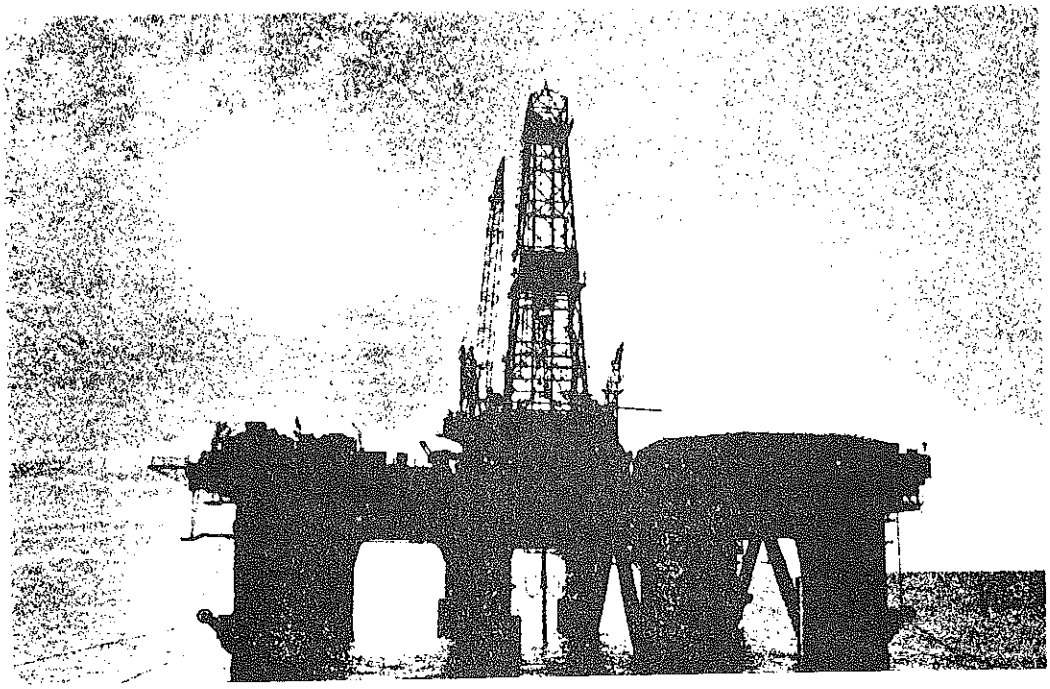

OCS Policy Study

Prepared for

Washington State Department of Ecology
Shorelands & Coastal Zone Management Program
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JUNE 1986

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OUTER CONTINENTAL SHELF POLICY STUDY

FOR

THE DEPARTMENT OF ECOLOGY

STATE OF WASHINGTON

JULY 1986

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PREFACE

On February 19, 1986, the Shorelands and Coastal Zone Management Program of the Washington Department of Ecology authorized Cogan Sharpe Cogan to study and analyze state policy options for oil and gas leasing on the Washington Outer Continental Shelf (OCS). The department is permitted to authorize this study by Section 306 of the Coastal Zone Management Act (CZMA) of 1972.

This study was subdivided into three elements:

1. Examination of OCS policy issues

2. Assessment of options within the Washington Coastal Zone Management Plan (WCZMP) for OCS leasing, exploration and development

3. Analysis and program recommendations

Eight reports covering these three elements are included on the following pages.

The consulting team undertaking this work was composed of the following individuals and firms.

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TABLE OF CONTENTS

I. POLICY ISSUES STEMMING FROM OIL AND GAS LEASING ON THE WASHINGTON OUTER CONTINENTAL SHELF

Cogan Sharpe Cogan, June 30, 1986

TABLE OF CONTENTS

I. INTRODUCTION

A. CZMA Authorization for this Study

On February 19, 1986, the Shorelands and Coastal Zone Management Program of the Washington Department of Ecology authorized Cogan Sharpe Cogan to study and analyze state policy options for oil and gas leasing on the Washington Outer Continental Shelf (OCS). The department is permitted to authorize this study by Section 306 of the Coastal Zone Management act (CZMA) of 1972.

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2. Assessment of options within the Washington Coastal Zone Management Plan (WCZMP) for OCS leasing, exploration and development

3. Analysis and program recommendations

B. Purpose of this Report

This report is addressed to the first element, a summary examination of OCS policy issues. It is the result of three principal steps:

- An orientation process that defined objectives of the Department of Ecology regarding this work and provided the consulting team with all appropriate materials.

- Preparation of an annotated bibliography of state and federal statutes, rules, regulations, procedures and policies relevant to OCS proposals concerning oil and gas leases.

- Analysis of policy issues applicable to the pre-lease and post-lease periods. The former analysis was organized according to the following:

  . Substantive issues

    - Planning area size (subarea deletions)
    - Location of leases within planning area
    - Timing and sequence of lease milestones
    - Coastal and marine resource protection
    - Funding for environmental review
    - Jurisdiction (including tribal fisheries)

  . Procedural issues

    - Environmental review process
    - Federal consistency
    - Federal, state, local agreements
    - Negotiation/lease sale participation

Issues to be included under the post-lease period are the following:

- Use conflicts
  - Commercial fishing
  - Recreation
  - Shipping
  - Other
- Facility siting
  - Onshore
  - Offshore
- Oil transportation
- Air and water quality
- Socioeconomic impacts
- Ecological impacts

C. Related Work Under This Contract

The following tasks related to this policy issues report have been completed:

- Evaluation of existing legislation, policies, and regulations.
- Evaluation of initiatives in other OCS regions.
- Formulation of WCZMP options.
- Presentation of workshop to consider policy options.

Reports on these subjects were prepared.

II. BACKGROUND AND SETTING

A. U.S. Department of Interior's OCS Oil and Gas Leasing Program

1. OCS Lands Act Authority

In 1953, Congress passed the OCS Lands Act (OCSLA) to expedite exploration and development of the Outer Continental Shelf (OCS). The OCS refers to offshore submerged lands under federal jurisdiction. For most states, it is generally those areas seaward of a line three miles from shore, which is the outer limit of state jurisdiction. Off the Washington Coast the shelf extends 12-40 miles before it begins its descent to the ocean floor. In 1983, President Reagan extended the jurisdiction of the U.S. to 200 miles. The Lands Act, as amended in 1978, requires that a leasing program "shall consist of a schedule of proposed lease sales . . . to best meet national energy needs for the five-year period following its approval or reapproval." The U.S. Department of Interior administers the OCS program through its Minerals Management Service (MMS).

Each OCS leasing program is a schedule of lease sales over five years. A lease sale is an offering of offshore blocks within a specific planning area. A typical tract is three miles on a side or nine square miles. The oil and gas industry bids competitively for leases to explore and develop these tracts. Each lease sale is preceded by pre-sale activity which takes approximately two years. Among these pre-sale steps, the federal government solicits industry to determine interest in the area under study, prepares environmental impact statements (EIS), conducts hearings, notifies governors of a proposed notice of sale, and reviews all pertinent comments. During this time, the Secretary of Interior may eliminate any area from leasing consideration because of environmental or other concerns. Blocks also may be dropped because no company is interested in bidding.

2. Experience of Leasing on U.S. Continental Shelf

Offshore oil development began in the United States "off the coast of Summerland (about 5 miles from Santa Barbara, California) in 1896 when wooden piers and platforms were erected along the shoreline. Offshore oil development, conducted mainly by means of piers very close to shore, continued through the 1920s and 1930s . . . In 1929 the first state leases were issued (off the coast of California) in the ocean area out to 3 miles, which is under the management authority of the state."[1]

"Up until the 1950s, offshore oil operations remained confined to the shoreline or in near shore waters. It was not until the late 1950s that new technological discoveries allowed oil companies to extend the range of their exploration. The first

truly offshore oil platform - Hazel - was built in 1958 in state waters, in 100 feet of water offshore Summerland."[1]

Federal jurisdiction and management responsibility for the OCS and OCS resources has been affirmed by the courts. In United States v. Maine, 420 U.S. 515 (1975) the Supreme Court held that states have no constitutional guaranty to management authority or control of the continental shelf, as that power belongs to the United States. Only Congress can grant the states authority over the continental shelf, as it has done in the Submerged Lands Act of 1953 which allows states to exercise control out to three miles and in the OCSLA which allows states a limited role beyond three miles.

When it began, offshore oil and gas development did not attract much attention as it was confined mainly to that part of the Gulf of Mexico off the coast of Louisiana. "The short history of offshore energy exploration in California coastal waters could hardly contrast more than that of the Gulf of Mexico. The federal offshore program in the Gulf grew slowly from the 1940s in quiet obscurity unexamined by the public eye, and only cursorily monitored by the federal government until the proposal to designate the unique Flower Gardens Coral Reef a national marine sanctuary, right in the middle of a drilling area off Louisiana and Texas catapulted the federal offshore program into the national press."[2] Since that time, federal/state relationships have been plagued with conflict and characterized by a level of contentiousness forcing greater use of the Congress and courts to formulate rational and equitable solutions.

Two events in the late 60s and early 70s affected the politics of coastal management and outer continental shelf development for years to come. "The tragic accident of the Santa Barbara oil spill in 1969 left the citizens of California wary of any further exploration. This incident in Santa Barbara was major in its proportions and influenced the decision to reduce activities of offshore explorations in the succeeding years."[3]

The other major event was the 1963 OPEC oil embargo which stimulated national concern for achieving energy independence. In 1974 President Richard Nixon directed the Department of the Interior (DOI) to accelerate its OCS program to lease 10 million acres on 1975, an amount equal to all previous federal leasing in the OCS since 1953. In 1978, Congress responded with major amendments to the 1953 Outer Continental Shelf Lands Act, requiring in part that DOI adopt five year lease sale schedules and outlined procedures for carrying them out.

Over the last 30 years, the OCS has produced more than 7 billion barrels of oil and 70 trillion cubic feet of natural gas. Today, offshore production accounts for about 1/8 of

domestically produced oil and 1/4 of domestic natural gas.[4] Some have estimated that almost half of future oil discoveries are expected to come from offshore areas.

Unfortunately, states have derived little direct benefits from the federal leasing activity. According to a consultant on this project, Professor Richard Hildreth, co-director of the Ocean and Coastal Law Center at the University of Oregon School of Law, "In the 30 years between 1953 and 1983, the federal government received over $68 billion from outer continental shelf oil and gas leases without sharing any with the adjacent coastal states."[5]

For a few years, starting in 1976 when Congress passed an amendment to the CZMA establishing the Coastal Energy Impact Program, about $100 million per year in grants, loans and other assistance was made available to help states mitigate possible adverse impacts from offshore oil development. Since 1981, funding has been eliminated and the program is now defunct. Some other proposals for sharing OCS revenue with the states have been considered by Congress, by none enacted yet.

3. Description of Proposed Program

Preparation of an OCS leasing program for 1987-91, the period of concern in this study, began in mid-1984. At that time, the Interior Department asked for suggestions on which planning areas should be offered and when; the size of individual sales; and possible conflicts with defense, shipping, fishing, and other economic or environmental interests.

In March, 1985, the Department of the Interior submitted a draft proposed program for review. The next, and current step, was to prepare the proposed program which is now under review by Congress, governors and local governments of coastal states, affected federal agencies, and other interested groups. Since approval of a leasing program is a major federal action which could affect the environment, the department is required to prepare a programmatic EIS considering alternative courses of action. The Secretary's decisions and approval of the final program must be supported by data in the EIS.

This proposed five-year OCS oil and gas leasing program operates between January, 1987 and December, 1991. The current proposed program was issued by the Mineral Management Service in February, 1986. Comments on the program, which calls for 33 sales in 17 planning areas, must be received by May 8, 1986 by the Deputy Associate Director for Offshore Leasing, Minerals Management Service (MMS).

Over the five-year period, the proposed program provides for 27 standard sales. That portion relevant to the State of Washington is sale #132, the Washington-Oregon Planning Area. In addition to 15 subareas of OCS planning areas deferred from leasing, there are 13 subareas identified for further analysis and comment. Of these, the westerly portion of the Washington-Oregon planning area is one of three subareas considered to be beyond the area of hydrocarbon potential. This subarea lies generally west of the continental shelf which extends approximately 40 miles seaward from the Washington coast.

The proposed program contains a new feature, frontier exploration sales, described in the proposed program as those areas where "incomplete geological data, MMS estimates of lower value, or current industry indications of lower interest call for an early decision point on whether to proceed with the standard presale process."[6] Ten frontier exploration sales are proposed including Washington-Oregon.

For sales in frontier areas, a request soliciting industry interest will be published in the Federal Register approximately four months prior to the call. The call depicts the area of hydrocarbon potential projected by MMS. According to the proposed program, "the call may be tailored on a case-by-case basis to exclude portions of the planning area (as in the exclusion of the Flower Garden Banks from the 1987 Western Gulf of Mexico sale)."[6] The level of response to the request for interest will help determine whether to proceed with the presale process. If there is insufficient interest in the sale, it can be deferred or cancelled. The request for interest for sale #132 is scheduled for December, 1988.

B. Proposed Lease Sale #132 - Washington/Oregon

1. History of Northwest Offshore Oil and Gas Exploration

The Washington Department of Natural Resources, the state agency authorized to lease state-owned land for oil and gas exploration, development and production, reports that "exploration interest in lands on the continental shelf off Washington's coast, has remained fairly steady for a number of years. To date, six wells have been drilled in this area, but no production has occurred. Aquatic lands in every county abutting the ocean have been leased for oil and gas exploration in the past; 100,000 acres were leased in 1978 (by the Department of Natural Resources). Two wells have been drilled on department aquatic lands; neither well was productive."[7] In 1978, the lease sale for state lands was offshore the Long Beach Peninsula. They expired in the spring of 1983.

Between April 1965 and August 1967, 12 exploratory wells were drilled on the Washington/Oregon OCS as a result of an oil and gas lease sale held on October 1, 1964. Evidence of hydrocarbons was found in some of the wells but none were considered

to be of commercial quality at that time. This lease sale was the second on the Pacific OCS, the first having occurred 18 months earlier off central and northern California.

The process for this sale moved ahead on August 14, 1963 when the federal government called for nominations on an OCS block covering more than "6 million acres off Oregon and nearly two million acres off Washington. A total of 651 whole and partial blocks (3,490,560 acres) were nominated, 446 blocks (2,401,920 acres) off Oregon and 205 blocks (1,088,640 acres) off Washington. Each whole block (a three-mile square) contained 5,760 acres . . . .

"A total of 196 tracts (encompassing 1,090,074 acres) were offered for lease, 149 tracts (836,134 acres) off Oregon and 47 tracts (253,940 acres) off Washington . . .

"Bids were received on 101 tracts (580,853 acres). Seventy-four of the tracts (425,433 acres) were off Oregon and 27 tracts (155,420 acres) were off Washington. The total of the high bids was $35,533,700.64, averaging $61.17 per acre. Oregon tracts brought in bids totaling $27,768,772.24 ($65.27 per acre), and Washington tracts totaled $7,764,928.40 ($49.96 per acre). No high bids were rejected . . . . The highest bid off Washington was $1,785,888.00 ($310.05 per acre) for tract 20 in the Copalis Beach area between Grays Harbor and Willapa Bay; the bid was placed by the Superior Oil Company/ Pan American Petroleum Corporation (Standard Oil Company of Indiana) consortium. Tracts off northern Washington were not offered at this lease sale because of the disputed boundary. All leases were relinquished between November 21, 1966, and November 30, 1969, and well records were made public by the U.S. Geological Survey on December 1, 1974."[8]

Despite the outcome of the 1964 lease sale, the level of industry interest in offshore oil and gas deposits in the Pacific Northwest has continued and could increase, particularly in the relatively shallower portions of the continental shelf. Seismic survey mapping continues, with some indication that the potential for offshore oil along the Washington coast may be greatest along two sedimentary basins--off Willapa Bay in the Willapa Canyon, and off the mouth of the Columbia River in the Astoria Canyon.

2. Description of Planning Area

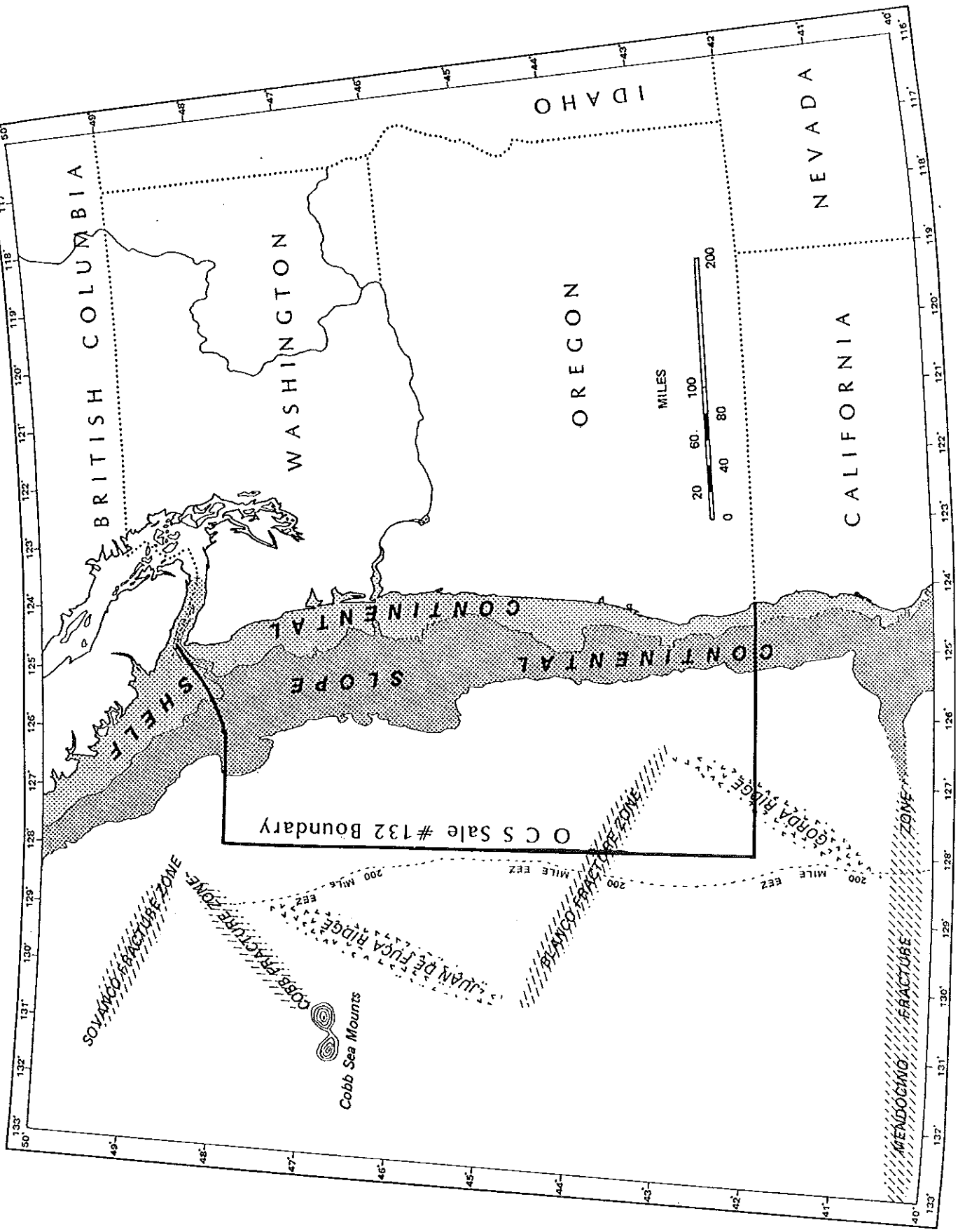
The Washington planning area is very large, totaling approximately 31,000 square miles, an area equivalent to half the State of Washington. In contrast, state waters within three miles of the coastline total approximately 516 square miles.

According to Interior's proposed program, the Washington/ Oregon outer boundaries are 128° west longitude, or approximately 150 miles west of Cape Flattery on the north and slightly less than 200 miles west of Cape Disappointment on the south. This large size is intended by DOI to encompass the maximum area of hydrocarbon potential while permitting the ultimate focusing on promising acreage. The western boundary is approximately 100 miles beyond the edge of the continental shelf, at depths in excess of 10,000 feet, and in Governor Booth Gardner's opinion, "well beyond the limits of drilling technology."[9]

The Minerals Management Service (MMS) estimates that there are 56 million barrels of oil equivalent within the Washington/ Oregon OCS, with an estimated net economic value of $207 to $454 million in 1987 dollars, with the variation dependent on the range of oil import prices between $19 and $29 per barrel. According to MMS, the estimated social costs (including environmental costs) to be incurred from development of hydrocarbon resources from the Washington/ Oregon planning area are less than $500,000. The MMS states that industry ranking of the potential of the Washington/ Oregon planning area is 15th on a list of 24, while the ranking by interest of industry is 13th.[6]

A map of the Washington/Oregon Planning Area for OCS Sale #132 appears on the following page.

WASHINGTON/OREGON OCS PLANNING AREA



3. Summary of Lease Milestones

According to the proposed program, the following major events are scheduled during the five-year lease period.

Date	Milestone
1986 - February	Proposed program issued by Secretary of Interior
- May	Comments to be submitted to Interior Secretary
1988 - December	Request for Interest in Sale #132, due to its designation as a frontier exploration sale
1989 - April	Call for information & nominations
- July	Area identification
1990 - March	Draft Environmental Impact Statement for blocks within Sale #132
- April	Public hearing and comments
- October	Final Environmental Impact Statement
- December	Proposed notice of sale
1991 - February	Governors' comments due
- March	Final notice of sale
- April	Sale of tracts within #132
- May	Bid adequacy review
- June	Lease issued with exploratory drilling and erection of offshore platforms to follow

C. Relationship of Department of Interior Leasing to Coastal Zone Management Program

The Outer Continental Shelf Lands Act (OCSLA), in Section 19, requires the Secretary of the Interior to "consult" with the Governors of states affected by OCS lease sales. Under the Coastal Zone Management Act (CZMA), federal agencies are required to act in a way which is "consistent to the maximum extent practicable" with

a federally approved state Coastal Zone Management Program (CZMP). These two separate (and, in some ways, unrelated) federal provisions have a number of important differences from a state level viewpoint. The differences fall under at least four categories:

- The standing of the state's comments:

  -- who makes them
  -- what criteria must be followed in order to overrule

- The stage of the OCS leasing process to which the state's comments are made.

- Who decides in contested situations?

- The role or responsibility of the commenting state.

A brief description of each of these points follows:

1. Standing of State's Comments

   Standing here refers to the weight and import given to a state's comment. Under the OCSLA consultation process, the secretary seeks the views, comments, suggestions, proposals, requests and recommendations of the Governor. The secretary, however, has full discretion to follow his own course without explaining, point-by-point, his reasoning to a Governor whose advice he chooses not to follow. The standard of judicial review of such secretarial decisions is quite low: the "arbitrary and capricious" test. The courts have given secretaries wide latitude and broad discretion in these decisions, and attempts to increase the standard of judicial review (and thus make it more difficult for a secretary to reject a governor's recommendations) failed in the Senate last month.

   Under the CZMA, a federal agency must evaluate the state's federally approved (by the Secretary of Commerce) CZMP to determine whether or not an intended activity would have a "direct effect" upon the state's coastal zone. If so, the federal agency then determines whether its activity is consistent with the CZMP. The state's coastal zone management agency (not the Governor) is given an opportunity to review the federal consistency certification; if it concurs, the activity proceeds.

   If a coastal management agency objects to an activity which the federal agency itself will undertake, the agency may proceed nonetheless. The burden falls to the CZM agency to bring suit; heavy weight is given to such provisions, and the courts will not allow inconsistent action to proceed. If a coastal management agency objects to a license or permit to be issued by a federal agency, (which a permit applicant has

determined to be consistent), the permit may not issue. The burden then shifts to the permit applicant to appeal the state CZM agency's objection to the Secretary of Commerce. The secretary has only two grounds on which to authorize the permit to issue: if the project is necessary to the national security or if it is consistent with the CZMA, regardless of whether it is inconsistent with a (perhaps more stringent) state CZMP.

2. Stage of Leasing Process to which State Comments are Made

The two federal reviews apply to different stages in the OCS leasing process. As the situation now stands, OCSLA consultation takes place during the earlier stages and consistency determinations are made at the later stages.

No state ever asserted consistency review authority at the five-year schedule stage (the one currently applicable to Washington). Similarly, there are several early stages in the life of each lease sale (call for nomination, preliminary notice of sale, etc.) which were never identified as "federal activities directly affecting the coastal zone"; consistency has never been applied to those steps. It was the final Notice of Sale for Lease Sale 53 which California (joined by many other coastal states) asserted was such an activity. Ultimately, the Supreme Court disagreed with California. Therefore, a state's only formal review of proposed OCS activities at the pre-lease stage is provided by the Section 19 consultation process.

The Supreme Court did assure states, however, that they retain consistency review authority over post-lease activities which involve actual drilling operations--at the Plan of Exploration and Development Production Plan stages. OCS consultation on the five-year schedule and the leas sale has concluded by this time, and therefore, consistency provides the only formal mechanism for state participation in the process during the final stages of the decision-making process.

More is known about the location and level of OCS activity later in the process, making it possible to measure the proposal against the CZMP and to negotiate specific mitigation measures with the operator. It is too late, however, at this stage, for a state to entirely reject OCS activity on tracts which have been leased. Also, it has been Interior's practice to submit the consistency determination before environmental studies or an EIS have been completed. This was the cause, for example, of California's objection to a Cities Service platform in the northern Santa Maria Basin.

Other decisions have called even this "late and limited" consistency review authority into question: the Secretary of Commerce overruled a California objection to a Union Oil drillship within the buffer area to the shipping lane in the

Santa Barbara Channel, just off Anacapa Island within the Channel Islands National Park and Marine Sanctuary. Intense negotiations assisted somewhat in increasing mitigation measures, it is true; but a secretarial override of a nonessential "delineating" well in a hazardous location and an extremely rich and sensitive habitat made it apparent that few state CZM objections would be upheld under the current federal administration.

The secretary did uphold a California objection to an Exxon exploratory drillship operation which prohibited drilling during the height of the season in a rich thresher shark fishing ground in the western Santa Barbara Channel. Sun Oil, on a nearby tract, abided by the time limitation by Exxon took both the California Coastal Commission and the Secretary of Commerce to court. Unfortunately, the Federal District Court ruled that the operation, about 12 miles offshore, had no "direct effect" upon the coastal zone and therefore was not subject to CZMA requirements.

3. Who Decides in Contested Situations?

As noted above, the Interior Secretary has full discretion and control over the OCSLA process, except for judicial review. In the CZMA process, a (theoretically) independent third party, the Secretary of Commerce, makes the final decision. since the Secretary of Commerce is responsible for coastal zone management and for rejection or approval of state CZMPs, support for a state should be expected. The secretarial endorsement of the Exxon thresher shark appeal gives states some hope that such support would be forthcoming. However, the Department of Commerce's intervention in a lawsuit against the State of Delaware--in a coal transshipment terminal case--brings that presumed support into question again.

4. The Role or Responsibility of the Commenting State

The difference between the two processes is found in the role or "mantle" assumed by the state. In the OCSLA consultation, the Governor is expected to approach the subject from a relatively parochial, self-interested point of view, representing the wishes of his constituency and the expressed desires of his state agency advisors or local governments.

This is quite different from the role of the CZM agency in reviewing consistency determinations. In creating the CZMA, Congress expressed the national interest in the coastal zone resources of the nation. In order to secure federal approval of its CZMP, each state must demonstrate that it has balanced the interests of both state and nation, and has provided adequate opportunity for port, coastal-dependent industry and energy facilities. Once federal approval is secured, a state's CZMP becomes a part of the national coastal management

plan. In a real sense, state CZM agencies serve as federal officers, protecting and managing a national resource. The election of a new governor, who may be more or less tractable in the OCSLA consultation process, cannot (and should not) modify the contents of the national coastal zone management plan, with which all federal activities must be consistent. Any such modification should be made only through the established CZMP amendment process.

III. PRE-LEASE POLICY ISSUES

The substantive and procedural policy issues analyzed in this section deals with the pre-lease period, that is all activity prior to April 1991, the projected date of sale of tracts within #132 for Washington/Oregon. While the overall lease program technically lies between January 1987 and December 1991, the process for sale #132 actually does not begin until December 1988 when MMS issues a request for interest. The overall review process began in July 1984 when the Secretary of Interior initiated a consultation process through a request for comments about the draft proposed program from governors of coastal states, interested federal agencies, the oil and gas industry, and the public.

A. Substantive Issues

1. Planning Area Size

The Washington portion of the OCS planning area under consideration is approximately 31,000 square miles, an area equivalent to half the State of Washington. There are numerous problems with such a large area. From an economic standpoint, this proposed lease sale places an enormous supply of land on the market all at one time. The inevitable result will be a reduced market value for this and other similarly large lease sales.

Ecologically and geologically, it is impossible to obtain sufficiently detailed data about such a huge divers area, nor would it be economical to undertake the required research to identify possible problems. The Environmental Studies Program promulgated by DOI includes several activities of importance to Washington in the next fiscal year: a symposium to explore research needs; evaluation of socioeconomic characteristics of coastal communities; collection of meteorological data; and possible study of sea otters.

As Washington Governor Booth Gardner stated in his May 1985 letter to the Secretary of Interior, "the draft program as presented is unbalanced and, to that extent, unacceptable because it purports to offer the entire Washington offshore for oil and gas leasing, including tracts which are beyond the continental shelf and goes well beyond the limits of drilling technology, both current and near-term future. Lease offerings should be limited to the acreage contained in the promising geologic structures."[9]

Likewise, Oregon Governor Vic Atiyeh, in his May 1985 letter to the Secretary, stated, ". . . the planning areas are too large and are based on political boundaries rather than geological ones . . . planning areas should only include geological basins of high hydrocarbon potential and of high industry interest, but should exclude subareas with significant fisheries. Oregon will continue to assert this

common sense approach to offshore leasing. I ask again that the areawide lease sale concept be abandoned."[10]

Washington and Oregon governors are not alone in their desire to limit the scope of lease sales encountered here. For example, within the last year, the states of Louisiana and Texas tried to test the legality of area wide leasing; the courts rebuffed these efforts and upheld DOI rights to proceed.

The Secretary of Interior may select some subarea deletions at a later time. It should be noted that about half the total lease area offshore Washington/Oregon has been identified in the proposed program as a subarea beyond the area of hydrocarbon potential, requiring further analyses and comment. For the states of Washington and Oregon, ultimate deletion of these subareas obviously would be a welcome reduction of the total planning area. However, it is not certain that these subareas will be deleted at all, either totally or partially. In any event, DOI proposes that the size of lease sales be determined by a presale process which focuses on promising acreage.

2. Location of Leases Within Planning Area

There are indications that the greatest potential for Washington offshore oil may be along two sedimentary basins--in the Willapa Canyon off Willapa Bay, and the Astoria Canyon off the mouth of the Columbia River. A possible lease approach would be to limit the offerings to these two areas if it were possible to mitigate whatever adverse impacts that might be encountered either through establishment of buffer zones or areas of limited or no activity to protect fisheries, habitats and other important resources within 20 to 30 miles from the coastline. Information from seismic soundings could identify more precisely these two areas or others with a high likelihood of oil or gas. Coastal areas north of Grays Harbor are less likely locations; more importantly, they are not desirable locations for onshore oil-related activities. Six Indian reservations as well as a national park and several national wildlife refuges are located in the vicinity.

A useful approach for selecting subareas where leases should and should not appropriately be located would be to develop broad, rational criteria. Such a process could be facilitated through the formation of geographically or technically based advisory groups. Agreement with such criteria among federal, state and local agencies, as well as public and private interest groups, would precede the selection of subarea deferrals.

3. Timing and Sequence of Lease Milestones

Washington is not included in the existing five-year schedule which expires in mid-1987. The timetable for 1987 through 1991, described in detail in the proposed program now being evaluated, will not be adopted until later in 1986. Even though the Secretary of Interior will not publish a request for interest for sale #132 until December, 1988, with a call for information and nominations in April, 1989, he will adopt the proposed final program in late 1986 or early 1987. Until that time, the proposed programs issued in February, 1986, provides preliminary guidance for sales after January 1, 1987. Sales on the current schedule will continue to be held in accordance with that schedule until the new program receives final approval.

Regarding the anticipated time schedule, the proposed program states that "the program's approach is necessarily flexible because many of the factors that affect OCS leasing are unpredictable. World oil price trends, international politics, the success or failure of various exploration strategies, and the development of new technologies for finding, producing, or refining oil and gas are but a few of the factors subject to continued change."[7]

Certainly, within the last few months, the downward spiral of oil prices and the continued volatile nature of political affairs in the Middle East underscore the likelihood that any schedule anticipated even six months ago probably will be different from one to be adopted six months from now. This factor only complicates the problem facing Washington concerning the limited amount of time and resources available to formulate an optimum strategy for dealing with offshore oil and gas exploration. According to the schedule of lease milestones, there is only an eight-month period between the issuance of a draft environmental impact statement for blocks within lease sale #132 (March, 1990) and the proposed notice of sale (December, 1990), hardly an adequate time period to formulate a suitable response.

4. Coastal and Marine Resource Protection

The very size of the planning area proposed by the Department of Interior makes the development of a detailed inventory of resources difficult, if not impossible. As the ability to conduct such inventories is beyond the resources of the State of Washington or other public institutions in the Northwest, technical assistance must be solicited and obtained from appropriate federal agencies such as the Department of Interior's Minerals Management Service, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration.

A detailed program of research and resource protection must be designed and implemented to include commercial and sport fish as well as nongame resources and endangered species such as whales and sea lions. A closely coordinated effort involving state departments of Fisheries, Game, and Ecology, among others, will be required.

5. Funding for Environmental Review

It is clear that the Department of Interior's perception of social costs associated with the development of recoverable hydrocarbon resources in the Washington/Oregon planning area is inadequate. The summary attachment to the draft proposed program states that the development of oil and gas resources in the Oregon/Washington planning area could provide $207 to $454 million in benefits while incurring "negligible" social costs of less than $0.5 to $1 million. The range depends on the oil import price per barrel. The social costs, which include regulatory, administrative, mitigating and other expenses, will be much higher, undoubtedly, when one considers the 500 miles of fragile, complex coastline to be dealt with in the two states. Furthermore, many impacts, such as an oil spill, can be of a disproportionate magnitude to the amount of oil or gas drawn from the OCS.

The current (1985/86 fiscal year) budget for OCS activity within the Washington State Department of Ecology is about $100,000 with a similar amount slated for next year. This amount is sufficient only to support one full time professional and part time support staff. When funds were available under the Coastal Energy Impact Program, additional studies, such as one conducted on the subject of sea birds, were possible. A special grant of $40,000 under CZMA Section 309 was made available this year to permit a study of sea otters by the State Department of Game.

The issue of funding is related to the amount and thoroughness of coastal and marine resource research discussed above. Qualitative and relative analysis is required, particularly of those areas most sensitive to oil exploration practices or likely to contain rich deposits of oil or gas. Major environmental research--from population studies of marine mammals and seabirds to geohazard studies of the sea floor--must be undertaken. The Environmental Studies Program sponsored by DOI is an important start in this effort. However, the critical questions are who will sponsor these research efforts and when. Considering the limited funds of the states, equity and fairness dictates that the burden of paying for the necessary research and also of compensating for any adverse impacts of exploration should be on the agency responsible, i.e., MMS.

6. Jurisdiction

The Submerged Lands Act states that Washington along with other coastal states, has clear jurisdiction over the three-mile coastal area. Minerals, including oil or gas, found on or under this coastal shelf belong to the State of Washington. The next adjacent band, generally three to six miles from the coast, falls under the jurisdiction of the federal government out to the 200-mile limit. However, as any drilling within this three-mile band could drain off an oil pool under the state's three-mile boundary, Section 8(g), OCSLA, provides that states should receive a "fair and equitable share" of revenues from leasing tracts adjacent to state waters. For seven years, there has been a disagreement between state and federal governments over the meaning of the "8(g)" provision and the proper share of revenue produced from the leasing and development of these "common pool tracts." This impasse finally ended on April 7, 1986 when President Reagan signed legislation giving coastal states 27 percent of all revenue earned within the 8(g) zone.

Other jurisdictional issues affecting oil exploration and development in the OCS are:

- The federal Clean Air Act assigns jurisdiction to EPA, the Environmental Protection Agency, to establish and regulate air quality standards within the three-mile limit. Beyond this, the U.S. Department of Interior is in charge. A conflict is therefore possible between the Department of Interior as a sponsor of projects which are potential polluters and as the assigned regulator of that air pollution.

- Another possible jurisdictional conflict concerns the establishment, extension and enforcement of shipping lanes in the OCS planning area. The U.S. Coast Guard has the responsibility of recommending shipping lanes to the Intergovernmental Maritime Organization in London which establishes such lanes. At the present time, the Marine Safety Division of the 13th Coast Guard District in Seattle is developing standards to guide the formulation of voluntary routes for ships offshore Washington's coastline. These may later result in their permanent establishment as designated shipping lanes. With the Department of Interior as the agency responsible for permitting oil/gas exploration in the OCS, the need for coordination with those who determine shipping traffic lanes is obvious.

- Two federal agencies, the Corps of Engineers and the Environmental Protection Agency, issue permits for waste discharges into the water within the three-mile zone adjacent to coastal shiplines. Although the Corps'

Section 404 permit process is limited to the state's territorial waters, EPA's NPDES process does not have such limits and applies to specific discharges produced by all exploration, production, and transport of oil or gas. EPA further becomes involved with the issuance of general permits under NPDES for the overall lease sale areas themselves.

- Extensive Indian tribal fishery activity exists off the coast of Washington. Federal courts have upheld the treaty rights for Indians to fish and manage fisheries in their "usual and accustomed places," including certain ocean areas. This activity together with increased sports and other commercial fishing operations creates a large potential for jurisdictional conflict involving oil exploration, production, and transportation operations.

B. Procedural

1. Environmental Review Process

Congress passed the National Environmental Policy Act (NEPA) under the principle that major federal actions are subject to public scrutiny through the preparation of an environmental impact statement (EIS). While NEPA has helped to raise environmental concerns as a factor in the OCS decision making process, there are great concerns that the areawide approach to leasing makes it very difficult to obtain useful data and prepare an EIS that is useful.

As stated by Governor Booth Gardner in his 1985 letter to the Secretary of Interior, "among the most important and immediate tasks is the initiation of a comprehensive environmental studies program. Without this effort, Washington State resource agencies will be ill-prepared to respond to OCS-related impacts."[9] An important issue is how, when, and through what process the State of Washington can obtain critically needed data on the specific lease sales. For DOI to conduct an environmental impact study of the exceptionally large planning areas is not only prohibitively expensive, but may even be futile as little data can be available to the states or other interested parties until just prior to the sale. As stated earlier in this paper, this may be too late to influence the important policy decisions required.

California, like Washington, has enacted a State Environmental Policy Act (SEPA), requiring the conduct of an environmental impact review (EIR) for oil and gas related facilities located within state jurisdiction, e.g., pipelines connecting offshore rigs to onshore facilities. Of possible use to Washington is the California experience primarily in the Santa Barbara area, of undertaking a joint EIS/EIR, saving time and expense for both state and federal interests. Further study of this practice would be desirable to ascertain its value from a resource protection standpoint.

Another technique to help mitigate adverse impacts of oil and gas development and protect sensitive offshore habitats is the use of biological stipulations. "Over the past decade, a variety of stipulations have been formulated and invoked for different lease sales in the Gulf of Mexico. At first, lease stipulations dealt primarily with issues of oil spill containment (specifying the equipment required of lessees drilling close to sensitive marine habitats) and platform placement (in an effort to minimize conflicts with commercial fishermen). However, the concept has been progressively expanded to protect other resources and to accommodate new environmental concerns. In particular, military, cultural, biological, and geological stipulations have been regularly invoked in recent Gulf of Mexico lease sales. The intent is (a) to mitigate the impact of oil and gas exploration and development on other prospective uses (military, fishing, recreation, research) by protecting the resources that sustain those activities, and (b) to reduce the risk of pollution by ensuring that oil-related structures are located away from hazardous areas."[11]

2. Federal Consistency

The Coastal Zone Management Act (CZMA) was enacted in 1972 to encourage prudent management of natural resources in the coastal zone. The CZMA requires all federal activities directly affecting the coastal zone to be conducted in a manner consistent with the federally approved state coastal zone management plan. The U.S. Supreme Court, in Interior v. California, 464 U.S. 312 Y (1984), held that the Interior Department was not required to perform a consistency review before the sale of oil and gas leases on the outer continental shelf. Subsequent lower court decisions found that lease sales per se are not subject to consistency requirements.

The University of Oregon's Coastal Law memo states that "The (Interior vs. California) decision casts doubt on the application of the consistency requirement to any activity not physically within the coastal zone, reducing the effectiveness of the CZMA . . . it remains to be seen whether 'directly affects' includes social or economic impact as well as physical impacts on the adjacent coastal zone."[12]

In a separate concluding statement in the coastal law memo, it is stated that "the Interior vs. California decision dealt a serious blow to the CZMA by removing the most powerful remaining incentive for states to adopt and maintain coastal zone management programs . . . the recent 'anti-consistency' decisions in the wake of Interior vs. California illustrate the need for Congress to better define state and federal roles in the management of our ocean and coastal resources."[12]

Some members of Congress are seriously concerned that the Secretary of Interior has not been giving adequate consideration to comments made by governors on the five-year plan for leasing OCS lands. A Congressional effort which failed earlier this year to amend Section 19 of the OCS Lands Act to require the Interior Secretary to explain why these comments are not followed, could have resulted in re-establishment of a type of consistency review overturned in Interior vs. California. If this amendment to the OCSLA had succeeded, Governors' comments would have been given greater standing, since the Secretary of Interior can now virtually ignore such comments on a proposed lease sale.

Because there is a fundamental conflict and tension between the interests of the federal government and states, this issue can be expected to be raised again, both in Congress and the courts. States must vigorously pursue their position, recognizing that federal agencies will attempt to minimize the importance of state concerns while resisting any move to change their decision making authority.

In the view of Professor Richard Hildreth, consultant to this study and co-director of the Ocean and Coastal Law Center of the University of Oregon School of Law, three separate consistency provisions are relevant to oil and gas development. These are:

- Lease sale consistency under Section 307(c)(1) which states "each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practical, consistent with (federally) approved states (coastal) management programs." The United States Supreme Court in its Interior vs. California case of 1984 decided that this section did not apply to DOI's lease sale decisions.

  Even against the "highly charged, litigational background," Professor Hildreth contends that "the results of applying Section 307(c)(1) consistency to OCS lease sales were mostly positive, both from a national interest and a state perspective."[5]

- Exploration, development, and production plan consistency under Section 307(c)(3)(B) requires OCS leasees who submit exploration, development, and production plans to DOI to certify that all activities described in those plans "affecting any land use or water use from the coastal zones" comply with the state's federally approved coastal management program and will be carried out in a manner consistent with the program. Technically, this is a post-lease issue, but is included here as part of a coherent discussion of the consistency questions. As

Professor Hildreth points out, "no federal licenses or permits from such activities may be issued until the state concurs with the applicant's consistency certification, or the Secretary of Commerce overrides the state's inconsistency objection by finding that either the activity is consistent with the objectives of the CZMA or 'is otherwise necessary in the interest of national security and larger.'"[5]

- Consistency of OCS-related permits under Section 307(c)(3)(A) "provides that the permit applicant shall certify to the federal permitting agency that the proposed activity complies with the state's coastal management program and will be conducted consistent with it, and that the state must concur in the certification or the Secretary of Commerce must override the state's inconsistency objection before the permit may be issued." It should be noted that this section can apply either to pre- or post-lease activities.

  Again, as Professor Hildreth points out, "the two principal permits issued by Interior under the OCSLA affected by this section are pipeline rights-of-way issued pursuant to OCSLA Section 5(e) and pre-lease geophysical exploration permits issued pursuant to Section 11(a). During fiscal year 1983, the coastal states concurred in 40 such permits processed by Interior pursuant to this section."[5]

  Professor Hildreth points out that this section "also provides states with very important rights regarding OCS-related permits issued by federal agencies other than Interior. Most significant are the so-called 'general' permits issued by EPA in various OCS areas for discharges from OCS oil and gas operations (such as drilling muds) pursuant to Section 402 of the Clean Water Act."[5]

3. Federal, State and Local Agreements

The most successful use of agreements for DOI permits occurred following the December 1980 destruction of more than 1,200 crab pots by a seismic survey vessel off the Washington and Oregon coasts in undertaking geophysical exploration approved by DOI. The two states successfully negotiated a memorandum of agreement to improve permit notification and coordination and thereby minimize possible conflicts in the future.

The federal/state agreement regarding the crab pot issue referred to above is a good example of the type of agreements which could be negotiated for other OCS lease sale issues.

Numerous opportunities exist for the formulation of creative agreements involving federal, state, and local agencies. Hundreds, if not thousands, of meritorious examples of interagency agreements exist in every state in which one or

more federal agencies are involved. These range from Corps of Engineers arrangements with cities and counties for the disposal of dredge spoil to Forest Service coordination of recreation projects with state and local agencies. Within the Department of Interior, the Bureau of Land Management has developed several techniques of coordination and review involving other federal, state, and local agencies, particularly those situations involving minerals, geothermal, and oil/gas leasing practices.

Also within DOI, the MMS has developed the concept of the federal/state task force to coordinate non-energy mineral exploration in the OCS off of California, Hawaii, and North Carolina. The Gorda Ridge Task Force is an example of such an approach.

Useful models of multi-jurisdictional planning, negotiation, and agreement can be found involving complex issues in limited geographical areas. For example, Richardson Bay, part of the San Francisco Bay system, a collaborative inter-governmental planning process was created which includes: "identification of a special area; development of a planning process; a consensus by all parties; integration of federal, state, and local requirements; public involvement; and an implementation program."[13]

Another example is Louisiana's Joint Public Notice System (JPNS) which was implemented in August, 1983 between the Louisiana Department of Natural Resources, Coastal Management Division (CMD) and the United States Army, Corps of Engineers, New Orleans District (COE). The purpose is "to issue joint public notices of permit applications for activities within the coincident jurisdiction of each agency . . . . The JPNS has provided two important benefits: (1) improved state/federal coordination; and (2) improved decision efficiency and predictability within the CMD."[14]

During the last several years, Congress has demonstrated sensitivity to concerns of coastal states about OCS oil and gas lease sales in specific areas offshore from California. For example, on December 18, 1985, members of a conference committee from the U.S. House of Representatives and Senate agreed to language in an appropriations measure which "prohibits the use of funds for leasing in the north Atlantic/Georges Bank Planning area as proposed by the House. The managers (of MMS) have agreed that negotiations should continue between the secretary and members of the California delegation and members from the appropriate committee of jurisdiction. The managers hope that these negotiations provide the appropriate range of advice to the secretary as he strives to seek consensus. The ongoing negotiation process must continue so this longstanding dispute can be resolved."[15] Prior to this statement the Committee on Appropriations deleted the moratoria on offshore leasing in California planning areas. However, Congress

apparently intends to continue using the threat of moratoriums in specific locations to ensure that the DOI Secretary is more responsive to state concerns and to prevent certain sensitive areas of the OCS from being offered for lease.

4. Negotiation/Lease Sale Participation

It is important to develop additional means for negotiation beyond the formal processes dictated by congressional action and court decisions. Creative processes that bring together the various interests--state agency personnel, governors, local officials, special and public interest groups, potential leasees, and others--is in everyone's best interest. Techniques worth exploring include use of mediation, regional coastal advisory committees, joint public notice systems, and creating forums for coordination and consultation. A good example of the latter concept is the Institute for Resource Management of Colorado created by Robert Redford. Early in 1986, Mr. Redford brought together representatives of major oil companies and national environmental organizations to discuss leasing practices off Bristol Bay in Alaska. The specific purpose was to reach a consensus regarding those areas which should be protected from leasing. Even though agreement among the participants was reached, DOI proceeded to lease anyway, over the objections of Alaska's Governor Bill Sheffield.

IV. POST-LEASE ISSUES

Issues considered in this section of the report cover that period after April, 1991, when sale #132 is expected to occur.

A. Use Conflicts

1. Commercial Fishing

The Washington Department of Fisheries has developed an extensive communication system with the fishing industry in the state that can help if conflicts arise with oil/gas exploration and development. The department also maintains hotlines covering specific problems of concern to commercial fishermen. Fishing fleets in the state are centralized with Ilwaco, Westport, and Puget Sound as important bases.

The Department of Fisheries also maintains close coordination with the Northwest Indian Fisheries Commission and the Pacific Fisheries Management Council. The latter group sets the fishing seasons within the 200-mile wide U.S. fisheries zone. The Northwest Indian Fisheries Commission assists with cooperative fisheries management, coordinates tribal activities with Washington fisheries agencies, and represents tribal views to national and interstate interests. Extensive Indian fishing operations exist off the Washington coast, in some areas well beyond the three-mile limit of coastal waters, creating the likelihood of conflict with oil and gas exploration, development, and transport operations.

Seventy percent of the annual catch of Dungeness crab occurs in December. This fishery is found along the Washington coast south of Destruction Island. There is a large bottom fish industry along the entire Washington coast, consisting of black cod, halibut, rockfish, Dover sole, and other flatfishes.

The state Department of Fisheries will want to review all proposed offshore lease sales to determine any impact on significant fishing areas and fish habitats. Depending upon the results, it may propose stipulations in the lease sales that reduce or eliminate anticipated impacts on commercial fishing. The approach used for stipulations in the Gulf of Mexico was discussed earlier in this paper.

2. Recreation

The major impacts on recreation are onshore and nearshore activities such as boating, ocean viewing, and sports fishing for salmon, albacore tuna, and bottomfish. The most likely conflicting uses are onshore facilities for pipelines and work boats related to offshore oil development.

The Washington Shorelines Management Act of 1971 states "the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible." Clearly, avoidance of possible damage from drilling discharges and major oil spills is crucial to attainment of this goal.

3. Shipping

With oil exploration and development occurring in the deeper waters off the Washington shore, the likelihood of conflict with large vessels increases. Despite the generally good safety record of the oil industry, there will be increasing possibilities of collisions and oil spills. Agreement on a vessel traffic safety plan is an important step in minimizing conflict with oil exploration and development activities. The plan should consider how to avoid established traffic lanes; prohibit temporary or permanent structures near them; control or designate waiting areas for construction of pipelines or structures near traffic lanes; and employ radar reflectors and automatic alarm devices.

The State of California became involved in a conflict concerning the location of a Union Oil drillship in a shipping channel near Anacapa Island. However, the state objection was overridden by the Secretary of Commerce. On the other hand, the state did participate in negotiations concerning shipping lanes in the Santa Barbara Channel.

Studies should be initiated to determine whether a significant increase in traffic off the Washington shoreline during the exploration and development period should be anticipated. It is known that the 13th Coast Guard District in Seattle is proceeding with the development of safety standards to guide shipping off the Washington coast.

4. Other

Oil and gas exploration and production activities generate drilling muds and cuttings that are discharged into the ocean. Assurances must be incorporated into the post-lease agreements to assure that biological productivity and quality of the coastal marine ecosystem would be preserved.

In a memorandum, Michael Fischer, now consultant to this study and then Executive Director of the California Coastal Commission, suggested that guidelines for ocean disposal of drilling muds and cuttings should include consideration of "general criteria for protecting marine organisms and associated habitat areas; suggestions for biological baseline information; mitigation measures and monitoring programs; and recommendations . . . for consistent, practical and enforceable ways to provide a greater assurance that coastal marine ecosystems are protected."[16] The statement also contains recommendations to

industry "to continue to refine drilling muds and cuttings recovery and chemical fixation technologies and to use muds which are as additive free and environmentally benign as possible."[16]

B. Facility Siting

Key documents guiding and regulating siting facilities along the coast of Washington are the shoreline master programs prepared by the four coastal counties. These documents should be updated to include provisions that control the siting of onshore storage facilities, lay down yards for pipe equipment and other materials, and landfall siting of offshore pipelines. The Department of Ecology should assist the communities to prepare these amendments as well as the appropriate regulatory documents.

C. Oil Transportation

The threat of oil spills from oil and gas exploration and development activities is an ever present concern as evidenced by the recent unfortunate experiences in the Port Angeles and lower Columbia River areas. According to a California Coastal Commission policy statement, there is a high probability (95 percent for large spills and 73 percent for very large spills) of accidents that could result from lease sale #73 from Point Conception to Morro Bay.

The California policy statement states further that "a large or very large oil spill, whether from a blowout on an oil platform, an exploratory rig, or a vessel accident can damage the environment, the economy, the lives of those involved in the immediate area, and the nation as a whole." It continues "environmentally sensitive habitats and recreational resources shall be protected to the maximum extent feasible from possible oil spills. Buffer zones between these areas and offshore oil operations may be required to provide time for oil spill cleanup measures (mechanical and chemical) to reduce the amount of oil reaching areas requiring protection, and to allow time for the most toxic portions of the spilled oil to evaporate. When required, the size of these buffer zones will depend on the environmental and recreational sensitivity of the region and the ability of special spill prevention or cleanup measures to respond to a spill in a way that minimizes the risk to acceptable levels."[17]

D. Air and Water Quality

The quality of the oil which can be recovered off of Washington's shoreline is not yet known. The higher its sulfur content, the more likely air pollution problems will result from the refining process. Oil from Alaska is relatively low in sulfur compared to California. Extensive tests on the type of oil expected to be recovered offshore from Washington are required before the extent of air pollution is known. Special attention must be given to

water and air pollution mitigation measures during the processes of oil exploration, drilling, pumping, ship loading, and refining.

E. Socioeconomic Impacts

From experience in other parts of the United States, the benefits of oil and gas exploration tend to be distributed nationally while the costs are concentrated locally. The federal government is a far bigger beneficiary than state and local jurisdictions. As an example of this disparity, in 1983, the federal government received $9.1 billion in total revenue from California's offshore oil development. Approximately $362 million from state leases was received by the state and only $36 million by all affected cities and counties.[1]

Another issue is the likely increase of some population growth on highly localized portions of the Washington coast once oil exploration and development begins. The issues of housing, schooling, urban and social services for newcomers in these areas must be considered. However, judging from past experience, offshore oil exploration and development in Washington is not likely to benefit the overall state economy to any great extent. Some limited employment opportunities will be available to Washington workers during the construction period, but the number of permanent employees will be relatively small. Many will be specialized workers recruited from outside the state.

F. Ecological Impacts

Unfortunately, there are few baseline studies that evaluate the impact of oil on the marine environment, particularly its effect on spawning grounds, shellfish, growing areas, wildlife habitats and similar resources. A major concern is the toxicity of the drilling muds or fluids used for well control and bit lubrication in the drilling process and their potential detrimental impact on marine life, particularly on young larvae. Some scientific studies also raise questions about the possible negative effects on fish eggs of the seismic acoustic pulse generators (air guns) normally part of geophysical exploration.

V. CONCLUSIONS

A. Findings

1. There is serious question about the recourse available to the State of Washington to influence, prevent, or delay the outcome of DOI lease sales, given the authority of the Secretary of Interior to make the final decisions and the diminished state prerogatives under court interpretation of state consistency powers. A recent congressional effort to amend Section 19 of the OSCLA to give governors' comments greater standing in lease sale decisions failed early in 1986. It can be expected that this issue will be raised again, both in Congress and in the courts.

2. During the last decade, Congress enacted numerous laws regarding the oceans, often in response to differing and sometimes conflicting interests and constituencies. The result was a body of laws which are "essentially single purpose in nature, and occasionally, internally inconsistent--e.g., laws were passed protecting marine mammals, promoting fisheries, promoting the development of oil and gas resources and hard minerals--purposes not always consistent and compatible with one another . . . this sectoral and single purpose framework under which each resource/use is under the jurisdiction of a different agency operating under a different legal mandate, poses a variety of problems: (1) advance planning for heavily used ocean areas is made more difficult; (2) no mechanisms are readily available for early identification and resolution of conflicts among uses; and (3) no opportunities exist for making tradeoff decisions among alternative ocean uses."[1]

3. Systems to resolve conflicts among federal, state, and local agencies and rationalize the divergent forces of oil production, revenue generation, and resource protection are inadequate. There is neither time nor sufficient resources for state and local officials to deal with these issues. In other leasing areas the tendency has been to deal with such issues on a project-by-project basis, neglecting important areawide policy matters.

4. Due to the compressed time schedule for conducting environmental impact statements and making data and other detailed information available to states and other interested parties about the sale, there is little opportunity to prepare a suitable response or influence the important policy decisions to be made. Furthermore, the extraordinarily large planning area proposed for sale #132 creates special economic, ecological, and geological problems so as to make rational evaluation of any specific locations a virtual impossibility.

5. With the demise of the Coastal Energy Impact Program, states and local jurisdictions receive little or no revenue to help them deal directly with the issues related to offshore oil and

gas. This is especially onerous when other federal grant and revenue sharing programs are being cut back or eliminated. The recent agreement to distribute to coastal states revenues generated from the leasing and production of common pool tracts adjacent to state territorial waters gives some hope that further oil and gas revenues might be shared with states.

6. Specific issues of concern to the State of Washington include potential conflicts between offshore oil exploration and development, and commercial, sport or Indian fishing; adverse affects on air and water quality; potential impacts of blowouts or oil spills; disruption to normal patterns of maritime shipping; proliferation of onshore industrialization; and damage to fragile environmental and recreational resources.

B. Preliminary Recommendations

1. To overcome its weaknesses inherent with any attempt to conduct negotiations with DOI, the state should take the initiative by mounting a comprehensive and integrated strategy of planning and management, strengthening its shoreline master programs, coordinating the response of affected state agencies, undertaking joint action between Washington and Oregon, initiating lawsuits on specific issues, and joining in with other state lawsuits already underway.

2. Washington, along with other states, must vigorously pursue a point of view in Congress and in the courts that legitimate state concerns and governors' comments be more adequately considered in decisions about specific sales by the Interior Secretary. There is some evidence of a changing relationship between state and federal agencies, e.g., the Exxon vs. Fischer case in California. These changing relationships should be examined carefully to determine what legal, political, institutional, and financial strategies could effectively be adopted by the state to respond to federal leasing initiatives.

3. The Department of Ecology should be alert to opportunities for support from members of the Washington Congressional delegation. For example, utilizing the threat of appropriations moratoria in specific locations off the coast of Washington and Oregon could be a useful strategy for placing limits on oil and gas leasing activities. Moreover, soliciting support from appropriate members of the delegation could be useful for other measures such as amendments to OSCLA Section 19 to ensure greater DOI sensitivity to state concerns.

4. There may be some value to utilizing the California experience of joint EIS/EIR documents to save time and expense for both state and federal agencies concerned with oil/gas related facilities within the three-mile zone and onshore. Also, consideration could be given to a practice employed in the

Gulf of Mexico to the use of biological stipulations to mitigate adverse impacts of oil and gas development at specific locations and to protect sensitive offshore habitats of particular concerns.

5. The shoreline master programs prepared for each of the four coastal counties could be key documents to guide and regulate the siting of facilities on the coast. These programs should be updated to include provisions for controlling the siting of onshore facilities. Such as support bases, staging yard, lay down yards for pipe equipment and other materials, and landfall siting of offshore pipelines.

6. In order to mount a successful program of coastal and marine resource protection, technical and financial assistance must be solicited soon from DOI and other appropriate federal agencies. At the same time, a detailed program of research and resource protection must be formulated and carried out involving key state agencies. Advisory groups, composed of representatives of geographical, technical, and professional interests, could be helpful in the formulation of rational criteria for selecting or deferring subareas. One approach for limiting the number and size of leases within the planning area would be to select only those areas which have a high likelihood of containing oil or gas deposits.

Appendix A

FOOTNOTES

Appendix A-Sain, Biliana, "Offshore Oil Development in California: Challenges to Governments and to the Public Interest," Department of Political Science and Marine Policy Program, Marine Science Institute, University of California, Santa Barbara, August 1985.

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16. "Final Adopted General Policy Statement on the Ocean Disposal of Drilling Muds and Cuttings," Memorandum to California Coastal Commission and Interested Parties from Michael Fischer, Executive Director, November 7, 1984.

17. "Policy Statement on Oil Spill Response Measures for the California Coastal Commission," December 15, 1983.

Appendix B

LIST OF INTERVIEWS CONDUCTED FOR

STATE OF WASHINGTON OCS OIL AND GAS LEASING PROGRAM

Bob Bailey
Oregon Department of Land
Conservation and Development
Portland, Oregon

Lt. Matt Bernard
Marine Safety Division
13th District
U.S. Coast Guard
Seattle, Washington

Russ Cahill, Deputy Director
Washington Department of Fisheries
Olympia, Washington

Dean Delevan
Federal Adjudicator for Hard Rock
Mining Leases
Bureau of Land Management
Oregon and Washington Office
Portland, Oregon

Del Fogelquist
Northwest Division Manager
Western Oil and Gas Association
Seattle, Washington

John O. Gabrielson
Environmental Engineer
U.S. Environmental Protection
Agency
Seattle, Washington

David Heiser
Chief of Environmental
Coordination
Washington Department of
Parks and Recreation
Olympia, Washington

Eldon Hout
Deputy Director
Oregon Department of Land
Conservation and Development
Salem, Oregon

Phil Johnson
Deputy Director
Washington Department of Ecology
Olympia, Washington

Rich Johnson
Chief Permit Evaluator
Regulatory Branch
U.S. Corps of Engineers,
North Pacific Division
Portland, Oregon

Robert E. Kropschot
General Manager
Western Region Exploration Department
Chevron U.S.A., Inc.
San Ramon, California

Rod Mack, Director
Shorelands Division
Washington Department of Ecology
Olympia, Washington

Curt Marshall
Staff Director
OCS Subcommittee
Merchant Marine Committee
U.S. House of Representatives
Washington, D.C.

Dick Mathews
Lead Policy Analyst
Oregon Department of Land
Conservation and Development
Salem, Oregon

Dennis McDonald, Fishery Biologist
and Environmental Coordinator
Northwest Indian Fisheries Commission
Olympia, Washington

Don Peterson, Section Supervisor
Planning Section
Shorelands & Coastal Zone Mgmt. Program
Washington Department of Ecology
Olympia, Washington

Charles Polityka
Northwest Regional Environment Officer
U.S. Department of Interior
Portland, Oregon

Jonathan Secter
Planning & Assessment Branch
Ministry of Environment
Province of British Columbia
Victoria, British Columbia
Canada

Henry W. Wright
Western Oil and Gas Association
Los Angeles, California

II. THE PRACTICE AND PARTICIPATION OF OTHER STATES IN THE OCS LEASING AND DEVELOPMENT PROCESS

Sedway Cooke Associates, April 25, 1986

TABLE OF CONTENTS

INTRODUCTION

The currently proposed national five-year OCS Leasing Program schedules a lease sale off the Oregon-Washington shoreline for 1991--the first OCS proposal in more than two decades. It is thus understandable that the Washington coastal zone management program is relatively silent on the subject, and contains no explicit policies dealing with the potential onshore and offshore consequences of leasing, exploration or development of oil development in OCS waters.

Other states have been actively engaged in the issue for the last 5-10 years, though. OCS leases have been held in the Gulf of Mexico, in the Central Atlantic and off New England, in the Santa Barbara Channel and Santa Maria Basin off California, and offshore Alaska. States in each of those regions have been required to participate in the public hearing and decision-making process leading up to each sale. Each state has been involved to a different degree, depending largely on the number of issues revised, the amount of drilling activity likely and, to some extent, on the political policies of the state administration.

This brief report summarizes information gained in interviews with state officials in seven states (Alaska, California, Connecticut, Florida, Massachusetts, North Carolina, and Oregon) as well as a review of the written statutes, regulations, and policies which each of those states has adopted to address the potential impacts of OCS oil operations.

The purpose of this report is to distill the experiences, the approaches, and the lessons of other states to assist the State of Washington in developing its own approach to possible offshore industrial activities.

A SURVEY OF SEVEN STATES

Each of the states we contacted was chosen on the basis of several factors: experience with the federal OCS leasing program; the existence of an active, competent, federally certified coastal zone management program (CZMP); a selection representing a variety of coastal issues raised and approaches taken; and, in several cases, interstate coordination experience.

Four questions were asked of each state:

1. What are the principal <u>issues</u> or concerns presented by OCS activity?

2. What written <u>policies</u> has your state established to address those issues? Are they incorporated into the CZMP or in statutory provisions?

3. Which state <u>agency</u> is responsible for coordinating OCS activity?

4. How are state agencies, local governments, and adjacent states <u>coordinated</u> and involved in decision-making?

Alaska

1. Issues. In Alaska, the principal issue of importance revolves around the impact of all aspects of OCS activities upon the commercial fishing industry. Seismic exploration, exploratory drillships, offshore platforms, and oil transshipment all create potential impacts of different kinds which would either destroy fishing gear, close areas to fishing or, were spills to occur, damage the fishery itself. Of secondary concern to the state is the potential impact of the same activities upon noncommercial marine species, especially marine mammals.

   There is also a perceived inequity between the benefits to the state and the burdens imposed upon local communities--if there were clear (economic, especially) advantages to localities, less opposition to the program would result.

   An issue in Alaska--and elsewhere--is the worldwide price of oil and the resulting pressure for domestic production. Below $19/bbl, there appears to be virtually no industry interest in offshore Alaska, except for areas of the Beaufort Sear contiguous to state sales (near Pump Station Number One of TAPS) and the North Aleutian Sale 92, primarily because that effort was so far advanced by the time of the recent sudden deflation in oil prices. As the potential for OCS exploration and development declines, so do the issues and civic concern.

2. Policies. The State of Alaska has no written policies dealing with federal OCS operations. According to the senior official interviewed for this study, the state desires to retain the flexibility to respond to each proposal on a case-by-case basis. Alaska has, it feels, adopted a supportive position toward OCS operations, given the state's historic approach and its economic dependence upon resource development. This general policy remains in place even though the state is currently undertaking litigation challenging Sale 92.

   The Alaska Coastal Management Program alludes to OCS operations only indirectly in their statute itself; the administrative code regulations permit "mining and mineral processing" so long as it is "compatible with the standards contained in this chapter" (AAC 8.110).

3. Agency. The state agency responsible for playing the lead role in initiating and coordinating the states response to federal OCS proposals is the Division of Governmental Coordination in the Governor's Office of Management and Budget--seen as "natural turf."

4. Coordination. While the Division of Governmental Coordination gets the ball rolling, policy coordination is centered on the Governor, whose special assistant for natural resources is expected to communicate the policy to cabinet members. The attorney general, an independently-elected constitutional officer, is involved only

when a client state agency is likely to request litigation support; he does not maintain a separate staff to monitor OCS activities.

State agencies generally do not hold their own public hearings on federal proposals; instead, they attend whatever hearings are convened by the federal Minerals Management Service.

Local agencies are quite interested--and are heavily involved--in determining the state's approach to OCS decisions. They participate through the Alaska Coastal Management Program; each of more than a dozen relatively large Coastal Resource Service Area is notified, informed, and consulted in the course of policy analysis; the recommendations of the local officials are then conveyed to Interior by the relevant state agency, usually the Department of Fish and Game.

The only interstate coordination attempted by Alaska is through the Coastal States Organization's legal network (when litigation is necessary); informal discussions occur during meetings of the Interior Department's OCS Advisory Board semiannual meetings.

California

1. Issues. Only in California was a wide range of issues identified, primarily because of the relatively high level of OCS activity the state is now experiencing. These issues include:

   - As in Alaska, the effects of all stages of OCS activity on the fishing industry, characterized entirely by independent small-business operators;
   - The effects of visible industrial facilities (onshore and offshore) and potential oil spills upon the tourism industry;
   - The need for new onshore industrial facilities and the potential cumulative effect of a multiplicity of shore-based support yards, docks, and terminals if independent offshore operators are uncoordinated;
   - The state of oil spill containment and cleanup technology and the preparedness of public and private emergency response operations;
   - The fate and effects of drilling fluids--both drill muds and produced water;
   - The onshore economic and environmental consequences of air emissions from both exploratory drillships and production platforms, especially the uncoordinated cumulative impacts;
   - Potential conflicts between stationary offshore facilities and shipping traffic;

- Especially in rural areas, the impact of industrialization upon the scenic value and "sense of place" of stretches of coastline highly prized for their visual beauty;

- The balance between the size of the resource (of importance primarily to the nation) and the level of the environmental risk (effects likely to be felt at the local level);

- Similarly, a desire to avoid a benefit/burden inequity through full mitigation and sharing of benefits, including economics;

- The amount and level of information available about the coastal and marine environment so that offshore operations can be designed to minimize impacts upon identified and evaluated resources;

- The absence of an enforceable management program to establish and assure limits upon the pace, level, nature, and extent of offshore operations and the resulting levels of impact; and

- The means of shipping produced oil to refineries and product to market, with consolidated large marine terminals preferred over multiple smaller terminals and pipelines preferred over tankerships.

2. Policies. The California Coastal Commission has, after public hearings, adopted written policies dealing with:

- oil spill response measures;
- conflicts with commercial fishing;
- ocean disposal of drilling muds and cuttings; and
- conflicts with vessel safety.

These policies are intended to refine and explain the relatively general references to OCS activities ("coastal-dependent industrial uses") included in the California Coastal Act of 1976. However, the policies are intended to be guidelines only, subject to reevaluation and negotiation on a case-by-case basis; hence they have not been adopted as administrative code regulations. The Western Oil and Gas Association, however, has attempted both in court and in the state legislature to force the adoption of such policies as formal regulations.

The Coastal Commission has also provided exhaustive written explanations of dozens of "consistency determination" which provide further documentation of the policy rationale for the state's positions on each of the issues cited above. The effect of these policies has not been to prohibit--or even to significantly limit--the scale of operations offshore Southern California. The policies have, however, required the oil industry to meet more stringent standards and to provide a wider range of mitigation measures than would otherwise have been required by federal agencies. The Commission has opposed altogether any OCS activity north of the Santa Maria River because of the lack of environmental information,

the clear richness and sensitivity of the marine and coastal environment, the deepness and roughness of the ocean waters, the unspoiled scenic beauty of the rugged, rocky coast and the absence of onshore support facilities.

3. Agency. The Governor has assigned the responsibility for OCS policy and coordination to his Secretary of Environmental Affairs, especially for the requirements of the federal Outer Continental Shelf Lands Act.

4. Coordination. Coordination of state agencies is the responsibility of the Secretary of Environmental Affairs, who operates through the Secretary of Resources for policies affecting functional resource departments. The Secretary of Environmental Affairs holds independent public hearings before forwarding comments on to Interior. The Secretary, however, does not serve as the sole state spokesperson; in fact, with two independent state agencies (a minority of whose voting members are responsible to the Governor), several independent constitutional officers (Lieutenant Governor, Attorney General, and Controller) and 57 independent local governments, there is no single initiator or coordinator of OCS policy in California. The California Coastal Commission, an independent state agency, is statutorily designated as the agency responsible for the state's role in OCS as set forth in the federal Coastal Zone Management Act. The Commission makes all consistency determinations and, with local governments, holds permit authority over onshore facilities located within the coastal zone.

   The State Lands Commission, a separate, independent state agency chaired by the controller with "landlord" status over state-owned lands (including tidelands) holds permit and lessor authority over any development--terminals and pipelines--which would connect OCS projects with shore-based support facilities.

   Local governments are interested and active participation in the OCS process. Local governments in northern California have retained their own independent (consultant) staff who alerts them to federal proposals. Policy resolution of county boards of supervisors are informed, knowledgeable and coordinated, and are presented vigorously to the Coastal Commission, the Secretary of Environmental Affairs, the Minerals Management Service and to Congress. Local governments in southern California are somewhat less active and coordinated, with the exception of San Diego County and its cities, who are coordinated effectively by their council of governments, the Comprehensive Planning Organization.

   Both Santa Barbara and San Luis Obispo counties, the location of most of the current OCS activity, have large and knowledgeable staffs of their own to analyze the onshore facilities proposed by individual oil corporations. Santa Barbara County's planning department, for example, has an energy staff of 18 to advise their Board of Supervisors on the local permit decisions which must be made.

California's independently-elected Attorney General serves in two capacities: he provides litigation support on request to client state agencies (and has on several occasions undertaken major cases at the request of the Coastal Commission and the former Governor); he also may independently bring an action on behalf of the people. Several deputy attorneys general have been assigned to separately track OCS issues and bring recommendations directly to him--those recommendations involve both litigation strategy and suggestions for congressional action.

As with Alaska, the specific impacts of OCS activity off California will not likely affect any other state. Hence, interstate coordination is carried out primarily through the Coastal States Organization to coordinate legal and congressional action in order to protect or augment state-level authority in general.

Connecticut

1. Issues. Because Connecticut is separated from the OCS by long Island and the territorial seas off Rhode Island and Massachusetts, the issue of importance to them is limited to the location and nature of onshore support facilities. In a way, Connecticut's relationships to the ocean and coastal impacts of OCS activities are similar to those which might be held by the local governments surrounding Puget Sound. Because some of Connecticut's shoreline is industrial with deep water available, the potential for onshore OCS support facilities is, while limited, a real one. The concerns here revolve around other uses which might be displaced, the spin-off effects upon wetlands or adjacent communities, including the visual effect of large-scale new industrial issues. The potential air quality impact upon Connecticut's nonattainment areas is such a serious issue that it alone would probably preclude a facility such as a refinery. A secondary issue is generalized concern over the effects of an oil spill. The input upon fisheries does not seem to be a concern in Connecticut; nor is it a concern in Rhode Island, puzzlingly, given the intense opposition to OCS activity held by nearby Massachusetts fishermen.

2. Policies. While Connecticut's Coastal Management Act is silent on OCS policies, the federally approved coastal zone management program does include explicit administrative policies which address the onshore impacts of OCS support facilities.

3. Agency. The responsibility for tracking federal OCS initiatives and for proposing and coordinating state policy is split. On issues dealing with energy supply, the Energy Division of the State Office of Policy and Management (similar to Alaska's OMB) is responsible; for all other aspects, responsibility falls to the Planning Division of the Department of Environmental Protection, a cabinet-level department; the Planning Division is the state's coastal zone management agency.

4. Coordination. The Planning Division is responsible for coordinating the review and comments of other state agencies and local government. This responsibility is informal, and has been little-exercised, since no real issue of concern has been presented to Connecticut to date. The independent attorney general is not involved in federal consistency issues unless and until the Planning Division legal staff initiates a request for litigation support.

   Interstate coordination is handled informally through the Coastal States Organization and through Connecticut's alternate membership on Interior's OCS Advisory Committee. Coordinated New England policies are engineered by the New York-New England Coastal Zone Task Force under the aegis of the New England Governors' Association (NEGA). Of its staff of 20 in Boston, 2.5 positions are devoted to ocean and coastal matters. Connecticut's participation in NEGA initiatives is usually triggered by Massachusetts, the most active state.

Florida

1. Issues. Off the western (Gulf) coast of the Florida peninsula, there are two principal issues of concern: fisheries and vistas. The extensive, fragile grass beds of the Panhandle and the coastline to the south are important spawning grounds for a variety of marine species. Little in-depth biological information is known, and information-gathering surveys have been requested by the state before scheduling lease sales. Oil spills from drilling operations far from shore can be carried hundreds of miles by Gulf currents which circulate to and along the Alabama/Florida coast, placing the spawning and fishing grounds in jeopardy even from very distant operations. The state has requested that operations in the Gulf off Florida be limited to the area below the 26th parallel--a request that is not honored in the proposed five-year schedule.

   In addition to the potential for impacts upon marine life from both chronic and catastrophic spills, Floridians are concerned about the impact upon the desirability of coastal communities for new industrial development. The tourism and retirement home economy of literally hundreds of miles of relatively recent development--Sanibel Island and the extensive growth around Tampa and St. Petersburg, for example--is dependent on beautiful sunsets, clean beaches, and a pleasant environment. The potential loss of those characteristics provides the second principal issue of concern.

   Off the Atlantic coast, the fishing and scenic issues are much diminished. The Cape Kennedy launching range precludes leasing off much of the coast, and for a variety of factors, leasing has been much farther from shore. The Gulf Stream separates the coastline from much of the potential lease-sale area, and a potential spill does not present the same level of threat to coastal environments.

2. Policies. The new State Comprehensive Plan, adopted by the Florida Legislature in May 1985, includes a general policy to "avoid the exploration and development resources which threaten marine,

aquatic, and estuarine resources." Beyond that, there are no more detailed written policies which would govern or restrict OCS operations. A 1984 publication of the Florida Institute of Oceanography, Oil and Gas Leasing in Florida Offshore Waters, addresses the procedural and fiscal issues of minerals leasing in state waters, and compares the practices of nine coastal states.

The approach which Florida has taken toward federal OCS operations has been one of supportive negotiation; state spokespersons welcome offshore activity, so long as strong environmental protection measures are employed. This is an understandable position, especially in light of the situation which finds 400 miles of state waters already under 90-year leases; leases which have more than 55 years remaining.

3. Agency. The Office of Coastal Management, located in the State Department of Environmental Regulation (DER), is the lead agency responsible for the "networked" coordination of federal consistency reviews. The Office of Planning and Budget (OPB), formerly responsible for the A-95 Clearinghouse function, performs interagency review under an agreement with DER. The functional agencies within the Department of Natural Resources have the principal substantive concerns, but have developed no specific policy statements of their own. A special advisor to the Governor comprises a one-person OCS policy unit within the Office of Planning and Budget. Under contract to OPB from the Florida Institute of Oceanography, the special advisor (Maurice Rankle, (813) 893-9100) has begun work on the development of coordinated interagency policies, but none have yet been adopted.

4. Coordination. As noted above, coordination responsibilities are divided between DER and OPB. The state's coastal zone management program proposes to employ the consistency review process to provide streamlined review of OCS activities using the consistency authority, but that appears to be unsuccessful to date; given the inherent limitations in the consistency process since the U.S. Supreme Court's subsequent decision, it may never be met.

   The attorney general provides support on request, but does not initiate actions on his own. Local governments have not taken the initiative to involve themselves actively in the decision-making process; their principal means of participation is through the 21-member Coastal Resources Citizens Advisory Committee, which includes three local elected officials on its membership.

   With Alabama and Mississippi to the west and Georgia to the north (none of which has an aggressive coastal management program), there have been very few attempts at interstate coordination other than through the informal national contacts provided by the Coastal States Organization and the OCS Advisory Board.

Massachusetts

1. Issues. Oil operations off New England are centered on the Georges Bank, 60-200 miles offshore. That fact, together with offshore prevailing winds and already existing ports and coastal industrial areas to provide land-based support, focuses the issues of concern to fisheries and shipping; the small potential of oil spills reaching the Massachusetts coastline provides a secondary issue.

   But possible impacts on the fisheries and conflicts with the fishermen provide enough public interest and concern to create an extremely controversial situation whenever OCS is mentioned in Boston or on Cape Code. The tradition of the Georges Bank doryman runs deep, and the characteristics of the bank place it in unique jeopardy of damage from offshore operations. Georges Bank, a huge area of shallow, warmer, nutrient-rich waters (so shallow that fishermen have been known to play softball out there at low tide) is teeming with fish. The factor which created the bank also places it at risk: a slow-moving tidal gyre, or circular current of ocean waters. It is feared that drilling muds discharged into the ocean would be held in suspension and dispersed throughout the area. Since scientific disagreements over the potential harmful effects of the elements of drilling muds have not been resolved to the satisfaction of all interested parties, this itself raises concern. An oil spill would, of course, be much worse. Containment and cleanup in the often rough, unsettled waters of the North Atlantic would be impossible. Angry confrontations--for real or imagined reasons--between fishermen and the oil industry over damaged or lost fishing gear make headlines and can drive a small-business fisherman broke.

2. Policies. Policy 9 of the Massachusetts Coastal Management Act provides the overall umbrella policy which gives direction to state agencies and which serves as the basis for consistency review as well as the Governor's comments under the OCS Lands Act. No other formally adopted, more detailed policies have been established.

   The state did complete a pipeline landfall study, even though the possibility of new onshore industrial facilities is not an issue of great significance; it is noteworthy that the Minerals Management Service did not perform such a clearly-indicated evaluation of its own.

3. Agency. The cabinet-level Secretary of Environmental Affairs is statutorily designated the coordinator of OCS policy for both the Governor's OCS Lands Act consultation and consistency review.

4. Coordination. The director of the coastal zone management program is the assistant secretary of environmental affairs, and is responsible for coordinating state agency review of OCS proposals. The state's federally-approved coastal zone management program has the "networked" interagency memoranda of understanding built into it.

Similarly, local governments participate in the process through the public hearings scheduled by the state CZM agency; unlike California, they perform no independent review of federal or industry proposals.

The state's attorney general, a constitutional officer, does have a separate environmental division. However, his staff does not independently track the OCS processes; they provide support upon request of the Secretary of Environmental Affairs.

Informal interstate coordination is provided by the regional technical working group of the OCS Advisory Committee. Formal, coordinated interstate actions are taken by the New England Governors' Conference, particularly requests or proposals made to the Congressional delegations of the New England states.

North Carolina

1. Issues. As with Washington, the issues addressed by North Carolina are all prospective--there is no exploration or development offshore, so the attention given to the possible impacts of OCS activities is relatively relaxed. However, a number of issues have been identified and addressed:

   - Concern over the impacts of oil spills on recreational beaches--potential spills from both OCS development and transshipment;
   - The effect which OCS operations and possible spills would have on both the fishery and the fishing industry;
   - Transportation and safety (subsets of the above issues) as well as port capacity to serve offshore operations; and
   - The onshore impacts of backup facilities. North Carolina has very little industry in its coastal area. Therefore, the new housing, the location of industrial facilities, and the visual impact upon natural areas and rural communities, together with concerns over truck and helicopter traffic changing the nature of the coastal area, are all perceived potential problems.

2. Policies. In comments to the Minerals Management Service, North Carolina has asked that no areas closer than 12 miles to shore be offered for lease; since most industry interest (limited though it is) is directed toward areas much farther out to sea, this policy has not been violated.

   The Coastal Area Management Act of 1974 is silent on OCS activities; and the North Carolina Administrative Code General Policy Guidelines for the Coastal Area only require that "energy facilities shall avoid significant adverse impact upon vital physical resources." As the Director of the Coastal Management Division put it, "frankly, North Carolina has not reached the point of enough actual OCS activity to warrant adoption of detailed policies."

North Carolina, however, is one of the few "ocean states"--a coastal state which has directed research, study, and overall policy attention to the ocean resources off its shores, even to the deep, remote ocean environments hundreds of miles from its harbors. The statute creating an Office of Marine Affairs in the Department of Administration includes legislative policy language emphasizing the importance of protection of the marine environment, although no regulatory authority attaches to that language.

In addition, the North Carolina Marine Science Council published last year An Ocean Policy Analysis with specific substantive and procedural recommendations which received the personal interest and endorsement of Governor Martin. The list of Coastal Energy Impact Program (CEIP) publications referred to in the bibliography to this report cites a half-dozen studies directly related to potential OCS activity, and dozens of resource inventories which add to public and industry understanding of the marine environment. None of these efforts, however, has resulted in formally-adopted policies directed to OCS activity.

3. Agency. The state coordinator of OCS affairs is the Director of the OCS Task Force (Donna Moffitt, (919) 733-2292) in the Office of Marine Affairs, located in the Department of Administration (an OMB-style agency). The Office of Marine Affairs also operates three marine resource centers and a coastal aquarium.

4. Coordination. The OCS Task Force coordinates state agencies and prepares the Governor's comments under the LCS Lands Act. The Division of Coastal Management in the Department of Natural Resources and Community Development is responsible for the coordination of local governments and for consistency determinations. The OCS Task Force holds public hearings on OCSLA matters, and the Coastal Resources Advisory Council (two-thirds local elected officials and one-third state agency representatives) holds its own hearings as well. There is not a great deal of local agency interest in the issue, since there does not appear to be a significant potential for OCS activity of any real scale. Local comprehensive plans are required under the North Carolina Coastal Area Management Act, and the consistency authority does attach to them (as in Alaska, and contrary to the practice in California). The local plans do address the possibility of onshore OCS support facilities, but in a relatively cursory manner.

Oregon

1. Issues: The issues posed by lease sale 132 should be almost identical for Washington and Oregon. As in North Carolina and Northern California, none of the impacts has yet been experienced, and the potential scale of offshore operations, with the lack of information about a very rich and dynamic ocean environment, colors the high level of concern about future OCS oil and gas development. The topics identified by the State of Oregon--in a relatively aggressive, forward-looking evaluation program--include:

- The effects of OCS activity upon the depressed natural-resource-based economies of the coastal counties;
- Potential conflicts with the fishing industry;
- The potential impact of seismic exploration and oil spills upon the fisheries and upon nearshore/estuarine habitat;
- The need for--and the impact of--onshore support facilities;
- The potential degradation of ocean water quality from drilling discharges; and
- Potential shipping conflicts, and the safety/spill implications of increased risk.

2. Policies. The current state approach is to develop an integrated, coordinated, and explicit program for managing mineral extraction from the state's offshore area and to have that system in place before the commencement of activities in federal waters. Oregon would then be in a position to hold federal activities to the same standard, is the hope. (Both California and Florida have such processes in place; however, policies and procedures of the Florida Board of Internal Improvement and the California State Lands Commission have had little discernible effect upon the scale, timing, location, or stipulations of federal OCS decisions). It is certainly true that a well-oiled, internally consistent and explicitly-understood state program addressing industrial activities in its own waters will prepare Oregon to be a knowledgeable--and thus more effective-participant in the negotiation process. Like most states surveyed, several state agencies have explicit statutory policies, responsibilities, and authority to deal with mineral extraction activities on and offshore.

These statutes do not extend, however, to activities in federal waters. But the legislation which created Oregon's Land Conservation and Development Commission (LCDC---Chapter 197 of the Oregon Code--requires LCDC to prevent the uncoordinated use of land; land is defined to include air, water, and subsoil. The legislation also requires LCDC to adopt, as a rule or administrative regulation, a series of statewide planning goals.

One of those, Goal 19, calls for the conservation of the long-term values, benefits, and resources of the nearshore ocean and the outer continental shelf, and explicitly gives priority to the protection of renewable resources over the short-term benefits to be realized from the mining of non-renewable ocean resources. Goal 19 also sets up a four-step functional process for reviewing proposed activities in the ocean: (1) inventory; (2) assess effects; (3) mitigate to meet the substantive protective requirements of the goal (including fishing industry, biological habitat, navigation/ports, aesthetics, recreation, waste discharges, dredge materials, and archaeological resources): and (4) provide contingency plans to protect the resource from potential damage in the event of a proposed activity is approved.

3. Agency. Under statute, the Land Conservation and Development Commission is the central coordinator of OCS policy issues. In practice, LCDC shares this role with the Governor's Office, whose assistant for Natural Resources (Pat Amadeo, (503) 378-3111) independently tracks OCS proposals and advises the Governor, especially during his OCSLA consultation with the Secretary of the Interior.

4. Coordination. Under the terms of Chapter 197, all cities, counties, special districts, and state agencies are required to abide by the statewide planning goals established by LCDC--including, of course, Goal 19. LCDC seeks the views and advice of affected state agencies in following the procedures set forth in Goal 19, and would use that information in determining the consistency of any federal activity with its coastal management program.

   To date, there has been little interest in OCS matters expressed by local elected officials; they would participate in decisions through public hearings scheduled by MMS and LCDC. As in other states, permits from local agencies would be required for the construction of onshore facilities. LCDC does not have the (never-used) override authority for energy facilities held by the California Coastal Commission.

   Interstate coordination is given greater importance in Oregon than any other state interviewed, save Massachusetts. Since sale 132 will cover both the Oregon and Washington OCS, it is clear to Oregon that a joint approach to the issue is called for. As a beginning, Oregon and Washington are collaborating in a Section 309 grant from the federal Office of Ocean and Coastal Resources; this grant administered by the Sea Use Council, is to begin the preparation of an inventory of living marine resources of the two states. The intended product of this project will be to develop a knowledgeable research program to be a prerequisite of any federal initiative offshore. In this way, the states can significantly influence--in advance--the determination of adequacy of an environmental impact statement needed to fulfill the first two steps of Goal 19. Thus, the states would become active, influential participants in OCS activities through three relevant federal statutes: NEPA, CZMA, and OCSLA. Goal 19 and the Sea Use interstate project are seen as key elements in preparing Oregon's next governor to effectively negotiate with Interior, in full cooperation with Washington's governor.

FINDINGS AND CONCLUSIONS

This brief survey of the states most actively engaged in OCS policies has uncovered no single model which Washington should attempt to emulate. However, a number of points can be drawn:

- There is a normal, natural, and understandable level of federal-interest versus state-interest, we/they, resource-production versus environmental-protection tension between Interior and all states surveyed;

- However, Interior holds both the initiative and the ultimate decision-making authority on the OCS;

- Therefore, a state can most effectively influence OCS policy through energetic and leader-like coordination and participation with Interior; and

- Washington can be best prepared to play an influential role through:

  - securing a direct, cooperative, and coordinated link between the Governor's Office, the coastal management agency, and the relevant functional agencies, as in Massachusetts and Oregon;

  - enacting clear statutory intent language, as in California and Oregon;

  - establishing administrative code regulations, as in Oregon;

  - undertaking ocean-oriented studies, both substantive and policy-directed, as in Northern California and Oregon;

  - adopting specific and detailed policy statements on important issues, as in California;

  - providing a supportive link--in both directions--between local governments and Interior as in North Carolina, Florida, Oregon, and California.

  - building a formalized relationship between states with a clear mutual interest as in New England; and

  - maintaining regular communication with the Attorney General and Congressional delegations in the likely event their assistance becomes necessary.

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III. LEGAL FRAMEWORK FOR WASHINGTON OCS POLICY OPTIONS

A. PRE-LEASE ISSUES - APRIL 28, 1986
B. POST-LEASE ISSUES - MAY 20, 1986

Richard G. Hildreth

LEGAL FRAMEWORK FOR WASHINGTON OCS POLICY OPTIONS

By Richard G. Hildreth

for Cogan, Sharpe, Cogan

April 28, 1986

Introduction

IV. FIVE-YEAR LEASE SALE PROGRAM

A. Process Issues

This is the current state of the process with respect to Sale 132 scheduled in the proposed five-year program for 1991. Governor Gardner submitted comments on the draft proposed program in a letter with memorandum attached dated May 21, 1985 and a hearing on the draft EIS for the program was held in Portland, Oregon, April 10, 1986. Secretary Hodel rejected the Governor's request for hearings in Washington to facilitate participation by the Indian tribes and other Washington citizens. The rejection of this apparently reasonable request should be emphasized in any future correspondence and litigation, especially any arising out of special Indian rights with respect to OCS development and their meaningful participation in the Interior decisionmaking process. Although the law on Interior Secretary acceptance of gubernatorial five-year program suggestions is quite weak (see "Ocean Resources" paper pages 14 and 15; California v. Watt, 668 F.2d 1290, 1321-22 (D.C. Cir. 1981)), Interior's treaty and statutory obligations to Indians would seem to include greater deference to a request for a hearing at a location more convenient to the Indians. Consideration also might be given to Indian representation on Interior's OCS Policy Committee, or perhaps more appropriately, Interior's Pacific Regional Technical Working Group to demonstrate the importance placed by Washington state on adequate Interior consideration of Indian interests in the OCS development process.

The governor's letter also suggests that Interior limit lease offerings to the acreage contained in promising geologic structures such as the sedimentary basins off Willapa Bay and the mouth of the Columbia River. Pushing Interior hard on that point could be counterproductive if, as seems especially likely for the Columbia River mouth, the promising geologic areas also turn out to be especially sensitive environmentally or with respect to potential use conflicts, e.g., fishing (including treaty fishing) and navigation.

The letter's criticism of Interior's estimated social costs (including environmental costs) to Washington from Sale 132 of $500,000 to $1 million seems especially well taken; the figure seems ridiculously low in light of potential use conflicts (the December 1980 destruction by an Interior permitted seismic survey vessel of 1,200 crabpots cost over $140,000 in gear losses alone) and environmental damage from, e.g., oil spills (the recent Mobil Oil tanker spill in the Columbia River resulted in cleanup costs of over $2.5 million; costs and damages from the December 1985 spill of 189,000 gallons of oil by the tanker ARCO Anchorage in Port Angeles Harbor are estimated to exceed $14 million). The state should prepare or contract for the preparation of revised estimates with supporting backup data that could be used as a component of a NEPA

challenge to the Sale 132 EIS if Interior fails to respond meaningfully to the state's figures.

The points emphasized here as well as other state comments on the five-year program could also be submitted as part of the record of the May 13, 1986 hearing on the five-year program before the House OCS subcommittee chaired by Washington Democratic Congressman Mike Lowry, and repeated in the state's comments on the five-year program draft EIS currently under review.

B. Consistency Issues

As pointed out at the bottom of page 2 of the April 15, 1986 Fischer memorandum, no state has ever asserted CZMA consistency review authority at the five-year schedule state at which Sale 132 currently is. OCSLA section 18(f)(5) requires the Interior Secretary by regulation to establish procedures for "consideration of the coastal zone management program being . . . administered" by a coastal state affected by the five-year lease sale schedule. Interior responded to this statutory mandate by promulgating 30 CFR § 256.16 (formerly 43 CFR § 3310.4) which merely states that "information concerning the relationship between a state's coastal zone management program and OCS oil and gas activity shall be requested from the governors of the affected coastal states . . . prior to the development of the proposed leasing program" at the same time information is requested from the governors about state laws, goals, and policies which the state believes should be considered in connection with the leasing program under the separate statutory mandate of OCSLA section 18(a)(2)(G) and 30 CFR § 256.16(b) (formerly 43 CFR § 3310.1).

In the coastal states' unsuccessful challenge to the Watt revisions to the 1982 five-year OCS oil and gas sale schedule, Oregon unsuccessfully challenged 30 CFR § 256.16 as a superfluous and inadequate Interior response to the separate statutory mandate of OCSLA section 18(f)(5). See California v. Watt, 712 F.2d 584, 610-11 (D.C. Cir. 1983). Direct application of CZMA section 307(c)(1) consistency to the five-year plan is made much less likely by Interior v. California, 464 U.S. 312 (1984), holding section 307(c)(1) inapplicable to individual lease sales held pursuant to the five-year plan. However, that decision serves to emphasize the need for consistency review prior to the post-lease exploration, development, and production stages which Interior v. California, confirms are applicable to consistency review under CZMA section 307(c)(3)(B). Thus the five-year plan consistency issue is worth raising in the current five-year plan process and reviewing for inclusion in any court challenges made to the current five-year plan on other grounds.

Consistency review of some sort as part of the five-year plan process would be especially useful if for some reason Sale 132 is dropped from the five-year plan. This was the situation Washington and Oregon found themselves in with respect to the 1982 five-year plan where proposed sales in Alaska and Northern California had definite potential spillover impacts on the states' coastal zones, without any consistency review being made of their coastal programs. Consistency reviews for the exploration, development, and production stages of Alaskan and Northern California OCS development are likely to be much more narrowly focused on those state's coastal program provisions and the coastal programs of their local governments.

A possible opportunity to raise five-year program CZMA consistency issues would be litigation which California is contemplating regarding proposed sales 91 and 95 off Northern and Southern California. Because those sales are shown on the proposed five-year schedule which has not yet been approved by Congress, California believes that Interior's February 1986 issuance of a call for information for Sale 91 violates OCSLA section 18(d)(3) which prohibits the issuance of leases for areas not included in an approved five-year program and that that section will be violated again if a call for Sale 95 is issued. In response to California's complaints about the scheduling of sales 91 and 95 prior to five-year program approval, Secretary of Interior Hodel spoke of his desire to have a California "agreement" included in the five-year program in an April 1986 address at the National Ocean Industries Association (NOIA) annual meeting in Washington, D.C.

In connection with five-year program consistency issues it should be noted that NOAA's amendments to its consistency regulations in response to Interior v. California (published in the August 30, 1985 Federal Register modifying 15 CFR § 923.11 and 15 CFR § 930.33) only state that "OCS oil and gas lease sale activities" are not subject to section 307(c)(1) and do not expressly exclude the five-year program from consistency review. In an April 23, 1985 exchange of letters with NOAA, the Justice Department objected to any such narrow interpretation being given to Interior v. California and the NOAA regulation, stating in its letter that "pre-lease or lease sale activities under OCSLA" do not appear to be subject to section 307(c)(1).

An additional forum for raising western coastal state dissatisfaction with the five-year program may be the Western Governors' Conference which in June 1982 adopted Resolution No. 82-1 (supported by Governors Atiyeh and Spellman) urging the sharing of revenues from OCS oil and gas development with the coastal states which was transmitted to then Secretary of Interior Watt. Interestingly enough, oil industry representatives including the National Ocean Industries Association have heavily criticized the proposed five-year program at hearings

on the draft EIS, arguing strongly against Interior's use of subarea deferrals and the slowed pace of leasing in high interest, high value planning areas such as the California offshore.

V. PRE-LEASE EXPLORATION

This is the one stage of the elaborate OCS development process that has moved from paperwork processing into actual activity in the waters offshore Washington. As the Department of Ecology's July 30, 1982 memorandum states, four offshore seismic surveys had been conducted along the Washington coast in the previous two years and several more were proposed. The December 1980 incident in which a seismic survey vessel off Washington destroyed 1,200 crabpots has been mentioned previously and is described even more extensively in Brian Walsh's OCS slide show text. As that incident so dramatically illustrates, use conflicts such as conflicts with commercial fishing operations can arise in the OCS development process even prior to a lease sale. Therefore, significant attention to this actual ongoing activity in the development of Washington OCS policy is very justified.

The two major Washington State initiatives since the crabpot incident have been: (1) the entering of a memorandum of agreement (MOA) between the state and Interior's Minerals Management Service (MMS) providing advance notice to the state and fishermen of proposed exploration activities and the incorporation into MMS OCSLA section 11 pre-lease exploration permits of information identifying offshore areas where fishing gear is concentrated. And to date, a petition of the December 1980 crabpot incident has been avoided, (2) the 1983 Washington legislature's addition of RCW 90.58.550 and 90.58.560 to the Shoreline Management Act (SMA) providing Washington's Department of Ecology (Ecology) with permit authority over such oil and gas exploration activities not involving drilling in state waters. Ecology regulations implementing those statutes are found in Chapter 173-15 WAC. The controversy surrounding the first permit application received under these state provisions from ARCO Exploration Company is described in the November and October 1984 issues of Ecology's Coastal Currents publication.

Two useful improvements to the state's regulations would be: (1) in addition to the criminal penalties imposed by statute, the civil penalties imposed by WAC 173-15-040, and insurance or bonding requirements imposed pursuant to WAC 173-15-030(7)(b)(vi), a regulation imposing strict liability on the permittee for any damages inflicted during exploration operations and activities in support of exploration operations on public or private property such as the crabpots involved in the December 1980 incident, including natural resources owned or managed by the state such as shellfish and fishing in state waters and their beds should be added. According to the November 1984 Coastal Currents story concerning the ARCO permit request, it was possible impacts on such resources that led Ecology to withhold a decision on the permit request pending further environmental analysis. (2) The regulations say nothing about the sharing of exploration information gained by

the permittee with the state or the public. As discussed below in connection with OCS exploration information sharing, the state exploration permit requirement provides a useful vehicle for the imposition of a state information sharing requirement. Both strict liability and an information sharing requirement probably could be imposed on a permit-by-permit basis (as envisioned by RCW 90.58.550(2) and WAC 173-15-030(7)(a) and (b)) pending amendment of the regulations or statute.

Page 3 of the additional Washington State comments attached to Governor Gardner's May 21, 1985 letter to Secretary Hodel commenting on the draft proposed five-year program quite appropriately suggests that the 1982 MOA with MMS should be updated to reflect, among other things, Ecology's new exploration permit authority, perhaps by negotiations under the auspices of Interior's Pacific Regional Technical Working Group. One way to improve coordination between the two permit processes would be to develop a joint permit process analogous to the joint Corps of Engineer-state wetland protection agency permit processes that exist for wetland fill projects such as the Corps-Oregon Division of state lands joint permits process. It would also seem useful and appropriate to amend the "Washington State's Coastal Authorities to be Used for Federal Consistency Purposes" document (approved by NOAA as part of Washington's federally approved coastal management program (CMP)) to list on page 16 MMS OCSLA section 11 pre-lease exploration permits as a federal permit subject to the CZMA consistency process (section 307(c)(3)(A)).

Page 15 of that same document in section III.7.b. lists federal Environmental Protection Agency (EPA) NPDES permits as being subject to the consistency process. In California an EPA permit issued to McClelland Engineers to drill 32 test wells along the ocean floor searching for oil formations off the coast of Northern California has been challenged by five national and regional environmental groups, the State of California, five counties, and two coastal cities who are concerned about potential adverse impacts on the marine environment from such test drilling. Washington State consistency procedures should be reviewed with the regional EPA office to make sure that requests for such permits to drill test wells in waters offshore Washington will go through the consistency process.

Finally, if the state has not already do so, the exploration permit amendments to the SMA and the accompanying exploration regulations should be submitted to NOAA either as routine program implementation or as amendments to the federally approved Washington Coastal Management Program. If they are to be treated as program amendments, recent amendments to CZMA section 306(g) regarding the program amendment process should be reviewed first. Subjecting MMS OCSLA section 11 permits to the consistency process is supported by MMS's own regulations, 30 CFR § 251.6-1(c).

VI. FEDERAL-STATE INFORMATION SHARING

Use of the state exploration permit process as a state information gathering device as discussed above could be quite useful given the problems from the state perspective with the current OCSLA information sharing regime described at pages 21-23 of the "Ocean Resources." Important existing information held by Interior to which Washington state and local governments are entitled to summaries under OCSLA section 26 are the results of the pre-lease exploration activities already permitted by Interior under OCSLA section 11 offshore Washington. See 30 CFR §§ 252.4, 251.14 and OCSLA section 26(b)(2). (The only other significant pre-lease information sharing obligation of Interior is with respect to Interior proposals to lease OCS lands within the first three miles of federal ownership. See OCSLA section 8(g)(1); 30 CFR §§ 250.4, 251.14, 256.25(g).) These summaries are oriented towards assisting state and local government planning for the onshore impacts of possible oil and gas development and production, and must include estimates of oil and gas reserves, size and timing of development, location of pipelines and the nature of onshore facilities. Furthermore, by regulation these summaries are not to include data whose release would unduly damage the competitive position of the lessee or permittee who provided the data.

Due to Congressional moratoria and litigation delaying lease sales, Interior has proposed extending the protective periods for data gathered by lessees and permittees for OCS areas unavailable for leasing due to those and related causes. See 51 Federal Register 6133 (Feb. 20, 1986).

With respect to information submitted to Interior by industry as part of the five-year program development process, Interior's policy is to protect such information from disclosure during the life of the plan. It would be quite useful if Washington and other interested states could have access to such information on a confidential basis prior to lease sales being carried out under the plan under restrictions like those contained in 30 CFR section 252.7 with, of course, the current regulatory prohibition on pre-lease sale inspection removed and with loosening of the regulations to allow transmission to the state on a confidential basis as well as inspection by the state. Also, the legal basis for Interior protection of industry five-year program submissions should be explored further since the author has not been able to locate any statute or regulation expressly authorized such protection.

VII. INTERIOR ENVIRONMENTAL STUDIES PROGRAM

OCSLA section 20 requires Interior to conduct environmental studies of areas or regions included in oil and gas lease sales and share that information with the affected state and local governments. See 30 CFR § 256.82. By statute the studies are required to be planned and carried out "in full cooperation with affected states" and must be commenced at least six months prior to the holding of a

lease sale in any area such as offshore Washington and Oregon where no lease sale has previously been held. Section 20(b) also imposes an obligation on Interior to conduct post-lease monitoring studies. Examples of studies commissioned by Interior under section 20 which could be useful both to the state and Interior in connection with Sale 132 are a 22-month, $482,491 study of oil spill avoidance measures for California southern sea otters and a 21-month, $475,584 study of the effects of geophysical acoustic operations on commercial fishing offshore California.

Quite appropriately, Washington State has urged a "study first, drill later" philosophy upon Interior with respect to largely untested areas like offshore Washington and Oregon where important data gaps exist. Page 2 of Washington's additional comments on the five-year program attached to Governor Gardner's May 21, 1985 letter to Hodel recommends that Interior immediately initiate a comprehensive environmental studies program with respect to Sale 132 preceded by an Interior sponsored symposium to determine what the baseline information needs are relative to Sale 132, followed by the assembly of a representative task force to advise Interior on Washington-Oregon environmental studies. Also suggested are the establishment of an Interior environmental studies field office in Washington and the organization and presentation of environmental studies information compatible with Washington's needs and information on state marine lands and waters.

Page 12 of the "Summary of Consideration" attached to Interior's 1986 Proposed Five-Year Program Decision and Summary states that "the sales offshore Washington-Oregon and in Hope Basin, offshore Alaska, have been proposed in 1991 to allow for the completion of the necessary environmental studies" (emphasis added). Given that it takes about two years for environmental studies identified as needed to receive funding by Interior, and that the studies then can take two years or more to be completed, available, and useful to the state prior to Sale 132, they must begin working their way through the Interior decision and budgeting process now, beginning with the Pacific Regional Technical Working Group. If through Gramm-Rudman, other budget cuts, and delays, Interior is not able to commence (and perhaps complete due to the emphasis given on completion in the proposed five-year program) a creditable environmental studies program off Washington and Oregon at least six months prior to any scheduled sale, then it would appear to be required by statute to delay the sale accordingly. Due to Gramm-Rudman the fiscal 1986 Interior environmental studies budget of $27.1 million was reduced $1.1 million. Interior's fiscal 1987 budget request for environmental studies is reduced by an additional $4 million to $23 million due to "decreased activity" by the oil industry under the proposed five-year sale schedule which includes five sales in 1987.

VIII. LEASE SALE PROCESS

A. Congressional Exclusions

In addition to the OCSLA sale decision process, states dissatisfied with Interior lease sale decisionmaking have successfully turned to Congress for permanent and temporary exclusions of particularly sensitive offshore areas from the sale process. Examples of "permanent" exclusions include proposed S. 1902 introduced by Senator Paula Hawkins, Republican of Florida, which would prohibit Interior from leasing various environmentally sensitive areas off western Florida by establishing a permanent lease-free buffer 20 to 30 miles in width along Florida's west coast. Also, OCSLA section 11(h) which prohibits the issuance of leases or exploration permits within 15 miles of the Point Reyes, California National Seashore unless California allows the exploration and development of adjacent state submerged lands. The presence of Olympic National Park and various federal wildlife refuges including the Washington Islands National Wildlife Refuge along Washington's Pacific coastline suggests an appropriate analogy to the Point Reyes buffer zone established in section 11(h). To strengthen its case for the establishment of such a federal buffer zone, Washington should maintain its current Department of Natural Resources (DNR) "self-imposed" moratorium on oil and gas leasing in state Pacific Ocean waters. The legal basis for the state moratorium should be reviewed and at least reflected in a DNR administrative regulation if this has not already occurred, and perhaps even unshrined in state statute like the current statutory prohibition (RCW 90.58.160) on surface drilling for oil and gas on Puget Sound and along the Strait of Juan de Fuca which is part of Washington's federally approved coastal management program to which the CZMA federal consistency obligations apply. California's failure to date to impose such a moratorium on the leasing of state lands adjacent to proposed OCS Sale 91 which the state is vigorously opposing has weakened the state's political case for a Congressional moratorium on OCS lease sales in the area covered by Sale 91.

The use of such one-year budget-cycle sale moratoria by Congress at the request of coastal states is summarized on pages 53-55 of the "Ocean Resources" paper. Maintaining those moratoria from year-to-year consumes a great deal of state political energy in annual lobbying efforts which as California recently found out may not always succeed. For fiscal 1986 only Massachusetts was successful in having a five-year old moratorium on leasing on Georges Bank and some other sensitive areas offshore Massachusetts extended for an additional year. Extension of that moratorium and other state moratoria requests currently are pending before the House Interior Appropriation Subcommittee chaired by Congressman Sidney Yates, Democrat of Illinois, as alternative means to protect state interests if Interior fails to delete sensitive areas such as Georges Bank from the five-year proposed program.

B. OCSLA Process

Failing such permit or temporary Congressional protection, all OCS areas shown in an approved five-year leasing schedule may be leased by Interior pursuant to the sale process described in OCSLA sections 8 and 19, 30 CFR §§ 256.22-256.32, and the Washington Ecology brochure, including compliance with National Environmental Policy Act (NEPA) EIS requirements. The Supreme Court specifically held in Interior v. California that the CZMA consistency provisions do not apply to Interior's sale decisions. The remaining opportunities for state and public input to the sale process are summarized in the table included in the introduction above and in pages 6-8 (NEPA) and 17-20 (OCSLA section 19) of the "Ocean Resources" paper. Interior's proposed extensive changes to its OCS oil and gas regulations published in the March 18, 1986 Federal Register (comments are due by June 16, 1986) should be scrutinized carefully for changes adverse to Washington State interests, both in the sale process and other stages of OCS oil and gas development.

Section 19 states that the Interior Secretary must accept gubernatorial sale recommendations if "they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state." However, section 19 also states that the secretary's decisions rejecting state recommendations shall not be judicially invalidated unless found to be "arbitrary or capricious." Of the five federal district courts to rule on state challenges to secretarial rejection of gubernatorial sale recommendations, three have found the secretary violated section 19. However, in the only federal appellate court decision interpreting section 19, California v. Watt, 683 F.2d 1253 (9th Cir. 1982), the Ninth Circuit Federal Court of Appeals (whose jurisdiction includes Washington and Oregon) suggested that the secretary has wide discretion both substantively and procedurally in responding to state recommendations under section 19. Thus, although section 19 does not appear to provide a strong basis for judicial invalidation of Interior sale decisions, nevertheless, Interior violations of section 19 should be included in any litigation brought challenging a sale decision, e.g., for violating NEPA.

C. NEPA Compliance

As summarized on page 7 of the "Ocean Resources" paper, coastal states have successfully challenged Interior sale decisions on the following NEPA grounds: (1) failure to include a worst-case analysis of potential post-lease seismic exploration on endangered whales such as the gray whales which migrate off the Washington coast; (2) failure to revise the sale EIS to reflect significantly reduced oil and gas resource estimates; (3) failure of the sale EIS to evaluate an adequate range of alternatives; (4) inclusion of too large a geographic area for adequate environmental analysis. Furthermore, the so far successful litigation challenging the Bristol Bay sale

includes a serious challenge on NEPA grounds of Interior's oil spill trajectories methodology which is criticized as being too rigid and arbitrary given the great importance that Interior appears to place on its oil spill risk analyses in making sale decisions. Also, although it would appear oil prices do not have much further room to fall, if a sale EIS's cost-benefit analysis were based on high oil prices which had prior to the sale fallen dramatically, failure to revise the EIS in light of those price changes could also lead to judicial invalidation of the sale decision.

Although none of the sale challenges just reviewed may appear overwhelmingly strong or be present in every sale situation, Interior sale decisions should be scrutinized for legal validity with great care given that coastal state rights in the post-lease sale process appear to be even weaker legally than their pre-sale rights and with respect to the sale decision itself. Furthermore, even partially successful sale litigation creates bargaining leverage and time to seek Congressional intervention.

D. New Key Step for Frontier Sales Like Sale 132: Request for Interest

With respect to the impact of falling oil prices on scheduled sales, Secretary Hodel stated in in April 1986 that the Interior Department was considering delaying or cancelling five frontier-area sales scheduled for 1986, three off Alaska and two off the east coast, based on anticipated lack of industry interest. However, he also stated that the department was exploring ways to at least prevent offshore exploration from coming to a halt, and, so far, Interior has proceeded with non-frontier area sales generally as scheduled. And as to other frontier sales scheduled further in the future such as Sale 132, Hodel stated in March 1986 that although Washington and Oregon waters do "not look promising," he said the department was continuing to schedule Sale 132 because new information could disclose promising oil formations.

In March 1986 Interior cancelled Sale 86 for the Shumagin area off Alaska originally scheduled for December 1987, then included on the proposed five-year program for April 1988, due to the poor responses Interior received to the "call for information" which covered 15,054 blocks encompassing approximately 83 million acres to which only six oil companies had replied. The next sale scheduled in the Shumagin area is designated in the proposed five-year program as a "frontier exploration sale" like Sale 132 for which Interior has added an additional step--"Request for Interest"--which will be used to evaluate whether there is sufficient interest to undertake further steps leading to a sale. Thus it appears that the industry response to the Request for Interest for Sale 132 which is scheduled to be issued in December 1988 will be a key factor in determining whether Interior proceeds with Sale 132. Under the terms of the

proposed five-year program, Sale 132 could not be moved forward in time because the Washington-Oregon area is not one of the eight OCS areas designated in the plan as "higher value/higher interest areas" for which the five-year program contains an acceleration provision authorizing a reduction in the period between sales from three to two years.

In his revisions to Secretary Andrus' first five-year program, Secretary Watt dropped the "tentative tract selection" step in the sale process in favor of an "area-wide" leasing approach, with both moves being heavily criticized by coastal states including Washington. Without tentative tract selection it was felt that the ability of coastal states to delete geologically hazardous, environmentally sensitive, or biologically productive areas from proposed sales would be greatly diminished. Louisiana and Texas went so far as to challenge the legality (unsuccessfully) of the area-wide approach in federal district court. Washington's additional comments attached to Governor Gardner's May 21, 1985 letter compliment Interior for modifying the area-wide approach to what has been termed "focused leasing" based on the concept of "subarea deletions" used to delete 15 subareas from leasing during the proposed 1987-91 program and highlight 13 additional subareas (including the areas furthest offshore Washington and Oregon) for further analysis and public comment. The subarea deletion approach has been criticized by the oil industry as prematurely excluding major portions of the OCS, and as the Washington comments point out, subarea deletion, although a step in the right direction, still does not provide the states with a process like tentative tract selection that recognizes from the outset that there are coastal and marine areas which, due to their environmental sensitivity or importance for recreation, commercial, fishing, or tourism should be protected. However, it does not appear that Washington could force Interior to return to the tentative tract selection approach without litigation.

The significance of opportunities for state input prior to the Call for Information stage such as the new Request for Information step for frontier sales like Sale 132 is illustrated by Interior's February 1986 decision (heavily criticized by industry) to include only 4 percent of the Northern California OCS area in the Sale 91 Call for Information, a major reduction in scope as compared with Sale 73 held in November 1983 which included major portions of the Northern California OCS. Interior stated that it significantly reduced the acreage in Sale 91 based on the industry response to the request for interest, discussions between Secretary Hodel and the California Congressional delegation, the existence of hydrocarbon-prone geologic conditions, and comments received at public meetings in California.

IX. SUBSTANTIVE LEASE SALE DECISION FACTORS

A. Introduction

Beyond OCSLA section 18(a)(2)(B) indicating a concern for potentially conflicting uses in the design of the five-year program and general policy and findings statements in OCSLA sections 3(b) and 101(13), the OCSLA and implementing regulations basically are devoid of substantive principles for resolving multiple-use conflicts on the OCS raised in gubernatorial comments under OCSLA section 19 or disclosed in a sale EIS. The one existing statutory tool in federal law which theoretically encompasses multiple-use management of the OCS, the Marine Sanctuaries Act, has yet to be successfully used for true multiple-use management where oil and gas development is one of the managed activities. However, the Santa Barbara Channel National Marine Sanctuary has served as a partially effective environmental protection device in that key OCS oil and gas development area. While no areas of the Washington OCS currently are under active consideration for designation as a national marine sanctuary, the lead time for Sale 132 is such that a state or Washington public interest group initiated designation request backed by adequate data theoretically could make it through the NOAA sanctuary designation process prior to Sale 132. See University of Oregon Ocean and Coastal Law Center Ocean Law Memo No. 26 (March 1, 1985) entitled "National Marine Sanctuary Program Reauthorized: Past Problems and Future Prospects." By default, the states have used the CZMA consistency process for resolving multiple-use conflicts but that process is not applicable to the sale stage.

In some sale areas such as Southern California, the use conflict of greatest practical significance to the OCS lease sale process has been classified and unclassified military activities above, on and below the surface of OCS waters. Large portions of sale areas have been deleted due to military objections to OCS activities in areas which often have overlapped or coincided with areas concerned state and local governments would like to see deleted. Thus Washington should obtain and evaluate as much information as is available on military uses of the OCS off Washington and seek to coordinate its Sale 132 participation with relevant Department of Defense representatives.

The two potential use conflicts of greatest legal significance at the sale stage would appear to be (1) potential conflict between OCS oil and gas development and commercial and recreational fisheries (including Indian treaty ocean fisheries), and, (2) conflicts with marine mammals, some also designated as endangered species, which migrate through and periodically inhabit federal and state waters off the Washington coast. Aspects unique to Indian treaty fishing rights are discussed

above and in the attached letter from Professor Ralph W. Johnson. Discussed below is the law regarding the obligation of Interior to consider impacts on fisheries and marine mammals at the sale stage of OCS development.

Concern about impacts on these two uses was expressed in Washington's additional comments attached to Governor Gardner's May 21, 1985 letter which urged Interior to address those concerns in the five-year plan EIS. However, the draft five-year plan EIS projects very-low to low impacts on fish resources in most planning areas except the North Atlantic and Gulf of Mexico, where levels of impact could be moderate. The draft EIS also projects low impacts on marine mammals except in Alaska, where impacts could reach high levels in parts of some planning areas.

The five-year draft EIS's conclusions of low impacts on fisheries and marine mammals should be reviewed against available data for correctness in preparation for a more detailed response on those issues as part of the Sale 132 process. The Washington Department of Fisheries mapping effort for commercial and recreational marine fisheries resources throughout the Washington coastal zone mentioned in Brian Walsh's OCS slide show script appears to fill an important informational need for the state in expressing its concerns about fisheries impacts to Interior. Russ Cahill, Deputy Director of the Washington Department of Fisheries, has indicated his department's willingness to propose lease stipulation to Interior that would reduce or eliminate anticipated impacts on commercial fishing based on the foregoing mapping effort and other information available to that department.

Through the Pacific Regional Technical Working Group the state ought to be able to get timely access to the Interior environmental studies program research mentioned above on the effects of geophysical acoustic operations on commercial fishing offshore California which would appear to have implications for Washington fisheries impacts as well. In discussing fisheries impacts with Interior, it should be remembered that while the over $140,000 in gear losses suffered by Washington State crab fishermen in the December 1980 pre-lease exploration crabpot incident may seem relatively insignificant to Interior in dollar terms compared to per-barrel oil prices at their peak in the world market, those sums of money are quite significant in the economy of Pacific Coast Washington State.

B. Legal Obligation to Consider Fisheries at the Sale Stage

The strongest statement to date about Interior's legal obligation to consider fisheries impacts at the lease sale stage occurred in Massachusetts' challenge to Georges Bank Sale 42 in 1979. In Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979), the First Circuit Court of Appeals felt that

it was clear "the [Interior] Secretary had a legal duty to avoid unreasonable risk to the fisheries in waters over the Outer Continent shelf even to the point of refusing to lease particular areas where the risk would be unreasonable." No court has halted or ordered modified a lease sale based on the foregoing principle, but the issue emerges soon in a very concrete context in Alaska's challenge to Interior's recent decision to proceed with the Bristol Bay lease sale despite state and fishermen concerns about significant adverse impacts on the major commercial salmon fishery carried out in those waters. In response to claims of native Alaskans that the Bristol Bay sale would adversely injure their special statutory subsistence fishing rights, a federal district court recently ordered Interior not to accept the bids it had received in the sale. See Tribal Village of Akutan v. Hodel, 16 ELR 20245 (D. Ak. Jan. 13, 1986), affirmed by Ninth Circuit April 28, 1986. Continued active participation by Washington State as a friend of the court in support of Alaska's positions especially with respect to issues relevant to Washington State interests such as fisheries impacts is strongly recommended.

C. Marine Mammal Impacts

There also are strong legal protections in federal laws other than the OCSLA for marine mammals potentially adversely affected by OCS oil and gas development, especially those marine mammal species which also are designated as endangered or threatened under the federal Endangered Species Act (ESA), such as endangered gray whales which migrate annually north and south along the Washington coast. Both the federal Marine Mammal Protection Act (MMPA) and the ESA have strong prohibitions on "takings" of marine mammals and endangered species, with "takings" under both statutes very broadly defined to include almost every conceivable form of adverse impact.

The southern California sea otter is the only sea otter species currently designated as threatened or endangered under the ESA. The Interior environmental studies program funded research on oil spill avoidance measures for southern California sea otters mentioned above could provide information useful in predicting impacts on Washington sea otters Even though they are not designated under the ESA, Washington sea otters still are protected by the MMPA along with harbor seals and sea lions which also are found offshore Washington. Additional federal law and policy support for their protection is provided by the Washington Islands National Wildlife Refuge where those three marine mammal species are found along with important bird populations.

Depending on the protected species involved, either the National Marine Fisheries Service (NMFS) or Interior's own Fish and Wildlife Service (FWS) provide biological opinions on potential species impacts as part of the Interior lease sale decision-making process. For example, as part of the Bristol Bay sale

process, NMFS recommended that Interior adopt a 20-mile wide coastal buffer zone to protect migrating endangered gray whales which recommendation Interior rejected in favor of a 9 to 11 mile-wide buffer zone. Interior's rejection of the NMFS recommendation is being challenged as part of the Bristol Bay litigation and there is some fairly good case law supporting an obligation of Interior to follow such recommendations.

At the lease sale stage, the courts are willing to allow Interior to take a segmented approach to the sale and post-sale stages of OCS development and allow Interior to offer leases while deferring concrete protective measures for marine mammals to later stages of the development process. However, there is a key exception to that judicial approach: because OCS lessees may carry out certain non-drilling activities such as seismic exploration without further Interior approval, the courts require Interior to deal meaningfully with the impacts of such activities on endangered marine mammals at the lease sale stage. Compare Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Ak. 1983), affirmed on other grounds, 733 F.2d 605 (9th Cir. 1984), with North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) and Interior v. California, 464 U.S. 312 (1984).

A potentially useful addition to the federally-approved Washington coastal management program (either as routine program implementation or as program amendments) would be Washington's statutes (RCW 77.08.010, .12.010, .12.020, .16.120) and administrative regulations (WAC 232-12-011, 12-014) paralleling the protections provided marine mammals by federal law. If treated as program amendments by NOAA, recent amendments to CZMA section 306(g) regarding the program amendment process should be reviewed first.

LEGAL FRAMEWORK FOR WASHINGTON OCS POLICY OPTIONS:

POST-LEASE ISSUES MERITING FURTHER INVESTIGATION

by

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for Cogan, Sharpe, Cogan

May 20, 19986

I. POST-LEASE MONITORING AND LEASE CANCELLATION

30 CFR 256.82(d) imposes a post-lease monitoring requirement on Interior as part of the Environmental Studies Program which could provide Washington State with important post-lease information about adverse environmental effects. OCSLA section 5(a) and 30 CFR section 256.76 authorize Interior to cancel leases under specified conditions, including such subsequently discovered adverse environmental effects. Furthermore, OCSLA section 23 authorizes "any person" (defined to include state and local governments) adversely affected to sue to compel compliance with the OCSLA, including section 5. This raises the possibility of state-initiated suits to compel lease cancellation where post-lease information discloses severe adverse environmental effects or conflicts with other uses such as fisheries or marine mammals.

II. STATE REVIEW OF LESSEE EXPLORATION PLANS SUBMITTED PURSUANT TO OCSLA SECTION 11(c)

The state's strongest handle on exploration plans, CZMA section 307(c)(3)(B) consistency, has been seriously weakened by the federal district court decision in Exxon v. Fischer discussed at page 5 of University of Oregon Ocean and Coastal Law Center Coastal Law Memo No. 5 (March 1986). Therefore, Washington State should actively participate in California's appeal of that decision currently pending in the Ninth Circuit Court of Appeals and any further appeal to the United States Supreme Court. See March 4, 1986 Memorandum from Brian Walsh to Rod Mack.

Individual exploration plans with potentially significant environmental effects also have to go through the NEPA EIS process which provides an opportunity for state comment and judicial review for EIS adequacy. See GOO v. Andrus, 477 F. Supp. 40 (C.D. Cal. 1979). Washington State should urge Interior to make both exploration plan and development and production plan EISs available earlier so that they may be used in the CZMA section 307(c)(3)(B) consistency review process.

III. STATE REVIEW OF LESSEE DEVELOPMENT AND PRODUCTION PLANS SUBMITTED PURSUANT TO OCSLA SECTION 25

A. Like exploration plans, development and production plans are subject to state CZMA consistency review pursuant to CZMA section 307(c)(3)(B) which is adversely affected by the Exxon v. Fischer decision, and in some cases to NEPA EIS review. However, development and production plans also are subject to gubernatorial comment under OCSLA section 19 like lease sales.

B. An additional untested opportunity for state development and production plan input is OCSLA section 25(e) (see also 30 CFR 250.34(4) which requires Interior to prepare at least one development and production plan EIS under NEPA in each OCS area outside the Gulf of Mexico.

State participation in this and other development and production plan EIS processes provides the opportunity to suggest environmentally protective conditions on oil field development and production concerning such matters as transportation methods and routes, e.g. pipelines v. tankers, and conditions avoiding conflict with other uses such as California tried to impose through the consistency process in Exxon v. Fischer in order to protect the commercial thresher shark fishery.

C. Current Interior regulations require offshore oil producers to remove all structures and facilities upon termination of operations. However, Interior has published proposed regulations in the March 5, 1986 Federal Register which would allow offshore platforms to remain after production ceases to serve as artificial reefs which, offshore Washington, might enhance commercial and recreational fisheries. Thus the state should decide whether the benefits of such an offshore artificial reef program utilizing oil and gas structures would outweigh the costs, e.g., potential navigation conflicts, and commend to Interior accordingly. Because permits for such artificial reefs would also be required from the Corps of Engineers, the state could have an opportunity to review the consistency of such Corps permits under CZMA 307(c)(3)(A).

IV. OCS PIPELINE RIGHTS OF WAY; STATE CONTROL LANDWARD OF THE OCS

A. OCSLA section 5(e) and 30 CFR 256.83 authorizing Interior to grant oil and gas pipeline rights of way across OCS lands while assuring the maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial. However, to cross state submerged lands from three miles offshore on in, OCS lessees must obtain appropriate permits, easements, and leases from the state. Washington State local governments also appear to have permit jurisdiction over offshore pipelines running across the state submerged lands, tidelands, wetlands, and shorelines under the Shoreline Management Act. Local governments could also control the location of the upland portions of such pipelines. These state and local controls on pipelines coming from the OCS represent very strong state and local handles on the nearshore and onshore impacts of OCS development. However, if state and local agencies are viewed as unreasonable in their decisions with respect to pipelines and associated onshore facilities, Interior may allow OCS lessees to construct the necessary transportation, storage and transfer facilities offshore. See GOO v. Exxon, 586 F.2d 726 (9th Cir. 1978).

B. Prior to oil and gas development taking place either in state or federal waters, existing state permitting and siting criteria for pipelines should be reviewed and updated as necessary. The states should consider developing pipeline siting criteria which local governments could then apply in revising their shoreline master programs to designate acceptable and unacceptable routes for pipelines coming ashore. Such

studies could be patterned after Ecology's February 1984 platform fabrication yard siting study and coordinated with the Pacific Regional Technical Working Group's pipeline landfall siting work and the Washington Department of Game and Washington Natural Heritage Program's land use/land cover/habitat/wetland baseline inventory mapping effort.

State and local pipeline regulations as revised should then be added to Washington's federally approved coastal management program either as routine program implementation or program amendments. If they are treated by NOAA as program amendments, recent amendments to CZMA section 306(g) regarding the program amendment process should be reviewed first. In addition, Washington's experience with the Northern Tier Pipeline proposal should be reviewed for lessons applicable to state decision-making with regard to OCS pipelines transiting Washington waters and lands. All changes in Washington state and local pipeline criteria and procedures should then be factored into the Washington Energy Facility Siting Act pipeline process as the principal statute governing the construction of major pipelines (at least 15 miles in length with an inside diameter larger than six inches) in Washington which was made a part of Washington's federally approved coastal zone management program as part of the February 1979 amendments to that program.

V. SITING OF OTHER FACILITIES SUPPORTING OCS OIL AND GAS DEVELOPMENT IN WASHINGTON WATERS AND LANDS

A. Figure 1 on page 2 of the February 1979 Washington CZM Program Amendment document summarizes in tabular form the Washington State authorities governing the siting of support facilities for OCS oil and gas development. Some fall under the exclusive, centralized, preemptive authority of the Washington Energy Facility Siting Council while others must proceed through the more traditional multiple-permit review process. Under either approach compliance with Washington's equivalent to NEPA, the State Environmental Policy Act (RCW Chapter 43.21C), is required, and the council considers Shoreline Management Act standards in ruling upon projects subject to its exclusive jurisdiction. Page 14 of that same document points out that pipelines over and across state-owned aquatic lands require the grant of a right-of-way easement by the state Department of Natural Resources.

B. Not discussed in the 1979 program amendments document is the role of Washington local governments in the siting of OCS onshore support facilities such as platform fabrication yards, pipe coating yards, equipment storage depots, and crew and supply bases which are not covered by the preemptive Energy Facility Siting Act process over and beyond their role as the initial permitting authority under the Shoreline Management Act (SMA) given that SMA substantial development permits are in addition to rather than in lieu of other local requirements (see State v. Lake Lawrence Public Lands Protection Association, 92 Wn.2d 656, 601 P.2d 494 (1979)).

A major policy issue is what stance the state should take, if any, with regard to local government actions prohibiting, discouraging, or encouraging the development of OCS onshore support facilities. Recent state-local friction over OCS-related construction proposed by Chicago Bridge and Iron and Peter Kiewit at Cherry Point and by the Port of Grays Harbor illustrate the point. In California ballot measures which would ban in one manner or another the siting of onshore facilities are now pending in several jurisdictions, including San Luis Obispo County, The City of Hermosa Beach, and San Mateo County. In November 1985 the City of Santa Cruz passed such a measure while an initiative measure restricting OCS support facility construction in Santa Barbara County was defeated. As of March 1986, guidelines for oil project mitigation funds were pending before the Santa Barbara Board of Supervisors. The guidelines would establish a Coastal Resources Enhancement Fund, Fisheries Enhancement Fund, and a Fisheries Compensation Fund as back-ups to similar provisions under the OCSLA which are discussed below. The funds to carry out these programs would be obtained from the oil companies at the time of their onshore project review according to fee schedules established by the county. Washington State could establish a similar program statewide, in lieu of individual local government actions, or could leave such matters to local government decisionmaking.

Any state OCS onshore support facilities siting policies that are developed could be included in a new "OIL AND GAS" use activities element in WAC 173-16-060 governing local shoreline master programs.

C. A technical question to be answered with respect to Washington local government rules and authority with respect to OCS development is the seaward limit of local government regulatory powers, particularly those of Washington coastal counties. In Oregon coastal county boundaries may extend westward to the three-mile limit of state ocean waters provided under the Submerged Lands Act, raising the possibility of dual regulation by state and local agencies of OCS support activities in that area and suggests the importance of clarifying any ambiguities on this question in Washington law. A particular context to which the question relates is discussed further below in connection with air pollution from OCS operations.

D. The important roles of local governments in commenting on the five-year lease sale schedule (via the governor) and individual lease sales under OCSLA sections 18 and 19 and participating in the CZMA consistency process should not be neglected either.

VI. STATE AND LOCAL TAXATION OF OCS ACTIVITIES

With respect to state and local taxation of OCS activities, OCSLA section 4(a)(2)(A) makes state taxation laws inapplicable to the OCS. In Maryland v. Louisiana, 451 U.S. 725, the United State's Supreme Court overturned Louisiana's tax on OCS natural gas production piped through Louisiana. The case is discussed further in vol. 57 of the Tulane Law Review at page 390.

VII. STATE ROLE IN CONTROLLING POLLUTION FROM OCS-RELATED DEVELOPMENT OFFSHORE AND ONSHORE

A. Air Pollution: California v. Kleppe, 604 F.2d 1187 (9th Cir. 1979), held that Interior rather than the federal Environmental Protection Agency regulates air emission from OCS oil and gas facilities located on the OCS under OCSLA section (a)(8). Where prevailing winds blow onshore, such emissions can contribute significantly to onshore air quality problems. In particular, the pristine air quality of the Olympic National Park could be threatened in violation of Clean Air Act no-significant-deterioration standards. Furthermore, the adequacy of Interior's OCS air quality regulations (30 CFR 250.57) has been challenged in litigation brought by the State of California and environmental groups. State v. Watt, No. CV 81-3234-1 (C.D. Cal); see Selmi, The Controversy Over Regulation of Air Pollution From Outer Continental Shelf Leasing, Western Natural Resources Law Digest (Winter 1985), pages 9-16. The parties to that dispute have entered into a negotiated rule making process in an attempt to develop better regulations. The outcome or the litigation and negotiated rule making will determine the adequacy of the OCS air quality regime governing OCS development off Washington.

In the meantime the adequacy of the Washington State air quality control regime governing the Washington coastal zone out to three-miles offshore should be reviewed. Applicability of the state's ambient air quality standards contained in WAC 173-475 offshore out to three miles should be confirmed and the substantive adequacy of those standards for protecting coastal air quality should be reviewed. Also to be clarified with respect to that offshore zone is whether the state through the Ecology Office of Air programs or local Air Pollution Control Authorities manage air quality in that offshore zone. In California local air pollution authorities regulate offshore air quality out three miles, a situation which has complicated the OCS air quality issue. RCW 70.94.053 provides that local air pollution control authority boundaries are co-extensive with the boundaries of the county within which the local air authority is located. Thus resolution of the question of how far offshore county boundaries extend in Washington raised above in connection with onshore facilities siting questions also is relevant to the question of offshore air quality control.

According to WAC 173-403-080(4) Olympic National Park has been classified as a "Class I" pristine area where significant deterioration in air quality must be prevented. According to the June 1976 Washington coastal program document at page 6 Indian governing bodies as well as federal land managers have the primary responsibility for such classifications. The state should review the classification status of other federal landholdings in coastal Washington such as national wildlife refuges and coastal Indian reservations from the perspective that "Class I" classifications may be appropriate for them as well.

B. Water Pollution: The federal Environmental Protection Agency controls discharges from OCS operations beyond three miles such as drilling muds under the federal Clean Water Act. The California Coastal Commission has expressed continuing dissatisfaction with EPA's approach to such discharges, as has the State of Massachusetts in connection with such discharges from OCS operations on Georges Bank. In particular, EPA's proposal to authorize such discharges through two blanket general permits off southern California, one for mobile exploratory operations and one for development and production platforms, instead of reviewing them on a case-by-case basis, has been questioned by the coastal commission. The willingness of the federal courts to scrutinize EPA's performance of its responsibilities in this area is exemplified by Kitlutsisti v. ARCO Alaska, Inc., 592 F. Supp. 832 (D. Ak. 1984), appeal dismissed as moot, 782 F.2d 800 (9th Cir. 1985), in which drilling in Norton Sound was enjoined pending issuance of necessary permits by EPA. Furthermore, EPA issuance of water discharge permits to drilling operations on the OCS is subject to consistency review by Washington State under CZMA section 307(c)(3)(A) to the extent such discharges affect land and water uses within three miles of the Washington coast.

A key component of such consistency reviews by Washington State would be the state water quality standards governing ocean waters out to three miles offshore contained in WAC 173-201-045 which should be reviewed for their adequacy for this purpose. Ecology water quality personnel may want to contact Krystyna Wolniakowski of the Oregon Department of Environmental Quality, (503) 229-6018, who currently is reviewing and revising Oregon's offshore water quality standards.

A review of state offshore water quality standards is particularly timely given that the federal courts recently have strengthened and reconfirmed the state water pollution control role in ocean waters out to three miles. In Chevron v. Hammond, 726 F.2d 483 (9th Cir. 1984), review denied with opinions, 105 S. Ct. 2686 (1985), the 9th Circuit Court of Appeals found an Alaska statute prohibiting the discharge into state waters of any ballast which had been stored in oil cargo tanks not preempted by a weaker Coast Guard standard. The court distinguished Congress's intent to completely occupy the

field of tanker design found in Ray v. ARCO, 435 U.S. 151 (1978), striking down major portions of Washington State's Tanker Law, and found no similar Congressional intent to entirely occupy the field of tanker ballast discharge regulation. Instead, the court found Congressional recognition of a need to collaborate with states in such regulation and defer to Alaska's right to set high environmental protection standards within its waters. The court specifically noted provisions of the federal Clean Water Act permitting the states to establish higher water quality standards than applicable federal minimum standards under the Clean Water Act. In accord with Chevron is Bass River Associates v. Bass River Township, 743 F.2d 159 (3rd Cir. 1984). The Chevron and Bass River decisions also support strong state laws regarding oil spills in state waters discussed below.

C. For onshore support facilities for OCS oil and gas development the Corps of Engineers administers important wetland fill permit requirements under the Rivers and Harbors Act and the Clean Water Act. Such permits are subject to consistency review by Washington State under CZMA section 307(c)(3)(A). Since Washington experienced coordination and consistency difficulties with the Corps in connection with the Northern Tier Pipeline project, and other states including Florida and Oregon have had similar difficulties, coordination consistency procedures with the Corps should be reviewed in connection with other OCS onshore support facility planning and procedures implemented by the state. In particular, Oregon had a problem with Corps "letter permits" issued under 33 CFR 325.2(e)(1) for minor projects regulated by the Corps under Rivers and Harbors Act section 10. Oregon does not require a state permit for those projects, and the Corps was issuing its letter permits with an effective date ten days in the future, which was hampering effective state CZMA consistency review tremendously. Based on NOAA and Oregon objections, the Corps process has been modified to provide time for meaningful state input.

VIII. WASHINGTON STATE PROCEDURES AND LAWS REGARDING OIL SPILLS

Unfortunately, Washington oil spill response capabilities have been tested recently by tanker spills in the Columbia River and in Port Angeles Harbor. In addition to spills directly in Washington waters, winds and currents may bring spills off northern California and Oregon into Washington waters as well. RCW 90.48.320 imposes strict liability on those who spill oil in Washington waters. The state should consider strengthening its Coastal Protection Fund which under RCW 98.48.400(b) is available to cover costs involved in oil spill cleanup by imposing a per barrel fee on oil transported into the state with all fees collected going into the Coastal Protection Fund. Although current federal law allows such separate state oil spill cleanup funds and fees, H.R. 1232 passed by the House of Representatives and currently in conference between the House and the Senate would prohibit such separate state oil spill fund and

consolidate four separate federal oil spill liability laws and funds into one, including OCSLA sections 301-315 which establish strict liability for spills in connection with OCS oil production and transportation and a fund maintained by a per barrel fee on OCS production. A related regulatory effort of which the state should be aware is new Interior regulations for assessing damages to natural resources which should be reviewed for their adequacy and as a potential aid in assessing damages caused by oil spills.

IX. REVENUE SHARING FROM THE FIRST THREE MILES OF FEDERAL SEABED PURSUANT TO OCSLA SECTION 8(g)

Under section 8(g) Interior must provide the governor with additional information about possible oil and gas deposits within the first three miles seaward of the state's offshore boundary. Furthermore, under amendments to section 8(g) enacted April 7, 1986 (see Public Law 99-272, 99th Cong., 2nd Sess., section 8003) Washington State would be entitled to 27 percent of lease revenues from all acreage located within three miles of the state's boundary. If Interior or the governor determines that an oil and gas pool actually spans the federal-state boundary, they may attempt to negotiate a special agreement for the sharing of revenues from the development of the common pool. Failing such agreement, Interior may nevertheless proceed to lease tracts on its side of the boundary containing portions of the common pool and the state will be entitled to 27 percent of the revenues as described above.

Thus, if Interior proceeds with Sale 132, Washington should be prepared with the necessary expertise and information to identify common pools included within Sale 132, notify Interior of the existence of such pools, attempt to negotiate revenue sharing agreements for those pools with Interior, and if a satisfactory agreement cannot be negotiated, consider leasing state lands on the state side of the federal-state boundary containing the common pool to protect state fiscal interests in the common pool resource.

A simultaneous amendment to OCSLA section 3(4)(B) describes the sharing of revenues under OCSLA section 8(g) as providing "affected coastal states and localities with funds which may be used as the mitigation of adverse economic and environmental effects related to the development" of OCS resources.

X. POSSIBLE IMPROVEMENTS IN THE WASHINGTON COASTAL ZONE MANAGEMENT PROGRAM (CPM) RELATED TO OCS OIL AND GAS DEVELOPMENT

A. Potential Financial Consequences of Amendments to the State's Federally-Approved CMA: In December 1985 a federal district court in Save Our Dunes v. Pegues, CV No. 84-T-518-N (M.D. Ala. Dec. 17, 1985), strictly interpreted CZMA section 306(g) as prohibiting further federal program administration grants to a state until any and all amendments to the program since its original federal approval had been specifically approved by NOAA. In response, Congress amended section 306(g) in Public Law 99-272, section 6043 to read as follows:

> (g) Any coastal state may amend or modify the management program which it has submitted and which has been approved by the Secretary under this section, pursuant to the required procedures described in subsection (c), and subject to the following conditions:
>
> > (1) The state shall promptly notify the Secretary of any proposed amendment, modification or other program change and submit it for Secretarial approval. The Secretary may suspend all or part of any grant made under this section pending state submission of the proposed amendment, modification or other program change.
> >
> > (2) Within 30 days from the date on which the Secretary receives any proposed amendment, the Secretary shall notify the state whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days from the date the Secretary received the proposed amendment. The Secretary may extend this 120-day period only as necessary to meet the requirements of the National Environmental Policy Act (42 U.S.C. 4321 et seq.)
> >
> > (3) The state may not implement any proposed amendment as part of its approved program pursuant to section 306, until after the proposed amendment has been approved by the Secretary.

Unfortunately, the amendments do not appear to have completely removed the financial risks to states which propose amendments to their programs. The broad language in new section 306(g)(1), second sentence, that "the Secretary may suspend all or part of any grant made" (emphasis added) under section 306 pending state submission of program amendments, modifications or other changes, appears to grant the Commerce Secretary the authority to completely suspend federal grants pending approval not only of amendments, but also less major changes categorized as routine program implementation! However, the legislative history for new section 306(g) does suggest that Congress' intent was only to limit state expenditures on implementing proposed amendments pending secretarial approval, not on the rest of the program. Hopefully, NOAA will issue regulations which will narrowly specify which circumstances, if any, the Commerce Secretary might decide to suspend all federal payments pending his approval of program changes. New section 306(g) confirms that program amendments do not become effective for federal consistency purposes until approved by the Commerce Secretary.

B. Pending Litigation Weakening the Enforceability of State Coastal Management Programs: Pages five and six of Coastal Law Memo No. 5 cited above describe litigation pending before the United States Supreme Court on appeal by California from an adverse decision (Granite Rock Company v. California Coastal Commission, 768 F.2d 1077 (9th Cir. 1985), Supreme Court review granted March 31, 1986) and the 3rd Circuit Court of Appeals on appeal from a federal district court decision favoring the state of Delaware (Northfolk Southern Corp. v. Oberly, 594 F. Supp. 514 (D. Del. 1985)) in which plaintiffs are making major challenges to the legal enforceability of state coastal zone management programs. Ecology should urge participation as a friend of the court by the Washington Attorney General in those appeals in support of California and Delaware's positions if Washington is not already so participating.

C. Absence of an OCS Policy Element in the Washington CMP as Perhaps the Most Significant Gap: The February 1979 program amendments did contain a descriptive appendix regarding OCS development, but what is needed is a statement of state offshore development policies analogous to Oregon's Ocean Resources Goal 19. As pointed out in the April Cogan, Sharpe, Cogan "Policy Issues" memorandum, while gubernatorial views as to OCS development may vary from administration to administration, a state's federally-approved coastal management program survives changes in state administrations and can provide a more scientific and policy-based (as compared to political) state response to OCS oil and gas development. Admittedly, the Interior v. California and Exxon v. Fischer court decisions lessen but do not entirely eliminate the legal significance of an OCS policy element in the Washington coastal management program.

D. Other state concerns identified in Governor Gardner's May 21, 1985 letter with attached additional comments of Washington State on the five-year OCS sales schedule which do not appear to be adequately treated in the Washington coastal management program as amended in February 1979 include:

1. The June 1976 program document describes Indian land and tidelands ownership interests but should be updated to reflect recent developments bearing on offshore resource development such as Makah tribe's judicially-confirmed ocean treaty fishing right including appropriate policies, e.g., buffer zones to protect that right from degradation and interference by other ocean users. The participation of a Makah representative in the May 14, 1986 OCS workshop conducted in Olympia by Cogan, Sharpe, Cogan is an important first step in generating improvements to the coastal management program with respect to Indian coastal and ocean interests. More generally, the August 1985 NOAA evaluation of the Washington CMP recommended improved

notice to Indian tribes of proposed coastal and ocean development activities with potential impacts on Indian interests.

2. Washington state laws and policies protecting and encouraging commercial and recreational fishing are not adequately represented in the coastal management program. State and local initiatives to protect and enhance fisheries vis-a-vis OCS developments such as the pending Santa Barbara County Fishermen's Fund described above and the joint Oil Industry-Fishing Industry newsletter and committee structure used in the Santa Barbara Channel to reduce conflict between oil and fishing operations (contact John Richards, Marine Advisor, 3877 Storke Road, Goleta, California 93117-2949 (805) 968-2149) are important examples. Such state and local initiatives on behalf of Washington fishermen are particularly important given that the fiscal 1987 federal budget proposes elimination of the OCSLA Fishermen's Contingency Fund which compensates fishermen for losses caused by offshore oil and gas activities. See OCSLA section 401 et seq. and 50 CFR 296).

3. Similarly, aquaculture is an understated by important activity potentially adversely affected by OCS development, especially the development of onshore facilities. It is very briefly mentioned as a preferred use at page 34 of the June 1976 CMP document--its importance should be stressed along with commercial and recreational fishing in any program revisions undertaken.

4. With regard to onshore facilities supporting OCS development, Washington's aquatic lands management regulations including the briefly-spelled out mitigation policy in Chapter 332-30 of WAC should be included in the CMP as enforceable program laws and policies.

5. Estuary and wetland preservation values: The Skagit River system and Padilla Bay are identified as areas of particular concern in the June 1976 CMP document at page 12 and their preservation and resource values described at pages 16 and 17. Those discussions need updating to reflect the designation of Padilla Bay as a national estuarine sanctuary. The Washington Department of Natural Resources Natural Heritage Program recently identified 19 estuarine wetlands as the best remaining examples of pristine wetlands in Puget Sound and suggested including them in a statewide estuarine sanctuary system, a concept that was supported by NOAA in its August 1985 evaluation of the Washington CMP. Thus further exploration and implementation of a state estuarine sanctuary system would seem to be timely given the pressure that OCS onshore support facility development can place on remaining key undeveloped estuarine and wetland locations.

Recreation and preservation values are emphasized at pages 2-3 of the state's additional comments to Governor Gardner's May 21, 1985 letter on the five-year schedule. Important natural areas mentioned by the Governor such as Olympic National Park are mentioned in the CMP (page 12, June 1976 document) but that discussion could use updating to reflect the five national wildlife refuges located in coastal Washington also mentioned by the Governor, revision to strengthen CMP policies favoring protection and buffering of those areas from the adverse effects of OCS development, and coordination with state preservation efforts like those for Puget Sound estuarines just discussed, locations like Sand Island and Goose Island in Grays Harbor, and the Washington Department of Game natural areas for rhinocerous aucklets on Protection Island in the Strait of Juan de Fuca and upland areas adjacent to Padilla Bay.

6. Oil Spills: The Governor's May 21, 1985 letter also requested that Interior address oil spill trajectory, contingency planning and cleanup capabilities for oil spills on the Washington coast. The February 1979 CMP amendment document discusses at page 35 the risk of OCS oil spills as a state concern in OCS development and relevant Washington law is quoted on page 17, but the basic June 1976 program document does not discuss oil spill questions at all. Thus as part of revisions to the Washington coastal management program, Washington coastal resources and locations particularly exposed to and sensitive to oil spills should be identified and the state's recent experience in responding to spills in the Columbia River and Port Angeles Harbor should be reviewed, all with a view toward further refining and defining state concerns with the oil spill risk from all stages of OCS development including transportation to and from onshore processing, storage, and transportation facilities.

E. Washington Consistency Program Document: All the foregoing changes in the Washington CMP program should then be reflected in an updated and revised NOAA-approved version of the Ecology June 8, 1982 Federal Consistency Program document originally approved by NOAA October 27, 1980 so as to ensure application of federal CZMA consistency requirements to the program changes.

IV. RIGHTS OF INDIANS IN WASHINGTON STATE VIS-A-VIS OCS OIL AND GAS DEVELOPMENT

Ralph Johnson, Professor of Law
University of Washington
April 30, 1986

Memorandum

RIGHTS OF INDIANS IN WASHINGTON STATE vis a vis OCS OIL AND GAS DEVELOPMENT

April 30, 1986

Ralph W. Johnson
Professor of Law

There are 25 Indian reservations in Washington State, and approximately 58,000 Indians, many of whom live off-reservations. Indian reservations comprise about 7 percent of the land area of the state. Five reservations are located on the ocean coast, including the Makah, Ozette, Quileute, Hoh, and Shoalwater. These reservations are most likely to be affected by OCS oil exploration and development. The Chehalis Reservation is located on the Satsop River, several miles upstream from Grays Harbor, which opens into the Pacific. Conceivably two other reservations, the Lummi and Swinomish at the east end of the Strait of Juan de Fuca might be affected. Other reservations, the Tulalip, Port Gamble, Port Madison, Puyallup, Muckleshoot, Skokomish and Nisqually are located on Puget Sound or Hood Canal, and would have a remote chance of being impacted by OCS activity. The large Yakima Reservation in Eastern Washington on the Yakima River (with off-reservation fishing rights on the Columbia River) would be affected if an oil spill or other OCS activity damaged salmon runs that spawn in the Columbia River or its upstream tributaries. The Nooksack Reservation on the Nooksack River in northern Washington and the upper Skagit-Sauk-Seattle Reservation on the Skagit River in northern Washington would be affected if damage occurred to salmon runs on these rivers. The only Washington tribes that own no land on the coast, and have no fishing rights that would be affected, are the Colville, Kalispel, and Spokane tribes in eastern Washington.

Most of the tribes claiming fishing rights or coastal land ownership base their rights on one of five treaties signed in 1854 and 1855 between the Indians of this area and Governor Stevens on behalf of the U.S. These treaties are the Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939; Treaty of the Yakimas 12 Stat. 951.

These treaties have been construed to provide the signatory Indian tribes with exclusive fishing and gathering rights on their reservations. In addition, the treaties guarantee the tribes off-reservation fishing rights at their usual and accustomed fishing sites "in common with the citizens of the territory."

As the treaties were written in English, refer to Anglo-American legal concepts, and were explained to the Indians in the Chinook jargon - a trade language of about 300 words - the courts have said that any ambiguities in the documents will be construed in favor of the Indians; that is the words will be construed as "they would naturally be

understood by the Indians." Jones v. Meehan, 175 U.S. 1 (1899); Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). (Hereinafter called "Passenger Fishing Vessel") The Supreme Court has also said the treaties "reserved" to the Indians their fishing rights out of the larger rights the Indians had prior to treaty signing; that is the treaties were not grants of rights from the United States to the Indians, but were reservations of rights by the Indians. United States v. Winans, 198 U.S. 371 (1905).

These Indian treaty fishing rights have now been extensively litigated. In summary, the rights derived from the cases are as follows. Members of the treaty tribes have the right to fish off-reservation at their usual and accustomed fishing sites even though those sites are privately owned by non-Indians. United States v. Winans, 198 U.S. 371 (1905). Treaty Indians need not obtain state fishing licenses when fishing either on their reservation or off-reservation at their customary sites. Tulee v. Washington, 315 U.S. 681 (1942). Treaty tribes are entitled to the opportunity to catch up to 50 percent of the harvestable salmon and steelhead in treaty waters. Harvestable fish include all fish not needed for spawning. Treaty waters include nearly all the rivers, streams, and salt water areas within the State of Washington. Passenger Fishing Vessel. The state can regulate Indian treaty fishermen at off-reservation fishing sites when "necessary for conservation." Puyallup Tribe v. Department of Game, 391 U.S. 392 (1986). However, the state cannot regulate treaty fishermen if the particular tribe has its own judicial and enforcement system and self-regulates its members. Passenger Fishing Vessel.

Indian off-reservation treaty fishing rights cover both salmon and steelhead. Coastal tribes have treaty rights to ocean fisheries. The Makah Tribe, for example, has treaty rights to "halibut, salmon, cod, and other kinds of fish as well as for whales and seals."

> "This right extends to waters of the Pacific Ocean west of the coasts of Vancouver Island and what is now the State of Washington bounded on the west by longitude 125 degrees 44' W. and on the south by a line drawn westerly from the Norwegian Memorial along latitude 48 degrees 2' 15"N., including but not limited to the waters of 40 Mile Bank, Swiftsure Sound, and waters above Juan de Fuca Canyon, to the extent that such waters are included in the area described. United States v. Washington, 626 F. Supp. 1405 (W.D. Wash 1985)."

The Indian off-reservation treaty fishing right includes the right to harvest hatchery fish as well as natural runs, even though some hatcheries are owned and operated by the State of Washington (rather than by the United States or an Indian tribe). United States v. Washington 759 F.2d 1353 (1985).

The Indian tribes claim their off-reservation fishing right includes the right to protect the fishery environment, that is the right to prevent pollution, dams, logging, water extraction, and other activities that

might harm this environment. To date, the 9th Circuit has avoided answering this issue on the ground that no actual "case or controversy" has come before it and the court does not want to rule on the issue in the abstract. The treaty Indians argue that their fishing right necessarily includes the right to an acceptable fishery habitat or else the right could be totally defeated. It is my opinion from studying the 9th Circuit case, and two prior Ninth Circuit opinions that were later withdrawn (see, for example, United States v. Washington, 694 F.2d 1374 (9th Cir. 1983) that the federal courts will eventually uphold some kind of Indian treaty right to protect the fishery environment. Just what that right will be remains to be seen.

The Makah, Quileute, and Quinault tribes, on the coast, and other tribes located on Hood Canal and Puget Sound, generally own the tidelands along their reservations. At these on-reservation sites the tribes have the right to harvest clams, oysters, and other shellfish and products of the tidelands.

The on-reservation and off-reservation treaty fishing rights discussed above are not merely perfunctory or ceremonial. They are worth many millions of dollars each year to the Indian tribes. Any damage to them from oil spills or otherwise could result in extensive costs.

The principal risk arising from OCS oil development off the Washington coast would be from oil spills. A spill might occur at the wellhead on the outer continental shelf, in a pipe carrying the oil to shore, or on the beach.

A spill at sea would likely have little effect on salmon because they are highly mobile and can avoid oil on the water. If the oil settled to the bottom, it might adversely affect halibut, cod, and other bottomfish stocks. If the spill, wherever it occurred, got to shore, it could (1) damage salmon and steelhead runs headed for coastal rivers for spawning, and (2) damage Indian owned, and treaty protected tidelands, with their shellfish and other resources. These tidelands are also a valuable recreational resource. Such a spill might also damage birds that inhabit reservation coastal lands.

The federal government has a trust responsibility towards Indians. The two Mitchell cases, United States v. Mitchell, 445 U.S. 535 (1980), and United States v. Mitchell, 103 S. Ct. 2961 (1983), held that the federal trust responsibility towards Indians must be found in federal statutes. That is, no "general" trust responsibility exists outside of those identified in particular federal statutes. Thus, for example, the nature and extent of the government's obligation to manage Indian owned timber on the Quinault Reservation had to be found in federal statutes. I suspect there are federal statutes that create a government trust responsibility toward Indians regarding OCS oil development and the threat of oil spills, and that these statutes would apply to fisheries and shellfish, and to tidelands and other resources. This is a topic I have not had an opportunity to research under the present time and budget constraints of this project. It is a subject that deserves further investigation.

A lawsuit for damages from an oil spill could be brought by the United States as the legal owner and trustee for the Indian tribes of tidelands. It might be brought by the United States as trustee of a tribe's fishing rights (28 U.S.C. Sec. 1345). Or it might be brought by the tribe in its own name.

Many general environmental laws such as the National Environmental Policy Act, the Clean Water Act, Clean Air Act, and others exist, but they apply equally to all citizens and generally do not give Indians or Indian tribes any special rights. If an oil spill washed onto Indian reservation beaches or damaged Indian fishery resources, the tribe might bring suit based on a standard common law or statutory theory, available to non-Indians, or the suit might be based on a treaty "environmental right" such as the one asserted in the 9th Circuit case discussed above.

In summary, Indians have special treaty rights to land, beaches, shellfish and fish. If these resources were damaged by an oil spill, lawsuits might successfully be brought either by the affected tribes, or by the United States as their trustee, for the damages caused by the spill.

V. RESULTS OF FOCUS GROUP WORKSHOP, MAY 14, 1986

Cogan Sharpe Cogan, June 5, 1986

TABLE OF CONTENTS

INTRODUCTION

On May 14, 1986, 21 individuals from diverse backgrounds discussed issues and potential policy options regarding the leasing, exploration and development of oil and gas resources on the Washington Outer Continental Shelf (OCS). The meeting took place in Room 2205 of the Daniel J. Evans Library building on The Evergreen State College campus. Participants were selected because of their knowledge, experience and interest in the environmental, governmental, economic, legal and technical aspects of offshore oil and gas leasing. Each participant was provided with briefing materials in advance.

Sumner Sharpe and Arnold Cogan, partners in the consulting firm of Cogan Sharpe Cogan, were discussion facilitators. Technical assistance was provided by Brian Walsh, OCS Program Manager for the Shorelands & Coastal Zone Management Program of the Washington State Department of Ecology, and Michael Fischer, senior associate with Sedway Cooke Associates. A list of all participants and support personnel, the agenda and the discussion guide are included in the appendix to this report.

To stimulate discussion, the facilitators posed specific questions and issues to which the participants responded. Debate and consensus building were not as important as obtaining specific opinions and perspectives of the attendees. The individual group discussions were tape-recorded and augmented by written notes and summaries on newsprint.

RESULTS OF DISCUSSION

Following is a synthesis of responses to specific questions.

What does oil and gas leasing in the OCS mean to you and what ideas does it stimulate?

- The effect on marine resources and shoreland as well as the need for planning to mitigate adverse impacts.
- Problems of coordination among various concerns, e.g., local government and fishing interests.
- Possibility of jobs and potential of economic development.
- Low probability of finding oil/gas and marginal interest by oil companies.
- Processes limited to a few major companies.
- Need public input to help evaluate each site.
- Tends to support our reliance on a nonrenewable resource.
- Temporary, i.e., 50 to 100 years maximum, use of the sea and related upland areas by heavy industry.

- Controversy over competing uses; other resources are equal to or more important than oil/gas.

- Great need for detailed information about fish resources to help develop operational strategies.

- Wide price fluctuation for oil makes planning difficult.

- Numerous community problems.

- Need a single state agency to prevent chaos and coordinate needed research and planning.

What pre-lease issues do you consider most critical?

- Size of the planning area:

  - There is a serious lack of data and information about the planning area.

  - DOI should delete very deep portions; such areas are impractical locations for platforms and exceed the economic limits of drilling.

  - Even if the very deep areas are deleted, the shallower areas are still a problem because of the lack of data and little or no planning.

  - Reducing the size of the planning area should be delayed until sufficient data is available.

  - Washington and Oregon do not have the technical expertise or financial resources to deal with such a large area.

- Protection of coastal and marine resources:

  - Need to maintain pristine portions of the coast.

  - Aesthetic impacts are crucial; must minimize obtrusiveness of the oil rigs.

  - Potential problem of water pollution.

  - Natural gas is more likely to be developed than oil.

  - Onshore impacts, particularly from rig fabrication plants and pipelines, are a large part of the problem.

  - More data needed about marine resource protection in specific tracts with fragile marine life.

  - More attention needed to planning for crisis situations, e.g., the impact on breeding and habitat areas of blowouts and spills.

- Marine mammals and deep water fishing, especially for black cod, shrimp and bottom fish, require consideration.

- Numerous questions are raised about the effect of seismic surveys on eggs and larvae. According to industry representatives, the drilling that follows is more environmentally sound because of the information acquired from the surveys.

- Allowing the state access to geophysical data is important to its work in planning and evaluation of proposed leases.

- Jurisdictional issues:

  - The entire process should be more coordinated.

  - Each agency and level of government--federal, state and local--should exert its maximum influence upon the decision-making process.

  - How the state regulates activity in its own territorial waters is an important precedent to its influence in the OCS area.

  - The Makah Indian fishing grounds may extend as far as 30 or more miles, well into federal waters.

  - Many institutions and jurisdictions will continue to be involved with fish issues.

  - Another important question is whether or not the OCSLA grants DOI jurisdiction outside the outer continental shelf.

  - Local jurisdiction over upland development needs recognition.

  - Although the state cannot speak for the Indian tribal councils, its response to DOI should identify potential leasing conflicts with the tribes.

  - Coordination of state and local activities would simplify mitigation questions.

  - State should request that NEPA/SEPA documents be prepared jointly.

  - There are significant jurisdictional problems over terminals and other onshore facilities without a clear process for resolving them.

- Other issues:

  - There are no quick solutions. Regulating oil and gas resources off the Washington/Oregon coast is a long-term process of perhaps up to 40 years.

  - The low domestic price of oil has virtually shut down exploration, resulting in an increasing dependency on foreign oil.

What are your reactions to pre-lease procedural issues?

- Difficult to carry out extensive planning prior to discovery.

- Close coordination with Oregon is important; an Oregon/ Washington technical working group is needed.

- Opportunities for public participation are insufficient; e.g., the hearings process is not an adequate forum and notification time is too short; methods of informing the public cannot depend on the federal register; agencies should develop their own lists.

- Need more adequate resolution of the consistency question; restriction on state influence over pre-lease conditions delays the ultimate solution of conflicts.

- States have neither staff nor technical and financial resources to tend to all the critical details of the OCS process.

- The timetable of the process is a problem to government and industry. At the early stages, the planning area is so vague and large that it is difficult to deal with any specific issues. At the later stages when the issues are more easily identified, there is inadequate time. On the other hand, according to oil industry representatives, engaging in detailed planning this early in the process is a waste of effort in light of the significant number of oil exploration failures likely to occur.

- The state should identify areas offshore where facilities are appropriate.

- Washington should not develop new statutes or design a process that depends on a citizen mandate because there is not enough time for these to be useful.

- The county master programs deserve exploration as vehicles for dealing with local onshore issues. However, because of differences among the counties and lack of clear roles for them in the process, the state should develop policies and technical assistance programs that enhance the master programs.

What post-lease issues do you think are most important?

- Authorize specific research early in the process for those areas where development is expected to occur.

- Conduct thorough state and local planning so that the regulation and location of on-site facilities meet appropriate goals and criteria.

- Do a better job of coordinating federal/state procedures in crisis situations.

Which policy options appear to make the most sense for the State of Washington?

Options with an asterisk (*), were identified by the group as the preferred approaches to oil and gas leasing issues. They were selected because the group believed they offer an efficient process, are politically acceptable, are an achievable approach, and provide beneficial results.

- Recommend deletion of the entire area.

- As a counterpoint to above, recommend development of a positive plan which includes active exploration.

* - Expand ocean studies to include baseline data collection for areas most likely to be developed and marine species most likely affected.

* - Formulate policies and initiate management strategies, including a planning approach that supports the political process.

- Strengthen local master programs with state support.

- Expand public awareness and opportunities for input, including continuing efforts at the local level.

* - Influence attitudes and actions of congressional delegations.

- Support marine sanctuary concept and avoid fragile areas.

* - Undertake public communications program to complement surveys and information campaign.

* - Coordinate action with Oregon.

- Utilize mediation when controversies arise.

- Take legal action if necessary.

- As a counter to the item preceding, avoid legal action except as the last alternative.

* - Coordinate state/local initiatives.

* - Expand oceanic and socioeconomic studies following a clear definition of resources and information needs.

- Explore options to oil dependency.

- Invoke liability insurance programs/payment for damages.

* - Articulate executive policy as a basis for negotiation and resolution of issues.

CONCLUSIONS

Following is a summary of the conclusions from this focus group:

- Generally, it is the opinion of state personnel and environmental representatives that relatively early in the process the size of the planning area should be reduced substantially and that some significant areas--such as the area offshore from Olympic National Park and the shipping lanes leading into the Straits of Juan de Fuca--should be declared off limits.

- Industry representatives feel that premature deletions of portions of the planning area would severely limit the opportunity to discover worthwhile resources and make it more difficult for smaller companies to compete. They admit, however, that geophysical data suggests there are areas unlikely to result in oil and gas finds.

- Successful negotiation with the Department of Interior requires a tightly coordinated state response. This includes close coordination and consensus with Oregon to ensure consistent responses.

- The Governor should issue an executive order requesting affected agencies to examine whether existing procedures, rules and regulations are sufficient to protect against adverse impacts of oil and gas exploration. If not, remedial legislation or new regulations/procedures should be promulgated.

- To protect the interests of Oregon and Washington requires the Governors' personal involvement, as well as that of the congressional delegation, particularly the U.S. Senators. Lobbying Congress has been effective in the past and should be expanded, particularly during the pre-lease stage.

- This issue is not sufficiently understood by special interest groups, much less the general public. A wide-ranging public information campaign, utilizing polls and surveys where appropriate, is necessary.

- It is important to expand baseline data collection and research. Recognizing that such studies are expensive, the group suggested studying those areas considered most critical and utilizing information from existing sources such as geophysical surveys.

- Clarify legislative and executive policies and priorities on these issues and work closely with other state agencies, local government and special interest organizations. A strong management, planning, and coordination approach should support this process.

- Greater cooperation and coordination of Oregon and Washington is essential. A bi-state technical working group should be formed.

APPENDIX

O C S P O L I C Y S T U D Y

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THE LEASING, EXPLORATION AND DEVELOPMENT OF
OIL AND GAS RESOURCES ON
WASHINGTON'S OUTER CONTINENTAL SHELF

Room 2205, Daniel J. Evans Library Building
The Evergreen State College

May 14, 1986

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FOCUS GROUP DISCUSSION

THE LEASING, EXPLORATION AND DEVELOPMENT OF
OIL AND GAS RESOURCES ON
WASHINGTON'S OUTER CONTINENTAL SHELF

Agenda

Room 2205, Daniel J. Evans Library Building
The Evergreen State College

May 14, 1986

10:00	Welcome and Introductions
10:15	Focus Group Discussions: Issues
	• Arnold Cogan and Sumner Sharpe, Facilitators
	• Brian Walsh and Michael Fischer, Technical Specialists
12:00	Lunch
1:00	Focus Group Discussions: Policy Options
2:45	Observations by Brian Walsh and Michael Fischer
3:00	Concluding Reception

TOPIC GUIDE FOR FOCUS GROUP DISCUSSION

THE LEASING, EXPLORATION AND DEVELOPMENT OF
OIL AND GAS RESOURCES ON
WASHINGTON'S OUTER CONTINENTAL SHELF

Room 2205, Daniel J. Evans Library Building
The Evergreen State College

May 14, 1986

10:00 INTRODUCTION

10:15 PRE- AND POST-LEASE POLICY ISSUES

We will begin the discussion by introducing ourselves: What do you do? How long you have been in Washington? What is your interest in this subject?

Opening Question: What does oil and gas leasing in the OCS mean to you? What ideas does it stimulate? Take a few moments to jot down three or four words on paper. Then, I will ask each of you to share your thoughts, which we will list on newsprint.

Second Question: What are your reactions to these ideas? Probe those with particularly strong viewpoints for specificity; test for generalities.

Third Question: Now we would like to focus on those pre-lease issues which are most critical. We have identified a few we consider most critical. Let's discuss these now. We can talk about others as you think of them.

First, I would like your reactions to several of these substantive issues:

- Size of planning area and location of leases within the planning area. Do you have an opinion on this or a reaction to the issue?

- Protection of coastal and marine resources (repeat same set of questions)

- Jurisdictional matters (including tribal fisheries)

- Other substantive issues such as the availability of financial and technical resources, timing and sequence of major steps in the leasing process, etc.

Fourth Question: Next, we would like to inquire about your reaction to pre-lease procedural issues. Think about the number of ways the State of Washington can participate in OCS leasing--ascertaining federal consistency with state coastal plans; potential for agreements among state, local and federal agencies; and/or the opportunity for negotiations with the parties involved in the lease/sale. Which of these are most critical? Why? Are there other procedural questions?

Fifth Question: Now we will discuss several post-lease issues. There are a number you may have heard about such as air and water pollution, socioeconomic issues, conflicts among various uses, and problems about the siting and location of oil exploration and development activities. Which of these do you think are the most important? Are there others?

12:00 BREAK FOR LUNCH

1:00 RECONVENE

1:00 AFTERNOON FOCUS GROUP SESSION

This afternoon we would like to concentrate on the policy options which appear to make the most sense for the State of Washington and why they deserve further exploration.

Sixth Question: All of you received a paper in your briefing packet titled "Potential Policy Options." A number of options were described along with criteria or consequences for each policy that should be considered. These include whether the option has political assets, produces beneficial results, is an achievable approach, and is an efficient process. Thinking of these policy options and the criteria, which policy options appear to you to be the most practical and most logical directions for the State of Washington? I would like you to take a minute to think about that; then we will go around the table and give each of you an opportunity to identify the policy option you think is most appropriate, logical and makes the most sense. We will list them on the newsprint.

Seventh Question: The matrix on page 5 of our briefing paper was intended to stimulate your thinking about policy options. Of all the suggestions we have made here this afternoon, which are the most beneficial from each of the criteria we discussed? In other words, which seem to you to have the greatest political asset? Which seem to produce the most beneficial results? Which seem to be most achievable? And which ones result in the most efficient process? Let's select those and discuss them further.

Eighth Question: (If time permits) How do we accomplish those policy options which we have just selected?

2:45 OBSERVATIONS BY BRIAN AND MICHAEL

3:00 END OF DISCUSSION. Thank you very much for your participation, time and ideas. It was a very valuable session and very helpful to us. You are welcome to join us at a reception in the outer lobby area.

VI. ANNOTATED BIBLIOGRAPHY OF FEDERAL, STATE AND PRIVATE DOCUMENTS RELEVANT TO THE PROPOSED PROGRAM OF OCS LEASING

Cogan Sharpe Cogan, June 24, 1986

TABLE OF CONTENTS

OUTER CONTINENTAL SHELF POLICY STUDY BIBLIOGRAPHY

Introduction and Guide to Use of Bibliography

The purpose of this bibliography is to provide elected and appointed decisions makers in Washington State with a usable reference guide to publications related to Outer Continental Shelf (OCS) policy issues. The bibliography has four main characteristics:

Major Headings

I. OVERVIEW

- A. The Department of Interior Lease Program
- B. Intergovernmental Relationships

II. PRE-LEASE ISSUES

- A. Substantive; e.g., Lease Locations, Planning Area, Area Size, Deletions, etc.
- B. Procedural

III. POST-LEASE ISSUES

- A. Environmental
- B. Facility Siting
- C. Transportation
- D. Fisheries
- E. Maritime Trade

Institutional Approaches

Within each of the above headings, the publications are arranged according to a variety of institutional/policy approaches that appear to be relevant to the study, as follows:

Administrative Procedures
Conflict Resolution
Executive Actions
Federal Authority and Programs
Federal-State Coordination
Public Involvement
Public-Private Relationships
State Authority and Regulations
State-Local Coordination

Publication Sources

The publications from this bibliography have come from various sources. To allow for retrieval after the study's conclusion, each publication has a source reference number following its listing. The five sources are as follows:

Source	Reference Number
Department of Ecology State of Washington Olympia, Washington	(1)
Department of Land Conservation and Development State of Oregon Portland, Oregon	(2)
Ocean and Coastal Law Center University of Oregon Eugene, Oregon	(3)
California Coastal Commission San Francisco, California	(4)
Various or Unknown Sources	(5)

Citation/Annotation

Publications are arranged alphabetically under the institutional approach headings. Each publication citation will include an annotation which describes the major points which are pertinent to the study. It should be noted that there is a substantial amount of information which is not cited in this bibliography either because it was felt that it did not have sufficient relevance to OCS oil and gas policy issues or it repeated the main themes of publications already cited.

Section I. OVERVIEW

A. The Department of Interior Lease Program

This section of the bibliography includes general information about the DOI lease program, legislative and administrative guidelines, descriptions of the program and activity schedules, and communications between state and federal officials.

FEDERAL AUTHORITY AND PROGRAMS

- U.S. Congress, Outer Continental Shelf Lands Act, Public Law 83-212, 67 Stat. 462, August 7, 1953 (43 U.S. Congress, 1331-1356) as amended by: Public Laws 93-627, 88 Stat. 2126, January 7, 1985; and 95-372, 92 Stat. 629, September 18, 1978. (1)

  Congressional Act which provides for federal jurisdiction over the submerged lands of the Outer Continental Shelf and authorizes the Secretary of the Interior to lease such lands for certain purposes.

- U.S. Congress, Submerged Lands Act, Public Law 83-31, Stat. 29, May 22, 1953 (43rd U.S. Congress 1301-1313). (1)

  Congressional Act which confirms and establishes state's titles to lands beneath navigable waters within state boundaries and to the natural resources within such lands and waters; and confirms federal jurisdiction and control over natural resources of the seabed of the Continental Shelf seaward of state boundaries.

- U.S. Department of the Interior, Minerals Management Service, Energy Offshore: The Department of Interior's Oil and Gas Leasing Program, Washington, D.C., June 1983. (1)

  Precise description of steps in the Department of Interior's oil and gas leasing program.

- U.S. Department of the Interior, Minerals Management Service, From Policy to Production: Offshore Leasing and Operations, Washington, D.C., November 1983. (1)

  Describe the Department of Interior's streamlined five-year offshore oil and gas leasing program from pre-lease to production; explains policies and procedures involved, including state consultation.

- U.S. Department of the Interior, Minerals Management Service, In the National Interest: Federal Offshore Leasing, Public Information Flyer, Washington, D.C., circa 1985. (5)

  A small brochure containing a general description of the Department of the Interior's OCS program of federal offshore leasing.

- U.S. Department of the Interior, Minerals Management Services, Pacific OCS Lease Sale: October 1964; Oregon and Washington, October 1985. (1)

  Describes the results of the 12 exploratory well drillings (1965-67) that occurred after the OCS lease sale in October 1964.

- U.S. Department of the Interior, Minerals Management Service, Proposed 5-Year Outer Continental Shelf Oil and Gas Leasing Program, January 1987 - December 1991, Draft Environmental Impact Statement, v. 1 & 2, February 1986. (1)(2)

  Includes draft impact analysis on the environment: air and water quality, coastal habitats, employment and demographic conditions, coastal land uses, commercial fishers, archeological resources, and marine vessel traffic and ports.

- U.S. Department of the Interior, Minerals Management Service, Proposed Program: Five-Year Outer Continental Shelf Oil and Gas Leasing Program for January 1987 - December 1991, February 1986. (1)

  Department of Interior's five-year leasing program, 1987-1991. Decisions leading to rankings and inclusion of Washington/Oregon planning area. Summarizes cost/benefit ratios.

- U.S. Department of the Interior, Minerals Management Service, Office of Offshore Information Services, OCS Laws Related to Mineral Resources Activities on the Outer Continental Shelf, OCS Report MMS 85-0069, 1985.

  A compilation, in looseleaf format, of federal laws related to mineral resource activities on the OCS. Includes the relevant portions of all federal laws that pertain to MMS responsibilities. Replaces 1981 edition and is based on the United States Code (codified public laws).

- U.S. Department of the Interior, Minerals Management Service, Outer Continental Shelf Information Program, the following series:

  Pacific Index: January 1962 - October 1980, by Sharol L. Kolasinski, 111 p. (1)(2)

  Pacific Index: November 1980 - June 1981, by Mary Ann Collignon, 89 p. (1)(2)

  Pacific Index: July 1981 - March 1983, by Jeffrey D. Wiese and Mary Ann Collignon, 86 p. (1)(2)

  Pacific Index: April 1983 - October 1984, by Denise Molajo, 85 p. (1)(2)

  Index includes information on lease sales, leasing procedures, pre-lease and post-lease information. Identifies states' responsibilities related to OCS oil and gas activities.

FEDERAL-STATE COORDINATION

- Oregon State Office of the Governor, "Comments on the Draft Proposed Five-Year Outer Continental Shelf Oil and Gas Leasing Program," Letter to U.S. Secretary of the Interior, Salem, Oregon, May 1985. (2)

  Oregon Governor and state agency responses to the draft five-year program. Provides qualified approval to undertake studies leading to exclusions; asks for abandonment of area-wide lease sale concept.

  Oregon Governor and DLCD responses to the proposed OCS leasing program and the draft EIS. Topics discussed include: precise information on the size, timing, and location of leasing activity; violation of Goal 19 if leasing occurs in areas requested for deletion; analysis of program impacts; inadequate provisions for technical consultation with Oregon and Washington; the EIS determination of "low" environmental costs are unjustified; and the cost-benefit analysis supporting the Oregon/Washington inclusion are out-of-date and need revision to reflect a lower price per barrel of recovered oil.

- Oregon State Office of the Governor, "Comments on the Proposed Five-Year Outer Continental Shelf Oil and Gas Leasing Program" and the "Draft Environmental Impact Statement," Letter to U.S. Secretary of the Interior, Salem, Oregon, May 1986. (2)

- U.S. Congress, Submerged Lands Act, Public Law 83-31, 67 Stat. 29, May 22, 1953 (43rd U.S. Congress 1301-1315). (1)

  Congressional Act which confirms and establishes states' titles to lands beneath navigable waters within state boundaries and to the natural resources within such lands and waters; and confirms federal jurisdiction and control over natural resources of the seabed of the Continental Shelf seaward of state boundaries.

- U.S. Department of the Interior, Minerals Management Service, From Policy to Production: Offshore Leasing and Operations, Washington, D.C., November 1983. (1)

  Describes the Department of Interior's streamlined five-year offshore oil and gas leasing program from pre-lease to production; explains policies and procedures involved, including state consultation.

- Washington State Department of Ecology, "Planning Washington's Offshore Future," Pamphlet, circa 1986. (1) Succinctly describes the OCS leasing program's national objectives; the role of the State of Washington's CZMP; the roles and benefits of OCS leasing; pre-lease and post-lease phases; and citizen involvement opportunities.

- Washington State Office of the Governor, "Comments on Draft Proposed Five-Year Outer Continental Shelf Oil and Gas Leasing Program," Letter to U.S. Secretary of the Interior, Olympia, Washington, May 1985. (1)

  Washington Governor and Department of Ecology responses to the draft five-year program. Raises questions about the underestimation of costs included in the EIR social cost analysis, and recommends involvement of Indian tribes in discussions on the leasing program.

STATE AUTHORITY AND REGULATIONS

- U.S. Department of the Interior, Bureau of Land Management, The Outer Continental Shelf Oil and Gas Development Process: A Background Paper for State Planners and Managers, 1976. (2)

  Although dated, provides a good overview of the OCS development phases from pre-lease to shutdown.

- U.S. Department of the Interior, Minerals Management Service, Outer Continental Shelf Information Program, the following series:

  Pacific Index: January 1962 - October 1980, by Sharol L. Kolasinski, 111 p. (1)(2)

  Pacific Index: November 1980 - June 1981, by Mary Ann Collignon, 89 p. (1)(2)

  Pacific Index: July 1981 - March 1983, by Jeffrey D. Wiese and Mary Ann Collignon, 86 p. (1)(2)

  Pacific Index: April 1983 - October 1984, by Denise Molajo, 85 p. (1)(2)

  Index includes information on lease sales, leasing procedures, pre-lease and post-lease information.

  Identifies state responsibilities related to OCS oil and gas activities.

PUBLIC-PRIVATE RELATIONSHIP

- American Petroleum Institute, The Search for Offshore Oil and Gas: A National Imperative, August 1981. (1)

  Booklet explains the need for offshore drilling; the steps for obtaining a federal OCS lease; the major steps in OCS oil and gas production; and the risks, problems and impacts associated with such activities.

Section I. OVERVIEW

B. Intergovernmental Relations

This section includes publications which provide a general overview of federal-state-local relationships associated with coastal and OCS management. Some non-OCS materials are included which offer alternative models of intergovernmental relationships.

CONFLICT RESOLUTION

- Lyle, Virginia, editor, Proceedings of the Ocean Studies Symposium, November 1982. (2)

  Includes recommendations on management tools, research, conflict resolution and new approaches (pp. 41-44).

FEDERAL AUTHORITY AND PROGRAMS

- Anderson, Alfred W., et al., U.S. Ocean Policy in the 1970's: Status and Issues, U.S. Department of Commerce, 1979. (2)

  Although somewhat dated, Chapter 4, "Coastal Resources," includes sections on CZM, alternative approaches to CZM, and coastal energy facility siting. Provides general overview of federal laws and regulations related to all ocean resource issues.

- Armstrong, John M. and Peter C. Ryner, Coastal Waters: A Management Analysis, Ann Arbor Science, 1978. (2)

  Includes chapters titled "State Authority to Manage Coastal Waters; Federal Laws and Agencies Related to Coastal Waters; OCS Oil and Gas Development; Comprehensive Coastal Water Management; and Site Management Profiles."

- Champ, Michael A., Chairman, Exclusive Economic Zone Papers, Ocean Assessment Division, National Oceanic and Atmospheric Administration, September 1984. (1)

  Proceedings of an Exclusive Economic Zone Symposium. Of interest are the papers on multiple-use management issues in the EEZ: "Regionalizing EEZ Management" (pp. 7-9) and "Conflict Resolution and Multiple-Use Management in the EEZ" (pp. 10-14).

- Havran, Kenneth J. and Christopher Lynch, Pacific Summary Report, prepared for the Outer Continental Shelf Oil and Gas Information Program, Minerals Management Service, U.S. Department of Interior, July 1984. (1)(2)

  An example of a series of annual information reports explaining OCS oil and gas activities in the Pacific and their onshore impacts. Appendices review current topics and issues, including litigation related to federal regulation of OCS oil and gas and coastal zone activities.

- Myers, Jennie C., America's Coasts in the 80's: Policies and Issues, Coast Alliance, 1981. (2)

  Includes a review of federal statutes related to OCS pre-lease and post-lease activities (pp. 82-84).

- Ryan, Paul R., editor, Oceanus, Vol. 27, No. 4, Winter 1984/85, Woods Hole Oceanographic Institution. (1)(2)

  Special issue on "The Exclusive Economic Zone" includes an explanation of the EEZ and articles on "Regionalizing the EEZ," "Multiple-Use Management in the EEZ, and "A Strategy to Avoid EEZ Conflicts." The EEZ concept overlays OCSLA and other ocean resource issues; a central issue appears to be whether EEZ management should be comprehensive or coordinated.

- U.S. Department of the Interior, Bureau of Land Management, Intergovernmental Planning Program for OCS Oil and Gas Leasing, Transportation and Related Facilities, circa 1979. (2)

  Describes BLM regional technical working groups of federal agencies established to provide guidance to BLM and other DOI bureaus.

FEDERAL-STATE COORDINATION

- Armstrong, John M. and Peter C. Ryner, Coastal Waters: A Management Analysis, Ann Arbor Science, 1978. (2)

  Includes chapters on "State Authority to Manage Coastal Waters, Federal Laws and Agencies Related to Coastal Waters, OCS Oil and Gas Development, Comprehensive Coastal Water Management, and Site Management Profiles."

- Cicin-Sain, Biliana, "Offshore Oil Development in California: Challenges to Governments and to the Public Interest"; Marine Policy Program, Marine Science Institute, University of California, Santa Barbara, August 1985. (5)

  Excellent overview of key issues faced by government and the public with respect to offshore oil development in California. Issues discussed include: natural benefits versus local costs and impacts, fragmentation of offshore resource management, and citizen/local/state/federal roles and relationships. Proposes changes in decision processes, money flow and citizen participation.

- Corsaut, Kati and Gina Bentzley, editors, California's Coast: A State-Federal Partnership in the Management of Coastal and Marine Resources, California Coastal Commission in cooperation with the Office of Ocean and Coastal Resource Management, June 1983. (3)

  A review of federal laws and programs, California's management program and state policies related to coastal zone management. Does not include information on OCS activities.

- Hildreth, Richard, "Ocean Resources and Intergovernmental Relations in the 1980's: Outer Continental Shelf Hydrocarbons and Minerals," Ocean and Coastal Law Center, University of Oregon, unpublished manuscript, circa 1986. (3)

  Using legal decisions related to OCS oil and gas development in the 1980's, this paper develops general observations about intergovernmental relations in offshore oil and gas matters and projected offshore mineral development; proposes improvements to current approaches including "better statutory articulation of decision formulas which are sensitive to intergovernmental concerns."

- Hildreth, Richard G. and Ralph W. Johnson, "CZM in California, Oregon and Washington," Natural Resources Journal, v. 25, January 1985, pp. 103-165. (3)

  Compares and contrasts three state programs and the San Francisco Bay program under five separate topics: topics one to four emphasize CZM processes, public participation and local government relationships; topic five discusses substantive changes in patterns of coastal resource use, outlines the legal framework for all topics, and assesses the experiences in program administration. Limited discussion of OCS issues but good West Coast CZM overview.

- Johrde, Mary, North Carolina and the Sea: An Ocean Policy Analysis, Report of the Ocean Policy Committee of the North Carolina Marine Science Council, November 1984. (2)

  Excellent review of federal-state relationships. Describes 16 ocean policy areas including oil spills, OCS oil and gas leasing programs, onshore siting, and OCS revenue sharing. Raises policy questions and makes recommendations for each policy area; prescribes regionalization of OCS activities.

- Magoon, Orville T., et al., editors, Coastal Zone '85, v. 1 & 2, pp. 194-239, 1985. (1)

  Section on federal consistency includes papers:

  - "What's Going on with Federal Consistency?" by Nan Evans
  - "Federal Consistency: Coordination or Control?" by Paul Stang
  - "Interagency Coordination in Louisiana's Coastal Zone" by Frank Monteferrante and Dianne Linstedt
  - "Consistency Appeals: Recent Developments," by Nathan Bergergest

- Massachusetts Coastal Zone Program and Final Environmental Impact Statement, 1978. (5)

  Provides policy guidance on accommodating OCS exploration, development, and production to minimize impacts on the marine environment; conflicts with other maritime-dependent uses are minimized; and on-shore facilities are located in existing

developed ports. Identifies implementation strategies and the states' CZM role in reviewing OCS leases for consistency purposes.

- New York State Department of Environmental Conservation, Outer Continental Shelf Study Program, New York State and Outer Continental Shelf Development: An Assessment of Impacts, December 1977. (2)

  Although dated, includes review of federal leasing program, relationship to CZMP and OCS leasing/post-leasing phases and activities. Legal and institutional issues are related to OCS pre-lease, lease and post-lease, with discussion of federal, state, and local roles.

- Pendleton, Allan R., "Notice of Routine Program Implementation--San Francisco Bay Segment of the California Coastal Zone Management Program," March 7, 1986. (4)

  Memorandum from executive director of the San Francisco Bay Conservation and Development Commission describing difficulties in obtaining federal concurrence in amending a portion of the coastal management program.

- Perkins, Sarah S., "Splitting Common-Pool Offshore Oil and Gas Revenues," in Magoon, Orville T., et al., editors, Coastal Zone '85, v. 2, pp. 1686-1690, 1985. (1)

  Describes federal-state conflict over common pool revenues (almost $6 billion) and the various proposals that have been considered to divide these revenues.

- Schell, Steven R., "Living with the Legacy of the 1970s: Federal/State Coordination in the Coastal Zone," Northwestern School of Law, Lewis and Clark College, v. 14, 1984. (5)

  Provides an overview of federal-state legislation, programs and case law related to coordination in the coastal zone. Describes Oregon's approach to federal-state coordination and consistency review and includes a case study, the Columbia River Estuary Study Task Force (CREST).

- U.S. District Court, Middle District of Alabama, "Save Our Dunes," et al., Plaintiffs v. Leigh Pegues, et al., Defendants, Civil Action No. 84-T-518-N, December 17, 1985. (3)

  Alabama case involving a lawsuit challenging the construction of multi-family condominiums on the beaches of Perdido Key on the Alabama Gulf Coast. Court ruled that Alabama procedures for issuing coastal permits were defective and required remedial action. Further ruled that under CZMA/Section 306g, an amendment to a state's CZMP could place federal funding in jeopardy, and by extension, places consistency authority in a similar position. However, in this case, federal officials had made CZMA grants after

notification of, but not approval of, the amendment; therefore the court did not agree that there had been a 306g violation.

- Walsh, Brian, "Conferees Agree on Coastal Provisions of Budget," in Coastal Currents, January 1986. (1)

  Describes December 1985 congressional omnibus budget reconciliation bill which includes four major coastal-related provisions: reauthorization of the Coastal Zone Management Act (CZMA); approval of an OCS revenue sharing package; an amendment to the Outer Continental Shelf Lands Act (OCSLA) which strengthens the role of coastal governors; and a "fair and equitable" distribution of revenues from federal/state common offshore tracts. Sounds a warning that the Gramm-Rudman-Hollings deficit reduction bill may obviate the agreements in the omnibus budget reconciliation bill.

- Wik, J. and J. Slaughter, Meeting Report: Pacific Coast Meeting, Outer Continental Shelf Oil and Gas Information Program, The MITRE Corporation, May 1979. (2)

  Explains role of BLM intergovernmental (federal and state) planning program from pre-lease through production phases.

PUBLIC INVOLVEMENT

- Chorich, Martin, Cooking with Offshore Oil: A Handbook for Local Government, OCS Training Project, USC Institute for Marine and Coastal Studies, August 7, 1978. (2)

  Provides an introduction to local government and OCS issues, including local roles in the leasing and development processes, an OCS issues chart describing a range of possible local response mechanisms, planning responses to OCS development, policy options for local governments, and some courses of action based on experienced OCS actors.

- Cicin-Sain, Biliana, "Offshore Oil Development in California: Challenges to Governments and to the Public Interest," Marine Policy Program, Marine Science Institute, University of California, Santa Barbara, August 1985. (5)

  Excellent overview of key issues faced by government and the public with respect to offshore oil development in California. Issues discussed include: natural benefits versus local costs and impacts; fragmentation of offshore resource management; and citizen/local/state/federal roles and relationships. Proposes changes in decision processes, money flow and citizen participation.

- Duddleson, William J., "How the Citizens of California Secured Their Coastal Management Program," in Protecting the Golden Shore, Robert G. Healy, editor, The Conservation Foundation, 1978, pp. 3-66. (3)

History of citizen involvement in the establishment of California's coastal management programs.

- Hildreth, Richard G. and Ralph W. Johnson, "CZM in California, Oregon and Washington," Natural Resources Journal, v. 25, January 1985, pp. 103-165. (3)

  Compares and contrasts three state programs and the San Francisco Bay program under five separate topics: topics one to four emphasize CZM processes, public participation and local government relationships; topic five discusses substantive changes in patterns of coastal resource use, outlines the legal framework for all topics, and assesses the experiences in program administration. Limited discussion of OCS issues but good West Coast CZM overview.

PUBLIC-PRIVATE RELATIONSHIP

- Palmer, C.R. and Paul L. Kelly, "America's Five-Year Offshore Leasing Plan," Presentation to the 23rd Annual Institute on Petroleum Exploration and Economics, March 10, 1983. (5)

  Presents industry's perspective on its past and future role in pre-lease and post-lease OCS activities in order to keep the program on schedule.

STATE AUTHORITY AND REGULATIONS

- Armstrong, John M. and Peter C. Ryner, Coastal Waters: A Management Analysis, Ann Arbor Science, 1978. (2)

  Includes chapters on "State Authority to Manage Coastal Waters, Federal Laws and Agencies Related to Coastal Waters, OCS Oil and Gas Development, Comprehensive Coastal Water Management, and Site Management Profiles."

- Alaska State Office of Management and Budget, Division of Intergovernmental Coordination, "Statutes and Regulations: Alaska Coastal Management Program," January 1985. (5)

  Includes discussion of statutes that "offshores areas must be managed as a fisheries conservation zone so as to maintain or enhance the state's sport, commercial, and subsistence fishery."

- Banta, John S., "The Coastal Commissions and State Agencies: Conflict and Cooperation," in Protecting the Golden Shore, Robert G. Healy, editor, The Conservation Foundation, 1978, pp. 97-132. (3)

  Overview of the role and relationships of California's geographically-oriented coastal commissions to functionally-oriented state agencies. Reviews responsibilities of the commissions in interim permits, review authority, the development-approval process, monitoring and enforcement, long-range policy, and permit processes.

- Healy, Robert G., "The Role of the Permit System in the California Coastal Strategy," in Protecting the Golden Shore, Robert G. Healy, editor, The Conservation Foundation, 1978, pp. 67-96. (3)

  An investigation of the relationships between the Coastal Plan and the state's permit process.

- Hildreth, Richard G. and Ralph W. Johnson, "CZM in California, Oregon and Washington," Natural Resources Journal, v. 25, January 1985, pp. 103-165. (3)

  Compares and contrasts three state programs and the San Francisco Bay program under five separate topics: 1) topics one to four emphasize CZM processes, public participation and local government relationships; and 2) topic five discusses substantive changes in patterns of coastal resource use, outlines the legal framework for all topics, and assesses the experiences in program administration. Limited discussion of OCS issues, but good West Coast CZM overview.

- Miller, James W. and Murice O. Rinkel, Oil and Gas Leasing in Florida Offshore Waters, Volume I: A Description of Florida's Existing Program and Recommendations for Revised Procedures, Florida Institute of Oceanography, October 1984. (5)

  Review of Florida's oil and gas leasing procedures and those of eight other coastal states. Study results show primary orientation to onshore operations and vague, sometimes contradictory, statutes, regulations and policies for offshore leasing and operations. Policy recommendations include: formation of a policy advisory group, development of an offshore comprehensive leasing program, development of a pre-leasing environmental study program, restrictions on offshore lease sales, and exclusion of mineral leasing if not related to the oil and gas leasing program.

- Resource Planning Associates, Inc., Identification and Analysis of Mid-Atlantic Onshore OCS Impacts, prepared for Middle Atlantic Governors' Coastal Resources Council, circa 1975. (2)

  Although dated in some respects, provides a matrix of state policy decisions and policy options in Chapter 4.

- Williams, David C., State Information Needs Related to Onshore and Nearshore effects of OCS Petroleum Development, OCZM, NOAA and BLM, January 1977. (2)

  Dated, but executive summary provides a useful overview of then-current policy issues and information needs and includes a section describing the Oregon and Washington OCS perspective in the 1970s.

STATE-LOCAL COORDINATION

- Chorich, Martin, Cooking with Offshore Oil: A Handbook for Local Government, OCS Training Project, USC Institute for Marine and Coastal Studies, August 7, 1978. (2)

  Provides an introduction to local government and OCS issues including local roles in the leasing and development processes, an OCS issues chart describing a range of possible local response mechanisms, planning responses to OCS development, policy options for local governments, and some courses of action based on experienced OCS actors.

- Duddleson, William J., "How the Citizens of California Secured Their Coastal Management Program," in Protecting the Golden Shore, Robert G. Healy, editor, The Conservation Foundation, 1978, pp. 3-66. (3)

  History of citizen involvement in the establishment of California's coastal management programs.

- Florida State, The Florida Coastal Management Program: Final Environmental Impact Statement, U.S. OCZM and State of Florida Department of Environmental Regulation, Office of Coastal Management, August 1981. (5)

  Includes policies relative to intergovernmental coordination including:

  - role of the state Outer Continental Shelf Advisory Committee and support from the Florida Coastal Management Program;

  - role of Coastal Management Program in assisting with development of a coordinated state level approach to OCS related activities; and in developing regional impact guidelines and in evaluating the application of the Industrial Siting Act to oil and gas facilities;

  - coordination and assistance to local governments in dealing with impacts and strategies related to energy facility development under the Coastal Energy Impact Program;

  - review of OCS plans, reports and use of consistency review to expedite regional, state, and local decisions.

- Hildreth, Richard G. and Ralph W. Johnson, "CZM in California, Oregon and Washington," Natural Resources Journal, v. 25, January 1985, pp. 103-165. (3)

  Compares and contrasts three state programs and the San Francisco Bay program under five separate topics: topics one to four emphasize CZM processes, public participation and local government relationships; topic five discusses substantive changes in patterns

of coastal resource use, outlines the legal framework for all topics, and assesses the experiences in program administration. Limited discussion of OCS issues, but good West Coast CZM overview.

Section II. PRE-LEASE ISSUES

A. Substantive

Section II of the bibliography addresses two types of pre-lease issues: substantive and procedural. Substantive issues (in subsection II.A.) include selection of lease locations, designation of planning areas, size of lease areas, exclusion of OCS lands from leasing, etc. Procedural issues (in subsection II.B.) relate to federal-state-local processes associated with pre-lease and leasing. Section I of the bibliography covered some of these matters in a general manner, especially the descriptive information on the current program.

EXECUTIVE ACTIONS

- California Coastal Commission, Resolution in Response to Proposed Five-Year OCS Leasing Program for 1987-1991, San Francisco, California, 1986. (4)

  California Coastal Commission resolution opposing leasing activities and calling for local action. Includes flyer.

FEDERAL AUTHORITY AND PROGRAMS

- National Ocean Industries Association, Area-Wide Leasing: National Boon or Industry Boondoggle? Washington, D.C., October 1984. (5)

  An industry perspective on the first year of the OCS area-wide leasing program in the Gulf of Mexico. The report concludes that the area-wide leasing program meets the congressional mandate outlined in the Outer Continental Shelf Lands Act Amendments of 1978.

- U.S. House of Representatives, Ninety-Eighth Congress, Committee on Merchant Marine and Fisheries, Subcommittee on Oceanography, Hearings on H.R. 4589, U.S. Government Printing Office, 1984. (2)

  Hearings on a bill to amend the Coastal Zone Management Act of 1972 regarding federal activities that are subject to the federal consistency provisions of the act, and for other purposes. Amendment resulted from the supreme court ruling in Watt v. California, January 1984, that a federal activity must literally occur within the coastal zone in order to have a direct effect upon it.

FEDERAL-STATE COORDINATION

- Goldstein, Joan, Editor, The Politics of Offshore Oil, Praeger Publishers, 1982. (3)

  Study of OCS national energy policies involvement over time in four parts:

1. The Environmentalist Perspective: California study.

2. The State's Perspective: The Georges Bank case study; Mid-Atlantic Governors Coastal Resources Council designed to gain representative power in federal planning.

3. The Federal Perspective.

4. Industry Perspective.

Conclusion provides an overview of the social, economic, political issues affecting OCS decisions.

- U.S. House of Representatives, Ninety-Ninth Congress, Committee on Merchant Marine and Fisheries, Subcommittee on the Panama Canal/ Outer Continental Shelf, Hearings on the Five-Year Draft Proposed Program for Oil and Gas Leasing on the Outer Continental Shelf, and the State/Federal Consultation Process, U.S. Government Printing Office, 1986. (2)

  Hearings on draft five-year program including discussion of state's acceptance of off-shore leases and OCS revenue-sharing legislation. Includes statements of Secretary Hodel regarding Oregon and Washington leases and comments by J.D. Nyhart regarding conflict management techniques.

PUBLIC INVOLVEMENT

- Ortman, David E., Conservation Representative, Friends of the Earth, Letter to Deputy Associate Director for Offshore Leasing, Minerals Management Service, U.S. Department of Interior, May 2, 1986. (5)

  Expresses both substantive and procedural concerns relating to the leasing decision process including comments on the following: inadequate public works, subarea deletions and focused leasing, acceleration provisions, and inclusion of the Oregon/Washington Coast (impacts of oil spills, site specific impacts of routine discharges, and on-shore impacts of drilling-related activities).

PUBLIC-PRIVATE RELATIONSHIP

- California Coastal Commission, General Policy Statement on Conflicts Between the Commercial Fishing and Oil and Gas Industries, San Francisco, California, 1986. (4)

  Includes policies regarding pre-lease decisions and post-lease conflicts.

- Guerriere, Ursula, et al., "The Effects of a Ban on Leasing the Federal Outer Continental Shelf off California for Oil and Gas

Development," American Petroleum Institute, unpublished paper, August 1985. (1)

Industry's comments on DOI tentative agreement to prohibit leasing of certain OCS tracts, except in the instance of a national emergency, until after the year 2000. The paper assesses the effects of the proposed "ban" on the U.S. economy, national security, and the environment.

- National Oceans Industries Association, "Economic Survey Shows 55 Percent Employment Decrease from Offshore Oil Restriction," unpublished paper, circa 1985. (1)

  Results of an informal telephone survey of 37 California companies to determine the effect of the proposed DOI leasing moratorium on employment.

STATE AUTHORITY AND REGULATIONS

- American Petroleum Institute, Should Offshore Oil Be Put Off Limits? June 1984. (1)

  Presents industry's view that the critics suggest that OCS oil should be off limits and industry's experience that it should not. Includes section on the influence of coastal states in offshore oil decisions.

- Douglas, Peter, and Joe Nicholson, "Staff Recommendations on California Coastal Commission Comments to the Department of Interior on the Proposed Five-Year Oil and Gas Lease Program," Memorandum, February 1986. (4)

  Comments on DOI failure to address five critical concerns:

  1. size, timing and location
  2. area deletions
  3. assessment of impacts
  4. phasing of development
  5. transportation of oil

Section II. PRE-LEASE ISSUES

B. Procedural

This section addresses the processes and actions related to the issuance of leases, including the federal requirements and state response to pre-lease activities.

FEDERAL AUTHORITY AND PROGRAMS

- Manners, Ian R., "Biological Assumptions and the Protection of Environmental Resources in the Gulf of Mexico," in Magoon et al., editors, Coastal Zone '85, Vol. 2, pp. 1703-1722. (1)

  Paper documents the growing use of lease stipulations as an impact mitigation procedure in the Gulf of Mexico. In particular, the paper analyzes the role and effectiveness of biological stipulations in protecting sensitive offshore habitats. Experience with stipulations appears to have considerable influence in determining balance in OCS development in marine environments.

- U.S. Court of Appeals, Ninth Circuit, U.S. of America, Plaintiff v. State of Washington, 1985. (3)

  U.S. of America brought suit as trustee for Indian tribes concerning Indian treaty fishing rights in the Pacific Northwest.

  In a 1980 U.S. District Court, Washington, case (Boldt), tribes were granted right to have fishing habitat provided. In this 1985 decision of the Ninth Circuit Court of Appeals, environmental degradation of fisheries issue was deemed not appropriate for judicial review. However, the court allowed that the issue was open to further review.

- U.S. Department of the Interior, Minerals Management Service, Outer Continental Shelf Oil and Gas Information Program, Pacific Summary Report, by Kenneth J. Havran and Christopher W. Lynch, July 1984. (1)(2)

  Annual reports which include OCS oil and gas activities in the Pacific and their onshore impacts. Includes appendix which reviews topics and issues related to federal regulation of OCS and coastal zone activity.

FEDERAL-STATE COORDINATION

- Botzum, John R., Editor, Coastal Zone Management, Vol. 16, No. 39, October 1985. (4)

  Review of Exxon case. Key concern explained: ruling ignores the Commerce Secretary's override, therefore overlooking consistency review process and thwarting administrative procedures.

- Gault, Ian Townsend, "Jurisdiction Over the Petroleum Resources of the Canadian Continental Shelf: The Emerging Picture," Alberta Law Review, Vol. XXII, No. 1, 1985, p. 75-100. (3)

  Explains constitutional debate, a.k.a. Hibernia Reference, regarding federal-state relationship with respect to oil and gas exploration on the continental shelf. States that federal government has jurisdiction in the territorial seas. The Hibernia Reference has not resolved all issues -- a great many jurisdictional uncertainties remain unresolved.

- Goldstein, Joan, Editor, The Politics of Offshore Oil, Praeger Publishers, 1982. (3)

  Study of OCS national energy policies involvement over time in four parts:

  1. The Environmentalist Perspective: California study

  2. The States' Perspective: the Georges Bank case study; Mid-Atlantic Governors Coastal Resources Council designed to gain representative power in federal planning.

  3. The Federal Perspective

  4. Industry Perspective

  The conclusion provides an overview of the social, economic, and political issues affecting OCS decisions.

- Rathgeber, David D., "Outer Continental Shelf Leasing Policy Prevails over the California Coastal Commission," Natural Resources Journal, v. 24, October 1984, p. 1133-1145. (3)

  Watt v. California case (Lease 53). Describes CZMA consistency issues at stake in Lease 53 case. Court found that no consistency review was required because leasing is not an action "directly affecting" the coastal zone.

- University of Oregon, Ocean and Coastal Law Center, "Federal Consistency Under the Coastal Zone Management Act Revisited," Coastal Law Memo, Issue 5, Eugene, Oregon, March, 1986. (3)

  The U.S. Supreme Court decisions on consistency provisions of the CZMA; especially the court's reasoning in Clark v. California, 1984, and several cases since.

- U.S. Court of Appeals, District of Columbia Circuit, State of Oregon, et al., Petitioners, v. James G. Watt, et al., Respondent, and American Petroleum Institute, et al., Intervenors Respondents, Case Nos. 82-2102, 82-2118, 82-2085, as consolidated with Nos. 82-2081 and 82-2097, October 1982. (3)

Oregon petitioners in Lease #53 case (Watt v. California). Argues that Secretary Watt failed to consider the impact of the five-year leasing program on Oregon and Washington and fails to strike a balance between oil and gas development and environmental impacts; that the EIS was inadequate; and that the procedures for making consistency determinations were inadequate.

- U.S. Court of Appeals for the Ninth Circuit, Secretary of the Interior, et al. v. California, et al., Proceedings, January 1984. (3)

  Held sale of oil and gas leases does not directly affect coastal zone; consistency review not required; distinguishes between lease sale and a permit to explore, produce, or develop oil and gas.

PUBLIC INVOLVEMENT

- Ortman, David E., Conservation Representative, Friends of the Earth, Letter to Deputy Associate Director for Offshore Leasing, Minerals Management Service, U.S. Department of Interior, May 2, 1986. (5)

  Expresses both substantive and procedural concerns relating to the leasing decision process, including comments on the following: inadequate public notice, subarea deletions and focused leasing, acceleration provisions, and inclusion of the Oregon/Washington Coast (impacts of oil spills, site specific impacts of routine discharges, on-shore impacts of drilling-related activities).

STATE AUTHORITY AND REGULATIONS

- Washington State Department of Natural Resources, Oil and Gas Leasing Program, June 1985. (1)

  Discusses Washington's oil and gas leasing program and programmatic EIS. Includes aquatic lands and marine waters under the state's jurisdiction.

- Washington State Department of Natural Resources, Oil and Gas Leasing Program: Final Environmental Impact Statement, May 1985. (1)

  The EIS associated with Washington State's Oil and Gas Leasing Program for lands under the state's jurisdiction.

- Washington State, Chapter 332-12 WAC, Oil and Gas Leases, 1983. (1)

  Washington State, Chapter 79.14 RCW, Oil and Gas Leases on State Lands, 1985. (1)

Washington State, Commissioners of Public Lands, Notice of Intention to Adopt, Amend, or Repeal Rules: Chapter 79.14 RCW, Oil and Gas Leases on State Lands, January 1986. (1)

State rules and regulations which deal with oil and gas leasing on state lands.

STATE-LOCAL COORDINATION

- Chorich, Martin, Cooking with Offshore Oil: A Handbook for California Local Government, Institute for Marine and Coastal Studies, University of Southern California, Los Angeles, California, 1978. (2)

  Five parts focus on local government's role in OCS:

  1. Introduction to the leasing process and the OCS development process
  2. OCS issues chart showing range of local response mechanisms
  3. Development issues and recommended planning responses
  4. Policy options open to local governments
  5. Policy recommendations based on OCS actions which provide promising courses of action

  Appendices and bibliography may also be helpful.

Section III. POST-LEASE ISSUES

A. Environmental

Section III addresses a range of policies/actions associated with OCS lease exploration and development activities: environmental, facility siting, transportation, fisheries and maritime trade. Subsection III.A. covers environmental issues.

FEDERAL AUTHORITY AND PROGRAMS

- U.S. Department of the Interior, Bureau of Sport Fisheries and Wildlife, Washington Islands National Wildlife Refuge: Information Packet. (1)

  Exclusion/deletion argument. U.S. Fish and Wildlife Service Region I Marine Board Policy. Includes effective regulations of offshore oil and mineral development and stringent tanker safety laws.

FEDERAL-STATE COORDINATION

- Noonan, Diedre Jane Josephine, "Permitting Oil and Gas Activities in the OCS Mukluk Island, Beaufort Sea, Alaska, 1983," in Magoon, et al., editors, Coastal Zone '85, v. 2, pp. 1691-1702. (1)

  Case study which describes events, actions and procedures involved in issuing permits for oil and gas exploration on Mukluk Island. Case reveals the flaws, inconsistencies and redundancies inherent in existing permit processes.

PUBLIC-PRIVATE RELATIONSHIP

- American Petroleum Institute, Oil, Gas and Deepwater Technology: The Hidden Frontier, December 1982.

  Booklet describes the technological progress being made in the exploration and production of crude oil and natural gas in deepwater areas.

STATE AUTHORITY AND REGULATIONS

- California Coastal Commission, "Oil Spill Response Briefing," Staff Memorandum, January 24, 1986. (4)

  California Coastal Commission: overview of CCC Oil spill response program -- legal responsibilities, general response structure and research, and future areas of investigation.

- California Coastal Commission, Policy Statement on Oil Spill Response Measures, December 1983. (4)

  California Coastal Commission policy on oil spills and resource protection.

- California Legislature, Assembly Bill No. 4044, "An Act to add Section 294 to the Harbors and Navigation Code, Relating to Liability," February 21, 1986. (4)

  Proposed California legislation that would make oil companies fully financially responsible for any and all damages associated with their offshore oil operations.

- Feldman, James H.; and Ernest J. Englander, Environmental Plan for Oil and Gas Exploration and Development in Washington State: Part One: Petroleum Impacts and Management Experience. Prepared for the Washington State Department of Natural Resources, September 10, 1979. (1)

  Describes federal, California, and Alaska planning requirements related to oil and gas exploration and offshore activities. Prepared as the first part of a study to help Washington develop environmental planning and petroleum management approaches.

STATE-LOCAL COORDINATION

- Energy Facility Siting Council, State of Washington, Energy Facility Planning Process, undated, 38 pp. (1)

  Washington energy facility planning process as it related to OCS oil and gas production. Cites both EFSEC and non-EFSEC sources of authenticity.

- California Coastal Commission, Staff Recommendation on Consistency Certification, 1985. (4)

  California Coastal Commission staff response to National Pollution Discharge and Elimination System (NPDES) draft permits for disposal of drilling muds and cuttings and associated wastes resulting from the exploration and development of OCS oil and gas resources in federal waters off southern California. Recommends that the commission objects to the permits on the following grounds: permits are inconsistent with state standards for protecting ocean waters; inadequate monitoring and testing procedures to assure control of toxic materials; and greater enforcement activities are necessary to assure compliance with permit requirements.

- California State Governor's Office, Office of Planning and Research, Offshore Oil and Gas Development: Southern California, Volumes One and Two, prepared for the California Coastal Commission, October 1977. (4)

Addresses OCS exploration and development issues in California. Includes articles on institutional arrangements for OCS management, socioeconomic and environmental facility site and future leasing.

- New England River Basins Commission, Strategies for State Participation in OCS Exploration Decisions, March 1980. (2)

  Discusses issues related to exploration phase of OCS decisions: planning needs, strategies, and institutional and organizational options for effective participation in decision making. Includes a review of procedures in other states and Scotland.

- New England River Basins Commission and U.S. Geological Survey, Strategies for State Participation in OCS Exploration Decisions, Conference Proceedings, March 22, 1979. (2)

  New England conference proceedings including sections on:

  - OCS exploration, decision making and opportunities for state involvement;
  - Planning needs associated with OCS exploration;
  - Options associated with effective participation in OCS exploration decisions;
  - A regional approach to OCS development decisions.

STATE-LOCAL COORDINATION

SLC
- Oregon Land Conservation and Development Commission, Oregon's Statewide Planning Goals, 1985. (2)

  Oregon's statewide planning goals, including:

  Goal 16: Estuarine Resources, p. 13
  Goal 17: Coastal Shorelands, p. 18
  Goal 18: Beaches and Dunes, p. 20
  Goal 19: Ocean Resources, p. 22

  Goals and guidelines to be addressed by local government, state agencies, and private developers in actions affecting above areas.

Section III. POST-LEASE ISSUES

B. Facility Siting

Section III addresses a range of policies/actions associated with OCS lease exploration and development activities: environmental, facility siting, transportation fisheries, and maritime trade. Subsection III.B. addresses facility siting issues.

FEDERAL-STATE COORDINATION

- Goldstein, Joan, editor, The Politics of Offshore Oil, Praeger Publishers, 1982. (3)

  Study of OCS national energy policies involvement over time in four parts:

  1. The Environmentalist Perspective: California case study.
  2. The States' Perspective: The Georges Banks case study; Mid-Atlantic Governors Coastal Resources Council designed to gain representative power in federal planning.
  3. The Federal Perspective.
  4. The Industry Perspective

  Conclusion: Overview of social, economic, and political issues affecting decisions.

STATE AUTHORITY AND REGULATIONS

- Mathematical Sciences N.W., Inc.; Energy Refinements for the Washington State Coastal Zone Management Program, June 1977. (1)

  Review of Coastal Energy Impact Program, examination of state's energy facility planning process, and identification of state's interest in OCS development.

- New England River Basins Commission, On-Shore Facilities Related to Offshore Oil and Gas Exploration: Strategies for State Participation in OCS Exploration Decisions, Conference Proceedings, March 22, 1979. (5)

  Presenting a New England perspective, these proceedings address the following topics: opportunities for state involvement, effective state participation in OCS exploration decisions, and a regional approach to OCS exploration decisions.

STATE-LOCAL COORDINATION

- Energy Facility Siting Council, State of Washington, Energy Facility Planning Process, undated, 38 pp. (1)

  Washington energy facility planning process as it relates to OCS oil and gas production. Cites both EFSC and on-EFSC sources of authenticity

- Grays Harbor Regional Planning Commission, Final Report of Onshore Support Activities Planning Study for Outer Continental Shelf Construction: Grays Harbor, Washington, October 1975. (1)

  A study to provide information to assess the potential effect of using the Grays Harbor area as support for OCS development and to plan properly for the future.

- Skagit Regional Planning Council, Onshore Support Activities Planning Study for Outer Continental Shelf Construction: Anacortes, Washington, October 1979. (1)

  Analysis of proposed private development (Snelson-Anvil) to construct OCS support facilities at Anacortes, including discussion of impacts of the facility is having on the Anacortes community and a strategy to mitigate identified impacts.

- Washington State Department of Ecology, An Environmental Review of Potential Outer Continental Shelf Platform Fabrication/Assembly Yard Sites in Washington's Coastal Zone, February 1984. (1)

  Assessment of impact of siting and/or expansion of industrial facilities for offshore oil and gas drilling platforms. Includes market demand; rig yard siting requirements; existing or potential sites; environments and issues; impact avoidance measures; and a summary of local, state, and federal permit requirements.

- Williams, David C., and Zinn, Jeffrey A., editors, Source Book: Onshore Impacts of Outer Continental Shelf Oil and Gas Development, prepared for the American Society of Planning Officials; sponsored by the U.S. Department of the Interior and U.S. Environmental Protection Agency, May 1977. (5)

  Includes section on planning and managing onshore impacts. Dated.

Section III. POST-LEASE ISSUES

C. Transportation

Section III addresses a range of policies/actions associated with OCS lease exploration and development activities: environmental, facility siting, transportation, fisheries, and maritime trade. This subsection, III.C., discusses transportation issues.

STATE AUTHORITY AND REGULATIONS

- New England River Basins Commission, State Participation in OCS Transportation Decisions, July 1981. (2)

  Includes sections on umbrella legislation; pipelines and tankers regulation; and case studies in California, New Jersey, and Texas.

- Santa Barbara County, California, Resource Management Department, Petroleum Transportation Committee, Phase I, Final Report, October 1982. (2)

  Includes a section on streamlining environmental review and permit processes.

E

Section III. POST-LEASE ISSUES

D. Fisheries

Section III addresses a range of policies/actions associated with OCS lease exploration and development activities: environmental, facility siting, transportation, fisheries, and maritime trade. This subsection, III.D., discusses issues relating to fisheries.

FEDERAL AUTHORITY AND PROGRAMS

- Northwest Indian Fisheries Commission, "What is Cooperative Management?", circa 1985. (1)

  Describes the U.S./Canada Pacific Salmon Interception Treaty. Objective is improved habitat protection and revitalization.

FEDERAL-STATE COORDINATION

- Northwest Indian Fisheries Commission, Annual Report: Fiscal Year, 1985. (1)

  Describes 1985 accomplishments including ratification of the U.S./Canada Treaty and development of the Pacific Salmon Commission, coordination of tribal activities with Washington State Fisheries agencies, and the commission's environmental management activities. No direct mention of OCS-related activities.

- U.S. District Court, Central District of California; Exxon Corporation, Plaintiff, v. Michael L. Fischer, Executive Director of the California Coastal Commission, et al., Defendants; CV No. 84-2362-PAR; 1985. (3)

  Ruling that CZMA 307(c)(3)(b) does not give California Coastal Commission the authority to control time of OCS exploration in "Thresher shark" fishery area; sharks are outside the coastal zone and therefore not subject to consistency review.

PUBLIC-PRIVATE RELATIONSHIP

- California Coastal Commission, General Policy Statement on Conflicts Between the Commercial Fishing and Oil and Gas Industries, San Francisco, California, 1986. (4)

  Includes policies regarding pre-lease decisions and post-lease conflicts.

- Hay, Keith, G., Fish and Offshore Oil Development, American Petroleum Institute, December 1984. (1)

  Describes oil and gas industry's role in protecting and enhancing the fishing resources -- "fixed offshore oil and gas structures not only attract and shelter a great number and diversity of aquatic organisms, but such structures have been shown actually to increase fish production." Also points out that problems, e.g., oil spills, have occurred, but that there have been complete recoveries in those instances.

- Rogers, Golden and Halpern, Inc., Pacific Summary Report, prepared for OCS Information Report MMS 85-0040, April 1985. (1)

  Appendix B presents a discussion of a conflict resolution approach between California's commercial fishing industry and the offshore oil-and-gas industry: communications, traffic and maneuverability, loss of fishing opportunities, and perceived damage to the resource. Problem resolution approaches include:

  - communications - establishment of an oil consortium funded liaison office located at C/COG;
  - traffic and maneuverability - preparation of a fishing vessel traffic map showing corridors between coast and permanent oil structures;
  - loss of fishing opportunities - committee of state and federal officials formed and research underway to study fish dispersal resulting from seismic blasts during geophysical research;
  - damage to the resource - public-private committee studying impact of seismic blasts on underdeveloped fish eggs and larvae.

STATE AUTHORITY AND REGULATIONS

- California Coastal Commission, Final Adopted General Policy Statement on the Ocean Disposal of Drilling Muds and Cuttings, Staff Memorandum, November 1984. (3)

  Under the authority of the Coastal Act of 1976 (Sections 30230 and 30231), and commission must assure that marine resources are maintained, enhanced, and where feasible, restored; and that uses of the marine environment are carried out in a manner which sustains the biological productivity and quality of marine ecosystems. These policies address: commission authority over discharge of drilling muds and cuttings in state and OCS waters; criteria for protecting marine organisms and associated habitat areas; suggestions for baseline biological information, mitigation measure and monitoring programs; and recommended interagency approaches for protecting marine ecosystems.

Section III. POST-LEASE ISSUES

E. Maritime Trade

Section III addresses a range of policies/actions associated with OCS lease exploration and development activities: environmental, facility siting, transportation, fisheries, and maritime trade. This subsection, III.E., discusses maritime trade issues.

FEDERAL-STATE COORDINATION

- Cournoyer, Jill, "Delaware's Coastal Zone Act Challenged as Burden on Interstate Commerce," Territorial Sea, Newsletter of the Marine Law Institute, Vol. V, No. 4, December 1985. (4)

  Norfolk Southern Corporation's proposed coal transportation project was excluded from Delaware Bay because of a Delaware CZA ban on bulk product facilities in the coastal zone. Company claimed that the ban is an unconstitutional burden on foreign and interstate commerce. Article points out the conflict between two national interests -- ecological protection and development of U.S. export market; resolution will have to come from source other than commerce clause, and use CZMA to weigh these interests.

- U.S. District Court, Delaware; Norfolk Southern Corporation, et al., Plaintiff, v. Charles M. Oberly, III, et al., Defendants; Civil Action No. 84-330; September 1984. (4)

  CZMA procedures can limit siting of facilities. Seek remedy elsewhere regarding obstruction of interstate commerce.

STATE AUTHORITY AND REGULATIONS

- California Coastal Commission, Policy Statement on Conflicts Between Vessel Safety and Offshore Oil and Gas Operations, July 1982. (4)

  Limits structures in or near vessel traffic lanes; sets up marshaling and designated waiting areas; limits movement of traffic lanes; requires radar protection; and suggests possible limit on the number of structures.

- California Coastal Commission and the California Department of Fish and Game, Collection of Papers Presented at the Ocean Studies Symposium, Asilomar, California, November 1982. (4)

  Includes papers on offshore oil conflicts with vessel navigation. Several other papers on OCS environmental and resource matters.

VII. POTENTIAL POLICY OPTIONS

Cogan Sharpe Cogan, April 30, 1986

INTRODUCTION

This report is prepared pursuant to element two of the contract between Cogan Sharpe Cogan and the Washington State Department of Ecology concerning "assessment of the WCZMP options for OCS leasing, exploration and development." Other work which has been prepared under this contract includes:

- Analysis of policy issues applicable to the pre-lease and post-lease periods
- Evaluation of existing legislation, policies and regulations
- Evaluation of initiatives in other OCS regions
- Preparation of an annotated bibliography of federal, state, and private documents relevant to the proposed program of OCS leasing.

Issues which have been analyzed thus far in the study are:

I. Pre-Lease Policy Issues

A. Substantive:

1. Planning area size (sub-area deletions)
2. Location of leases within planning area
3. Timing and sequence of lease milestones
4. Coastal and marine resource protection
5. Funding for environmental review
6. Jurisdiction (including tribal fisheries)

B. Procedural:

1. Environmental review process
2. Federal consistency
3. Federal, state, and local agreements
4. Negotiation/lease sale participation

II. Post-Lease Issues

A. Use Conflicts:

1. Commercial fishing
2. Recreation
3. Shipping
4. Other

B. Facility Siting:

1. Onshore
2. Offshore

C. Oil Transportation

D. Air and Water Quality

E. Socioeconomic Impacts

F. Ecological Impacts

To address these issues, this paper identifies preliminary policy options and their consequences. It is intended for review and comment by the OCS program manager and others concerned with the project. It also provides a briefing for participants in the workshop in May 14, 1986. After thorough discussion and evaluation, some options will be selected for more detailed analysis in a report concluding the work under this contract by June 30.

POLICY OPTIONS

The following policy options are an initial selection and are not intended to be an exhaustive list of all potential alternatives available to the State of Washington in the matter of OCS leasing. Recognition is given of policies that already have been created and utilized by the State of Washington as well as those which may be expanded or added.

1. Articulate Executive Policy. Clarify existing policy; adopt specific policy statements on other important OCS-related issues as has been done in California; develop clear relationships on these matters within the Department of Ecology and the Governor's Office.

2. Clarify Statutory Authority. Enact laws regarding the state intent in these matters modeled after California experiences and Oregon's Land Use Goal 19 dealing with ocean resources. Additional laws concerning environmental and coastal resources also may be appropriate.

3. Formulate New Regulatory Initiatives. Expand state regulations in the Shoreline Management Act about water and air protection.

4. Expand Facility Siting Procedures. Utilize and expand regulations of the State Energy Facility Siting council in regard to OCS.

5. Initiate Mutual Arrangements with Affected Institutions. Develop supportive and cooperative agreements with other state agencies and units of local government.

6. Coordinate State/Local Initiatives. Utilize the technical capabilities of the Department of Ecology to develop a coordinated approach to mitigate adverse impacts of oil and gas leasing, exploration, and development.

7. Initiate Management Strategy. Through the State Department of Ecology and other agencies such as Parks and Recreation and Fisheries, improve lines of communication and supervision of OCS issues.

8. Implement Administrative Procedures. Clarify and expand administrative codes to permit state agencies to take timely and effective action when needed.

9. Mobilize Citizen Initiatives. Consider the Washington Shoreline Management Act, which began through citizen initiative, as a model for an expanded public approach to OCS issues.

10. Generate Financial Resources. Undertake an aggressive approach to defining and securing funding from federal, state, and private sources.

11. Influence Congressional Delegation. Apprise Washington representatives and senators of the issues and seek their support.

12. Pursue Legal Action. Continue to consult with the State Attorney General's Office regarding possible lawsuits against the DOI Secretary and willingness to participate in litigation with other states.

13. Undertake Communications Programs. Develop active program of disseminating information through the media.

14. Coordinate Actions with Oregon. Develop a united bi-state approach to the DOI Secretary, in recognition of the mutual interests of the two states.

15. Utilize Mediation Techniques. Consider available means to resolve disputes in lieu of litigation.

16. Formulate Environmental Stipulations. Utilize experience from leases in the Gulf of Mexico to mitigate adverse impacts of oil and gas developments at specific locations and to protect sensitive offshore habitats.

17. Expand Ocean Studies. Fund additional data collection to support effective evaluation of the recommendations of DOI.

18. Strengthen County Master Programs. Utilize and expand the current master programs for each of the four coastal counties, particularly regarding the siting and regulation of onshore facilities.

CONSEQUENCES OF EACH POLICY

On the following page, the policy options and possible consequences are depicted in a comparison matrix. These consequences are:

1. Political Asset

   - Minimal public opposition expected
   - Likelihood of bipartisan support
   - Enhances perception of leadership

2. Beneficial Result

- Positive outcome anticipated
- State's position enhanced
- Assists in resolving the problem or issue

3. Achievable Approach

- May be accomplished with available resources
- Minimal expectation of obstacles or opposition

4. Efficient Process

- Maximum results with minimum effort
- Cost effective and expeditious.

COMPARISON OF POLICY OPTIONS

Alternative Policy Options	Political Asset	Beneficial Result	Achievable Approach	Efficient Process
1. Articulate Executive Policy	M-H	H	H	H
2. Clarify Statutory Authority	L-M	M	M	L
3. Formulate New Regulatory Initiatives	M	M	L	L
4. Expand Facility Siting Procedures	M	H	H	M
5. Initiate Institutional Arrangements	H	H	M	L-M
6. Coordinate State/Local Initiatives	M-H	H	M-H	L-M
7. Initiate Management Strategies	H	M-H	H	M-H
8. Implement Administrative Procedures	H	M-H	H	M-H
9. Mobilize Citizen Initiatives	H	H	M	L
10. Generate Financial Resources	L-M	H	M-H	L
11. Cultivate Congressional Delegation	H	H	M-H	M
12. Pursue Legal Action	M	H	M-H	L
13. Undertake Communications Programs	H	H	H	L-M
14. Coordinate Actions with Oregon	H	H	M	M
15. Utilize Mediation Techniques	H	M-H	L-M	L-M
16. Formulate Environmental Stipulations	H	H	H	M
17. Expand Ocean Studies	H	H	M	M
18. Strengthen County Master Programs	M-H	H	M-H	M

Code to scoring consequences:

L - Low
M - Medium
H - High

VIII. RECOMMENDED POLICY OPTIONS AND STRATEGIES FOR THE STATE OF WASHINGTON REGARDING LEASING, EXPLORATION AND DEVELOPMENT OF OIL AND GAS RESOURCES ON THE WASHINGTON OUTER CONTINENTAL SHELF

Cogan Sharpe Cogan, July 11, 1986

TABLE OF CONTENTS

Section

INTRODUCTION

This study was initiated by the Washington State Department of Ecology (Ecology) in response to the U.S. Department of the Interior's (DOI) proposed five-year outer continental shelf (OCS) oil and gas lease program. Ecology is responsible for administering the state's coastal zone management program and formulating its OCS response. Maps depicting the Washington-Oregon planning area for OCS sale 132 and planning areas in other coastal regions of the nation are included at the end of this introductory section.

CZMA Authority for State Participation in OCS Studies

On December 12, 1975, the State of Washington Department of Ecology submitted its Washington State Coastal Zone Management Program (WCZMP) to the National Oceanic and Atmospheric Administration (NOAA) in the U.S. Department of Commerce. In 1976, Washington was the first state in the nation to be granted program approval.

In his letter to NOAA, Governor Dan Evans stated in part that

> "The state has the required authorities and is presently implementing the coastal zone management program;
>
> "The state has established, and is operating, the necessary organizational structure to implement the coastal zone management program;. . .
>
> "The Department of Ecology is the single designated agency to receive and administer grants for implementing the coastal zone management program, and further the Department of Ecology is hereby designated as the lead agency for the implementation of the coastal zone management program;. . .
>
> "The state presently uses the methods listed in Section 306(e)(1) of the Coastal Zone Management Act for controlling land and water uses in the coastal zone, including: (1) the authority derived from the (state's 1972) Shoreline Management Act (SMA), the Act's implementing regulations including the final guidelines and local master programs; (b) state administrative review of local programs, and permits associated with the Shoreline Management Act; and (c) direct state regulatory authority for control of air and water pollution;. . .
>
> "Those state laws cited in the program have been passed by the legislature and enacted into law. Administrative regulations required to implement the laws have been formally adopted by the responsible state agencies; and state approved local master programs have been formally adopted by the appropriate local government;. . ."

Also cited in the WCZMP is consideration of the national interest in facility siting:

> "The Coastal Zone Management Act at Section 306(c)(8) and its approval regulations require the state to consider adequately the national interest in the siting of facilities necessary to meet requirements which are of greater than local concern. The Washington coastal zone management program and its related state network of policies and authorities establish a reasoned means to consider the siting of facilities of local as well as national import. Similarly, SMA and the other components of the coastal zone management network are adequate to deal with uses of regional benefit. . .
>
> "Perhaps the most essential ingredient in meeting national or regional needs is the commitment to a coastal zone management program acknowledging national valuers and needs in Washington's coastal zone; establishing a responsive system of consultation and coordination; and committing the state to a continuing process of interaction with these interests."

Consultant Team

Consultants Cogan Sharpe Cogan, Portland, in collaboration with Sedway Cooke Associates, San Francisco, and Professor Richard Hildreth, University of Oregon, were retained to assist Ecology with the following:

1. Examine coastal zone management implications posed by the U.S. Department of the Interior's proposal to offer tracts for oil and gas leasing off the Washington coast;

2. Document authority, policy, regulations, and administrative procedures available to the state through the existing CZM program which would apply to the OCS question;

3. Assess the current federal and state coastal zone policy and management framework and the capability of existing authority, policy, regulations and administrative procedures to cope with probable OCS issues;

4. Make recommendations for modifications to the WCZMP to improve the state's readiness and protect those resources which could be adversely affected by OCS development;

5. Develop state policy options and, where appropriate, legislative recommendations.

The detailed results of our research, findings and recommendations have been submitted previously in the following reports:

- Policy Issues Stemming from Oil and Gas Leasing on the Washington Outer Continental Shelf, Cogan Sharpe Cogan, June 30, 1986

- The Practice and Participation of Other States in the OCS Leasing and Development Process, Sedway Cooke Associates, April 25, 1986

- Legal Framework for Washington OCS Policy Options, Richard G. Hildreth

  - Pre-lease Issues, April 28, 1986
  - Post-lease Issues, May 20, 1986

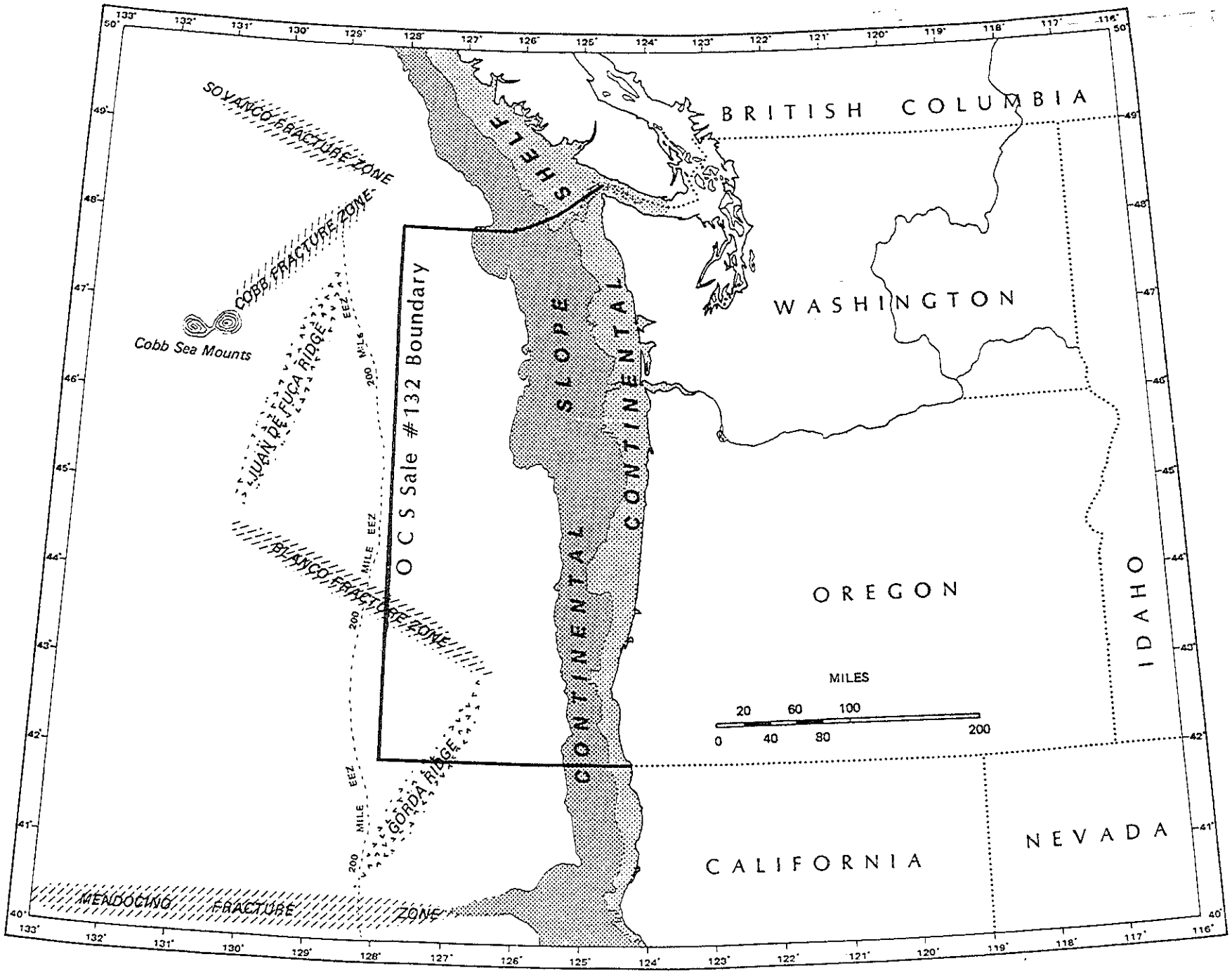
- Rights of Indians in Washington State vis a vis OCS Oil and Gas Development, Ralph Johnson, Professor of Law, University of Washington, April 30, 1986

- Results of Focus Group Workshop, May 14 to explore issues and policy options with 21 individuals chosen because of their knowledge, experience, and interest in the environmental, governmental, economic, legal, and technical aspects of offshore oil and gas leasing, Cogan Sharpe Cogan, June 5, 1986

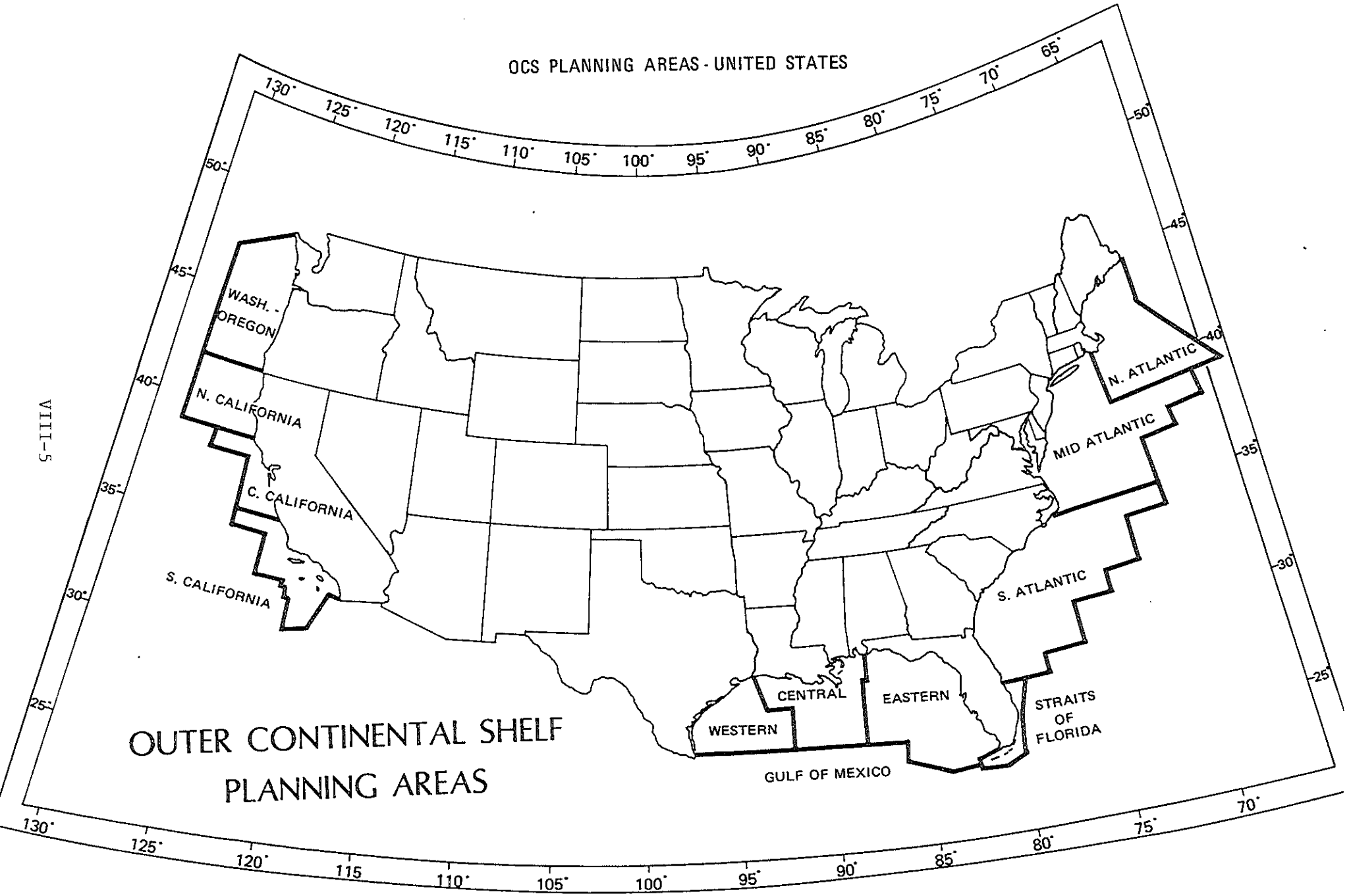
- Annotated Bibliography of Federal, State and Private Documents Relevant to the Proposed Program of OCS Leasing, Cogan Sharpe Cogan, June 24, 1986

- Potential Policy Options, Cogan Sharpe Cogan, April 30, 1986

This final report is the cumulative result of all previous work. It presents our findings and recommendations and a blueprint for action.



WASHINGTON/OREGON OCS PLANNING AREA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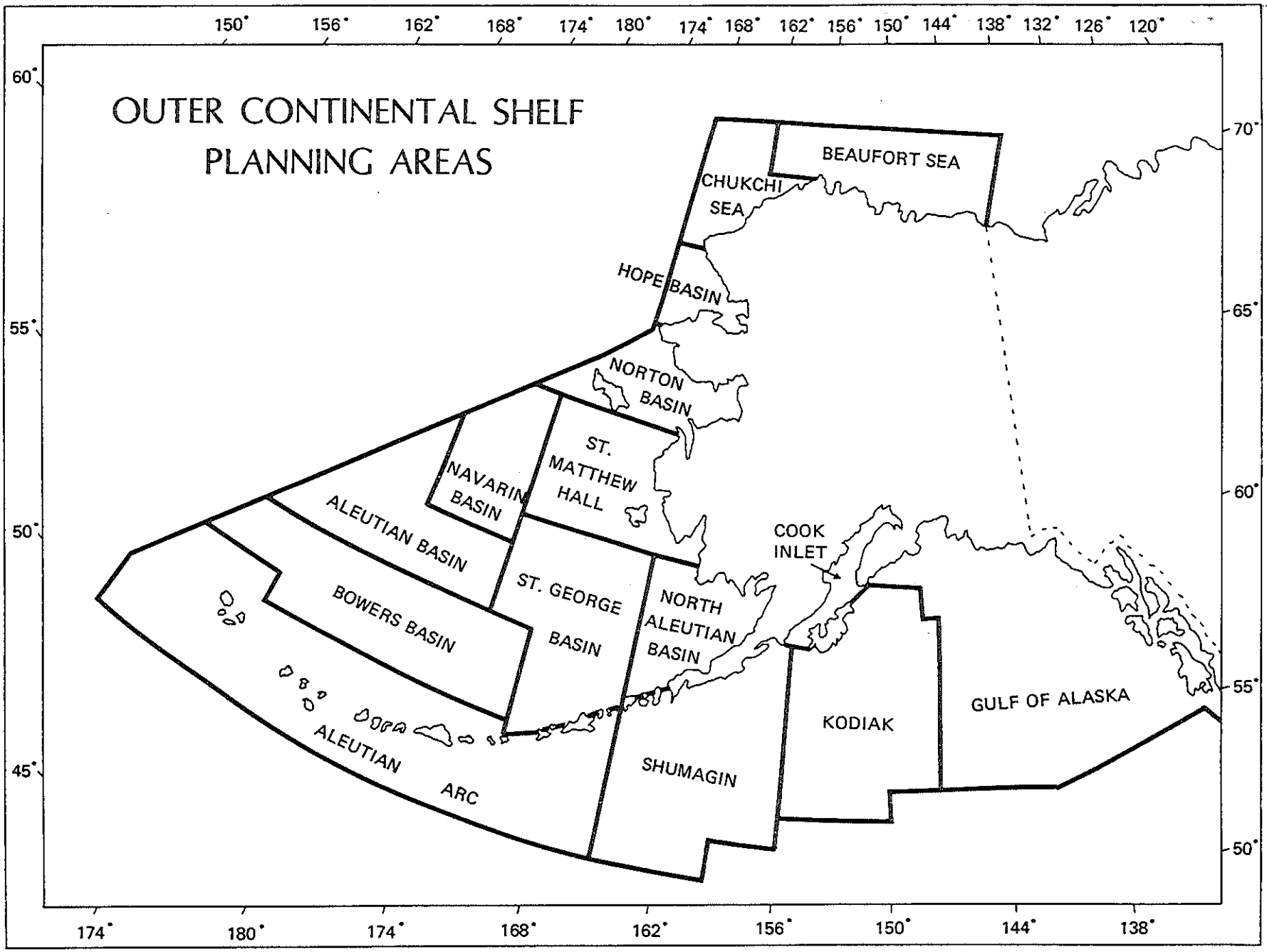

OCS PLANNING AREAS - ALASKA

FINDINGS AND RECOMMENDATIONS

General Findings

The Department of Ecology should try to have an impact on both pre-leasing and post-leasing. Obviously, the state would have its maximum effect on federal policies and procedures if it is allowed to be an early and active partner in pre-lease activities between now and 1990.

Indeed, the federal OCS Lands Act (OCSLA) requires the Secretary of Interior to balance the development of oil and gas reserves with protection of the environment and to consider the adverse impacts that leasing may have on the coastal zone.

Unfortunately, there is a serious question whether the State of Washington can prevent, delay, or influence the outcome of DOI lease sales, given the authority of the Secretary to make the final decisions and diminished state prerogatives under court interpretation of state consistency powers. For example, early in 1986, congressional efforts to amend Section 19 of the OCSLA to give governors' comments greater standing in lease sale decisions failed. It is expected that this issue will be raised again in Congress and in the courts.

However, Congress, itself, has not been clear in its intent about how far oil and gas exploration can be allowed to affect other resources. For example, in recent years it has enacted numerous laws regarding marine mammals, fisheries, minerals as well as oil and gas development. As they were in response to differing and sometimes conflicting interests, the resulting laws are generally single purpose and somewhat inconsistent.

Moreover, each resource/use is under the jurisdiction of a different operating agency. It is difficult, therefore, to coordinate planning and identify and resolve conflicts. Another problem is that the time schedule for DOI to assess environmental impacts and provide data to states and other interested parties is insufficient to allow for their suitable response and influence over important policy decisions. Refer to the schedule of major steps on the Lease Sale Process on the next page. Furthermore, the large planning area proposed for Sale #132 has extraordinary economic, ecological, and geological problems.

With the demise of the Coastal Energy Impact Program, states and local jurisdictions receive little or no federal revenue to help them respond to vital issues related to offshore oil and gas.

Specific issues of concern to the State of Washington include potential conflicts between offshore oil exploration and development, and commercial sport of Indian fishing; adverse affects of air and water quality; potential impacts of blowouts or oil spills; disruption of normal patterns of maritime shipping; proliferation of onshore industrialization; and damage to fragile environmental and recreational resources.

These problems -- inadequate processes and funds to resolve important issues regarding oil production, revenue generation, and resource protection -- also are endemic in the relationships between the state and local governments. Furthermore, experience in other parts of the U.S. indicates the tendency to deal with issues on a project-by-project basis, often neglecting or overlooking area-wide policy matters.

Though legally, the Department of Interior has the ultimate decision-making authority on the OCS, a concerned state such as Washington can influence national policy and actions through energetic and forthright planning, coordination and participation.

As can be seen on the following time schedule, the most optimistic time between bidding on a tract in lease sale 132 and actual production of oil or gas is five years, or 1996. Ten years is more realistic, placing the likely year for startup in 2001.

SCHEDULE OF MAJOR STEPS IN
WASHINGTON/OREGON LEASE SALE #132

<--------PRE-LEASE---------> <----------POST-LEASE----------->

1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001

* 5-year schedule finalized

* Request for interest

* preliminary notice of sale

* LS132

<----------------> prepare next 5-year schedule

<--- exploratory drilling --->

<--- erection of offshore platforms --->

<potential production startup>

Recommended Policy Options

The following is a synthesis of the results of research and analysis conducted by the consultant, extensive discussion and review with the Washington OCS program manager and his advisory committee, feedback from the focus group workshop, and interviews and discussions with people knowledgeable about this field.

Since, as stated, the state can be most effective in the current pre-lease stage, most of the recommendations in this section of the report are directed toward what Washington can do immediately to advance and protect its interests. Some activities such as the need for continued gubernatorial response, are continual. All recommendations apply to the Department of Ecology unless stated otherwise.

- Undertake Strategic Analysis and Planning

  Develop a strong management, planning, and coordination capability. Clarify legislative and executive policies and priorities on OCS-related issues working closely with other state agencies, local government, and special interest groups. Prepare a strategic plan to guide the State of Washington during the next five years.

- Articulate Executive/Management Authority

  Issue an executive order from the Governor requesting affected agencies to examine whether existing procedures, rules and regulations sufficiently protect the state against adverse impacts of oil and gas exploration or development; suggest remedial or new legislation if required.

  Clarify existing administrative procedures and adopt specific policy statements on other important OCS-related issues. Identify clear relationships and responsibilities on these matters, within the Department of Ecology and the Governor's Office as well as between the two entities.

- Implement Public Communications Programs

  Develop an active program of information dissemination within the state to the public both in coastal communities and elsewhere, other state agencies, members of the legislature, units of local government, and the Washington Congressional delegation, as well as outside, particularly with other West Coast states. Take polls and surveys as necessary to ascertain opinions of special interest groups and the general public.

- Obtain More Oceanic and Socioeconomic Information

  Define baseline data and research needs before undertaking expensive studies; more importantly, conduct all necessary research prior to moving ahead with lease agreements. Examine only those areas considered most critical and, whenever possible, utilize information from existing sources, such as geophysical surveys. Consider using the state exploration permit process, created as a result of the December 1980 Geco Alpha/crab fishing conflict to gather DOI information prior to lease sales. Persuade DOI to share more of its information, possibly through the Pacific Regional Technical Working Group, and provide the necessary financial resources to the research projects. In addition, the two states should develop an analysis of economic benefits from leasing activity.

- Strengthen Department of Ecology Role as the Lead Agency

  Ecology is the logical agency to administer the state's responsibility under the provisions of both the CZMA and OCSLA. Further, provisions of OCSLA require federal consistency for post- lease activities and CZM gives Ecology the authority to undertake consistency

reviews. The agency's budget and staff should be expanded to encourage aggressive coordination, lobbying, research, negotiations, and other necessary tasks to fully protect the interests of the state.

- Coordinate Action with Oregon

  Form a bi-state technical working group to present a united approach to the DOI Secretary, in recognition of the mutual interest of the two states. This effort should be initiated with agreement by the two governors in a joint letter of understanding. If the states fail to speak with one voice, Interior will seize the opportunity to play one against the other.

- Influence Attitudes and Actions of the Congressional Delegations

  Apprise the entire state delegation of OCS issues of state concern and seek their support on key legislation. Monitor congressional action and testify at appropriate hearings. Regular and recurring contact will be needed.

- Coordinate State/Local Initiatives

  Develop a coordinated approach to mitigating adverse impacts of oil and gas leasing, exploration and development. Consider utilizing and expanding the current master programs for each of the four coastal counties, particularly regarding the siting and regulation of onshore facilities. Provide technical and financial assistance to local government as needed. Opportunities should be developed to channel and focus local and state resources whenever possible.

Specific Findings and Recommendations

Supporting the general findings and policy options recommended above are the following specific conclusions for both the pre-lease and post-lease periods.

Pre-Lease Period, 1986-1991

- OCSLA section 20 requires DOI to conduct environmental studies of areas or regions included in oil and gas lease sales and share that information with the affected state and local governments. These studies must be begun at least six months prior to the holding of the lease sale in any area, such as Washington and Oregon, where none has been held previously. The negotiating process with the Pacific Regional Technical Working Group should begin immediately.

- Reduce the size of the planning area substantially by eliminating significant areas such as those offshore from the Olympic National Park and the shipping lanes leading to the Straits of Juan de Fuca. Some states dissatisfied with DOI lease sales have successfully petitioned Congress for temporary or permanent exclusions of particularly sensitive offshore areas. The presence of Olympic National Park and various federal wildlife refuges along

Washington's coastline may be an appropriate buffer zone as used in California, Florida, and elsewhere. To strengthen its case, Washington should maintain its current moratorium on oil and gas leasing in the state's Pacific Ocean waters.

- Update the memorandum of agreement between the state and MMS providing advance notice to the state and its fishermen of proposed exploration to reflect, among others, Ecology's new exploration permit authority. Consider a joint permit process between the Department of Ecology's exploration permit authority and DOI similar to the Corps of Engineers/States' wetlands permit system for fill projects.

- Explore issues of Indian tribal rights over OCS exploration and development. A number of reservations on the Washington coast -- Makah, Ozette, Quileut, Hoh, Shoalwater, Quinalt, and Chehalis -- are most likely to be affected. Treaty rights have been construed to provide signatory Indian tribes exclusive fishing and gathering rights on their reservations. In addition, they guarantee off-reservation fishing rights at their usual and accustomed fishing sites, even if those sites are owned by non-Indians. If treaty rights to land, beaches, shellfish, and fish are damaged by an oil spill, for example, lawsuits might be brought successfully either by the affected tribes or by the United States as trustee.

- Monitor DOI's proposed extensive changes to OCS oil and gas regulations as published in the Federal Register of March 18, 1986. They should be scrutinized carefully for changes adverse to Washington State's interest, in the sale process and other stages of oil and gas development. Rules are likely to change in the future necessitating continued vigilance.

- The State Attorney General's Office should assume responsibility for a variety of legal actions, research, monitoring cases elsewhere and preparing briefs as required. Specific activities could include the following:

  - Raise legal and procedural questions regarding DOI's jurisdiction over lease areas beyond the geologic shelf. A definitive resolution of this issue by Congress or the courts is needed and states could benefit by pursuing the issue vigorously.

  - Participate in California's appeal of the court decision weakening the state's control over exploration plans, the "consistency" section, CZMA 307(c)(3)(B).

  - Utilize, and refer to when appropriate, federal legal protections for marine mammals potentially adversely affected by OCS oil and gas development, especially those designated as endangered or threatened under the Federal Endangered Species Act, such as grey whales which annually migrate along the Washington coast.

- Resolve issues of state/local jurisdictions in regard to onshore support facilities, coastal boundaries beyond three miles, and other matters. A specific time schedule for this task should be established and a task force of state and local officials organized.

Post-Lease Periods, After-1991

After its pre-lease studies, the Department of Interior determines which offshore tracts, if any, are to be offered for lease. The state, through the Governor, has authority to review and comment on these proposals. Under the OCS Lands Act, the Secretary of Interior is required to accept the Governor's comments unless he determines that "the national interest" takes precedence. After appropriate modifications, the lease sale is held.

Activities to be undertaken during this phase are less certain at this time, but it is clear that not only exploration, but also development and production, are subject to gubernatorial comment, state CZMA consistency review, and in some cases, to NEPA EIS. Following are specific recommendations:

- An additional untested opportunity for state input is OCSLA Section 25(e) which requires DOI to prepare at least one development and production plan EIS under NEPA in each OCS area outside the Gulf of Mexico. State participation provides the opportunity to suggest environmentally protective conditions for such matters as transportation methods and routes related to oil field development and production.

- Under OCSLA Section 8(g), DOI must provide the Governor with additional information about possible oil and gas deposits within the first three miles seaward of the state's offshore boundary. If DOI proceeds with Sale 132, Washington should be prepared with the necessary expertise and information to respond appropriately. Preparation for this must begin at the earliest opportunity.

- The state also should consider strengthening its coastal protection fund which covers the costs of oil spill cleanup through a per-barrel fee on oil transported into the state. Although current federal law allows such separate state oil spill cleanup funds and fees, HR 1232 passed by the U.S. House of Representatives and currently in conference between the House and the Senate, would prohibit such separate state oil spill funds and consolidates four separate federal oil spill liability laws and funds into one.

- The absence of an OCS policy element in the Washington Coastal Zone Management plan is a significant omission that should be rectified. What is needed is a clear policy similar to Oregon's Goal 19 on ocean resources, as well as specific policies such as adopted by California for such issues as muds and cuttings, air quality, and shipping lanes.

- Develop local pipeline siting criteria and regulations governing acceptable and unacceptable practices and routes for pipelines onshore and in the state's territorial waters.

- Review the adequacy of Washington State air quality control regulations governing the coastal zone to three miles offshore. DOI's OCS air quality regulations are being challenged in litigation brought by the State of California and environmental groups. The outcome of that litigation and subsequent rulemaking will determine the adequacy of the air quality control program governing OCS development off Washington. Air pollution and emissions from oil and gas facilities may contribute to onshore air quality problems, in particular, the Class I pristine quality of the Olympic National Park.

- Evaluate state offshore water quality standards. EPA issuance of water discharge permits to drilling operations on the OCS is subject to consistency review by Washington State under CZMA Section 307(c)(3)(A), to the extent that such discharges affect land and water uses within three miles of the coast. A key component of such reviews will be the state's water quality standards.

ORGANIZATIONAL APPROACHES TO POLICY IMPLEMENTATION

These three alternatives to implementing the recommended policies and action steps are available:

- Status quo. Continue present Ecology staffing and budgetary patterns.

- Major expansion. Request the legislature to allocate sufficient funds in FY 1986/87 to meet the challenges created by the Interior's OCS program.

- Gradual expansion. Develop five-year plan of escalating expansion which continues the status quo for no more than the first two years

The status quo mode is sufficient if the Washington/Oregon lease sale is removed from the program or if the state makes a deliberate decision that it wishes only to monitor the program and not be an influential player.

Due to the importance of the issues under consideration and the need for immediate and appropriate state responses, it is our belief that neither the status quo nor the gradual expansion is satisfactory. It will be literally impossible for the present, one-person staff to cope adequately with the myriad responsibilities inherent in its role as the guardian of the state's interests in these matters. Without a significant expansion of staff and resources, Washington State will, in effect, decline to play a meaningful role and be merely an observer.

North Carolina and Massachusetts are examples of states playing active roles. Each has two full time and two part time staff devoted to offshore and gas issues. Florida has three and California has a total of 22, 12 of whom operate out of the Governor's Office and 10 out of the Coastal Commission. Santa Barbara County has created an 18-person staff to monitor and administer its interests in these matters.

It is our professional judgment that nothing short of a major increase in budget and staff is warranted. We propose the following organizational options for implementing this recommendation be considered.

Major Expansion of In-House Resources

Provide the OCS Program Manager with the following support staff:

- Environmental Specialist. Compile, collect, and analyze environmental data; evaluate environmental impact studies prepared by DOI; formulate the scope of expanded oceanic and socioeconomic studies; assist in preparing environmental stipulations; monitor experience from other regions with regard to marine mammals and endangered species as well as programs for protecting sensitive offshore habitats.

- Policy Planner. Assist with development of strategic analysis and plans to provide a basis for clarifying legislative and executive policies and priorities; provide technical assistance in the update and expansion of master programs by four coastal counties; develop annual strategic plans regarding Washington efforts in the five-year OCS process.

- Communications Specialist. Maintain contact with media, public interest groups, and the general public; develop networks of communication with major interest groups, organizations and businesses; schedule and conduct public hearings and meetings as required; develop and publish public information bulletins.

In addition to overall responsibility for the program, the OCS Program Manager should have principal responsibilities for:

- Coordinating with key state agencies.

- Informing the Governor's Office.

- Lobbying with members of the Legislature and Congress.

- Maintaining contact with DOI.

To assist the professional personnel identified above, the OCS office should have a full-time secretary and space which permits confidential telephone conversations and meetings when required.

Bi-State Approach

As the Department of Interior has already identified Sale 132 as a single Washington/Oregon planning area, there is obviously mutual interest by both states. Moreover, the circumstances facing them are very similar, as evidenced by the letters of Governors Gardner and Atiyeh to the Secretary of Interior in response to the proposed program expressing similar viewpoints and concerns. While the major expansion of in-house resources is still needed, there may be a savings by each state in sharing some resources. For example, one state could employ the environmental specialist and the other, the communications specialist. We suggest that, at the earliest possible time, the governors agree upon a letter of understanding and establish an interstate task force to initiate a bi-state program.

Consultants

Utilization of consultants could help the agency reduce overhead costs while allowing it to retain specialists for discrete tasks. Further, consultant retention could provide Ecology with important and relatively short-term assistance while the agency expansion program is underway.

Combination

The best approach is to utilize the optimum features of each option -- undertaking a major expansion of in-house resources, within the framework of a bi-state approach and prudent use of consultants. In

this way, the State of Washington would be in the strongest position to represent its interests amidst the growing complexities of the five-year OCS leasing program.

Suggested Time Schedule

Following is a set of tasks we suggest be undertaken within five annual segments.

Year 1: 1986-87

1. Governor issues executive order establishing OCS oil/gas interagency task force under Ecology leadership.

2. Governors of Washington and Oregon consider development of a bi-state compact and agree upon a letter of understanding expressing mutual support, establishing an interstate task force which is to meet regularly and a Pacific Northwest governors' OCS project.

3. Identify key bi-state Sea Grant research projects.

4. Commence preparation of Washington OCS strategic plan.

5. Initiate a public information/communication program.

6. Analyze economic impact potential of oil and gas leasing to the two states.

7. Use state membership in OCS Policy Committee to organize state lobbying for early, more extensive DOI studies.

Year 2: 1987-88

1. Oregon and Washington legislatures consider oil and gas sanctuaries in state waters.

2. Add two staff personnel to Washington Ecology.

3. Add new oceanic research programs in budgets of state agencies emphasizing resources in state waters, i.e., water and air quality, mammals, fisheries, etc.

4. Finalize preparation of strategic plan.

5. Commence regular briefings of bi-state congressional delegations.

6. Establish joint federal/state exploratory permit process.

7. Increase sea grant study funds to include such projects as aquaculture, wind/wave/current trajectories, and relative vulnerability of low energy oyster bays.

Year 3: 1988-89

1. Reflect new OCS policies in amended WCZMP.

2. Participate in DOI Notice of Interest.

3. Establish state/local/Indian task force.

4. Initiate air quality baseline studies.

5. Begin work on succeeding national five-year schedule.

6. Expand public information/communication program.

7. Schedule a conference of the two governors and congressional delegations.

Year 4: 1989-90

1. Amend coastal county master programs

2. Adopt Ecology policy statements on such post lease issues as drill muds, pipelines, air quality, etc.

3. Participate in lease sale #132 and use OCSLA Section 25(c).

Year 5: 1990-91

1. Influence specific lease sale #132 stipulations.

2. Build Ecology staff size and expertise to effectively participate in post-lease decisions.