Not on My Beach: Local California Initiatives to Prevent Onshore Support Facilities for Offshore Oil Development

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The leasing of federal offshore lands along the California coast for oil and gas development has engendered one of the most heated federal-state environmental conflicts in recent years. The battle between the State of California and the federal government on this issue has raged since 1945, both in Congress and in the federal courts.¹

The conflict has centered on the state and local governments’ ability to affect decisions that may have tremendous effects on their coastlines and economies. Offshore development threatens sensitive coastal areas

¹. On September 28, 1945, President Harry Truman issued a “Proclamation on the Continental Shelf” stating that the United States Government “regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas contiguous to the coasts of the United States, subject to its jurisdiction and control.” Exec. Order No. 9633, 10 Fed. Reg. 12,305 (1945).


Congress passed two acts in 1953 that helped to clarify the federal-state jurisdictional issues. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1953) (amended 1978), ceded any federal interest in the lands within three miles of the coast, while confirming the federal government’s interest in the area seaward of the three-mile limit. The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (1953) [hereinafter OCSLA], declared that the “subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition . . . .” The OCSLA also established procedures for federal leasing of OCS land to develop mineral resources. See generally Miller, supra, at 402-14; Annotation, Administration, and Construction, under the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. §§ 1331 et. seq.), of Leases to Explore for Oil and Gas Deposits under Continental Shelf, 31 A.L.R. FED 615 (1977).

not only with oil spills and air and water pollution, but also with the development of extensive onshore support facilities such as refineries, pipelines, oil and gas separation facilities, tanker farms, and other staging areas. Indeed, these support facilities present a greater and more immediate threat to coastal areas than do the potential long-term hazards of oil spills and other environmental consequences of offshore development.2

Onshore support facilities require considerable amounts of scarce coastal lands that are highly valued both recreationally and aesthetically. They also demand local governmental expenditures for new roads, schools, and fire and police protection, well before tax revenues from the offshore development are realized. New utilities may be required and demands from these new facilities will burden already limited municipal water supplies and sewage treatment facilities.3 As a result of these potentially profound economic, social, and environmental effects resulting from the development of the mineral resources of the Outer Continental Shelf (OCS), state and local governments have attempted to influence the federal leasing process.

State and local governments have had varied success in affecting federal decision making. California, for example, obtained a series of congressional moratoria4 on offshore leasing along certain areas of the California coast. In Secretary of Interior v. California,5 however, the Supreme Court held that federal offshore leasing did not require that states approve the tracts as “consistent” with coastal programs author-


3. See Breeden, supra note 2, at 1107-08. For example, Bodega Bay in Sonoma County already has a building moratorium in place because of a lack of water. Sonoma Measure A § 30-2(6) (Nov. 4, 1986). See infra note 13.


ized pursuant to the federal Coastal Zone Management Act (CZMA). As a result, state and local governments lost their most effective tool in influencing federal selection of tracts early in the process before potential discoveries of offshore resources create an overwhelming economic imperative in the direction of development. Local groups and elected officials became frustrated with the resulting protracted stalemate, their inability to affect the Department of Interior's seemingly relentless march toward leasing off the California coast, and the perceived acquiescence of Governor George Deukmejian.

When Congress lifted the moratorium on offshore leasing in the winter of 1985, local groups undertook a new strategy to prevent off-


8. This decision and the events following it have had numerous political repercussions. The 1985 Interior Appropriations bill directed the Department of Interior and the California congressional delegation to enter negotiations to settle the long-term stalemate between the parties that had resulted in four consecutive moratoria on offshore leasing in northern and central California and certain sensitive southern California areas.

On July 16, 1985, the Secretary of Interior and the California delegation reached an agreement whereby two percent of the previously moratorium-banned tracts would be opened to leasing and three test wells would be allowed in northern California. The remainder of the moratorium areas would be protected until the year 2000. See generally Impact of Moratoria on OCS Leasing in Federal Waters Adjacent to the Coastline of the State of California: Hearings Before the Senate Comm. on Energy and Natural Resources, 99th Cong., 1st Sess. 46-61 (1986) (testimony of Rep. Leon E. Panetta).

On September 10, 1985, Secretary of Interior Donald Hodel abandoned the agreement under oil company pressure. Hodel's reneging on the congressional agreement created a political uproar and seriously damaged his reputation with the coastal governments and their representatives. Hodel Backs Out of California Agreement on Lease Sales; Panetta to Seek Bans Again, [16 Current Developments] Env't Rep. (BNA) No. 20, at 869, 869-70 (Sept. 13, 1985).

After Hodel killed the agreement, the California congressional delegation sought to reinstate the 1986 moratorium. That effort lost by one vote in the House Appropriations Committee. House Panel Reports Continuing Resolution, Rejects Oil Lease Ban Off California Coast, [16 Current Developments] Env't Rep. (BNA) No. 31, at 1448, 1449 (Nov. 29, 1985).

In February 1986, Hodel announced a new five year leasing program that would open nearly the entire California coast to OCS development. The plan would lease tracts comprising nearly 1 billion acres over a five year period and included previously untouched areas off Humboldt and Mendocino Counties. Five-Year Offshore Oil Leasing Program Proposed by Interior Would Omit Some Areas, [16 Current Developments] Env't Rep. (BNA) No. 42, at 1881, 1881-82 (Feb. 14, 1986). This chain of events created the highly charged political climate that precipitated the statewide onshore support facility initiative movement. See Payton, Strong
shore leasing along their coastlines: enacting ordinances—by vote of the board of supervisors or city council, or through voter initiative—that prohibit the siting and development of onshore support facilities such as refineries, pipelines, or oil processing or storage facilities for offshore oil and gas operations. One type of ordinance places an absolute ban on the siting and development of onshore support facilities. Another type, modeled after the City of Santa Cruz initiative, allows siting and develop-
ment of onshore support facilities only after a voter referendum in which a majority of voters approve the new development.12 Specifically, the Santa Cruz model requires that a majority of voters approve the siting amendment before the board of supervisors can amend the county's coastal land use plan.13

12. County of Monterey, Cal., Measure A, Ordinance 3167 (Nov. 4, 1986). Section 16.55.020(2) provides:

   the local government determination required by Public Resources Code Section 30515 shall include a vote of the qualified electors of Monterey County, . . . and no local government determination approving [an amendment of the LCP to allow onshore support facilities] shall be valid unless a majority of the electors voting in such election approve the amendment proposed.

County of San Luis Obispo, Cal., Initiative Measure A, Ordinance 2288 (Nov. 4, 1986). Measure A provides that

[no] permit, entitlement, lease, or other authorization of any kind within the County of San Luis Obispo which would authorize or allow the development, construction, installation, or expansion of any onshore support facility for offshore oil and gas activity shall be final unless such authorization is approved by a majority of the votes cast by a vote of the people of the County of San Luis Obispo in a general or special election. For the purpose of this ordinance, the term “onshore support facility” means any land use, installation, or activity required to support the exploration, development, production, storage, processing, transportation or related activities of offshore energy resources.

Id. § 1.

SANTA CRUZ COUNTY, CAL. CODE § 16.55 (July 22, 1986) is identical in content to Monterey County Ordinance 3167.

City of Monterey, Cal., Measure G, Ordinance 86-134 (Nov. 4, 1986). Section 4(b) provides: “No zoning changes to accommodate onshore support facilities for offshore oil and gas drilling shall be enacted without a vote of the people of the City of Monterey.”

City of Santa Cruz, Cal., Ordinance 85-70 (Nov. 5, 1985). This ordinance states that “No zoning changes to accommodate onshore support facilities for offshore oil and gas drilling shall be enacted without a vote of the people of the City of Santa Cruz.” Id. § 4 (2).

13. The Santa Cruz model specifically seeks to avoid potential federal preemption or commerce clause conflicts posed by an outright moratorium. See infra sections II, III.

For an example of a county initiative adopting this approach see County of Sonoma, Cal., Ordinance 3592R (Nov. 4, 1986). The Sonoma ordinance provides in § 30-3(a) that

[w]hen any person proposes to undertake the development within Sonoma County of any on-shore energy facility relating to the exploration or development of off-shore oil or gas resources and requests an amendment of the County's Certified Local Coastal Program to facilitate such development, a determination by the Board of Supervisors pursuant to Public Resources Code section 30515 that the proposed amendment is in conformity with the policies of the Coastal Act and the Certified Local Coastal Program should be amended to incorporate such development shall not be effective unless a majority of the electors of Sonoma County, in a general or special election, approve the proposed amendment.

Other localities have adopted similar measures to Sonoma County. See City of Redondo Beach, Cal., Ordinance 2462 (Jan. 20, 1987); City of Point Arena, Cal., Ordinance 124 (Feb. 24, 1987).

For a hybrid model of an outright prohibition and a voter initiative requirement, see County of San Mateo, Cal., Measure A (Nov. 4, 1986) (not yet codified), which repeals the “Energy Component” of the San Mateo County Local Coastal Program. Section 3, pt. 4.25 “[p]rohibit[s] onshore support facilities for offshore oil and gas from locating in the Coastal
Such ordinances raise a number of potential conflicts with state and federal law, as well as a potential federal constitutional challenge under the commerce clause. This Note explores these potential conflicts to determine whether these local ordinances will withstand judicial scrutiny and, if so, whether particular measures will fare better than others.

Section I discusses the threshold question of whether these measures are consistent with the federal Coastal Zone Management Act (CZMA). Section I first analyzes whether the measures comport with California's coastal program authorized by the California Coastal Act of 1976 and federally approved pursuant to the CZMA. Section IA considers whether the California Coastal Commission can approve the measures as consistent with the energy siting provisions of the California Coastal Act. Section IB then discusses federal consideration of the measures under the CZMA. Sections IC and ID discuss the consequences of federal approval or rejection of the ordinances pursuant to the CZMA.

Section II analyzes whether these ordinances, even if approved under the CZMA, are preempted by the federal Outer Continental Shelf Lands Act (OCSLA), which authorizes leasing, exploration, and development of mineral resources on the federal OCS. This analysis involves an examination of congressional intent in enacting the statute and recent judicial opinions that suggest how a court may treat this federal-local conflict.

Section III considers the local measures' regulation of interstate commerce in offshore energy products and whether such regulation constitutes an unconstitutional burdening of interstate commerce under a "dormant" commerce clause analysis. Section IV explores the political considerations raised by these onshore support facility ordinances. In particular, this section discusses the political dangers and advantages for local governments in adopting these ordinances.

Section V advises local governments of the most advantageous form of ordinance (and statutory language) to obtain the desired political leverage with energy companies and the federal government.

I. The Governmental Approval Process for Local Ordinances

By either banning onshore support facilities or requiring a voter referendum to allow their siting, these ordinances make changes in the local governments' energy siting processes that may conflict with California's Zone. Section 10 provides that "[t]his ordinance may be repealed or amended only by a majority of the voters of San Mateo County voting in a valid election." Measure A also contains an express prohibition of "pipelines for the transmission of offshore oil and gas." Id. § 3, pt. 4.

coastal management program as approved under the CZMA. Accordingly, both the California Coastal Commission and the federal Office of Ocean and Coastal Resource Management within the United States Department of Commerce may need to determine the validity of these ordinances under CZMA. To understand this process, it is necessary to evaluate the cooperative federalism approach contained in the CZMA.

Congress enacted the CZMA in 1972 in response to a growing national concern over the need to preserve, protect, and wisely develop the resources of the nation's coastal areas. Instead of drafting a comprehensive statute controlling coastal uses, however, Congress adopted a voluntary program that sought to encourage each state to establish its own separate coastal management program. The CZMA encourages the development of state programs in two ways: by providing monetary assistance to states that develop and exercise management programs consistent with its standards, and more importantly, by requiring that federal activities in or affecting the coastal zone conform with an approved state program.

Before approving a state program, the Secretary of Commerce must find that it satisfies a number of conditions imposed by Congress. One such condition requires that a state management program contain provisions allowing for consideration of the national interest in the planning, siting, and development of major energy facilities that are necessary to meet other than local energy demand. Section 1455(c)(3)(B) specifically requires that

\[ \text{the management program provides for adequate consideration of the national interest involved in the planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature. In the case of such energy facilities, the Secretary shall find that the state has given such consideration to any applicable interstate energy plan or program.} \]

The regulations promulgated by the National Oceanic Atmospheric Administration (NOAA) implementing this section explain that

\[ \text{the primary purpose of this requirement is to assure adequate consideration by States of the national interest involved in the planning for} \]

20. Id. § 1456(a).
21. Id. § 1455(c)-(e).
22. Id. § 1455(c)(3)(B) (emphasis added).
23. NOAA, under the Department of Commerce, has the responsibility for administering the Coastal Zone Management Act. The Office of Ocean and Coastal Resource Management (OCRM), headed by an Assistant Secretary, has been delegated primary authority under the Act.
and siting of facilities (which are necessary to meet other than local requirements) during (1) the development of the State's management program, (2) the review and approval of the program by the Assistant Administrator [of the Office of Ocean and Coastal Resource Management], and (3) the implementation of the program as such facilities are proposed.  

These regulations require the state program to outline the decision making process for facility siting; specifically, the program must indicate where in that process the "national interest" will be considered. Thus, NOAA's regulatory scheme envisions that when a state considers whether to site a particular energy facility, it include the "national interest" in the calculus of its decision making. This scheme does not re-

24. 15 C.F.R. § 923.52(c) (1986). Under the regulations a state in its coastal management program must:

(1) Describe the national interest in the planning for and siting of facilities considered during program development.
(2) Indicate the sources relied upon for a description of the national interest in the planning for and siting of the facilities.
(3) Indicate how and where the consideration of the national interest is reflected in the substance of the management program. In the case of energy facilities in which there is a national interest, the program must indicate the consideration given any interstate energy plans or programs, developed pursuant to section 309 of the Act which is applicable to or affect a State's coastal zone.
(4) Describe the process for continued consideration of the national interest in the planning for and siting of facilities during program implementation, including a clear and detailed description of the administrative procedures and decisions points where such interest will be considered.

Id. § 923.52(c).

25. The NOAA regulations impliedly adopt the "procedural" perspective of the Senate Report accompanying the 1976 amendments to the CZMA. The Senate Report states:

The Secretary of Commerce (through NOAA) should provide guidance and assistance to the States under this section 305(b)(8), and under section 306, to enable them to know what constitutes "adequate consideration of the national interest" in the siting of energy facilities necessary to meet the requirements other than local in nature. The Committee wishes to emphasize, consistent with the overall intent of the Act, that this new § 305(b)(8) requires a State to develop, and maintain a planning process, but does not imply intercession in specific siting decisions. The Secretary of Commerce (through NOAA) in determining whether a coastal State has met the requirements, is restricted to evaluating the adequacy of the process.


The House Report on the 1972 Act explaining § 306(c)(8) can be read as implying a substantive requirement.

To the extent that a state program does not recognize these overall national interests, as well as the specific national interest in the generation and distribution of electric energy . . . or is construed as conflicting with any applicable statute, the Secretary may not approve the state program until it is amended to recognize those Federal rights, powers, and interests.

HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, COASTAL ZONE MANAGEMENT, H.R. REP. NO. 1049, 92nd Cong., 2d Sess. 18 (1972), reprinted in LEGISLATIVE HISTORY OF
quire, however, that a state identify in advance certain sites or general areas for energy development. The provisions have been interpreted as not "action-inducing"; in other words, they do not force a state to site certain facilities considered to be in the national interest. The Ninth Circuit upheld this "procedural" interpretation of the CZMA national interest provision in a suit brought by the American Petroleum Institute (API) against the acting administrator of the federal Coastal Management Program challenging the "final approval" of California's Coastal Management Program. Thus, the national interest provisions are not substantive requirements that would force a state to site an energy facility it considered not in its interest as long as the state considers "other than local interests."

Although the present energy siting provisions of the California Coastal Act comport with CZMA's national interest provisions, the locally enacted ordinances may significantly alter the state's approved program. To understand how, it is initially important to examine the

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27. American Petroleum Institute v. Knecht, 609 F.2d 1306 (9th Cir. 1979). API challenged NOAA's interpretation of § 306(c)(8) in a lawsuit seeking to enjoin "final approval" of the California Coastal Management Program by the federal government. API argued that the California coastal program lacked "explicit commitments" to act according to the national interests in siting energy facilities. Id. at 1313. The Ninth Circuit rejected this reasoning, holding that "NOAA had properly considered the Congressional mandate in its program approval regulations." Id. at 1314. The Ninth Circuit concluded that the Acting Administrator's finding that California's program satisfied § 306(c)(8) was supportable and proceeded from a correct interpretation of the CZMA. Id. at 1315.

28. See Whitney, Siting of Energy Facilities in the Coastal Zone: A Critical Regulatory Hiatus, 16 WM. & MARY L. REV. 805, 815 (1975) (arguing the need for action-enforcing provisions in CZMA to force states to site facilities considered in the national interest); see also Kanouse, supra note 25, at 541-44 (concluding that the national interest provisions are procedural rather than substantive requirements); Rubin, The Role of the Coastal Land Management Act of 1972 in the Development of Natural Gas from the Outer Continental Shelf, 8 NAT. RESOURCES LAWYER 399, 420-22 (1975) (while recognizing that the NOAA regulations are not action-inducing, argues that although "there is no justification for totally prohibiting activity associated with offshore drilling because of the urgent need for energy resources . . . Only those facilities that are absolutely necessary for offshore operations should be permitted in undeveloped areas of the coastal zone").


29. It is important to keep in mind that the California program was originally approved during the Carter Administration. The Reagan Administration has adopted a differing interpretation of the national interest provisions. See infra notes 83-86 and accompanying text; see
general framework of the California Coastal Act and its relationship with the federal CZMA.

A. Consideration at the State Level: The California Coastal Act

The legislature enacted the California Coastal Act of 1976 as a comprehensive scheme to govern development, preservation, and land use planning for the entire California coastal zone. Under the Coastal Act, a local government within the coastal zone prepares and submits a local coastal plan (LCP) to the California Coastal Commission. The LCP consists of a local government’s land use plans, zoning ordinances, zoning district maps, and, within sensitive coastal resources areas, other implementing actions. The precise content of each LCP is determined by the local government in full consultation with the Commission. The LCP must meet the requirements of the Act and implement the Act’s provisions and policies at the local level. The Coastal Commission must review and approve the LCP to ensure that it conforms with the specific policies of the Act. Once the Commission certifies the LCP, the local government has authority to issue permits for development consistent with the LCP.
Like the federal CZMA, the California Act allows for development of land use plans at a lower level of government while ensuring that local governments consider broader state interests. As a result of conscious political compromise by the state legislature, however, the grounds upon which the Coastal Commission can require changes in an LCP submitted by local government are very limited. Public Resources Code section 30512.2 provides:

(a) The Commission’s review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform to the requirements of Chapter Three. . . .

(b) The Commission shall require conformance with the policies and requirements of Chapter Three . . . only to the extent necessary to achieve the basic state goals specified in Section 30001.5.  

Thus, the Coastal Commission cannot require changes in an LCP that it considers desirable but that are not necessary for conformance with the basic state goals specified in section 30001.5 of the Coastal Act. Consequently, an LCP amendment is subject to limited review at the state level but may then be reviewed at the federal level on an entirely different basis.

While local governments subsequently may amend their approved LCPs, section 30514 requires that the Commission approve such amendments. Since LCPs consist of both land use plans and ordinances, a

36. CAL. PUB. RES. CODE §§ 30512.2(a), (b) (West 1986). Section 30001.5 provides: The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:

(a) Protect, maintain and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.

(b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.

(d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.

(e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.


38. This paradox could leave the Commission in an awkward situation in which it realizes that an LCP will be rejected at the federal level (if considered an amendment to the state’s management program) on the basis of the CZMA national interest provisions. Because of the Commission's differing and narrow standard of review, however, the Commission would have to approve the LCP knowing it may rejected at the federal level.

39. CAL. PUB. RES. CODE § 30514(a) (West 1986). Section 30514 provides: “A certified coastal program and all local implementing ordinances, regulations, and other actions may be
change in either requires the Commission’s approval. As a result, when either a county board of supervisors or voters through an initiative adopt an ordinance banning onshore support facilities\(^4\) or allowing their siting only after a voter referendum, in effect they may be amending their LCPs.

Initially, the Coastal Commission must determine whether these ordinances are amendments of the local government’s approved LCP. If they are not, then Commission approval is not necessary. If, however, the ordinances are considered amendments, then they are subject to the Commission’s approval. To determine whether an ordinance is an amendment, the Commission must compare the current energy siting provisions of the locality’s LCP with the future provisions as altered by the newly adopted ordinances.

These ordinances generally take two different approaches: voter approval of energy siting actions\(^1\) and outright bans on onshore facilities. Because the two approaches may be treated differently by the Coastal

amended by the appropriate local government, but no such amendment shall take effect until it has been certified by the commission.”

40. The California Supreme Court in Yost v. Thomas, 36 Cal. 3d 561, 571-73, 685 P.2d 1152, 1158-60, 205 Cal. Rptr. 801, 807-09 (1984), held that the California Coastal Act does not preempt either the local planning authority or the power of the voters to act through referendum. The referendum at issue sought to overturn the Santa Barbara City Council’s approval of a hotel and conference center development pursuant to an approved LCP. Id. at 564 & n.1, 685 P.2d at 1154 & n.1, 205 Cal. Rptr. at 803 & n.1.

41. Voter referenda raise an additional legal issue in that only legislative acts are properly the subject of the referendum power. In Yost, the California Supreme Court made clear that amendments to LCPs are legislative acts, subject to voter referendum, even though they refer to particular sites. Id. at 570, 685 P.2d at 1157, 205 Cal. Rptr. at 806-07. The problem is in the area of conditional use permits, variances, and other adjudicatory or quasi-judicial acts that may not be determined by a vote of the electorate. Arnel Dev. Co. v. Costa Mesa, 28 Cal. 3d 511, 518-519, 620 P.2d 565, 569-70, 169 Cal. Rptr. 904, 908-09 (1980). Rather, an adjudicatory administrative act such as a permit application procedure must be accompanied by hearings and findings in order to protect the applicant’s due process rights under the fourteenth amendment of the Constitution. San Diego Bldg. Contractors Ass’n v. City Council of San Diego, 13 Cal. 3d 205, 211, 529 P.2d 570, 573, 118 Cal. Rptr. 146, 149 (1975); Wiltshire v. Superior Court, 172 Cal. App. 3d 296, 304, 218 Cal. Rptr. 199, 203-04 (1985).

The Wiltshire court, in addressing a very similar issue that dealt with an initiative that required voter approval before a “waste-to-energy plant” could be sited in San Marcos, stated: [s]uch plants can be sited only through the issuance of a special use permit. Those permits are the product of the adjudicatory process. Due process of the law in that setting requires notice and hearing . . . . Section I of the initiative denies those rights by lodging adjudicatory powers in the electorate and is thus invalid.

Wiltshire, 172 Cal. App. 3d at 304, 218 Cal. Rptr. at 204 (citation omitted). The Santa Cruz ordinance provides for a voter referendum for both the LCP amendment and the issuance of any individual permit for an onshore support facility. In light of Wiltshire and Arnel Development, the referendum requirement for the issuance of a development permit may be invalid. However, because these initiatives contain savings clauses in the event a section is held invalid the LCP amendment referendum requirement will remain valid, as supported by Yost. Local governments in California with ordinances that include a referendum requirement for permits
Commission in the amendment determination process, each will be analyzed separately.

Under the referendum model, a board of supervisors first approves the siting of an onshore support facility, and then submits the action to the voters for approval. Because voter referenda leave intact the current LCP criteria for industrial development in the county, they appear to be only procedural and not substantive changes in the siting process. However, because they change the LCP energy siting process itself, these referenda ordinances will likely be seen as substantive amendments requiring Commission approval. Furthermore, the state Coastal Commission can override a local government’s refusal to amend its LCP to accommodate a major energy facility of more than local interest.42

By contrast, an outright prohibition of onshore support facilities seems to be on its face a more substantive change. The Coastal Act requires that local governments consider anticipated future energy facilities while preparing their LCPs.43 Consequently, these LCPs may contain siting priority provisions in anticipation of future decision making.44 The Commission would regard the adoption of an ordinance strictly prohibiting the siting of onshore support facilities as a repeal of these LCP siting provisions and therefore would treat the ordinance as an LCP amendment.45

If these ordinances are considered to be LCP amendments, the question becomes whether the Commission or a reviewing court will uphold

are Monterey County, San Luis Obispo County, Santa Cruz County, City of Monterey, and City of Santa Cruz.

42. CAL. PUB. RES. CODE § 30515 (West 1986).
43. CALIFORNIA COASTAL COMM’N, COASTAL ENERGY DEVELOPMENT: THE CALIFORNIA EXPERIENCE, A GUIDE FOR COASTAL LOCAL GOVERNMENTS 13 (1981) [hereinafter COASTAL ENERGY DEVELOPMENT]; see CAL. PUB. RES. CODE § 30001(d) (West 1986).
44. See CAL. ADMIN. CODE tit. 14, § 13513(a)(3) (1982) (Uses of More than Local Importance); California Coastal Commission Local Coastal Program Regulation 00041, reprinted in CALIFORNIA COASTAL MANAGEMENT PROGRAM, supra note 26, at 5-8. See, e.g., San Luis Obispo County’s LCP containing a “performance standard approach” and applying three different standards of review before a project is approved depending on the type of facility or activity and its location. Note that San Luis Obispo Measure A does not contain an outright prohibition but rather provides for a voter referendum. COASTAL ENERGY DEVELOPMENT supra note 43, at 11.
45. See, e.g., County of San Mateo Measure A, supra note 13. But see City of San Diego Ordinance R-265,261, supra note 11 (The ordinance prohibits any city employee or official from “taking any action, or permitting any action to be taken, which directly or indirectly authorizes or permits” the development of onshore support facilities for offshore operations within 100 nautical miles of the coastline of the County of San Diego. By restricting the discretion of city officials and officers rather than limiting land uses directly, this measure seeks to avoid characterization as a zoning ordinance, which would require Coastal Commission approval as a LCP amendment. The Coastal Commission has requested a legal opinion from the California Attorney General as to the legal consequence of such de facto LCP amendments. Given the broad definition of LCPs, it is likely that these discretion-limiting ordinances will be considered LCP amendments subject to Commission approval.).
them as consistent with the energy siting provisions of the Coastal Act. Such a consideration could either arise in a noncase-specific situation such as the Commission's certification of an LCP amendment, or in a case-specific situation in which an energy company seeks the siting of a specific energy facility that has been prohibited by a local ordinance.\textsuperscript{46}

The California Coastal Act represents a political compromise between the need to protect the coastline from undesirable industrial development and the recognition that because of economic necessity certain coastal-dependent industries must be sited in the coastal zone. The legislative findings in section 30001.2 of the Coastal Act set forth the tone and approach taken toward energy facility siting:

The Legislature further finds and declares that, notwithstanding the fact electrical generating facilities, refineries, and coastal-dependent developments, including ports and commercial fishing facilities, offshore petroleum and gas development, and liquefied natural gas facilities, may have significant adverse effects on coastal resources or coastal access, it may be necessary to locate such developments in the coastal zone in order to ensure that inland as well as coastal resources are preserved and that orderly economic development proceeds within the state.\textsuperscript{47}

The Act's major energy siting provisions are contained in section 30260, which provides for siting of new coastal-dependent industrial development if three requirements are met:\textsuperscript{48}

Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 [relating to use of tanker facilities]\textsuperscript{49} and 30262 [relating to oil

\textsuperscript{46} For example, the Coastal Commission will review the City of Morro Bay's ban of onshore support facilities in the abstract without an energy company proposal before it seeking to locate such a facility. Should the Commission approve the initiative as an LCP amendment, an energy company that wishes to site such a facility in Morro Bay may seek state court review of the Commission's decision.


\textsuperscript{48} \textit{id.} § 30260. Other sections providing exemptions for energy and coastal-dependent development from specific environmental restrictions of the Act include: § 30233 (exemption from prohibition of diking, filling, or dredging open coastal waters, wetlands, estuaries, and lakes); § 30235 (exemption from prohibition of new revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes); § 30250(b) (exemption from requirement that new development be located within, or contiguous with, existing developed areas for "new hazardous industrial development" such as liquified natural gas terminals).

\textsuperscript{49} \textit{id.} § 30261(a). Section 30261(a) provides:

Multicompany use of existing and new tanker facilities shall be encouraged to the maximum extent feasible and legally permissible, except where to do so would result in increased tanker operations and associated onshore development incompatible
and gas development)\textsuperscript{50} if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.\textsuperscript{51}

Therefore, a proposed energy facility may be accommodated under certain circumstances even if it does not meet the general environmental protection and development criteria of the Coastal Act.\textsuperscript{52}

Ordinances that ban onshore support facilities in all circumstances may conflict with these siting provisions. By prohibiting the siting of a facility that meets the three prong test of section 30260, such ordinances could conflict with the state Coastal Act.

The Commission's determination of whether these ordinances conflict with the Coastal Act's siting provisions depends upon four factors: (1) whether the Commission interprets section 30260 as requiring the siting of facilities that meet its conditions or as simply giving local governments the option to site facilities that would otherwise violate the general provisions of Chapter Three; (2) whether the Commission considers onshore support facilities covered by the ordinances to be coastal-dependent, coastal-related, or neither; (3) whether the Commission applies a different analysis to the voter referendum as compared to the moratorium approach; and (4) what effect the Commission gives to its ultimate override authority for major energy facilities under Section 30515. Each of these factors will be examined separately.

In examining the first factor of the Commission's determination, outright bans of onshore support facilities may conflict with section 30260 of the Act, which permits the siting of coastal-dependent facilities otherwise inconsistent with the environmental protections of the Coastal Act if the three prongs of that section are met.\textsuperscript{53} Thus, the key variable is whether the Coastal Commission would reject an onshore support facility ban because of the potential conflict.

with the land use and environmental goals for the area. New tanker terminals outside of existing terminal areas shall be situated as to avoid risk to environmentally sensitive areas and shall use a monobuoy system, unless an alternative type of system can be shown to be environmentally preferable for a specific site. Tanker facilities shall be designed to (1) minimize the total volume of oil spilled, (2) minimize the risk of collision from movement from other vessels, (3) have ready access to the most effective feasible containment and recovery equipment for oil spills, and (4) have onshore deballasting facilities to receive any fouled ballast water from tankers where operationally or legally required.

\textsuperscript{50} Id. \textsection 30262. Section 30262 adds a number of provisions concerning geologic conditions and monitoring; restrictions of platforms or islands in sea-lanes; and use of subsea platforms, where environmentally safe, to protect coastal visual qualities.

\textsuperscript{51} Id. \textsection 30260 (emphasis added).

\textsuperscript{52} The key word is "feasible," which the Act defines as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Id. \textsection 30108.

\textsuperscript{53} Id.
This is only a potential conflict, since section 30260 does not require siting of a facility that meets its statutory requirements. Therefore, rejection of the ordinances on the ground that they require a result contrary to the Coastal Act's requirements seems improper. Section 30260 is simply part of the Coastal Act's planning guidelines, which provide coastal-dependent development with an exemption from the environmental requirements of the Act so that local governments may, if they choose, site coastal-dependent facilities that meet the terms of the exemption. The section's use of the term "may" conflicts with the view that the coastal-dependent development provisions "require" that a local government allow for such development. Given the permissive language of section 30260, even outright bans of onshore support facilities can be approved.

However, should the Commission view the Coastal Act as requiring the siting of coastal-dependent facilities, it must then determine whether onshore support facilities covered by the ordinances are coastal-dependent. Coastal-dependent developments or uses are those that "require a site on, or adjacent to, the sea to be able to function at all." The Act specifies ports and offshore oil and gas development as coastal-dependent, although Commission decisions make clear that "not all activities associated with such developments would be considered coastal-depen-

54. Lending support to this interpretation is section 30005, which provides in part: No provision of [the Coastal Act] is a limitation on... the power of a city or county... to adopt and enforce additional regulations, not in conflict with this act, imposing further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone.”

Id. § 30005. The California Supreme Court held in Yost v. Thomas that under the act, local governments... have the discretion to zone one piece of land to fit any of the acceptable uses under the policies of the act, but they also have the discretion to be more restrictive than the act. The Coastal Act sets minimum standards and policies with which local governments within the coastal zone must comply; it does not mandate the action to be taken by a local government in implementing local land use controls.


55. This permissive interpretation is supported by a recent Commission decision holding that the Commission's issuance of a development permit for a new hotel complex did not require the newly incorporated City of Solana Beach to allow the development. The Commission held that the city's interim building moratorium aimed at such development did not require Commission approval through the LCP review process and did not conflict with the Commission's pre-incorporation issuance of a development permit. See Memorandum from Ralph Faust, California Coastal Commission Chief Counsel, and Mary L. Hudson and Jane McCoy, Staff Counsel, to Commissioners and Interested Persons (Sept. 10, 1986) (“Commission Jurisdiction in Respect to Enactment of Local Moratoria”) (on file at The Hastings Law Journal).

56. CAL. PUB. RES. CODE § 30101 (West 1986). In contrast, "coastal-related" uses are to be sited “[w]hen appropriate” and “should be accommodated within reasonable proximity to the coastal-dependent uses they support.” Id. § 30255.
dent uses."57

Since the phrase "onshore support facilities" encompasses a variety of activities, only some of which may be considered coastal-dependent, it is possible that sections of these ordinances could be upheld and others rejected.58 While the statute classifies offshore oil and gas development as a coastal-dependent activity, it is not certain whether this coastal-dependent status extends to crude oil pipelines, storage facilities, oil and gas separation facilities, refineries, port facilities, or the other uses described in the local ordinances. For example, because pipelines and harbor facilities must by their nature be sited on, or adjacent to, the sea to function at all, they are likely to be considered coastal-dependent. By contrast, storage facilities59 and refineries60 generally have not been considered coastal-dependent. Since pipelines and port facilities are likely to be considered coastal-dependent, the ordinances specifying an outright ban on these facilities potentially conflict with the three-prong test of section 30260.

If the Commission views section 30260 as requiring the siting of these facilities, it could take two different approaches: (1) reject the entire ordinance outright, or (2) look to the locality's particular situation to determine whether such a conflict actually exists. Under the latter approach, the Commission would need to determine whether energy companies anticipate the development of onshore support facilities and whether such facilities could in fact be sited under section 30260. The approach would vary from locality to locality depending upon whether mineral deposits have been located offshore and whether there are plans to develop those deposits. If offshore development is anticipated, the Commission could still allow the locality to show alternatives that are not environmentally damaging and that will accommodate the offshore development using facilities outside the county. If the Commission


58. See, e.g., County of San Mateo Measure B, supra note 13, § 3, pt. 4.23, which "[d]efine[s] onshore facilities for offshore oil as temporary or permanent service bases, including but not limited to warehouse, open storage or stockpiling areas, offices, communication centers, harbor or wharf development or improvement, parking and helipad areas, processing plants and storage tanks."


60. CAL. PUB. RES. CODE § 30263 (West 1986). Section 30263 provides similar requirements for new or expanded refineries or petrochemical facilities to those applied to coastal-dependent industrial development, but adds the requirements that the facility must not be "located in a highly scenic or seismically hazardous area . . ., or within or contiguous to environmentally sensitive areas" and that it be sited so as to "provide a sufficient buffer area to minimize adverse impacts on surrounding property." This provision seems to provide refineries with a hybrid coastal-related status, thereby subject to more stringent siting requirements than coastal-dependent facilities.
agrees with the locality's alternatives analysis, it might approve a flat moratorium on onshore development.

In making this determination, the Commission must initially consider whether the use of alternative locations is infeasible—that is, unable to be successfully accomplished within a reasonable period of time, taking into account economic, environmental, social, and technological factors—61—or whether their use would be more environmentally damaging. As an alternative to pipelines, refineries, and storage facilities, an offshore tanker arrangement could transport crude oil to existing refineries. However, such a tanker system may not only be more costly to the energy companies but may pose greater environmental risks through the increased possibilities of oil spills and tanker accidents on route to refineries.62 Offshore tanker facilities may also pose air pollution problems through increased release of hydrocarbons.63

Consequently, in balancing the economic and environmental costs of an offshore tanker system, the Commission could conclude that alternative facilities are not feasible. In such a scenario, it is likely that an onshore facility would be considered in the public welfare,64 and all that would be required is that environmental effects be mitigated to the maximum extent feasible. Thus, even under this localized approach, adherence to a mandatory siting interpretation of the Act might lead to rejection of a county LCP flatly banning all onshore support facilities.

The third variable in the Commission’s decision making process differentiates between the moratorium and voter referendum ordinance approaches. Consideration of the voter referendum model requires a similar but slightly different analysis. In the case of referenda the Commission must decide whether the voters’ potential power to reject a facility that is otherwise consistent with the state Coastal Act presents a direct conflict with the Act’s energy siting provisions. If the Commission adopts a mandatory siting interpretation of the Coastal Act, rejection of the referendum is possible.

However, a local board of supervisors already make the initial siting decisions and they also presently have the power to reject the siting of

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61. See supra note 52.
63. Id.
64. The Commission’s standard is very vague. See CALIFORNIA COASTAL MANAGEMENT PROGRAM, supra note 26, at 66 (“In making such a finding, the Commission considers the State and national public welfare as expressed in appropriate legislation, policy statements and documents on energy policy.”). See CAL. ADMIN. CODE tit. 14, § 13666.4 (1982) (“disapproval would adversely affect the public welfare as defined in the findings, declarations, and general provisions of the Coastal Act . . . and the California Coastal Management Program, if applicable.”).
facilities that are otherwise consistent with the Coastal Act siting provisions. Because the referenda only transfer that power to the voters, it would seem that referenda impose changes that are wholly procedural rather than substantive in nature. In effect, the referenda allow local representatives to defer to the people on an issue that is already left, under the Coastal Act, to the initial consideration of a local jurisdiction. Accordingly, the Commission may well adopt a wait and see approach as to the potentially conflicting use of the voter referendum or may simply consider the measures as insignificant procedural changes. In any case, the Commission could then approve the referendum model.

The fourth and potentially most important variable is the Commission's use of its override power over local decisions not to site major energy facilities. Section 30515 allows the Coastal Commission, in certain circumstances, to override a local government's decision not to site a major energy facility. This provision specifically provides that

[any person . . . proposing an energy facility development may request any local government to amend its certified local coastal program, if the purpose of the proposed amendment is to meet public needs of an area greater than that included within such certified [LCP] that had not been anticipated by the person making the request at the time the [LCP] was before the commission for certification. If, after review, the local government determines that the amendment requested would be in conformity with the policies of this division, it may amend its certified [LCP] as provided in section 30514. If the local government does not amend its [LCP], such person may file with the Commission a request for amendment. . . . The commission may . . . approve and certify the proposed amendment if it finds, after a careful balancing of social, economic, and environmental effects, that to do otherwise would adversely affect the public welfare, that a public need of an area greater than that included within the certified [LCP] would be met, that there is no feasible, less environmentally damaging alternative way to meet such need, and that the proposed amendment is in conformity with the policies of this division.]

Under Section 30515, the Coastal Commission retains the power to override a local government and amend its LCP to allow the siting of onshore facilities, despite any local LCP banning such facilities. Before the Commission may execute its override power, it must meet two important preconditions. First, the facilities must meet the “public needs” of an area larger than the particular locality. Offshore energy development serves both state and national energy needs and consequently would fulfill this condition. The second condition—that the purpose of the amendment is

65. CAL. PUB. RES. CODE § 30515 (West 1986) (emphasis added). Section 30107 of the Act defines energy facility as “any public or private processing, producing, generating, transmitting or recovering facility for electricity, natural gas, petroleum, coal or other source of energy.” Id. § 30107.
66. Id. § 30515.
to meet public needs unanticipated at the time of the certification of the original LCP—presents a greater limitation on the Commission’s override authority. This requirement seems relatively flexible. For example, an energy company need only show that the necessity for onshore facilities is the result of greater offshore development than was anticipated, in response to growing public energy demands.

While the statute does not require the Commission to consider the override provision when reviewing LCP amendments, these provisions are nonetheless likely to influence the Commission’s decision making process since the override is an important check on local siting decisions. Given the Commission’s ultimate override power, approval of the referendum ordinances seems probable. While less probable, the moratorium ordinances could also be approved by the Commission.

Political considerations may greatly influence the Commission’s determination of these issues. The Commission generally shares with the local governments the concern over the threats posed by offshore development. Given its ultimate override authority, the Commission may approve these ordinances as amendments to the local governments’ LCPs. However, given the wide range of political views represented on the Commission, it is exceedingly difficult to predict the outcome on the

67. See County of Sonoma Measure A, supra note 13, § 30-2(f):

[W]hen balanced against the dramatic impacts of [offshore energy development, the referendum process is reasonably calculated to address local concerns while not un-
duly interfering with federal and state energy objectives. This is especially true in light of the local override procedure set forth in section 30515 of the Coastal Act.

(Emphasis added).

68. Although Republican Governor George Deukmejian’s appointments have tempered the Coastal Commission’s conservationist bent, the Democratic Speaker of the Assembly and the Senate Rules Committee each appoint two members to the Commission. See CAL. PUB. RES. CODE § 30301 (West 1986). Observers of the Commission place the conservation leanings of the current Commissioners into three categories: (1) those who fundamentally oppose OCS development; (2) those who will allow such development to occur with sufficient environmental safeguards; and (3) those who strongly favor OCS development. See CALIFORNIA COASTAL COMM’N, COMMENTS TO THE DEPARTMENT OF INTERIOR ON THE PROPOSED FIVE-YEAR OIL AND GAS LEASING PROGRAM 1 (Apr. 10, 1986). It provides:

The Commission opposes proceeding with the Proposed Five-Year Oil and Gas Leasing Program at this time because subsequent lease sales will result in unacceptable impacts on coastal resources. The Commission believes that such activities pose unacceptable risks of oil spills, visual and air quality degradation, marine resource impacts and conflicts between the commercial fishing and tourism industries and petroleum operations. Further, the lack of an overall comprehensive energy policy precludes rational planning for such lease sales and the absence of an adequate [Environmental Impact Statement] for the Five-Year Planning Program does not allow for a complete assessment of the effects such a program will have on the coastal zone.

Id. (emphasis in original). See also Hurley, Politics and Pro-development Bias Plague California Coastal Commission, Sierra Club Yodeler, Mar. 1987, at 4 col. 3 (citing Natural Resources Defense Council study of the voting records of Coastal Commissioners).
particularly sensitive political issues involved in the consideration of these measures.

In summary, the Coastal Commission must initially consider whether the ordinances are amendments of the locality's LCP. Given the broad scope of LCPs in general, it is very likely that the Commission will determine that both moratoria and referendum ordinances constitute amendments of the LCP. Having made that determination, the Commission must consider whether the ordinances are consistent with the Coastal Act. To resolve this issue, the ordinances must be compared to the coastal-dependent industrial siting provisions which allow such development if alternative locations are infeasible, the facility is in the public welfare, and adverse environmental impacts are mitigated to the maximum extent possible. The outcome of this comparison depends, first, upon the treatment the Commission gives to the referendum or moratorium approach and, second, upon whether the Commission considers the siting provisions of section 30260 as requiring the approval of facilities that meet its statutory criteria or as simply giving local governments the option to site facilities that otherwise would violate the general provisions of Chapter Three. Given the Coastal Commission's override authority for energy facilities and the seemingly nonmandatory language of section 30260, the Commission should legally approve the ordinances as consistent with the Coastal Act. Once approved by the Coastal Commission, these ordinances are effective under California law and enforceable by the locality as part of its LCP. However, to be approved pursuant to the federal CMZA, the Department of Commerce must consider the ordinances' effect on the state's coastal management program.

B. Consideration at the Federal Level: the Federal Coastal Zone Management Act

Once an onshore support facility ordinance is approved by the state Coastal Commission, its treatment under the federal CZMA depends on whether it is regarded as an amendment to the state's coastal program or as a routine program implementation. The Secretary of Commerce (Secretary) must review amendments to ensure consistency with the federal CZMA. However, the Secretary need not review a routine program

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69. See supra notes 32, 45 and accompanying text.
70. CAL. PUB. RES. CODE § 30515(a) (West 1986). There are dangers in enforcing an LCP provision before it is approved by the federal Office of Ocean and Coastal Resource Management. See, e.g., Save Our Dunes v. Leigh Pegues, 642 F. Supp. 393, 407 (M.D. Ala. 1985) (court enjoined further issuance of coastal development permits by Alabama until OCRM had reviewed its coastal plan amendment and determined whether an environmental impact statement was required).
71. NOAA Regulations, 15 C.F.R. § 923.82 (1986). The Secretary of Commerce has delegated his review authority to the Office of Ocean and Coastal Resources Management within the National Oceanic Atmospheric Administration (NOAA).
The NOAA regulations define amendments as substantial changes in, or substantial changes to enforceable policies or authorities related to:
1) Boundaries;
2) Uses subject to the management program;
3) Criteria or procedures for designating or managing areas or particular concern or areas for preservation or restoration; and
4) Consideration of the national interest in the planning for and in the siting of, facilities which are necessary to meet requirements which are other than local in nature.

The Coastal Commission would likely argue that because the ordinance does not affect the energy facility override contained in section 30515 of the California Coastal Act, no substantial change has been made in the state energy siting provisions. Under such an analysis, the onshore support facility ordinances would arguably only be routine program implementation actions not requiring federal approval.

It is unlikely, however, that the Secretary would accept this reasoning. The comments to the regulations governing amendments to state programs make clear that "[s]ubsequent changes to local programs that result in any changes contained in section 923.80(c) [which includes consideration of the national interest in energy facility siting] will be treated as amendments." On this basis, the Secretary could conclude that, regardless of the state override provisions, the ordinance represents a significant change in the local program's energy siting provisions and the sufficiency of the local government's consideration of the national interest.

If the Secretary views the ordinances as state coastal program amendments, he must then determine whether the state's amended management program still constitutes an approvable program under the CZMA. This review would include a determination of consistency with the national interest provisions. As noted in the previous discussion of the national interest provisions, the Secretary's principal inquiry is whether the state has considered the national interest in making

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72. Id. § 923.84.
73. Id. § 923.80(c)(1-4) (emphasis added).
74. Id. § 923.80(c); see 44 Fed. Reg. 18,594 (1979).
75. For example, the regulations require that the state management plan "[d]escribe the process for continued consideration of the national interest . . . including a clear and detailed description of the administrative procedures and decisions points where such interest will be considered." 15 C.F.R. § 923.52(c)(4) (1986). Since the ordinances change the procedures of local consideration and arguably may remove consideration of the national interest from decision making at the local level, they amend the current program.
76. Id.
77. Id. § 923.52.
78. See supra notes 22-28 and accompanying text.
energy facility siting decisions. The onshore support facility ordinances raise the question of whether they provide for an adequate consideration of more than local interests. A blanket prohibition of all future onshore support facilities, initiated by local voters, would seemingly prevent future consideration of the national interest in a future facility proposal. Moreover, very few of these local ordinances include any mention either of the national or the state energy needs that are generally cited as the primary justification for offshore mineral development. As a result, the Secretary may conclude that the local government has failed to consider the national interest in the siting of these facilities.

Whether such a determination requires a rejection of the amendment depends upon the Secretary's interpretation of the state override provision. Neither the statute nor the regulations require that the national interest be considered at every possible level of decision making. As a result, the Secretary acting within his discretion, could conclude that the state override provision of the Coastal Act guarantees an adequate consideration of the national interest since the Coastal Commission can override a locality's onshore facilities ban and site a major energy facility. Thus, the Secretary could conclude that the California Coastal Commission already protects the national interest in energy facilities through its override and that any change in national interest consideration at the local level would not weaken this protection.

Political considerations, however, such as the Reagan Administration's offshore leasing policies and the perceived ideological bent of the state Coastal Commission, will likely influence the Secretary's determination. For example, if the administration favored a pro-OCS development policy, the Secretary would probably not rely on a state override held by a conservation-minded state coastal commission.

The Reagan Administration has consistently sought greatly expanded offshore energy development along the California coast. Moreover, recent actions by the Office of Ocean and Coastal Resource

80. The striking exception is the County of Sonoma, Cal., measure which includes a detailed discussion of the county's status as a net exporter of energy:
Sonoma County is already a net exporter of energy and thus has met and will continue to meet its burden to contribute to the production of area-wide, state and national energy needs. Because of the existing level of this contribution and the fact that the field life of [the] geothermal plants [located in the County] is from 30 to 50 years, the development of the Sonoma County coast for oil and gas production should not be accomplished in the name of regional, state or national energy needs.
Sonoma County Measure A, supra note 13, at §§ 30-2(d) to 30-2(e) (includes a discussion of the need for a national energy policy); see also Monterey County Measure A, supra note 12, at 16.55.010 ("Rather than consuming offshore oil and gas resources now, our nation should conserve these resources, since they are nonrenewable.").
81. See 15 C.F.R. § 923.52(c) (1986).
82. See, e.g., OCS LEASING PLAN, supra note 2.
Management (OCRM), which acts as the delegate of the Secretary in these matters, indicate its disapproval of local LCPs that contain language opposing federal offshore development. In its recent consideration of an LCP amendment proposed by Crescent City, California involving future expansion of the city's port to accommodate offshore development, OCRM struck out language that suggested the OCS off northern California be made a National Marine Sanctuary. OCRM approved the LCP after removing the objectionable language. This action not only demonstrates future political problems for LCPs banning onshore support facilities, but also raises legal questions concerning whether the OCRM can edit language from an LCP and then approve the edited plan. A literal reading of the Act and NOAA regulations suggests that OCRM must either approve in total or reject an LCP amendment as inconsistent with CZMA.

In view of the Secretary's discretion in reviewing LCP amendments and the Reagan Administration's pro-offshore leasing policies,


84. Id.

85. See 15 C.F.R. § 923.82 (1986). Section 923.84 provides for a voluntary mediation of “serious disagreements” between the state and a federal agency. However, neither of these regulations gives OCRM the authority to conditionally approve an LCP amendment. The U.S. Justice Department dismissed a suit claiming that a similar conditional approval by the State of New Jersey was contrary to CZMA's federal consistency review provisions. See Chemical Waste Mgmt. v. United States Dept. of Commerce (D.D.C. No. 86-624) (1986).

A more fundamental question, because of the procedural interpretation given the national interest siting provisions, is whether OCRM can legitimately interject its views into the substance of a LCP. See Letter from Peter Douglas, Executive Director of the California Coastal Commission, to Peter Tweedt, Director, Office of Ocean and Coastal Resource Management (Mar. 28, 1986) (requesting reconsideration of the Crescent City LCP decision) (on file at The Hastings Law Journal). Given the procedural interpretation of the national interest provisions and the previously accepted protections of the state override provision, this author believes that OCRM cannot interject its own substantive views into a LCP. See, e.g., Save Our Dunes v. Leigh Pegues, 647 F. Supp. 393, 401 (M.D. Ala. 1985). The federal district court held:

CZMA was not intended to provide a system by which federal officials would directly regulate and control a state's coastal zone. With the exception of land subject to exclusive federal control, the Act does not vest the federal government with ultimate power to control environmental activities along the coast. Rather, the Act is more procedural in nature, requiring that states make 'conscious and informal [sic] choices among the various alternatives' through the development of coastal zone management programs.

See also American Petroleum Inst. v. Knecht, 609 F.2d 1306, 1313-15 (9th Cir. 1979) (upholding procedural interpretation of CZMA national interest provision).

86. OCRM has recently sought to change the process by which it reviews changes in LCPs. OCRM now processes routine program implementation (RPI) changes in the same manner as program amendments. Thus, each RPI is analyzed for consistency with CZMA policies and standards. See Letter from Peter Tweedt, Executive Director of Office of Ocean and Coastal Resource Management, to Agency Heads, State Coastal Program Managers (Feb. 28, 1986) (on file at The Hastings Law Journal).
the ordinances banning onshore facilities are likely to either be rejected or modified. The voter referendum ordinances do not on their face, however, ban onshore facilities. Consequently, although still unlikely, the voter referendum ordinances may have a better chance of approval than do the outright onshore facility bans.

In conclusion, if the Secretary of Commerce either considers the ordinances as simply routine program implementations or approves them as state coastal plan amendments, the ordinances will be given effect under the CZMA.87 If the Secretary considers the ordinances amendments and rejects them,88 then the ordinances will not be given effect under the CZMA. The enforceability of ordinances rejected as amendments under the CZMA will be considered in the following sections. Section IC considers the consequences of an ordinance's approval under the CZMA.

C. The Consequences of Federal Approval of a State Coastal Program Amendment Under the Coastal Zone Management Act

Although approval of a state program under the CZMA does not insulate its provisions from a preemption challenge on the basis of a conflict with federal law,89 federal approval of the program brings with it
potential protection from a constitutional attack under the commerce clause and federal consistency review under the CZMA.

Courts have interpreted the Secretary of Commerce's approval of a state coastal management program as manifesting "congressional consent" to the state program. A federal district court in *Norfolk Southern Corp. v. Oberly* 90 rejected a commerce clause attack on the Delaware Coastal Zone Act on the ground that the Secretary's approval of the program manifested congressional consent to the program's ban on the siting of new heavy industry in the state coastal zone. 91 The Norfolk Southern Corporation had sought to invalidate the heavy industry ban, arguing that it unduly burdened interstate commerce and was therefore void under a dormant commerce clause analysis. 92 The court rejected this challenge using the following reasoning:

In enacting the CZMA Congress was acting, in part, pursuant to its constitutional power under the Commerce Clause. The CZMA thus embodies a congressional exercise of the Commerce Clause power translated into a set of congressionally mandated policies over the coastal zone. Congress funds only those plans that comport with the national interest, and therefore requires the Secretary of Commerce to approve state plans. . . . Based upon the regulations and the Secretary's periodic approval of the Delaware plan, the requirement of express congressional consent is met. . . . The Delaware [Coastal Zone Act] is therefore immune from plaintiffs' challenge under the Commerce Clause . . . . 93

If a court adopts this analysis, the Secretary's approval of an ordinance pursuant to CZMA will eliminate any potential attack on the ordinance as violating the dormant commerce clause.

Another advantage of the Secretary's approval of a state management program centers on the CZMA consistency provisions governing federal activities. The consistency provisions require federal activities or federal permits and licenses affecting the coastal zone to conform with the state's coastal program. 94 While the United States Supreme Court in

Coastal Commission over abandonments pursuant to CZMA not preempted or repealed by the revised Interstate Commerce Act).


91. *Id.* at 1243.

92. *Id.*

93. *Id.* at 1250-52. It should be noted that the court was not faced with a state coastal plan that directly conflicted with another federal statute as was the Supreme Court in Ray v. Atlantic Richfield, 435 U.S. 151 (1978). See Rubin, *supra* note 28, at 420 n. 83; *but see* Brief for the United States Department of Justice as Amicus Curiae, Norfolks Corp. v. Oberly, 632 F. Supp. 1225 (D. Del. 1986) (No. 84-330) (The U.S. Department of Justice argued that neither CZMA itself nor approval by the Department of Commerce removes the commerce clause restraints on state law.), *appeal docketed*, No. 86-5322 (3rd Cir. argued Feb. 9, 1987).

94. It is important to note that the California Coastal Commission uses the Coastal Act as its basis of review, not the locality's LCP provisions, when it reviews a federal consistency
Secretary of Interior v. California concluded that consistency review did not extend to offshore leasing, the consistency provisions of section 307(c)(3)(B) expressly require that offshore mineral exploration, development, and production conform with the state's coastal program. Under the offshore development consistency provision, if a state objects to the proposed federal activity on the ground that it is inconsistent with the state's management program, the federal government will not issue a permit or license for the offshore activity unless the Secretary decides to override the state's objection.

determination concluding that a federal activity conforms with the State Plan. For example, when reviewing the Secretary of Interior's determination that an offshore drilling rig off County X is consistent with California's Coastal Management Program, the Coastal Commission would not use the LCP of County X which bans onshore support facilities as the standard of review. The Commission would instead review the rig proposal in terms of the California Coastal Act and County X's LCP would merely be advisory. See Letter from Peter Douglas, Executive Director of the California Coastal Commission, to Peter Tweed, Director, Office of Coastal Resource Management, at 4 (Mar. 28, 1986) (on file at The Hastings Law Journal); see also 15 C.F.R. § 930.39(c) (1987) (federal agencies must only give adequate consideration to management provisions which are in the nature of recommendations); 15 C.F.R. § 930.58(a)(4) (1987) (applicants need only demonstrate adequate consideration of policies which are in the nature of recommendations).


96. There are three consistency review provisions in the CZMA. 16 U.S.C. § 1456(c)(1), which corresponds to § 307(c)(1) of the Act, applies to federal activities that "directly affect" a state's coastal zone and requires that those federal activities be consistent with the state programs "to the maximum extent practicable." The second consistency provision, 16 U.S.C. § 1456(c)(3)(A), which corresponds to § 307(c)(3)(A) of the Act, applies to nongovernmental applicants for federal licenses or permits to conduct activities affecting a state's coastal zone. Applicants for such licenses or permits must certify that their activities will be conducted in a manner consistent with state management programs. If a state disagrees with the certification of consistency, the federal government will deny the application unless the Secretary of Commerce overrides the state's objection. Congress in 1976 amended CZMA to add a third consistency provision to reinforce the state's power to influence OCS development. This new provision, 16 U.S.C. § 1456(c)(3)(B), which corresponds to § 307(c)(3)(B) of the Act, requires OCS lessees to certify that any development, exploration, or production will be consistent with the affected state management program. The Supreme Court in Secretary of Interior v. California concluded that the absence of the word "lease" in this scheme manifested Congress' intent that OCS lease sales were also not included in the consistency review provision of 16 U.S.C. § 1456(c)(3)(A). 464 U.S. at 336-40. That decision has been greatly criticized by a number of commentators. See supra note 7.

97. 16 U.S.C. § 1456(c)(3)(B) (1986). The Secretary can override the state's objection if he finds the activity "is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security." Id. See also NOAA Regulations, 15 C.F.R. §§ 930.120-.134 (1986). Section 930.121 provides:

The term 'consistent with the objectives or purposes of the Act' describes a Federal license or permit activity . . . which, although inconsistent with a State's management program, is found by the Secretary to be permissible because it satisfies the following four requirements: (a) The activity furthered one or more of the competing national objectives or purposes contained in sections 302 or 303 of the Act [which cite the need for priority consideration for coastal dependent uses and orderly processes for the siting of major energy facilities], (b) When performed separately or when its cu-
The OCSLA specifically requires that a lessee submit a development and production plan that is
accompanied by a statement describing all facilities and operations, other than those on the outer Continental Shelf, proposed by the lessee and known by him (whether or not owned or operated by such lessee) which will be constructed or utilized in the development and production of oil or gas from the lease area, including the location and site of such facilities and operations, the land, labor, material, and energy requirements associated with such facilities and operations, and all environmental and safety safeguards to be implemented.\(^9\)

However, since these plans for onshore support facilities are not an actual part of the development and production plan approved by the Secretary of Interior, they are not part of the federal consistency review process.\(^9\) Rather, the energy companies must apply directly to the local governments for development approval and may be able to appeal a local denial to the Coastal Commission under section 30515.

In sum, should the Secretary approve the ordinances as consistent with the CZMA, there is judicial authority providing the ordinances immunity from a dormant commerce clause attack.\(^10\) The ordinances must, however, still overcome a preemption challenge on the ground that they conflict with the OCSLA, which authorizes mineral development on the federal OCS. Section III discusses this possible preemption challenge. Before that discussion, however, the Note takes a brief look at the potential consequences if the ordinances are rejected as inconsistent with the CZMA.

## D. Consequences of Federal Rejection of a State Coastal Program Amendment Under the Coastal Zone Management Act

If the Secretary refuses to approve an ordinance as a state program
amendment, the state may seek to enforce its onshore zoning laws outside of the CZMA framework. While CZMA is a voluntary program and therefore not a preemptive exercise of the commerce power, a state may run the risk of either losing or reducing its CZMA funding if it seeks to enforce a provision inconsistent with the terms of the Act. A state also runs a more significant risk as a result of potential decertification of its program: it may lose its consistency review authority over federal activities in the coastal zone. While California might be willing to give up its two million dollars in federal CZMA funding to prevent unde-


Through the system of providing grants-in-aid, the States are provided financial incentives to undertake the responsibility for setting up management programs in the coastal zone. There is no attempt to diminish state authority through Federal preemption. The intent of this legislation is to enhance State authority by encouraging and assisting the States to assume planning and regulatory powers over their coastal zones.

Id. (emphasis added); Breeden, supra note 2, at 1147-48. Breeden states:

In particular, the power to override it [state coastal regulation which the CZMA] gives the Secretary of Commerce should be understood not as a preemption of state control, but as a device to provide relief in extraordinary cases from a general congressional intention that state-determined priorities should prevail over federal policies for the coastal region. There are several reasons for this interpretation. First, the provision is only applicable to states that have voluntarily participated in the coastal zone management program. Had Congress concluded that there was a need for federal preemption of the siting of OCS-related facilities, it presumably would have extended the Secretary's power to override to all states, not just those that chose to join the CZMA program. Second, if participation in the CZMA scheme subjected states to preemption, many might refrain from developing coastal plans under the CZMA — exactly opposite the result that Congress intended.

102. Under 16 U.S.C. 1458(c) (1986), the Secretary may reduce program administration funding by up to 30% if she determines that the coastal state is failing to make significant improvement in achieving coastal management objectives specified in § 1452(2)(A) through 1452(2)(C). Section 1452(2)(C) provides that “priority consideration [be] given to coastal-dependent uses and orderly processes for siting major facilities related to . . . energy.” Id. This provision was recently amended in the 1985 Coastal Zone Management Reauthorization Act, Pub. L. No. 99-272, § 6043(a), 100 Stat. 124 (1985).

The district court in American Petroleum Institute v. Knecht, noting a provision in the special Energy Impact Program of CZMA, stated that:

The Congress was particularly careful to circumscribe the role of the federal government in particular siting decisions. Thus, § 306(i) provides: The Secretary shall not intercede in any land use or water use decision of any coastal state with respect to the siting of any energy facility or public facility by making siting in a particular location a prerequisite to, or a condition of, financial assistance under this section.


In 1986, California received approximately $2 million in federal administrative support funding under CZMA. However, under the OCS revenue sharing program California received $338 million, which is not dependent on the state's compliance with CZMA. See infra note 125. This money, although not presently targeted to the California Coastal Commission, could more than make up for lost CZMA administrative funding.
sirable coastal industrial development, it may not be willing to risk the potential loss of its consistency review authority under the CZMA. Presently, the consistency review provisions are California's principal avenue of affecting activities on the federal OCS. Consistency review is generally an important source of state input into federal decision making throughout the coastal zone.

The Secretary of Commerce makes the key determination of whether a state's enforcement of an inconsistent LCP provision is sufficient grounds to decertify the state's coastal management program, thereby depriving the state of consistency review authority over federal activities. Under section 1458(d), the Secretary must withdraw approval and funding of a state program "if the Secretary determines that the coastal state is failing to adhere to, is not justified in deviating from . . . the management program approved by the Secretary . . . and refuses to remedy the deviation." To date, the Secretary has never decertified a state coastal program. It is therefore unclear to what extent a state could deviate from its approved program before the Secretary would decertify the program. To justify decertification, the Secretary would need to point to specific actions by a state or local government in conflict with its approved program. For example, the Secretary would have to bring forth specific evidence showing that a local government had rejected siting of energy facilities that should have been sited under their LCP's previous siting provisions. The Secretary could then argue that the local government, by rejecting siting of those facilities, was in actuality enforcing the federally rejected moratorium ordinance.

In summary, while the potential loss of consistency review authority makes decertification extremely threatening to a state, the chances of the Secretary decertifying the state's coastal program seem remote. Furthermore, even if the Secretary interprets a state action as deviating from its approved program, the Secretary may decertify the program only after the state has had an opportunity to remedy its noncompliance. This provision gives the state time to challenge the Secretary's determination in court, if necessary, or to capitulate and remove the objectionable provisions from the LCP. Nevertheless, given the present state of confrontation between the federal government and the State of California over the impact of offshore energy development, the potential threat of decertification remains a very serious one. Consequently, the state Coastal Com-

104. Cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416-20 (1971) (Court held that the Administrator of Transporation needed to provide an adequate explanation of his discretionary approval of a highway in order to allow the lower court to "consider whether the decision was based upon a consideration of relevant factors and whether there ha[d] been a clear error of judgment.").
105. Id.
mission may be reluctant to allow a locality to enforce provisions that the Secretary has determined to be inconsistent with the CZMA.

Should the state or local government nonetheless decide to enforce the onshore support facility ordinances outside the CZMA framework, the measures' enforceability depends upon overcoming two additional hurdles. First, as with an approved program under the CZMA, the ordinances must survive potential federal preemption by the OCSLA—the federal statute authorizing OCS mineral leasing and development. If the ordinances are not preempted, they must then meet and overcome the final hurdle: constitutional muster under the commerce clause.  

II. The Preemption Challenge by the Outer Continental Shelf Lands Act

By disrupting or perhaps even making mineral development on the federal OCS impossible, the onshore support facility ordinances may impermissibly conflict with the federal OCSLA, which authorizes development of the federal OCS. Resolution of the preemption issue requires examination of Congress' intent in adopting the OCSLA to determine whether the Act (1) expressly preempts state regulation,  


foreign energy sources¹¹¹ and to provide for greater environmental protection¹¹² and financial assistance to affected coastal areas.¹¹³

Under the supremacy clause, it is well established that within constitutional limits Congress may preempt state law by so stating in express terms.¹¹⁴ The first step in determining whether the OCSLA expressly preempts the onshore support facility ordinances involves looking to Congress' specific intent concerning the onshore impacts of OCS development. While section 1332 of the OCSLA specifically extends federal jurisdiction over the subsoil and seabed of the OCS seaward of the three mile state waters, and provides for a detailed regulatory scheme governing mineral development operations on the OCS,¹¹⁵ the Act contains no specific provision for preempting state regulation of onshore facilities supporting these OCS operations. Moreover, the statute does not expressly regulate these onshore facilities. The only reference to onshore

¹¹¹ See 43 U.S.C. § 1332 (1986). The congressional declaration of policy states: "The outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." Id. § 1332(3).

¹¹² Id. Section 1332(6) provides:

[O]perations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

(Emphasis added).

¹¹³ Id. Section 1332(4) provides:

[S]ince exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments (A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and (B) such States, and through such states, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.


facilities in the federal scheme is a requirement that energy companies submitting an oil and gas development and production plan to the Secretary of the Interior include a separate description of "all facilities and operations" not sited on the OCS. The House-Senate Conference Committee Report on this provision makes explicit "that the plan itself is only to cover OCS facilities and operations, including pipelines, and not facilities and operations in state waters." Consequently, while the OCSLA grants the state consistency review over offshore facilities and operations that affect their coastal zone, the OCSLA specifically denies the Secretary of Interior authority to review onshore support facilities or operations in state waters as part of the development and production plan.

The Act’s declaration of policy strengthens this interpretation: "[T]he rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized." On the basis of this policy statement, a court could easily conclude that Congress, even absent the CZMA consistency provisions, had within the OCSLA expressly reaffirmed the power of state and local governments to make land use decisions pursuant to their police power to protect their coastal areas from the adverse affects of offshore development. If a court reaches the conclusion that Congress had expressly affirmed state regulation of onshore support facilities, the preemption analysis is complete. The likelihood of a court reaching this conclusion depends in part upon the weight it gives the language of the congressional statement of policy. While some courts have given considerable effect to the general policy statements contained in federal statutory schemes, others have maintained that congressional consent must be more explicit. Under the latter approach, the

118. Id.
120. Id. § 1351 (cross reference to 16 U.S.C. § 1456). The consistency provisions provide the state with review authority of these operations limited by the Secretary's national security override.
121. See, e.g., Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), affd per curiam without opinion, (D.C. Cir. 1972), aff'd, 412 U.S. 541 (1973). The district court, relying on the Clean Air Act's general declaration of purpose in § 101 — "to protect and enhance" the nation's air quality — required the Administrator of the EPA to promulgate regulations to ensure that the quality of specified clean air regions did not deteriorate. The court reached this conclusion even in the face of a complex scheme set forth in the Act that technically allowed air pollution at greater national levels than in these clean air regions. Id. at 255.
122. See Association of Am. R.R. v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977) ("[a] preamble no doubt contributes to a general understanding of a statute, but it is not an opera-
court would then determine whether Congress had implicitly preempted the ordinances.

The second test of preemption is whether the Act implies a congressional intent to preempt state law from the legislative field. Courts have found implied congressional intent to supersede state law in two different ways. First, such intent can be implied from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."123 Second, courts have inferred the requisite congressional intent when the matter is an issue traditionally left to federal control.124

In light of the limited mention of onshore support facilities and the express congressional exclusion of these facilities from OCS development and production plans, a court using the first test may conclude that the OCSLA does not manifest a regulatory scheme sufficient to be considered pervasive. An oil company challenging the onshore regulation, however, may argue that the Act's pervasive regulation is manifested by other provisions: the fisherman's contingency fund, oil spill liability provisions, environmental and safety regulations concerning OCS operations, and the CZMA energy impact funds. The oil companies would argue that these regulations adequately address the local concerns behind the ordinances.125 In response, the local governments would argue that onshore land use decisions and other related problems constitute a separate "field of concern" left by Congress to local regulation. The local governments

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125. See 43 U.S.C. § 1842 (1986) (Fisherman's Contingency Fund as source of compensation for losses to commercial fisheries related to OSC development); id. § 1811-18 (Offshore Oil Spill Pollution Fund); id. § 1346 (environmental studies concerning impact on OCS); id. § 1347 (safety and health regulation of OCS operations); 16 U.S.C. § 1456a (1985) (CZMA Energy Impact Grants Program which seeks "to encourage new or expanded oil and natural gas production in an orderly manner from the Nation's outer Continental Shelf (OCS) by providing for financial assistance to meet state and local needs resulting from specified new or expanded energy activity in or affecting the coastal zone.") H.R. CONF. REP. No. 1298, 94th Cong., 2d Sess. 23, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 1821); 43 U.S.C.S. § 1337 (Law. Co-op. Supp. 1987) (revenue sharing of OCS royalties with coastal states to compensate States for onshore impacts; California received approximately $338 million in 1986).
would probably prevail, given the lack of language in the Act specifically addressing onshore support facilities.

The second preemption test is whether the matter is an issue traditionally left to federal control. Such control can be shown in two ways: (1) the Act "[touches] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;"126 or (2) "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose."127

The major United States Supreme Court case cited for these two tests is *Hines v. Davidowitz.*128 In *Hines,* the Court held that the federal Alien Registration Act barred enforcement of Pennsylvania's Alien Registration Act. This holding was based on the important national interest in regulating aliens and, more generally, in governing foreign affairs.129 In the case of onshore facility ordinances, the question thus becomes whether the national interest in domestic energy production is a sufficient basis upon which to imply preemption. While national energy self-sufficiency is clearly a matter of national interest, it is not a concern dominated by the federal government.130 Consequently, it is unlikely that the general federal interest in encouraging domestic energy production would be a sufficient basis upon which to preempt all state regulation.131

Even assuming that the federal proprietary interest in ownership of the OCS itself may evince a federal interest so dominant as to preclude state regulation of activities on the OCS, the federal interest in having its lessees bring their offshore mineral production directly to the nearest shore is not so dominant as to raise a presumption of preemption. As one commentator noted:

The statute merely asserts American territorial ownership and permits the Secretary of the Interior to lease tracts for private oil development. Because zoning and pollution requirements for installations on state coastal property far removed from the OCS so clearly qualify as "peripheral concerns" of the regulations of the Outer Continental Shelf

128. 312 U.S. 52 (1941).
129. Id. at 73-74.
131. See Pacific Gas and Elec. Co. v. Energy Resources Comm'n, 461 U.S. 190, 220-23 (1982); see also id. at 223 (Blackmun, J., concurring); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 633 (1981) (Court rejected claim that congressional policy favoring the use of coal as a fuel source preempted state legislation that may have an adverse effect upon coal consumption.)
Lands Act, courts should not infer congressional intent to preempt this area solely on the basis of this statute.\textsuperscript{132} In light of the lack of specific language regulating onshore support facilities and the Congressional findings that states have the right to preserve and protect coastal environments through regulation of land use,\textsuperscript{133} a court should conclude that Congress did not intend expressly or impliedly to occupy the field of OCS-related activities.

This interpretation is buttressed by recent Supreme Court decisions upholding state regulatory schemes challenged on the ground that Congress had occupied the entire field. In \textit{Pacific Gas and Electric v. State Energy Resources Commission},\textsuperscript{134} PG\&E challenged a California statute that required the State Energy Resources Conservation and Development Commission to determine that before a nuclear power plant could be built in the state, "adequate capacity" existed for interim storage of the plant's spent nuclear fuel. PG\&E argued that the Atomic Energy Act preempted the California statute because the federal act was "intended to preserve the Federal Government as the sole regulator of all matters nuclear," and therefore the statute fell within the scope of this impliedly preempted field.\textsuperscript{135} In reviewing the legislative history of the Atomic Energy Act, the Court noted that economic regulation of new power facilities was traditionally a matter of state concern. The Court concluded that the Act did not supersede the state's role in this area of concern and that the federal Act preempted only safety concerns. Consequently, the Court rejected the broad argument that the Act regulated all matters related to nuclear energy.\textsuperscript{136} The Court found economic justification for the California statute and therefore upheld the nuclear power plant moratorium because it regulated a field left to state control.\textsuperscript{137}

Analogizing the reasoning of \textit{Pacific Gas and Electric} to the onshore facility ordinance preemption question, local governments can argue that while the OCSLA may preempt state regulation of the OCS itself, Congress intended land use to be a traditional area of state and local concern.\textsuperscript{138} Consequently, a court should not extend the scope of federal preemption to these onshore OCS-related activities.

The final preemption analysis examines whether there is a direct

\begin{itemize}
\item \textsuperscript{132} See Breeden, \textit{supra} note 2, at 1147 n.184. The author cites the following language from Decanas v. Bica, 424 U.S. 351, 360-61 (1976): "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal regulation]."
\item \textsuperscript{133} 43 U.S.C. § 1332(5) (1986).
\item \textsuperscript{134} 461 U.S. 190 (1982).
\item \textsuperscript{135} \textit{Id.} at 205.
\item \textsuperscript{136} \textit{Id.} at 211-12.
\item \textsuperscript{137} \textit{Id.} at 216.
\item \textsuperscript{138} See \textit{supra} notes 18, 117-18 and accompanying text.
\end{itemize}
conflict between the state and federal statutes. Even when Congress has not displaced state regulation from a specific field, state law is preempted to the extent that it actually conflicts with federal law.\textsuperscript{139} Such a conflict arises when compliance with both federal and state regulations is a physical impossibility\textsuperscript{140} or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{141}

In applying the first test, it is unclear whether a direct conflict between state and federal statutes exists on the basis of a "physical impossibility" for lessees to pursue offshore development. Since offshore mineral development may use either an offshore tanker or processing arrangement or both,\textsuperscript{142} federal lessees can develop an offshore lease, although perhaps at greater cost, without major onshore support facilities. Since refinery facilities areas already exist in northern California,\textsuperscript{143} a court would not be confronted with a situation in which a state's entire coastline was closed to needed oil processing facilities. In that situation, energy companies could raise a "physical impossibility" argument.

Energy companies may argue that the increased costs of transportation due to lack of nearby shore support facilities constitute impossibility. Because companies such as Exxon are seeking to expand their existing offshore storage and treatment facilities,\textsuperscript{144} it is difficult to support the argument that increased costs rise to such a degree as to constitute a "physical impossibility."

The energy companies may also argue that these ordinances are preempted because they indirectly "regulate" or prohibit activities on federal offshore lands by prohibiting onshore support facilities. According to a recent series of cases, state and local authority to regulate federal


\textsuperscript{142} See CITIZENS' GUIDE, supra note 2, at 85; Offshore Oil Battle Goes to the Ballot, San Francisco Chronicle, Oct. 13, 1986, at 9, col. 5. These facilities are generally referred to as Offshore Storage and Treatment Facilities (OS&T). Such an offshore arrangement does, however, raise greater potential environmental hazards. See Response Brief of California Coastal Commission In re the Appeal by Exxon Company, U.S.A. to the Consistency Objection to Exxon's Proposed Development of the Santa Ynez Unit 69-90 (Jan. 2, 1987) (appeal to Secretary of Commerce) (on file at The Hastings Law Journal).

\textsuperscript{143} See OCS LEASING PLAN, supra note 2, IV B.9.a(2)(b)-1 & 10.a(2)(b)-1. The Mineral Management Service (MMS) Five Year Plan predicts that the current refineries and marine terminals are adequate to accommodate planned OCS development during this period. Id. at IV.A.-13 & -33. According to MMS, a new supply base will, however, will need to be established in either Monterey, San Francisco or Bodega Bay. Id. IV.B.9-24-25.

lands within their boundaries is extremely limited. However, these cases are distinguishable because the ordinances regulate onshore activities within the localities themselves and not the federal lands offshore.

The second test of the direct conflict question is whether the state statute "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." The motives underlying the ordinances are at odds with the congressional purpose of expediting offshore energy production. One motive, for example, is to gain bargaining power with the federal government and its lessees in areas where the local electorate feels the cost of development outweighs the benefits. However, it seems unlikely that the Congressional purpose in general conflict with these motives would be held sufficient to constitute preemption, given the Supreme Court's application of this test. For example, in *Pacific Gas and Electric* the Court noted that while "[t]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power," federal licensing and safety regulation as well as continued preservation of traditional state economic regulation make clear that this "promotion . . . is not to be accomplished at all costs." Similarly, federal offshore energy needs have been tempered by

145. See Kloppe v. New Mexico, 426 U.S. 529, 540-43 (1976) (Court held that Congress retains power under the property clause of the Constitution to legislate on all matters relating to the management and use of federal lands, and these rules override conflicting state and local law. Absent congressional legislation, however, state and local governments are free to enforce criminal and civil laws on those lands; Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1986 (9th Cir. 1979) (Court struck down the county's attempt to enforce a permit requirement against a federal onshore oil and gas lessee), aff'd, 445 U.S. 947 (1980). But see California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1432 (1987) (upholding State Coastal Commission's authority to require state permit imposing environmental regulations on lessee's mining operations on U.S. Forest Service lands); Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n, 693 P.2d 227, 238 (Wyo. 1985) (Wyoming Supreme Court held that a state drilling permit requirement for operation on federal lands with an access condition was not preempted by federal law). See generally Burling, *Local Control of Mining Activities on Federal Lands*, 21 LAND & WATER L. REV. 33 (1986); Freyfogle, *Federal Lands and Local Communities*, 27 ARIZ. L. REV. 653 (1985).


149. *Id.* at 221-222. But see First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152, 166 (a state law which made diversion of water from one river to another illegal without a state permit was not binding upon the Federal Power Commission (FPC) or its lessees, since the diversion was the very feature that "[brought] this project squarely under the Federal Power Act and at the same time gives the project its greatest economic justification"), reh'g denied, 328 U.S. 879 (1946); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340 (1958) (although holding that "state laws cannot prevent the Federal Power Commission from
federal environmental and safety regulation and presumably preservation of traditional local police power over land use decisions. Consequently, offshore development is not to be accomplished “at all costs.”

Furthermore, the preemption cases decided upon the basis of the above test have relied on specific statutory provisions requiring a result from which the Court implied preemption. In the Court’s most recent case, Lawrence County v. Lead-Deadwood School District, the Court struck down a South Dakota statute requiring local governments to distribute federal payments in lieu of taxes in the same way they distributed general tax revenues. The Court held that these state requirements frustrated the congressional requirement that “payments . . . [not only] should go directly to units of local government but also that these new payments should not be restricted or earmarked for specific purposes.” Since the OCSLA does not contain a similar explicit manifestation of congressional purpose concerning onshore support facilities, energy companies would have difficulty making such a “frustration of purpose” argument.

In conclusion, OCSLA preemption of these local zoning ordinances is unlikely. Given the lack of specific statutory preemption language, a court is unlikely to rule that Congress expressly preempted state regulation of onshore support facilities. Neither are there grounds upon which to infer Congressional preemption of the legislative field. The general lack of a regulatory scheme for onshore facilities suggests that Congress did not establish a pervasive regulatory scheme upon which a court could infer a preemptive congressional intent. Moreover, because courts have generally concluded that energy production does not constitute a dominant federal interest as in the area of foreign affairs, preemption is unlikely on the basis of the general federal interest in offshore energy production.

Furthermore, a court will probably not preempt the ordinances on the basis of a direct conflict with federal law. Since offshore energy production can occur using either existing facilities or offshore storage and treatment facilities or both, the ordinances do not directly conflict with the OCSLA under a “physical impossibility” test. Finally, the Congress’
mixed motives in adopting the OCSLA and the lack of specific language in the statute concerning facilities outside the OCS compel the conclusion that these ordinances do not frustrate "the accomplishment of the full purposes and objectives of Congress."

Moreover, the Supreme Court's more recent posture of not presuming the invalidity of state statutes absent persuasive reasons evidencing congressional intent favoring preemption further compels the conclusion that state zoning power over onshore facilities be recognized.\(^{153}\) Because zoning powers have traditionally been a matter of local concern,\(^{154}\) a court would be even more hesitant to imply preemption without more explicit statutory language.

### III. Commerce Clause Challenge

By placing a flat ban on all pipelines and onshore facilities, these onshore support facility ordinances may make OCS development offshore from certain localities either technologically impossible, or more likely, prohibitively expensive. Consequently, such ordinances could effectively force OCS development into other areas. By establishing barriers to the transfer of oil and gas into a locality, these ordinances raise the question of the extent to which local police or proprietary powers may extend before violating the limits imposed by the commerce clause of the Constitution. Because much of the affected oil and gas would enter interstate commerce, these ordinances may violate the dormant commerce clause,\(^ {155}\) if not insulated by congressional consent through CZMA approval.\(^ {156}\)

Absent congressional exercise of the commerce power, the commerce clause prevents the states from erecting barriers to the free flow of

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155. See [Maryland v. Louisiana, 451 U.S. 725, 755-56 (1980), where the Court held that the flow of gas from the federal OCS to ultimate consumers in other states constitutes interstate commerce. The Court reasoned that Louisiana's "first-use" tax on federal OCS products was unconstitutional under the commerce clause because the tax impermissibly discriminated against interstate commerce in favor of local interests, since Louisiana's uses of OCS products were not subject to the first-use tax. The tax was not justified as a "compensatory" tax since Louisiana had no sovereign interest in being compensated for the severance of resources from federally owned OCS lands. Id. at 755-56.]

156. See supra notes 90-93 and accompanying text.
Not every exercise of local power is invalid merely because it in some way affects the flow of commerce between the states. The courts use a balancing test to weigh competing local and federal interests, often involving delicate, fundamental political questions concerning the nature of the federal system of government. One must balance the federal interest in a "national free market" against the traditional police power of the states and local governments to legislate for the health, safety, and general welfare of their citizens.

The standard governing judicial review of state regulation under the commerce clause remains unsettled. Nevertheless, the courts have uniformly adopted a strict scrutiny or a "virtual per se" rule of unconstitutionality if the state regulation effectuates economic protectionism. A statute that "overtly blocks the flow of interstate commerce at a state's borders" falls most easily into this category of strict scrutiny.

As a recent Supreme Court case, *City of Philadelphia v. New Jersey*, explains: "The crucial inquiry . . . must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." The threshold question in the commerce clause analysis of these ordinances, then, is "whether the primary purpose or effect of the [onshore support facility ordinances] . . . is to favor in-state economic interests or to burden out-of-state economic interests."

The onshore support facility moratorium ordinances do not facially
discriminate against out-of-state economic interests. The bans apply to California as well as out-of-state companies. Neither do these ordinances manifest a discriminatory intent toward out-of-state economic interests. The moratorium ordinances have a blanket effect on offshore operations in both state and federal waters by banning onshore support facilities in the locality's jurisdiction.

Even if the burden of the onshore facility ban fell solely on non-California energy companies, however, the ban would not manifest a sufficiently discriminatory intent against out-of-state economic interests. In Exxon Corp. v. Governor of Maryland, the Supreme Court considered a commerce clause challenge to a Maryland statute that prohibited producers and refiners of petroleum from operating retail service stations within the state. Although the divestiture requirement fell solely on interstate companies that operated gasoline stations in Maryland, the court found no discriminatory intent in the statute. The prohibition did not lead "either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level."  

Opponents of local ordinances could argue that the ordinances manifest a discriminatory intent against offshore oil operators generally. This argument would be most plausible where a locality approves an oil refinery that supports local onshore oil development while banning refineries that support offshore operations in federal waters. In this situation, a court might conclude that such an action manifests economic protectionism in favor of state onshore oil interests. Local governments, however, may convincingly respond that the bans prohibit onshore facilities

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166. See, e.g., Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). In Hughes, an Oklahoma statute facially discriminated against out-of-state interests by forbidding the transport of minnows outside the state. In striking down the statute, the Court specifically noted that the state had chosen the most discriminatory alternative in effectuating its legitimate local purpose of conserving its natural minnow population. Justice Rehnquist dissented, arguing that Oklahoma's substantial interest in conserving and regulating its natural minnow population outweighed the minimum burden on commerce of requiring all who export minnows from the state, residents as well as non-residents, to secure them from hatcheries. Id. at 345-46 (Rehnquist, J., dissenting).

167. See Cloverleaf Creamery, 449 U.S. at 473. (upheld under the Pike test a ban on the retail sale of milk in nonreturnable plastic containers, recognizing "that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry"); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617-19 (1981) (upheld Montana severance tax on coal, 90% of which is shipped out-of-state).


169. Id. at 125.

170. Many of the initiatives contain a separate section that manifests the locality's opposition to federal OCS development and requires the local government body to inform their federal representatives concerning this opposition. See, e.g., City of Santa Cruz, Cal., Measure A, supra note 12, § 2; Sonoma County, Cal., Measure A, supra note 13, § II.
that support offshore operations in either state or federal waters. In *City of Philadelphia v. New Jersey*, the Supreme Court held invalid a New Jersey law that prohibited out-of-state use of landfill sites. The Court noted, however, that it would be permissible to slow the flow "of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." In burdening state and federal offshore oil operators, the local ordinances do not seek to protect an in-state market from out-of-state competition in the same market. Consequently, favoring onshore oil operations is not unconstitutionally protectionist in that both in-state and out-of-state companies can pursue onshore oil development.

Underlying the general environmental scheme of the ordinances to protect the locality's coastline from onshore facility development is an additional purpose: to create political leverage with the federal government and the oil interests by erecting obstacles to frustrate implementation of federal leasing plans. This secondary motive, however, would not constitute grounds upon which to invalidate the measures. The ultimate environmental protectionist aim of both purposes is the same and "the courts would have little basis for distinguishing between the two motives short of an admission by the [locality]."

In light of the Supreme Court's analyses in *Exxon* and *Philadelphia*, the onshore support facility ordinances would not constitute economic protectionism but rather "evenhanded regulation" with only "incidental" effects on interstate commerce. Having cleared this ini-

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172. Id. at 627.
174. See *Breeden, supra* note 2 at 1127 n.89. Professor Breeden cites *Palmer v. Thompson*, 403 U.S. 217 (1971), a case involving the closing of municipal swimming pools for allegedly discriminatory reasons. Justice Black's majority opinion described the Court's attitude towards considerations of legislative motives:

> [It is] difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its racial content or effect, it would presumably be valid as soon as the legislature . . . repassed it for different reasons.

175. See *supra* notes 168-69 and accompanying text.
176. See *supra* note 171-73 and accompanying text.
177. See also *Norfolk S. Corp. v. Oberly*, 632 F. Supp. 1225, 1236-38 (D. Del. 1986) (In
tial hurdle in the commerce clause analysis, the court must then balance the ordinances' burden on interstate commerce against the local benefits of the regulation.

A common Supreme Court approach for reconciling these interests is the balancing test as summarized in *Pike v. Bruce Church, Inc.*:178

[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.179

Under the *Pike* balancing test, one must first consider the federal interest in uniform regulation of offshore energy products and particularly the burden that the local ordinance places on this federal interest. Courts have systematically struck down state safety requirements when the need for national uniformity outweighed the potential local benefits.180 The Supreme Court stated in *Kassel v. Consolidated Freightways*:181 "[Regulations to promote the public health or safety] may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."182 In *Kassel*, the Court struck down an Iowa statute that banned sixty-five foot double trailer trucks from its highways. The plurality argued that when "the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause."183 An oil company challenging these ordinances could seize

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a determination for the purpose of deciding which test applies should the case be remanded, the court held that the Delaware Coastal Act (Del. Code Ann. tit. 7, § 7001 (1983)), which prohibits the citing of heavy industry in the Coastal Zone, does not discriminate against interstate or foreign commerce.), appeal docketed, No. 86-5322 (3rd Cir. argued Feb. 9, 1987).

179. Id. at 142 (citation omitted).
182. Id. at 670.
183. Id. at 671. Justice Brennan and Justice Marshall concurred in the judgment but would have invalidated the law on the grounds that it was "protectionist legislation" because it aimed at deflecting traffic around Iowa. Id. at 679-86. Justice Rehnquist, in keeping with his general states' rights approach, dissented, arguing for the necessity of "sensitive consideration" of the state's safety justifications, and that Iowa had demonstrated those justifications were not illusory.
upon these cases to argue that the national interest in uniform and efficient interstate transportation of energy products via pipelines from the federal OCS to the shore far outweighs any potential local benefit. Because the onshore support facilities ordinances impair this national interest, the argument goes, they are unconstitutionally impermissible.

However, local governments have strong grounds upon which to distinguish these cases. *Kassel, Bibb v. Navajo Freight Lines*, 184 and *Southern Pacific Co. v. Arizona* 185 involved statutes that forced widespread out-of-state adoption of particular equipment or operating standards. The United States Supreme Court has recognized this type of disruption to commerce as most profound when the state regulations focus on the instrumentalities of interstate transportation. In contrast, local governments would argue, the onshore facility ordinances do not raise similar non-uniform standards problems. The ordinances do not seek to impose specifications on operations outside their jurisdictions, nor do they focus upon the instrumentalities of interstate commerce.

A court might be influenced by the impacts of such ordinances if all adjacent coastal counties or states enacted total onshore siting bans. 187 This total coastal exclusion could make offshore development impossible. The ordinance’s challengers could argue that national uniform standards for oil production, refining, and distribution are necessary to avoid local disruptions of the production of oil across the country. 188

185. 325 U.S. 761 (1945).
186. A number of commentators point out that in these situations, as in the economic discrimination cases, the commerce clause acts as an equal protection mechanism to shield out-of-state interests from local majorities. See South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 92 (1984); L. Tribe, AMERICAN CONSTITUTIONAL LAW 326-327 (2d ed. 1978). Critics of the dormant commerce clause would point out that these out-of-state interests often have a great deal of economic and political clout both in the state legislature and in the U.S. Congress, and can adequately protect their interests.
187. See discussion of this hypothetical in Breeden, supra note 2, at 1120-27.
188. See Impact of Moratoria on OCS Leasing, supra note 2, at 4. Debate over the importance of national energy needs often gets rather extreme, as Rep. William Dannemeyer (R.-Ca.) illustrated when he testified: “[A]s a Member of Congress, I would much rather explain to the parents who have a son who lives on the coast of California [why] there is a drilling platform off the coast . . . than[n] I want to explain to those parents why we need their son to come into the military service to possibly fight on the sands of the Middle East to preserve a resource that some of us in our State our unwilling to develop.” Id. In response to energy security arguments, critics of the Department of Interior’s offshore leasing policies contend that the Reagan administration lacks a consistent energy policy. “The administration has approached [the current oil glut] with two separate, and fundamentally inconsistent policies. On the one hand, the American People are told that conservation and the search for alternative forms of energy are no longer national priorities. The message seems to be that because oil is cheap, we can stop filling the strategic petroleum reserve, we can weaken the automobile fuel efficiency standards, we can eliminate tax credits for conservation and alternative energy resources and we can even export Alaskan crude oil to Japan. On the other hand, the falling price of oil in no way weakened the Administration’s resolve to open
In reply, local governments would argue that existing refinery sites in northern and southern California can accommodate expanded offshore development. The existence of these sites makes the total exclusion argument improbable, considering that only a handful of coastal governments have adopted total siting bans. However, because of the inherent flexibility in the weighing and balancing approach, consideration of a potential total coastal ban could enter into a court's analysis. Although a court could place controlling emphasis on the possibility of a total coastal ban, it is more likely to concentrate on the burdens posed by the specific locality in considering the burdens on interstate commerce. Accordingly, a local government would argue that a court should examine almost the entire California OCS to offshore oil and gas development.  

Another argued inconsistency lies in the fact that "President Reagan has recently vetoed legislation requiring electrical appliances to meet energy-saving standards that would have saved the equivalent of over 1.3 billion barrels of oil, almost as much as the 1.8 billion barrels that the Interior Department has estimated are in the unleased areas off California." N.Y. Times, Feb. 3, 1987, at 8, col. 2 (quoting Lisa Speer, Senior Scientist, Natural Resources Defense Council).

Representative Leon E. Panetta (D.-Ca.) contends that the California OCS is a relatively insignificant energy source: 

Department of Interior's most recent estimates suggests that we can find reserves of 1.88 billion barrels of oil on the unleased portions of the California OCS. National reserves are estimated at 66.8 billion barrels. Thus California's unleased OCS reserve represents less than 3% of the Nation's total. Considering Saudi Arabia's proven reserves of 168.8 billion barrels of oil, it becomes clear that California's OCS resources will not have significant impact on the United States' dependence on foreign sources of oil.


See supra note 143 and accompanying text.

The localities adopting total bans on onshore support facilities are the cities of San Francisco, Morro Bay, San Diego and the County of San Mateo. With the possible exception of San Mateo County and Morro Bay, the oil companies are not presently interested in developing these areas because they represent a small portion of California's 1,072 miles of coastline.

Localities adopting a voter referendum approach have the additional strong argument that the required referendum process does not add a significant burden to the existing siting process. In these localities, after the board of supervisors approves an LCP amendment allowing for onshore support facilities, the voters must approve the decision. The Coastal Commission can override the voters' veto. In this context, the burden on interstate commerce seems procedural, not substantive. If zoning and health and safety regulation are appropriate subjects for local regulation, it should not make a difference who exercises that power. Consequently, given the present regulatory scheme, it is even more unlikely that the referendum approach would be seen as unduly burdening interstate commerce.

While approval of onshore moratoria might encourage some localities with the voter referendum approach to follow that course, there are certain communities which have actually sought location of onshore development because of the economic benefits involved. The City of Eureka is an example of a coastal city which has supported offshore oil development for economic reasons.
particular ordinances on a case-by-case basis to determine whether it places a undue burden on interstate commerce.

In addition, local governments would contend that a national uniform standard is improper in this context because Congress, through the CZMA, recognized the need to consider unique local circumstances.\textsuperscript{191} That Congress has not specifically preempted the field,\textsuperscript{192} as it has done in the economic regulation of natural gas,\textsuperscript{193} supports the argument against a national standard. Given the recognition of local zoning concerns in both the California Coastal Act and CZMA, a court is unlikely to conclude that there is an overwhelming need for national uniformity in onshore facilities regulation.

On the other side of the scale in the \textit{Pike} balancing test are the local interest and benefits in the regulatory scheme of the ordinance. The court must consider whether the "statutes effectuate a legitimate public interest."\textsuperscript{194} Generally, the primary purpose of the ordinances is to prevent the adverse effects of onshore support facilities development, such as destruction of scarce coastal land, degradation of beaches, excessive water demands, water and air pollution, and disposal of toxic drilling mud and other production byproducts.\textsuperscript{195} Such land use controls and pollution and safety measures have long been regarded as proper exercises of the police power.\textsuperscript{196} Clearly, these measures effectuate legitimate public interests and are not illusory.

Professor Breeden argues that a \textit{statewide} ban on pipelines and onshore support facilities by a \textit{state} might be permissible if it were necessary for the achievement of a sufficiently critical state interest (such as protection of some unique or biological resource), or were strictly limited in

\textsuperscript{191} See supra notes 17-19 and accompanying text.
\textsuperscript{192} See supra notes 115-23 and accompanying text.
\textsuperscript{194} Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
\textsuperscript{195} See supra notes 11-13.
\textsuperscript{196} See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Construction Ind. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897, 909 (9th Cir. 1975), \textit{cert. denied}, 424 U.S. 934 (1976). In \textit{Construction Ind. Ass'n}, the court upheld the Petaluma growth control plan as a reasonable and legitimate exercise of the police power. The court refused to consider a commerce clause argument stating: "It is well settled that a state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its uniformity."
duration (such as to allow for necessary preparations onshore to handle the impacts of new facilities and residents).\footnote{197} Almost certainly, courts would insist on special circumstances distinguishing this state's total ban from similar bans that might be imposed by other states and that, if upheld, would bring all OCS development to a halt. In the absence of such factors, state environmental objectives probably would not be found sufficiently compelling to justify a stranglehold on the flow of OCS oil through the state. While Professor Breeden's argument is advanced in the context of a state-wide onshore facilities ban, he raises a number of critical points that may be applicable to county-wide bans. Under Professor Breeden's analysis, a county would need to demonstrate that its coastline represents either a unique area or contains critical biological resources or both. Monterey County, for example, could assert the uniqueness of the nationally recognized scenic Big Sur coastline, currently under consideration for special federal protection.\footnote{198} Monterey and the other counties could also argue that commercial fishing and tourism, so crucial to their economies, would be threatened by onshore development, oil spills, and water pollution.\footnote{199} Monterey and San Luis Obispo Counties also contain state wildlife refuges for the endangered sea otter population. San Francisco County, which has imposed an onshore facilities moratorium of two years in order to study the impact of such facilities, may argue that its ban is only temporary and imposed only to enable the city to plan for the impact of such development.

When the court weighs the federal and local interests in the \textit{Pike} balancing test, the validity of the local ordinances then "becomes one of degree."\footnote{200} The ordinances "will be upheld unless the burden imposed on \ldots\ [interstate] commerce is clearly excessive in relation to the putative local interests" taking into consideration the "nature" of those interests.\footnote{201} The extent of the burden imposed of course will vary from case to case.\footnote{202} If it is possible for offshore development to continue using facilities outside the locality or if offshore processing is feasible, then the burden imposed on interstate commerce by the ordinance would be limited

\footnote{197} Breeden, \textit{supra} note 2, at 1122.
\footnote{199} \textit{See} Mineral Management Service Hearings on \textit{Proposed Five-Year Outer Continental Shelf Oil and Gas Leasing Program}, held in San Francisco, April 8, 1986 (testimony of Rep. Leon E. Panetta at 7) (Offshore development poses a threat to California's $1.25 billion per year commercial fishing industry and $16 billion a year tourism industry.). The northern counties of Sonoma and Mendocino often raise the inadequacy of oil spill clean-up technology in the rocky and rough waters found along their coastlines. \textit{See id.} at 5-6.
\footnote{200} \textit{Pike} v. Bruce Church, 397 U.S. 137, 142 (1970).
\footnote{201} \textit{Id.}
\footnote{202} \textit{See supra} notes 158-59 and accompanying text.
to a potential increase in the cost of energy products. In this scenario, the court would not be faced with an absolute denial of national energy needs by the locality but rather with the economic burdening of a national need in exchange for protecting a local interest. The court would therefore balance a locality's interest in protecting its economic and environmental health against the national desire for additional sources of energy. If it recognized the inherently essential interests involved in zoning and health and safety measures, a court would likely give greater weight to these local interests so as to outweigh the burdens on commerce. In light of the traditional deference given local police power in the absence of facially discriminating legislation,\textsuperscript{203} it would be difficult for a court to rule that the burdens on interstate commerce are clearly excessive.

The final consideration in the commerce clause balancing test involves "whether [the local interests] could be promoted as well with a lesser impact on interstate activities."\textsuperscript{204} In applying this test to the ordinances, a court would consider whether local governments could protect their coastlines without intrusively affecting interstate commerce. While oil companies may argue that these facilities could operate using present environmental and safety controls without degrading the coastal environment, such an argument would require a court to inquire into the validity of the local legislative judgment\textsuperscript{205} that onshore bans are necessary to protect the local coastline. The local governments could subsequently argue that an inquiry into the validity of a legislative judgment oversteps the boundaries of proper judicial review in applying the reasonable alternatives test. The Supreme Court in the \textit{Pike} case specifically referred to the putative or purported benefits of the local enactment, indicating that the court's role in questioning the local government's legislative judgment is limited.\textsuperscript{206} The court must therefore limit its inquiry to whether the locality could have protected itself from the perceived threats of on-
shore oil facilities without burdening oil and gas that was destined for shipment out-of-state. Unlike the situation in Philadelphia, these ordinances burden both in-state and out-of-state commerce equally. Consequently, if the court defers to the local government’s judgment that onshore bans are necessary to protect their coastlines (or agrees with its judgment), the court would presumably conclude that no alternatives are available to the local governments that have a lesser impact on interstate commerce.

In conclusion, a court would have strong justifications for upholding these measures under a commerce clause challenge. The local governments have not established a “stranglehold” on the entire coast through the enactment of these ordinances, but instead have shown critical local interests in preventing onshore support facilities, and have no less discriminatory alternatives by which to advance their interests. The Rehnquist Court’s “state rights” orientation increases the probability of such a holding.

Corporation, 450 U.S. 662 (1981) in which the Court held that the Iowa statute’s benefits were “illusory.”

Beyond consideration of whether the benefits are illusory, courts have generally deferred to the judgment of the legislative body. See, e.g., Zahn v. Board of Pub. Works, 274 U.S. 325, 328 (1927) (where a zoning ordinance is not clearly arbitrary, the court will not substitute its judgment for the judgment of the municipal legislative body); Larkin v. Grendel’s Den Inc., 459 U.S. 116, 121 (1982) (because zoning function is traditionally a legislature task requiring the balancing of competing considerations, courts should refrain from reviewing the merits of such decisions, absent a strong showing of arbitrariness or irrationality). See also Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973). Chief Justice Burger stated:

When legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. [The] fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

_id. at 62.

207. See supra notes 163-65 and accompanying text.

208. See, e.g., Kassel, 450 U.S. at 687-706 (Rehnquist J., dissenting); Philadelphia v. New Jersey, 437 U.S. 617, 629-33 (1978) (Rehnquist J., dissenting). In Hughes v. Oklahoma, 441 U.S. 322, 339-46 (1979) (Rehnquist J., dissenting), now Chief Justice Rehnquist stated: “Given the primacy of the local interest here [preservation of wild minnows], in the absence of conflicting federal regulation, I would require one challenging a state conservation law on Commerce Clause grounds to establish a far greater burden on interstate commerce than is shown in this case.” _Id._ at 343 n.7.

See also Powell, The Compleat Jeffersonian: Justice Rehnquist and Federalism, 91 YALE L.J. 1317 (1982). “Accepting for the purposes of discussion the standard liberal view of Justice Rehnquist as a right-wing ideologue, unsympathetic to claims based upon individual liberties, and conceding that most of Rehnquist’s federalism positions dovetail nicely with conservative politics, it still must be said that at times ‘his federalism’ leads Justice Rehnquist to reach ‘liberal’ results.” _Id._ at 1362-63.
IV. Political Considerations

The extreme federal-local confrontation posed by the onshore support facility ordinances raises not only legal problems for the local governments but political dangers as well. The primary danger is the threat of political reaction. It is possible that the energy companies will seek legislation in Congress or the state legislature to expressly preempt these onshore support facility bans. In this worse-case scenario, the local governments would lose much of their leverage against the energy companies because clearly the local laws would be preempted by statute. However, for political reasons it is very unlikely that either the state legislature or Congress would take such intrusive action. This is particularly true with respect to the state government, which already holds an optional veto over local refusals to site energy facilities.

Another political reaction at the federal level would be for NOAA to strengthen its review power under CZMA by revising the national interest regulations. By revising these regulations or the LCP amendment review procedures, NOAA might require more specific assurances that certain onshore energy facilities will be sited. While the language of the Act leaves NOAA limited maneuvering room, the agency could still seek to extract additional safeguards from coastal states.

Second, opponents of the measures argue that these ordinances will force the location of processing and tanker facilities offshore into federal waters. With these facilities sited in federal waters, local governments would be unable to regulate the facilities themselves, but instead would have to rely upon the state Coastal Commission to use the CZMA consistency provisions to control the pollution effects of those facilities. The danger, of course, is that the Secretary of Commerce may override a state determination that an offshore facility is inconsistent with its state management program. The override would arguably leave the local governments without any control over these facilities.

209. It is much more likely that the oil companies will seek to work through Governor George Deukmejian and the Reagan Administration to put political pressure on or obstacles in the way of such a local approach.
210. See supra note 86.
211. See supra notes 24-28 and accompanying text. See generally Kanouse, supra note 25, at 542. “[A]dequate consideration of the national interest’ is sufficiently ambiguous to be read as either procedural or substantive requirement.” Id. Moreover, given the judicial deference afforded an administrative agency’s interpretation of an ambiguous statute it is empowered to administer, it would be very difficult to challenge these new regulations. See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 844 (1984) (“A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).
212. See Argument Against Measure A, COUNTY OF SAN LUIS OBISPO, SAMPLE BALLOT & VOTER INFORMATION PAMPHLET, GENERAL ELECTION ON TUESDAY, NOVEMBER 4, 1986 40-52.
213. See supra note 97 and accompanying text.
Last, and perhaps most important, an offshore tanker arrangement may pose a greater environmental harm as a result of increased risk of oil spills and tanker accidents. The Coastal Commission generally favors pipeline transportation of oil and gas as the most environmentally safe transportation method. Consequently, if offshore development proceeds over the objection of the state and local governments, the Coastal Commission will favor such a pipeline arrangement.

V. Advice to Local Governments

In light of the above legal and political considerations, it is most advantageous for the local governments to adopt the referendum model of these ordinances. The referendum best achieves the essential purpose of all these ordinances — to gain political leverage with the energy companies and the federal government. First, by not explicitly banning onshore support facilities, these ordinances have a better chance of receiving federal approval under CZMA and a much better chance of withstanding a preemption or commerce clause challenge. Second, the referendum model focuses local electoral power without raising political problems for the state Coastal Commission due to substantive changes in a LCP's energy siting criteria which may be rejected by the federal Office of Ocean and Coastal Resource Management. Third, this process places the oil companies in the position of challenging the authority of local voters to control the destiny of their own coastline, which may well create a politically embarrassing and provocative situation within the very communities the companies are trying to woo into siting their facilities. Finally, the threat of a voter veto of a local siting decision may act as a continuing threat to those seeking offshore development. This manifestation of local "political will" may also give local boards of supervisors more clout in negotiating with energy companies and, more immediately, give greater clout to the locality's representatives in Washington.

The most advantageous statutory language for the ordinances

214. See supra text accompanying notes 62-63 and CAL. PUB. RES. CODE § 30265 (West 1986). Section 30265, added in 1984 in response to plans for a southern California crude oil pipeline, sets forth legislative findings that "pipeline transport of oil is generally both economically and environmentally preferable to other forms of crude oil transport." This provision, while not binding, may provide a basis for approval of an offshore crude oil pipeline, rather than an alternative tanker transportation plan which would not require onshore facilities.

215. In the view of the author, the Sonoma County model has the greatest overall chance of withstanding judicial scrutiny. See County of Sonoma Measure A, supra note 13.

216. See, e.g., Offshore Drilling Plan Makes Waves, San Francisco Chronicle., Feb. 3, 1987, at 1, col. 5. Senator Wilson (R-CA) criticized the Secretary of Interior's new offshore leasing plan and warned that "local governments all along the coast will erect a seawall [referring to the onshore support facility ordinances] against the kind of unreasonable and unyielding attitude we have found." Id. at 18, col 4.
should include specific findings relating to the environmental, health, or safety threats posed by onshore support facilities themselves, in addition to the threats posed by offshore mineral development. Ideally, the findings should also include a discussion of the national interest in these energy facilities and how this interest is outweighed by the threat to the local area or is being addressed in other ways. For example, the Sonoma County Ordinance discusses the county’s contribution to the state’s energy needs and the need for a balanced national energy policy before proceeding with extensive offshore development. Another potential advantage, as demonstrated in the Sonoma Ordinance, would be achieved by narrowly drafting the ordinance to require a voter referendum only on proposed LCP amendments, thereby avoiding a possible due process challenge that adjudicatory actions—issuance of permits or other authorizations—have been improperly put to a voter referendum.

In sum, while onshore support facility ordinances may pose public policy and legal questions, they are ingenious political mechanisms. They allow the locality to buy time for its supporters in Congress to force the next administration’s Department of Interior to take a sensitive balanced approach to offshore development, a cooperative approach that was mandated by Congress when it enacted the OCS Lands Act Amendments of 1978 and the Coastal Zone Management Act of 1972. These ordinances are a warning to those who seek to renege on this cooperative federalism approach. The local governments are saying in effect, “We, too, have a trump card in this offshore battle; we hold the beachheads.”

VI. Conclusion

At first impression, it would seem that the most difficult challenge facing the onshore support facility ordinances will take place at the state level. The ordinances effecting outright bans on onshore facilities facially appear to conflict with the energy siting provisions of the Coastal Act. However, the Coastal Act’s local override provisions will probably save these ordinances. This override may be seized upon by the Coastal Commission, which in the past has been generally sympathetic to the local governments’ concerns with offshore development, as a justification for upholding these ordinances. Depending upon the outcome at the federal level, the energy companies could challenge the Coastal Commis-

217. See Building Indus. Ass’n of S. California, Inc. v. City of Comarillo, 41 Cal. 3d 810, 824, 718 P.2d 68, 76, 226 Cal. Rptr. 81, 89 (1986).
218. See County of Sonoma Measure A, supra note 13.
219. See supra note 41.
220. See supra notes 119, 17-28 and accompanying text.
221. See supra text accompanying note 65.
222. See supra note 68 and accompanying text.
sion's approval in state court. However, in applying the generally deferential standard of judicial review, a court would likely affirm the Coastal Commission's approval.223 Presumably, a reviewing court would also be influenced by both the state override provision and the traditional view that zoning is a matter of local concern.

The Secretary of Commerce would then have to consider the ordinances' impact on the California Coastal Management Program. Given the Office of Ocean and Coastal Resource Management's growing political hostility toward measures restricting onshore energy facilities, the ordinances' chances for approval are shaky at best.224 The lack of action-inducing requirements in present CZMA national interest regulations is a factor in favor of approval of these regulations.225 Under the current interpretation, the Secretary of Commerce presumably must approve the amendment. Supporting such a conclusion is NOAA's continued certification of Delaware's coastal management program that bans entirely new heavy industry in its coastal zone.226 However, given OCRM's recent rejections of mild LCP language involving onshore support facilities,227 the onshore support facility bans may be destined for rejection. The voter referenda ordinances, by not explicitly prohibiting onshore facilities, have a better chance of approval.

With regard to the constitutional challenges, a court is unlikely to conclude that Congress has preempted state regulation of onshore support facilities through either the OCSLA or the CZMA. Without more explicit language concerning onshore support facilities in the OCSLA, a court would presumably be very hesitant to infer an implied preemption of this field of state regulation on the basis of general federal interests in OCS production or in national energy self-sufficiency.228

If approved under the CZMA, the onshore support facility ordinances would likely be upheld under a commerce clause attack.229 Even without congressional consent under CZMA, because the ordinances neither constitute economic protectionism nor discriminate against interstate commerce, it is likely they would be upheld as legitimate exercises of the local police power.230 Consequently, even if the ordinances were rejected as amendments to California's Coastal Management Plan, the

224. See supra notes 83-86 and accompanying text.
225. See supra notes 24-28 and accompanying text.
226. See supra notes 90-93 and accompanying text.
227. See supra notes 83-86 and accompanying text.
228. See supra text accompanying note 154.
229. See supra note 93 and accompanying text.
230. See supra text accompanying notes 155-208.
local governments could still enforce their onshore zoning provisions. By enforcing a rejected LCP provision, however, a state would be running the risk of losing its CZMA money and having its coastal program decertified.\textsuperscript{231}

While the local governments face political danger in that Congress or NOAA may seek to preempt the local measures, these ordinances are politically powerful weapons in the local governments' struggle to have their voices heard in the federal offshore leasing process. By manifesting strong local opposition to unrestrained offshore development, such ordinances not only strengthen the negotiating position of the local governments' supporters in Congress, but also signal a loud warning to the U.S. Department of Interior and the energy companies. Onshore support facility ordinances are strong reminders that offshore mineral development cannot take place in an efficient and orderly manner without the cooperation of local governments. As Sonoma County Supervisor Ernie Carpenter explains, "Those people in the White House and the Department of Interior have their sagebrush rebellion... Well, we have our seaweed rebellion, and they're going to have to take it seriously."\textsuperscript{232}

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\textsuperscript{231} \textit{See supra} note 102 and accompanying text.


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