Louisiana*, 363 U.S. 1 (1959), *reh'g denied*, 364 U.S. 856 (1960).

20. *See supra* note 16.

21. 43 U.S.C. §§ 1331-1356 (1976 & Supp. V 1981).

22. 16 U.S.C. §§ 1451-1464 (1982).

23. 42 U.S.C. §§ 4321-4370 (1976 & Supp. V 1981).

24. 43 U.S.C. § 1332. OCSLA was intended to assert ownership of and jurisdiction over the subsoil and seabed of the OCS and artificial islands erected thereon, which does not include the sea above the subsoil or the air above the sea. *Guess v. Read*, 290 F.2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962).

25. 43 U.S.C. § 1334(a) (1976 & Supp. V 1981).

into DOI's handling of offshore leasing matters, and local and state governmental input is limited under the Act.²⁶

The Coastal Zone Management Act provides for voluntary cooperation, with respect to the development of the OCS, between the affected coastal state, the federal government and the petroleum industry.²⁷ The Act requires certain offshore activities²⁸ to be consistent²⁹ with the state's approved coastal management program,³⁰ and provides that other activities, before they commence, are to be reviewed by the state.³¹ State participation under CZMA is voluntary and contingent upon the Secretary of Commerce's approval of the state's management program.³² Incentives for involvement include federal financial assistance³³ and the potential for greater influence over OCS decisions.³⁴

Presently, some confusion exists regarding the relationship between CZMA and OCSLA, particularly, whether CZMA's consistency requirements apply to OCS lease sales.³⁵ One source of this confusion is the conflicting underlying purposes of the two Acts. The thrust of OCSLA is toward rapid fulfillment of national energy needs,³⁶ whereas CZMA was designed to protect the environment.³⁷

The National Environmental Policy Act requires federal agencies to assess the environmental impacts of proposed OCS activities and to compose an environmental impact statement (EIS) before the activities begin.³⁸ Because of the uncertain applicability of CZMA's consistency requirements to OCS lease sales, and the inadequate opportunity for outside input under OCSLA,³⁹ the National Environmental Policy Act has become the predominant mechanism used by states, local governments, and environmental groups to challenge

26. See *infra* note 149.

27. 16 U.S.C. §§ 1451-1464 (1982).

28. See *infra* note 66.

29. The consistency doctrine refers to efforts to conform governmental regulations to regional land use plans.

30. 16 U.S.C. § 1455(c)(8) (1982); see also note 32 *infra* and accompanying text.

31. See *infra* notes 63-64 and accompanying text.

32. A state's coastal zone management program (see, e.g., California Coastal Act, Cal. Pub. Res. Code §§ 30,000-30,900 (West 1977)) must be submitted for approval to the Secretary of Commerce and must reflect the national energy interest. 16 U.S.C. § 1455(c)(8) (1982). Only upon such submission and approval will the consistency requirements of CZMA (which give the state much greater control over OCS development) apply. *Id.* §§ 1456(c)(1), (c)(2), (c)(3)(A), (c)(3)(B), (d) (1982).

33. The Reagan Administration has proposed to reduce or eliminate financial aid to coastal states. See Yi, *supra* note 5, at 168 n. 84.

34. 16 U.S.C. §§ 1454-1455 (1982); see *infra* note 67 and accompanying text.

35. See *infra* notes 70-80 and accompanying text.

36. See Yi, *supra* note 5 at 169.

37. *Id.*

38. 42 U.S.C. §§ 4321-4327 (1976 & Supp. V 1981); see also notes 102-106 *infra*, and accompanying text.

39. See *infra* notes 87-88 and accompanying text.

federal offshore oil and gas leasing.⁴⁰

The OCS Leasing Process

The OCSLA-authorized leasing process begins with the Department of the Interior's preparation of a five-year leasing plan.⁴¹ The Secretary of the Interior must consider the size, timing, and location of the proposed leasing to find a plan which will best suit the nation's energy needs.⁴² The plan must also assess and consider the "economic, social, and environmental values of the renewable and nonrenewable resources contained in" the OCS, and the potential impact of the planned activity on the marine, coastal and human environments.⁴³

Next, the DOI must narrow the proposed lease sales to specific tracts in the general areas described in the program.⁴⁴ A Draft Environmental Impact Statement (DEIS) is then issued describing the proposed leasing and its potential environmental consequences. Public and local government responses to the DEIS are solicited. The responses are recorded and answered in the Final Environmental Impact Statement (FEIS),⁴⁵ issued prior to the Secretary's final decision regarding which specific tracts will be leased.⁴⁶

The Secretary of the Interior then offers the offshore tracts listed in the FEIS for competitive bidding at lease sales, and grants development rights to specific tracts to "the highest responsible qualified bidder."⁴⁷ The oil companies awarded leases may explore and develop the oil and gas contained within the lease area.⁴⁸

40. See *infra* note 149 and accompanying text.

41. 43 U.S.C. § 1344(a) (1976 & Supp. V 1981).

42. *Id.*

43. *Id.* § 1344(a)(1). The Secretary must structure the leasing program "to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." 43 U.S.C. § 1344(a)(3).

44. See *infra* notes 126-133 and accompanying text (steps leading up to an OCS lease sale are considered in greater detail).

45. 40 C.F.R. § 1502.9 (1982).

46. See *infra* notes 133-134 and accompanying text.

47. 43 U.S.C. § 1337(a) (1976 & Supp. V 1981).

48. *Id.* § 1337(b)(4). After being awarded the lease, the lessee explores and evaluates the seabed under a DOI-approved exploration plan. The lessee cannot begin oil production until the DOI approves the lessee's development and production plan. *Id.* § 1351. The Secretary must submit the lessee's production plan(s) to the governor of the affected local governments. *Id.* § 1351(a)(3). The plan(s) must also be made available to the public. *Id.* § 1351.

Additionally, depending on the stage in the pre-oil production process, CZMA may require a consistency determination be made before further action is taken by the DOI or

State, Local Government and Public Participation in Federal OCS Leasing Decisions

Local communities will most acutely suffer the adverse impacts of offshore oil development. Oil from OCS operations is generally transported to adjacent land for processing.⁴⁹ Much of the oil processing equipment is situated under the waters and on the coast of the adjacent state.⁵⁰ In addition to potentially severe economic burdens for local communities,⁵¹ there are catastrophic possibilities for the local marine environment, including air, water, visual, and noise pollution.⁵² Although local communities will be the hardest hit by the ill effects of OCS oil production, their input to the OCS decision-making process is almost nonexistent.⁵³

Although the federal government has exclusive dominion over the OCS seabed and subsoil,⁵⁴ Congress has provided various channels for states, local governments, and the public to influence DOI's offshore leasing decisions.⁵⁵ When Congress enacted the Coastal Zone Management Act, improved federal-state cooperation and planning in coastal resources development was intended.⁵⁶ Such improved relations, however, have not occurred. Instead, federal-state communications on this subject have often been antagonistic.⁵⁷ Federal agencies, particularly the Department of the Interior, have opposed efforts by the states and the Office of Coastal Zone Management⁵⁸ to exercise or expand their influence.⁵⁹

Direct state and local participation in federal offshore leasing decisions has three basic statutory sources. First are the consistency re-

the petroleum industry. *See infra* note 66.

49. *See* Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107, 1107 (1976).

50. *Id.*

51. Adverse impacts of these operations include the costs of constructing new roads and/or repairing old ones due to increased oil industry use, installing new utilities, designing new water supply and sewage treatment facilities, and providing new housing, schools and public services (*e.g.*, fire, police) to the new oil workers and their families. *See id.* at 1107-08.

52. *Id.* at 1108.

53. *See infra* note 149.

54. *See supra* notes 20 and 24 and accompanying text.

55. *See supra* notes 9-11 and accompanying text.

56. 16 U.S.C. § 1451-1452 (1982) (declarations of congressional policy).

57. Gendler, *Offshore Oil Power Plays: Maximizing State Input into Federal Resource Decision Making*, 12 NAT. RESOURCES LAW. 347, 347-48 (1979).

58. OCZM is a subdivision of the National Oceanic and Atmospheric Administration (the latter agency was created by the Secretary of Commerce to administer the CZMA).

59. Comment, *Toward Better Use of Coastal Resources: Coordinated State and Federal Planning Under the Coastal Zone Management Act*, 65 GEO. L.J. 1057, 1072 (1977). The author believes federal agencies involved in the OCS decision-making process "remain concerned primarily with protecting their own authority and . . . react slowly to demands for new organizational processes." *Id.*

quirements of CZMA; second is section 19 of the 1978 amendments of OCSLA; and third is NEPA's environmental impact statement requirement. Furthermore, a state or local government presumably has the ability, outside of the federal statutory structure, to influence oil development adjacent to its coast, and thus indirectly affect leasing decisions.⁶⁰

Applicability of CZMA Consistency Requirements

The Coastal Zone Management Act was enacted to preserve and protect the resources of the nation's coastal zone⁶¹ from environmentally adverse development.⁶² As previously mentioned, state participation under this Act is voluntary; the main requirement is the development of a comprehensive coastal zone land use plan.⁶³ Once the state program is approved by the Secretary of Commerce,⁶⁴ CZMA's five consistency requirements are triggered.⁶⁵ Certain federal activities within or affecting the coastal zone must be conducted in a manner consistent with the state program's provisions.⁶⁶ Under

60. See Breeden, *supra* note 49, at 1115. Coastal states retain their authority under CZMA and OCSLA to regulate petroleum facilities falling within their jurisdictions, including the waters out to the three-mile territorial sea boundary (established as the state jurisdictional border under the Submerged Lands Act, 43 U.S.C. §§ 1301(a)(2), 1331(a) (1976 & Supp. V 1981)). State and local governments could enact land use restrictions to prevent oil companies from constructing refineries, processing plants and other facilities necessary to their OCS operations. Because the state controls rights-of-way from its shoreline to the three-mile territorial sea boundary, land use restrictions could prevent pipeline access to the shore. Such restrictions would likely be challenged by the oil companies on constitutional grounds (such as under the Commerce Clause), although the result of such a challenge is unclear. See Gendler, *supra* note 57, at 368-69.

61. "Coastal zone" is defined in CZMA as the state's "coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder) . . ." 16 U.S.C. § 1453(1) (1982). The coastal zone extends three miles seaward from the state's shoreline to the United States territorial sea boundary established by international law. *Id.*; see also *supra* note 1.

62. 16 U.S.C. § 1452 (1982).

63. *Id.* § 1454.

64. See *id.* § 1455(c) (requirements for approval of state coastal zone management plan).

65. *Id.* §§ 1456(c)(1), (c)(2), (c)(3)(A), (c)(3)(B), (d).

66. Activities subject to a consistency determination include: (1) those conducted or supported by a federal agency which directly affect the coastal zone, (2) development projects undertaken by federal agencies in the coastal zone, (3) OCS post-lease sale activities affecting the coastal zone's land or water uses which require a federal license or permit, (4) plans submitted by any person to the Secretary of the Interior for the exploration or development of, or production from any area leased under OCSLA, when the planned activity affects any land or water use in the coastal zone. 16 U.S.C. § 1456 (c), (d) (1982).

CZMA, the key to state control over federal offshore activity is the state's ability to object to a consistency determination by the federal agency.⁶⁷

The most promising CZMA provision for state control over federal Outer Continental Shelf oil and gas leasing is section 307(c)(1). This section requires federal agencies involved with activities "directly affecting" a state's coastal zone to conduct such activities in a manner "to the maximum extent practicable, consistent with [the] approved state management programs."⁶⁸ Until recently, because this section does not expressly refer to lease sales,⁶⁹ controversy existed⁷⁰ over whether section 307(c)(1)'s consistency requirement applied to DOI's offshore lease sales.⁷¹ The central issue was whether the sale of offshore leases "directly affects" the coastal zone of the state, thus requiring the Secretary of the Interior to submit a consistency determination for the state's review.

The Supreme Court has apparently settled this dispute in *Secretary of the Interior v. California*.⁷² A narrow majority⁷³ held that OCS oil and gas lease sales do not "directly affect" the state's coastal zone within CZMA's meaning, and thus a consistency review is not required.⁷⁴ Since neither the CZMA itself, nor accompanying legislative materials, define the term "directly affecting," the major-

67. Under CZMA section 307(c)(1) (the only consistency provision with potential applicability to the DOI's pre-leasing activities), federal activities "directly affecting the coastal zone" must be consistent "to the maximum extent practicable" with the state's approved program. 16 U.S.C. § 1456(c)(1) (1982). The DOI determines whether section 307(c)(1) applies. The state reviews this determination and may object. However, despite contentions that the consistency provisions are intended to give states leverage over federal actions, section 307(c)(1) can at most be viewed as a non-binding channel of state input to the DOI's decisions. See, e.g., Linsley, *Federal Consistency and Outer Continental Shelf Oil and Gas Leasing: The Application of the "Directly Affecting" Test to Pre-Lease Sale Activities*, 9 B.C. ENVTL. L. REV. 431, 444 n.67 (1980). If the state objects to the consistency determination, the federal agency is not required to disapprove the particular activity (e.g. lease sale) unless judicially compelled to do so. *Id.*

For comprehensive discussions of CZMA and its consistency requirements, see generally Yi, *supra* note 5; Comment, *supra* note 59; Shaffer, *OCS Development and the Consistency Provisions of the Coastal Zone Management Act: A Legal and Policy Analysis*, 4 OHIO N.U.L. REV., 595 (1977); Moore, *Outer Continental Shelf Development and Recent Application of the Coastal Zone Management Act of 1971*, 15 TULSA L.J. 443 (1980); Deller, *Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations be Consistent with State Coastal Zone Management Programs?*, 14 U.C.D. L. REV. 105 (1980).

68. 16 U.S.C. § 1456(c)(1) (1982).

69. Lease sales are the products of tract selection and lease provisions decisions. See *infra* notes 127-132 and accompanying text.

70. See e.g., Linsley, *supra* note 67, at 453-84. Controversy still exists, however, despite the sharply divided Court in *Secretary of Interior v. California*, 104 S. Ct. 656 (1984); see discussion *infra* notes 72-77 and accompanying text.

71. See, e.g., Linsley, *supra* note 67, at 453-84.

72. 104 S. Ct. 656 (1984).

73. The Secretary of Interior v. California case was a 5/4 decision.

74. 104 S. Ct. at 672.

ity pieced together its conclusion from an extensive investigation of the Act's legislative history.⁷⁵ In so doing, the Court reached a conclusion contrary to that of both the District Court and the Court of Appeals.⁷⁶

The four-Justice dissent in *Secretary of the Interior v. California*, lead by Justice Stevens, also went through a statutory construction exercise, agreeing with the lower court decisions that the sale of OCS leases did indeed directly affect the state's coastal zone, thereby requiring a consistency determination by the Department of the Interior.⁷⁷

The Coastal Zone Management Act's consistency provisions allow the coastal state to influence certain OCS post-lease sale activities.⁷⁸ Environmentally significant decisions are made, however, by the DOI in the pre-lease sale stages of OCS development.⁷⁹ Although section 307(c)(1) of the Act provides a potential vehicle for state influence upon those decisions, this potential has yet to be realized.⁸⁰ Furthermore, local government participation is very indirect,⁸¹ and CZMA makes no provision for direct public input.⁸²

OCSLA Section 19

The Outer Continental Shelf Lands Act was amended in 1978 to provide another method of state and local involvement in the OCS leasing process.⁸³ Under section 19 of the Act,⁸⁴ the governor of an affected state, and the executive of any affected local government "may submit recommendations to the Secretary [of the Interior] regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan."⁸⁵ The Sec-

75. The majority, led by Justice O'Connor, concluded not only that lease sales are not intended to be covered by Section 307(c)(1), but also that Congress did not intend Section 307 of the Coastal Zone Management Act to cover any federal activities outside of the state's 3-mile coastal zone. *Id.* at 666-67.

76. *Secretary of Interior v. California*, 104 S. Ct. at 673 (Stevens, J., dissenting); see *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982), *aff'g* *California v. Watt*, 520 F. Supp. 1359 (C.D. Cal. 1981). The Court reversed the decision of the Ninth Circuit insofar as it required DOI to conduct a consistency review. 104 S. Ct. at 672.

77. *Secretary of Interior v. California*, 104 S. Ct. at 689 (Stevens, J., dissenting).

78. See *supra* note 66.

79. See *infra* notes 157-160 and accompanying text.

80. See note 67 *supra*.

81. See *infra* note 149.

82. *Id.*

83. 43 U.S.C. § 1345 (1976 & Supp. V 1981).

84. *Id.*

85. *Id.* § 1345(a).

retary must accept recommendations of the governor and *may* accept those of local governments if "they provide for a reasonable balance between the national [energy] interest and the well-being of the citizens of the affected State."⁸⁶

However, the Secretary's decision whether to accept or reject such recommendations is "final and shall not, alone, be a basis for [judicial] invalidation of a proposed lease sale . . . unless found to be arbitrary or capricious."⁸⁷ Given this broad discretion vested in the Secretary concerning policy issues, and the Reagan Administration's plans to significantly increase the exploitation of OCS resources,⁸⁸ one might question whether the apparent ability, under section 19, to influence OCS lease sales decisions is not almost illusory.

National Environmental Policy Act

During the late 1960's, Congress recognized increasing public support for environmental protection and the political importance of enacting legislation addressing this concern. The National Environmental Policy Act of 1969⁸⁹ became effective January 1, 1970.⁹⁰ The Act's three main components are (1) a declaration of a national environmental policy,⁹¹ (2) a procedural basis for implementing the Act's objectives,⁹² and (3) the establishment of the Council on Envi-

86. *Id.* § 1345(c).

87. *Id.* § 1345(d). In *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982), the Ninth Circuit described its task in determining whether the Secretary of the Interior's rejection of Governor Brown's recommendation regarding Lease Sale 53 was arbitrary or capricious; "we must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment Additionally, we must consider whether the Secretary articulate[d] a rational connection between the facts found and the choice made . . . and whether the Secretary made the decision in accordance with his duty under law. . . . The court may not substitute its judgment for that of the agency." 683 F.2d at 1268-69.

The "arbitrary and capricious" test for judicial review is referred to as a narrower scope of review than the "substantial evidence" test (the usual test) and the "clearly erroneous" test. However, there is confusion as to how the three tests differ in application. *See, e.g.,* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.00 (Supp. 1982). In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), a leading case regarding the scope of review, the Court indicated the inquiry under the "arbitrary and capricious" test is essentially the same inquiry as under the "clearly erroneous" test: whether there has been a clear error of judgement. 401 U.S. at 416.; *see also* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.00. For a thorough treatment of judicial review of administrative findings, *see id.* at §§ 29.00-29.09.

88. *See Yi, supra* note 5, at 168. The Reagan Administration wants to increase the pace of oil and gas leasing for over 875 million acres of the OCS. *Id.*; *see also* 46 Fed. Reg. 39,226 (1981).

89. 42 U.S.C. §§ 4321-4370 (1976 & Supp. V 1980).

90. *Id.*

91. *Id.* at § 4331. The stated purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment . . . and stimulate the health and welfare of man" *Id.* § 4321.

92. *Id.* §§ 4332-4334.

ronmental Quality (CEQ).⁹³ The CEQ was created as a branch of the Executive Office of the President⁹⁴ to advise the President on environmental developments⁹⁵ and to recommend national policies and issue regulations⁹⁶ for the improvement of environmental quality.⁹⁷ CEQ is the coordinating body for the implementation of NEPA.⁹⁸

Although the intended effect of NEPA is unclear,⁹⁹ Congress at the very least intended to assure that federal agencies fully consider potential environmental consequences before taking action.¹⁰⁰ No specific provisions exist in NEPA, however, for judicially enforcing this goal.¹⁰¹

Section 102¹⁰² is the only NEPA provision which requires specific actions by the federal agencies.¹⁰³ The most crucial requirement is

93. *Id.* §§ 4341-4347.

94. Subchapter II of NEPA establishes the CEQ. *Id.* §§ 4341-4347.

95. The President must transmit to Congress an annual Environmental Quality Report stating the status and foreseeable trends in the quality, management and utilization of the environment. *Id.* § 4341. The CEQ prepares this report which the President then submits to Congress. *Id.* § 4344(1).

96. The CEQ issued regulations in late 1978 which are binding on all federal agencies. 40 C.F.R. §§ 1500-1508, 1500.3 (1982). CEQ had previously issued guidelines which were merely advisory. The goal of the regulations is to minimize paperwork and delay, while maximizing the quality of agency decisions. *Id.* §§ 1500.1, 1500.4, 1500.5.

97. 42 U.S.C. § 4344(4) (1976 & Supp. V 1981).

98. Exec. Order No. 11,514, Protection and Enhancement of Environmental Quality, 35 Fed. Reg. 4247 (Mar. 5 1970), reprinted in 42 U.S.C. § 4321 app. at 1722 (1976), amended by Exec. Order No. 11,991 (1977), 42 Fed. Reg. 26,967, reprinted in 42 U.S.C. § 4321 app. at 872 (Supp. V 1981). This order empowered CEQ to generally oversee the enhancement of the nation's environmental quality. 35 Fed. Reg. 4247-48.

99. See F. GRAD, 2 TREATISE ON ENVIRONMENTAL LAW, § 9.01 at 9-36 (1979). NEPA has been described as an Environmental Bill of Rights, as the most important administrative law ever passed, and as a mere preliminary step in the effectuation of a national environmental control program. *Id.* One court stated NEPA is a value judgment by Congress that to foster and promote general welfare, each generation of Americans must act as trustee of the environment for succeeding generations. Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972), cert. denied, 409 U.S. 1000 (1972).

100. See F. Grad, *supra* note 99, § 9.01 at 9-37; Jackson, *Forward: Environmental Quality, the Courts and the Congress*, 68 MICH. L. REV. 1073, 1079 (1970).

101. Because NEPA neither precludes nor establishes mechanisms for judicial review (see Liroff, *NEPA Litigation in the 1970s: A Deluge or a Dribble?*, 21 NAT. RESOURCES J. 315, 317 (1981)), the Administrative Procedure Act provides review of an agency's compliance with NEPA's procedural requirements. 5 U.S.C. §§ 701-706 (1982); see also Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974) (provisions of Administrative Procedure Act used to review compliance with NEPA).

102. 42 U.S.C. § 4332 (1976 & Supp. V 1981).

103. See *infra* note 104 and accompanying text. The rest of the Act is divided as follows: § 4321, congressional declaration of purpose; §§ 4331-4335, policies and goals; §§ 4341-4347 relate to the creation of and the duties of CEQ; and §§ 4361-4370 contain miscellaneous provisions.

that all federal agencies include a detailed Environmental Impact Statement (EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."¹⁰⁴

NEPA does not require preparation of an EIS for every federal agency action, but only for recommendations, proposals for legislation, and other federal actions which may significantly impact the quality of the human environment.¹⁰⁵ Prior to OCS lease sales, the Secretary of the Interior must prepare an EIS under section 102.¹⁰⁶

NEPA fundamentally changed federal agency decision-making procedures: agencies were forced to broaden the information base used to facilitate major decisions to include environmental factors, and their planning processes were opened to public scrutiny. The EIS is the primary instrument used to effectuate these changes. Court enforcement of NEPA's provisions, particularly those in section 102, is available: the courts generally¹⁰⁷ recognize the public has a clear right to demand an agency prepare an adequate EIS available to the public.¹⁰⁸

A court reviewing agency compliance with NEPA's procedural aspects¹⁰⁹ might find at least four inadequacies in the agency's EIS process: (1) failure to prepare a required EIS, (2) improper preparation of the EIS,¹¹⁰ (3) inadequate information in the statement,¹¹¹ or (4) failure to use the EIS's information in making the decision.¹¹² This Comment suggests the current timing of the Draft Environmental Impact Statement might be challenged as not providing adequate state and local influence at critical stages of the OCS leasing process.

104. 42 U.S.C. § 4332(2)(c) (1976 & Supp. V 1981). The EIS must discuss: (1) the environmental impact of the proposed action, (2) unavoidable adverse environmental effects of the action, (3) alternatives to the action, (4) the relationship between short-term and long-term uses of the environment, and (5) irreversible and irretrievable commitments of resources relating to implementation of the proposed action. *Id.*

105. 42 U.S.C. § 4332(2)(C) (1976 & Supp. V 1981). The CEQ regulations define the meaning of "major federal action" 40 C.F.R. § 1508.18; "proposal," *id.* § 1508.23; and "significantly," *id.* § 1508.27.

106. 43 U.S.C. § 1346 (1976 & Supp. 1981).

107. However, in one early case under NEPA, the trial court held the Act is merely a congressional statement of environmental policy which does not create any judicially enforceable duties or rights. *Bucklein v. Volpe*, 2 Env't Rep. Cas. (BNA) 1082, 1083 (N.D. Cal. 1970). This judicial attitude has not altogether disappeared. *See, e.g., Mountainbrook Homeowners Assoc. v. Adams*, 492 F. Supp. 521, 526 (D.N.C. 1979), *aff'd*, 620 F.2d 294 (4th Cir. 1980).

108. *See F. GRAD, supra* note 99, § 9.03 at 9-119.

109. For a discussion regarding whether NEPA created new substantive rights, see *F. GRAD, supra* note 99, § 9.03 at 9-117 to 9-126.

110. *See Comment, NEPA: Theories for Challenging Agency Action*, 1982 ARIZ. ST. L.J. 665, 670-71.

111. *Id.* at 668-70.

112. *Id.* at 671-73.

The Purpose and Importance of the EIS Timing

Once a federal agency determines a contemplated action requires an EIS,¹¹³ the next important issue is at what stage in the planning process the preparation of the initial or draft impact statement should begin.¹¹⁴ The timing of the draft EIS (DEIS) is of key importance to the quality and quantity of public input throughout the remainder of the agency's decision-making process. An impact statement provided early in the agency's planning process allows public input to strongly influence the agency's initial decisions, increasing the chances that subsequent decisions will reflect the public's environmental concerns.¹¹⁵

This Comment will first examine the purpose of section 102's EIS requirement. Thereafter, the timing of the DEIS in the OCS leasing context needed to effectuate this purpose, will be explored.

The courts uniformly recognize that NEPA section 102(2)(C) has a dual purpose:¹¹⁶ first, to inject environmental impact considerations into the federal agency decision-making process; second, to inform the public of the extent to which the agency has considered environmental concerns in reaching its decisions.¹¹⁷

The EIS allows parties otherwise removed from the agency planning process (the public) to independently evaluate and balance the relevant environmental factors.¹¹⁸ An additional function of the EIS is implicit in the first two: the agency is forced not only to consider environmental factors, but to consider public opinion regarding the importance of such factors.¹¹⁹

113. See generally F. GRAD, *supra* note 99, § 9.02(1)(a)(i) at 9-37. See also note 110 and accompanying text.

114. See 40 C.F.R. § 1502.9(a) (1979); see also notes 136-145 *infra* and accompanying text.

115. See *infra* note 168 and accompanying text.

116. See, e.g., *Weinberger v. Catholic Action*, 454 U.S. 139, 143 (1981).

117. *Id.* The crux of the EIS requirement is to insure that environmental considerations are integrated into the agency's planning; the EIS is the outward sign or proof that environmental values and potential impacts have been considered during the agency's decision-making process. *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

118. *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

119. Although NEPA directs an agency to consider environmental information, the agency is not required to give greater weight to environmental factors than to other considerations in its decision-making. *Strycker's Bay Neighborhood v. Karlen*, 444 U.S. 223, 227 (1980). Moreover, judicial review of the agency's use of environmental information is quite narrow. An agency decision whether to prepare an EIS and what information to address in an EIS is governed by the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1982), and only agency decisions which are arbitrary or capricious, or the result of an abuse of discretion, may be judicially overruled. *Id.* §§ 701-706. For discussion

Before preparing the Final EIS (FEIS),¹²⁰ the federal agency must affirmatively request comments from other appropriate federal agencies, appropriate state and local agencies, the public, and other interested groups.¹²¹ This is accomplished by issuing a Draft EIS, upon which such groups base their comments.¹²² The federal agency must respond to the comments in the Final EIS.¹²³ The EIS requirement partially insures against environmentally adverse decisions; the agency must not only show that it has considered environmental impacts, but also that relevant input received from the public has been incorporated into its decisions. However, judicial review of the substantive aspects of an agency's decisions is limited.¹²⁴

Timing of the EISs in the Offshore Leasing Context

Public involvement is a crucial component of every stage of a federal agency's environmental impact analyses and decision-making. Thus, the timing of the issuance of the Draft EIS, which is, in effect, a solicitation of the public's input regarding the proposed OCS lease sale,¹²⁵ is an important issue. Mineral Management Service's (MMS)¹²⁶ current procedures preceding an OCS lease sale are:

(1) MMS initially selects general areas for leasing, and collects preliminary assessments (geological, geophysical and environmental studies made by other federal agencies and private industry) of the oil, gas and other resource levels in that general area.¹²⁷

(2) A report based on these assessments and a Call for Tract Nominations is published in the *Federal Register*, thereby soliciting

of judicial review of agency decisions under NEPA, see generally Comment, *Environmental Impact Statements: Instruments for Environmental Protection or Endless Litigation?*, 11 *FORDHAM URB. L.J.* 527, 549-58 (1983); F. GRAD, *supra* note 99, § 9.03 at 9-120 to -126.7; Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 *B.C. ENVTL. AFF. L. REV.* 63 (1980). See also, K. DAVIS, *supra* note 87, §§ 29.00-29.09.

120. See 40 C.F.R. § 1502.9(b) (1982).

121. *Id.* § 1503.1.

122. *Id.* § 1502.9(a).

123. *Id.* § 1503.4. The agency must consider the comments both individually and collectively. *Id.*

124. To the extent that NEPA's procedural requirement of environmental evaluation has been met, courts generally defer to the agency's judgment on the assumption that the agency is best qualified to make that judgment. See F. GRAD, *supra* note 99, §9.03(1)(b)(i) at 9-121.

125. See *supra* notes 120-123 and accompanying text.

126. MMS has recently inherited the responsibility of administering the pre-leasing activities preceding an OCS lease sale. 47 *Fed. Reg.* 47,006 (Oct. 22, 1982). The DOI had initially delegated this responsibility to the Bureau of Land Management (BLM), 43 C.F.R. Part 3300 (1982). The procedures followed by MMS with regard to OCS oil and gas leasing are identical to those previously followed by the BLM — they have merely been redesignated at 30 C.F.R. Part 256 (1983) from 43 C.F.R. Part 3300 (1982).

127. 30 C.F.R. § 256.17 (1983).

the reaction of the public and the petroleum industry.¹²⁸ In connection with the Call for Nominations, MMS must also request comments on areas which should receive special concern and analysis.¹²⁹ This request generally includes or takes the form of an invitation for nominations for certain tracts or areas to be excluded from leasing for environmental reasons.¹³⁰

(3) After considering the responses to the Call for Nominations, MMS makes a preliminary selection of tracts for leasing.¹³¹

(4) Once the tracts are selected, MMS prepares a Draft Environmental Impact Statement.¹³²

(5) The DEIS is distributed to the public and governmental agencies for comment; public hearings are held to receive reaction to the DEIS.

(6) A Final Environmental Impact Statement is prepared, incorporating the public's comments and MMS's responses.¹³³

(7) The FEIS is used by the Secretary of the Interior, along with other considerations, in making a final determination of which tracts he or she will lease.¹³⁴

(8) A Final Notice of Sale, including tract selections and lease stipulations, is published in the *Federal Register*.¹³⁵

Currently, as noted above, a Draft EIS is prepared and circulated after MMS has made preliminary tract selections based on industry and public response to the Call for Nominations. Thus, local governments and the public must respond to the Call without the benefit of the environmental data held by the federal government.

The present timing of the Draft EIS is the product of the Department of the Interior's own interpretation of NEPA and the CEQ

128. *Id.* § 256.23.

129. *Id.*

130. *See, e.g.*, 41 Fed. Reg. 29,440 (1976).

131. 30 C.F.R. § 256.26 (1983).

132. The DEIS must comply "to the fullest extent possible" with the requirements for the FEIS. 40 C.F.R. § 1502.9(a) (1982). *See also id.* § 1502.10 (recommended format for impact statements), and §§ 1502.11-1502.18 (impact statement requirements). The most important requirements for an EIS (draft or final) are: (1) thorough discussion of alternatives to the proposed action, *id.* § 1502.14, (2) discussion of the affected environment: the impact statement "shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration," *id.* 1502.15, and (3) scientific and analytical discussion of environmental consequences. *Id.* § 1502.16.

A third document, the Supplemental EIS, is required in certain circumstances when an agency makes substantial changes in the proposed action after it has issued the FEIS, or if significant new environmental information arises. *Id.* § 1502.9(c).

133. 40 C.F.R. § 1503.4 (1982).

134. 30 C.F.R. § 256.26 (1983).

135. *Id.* § 256.29.

regulations, and of judicial interpretation of NEPA. No rigid statutory or regulatory¹³⁶ provisions govern the timing of the preparation and circulation of the draft impact statement prior to an OCS lease sale. NEPA itself does not dictate precise timing of the EIS¹³⁷ and does not mention a draft impact statement.¹³⁸

The general goal of the Council on Environmental Quality's regulations, however, is to foster public participation in the agency's planning process *as early as possible*.¹³⁹ Under the CEQ regulations, agency "procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."¹⁴⁰ Agencies are directed to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."¹⁴¹ The regulations also provide for extensive public participation in agency decision-making.¹⁴² Preliminary tract selection by the DOI is a significant decision which should not be made without informed public input.¹⁴³ A Draft EIS circulated before this decision would insure that environmental information is available to the pub-

136. Because the Council on Environmental Quality's regulations are applicable to, and binding on, all federal agencies, they contain no particular provision fixing the timing of the Draft EIS in the offshore leasing context. See 40 C.F.R. § 1500.3 (1982).

137. Section 102(2)(C) merely requires that an EIS exist at the time an agency makes a recommendation or report on a proposal for major federal action, and that the statement "shall accompany the proposal through the existing agency review process". 42 U.S.C. § 4332(2)(C) (1976 & Supp. V 1981).

CEQ's regulations direct federal agencies to commence preparation of an EIS as close as possible to the time a proposal is being developed, so that it may be completed in time for the FEIS to be included with any recommendation or report on the proposal. 40 C.F.R. § 1502.5 (1982). See also *id.*, § 1508.23:

"'Proposal' exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated A proposal may exist in fact as well as by agency declaration that one exists."

138. The statement referred to in the Act is the Final EIS. 40 C.F.R. 1502.9 (1982).

139. See, e.g., 40 C.F.R. §§ 1500.1(b), 1500.1 (a)-(d), 1500.2, 1501.7, 1502.1 (1982).

140. *Id.* § 1500.1(b). This is one of the stated purposes of the regulations. The EIS is to be prepared early enough so that it can "serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." *Id.* § 1502.5.

141. *Id.* § 1501.2.

142. The regulations provide: (1) The agency must request the public's comments and suggestions relating to the DEIS and must specifically respond to such input in the FEIS, *id.* §§ 1503.1, 1503.4, (2) the agency may hold public hearings to gather the public's opinion, *id.* § 1506.6(c), (3) the agency is required to make diligent efforts to involve the public in preparing and implementing NEPA procedures, *id.* § 1506.6(a), and (4) agencies are required to circulate and make available to the public the Draft EIS and the Final EIS. *Id.* § 1502.19.

143. See *infra* note 158 and accompanying text.

lic at an early time,¹⁴⁴ and would help insure that future DOI planning would be sensitive to environmental values.¹⁴⁵

Few cases have challenged the timing of the preparation and circulation of the Draft EIS. Most cases relating to the timing of impact statements have addressed the Final EIS.¹⁴⁶ In one case, decided before the CEQ regulations were promulgated, plaintiff argued for earlier public and local government participation in the Department of Interior's pre-leasing planning process via the issuance of an earlier EIS. Plaintiffs in *County of San Diego v. Andrus*¹⁴⁷ claimed that DOI should have prepared an EIS before issuing the Call for Nominations for OCS Lease Sale 48.¹⁴⁸

144. See *supra* text accompanying note 140.

145. See *supra* text accompanying note 141.

146. See, e.g., *Aberdeen & Rockfish v. SCRAP*, 422 U.S. 289 (1975); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Minnesota Public Interest Group v. Butz*, 401 F.Supp. 1276 (D. Minn. 1975), *rev'd on other grounds*, 541 F.2d 1292 (8th Cir. 1976).

The Supreme Court in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), for example, addressed the claims of environmental groups that the DOI could not allow further development of coal reserves in the region without preparing a comprehensive EIS under NEPA § 102(2)(C) on the entire region. The Court concluded that section 102 provides that a Final EIS is not required to be ready until the time at which the agency makes a recommendation or report on a proposal for federal action. *Id.* at 406. Furthermore, the *Kleppe* Court admonished the Court of Appeals for devising a balancing approach to determine at which point during the evolution of a potential proposal an impact statement should be prepared. *Id.* Note that *Kleppe* was decided in 1976, more than two years before the CEQ regulations required the use of DEIS in addition to an FEIS. See also *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079 (D. C. Cir. 1973) discussed *infra* text accompanying notes 161-163.

147. 10 Env't Rep. Cas. (BNA) 1681 (S.D. Cal. 1977).

148. See *Complaint for Declaratory Judgment, Injunctive Relief and Mandamus, County of San Diego v. Andrus*, No. 77-0236 (S.D. Cal., April 14, 1977) [hereinafter cited as *Complaint*]. Because the Call for Nominations invited the public to make negative nominations for specific offshore tracts to be excluded from the leasing plaintiffs asserted, "The lack of availability of an [EIS] during this public review period precluded meaningful input into this highly significant decision." *Id.* at 7. The plaintiffs believed the various geological and environmental data that the BLM had collected and its preliminary assessment of that area, should have been made available to the public and local governments by an EIS before plaintiffs were required to make negative nominations. *Id.* at 10. The district court dismissed the suit, however, agreeing with the defendants that the action was premature. 10 Env't Rep. Cas. (BNA) at 1682. The court stated that, "Before a meaningful EIS can be prepared, the agency must first formulate a proposal of sufficient definiteness upon which the EIS can be based . . . [A final] EIS is not required before a proposal has been formulated." *Id.* at 1683.

Despite the pre-CEQ regulations date of the San Diego case, its interpretation of when the Final EIS must be completed is still valid; the regulations conform with, and indeed support, this interpretation. See 40 C.F.R. § 1502.9(a), (b) (1982); see *supra* notes 139-141 and accompanying text (discussion of CEQ's regulations relating to the timing of the Draft and Final EISs).

RECOMMENDATION

The National Environmental Policy Act has become the major vehicle for local government and environmental group challenges to federal offshore leasing, largely because effective participation by these groups under CZMA and OCSLA is almost impossible.¹⁴⁹ A pre-Call for Nominations Draft EIS would: (1) provide for public and local government participation early in DOI's planning process as required by NEPA and its regulations,¹⁵⁰ (2) help insure that DOI's subsequent decisions would reflect local environmental concerns,¹⁵¹ and (3) likely result in a reduction of lawsuits concerning OCS leasing.¹⁵² In short, an earlier draft statement would increase the public's chance to affect preliminary tract selection — a key decision in the offshore leasing process.¹⁵³

An Earlier Draft EIS

In the present Department of the Interior pre-leasing planning process, some most important decisions — the selection of general

149. Under OCSLA, direct public participation is not provided for, and local governments may give recommendations to the DOI only through the governor of the affected state. The Secretary of the Interior must consider these suggestions, but he has discretion to absolutely reject them. 43 U.S.C. § 1345(c) (1976 & Supp. V 1981). OCSLA seriously restricts local governments from participating in the OCS process: "There is to be no independent basis for legal action by a local government unit [against the DOI] . . . because of a dispute regarding any alleged failure to consult with . . . or receive the recommendations of a local government." Gendler, *supra* note 57, at 356 & n.75 (noting the frequent use of this disclaimer in Congressional explanations of federal-state cooperation under the 1979 amendments to OCSLA).

Local governments indirectly participate in the offshore leasing process under CZMA by working with the state in developing a comprehensive land-use program which, upon approval by the Secretary of Commerce, activates CZMA's consistency requirements. See *supra* note 64 and accompanying text. Similar to OCSLA, no provisions exist for direct public participation in the DOI's decision-making process.

150. See *supra* notes 139-142 and accompanying text. There is opportunity for early public input under the CEQ regulations in a process called "scoping." 40 C.F.R. § 1501.7 (1982). "There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." *Id.* As part of the scoping process, the DOI must "(1) Invite the participation of affected Federal, State, and local agencies . . . and other interested persons (including those who might not be in accord with the action on environmental grounds) . . ." *Id.* § 1501.7(a)(1). The regulations also provide that the agency *may* hold meetings relating to the proposed action, *id.* § 1501.7(b)(4); the DOI generally does hold public meetings prior to OCS lease sales.

The problem is that such early "participation" falls on deaf ears. Nowhere is the DOI (MMS) required to respond to any such public input nor to incorporate it into its decision-making. On the other hand, once a Draft EIS has been issued, the DOI is required to invite the public's comments, and to include them and specifically respond to them in the Final EIS, *id.* §§ 1503.1-1503.4, which the Secretary of Interior must consider in making a final decision regarding which tracts to lease. *Id.* § 1502.1.

151. See *supra* note 115 and accompanying text.

152. See *infra* note 162 and accompanying text.

153. See *infra* note 158 and accompanying text.

leasing areas and the selection of specific tracts to be leased¹⁵⁴ — occur before the DEIS is made available to the public. Local governments and public groups must respond to a Call for Nominations, including negative nominations for certain tracts, without the aid of the Draft EIS and the environmental impact data contained therein. Furthermore, during the brief period between the publication of the Call and the due date for public response,¹⁵⁵ the public and local governments are asked to provide specific environmental information to support their negative nominations.

The current timing of the preparation and circulation of the DEIS also occurs too late in MMS's progression of pre-leasing decisions to allow effective public input.¹⁵⁶ The lack of DEIS availability during these periods precludes meaningful local governmental and public participation in this crucial governmental decision.¹⁵⁷

Preliminary tract selection is perhaps one of the most important decisions in the entire DOI (MMS) leasing process. This selection provides impetus for the ultimate leasing of, and drilling in, those specific tracts: it is a commencement toward actual leasing without informed public input based on a Draft EIS. The Call and the preliminary selection of tracts together represent a substantial commitment by the DOI to proceed with oil production in the selected area.¹⁵⁸

Such a substantial commitment should only be made after public review and consideration of an environmental impact statement. The District of Columbia Circuit has held that a Final EIS must be ready in time to give the public an opportunity to assess environmental impact before the agency commits itself, *even tentatively*, to action.¹⁵⁹ The Department of the Interior's preliminary tract selection

154. See *supra* notes 126-131 and accompanying text.

155. This period is generally about two months; see, e.g., Complaint, *supra* note 148, at 7.

156. At the time of the Call for Nominations, the DOI (through MMS) has already collected numerous assessments and studies of the geological and environmental resources of the general area to be leased. See 30 C.F.R. § 256.22 (1983). The public is asked, however, to make knowledgeable comments and commitments to negative nominations in response to the Call without the benefit of this environmental information.

157. See Complaint, *supra* note 148, at 7.

158. Preliminary tract selection is environmentally significant not only because it provides impetus for the ultimate leasing of specific tracts within the general area. This decision is also significant because it greatly reduces the huge general OCS area (e.g., 13.2 million acres for Lease Sale 48, 41 Fed. Reg. 29,440 (1976)) to specific tracts, pinpointing the human and natural environments which might be affected by the potential adversities of offshore oil production.

159. *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *rev'd on other*

is just such a tentative commitment to action — the actual leasing of those tracts — and should occur only after public input through an impact statement.

As noted earlier, the NEPA and its regulations are intended to assure timely external input into federal agency decision-making.¹⁶⁰ The consideration of environmental information early in the agency's planning has been discussed in numerous decisions.

In *Scientists' Institute for Public Information v. Atomic Energy Commission*,¹⁶¹ the District of Columbia Circuit observed that environmental impact statements must be prepared late enough to contain meaningful information, but early enough that their contents will help to ensure that decisions reflect environmental concerns.¹⁶² The court held that while the decision of when to prepare the statement rests with the agency and not the courts, "some degree of judicial scrutiny of an agency's decision that the time is not yet ripe for a NEPA statement is necessary in order to ensure that the policies of the Act are not being frustrated or ignored."¹⁶³

Preliminary tract selection by the Department of the Interior is a decision which fails to adequately assess environmental concerns. Effective external input is needed *prior* to this key decision:¹⁶⁴ a draft impact statement issued prior to the Call for tract nominations would provide a basis for such input.

In *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*,¹⁶⁵ a case involving the integration of NEPA's requirements into the nuclear licensing process at the Atomic Energy Commission, the court noted:

Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action — at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.¹⁶⁶

Preliminary tract selection in the OCS leasing process is such an "important stage" where an overall balancing of factors is important and where alterations might be made to minimize environmental

grounds, 427 U.S. 390 (1975).

160. See *supra* notes 137-142 and accompanying text.

161. 481 F.2d 1079 (D.C. Cir. 1973). This case involved the development of the liquid fast breeder reactor.

162. *Id.* at 1094.

163. *Id.* The court continued: "Agency decisions in the environmental area touch on fundamental personal interests in life and health, and these interests have always had a special claim to judicial protection." *Id.*

164. See *supra* note 158 and accompanying text.

165. 449 F.2d 1109 (D.C. Cir. 1971).

166. *Id.* at 1118.

harm.¹⁶⁷

As demonstrated above, early public participation on the basis of a pre-Call for Nominations DEIS could result in more balanced DOI decisions. A pre-Call impact statement would enhance the ultimate goals of NEPA and the CEQ regulations by incorporating environmental values into the DOI's planning in preliminary stages, insuring subsequent decisions are not made with callous disregard for potential environmental consequences. Additionally, earlier public and local governmental input in response to a pre-Call DEIS could lead to reduced NEPA litigation concerning OCS leasing.¹⁶⁸

Opposition to an Earlier DEIS

Arguments against a pre-Call DEIS also exist. First, opponents may contend an earlier impact statement would entail added economic cost and delay the leasing program. Added costs and delay must be subordinated, however, to the requirements and goals of NEPA¹⁶⁹ for responsible environmental policy. Additionally, earlier public participation could ultimately reduce the costs and delay of the entire leasing program. Local governments and environmental groups might be less likely to litigate to block OCS leasing if they have enjoyed early meaningful participation in the federal government's planning process.

A second factor opposing a pre-Call DEIS is precise data on potential environmental impacts may not yet be available to incorporate into the DEIS. However, the public and local governments pres-

167. See *supra* note 158 and accompanying text.

168. Because environmental groups and local governments would participate in the initial stages of the DOI's planning, the DOI's subsequent decisions would be more likely to reflect this participation. This could reduce litigation because: (1) these groups would view DOI's decisions more favorably given their early involvement in that agency's planning, and (2) the decisions of the DOI subsequent to the DEIS would more likely reflect the concerns of these groups.

169. "We have said, and we still believe, that '[c]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip the section [102(2)(C) of NEPA] of its fundamental importance.'" *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1247 (D.C. Cir. 1980) (quoting *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Commission*, 449 F. 2d 1109, 1115 (D.C. Cir. 1971)).

DOI generally claims that a lack of funding would preclude earlier, extensive environmental studies. An innovative approach would be to "require some percentage of the vast profits made by Interior from oil and gas revenues to be put into an environmental studies fund and to require that some of the profits made by the oil companies from OCS development be contributed to the same fund." Letter from Kelly Rigg, National OCS campaign coordinator for Greenpeace USA (Aug. 25, 1983) (on file with SAN DIEGO LAW REVIEW).

ently have the burden of quickly¹⁷⁰ determining specific environmental data to make intelligent suggestions in response to the Call, while the Department of Interior holds valuable information and assessments of the general leasing area beyond the public's reach. If DOI made this general information available in a pre-Call DEIS, public input would be undeniably more intelligent.¹⁷¹

A third opposition argument is that the public and the local governments have other adequate opportunities to express their views regarding environmental impacts.¹⁷² The first problem with this observation, however, is that most of these opportunities come too late in relation to the preliminary tract selection decision to allow the public to affect that crucial decision.¹⁷³ Second, input may be disregarded because MMS is not required by its rules to respond to the input. A third problem is public participation through these administrative channels activates the exhaustion of the administrative remedies rule.¹⁷⁴ As long as the decision whether to proceed with a proposed lease sale is in the DOI administrative process, DOI has primary jurisdiction over any related dispute and judicial review is seriously limited.¹⁷⁵ Because the CEQ regulations provide precise procedures for DOI to follow once it has issued a Draft EIS,¹⁷⁶ a DEIS issued before the Call for Nominations would increase the chances of judicial review of DOI's (MMS's) procedural compliance with NEPA.

CONCLUSION

The present timing of the Draft EIS in the OCS petroleum leasing context is insufficient to fulfill the purpose of the National Environmental Policy Act and its regulations. Local governments and the public do not have an adequate opportunity, before preliminary tract

170. *Supra* note 155 and accompanying text.

171. A pre-Call DEIS, of course, could never be as precise in its evaluation of alternatives and their impacts as a statement prepared after specific tracts had been selected. NEPA does not, however, require that preparation of a *Final* EIS be delayed until all relevant environmental effects are known. *Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973). *A fortiori*, such a claim could not be made with respect to the *Draft* EIS. One alternative would be for MMS, after tract selection is made, to supplement the pre-Call DEIS with the alternatives and impacts relevant to oil production in the specific tracts.

172. Availability of other opportunities for public input into DOI's decision making was a major reason *County of San Diego v. Andrus* was dismissed. 10 Env't Rep. Cas. (BNA) 1681, 1683 (S.D. Cal. 1977).

173. *See, e.g.*, CEQ's "scoping" requirement at 40 C.F.R. § 1501.7 (1982), discussed *supra* note 150.

174. *See, e.g.*, *U.S. v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956).

175. *See, County of San Diego v. Andrus*, 10 Env't Rep. Cas. (BNA) 1681, 1683 (S.D. Cal. 1977) (citing *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976); *Far East Conference v. U.S.*, 342 U.S. 570 (1952)).

176. 40 C.F.R. §§ 1500-1508 (1982).

selection, to assess and provide input regarding the potential environmental consequences of the proposed leasing.

A Draft EIS issued prior to the Department of the Interior's Call for Nominations would help cure the inadequacy of the current process. A pre-Call impact statement would further the aims of NEPA and the CEQ regulations by integrating public environmental values into initial DOI decisions. This would help insure that subsequent DOI planning would reflect these environmental concerns, and could also result in reduced litigation over offshore leasing.

Congressional legislation is needed to clearly define the limits of state and federal authority in the OCS, to lead to a more balanced decision-making process, and to provide for more and earlier input from the public, local governments and coastal states. Presently, these groups must continue to resort to the courts to influence federal offshore leasing decisions.

EDWARD CORWIN

