No. 118, Original

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE MOTION OF THE STATE OF ALASKA FOR SUMMARY JUDGMENT

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ARGUMENT

The United States and the State of Alaska agree that the controlling legal issue in this case is whether the Secretary of the Army may decline to issue a permit for construction of an artificial addition to the coast line unless the coastal State agrees that the construction will be deemed not to alter the location of the federal-state boundary. They disagree, however, as to the proper legal analysis. In our brief supporting the United States' motion for summary judgment, we urged that (1) the Secretary may consider the public interest in determining whether to issue a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403; (2) he may evaluate, as part of his

public interest review, a coastal structure's effect on the location of the federal-state boundary; and (3) he properly declined to issue a permit in this case unless the State agreed to execute a disclaimer preserving that boundary. The State of Alaska argues, by contrast, that the relevant statutes, judicial decisions, and regulations provide no authority for the Secretary's actions. As we explain below, Alaska is mistaken.

A. Alaska Incorrectly Asserts That Section 10 Of The Rivers And Harbors Appropriation Act Of 1899 Does Not Allow The Secretary Of The Army To Deny A Permit Based On The Effect Of A Proposed Structure On The Location Of The Federal-State Boundary

1. Alaska asserts that the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, entitles coastal States to an addition to their submerged lands grants upon construction of a qualifying structure. Alaska Br. 13-16. Alaska "freely admit[s]," however, that "Congress has constitutional authority necessary to prevent States from changing their coastlines" and that "Congress clearly could give the Army Corps authority to condition permits on waivers of Submerged Lands Act rights." *Id.* at 16. As Alaska recognizes, the crux of the issue here is whether Congress has done so. We submit that Congress has given the Secretary of the Army that authority through Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.

As we explained in our brief supporting the United States' motion for summary judgment (at 15-28), Congress has drafted Section 10 to impose a complete prohibition on the creation of "any obstruction" in navigable waters. 33 U.S.C. 403. It has then given

the Secretary of the Army, who is charged with executing that law, the power to allow exceptions on a case-by-case basis, where a structure or work is recommended by the Army Corps of Engineers. 33 U.S.C. 403. But Section 10 neither specifies the factors that the Secretary must consider in deciding whether to authorize construction in coastal or other waters nor limits the range of factors that he may deem relevant. Instead, it gives the Secretary discretion to identify the relevant considerations. Compare *Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956).

Alaska argues that Section 10 restricts the Secretary's permitting decision to considerations of "navigation and pollution." Alaska Br. 17. Section 10, however, contains no such restriction. Section 10 refers to "navigation" only insofar as it prohibits the "creation of any obstruction * * * to the navigable capacity" of United States waters. That provision confirms that a structure like the Nome causeway—which extends 2700 feet seaward into Norton Sound and would therefore constitute an obstruction to "navigable capacity"—is prohibited unless the Secretary authorizes it. But the quoted provision does not limit the factors that the Secretary may consider in determining whether to authorize such a structure. See U.S. Br. 18, citing *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 662 (1973). And Section 10 does not refer to "pollution" at all. See 33 U.S.C. 403.[1]

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[1] Alaska notes that Attorney General Wickersham issued an opinion in 1909 stating that Section 10 did not authorize the Secretary to consider the injury that a structure might cause to a "bathing beach." See 27 Op. Att'y Gen. 284, 288 (1909). The Attorney General reasoned that Congress has no power over navigable waters within a State "except to

2. Alaska's acknowledgement that the Secretary may take "pollution" into account, Br. 17, and the amici's acknowledgement that the Secretary may also consider "human health and welfare," the "marine environment," and "economic potential," Coastal States Amici Br. 17, are entirely consistent with—and actually support—*our* position. Section 10 makes no mention of those factors. Alaska and its amici derive them, instead, from *other* federal statutes. See Alaska Br. 18-19; Coastal States Br. 14-17. Thus, Alaska and the coastal States concede that the Secretary may look to the policies that Congress has set out in other laws in channeling the permitting discretion that Section 10 confers on him in unfettered terms. But their survey of those other federal laws is incomplete.

As we explained in our brief supporting the United States' motion for summary judgment (at 21-24), the Secretary adopted a formal and comprehensive process for "public interest review" specifically to keep pace with the evolution of federal law and to conform the agency's exercise of discretion to new legal requirements and policy developments. The Secretary's process considers the full spectrum of relevant statutes and identifies a broad range of congressional policies in addition to those

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preserve or improve the navigability of the stream" and that the Secretary's power "can be no broader than the source from which it is derived." *Id.* at 286, 287. As Alaska recognizes (Br. 16), the premise of the Attorney General's opinion has proven incorrect. See, *e.g.*, *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424-427 (1940). Attorney General Wickersham's opinion, which is also inconsistent with this Court's decision in *United States* v. *Pennsylvania Industrial Chemical Corp.*, *supra*, no longer represents the views of the United States.

set out by Alaska and the coastal States. See 33 C.F.R. 320.2, 320.4. Of particular relevance here, the Secretary takes into account Congress's declaration in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, that the United States has "jurisdiction, control and power of disposition" over the outer Continental Shelf, which is a "vital national resource reserve" of enormous commercial value. 43 U.S.C. 1332(1) and (3). The Secretary's "public interest review" process explicitly considers that policy by evaluating, as part of the Section 10 permitting process, "the effects of the proposed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f). See U.S. Br. 24-26.

The Secretary's approach is manifestly reasonable and conforms to the requirements of rational decision-making set forth in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Alaska and the coastal States agree that the Secretary may consider statutory environmental policies in the Section 10 permitting process. Alaska Br. 19-21; Coastal States Amici Br. 15. See *United States* v. *Cumberland Farms*, 826 F.2d 1151, 1158 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988); see also cases cited at U.S. Br. 21. Yet they offer no reason why the Secretary should at the same time ignore statutory policies respecting federal control of the outer Continental Shelf. The Secretary's approach gives effect to the full range of relevant federal law, rather than singling out a few selected statutes.

B. Alaska Incorrectly Interprets This Court's Decisions Respecting The Secretary's Authority

1. Alaska contends that this Court's decisions "provide no authority" for the Secretary's action in this case. Br. 22. As an initial matter, Alaska over-

looks this Court's decisions in *United States* v. *Pennsylvania Industrial Chemical Corp.*, *supra*, and *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352 (1933). As we have explained, *Pennsylvania Industrial Chemical Corp.* acknowledges the Secretary's broad authority under the Rivers and Harbors Appropriation Act of 1899 to consider factors other than navigation in determining whether to issue a permit. U.S. Br. 18. See also *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 486-487, 491 (1960) (discussed at U.S. Br. 7-8, 19). And *Greathouse* strongly indicates that the Secretary has discretion to deny a Section 10 permit where its issuance could impair federal property interests. U.S. Br. 19-21.

2. Alaska also is mistaken in asserting that the Secretary's "practice at issue here directly contradicts and frustrates this Court's purpose in incorporating the provisions of the Convention on the Territorial Sea and the Contiguous Zone [ratified by the United States Apr. 12, 1961, 15 U.S.T. 1607] into the Submerged Lands Act." Br. 22. The State relies on the following passage from *United States* v. *California*, 381 U.S. 139 (1965) (*California II*):

> It is our opinion that we best fulfill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations

(barring an unexpected change in the rules established by the Convention).

381 U.S. at 165 (footnote omitted). Alaska argues that "[t]he goal of a single coastline is frustrated" by the Secretary's insistence upon a disclaimer preserving the federal-state boundary. Br. 23. See also Coastal States Br. 7, 21.

Alaska's argument is fundamentally flawed. First, *California II* did not articulate the supposed "goal of a single coastline." Alaska Br. 23. As the quoted passage indicates, the Court adopted the Convention's definitions because they provided the "best and most workable definitions available." 381 U.S. at 165. The Court recognized that using the same definitions for purposes of the Convention and the Submerged Lands Act "establishes a single coastline." *Ibid.* But that was not its overriding "goal." The Court's objective was to give the Submerged Lands Act grant "definiteness and stability"—not to create perfect symmetry between the Convention and the Act. See *id.* at 165-167. Indeed, the Court recognized that the international coast line and the Submerged Lands Act coast line might diverge in the future, and it expressly rejected California's assertion that if the definitions of the Convention were amended, "the extent of the Submerged Lands Act grant would automatically shift." *Id.* at 166.[2]

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[2] The Court's subsequent interpretation of the extraordinary grant of submerged lands to Texas—which is based on the boundaries "as they existed at the time such State became a member of the Union," 43 U.S.C. 1301(b)—indicates that the Court was not pursuing the "goal of a single coastline." Although the Court had treated harborworks as part of the coast line when measuring California's standard 3-mile grant under the Submerged Lands Act, it refused to include them

Second, there is nothing unusual about divergences between international and federal-state boundaries. This Court recognized in *California II* that a "change in the rules established by the Convention" might render the international and federal-state boundaries non-coincident. 381 U.S. at 165, 166. Moreover, Congress has manifested its willingness to accept variations between the international and federal-state boundaries by providing in the Submerged Lands Act itself that any boundary between the United States and a State that has been fixed by a decree of this Court "shall not be ambulatory," even though the international boundary may move as a result of erosion or accretion. 43 U.S.C. 1301(b). Quite apart from that provision, the President recently proclaimed a 12-mile territorial sea for purposes of international law. See U.S. Br. 9 n.1; *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 n.8 (1989). Thus, even where the international seaward boundary and the federal-state boundary formerly coincided, the international boundary now extends 9 miles beyond the 3-mile federal-state limit.

Finally, the coastal States themselves have created, allowed, or endorsed variations between the international boundary and the federal-state boundaries by agreeing to compromise boundary disputes with the United States based on lines that plainly diverge

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as part of Texas's coast line when measuring that State's "historic" 3-league grant under the Act. *United States* v. *Louisiana*, 389 U.S. 155, 161 (1967). As a result, in the instances of Texas and Florida (see *id.* at 160 n.2), the coast line for purposes of international law differs from the coast line for purposes of the Submerged Lands Act.

from those that would be established under international law. See *Mississippi* v. *United States*, 111 S. Ct. 380 (1990); see also *California II*, 381 U.S. at 176-177 (endorsing the Special Master's observation that the United States and a State could enter into an agreement concerning the location of the coast line and the federal-state boundary). Hence, even if there once were some notion of pursuing the "goal of a single coastline," Alaska Br. 23, that goal is now beyond reach.

At bottom, Alaska's pursuit of a "single coastline" misdirects the inquiry. The crucial question here is whether the Secretary may deny a Section 10 permit based on the effect a proposed structure would have on the location of the federal-state boundary. A decision to deny a permit on that basis plainly does not create a "dual" coast line. The issue arises only because the Secretary offers the State the *option* of securing the permit for the State (or for another applicant within its borders) by agreeing to disclaim any right to additional submerged lands resulting from the proposed structure. It is Alaska's exercise of that option that creates the situation that Alaska now finds objectionable. Alaska can avoid the situation by simply declining to exercise its option.

3. Alaska attempts to discount (Br. 23-25) the Court's statements in *California II* that support the Secretary's interpretation of his Section 10 powers. As we explained in our brief supporting the United States' motion for summary judgment (at 26-28), the Court endorsed the Special Master's conclusion "that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could

thus be the subject of agreement between the parties." 381 U.S. at 176; see *id.* at 177. Alaska argues that the Court's reference to the United States' "power" alluded to Congress's constitutional power under the Commerce Clause, rather than the Secretary's power under Section 10. Alaska Br. 24. That contention, however, cannot be squared with the context of the Court's statements.

The Court's observation that the United States had power to resolve future disputes by "agreement" can refer only to the Secretary's powers. Executive Branch officials—not Congress—negotiate and execute "agreements." The Court's understanding is particularly clear when its observation is read in the context of the Special Master's Report. The Special Master stated:

> I think it may be assumed that in the past the question of the ownership of the lands, minerals, and other things underlying these artificial accretions has not been taken into consideration by the United States *in passing judgment upon whether the accretions will be permitted*; but it seems clear that in the future *that aspect of the matter can be, and probably will be, taken into account.* I do not share the view of counsel for the United States (U.S. 102) that this would be an undesirable situation. On the contrary, I think it would give opportunity for *appropriate negotiations and agreement between the State and the United States at the time the artificial change is approved.*

California II, Report of the Special Master (No. 6 Orig., O.T. 1952), at 46. That discussion makes sense only in relation to the actions of the Secretary in deciding whether to issue a Section 10 permit. Thus, there is no genuine room for doubt that the Court's and the Special Master's observations concerning the

United States' powers referred to the Secretary's already existing powers under Section 10. As we have explained, the Secretary's regulations implement the Court's expectations in *California II*. See U.S. Br. 27-28.[3]

4. Alaska and the coastal States also contend that the Secretary's refusal to issue a Section 10 permit unless Alaska agreed that the construction would be deemed not to alter the location of the federal-state boundary is inconsistent with this Court's decision in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987). See Alaska Br. 21, 26-27; Coastal States Amici Br. 19. That argument misconceives the Court's ruling in *Nollan*.

In *Nollan*, a state regulatory agency refused to issue a land owner a permit to build a small bungalow on his beachfront lot unless the owner deeded an

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[3] This Court's decision in *United States* v. *Louisiana*, 394 U.S. 1 (1969), bolsters our interpretation of *California II*. In *Louisiana*, the Court reaffirmed its *California II* reasoning, stating:

> The United States contends that the spoil bank should be ignored because its construction was unauthorized * * *. Even assuming that the creation of the bank was not authorized * * *, it would not follow that it does not constitute part of the coast. If the United States is concerned about such extensions of the shore, it has the means to prevent or remove them. See *United States* v. *California*, 381 U.S. 139, 177.

394 U.S. at 41 n.48. The Court's observation that the United States could "prevent or remove" unauthorized structures seems directed to the exercise of existing powers, since Section 10 of the 1899 Act already authorized the Secretary to prevent erection of structures and Section 12 of the 1899 Act, 33 U.S.C. 406, empowered the Attorney General to bring an injunctive action to compel the removal of unauthorized structures.

easement allowing the public to cross his property to use the beach. The Court agreed with the agency that

> a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.

483 U.S. at 836. The Court explained:

> If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Id. at 836-837. The Court concluded, however, that the agency's action was improper because the agency's legitimate reasons for denying a building permit were completely unrelated to the requirement that the land owner provide a public easement. *Id.* at 837. See *id.* at 838-842.

Here, by contrast, the opposite is true. The Army Corps of Engineers (acting pursuant to the Secretary's delegation of authority, see 33 C.F.R. 322.5) refused to issue a Section 10 permit after concluding, in consultation with the Department of the Interior, that construction of the proposed structure would alter the federal-state boundary and transfer valuable mineral-bearing lands from federal to state ownership. See U.S. Br. 28-29. The Corps offered to issue a permit if the State would agree to execute a disclaimer that would preserve the federal-state boundary and prevent the transfer of that property. *Id.* at 29-30. Thus, "the permit condition serves the same governmental purpose as the development ban."

Nollan, 483 U.S. at 837. It simply provides a less drastic "alternative to that prohibition" that satisfies the government's regulatory objective. *Ibid.*

Alaska's rhetoric that the Secretary is engaged in "extortion," Alaska Br. 21, 27, has no substance. The submerged lands that Alaska claims the Secretary is "extorting" are *federal* lands. As Alaska's disclaimer expressly states, the agreement simply "maintains the status quo of the baseline and the state-federal boundary" and "does not affect property or claims to which Alaska is now entitled." J.S. 30a. What Alaska really seeks is a windfall. Under Alaska's approach, the Secretary would be obligated to approve the construction of a proposed causeway, without regard to the fact that his approval would result in the transfer of 730 acres of valuable federal land (without any formal governmental consideration) from federal to state hands. More generally, there would be nothing to prevent a State from constructing coastal structures specifically to obtain control of valuable outer Continental Shelf lands. It is unreasonable to believe that Congress—which gave the Secretary broad powers to control coastal structures in the national interest, 33 U.S.C. 403, and identified the lands involved here as part of "a vital national resource reserve," 43 U.S.C. 1332(3)—intended that result.

C. Alaska Errs In Contending That The Army Corps of Engineers Improperly Applied The Secretary's Regulations In This Case

1. Alaska broadly argues that the Secretary's regulations "provide no authority" for the Corps' actions in this case. Alaska Br. 27-37. Plainly that is not so. The Secretary's regulations expressly pro-

vide that structures like the Nome port facilities require a Section 10 permit. See 33 C.F.R. 322.3. Those regulations also set out in precise terms the considerations that will guide the Corps' decision whether to issue a permit. 33 C.F.R. 320.4. The regulations make clear that the Corps may include in its evaluation the "effects of the proposed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f). Thus, the Secretary's regulations leave no doubt that the Corps may decline to issue a Section 10 permit based on the effect the proposed project would have on the location of the federal-state boundary. Alaska does not seriously dispute this interpretation of the regulation.[4]

Alaska argues that the regulations are defective because they "provide no authority allowing the Army

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[4] Alaska contends that Section 320.4(f) "addresses activities on submerged lands, not the property interests in the submerged lands." Br. 28. See also *id.* at 29. Alaska does not explain, however, the source of that supposed distinction. See 33 C.F.R. 320.4(f) (requiring consideration of the "effects of the proposed work on the outer continental rights of the United States"). Alaska later cites a separate regulatory provision, 33 C.F.R. 320.4(g), for the proposition that the Corps' review process is not concerned with "property ownership disputes." Alaska Br. 29, 31-32. Alaska, however, cites that provision out of context. The regulation states only that disputes as to whether "the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application * * * will not be a factor in the Corps public interest decision." 33 C.F.R. 320.4(g)(6). It does not prevent the Corps from considering the impact a proposed project would have on the conceded property rights of others (including the State itself). In particular, it does not negate the *express* terms of the immediately preceding paragraph (f), which requires consideration of the "effects of the proposed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f).

Corps to require a State to disclaim its rights in submerged lands when shifts in the coastline occur as a result of a coastal construction project." Alaska Br. 27-28. See also *id.* at 29, 31-32, 34-35, 37. Alaska apparently believes that the regulations must expressly prescribe the particular curative option that Alaska ultimately utilized in this case. Alaska fails to explain, however, why that is so. As we have explained here and in our brief in support of the United States' motion for summary judgment, if the Corps can legitimately prohibit the construction of the proposed port facility, it may certainly provide the City of Nome and the State of Alaska with a less drastic alternative to that prohibition that satisfies the government's regulatory objective. See pp. 9, 13, *supra*; U.S. Br. 29-30. The Corps is not required to communicate that alternative through any particular medium.

As this Court recently recognized, federal agencies do not communicate every policy and practice through formal regulations. See *United States* v. *Gaubert*, 111 S. Ct. 1267, 1274 (1991) (agencies may "establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs"). Indeed, it would be impossible for an agency to articulate every policy or practice in its regulations. Here, as in *Gaubert*, there is "no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation." *Id.* at 1277. The Corps acted reasonably in communicating the disclaimer option directly to the permit applicant and to the State. See J.S. 24a-25a.[5]

[5] Hence, Alaska's contention that "[i]nteragency coordination does not authorize the Army Corps to require this dis-

Alaska fails to explain why the Corps' approach is improper or what specific advantages would result from identifying the option through a formal regulation. Alaska received fully adequate notice of the option. The Corps expressly informed Alaska that the Solicitor of the Department of the Interior had objected to the issuance of the permit; it specified the particular curative measure that could be taken; and it gave the State ample time to consult with the agency and draft the disclaimer. See J.S. 3, 24a-25a, 26a. The Corps' action could not have come as a surprise. The Corps has requested such disclaimers on a case-by-case basis since 1970. See Joint Lodging of the United States and Alaska (providing copies of various disclaimers). Moreover, Alaska was familiar with the option as a result of similar Section 10 permit proceedings in the past, and it submitted an agreement in this case that is similar in form to its previous disclaimers. *Ibid.* In short, Alaska cannot reasonably attack the government's legal authority to offer it the disclaimer option on the ground that the State is now dissatisfied—after exercising the option—with the manner by which the government communicated it.

2. Alaska also makes the surprising contention that the "rules relied upon by the Army Corps in reviewing permit[] [applications] were not adopted in accordance with the Administrative Procedure

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claimer" (Br. 28-29) is beside the point. There also is no merit to Alaska's related contention (Br. 29-30) that the Corps has improperly delegated its authority through interagency coordination. The Corps plainly made the permitting decision in this case. See 33 C.F.R. 320.4(f); J.S. 24a-25a. See U.S. Br. 29.

Act." Alaska Br. 32. As an initial matter, the State of Alaska is not aggrieved in any manner by the "rules relied upon by the Army Corps in reviewing" permit applications. The issue before this Court arises from Alaska's execution of a submerged lands disclaimer and its reservation, within that disclaimer, of the right "to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." J.S. 30a. Alaska's APA challenge to the Secretary's procedures for reviewing permit application has no bearing on that issue.

In any event, there is no merit to Alaska's contentions. Alaska argues that the Secretary failed to give public notice of his regulations and failed to publish them in the Federal Register in accordance with Section 4 of the APA, 5 U.S.C. 553. Alaska Br. 32-34, 35-36. Alaska is mistaken. The regulations were adopted in 1974, in substantially their present form, through notice and comment rulemaking. See 39 Fed. Reg. 12,115 (1974) (final rule); 38 Fed. Reg. 12,217 (1973) (proposed rule). The Secretary's subsequent recodification and technical amendments were also published in the Federal Register after notice and comment. See 51 Fed. Reg. 41,220 (1986); 42 Fed. Reg. 37,122 (1977).

Alaska further argues that the Secretary violated Section 3(a)(1) of the APA, 5 U.S.C. 552(a)(1), by "fail[ing] to promulgate the criteria it employed in evaluating the permit application of the City of Nome." Alaska Br. 35. As we explained, however, the Secretary's regulations specifically identify the criterion that the Corps relied upon in requesting the disclaimer—"the effects of the proposed work on the

outer continental rights of the United States." 33 C.F.R. 320.4(f). And the Corps specifically informed the City of Nome and the State of Alaska that

> in accordance with the attached letter from the Office of the Solicitor, dated May 16, 1983 a [Department of the Army] permit will not be issued until an agreement has been reached between the Alaska Department of Natural Resources and the City of Nome, and a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary.

J.S. 24a; see J.S. 22a (Solicitor's letter raising objection based on the "outer Continental Shelf rights of the United States"). Thus, the Corps' objection was based on a regulatory criterion, the City of Nome and the State of Alaska were fully informed of that objection, and they received advice regarding an available curative measure. They were not "forced to litigate with agencies on the basis of secret laws." Alaska Br. 34-35.

3. Finally, Alaska asserts that the Secretary's action here should be set aside, under Section 10 of the APA, 5 U.S.C. 706, as "arbitrary and capricious." Alaska Br. 36-37. As we explained here and in our opening brief, however, just the opposite is true. The Secretary has adopted a "public interest review" process to ensure that his execution of the broad discretion conferred by Section 10 of the Rivers and Harbors Appropriation Act is tied to the congressional policies set out in other federal laws. Consistent with that approach, the Secretary's review process gives express consideration to Congress's declaration that the United States has "jurisdiction, control and power of disposition" over the outer Continental Shelf, 43 U.S.C. 1332, by evaluating "the effects of the pro-

posed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f). See U.S. Br. 24-26. The Secretary acted reasonably and in full accordance with that regulation here in refusing to grant a permit unless Alaska entered into an agreement protecting the United States' outer Continental Shelf rights. By contrast, Alaska's approach, which selectively ignores the important congressional policy in the Outer Continental Shelf Lands Act, would not allow for the consideration of all relevant factors, as the APA contemplates. See, *e.g.*, *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

CONCLUSION

The motion of the State of Alaska for summary judgment should be denied, and the motion of the United States for summary judgment should be granted.

Respectfully submitted.

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NOVEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE; 1991 312324 45163