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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA ex rel.,
THE CALIFORNIA COASTAL
COMMISSION; GRAY DAVIS, GOVERNOR
OF CALIFORNIA; AND BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA, et al.,

Plaintiffs,

v.

GALE A. NORTON, SECRETARY OF THE
INTERIOR; UNITED STATES
DEPARTMENT OF INTERIOR, MINERALS
MANAGEMENT SERVICE, REGIONAL
SUPERVISOR OF THE MINERALS
MANAGEMENT SERVICE, et al.,

Defendants.

_____ /

No. C 99-4964 CW

ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT

The central dispute in this case is whether Defendant Mineral Management Service (MMS) must make, and provide to Plaintiff California Coastal Commission (CCC), a determination that the MMS's grant of suspensions of certain oil and gas leases on the Outer Continental Shelf (OCS) off the coast of California is consistent with the State of California Coastal Management Program (CCMP). The Court finds that the MMS must do

1 so. Also at issue is whether the MMS complied with the
2 requirements of the National Environmental Policy Act (NEPA), 28
3 U.S.C. § 2201 et seq. in granting the lease suspensions.

4 Plaintiffs State of California, the CCC, Gray Davis,
5 Governor of California, and Bill Lockyer, Attorney General of
6 California, move for summary judgment that MMS did not comply
7 with the Coastal Zone Management Act (CZMA) when it granted the
8 requests of the lessees for suspension of the thirty-six leases
9 at issue here without determining that the suspensions were
10 consistent with the CCMP and providing the CCC the opportunity
11 to review that determination. Plaintiffs also move for summary
12 judgment that MMS did not comply with the requirements of NEPA
13 when it granted the suspension requests. Defendants Gale A.
14 Norton, Secretary of the Interior, the Department of the
15 Interior, the MMS, and the Regional Supervisor of MMS oppose
16 this motion and cross-move for summary judgment that Defendants'
17 grant of the suspensions of these leases complies with the CZMA.
18 Defendants also cross-move for summary judgment that they have
19 complied with all of the requirements of NEPA. Defendant
20 Operator Intervenors¹ also move for summary judgment that the MMS
21 has complied with all of the requirements of the CZMA and NEPA.
22 Some Plaintiff Intervenors² filed briefs in support of

24 ¹ The Operator Intervenors are AERA Energy, LLC., CONOCO,
25 Inc., Nuevo Energy Company, Poseidon Petroleum, LLC, Samedan Oil
Company.

26 ² Plaintiff Intervenors are County of Santa Barbara, County
27 of San Luis Obispo, Sierra Club, League For Coastal Protection,
Natural Resources Defense Council, Friends of the Sea Otter,

1 Plaintiffs' motion for summary judgment.
2 Plaintiffs also filed, without opposition, a request for
3 judicial notice of the Federal Register, volume 65, number 226
4 from pages 70361 to 70362. The matter was heard on December 1,
5 2000. Having considered all of the papers filed by the parties
6 and oral argument on the motion, the Court GRANTS Plaintiffs'
7 Motion for Summary Judgment (Docket #82) and Request for
8 Judicial Notice (Docket #97) and DENIES Defendants' Cross-Motion
9 for Summary Judgment (Docket #88) and Defendant Operator
10 Intervenors' Motion for Summary Judgment (Docket #85).

11 BACKGROUND

12 I. Leases Governed By the Outer Continental Shelf Lands Act
13 Oil and gas leases on the Outer Continental Shelf (OCS) are
14 governed by the Outer Continental Shelf Lands Act (OSCLA), 43
15 U.S.C. § 1331 et seq., enacted in 1953. Pursuant to the OSCLA,
16 the Department of the Interior may issue and administer leases
17 for exploration for and production of oil and gas on the Outer
18 Continental Shelf (OCS). See 43 U.S.C. § 1331 et seq.; see also
19 30 C.F.R. § 250 et seq. (regulations implementing the OSCLA).
20 These leases may have a primary term of five to ten years, and
21 may continue after the primary term for as long as there is
22 production of oil or gas in paying quantities, approved drilling
23 or well reworking operations. See 43 U.S.C. § 1337(b)(2).

24 The OSCLA prescribes a four stage process for the

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26 CALPIRG, California CoastKeeper, Santa Barbara Channelkeeper,
27 Santa Monica Baykeeper, Get Oil Out and Citizens Planning
28 Association.

1 development of oil and gas leases for exploration and
2 production. The first stage is the development and publication
3 of schedules of proposed sales of leases. See 43 U.S.C. § 1337;
4 30 C.F.R. § 256, subpart F (Lease Sales). The second stage is
5 the sale of the leases. See 43 U.S.C. § 1337(a)(1); 30 C.F.R. §
6 256, subpart G (Issuance of Leases).

7 The third stage is the filing and review of the exploration
8 plan (EP). See 43 U.S.C. § 1340; 30 C.F.R. § 250.203. At this
9 stage, the lessee submits a proposed EP to the Regional
10 Supervisor of the MMS for approval. The plan must include a
11 description of the exploration activities, a description of the
12 mobile drilling unit, a map of the proposed wells, and either a
13 certificate of a consistency determination by the federal agency
14 or a consistency certification by the State. See 43 U.S.C. §
15 1340(c); 30 C.F.R.
16 § 250.203. The Regional Supervisor of the MMS must consult with
17 the Governor of the affected State, or the Governor's designated
18 representatives, and the Office of Ocean and Coastal Resource
19 Management of the National Oceanic Atmospheric Administration
20 before approving or disapproving the proposed EP. See 30 C.F.R.
21 § 250.203. After the EP has been approved by the Regional
22 Supervisor, any revisions to it must be submitted to the
23 Regional Supervisor for approval. See 30 C.F.R. § 250.203(n).
24 If the Regional Supervisor determines that "a proposed revision
25 could result in a significant change in the impacts previously
26 identified and evaluated," 30 C.F.R. § 250.203(n)(2), the
27 revisions are subject to the same approval process as the

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1 original EP. See 43 U.S.C. § 1340(e)(1).

2 Finally, the fourth stage is the filing and review of a
3 development and production plan (DPP). See 43 U.S.C. § 1351; 5
4 C.F.R. § 250.204. The DPP must be submitted along with the
5 lessee's certification that each activity is consistent with the
6 State's coastal management program. See 43 U.S.C. § 1351(d); 30
7 C.F.R. § 250.204(b)(13). Development and production activities
8 may be carried out only in accordance with the approved DPP.
9 See 43 U.S.C. § 1351(b).

10 Pursuant to the OSCLA, 43 U.S.C. § 1334(a)(1), the MMS has
11 the authority to grant suspensions of the primary term, or of an
12 extended term, of the lease upon request of the lessee for
13 reasons such as facilitating the development of the lease or
14 making arrangements for transportation facilities. The MMS may
15 also direct suspensions of the leases on its own initiative, for
16 example, in the face of a threat of serious, irreparable, or
17 immediate environmental harm. See 43 U.S.C. §§ 1337(b)(5); see
18 also 30 C.F.R. §§ 250.168-180.

19 What is referred to as a suspension of the lease is
20 actually a suspension of the running of the term of the lease,
21 that is, in effect an extension of the lease.

22 II. The Leases At Issue

23 Between 1968 and 1984, the MMS, a division of the
24 Department of the Interior, conducted four sales of oil and gas
25 leases for the OCS off the coast of California, which resulted
26 in forty leases being issued, each with a primary term of five
27 years. Until October, 1992, the MMS, at the request of the

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1 lessees, had granted suspension of the leases, extending all of
2 the primary terms of the leases. On October 15, 1992, MMS
3 directed suspensions of the leases commencing on January 1,
4 1993. In May, 1999, when the directed suspensions were about to
5 end, each of the lessees filed a request for a lease suspension.
6 In May and June, 1999, a number of elected officials of the
7 State of California wrote letters to the Department of the
8 Interior opposing the lessees' pending requests for lease
9 suspensions, and asking the MMS to postpone its decision on
10 those requests until the CCC made a determination about its own
11 authority, under the CZMA, to review the pending lease
12 suspensions for consistency with the State's CCMP.

13 On June 25, 1999, independent of these letters from the
14 State's elected officials, MMS directed additional suspensions
15 of all forty of the leases until August 16, 1999, in order to
16 have additional time to review the lessees' suspension
17 proposals. See 3 Administrative Record (AR) 719-744.

18 The CZMA, 16 U.S.C. § 1451 et seq., had been enacted in
19 1972. In it, Congress declared a national policy which "has as
20 its main purpose the encouragement and assistance of States in
21 preparing and implementing management programs to preserve,
22 protect, develop and whenever possible restore the resources of
23 the coastal zone of the United States." S. Rep. No. 92-753
24 (1972), reprinted in 1972 U.S.C.C.A.N., 92nd Congress, Volume
25 3, at 4776. The CZMA encourages the States' development of
26 coastal zone management programs and cooperation between the
27 federal and State agencies engaged in programs affecting the

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1 coastal zone. See Exxon Corporation v. Fischer, 807 F.2d 842,
2 844 (9th Cir. 1987) (explaining that the CZMA is "a mechanism
3 for resolving conflicts between state coastal zone plans and
4 federally approved activities"). The legislative history of the
5 CZMA states, "There is no attempt to diminish state authority
6 through federal preemption. The intent of this legislation is
7 to enhance state authority by encouraging and assisting the
8 states to assume planning and regulatory powers over their
9 coastal zone." S. Rep. No. 92-753 (1972), reprinted in 1972
10 U.S.C.C.A.N., 92nd Congress, Volume 3, at 4776.

11 Since 1972, then, the CZMA has required that certain
12 federal agency activities, and certain private activities done
13 under the authority of a federal license or permit, that affect
14 the coastal zone, be consistent with the State's coastal
15 management program. See 16 U.S.C. § 1456(c). A federal agency
16 carrying out an activity that affects the coastal zone must
17 provide a consistency determination to the relevant State agency
18 before final approval of the federal activity. See 16 U.S.C. §
19 1456(c)(1)(C). Any applicant for a required federal license or
20 permit to conduct an activity, within or outside of the coastal
21 zone, that affects any land or water use or natural resource of
22 the coastal zone is required to furnish a certificate that its
23 proposed activity is consistent with the State's coastal
24 management program. See 16 U.S.C. § 1456(c)(3)(A). Title 15
25 C.F.R. § 930 et seq., enacted pursuant to the CZMA, "describes
26 the obligations of all agencies, individuals and other parties
27 who are required to comply with the Federal consistency
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1 provisions of the Coastal Zone Management Act.”

2 On July 27, 1999, the CCC advised the MMS that, pursuant to
3 the CZMA, 16 U.S.C. § 1456(c)(3), it was asserting its authority
4 to review the requests for suspension of the leases for
5 consistency with the State’s coastal management plan. See 3 AR
6 745. The CCC set out a number of issues about which it was
7 concerned, including the age of the leases, the poor quality of
8 the oil, the proximity of the leases to marine sanctuaries, and
9 changed environmental circumstances, such as the expansion of
10 the territory of the threatened southern sea otter into the
11 area. See 3 AR 745-47. The CCC also advised the MMS that the
12 lessees were to provide the State with a certification of
13 consistency and the MMS could not approve the requested
14 suspensions unless the State concurred with the consistency
15 certification. The CCC indicated that, therefore, the MMS
16 should hold the lessees’ requested suspensions in abeyance.

17 On August 13, 1999, former Secretary of the Interior Bruce
18 Babbitt, responding to the CCC, indicated that the lessees’
19 suspension requests did not trigger California’s consistency
20 review authority because the requested suspensions did not have
21 any effect on California’s coastal zone. See 3 AR 756-57.

22 On the same day, the MMS directed suspension of thirty-six
23 of the forty leases for ninety days, in order to ensure that the
24 lease development work complied with the CZMA.³ See id.

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26 ³ The MMS determined that the remaining four leases had
27 expired and, therefore, did not qualify for further lease
28 suspensions. The lessees of these four leases have
administratively appealed the MMS’s decision to deny their

1 On November 12, 1999, the MMS granted the lessees' requests
2 for suspensions of the thirty-six leases at issue here,
3 suspending the leases for nineteen to forty-five months. See 5
4 AR 0956. The MMS required that each lessee undertake certain
5 "milestone" activities, including drilling a well, submitting a
6 description of the proposed project, and submitting a revised EP
7 or DPP, in order to continue the suspension.

8 DISCUSSION

9 I. Legal Standard

10 Summary judgment is properly granted when no genuine and
11 disputed issues of material fact remain, and when, viewing the
12 evidence most favorably to the non-moving party, the movant is
13 clearly entitled to prevail as a matter of law. See Fed. R.
14 Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23
15 (1986); Eisenberg v. Insurance Co. of North America, 815 F.2d
16 1285, 1288-89 (9th Cir. 1987).

17 A motion for summary judgment may properly be brought in
18 litigation challenging decisions and actions of federal agencies
19 under the Administrative Procedure Act. See Muckleshoot Indian
20 Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999); see
21 also 5 U.S.C. §§ 702-706. In deciding such a motion for summary
22 judgment, the Court reviews the record of the federal agency and
23 determines whether the agency's decision was based on a
24 consideration of the relevant factors or whether its actions
25 were arbitrary, capricious, an abuse of discretion or otherwise
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27 requests for suspension.

1 not in accordance with the law. See Blue Mountain Biodiversity
2 Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998). However,
3 questions of law are reviewed de novo by the Court. See Wagner
4 v. National Transp. Safety Bd., 86 F.3d 928, 930 (9th Cir.
5 1996).

6 II. Coastal Zone Management Act

7 A. Federal Activity

8 As noted above, the CZMA requires federal agencies
9 conducting activities that affect the coastal zone to determine
10 that these activities are consistent with the State's coastal
11 management program. See 16 U.S.C. § 1456(c). Plaintiffs claim
12 that the MMS's grant of a request to suspend an oil or gas lease
13 is a "federal activity" which affects the coastal zone as
14 defined by the CZMA and requires the MMS to give the State a
15 consistency determination.

16 Between 1972 and 1984, it was not clear whether consistency
17 review was required for the sale of leases on the OCS off the
18 coast of California. In Secretary of the Interior v.
19 California, 464 U.S. 312 (1984), the Supreme Court considered
20 whether the sale of gas and oil leases for the OCS was a federal
21 activity "directly affecting" the coastal zone, which would
22 require a determination by the Secretary of the Interior that
23 the lease sale was consistent with the State's coastal
24 management plan. Id. The Court concluded that Congress did not
25 intend the CZMA to apply to activities on the OCS. See id. at
26 325-330. The Court held that "the Secretary of the Interior's
27 sale of outer continental shelf oil and gas leases is not an
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1 activity 'directly affecting' the coastal zone within the
2 meaning of this statute." Id. at 315. The Court noted that a
3 lease sale is one in a series of events that may culminate in
4 activities which directly affect the coastal zone. See id. at
5 321.

6 The Court also found that CZMA § 1456(c)(1) referring to
7 activities "conducted or supported by a federal agency" is not
8 applicable to lease sales on the OCS. Id. at 330. The Court
9 reasoned that the federal agency does not conduct or support the
10 activities of drilling for oil or gas under the lease. Id. at
11 332.

12 In 1990, Congress amended the CZMA to overrule Secretary of
13 the Interior. See H.R. Rep. No. 101-964 2374, 2675, reprinted
14 at 1990 USCCAN 6. Section 1456(c)(1)(A) was amended to delete
15 the word "directly" modifying "affects," so that the statute now
16 reads,

17 Each Federal agency activity within or outside the coastal
18 zone that affects any land or water use or natural
19 resources of the coastal zone shall be carried out in a
20 manner which is consistent to the maximum extent
21 practicable with the enforceable policies of approved State
22 management programs.

23 16 U.S.C. § 1456(c)(1)(A). Furthermore, Congress indicated in
24 the legislative history that "the term 'affects' is to be
25 construed broadly, including direct effects which are caused by
26 the activity and occur at the same time and place, and indirect
27 effects which may be caused by the activity and are later in
28 time or farther removed in distance but are still reasonably
foreseeable." H.R. Rep. No. 101-964 at 2675.

1 Congress also indicated in the legislative history that
2 this amendment was intended "to make clear" that the sale of oil
3 and gas leases is subject to the CZMA. Id. at 2676. By
4 requiring the lease sale itself to be consistent with the
5 State's coastal management program, Congress advanced the time
6 for consistency review of a federal activity to an earlier stage
7 than that of the development of the EP and the DPP. See id.
8 The legislative history states that the amendments should "leave
9 no doubt that all federal agency activities and all federal
10 permits are subject to the CZMA's consistency requirements."
11 Id.

12 All of the parties agree that since the 1990 amendment of
13 the CZMA, sales of leases for the exploration and development of
14 oil or gas on the OCS are federal agency activities that require
15 consistency determinations.

16 Plaintiffs argue that the MMS's grants of suspensions of
17 the leases are likewise federal activities that affect the
18 coastal zone, which requires the MMS to give the State a
19 determination that these suspensions are consistent with the
20 CCMP.⁴ Plaintiffs assert that, just as a sale of oil and gas
21 leases on the OCS is reviewable as a federal activity affecting
22 the coastal zone under the CZMA as amended, the grant of
23 suspension of the leases, which substantially extends the

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25 ⁴ Defendants assert that Plaintiffs did not allege in their
26 complaint that the grants of the lease suspensions are
27 violations of the CZMA, 16 U.S.C. § 1456(c)(1). The Court finds
28 sufficient Plaintiffs' allegations that "Defendants have
approved the requests for suspensions without complying with the
Coastal Act, the CCMP, and the CZMA." See Complaint at 8.

1 primary term of the leases, is also reviewable as a federal
2 activity affecting the coastal zone.

3 In further support of their argument, Plaintiffs point out
4 that the grant of these suspensions requires certain activities,
5 which are referred to as "milestones." These milestones include
6 the spudding (drilling) of exploration and delineation wells
7 which directly affect the coastal zone.

8 Defendants argue that the grant of a lease suspension is
9 not a federal activity, as defined by the CZMA, and, therefore,
10 the MMS is not required to give the State a consistency
11 determination. Defendants also respond that the grant of the
12 suspensions of the leases does not authorize any activity that
13 could affect California's coastal zone and, therefore, the MMS
14 is not required to determine that these suspensions are
15 consistent with the State's coastal management program.
16 Defendants assert that before any milestone, including the
17 spudding of new wells, the construction of new offshore
18 platforms and onshore facilities, oil transportation by tanker,
19 and exploration, is authorized, each lessee must file a new or
20 revised EP or DPP early in the lease suspension period.
21 Pursuant to the CZMA, if a lessee files a new EP or DPP, those
22 plans must be consistent with the CCMP. Further, Defendants
23 state that if the lessee files a revised EP or DPP, the MMS will
24 determine whether the revisions involve significant changes in
25 environmental impacts from the impacts evaluated when the
26 original EP or DPP was filed. If the MMS finds that the
27 revisions do involve significant changes in environmental

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1 impacts, the revisions must be determined to be consistent with
2 the CCMP before they can be approved. See 43 U.S.C. §
3 1304(e)(1); 30 C.F.R.
4 § 250.203(n)(2). Therefore, Defendants argue that merely
5 granting the suspensions does not authorize any activities or
6 affect the coastal zone and thus that Plaintiffs' arguments are
7 premature.

8 The Court finds that the MMS's grant of these suspensions
9 is a federal activity, as defined by the CZMA in 16 U.S.C.
10 § 1456(c)(1). Title 15 C.F.R. § 930.31, enacted pursuant to the
11 CZMA, defines "federal activity" as "any functions performed by
12 or on behalf of a Federal agency in the exercise of its
13 statutory responsibilities." The MMS's grant of the suspensions
14 is a federal activity which it carries out in the exercise of
15 its statutory duties.

16 As noted above, Congress, in the 1990 amendments to the
17 CZMA, advanced the time for review of oil and gas leases for
18 consistency with a State's coastal management program to the
19 time of the sale of the leases. These leases were not subject
20 to consistency review when they were sold because that occurred
21 prior to the clarifying amendments to the CZMA. These lease
22 suspensions extend the primary term of the leases, which would
23 have otherwise expired. At the time these suspensions were
24 granted, the leases were fifteen to thirty years old, although
25 they were entered into as five year leases. The suspensions
26 allowed the leases to continue for lengthy additional terms,
27 from one and half to four additional years. Because oil and gas

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1 leases must now be found to be consistent with the State's
2 coastal management program at the time they are sold, the Court
3 finds that the granting of these lengthy lease suspensions, long
4 after the leases were sold and would otherwise have expired,
5 must likewise be subject to a consistency determination as a
6 federal activity affecting the coastal zone, as defined by the
7 CZMA.

8 The Court's finding is bolstered by the fact that the
9 lessees must engage in certain milestone activities, including
10 the spudding of delineation and exploratory wells, in order to
11 continue the suspensions. Thus, by approving the suspensions,
12 the MMS requires the lessees to engage in activities that
13 directly affect the coastal zone.

14 Defendants' claim that the future review of the EPs or DPPs
15 that will be submitted for the milestone activities obviates the
16 need to review the lease suspensions for consistency is not well
17 taken. The CZMA, as amended, requires consistency review of
18 leases when they are sold and requires review again later when
19 the EPs and DPPs are submitted. See 16 U.S.C. §§ 1456(c)(1),
20 (c)(3)(A) and (c)(3)(B). Thus, under the CZMA, as amended, the
21 later review of the EPs or DPPs for consistency with the CCMP
22 does not obviate the MMS's responsibility to provide the State
23 with a consistency determination at the earlier stage when the
24 lease is sold. Neither does it obviate the need for a
25 consistency determination of the suspension of these leases,
26 which were not reviewed for consistency with the CCMP at the
27 time of their sale.

1 require consistency determination and briefly states the reasons
2 for its conclusions. See 15 C.F.R. § 930.35(d).

3 The August 13, 1999 letter was not a negative determination
4 as defined by 15 C.F.R. § 930.35(d). The letter did publish the
5 MMS's findings that the granted lease suspensions "will not
6 provide the lessees with any authority to conduct any activities
7 that have the potential to affect the land or water use or
8 natural resources of the State's coastal zone." See 5 AR 0865
9 (August 13, 1999 Letter). However, the letter indicates that
10 the MMS directed suspensions of
11 the leases in order to "maximize" the missions of the State and
12 authorities to have

13 a full opportunity to evaluate the appropriateness of
14 developing the leases under the full panoply of Federal and
15 State laws, including but not limited to the Coastal Zone
Management Act, the Clean Water Act, the Clean Air Act, and
the Commission's extensive regulations.

16 5 AR 864 (August 13, 1999 letter). Thus, the letter was merely
17 notice to the State authorities that the MMS was gathering
18 information about whether the passage of time and changed
19 circumstances might require that the leases be evaluated under a
20 number of statutes, including the CZMA.

21 B. Private Activities Requiring A Federal License or
22 Permit

23 Notwithstanding whether the MMS's grant of the lease
24 suspensions is a federal activity requiring consistency
25 determination under 16 U.S.C. § 1456(c)(1), Plaintiffs argue
26 that the grant of the lease suspensions is a federal license or
27 permit for private activities that affect the coastal zone, as

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1 defined by § 1456(c)(3)(A), which require consistency
2 certification. Because the Court has found that the MMS's grant
3 of these suspensions is a federal activity covered by CZMA §
4 1456(c)(1), the Court will not address whether the MMS's grant
5 of the lease suspensions is a federal license or permit for
6 private activities that affect the coastal zone.⁵

7 III. National Environmental Policy Act

8 The National Environmental Policy Act (NEPA), 42 U.S.C.
9 § 4331, et seq., requires federal agencies to consider the
10 environmental consequences of their actions. Metcalf v. Daley,
11 214 F.3d 1135, 1141 (9th Cir. 2000) (quoting Robertson v. Methow
12 Valley Citizens Council, 490 U.S. 332, 348 (1989)). NEPA
13 provides that federal agencies are to identify and develop
14 methods for implementing NEPA in consultation with the Council
15 on Environmental Quality (CEQ). See 42 U.S.C. § 4332(B); see
16 also, 40 C.F.R. § 1500 et seq. Title 40 C.F.R. § 1500 et seq.,
17 enacted pursuant to NEPA, are the "action-forcing provisions to
18 make sure that the federal agencies act according to the Act."
19 40 C.F.R. § 1500.1(a).

20 NEPA requires federal agencies to prepare an environmental
21 impact statement (EIS) for any action that will significantly
22 affect the environment. See 42 U.S.C. § 4332(C). In
23 determining whether an action will significantly affect the
24 environment, factors that should be considered are "(1) the

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26 ⁵ The Court likewise does not rule on the applicability of
27 the amended CZMA regulations, which are effective as of January
28 8, 2001, because these amendments relate to § 1456(c)(3).

1 degree to which the proposed action affects public health or
2 safety, (2) the degree to which the effects will be highly
3 controversial, (3) whether the action establishes a precedent
4 for further action with significant effects, and (4) whether the
5 action is related to other action which has individually
6 insignificant, but cumulatively significant impacts." Alaska
7 Center for the Environment v. United States Forest Service, 189
8 F.3d 851, 859 (9th Cir. 1999); see also 40 C.F.R. § 1508.27(b).

9 Pursuant to 40 C.F.R. § 1508.9, when determining whether to
10 prepare an EIS, a federal agency may prepare an Environmental
11 Assessment (EA) in order to "provide sufficient evidence and
12 analysis for determining whether to prepare an environmental
13 impact statement (EIS) or finding of no significant impact."
14 Pursuant to 40 C.F.R. § 1508.13, if the agency finds that the
15 proposed action would have no significant impact on the
16 environment, the agency may prepare a finding of no significant
17 impact (FONSI). When neither an EIS nor EA have been conducted,
18 the agency "must supply a convincing statement of reasons why
19 potential effects are insignificant." Alaska Center for
20 Environment, 189 F.3d at 858.

21 Pursuant to 40 C.F.R. § 1508.4, an agency may define
22 categorical exclusions from the requirement of preparing an EA
23 or an EIS. See 40 C.F.R. § 1508.4; see also 40 C.F.R. §
24 1500.4(p). Actions may be categorically excluded if they "do
25 not individually or cumulatively have a significant effect on
26 the human environment. See id.; see also Alaska Center for the
27 Environment, 189 F.3d at 859. An agency adopting categorical

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1 exclusions must provide for exceptions for extraordinary
2 circumstances in which a normally excluded action may have a
3 significant environmental effect that would require assessment
4 under NEPA. See 40 C.F.R. § 1508.4; Alaska Center for the
5 Environment, 189 F.3d at 859; Jones v. Gordon, 792 F.2d 821, 827
6 (9th Cir. 1986).

7 The MMS's exceptions for extraordinary circumstances to
8 actions listed as categorically excluded are actions which may
9 "(1) have "significant effects on public health or safety,"
10 (2) have an adverse effect on "unique geographical
11 characteristics," (3) have "highly controversial effects on the
12 environment," (4) have "highly uncertain effects on the
13 environment," (5) establish a "precedent for future action with
14 significant effects on the environment," (6) be related to
15 actions that cumulatively have a significant effect on the
16 environment,
17 (7) have "adverse effects on species listed or proposed to be
18 listed on the List of Endangered or Threatened Species or have
19 adverse effects on designated Critical Habitat for these
20 species," or (8) "threaten to violate a Federal, State, local or
21 tribal law or requirement imposed for the protection of the
22 environment."

23 49 Fed. Reg. 21437, 21439.

24 Plaintiffs acknowledge that the MMS has categorically
25 excluded the grant of suspensions of leases from NEPA. See
26 Pl.s' Motion for Summary Judgment at 22; see also Environmental
27 Intervenors' Brief for Summary Judgment, Ex. 1 (DOI Departmental

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1 Manual 516, Appendix 10 § 10.4(C)(6)). Nonetheless, Plaintiffs
2 argue that the MMS's reliance on a categorical exclusion in
3 granting the suspensions was in error because it failed to
4 provide explanatory findings to support its reliance on the
5 categorical exclusion or to support the inapplicability of the
6 extraordinary circumstances exceptions to the categorical
7 exclusions.

8 Plaintiffs also argue that circumstances of this case bring
9 it within the MMS's extraordinary circumstances exceptions to
10 the categorical exclusions. In particular, Plaintiffs assert
11 that these suspensions have highly uncertain, highly
12 controversial and potentially significant environmental effects
13 as evidenced in the administrative record. These environmental
14 effects include adverse impacts on the threatened sea otter,
15 whose territory has expanded in the direction of the leases, on
16 two marine sanctuaries which are ecologically significant, and
17 on hard bottom habitat, water quality, undersea noise and air
18 quality, and cumulative impacts. Plaintiffs also appear to
19 argue that the MMS has acknowledged that circumstances have
20 changed since the approval of the leases and, therefore, the MMS
21 should have conducted an EA or EIS prior to granting the
22 lessees' requests for suspensions. However, Plaintiffs provide
23 no citation of authority in support of this argument.

24 Defendants counter that NEPA does not require the MMS to
25 explain its reliance on the categorical exclusions it has
26 defined. Defendants assert that Plaintiffs should have
27 challenged the categorical exclusion at the time it was defined.

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1 Defendants also assert that requiring the MMS to document its
2 reasons for categorical exclusions would create unnecessary
3 paperwork and negate the purpose of categorical exclusions under
4 NEPA.

5 Defendants also argue that the lease suspensions do not
6 fall under the extraordinary circumstances exceptions to the
7 categorical exclusions because the suspensions do not have
8 environmental effects. Defendants assert that the suspensions
9 do not authorize any activities that will affect the environment
10 because no activities, including the required milestones, will
11 occur until after the lessees file new or revised EPs or DPPs.
12 Responding to one of Plaintiffs' arguments that the
13 extraordinary circumstances exceptions apply, Defendants assert
14 that mere opposition to the suspension is not enough to render
15 an activity highly controversial as defined by the extraordinary
16 circumstances exceptions to the categorical exclusions. Rather,
17 Defendants claim that a highly controversial activity is one
18 that generates dispute among scientists about its environmental
19 effects.

20 Although Defendants acknowledge that circumstances have
21 changed, they argue that nothing in NEPA requires them to
22 provide an EA or an EIS, or to supplement existing EISs.

23 The Court finds that the MMS should have provided some
24 explanation for its reliance on the categorical exclusion and
25 its view that the extraordinary circumstances exceptions do not
26 apply before granting the requested suspensions. In Jones, the
27 National Marine Fisheries Service issued a permit to Sea World,

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1 Inc. without conducting an EIS because the permit was defined as
2 a categorical exclusion. See 792 F.2d at 821, 823. The
3 district court ruled that the agency's action fell within an
4 exception to the categorical exclusion and that the agency
5 failed "to explain adequately its decision not to prepare an
6 environmental impact statement." Id. at 828. The district
7 court ordered the agency to prepare an EIS. The Ninth Circuit
8 held that "the district court did not err in concluding that the
9 decision of the [National Marine Fisheries] Service not to
10 prepare an environmental impact statement was unreasonable."
11 Id. The Ninth Circuit pointed out that the agency "did not
12 discuss whether an exception to the categorical exclusions
13 applied." See id. The Ninth Circuit also noted, "An agency
14 cannot avoid its statutory responsibilities under NEPA merely by
15 asserting that an activity it wishes to pursue will have
16 insignificant effect on the environment. Instead an agency must
17 provide a reasoned explanation for its decision." Id. (internal
18 quotations omitted). The Ninth Circuit reversed the district
19 court's order that the agency prepare an EIS, requiring instead
20 that it "provide a reasoned explanation of whatever course it
21 elects to pursue." Id. at 829.

22 In this case, the MMS did not issue any document discussing
23 either its reliance on the categorical exclusion for the lease
24 suspensions or the inapplicability of the extraordinary
25 circumstances exceptions to the categorical exclusion.

26 Plaintiffs have made a sufficient showing that the
27 suspensions may meet an extraordinary circumstance exception to
28

1 the categorical exclusion to justify requiring an explanation
2 from the agency. Therefore, the MMS must provide a reasoned
3 explanation for its reliance on the categorical exclusion and
4 explain the inapplicability of the extraordinary circumstances
5 exceptions. The MMS need not prepare an EIS or an EA at this
6 time, however.

7 CONCLUSION

8 Therefore, pursuant to the CZMA, 16 U.S.C. § 1456(c)(1),
9 the MMS must provide the State of California with a
10 determination that its grant of the lease suspensions at issue
11 here is consistent with California's coastal management program.
12 In addition, pursuant to NEPA, the MMS must provide a reasoned
13 explanation for its reliance on the categorical exclusion and
14 the inapplicability of the extraordinary circumstances
15 exceptions.

16 Thus, Plaintiffs' Motion for Summary Judgment (Docket #82)
17 and Request for Judicial Notice (Docket #97) are GRANTED.
18 Defendants' Cross-Motion for Summary Judgment (Docket #88) and
19 Defendant Operator Intervenors' Motion for Summary Judgment
20 (Docket #85) are DENIED. Accordingly, the MMS shall set aside
21 its approval of the requested suspensions, and shall direct
22 suspensions of the thirty-six leases, including all milestone
23 activities, for a time sufficient for it to provide the State of
24 California with a consistency determination in compliance with
25 CZMA § 1456(c)(1) and its implementing regulations.
26 Furthermore, before again granting these lease suspensions, the
27 MMS shall provide a reasoned explanation for its reliance on the

1 categorical exclusion and the inapplicability of the
2 extraordinary circumstances exceptions. Judgment for Plaintiffs
3 shall enter in accordance with this order. Each party shall
4 bear its own costs.

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6 IT IS SO ORDERED.

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Dated:

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CLAUDIA WILKEN
United States District
Judge

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Copies mailed to counsel
as noted on the following page

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