Federal Consistency and Dispute Resolution

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The 1970s marked a new era of environmental protection efforts in the United States. One major piece of legislation passed by Congress was the 1972 Coastal Zone Management Act (CZMA),[1] which established a program to provide for the wise use and protection of the nation's coastal resources. Issues such as the loss of coastal and marine resources and wildlife, decreased public space, multiple use conflicts, and shoreline erosion have been a focus of this legislation.

This article discusses the authority granted to state coastal zone management (CZM) programs pursuant to Section 307 of the CZMA. In particular, it focuses on the use of the federal consistency process as a tool for resolving intergovernmental disputes. In order to illustrate some of the issues surrounding the use of the federal consistency process, this article examines the legal questions surrounding a recent dispute which resulted in an appeal to the United States Secretary of Commerce by the Virginia Electric and Power Company (VEPCO). The Secretary's decision in this matter has important implications for a state CZM program's role in the federal consistency process.

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1972 CZMA

In 1972, Congress declared four national coastal management policies through the CZMA. These policies are: 1) to preserve, protect, develop, and where possible, to restore or enhance the resources of the coastal zone of the United States; 2) to encourage and assist the state to develop and implement coastal management programs which meet certain national standards; 3) to encourage the preparation of special area management plans to protect resources, ensure coastal dependent economic growth, and to protect life and property from natural disasters; and, 4) to encourage the participation and cooperation of the public, local and state government, and federal agencies.[2]

The CZMA established a voluntary federal grant-in-aid program which is administered by the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce. In order to encourage state participation in the CZM program, two incentives were provided; funding and federal consistency. First, individual states were eligible for funding to plan and develop coastal resource management programs. Once approved, the state is then eligible for implementation funding. Second, and perhaps the most important , has been federal consistency. Federal consistency ensures that federal activities comply with approved state coastal management plans and has played an integral role in state program implementation.[3]

While there are many requirements which states must satisfy to receive program approval, the NOAA has historically granted a great deal of flexibility in the structure of these programs.[4] The CZMA contains only broad standards which allow states to develop management programs that address issues of state and local concern.[5] Some issues typically addressed in state programs include: minimizing coastal hazards; beach access; preserving coastal-dependent uses; redeveloping

urban waterfronts and ports; siting industrial and commercial facilities in the coastal zone; and clustering new coastal development.[6] To address these issues, states rely on a variety of implementation tools which include, but are not limited to, special area management planning, comprehensive planning, land acquisition and direct regulatory permitting.

Perhaps the most important means of program implementation has been the guarantee that once a state program is approved, federal agencies and permittees whose activities affect the coastal zone and its resources, will remain consistent with state policies. This concept extends far beyond the advisory reviews of federal actions established in 1969 under the National Environmental Policy Act (NEPA).[7] Essentially, federal consistency allows states to review certain federal actions to ensure that they are consistent with their approved CZM programs.[8]

The Federal Consistency Provisions

CZMA's federal consistency provisions allow states to review five categories of federal activities:

1) Federal agency activities (Section 307(c)(1))

2) Federal development projects in the coastal zone (Section 307(c)(2))

3) Federal license and permit activities (Section 307(c)(3)(A))

4) Federal license and permits for Outer Continental Shelf activities (Section 307(c)(3)(B))

5) Federal financial assistance (Section 307(d))

The regulations promulgated by NOAA require all federal agency activities that affect any land or water use or natural resource of the coastal zones be carried out in a manner which is consistent to the "maximum extent practicable" with state CZM programs.[9] Federal license and permit activities and federal financial assistance that affect any land or water uses or natural resources of the coastal zone or outer continental shelf must be conducted in a manner consistent with state CZM programs.[10] The standard "consistent to the maximum extent practicable" is defined in the NOAA's regulations to be fully consistent unless compliance is prohibited based upon the requirements of existing law governing the federal agency's operations. The standard "consistent" with the approved state CZM program means fully consistent. However, the Secretary of Commerce (hereafter referred to as the Secretary) can override a state response and allow the federal financial assistance, licenses, or permits to be issued if he finds that the action is consistent with the objectives of the CZMA or is necessary in the interests of national security.[11]

The CZMA declares that there is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.[12] Two specific national interests have been identified: energy development and national defense. The Secretary reviews and approves state programs, and has the responsibility of ensuring that state programs adequately address these national interests. Accordingly, the Secretary has the power to deny approval of state programs if they fail to adequately recognize these national interests.[13]

The Federal Consistency Process

Just as there are two standards for federal consistency, there are two federal consistency processes: one for federal activities and development projects and one for federal license and permit activities.[14] These two processes give different roles and authority to the state agencies and have distinct dispute resolution processes.

In the first consistency review procedure, the federal agency reviews proposed activities in order to determine if the activity will affect the land or water use or natural resources of the coastal zone. To facilitate this process, a state CZM program, in consultation with federal agencies, can develop lists of federal activities that will affect its coastal zone. If the federal agency determines that the activity will affect the state's coastal zone or it is a listed activity, then the federal agency must provide the state with a consistency determination that includes a detailed description of the activity and its likely affects on the coastal zone.[15]

The state agency has 45 days to respond to this consistency determination or its concurrence is presumed.[16] If the state agency disagrees with the federal agency's consistency determination, the state agency must describe how the proposed activity is inconsistent with the enforceable elements of the state's approved CZM program and provide alternative measures (if any) that would make the activity consistent.[17] In the event of a serious disagreement between the state agency and a federal agency regarding the consistency determination, either party can request mediation by the Secretary.[18]

The second consistency review process is for federal license and permit activities that affect a state's land or water use or natural resources of the coastal zone. Included in each state CZM program is a list of federal license and permit activities which are likely to affect a state's coastal zone. When a state agency chooses to review federal licenses and permits for potentially impacting activities outside of the coastal zone, it must describe the general geographic location of such activities.[19] Applicants for federal licenses and permits subject to the state CZM program's listing requirements must submit a consistency certification to the state CZM program. This certification must describe the proposed

activity in detail, its probable coastal zone effects, and include a set of findings indicating how the proposed activity is consistent with the enforceable elements of a state CZM program.[20] States may also monitor unlisted federal license and permit activities using the Executive Order 12372 intergovernmental review process, and request consistency certifications for these.[21]

The state agency has six months to respond to the consistency certification or concurrence is presumed. If the state agency concurs, then the federal agency may issue the permit.[22] If the state agency objects, it must then describe why the proposed activity is inconsistent and describe alternative measures (if any) that would permit the activity to be carried out in a manner consistent with the state CZM program. As a result, the federal agency may not issue the license or permit until the state coastal zone management program concurs.[23] Should a dispute arise, the applicant may appeal to the Secretary or appeal in court.

The distinction between the two federal consistency review processes is important. First, the standard for federal activities, " consistent to the maximum extent practicable", is less than that for federal license and permit activities, "consistent." Second, while an objection to an applicant's consistency certification for a federal license or permit serves as a veto of that activity, a state objection to a federal activity or development project does not enjoin the federal government from acting. The federal agency may proceed if it disagrees with the state's determination unless a court determines otherwise. Third, the burdens of proof are different. For federal agency activities, the state must demonstrate either the need for a consistency determination or the inconsistency of the proposed action. For federal license and permit activities, it is the applicant who bears the burden of proof in a legal challenge or an appeal to the Secretary. Fourth, mediation is the only administrative mechanism available to resolve disputes over federal agency activities and development projects while a formal mechanism for appealing decisions to the Secretary of Commerce is available for federal license and permit activities. Accordingly, the differences between the two consistency review processes influence the nature of the disputes that emerge.

Resolving Intergovernmental Conflicts

One of the keys to effectively managing coastal resources is intergovernmental coordination. The federal consistency provisions provide an important mechanism to coordinate federal agency activities with state implementation of approved state CZM programs. Because it was inevitable that disputes would arise in the administration of Section 307, Congress included two administrative mechanisms in the CZMA for resolving disputes: mediation and appeal to the Secretary.

Mediation

Mediation by the Secretary may be requested by either the federal or state agency when there is a serious disagreement concerning the administration of an approved state CZM program. The mediation procedures are entirely voluntary and end as soon as either party decides it no longer wishes to participate.[24] In general, the formal mediation procedures have been used infrequently since the federal agency often refuses to participate. Informal mediation has been more successful and states frequently resolve disputes with federal agencies through informal negotiations.[25]

Appeal to the Secretary of Commerce

The CZMA also provides for appeals to the Secretary to resolve disputes between applicants for federal license and permits that result from a state's objection to a federal consistency certification. The Secretary may override a state objection if he finds that the activity is necessary in the interests of national security or if he finds the activity to be consistent with the state program and the objectives of the CZMA.[26]

To override on national security grounds, the Secretary must find that the activity is permissible because a national defense or national security interest would be significantly impaired if the activity was not permitted.[27] In order to override a state's objection and determine that the proposed activity is consistent with the objectives and purposes of the Act, the Secretary must determine that the proposed activity meets the following requirements: 1) the activity must fulfill a national objective listed in Section 302 and 303 of the CZMA; 2) the activity must not cause adverse impacts on the natural resources of the coastal zone substantial enough to outweigh its contributions to national interests; 3) the project must not violate the Clean Water Act or the Clean Air Act; and, 4) there must be no reasonable alternatives for conducting the activity.[28]

The first state CZM program was approved in 1976 and by the end of 1990, the Secretary had issued fifteen written decisions. Of the fifteen decisions, seven of these upheld the state's objections and none overode a state's objection on the grounds of national security. Most significant is that a state's objection has not been overturned if the state has provided reasonable alternatives. One product of the increasing number of written decisions is that a constantly expanding base of precedence is emerging that influences the future decisions of the Secretary during appeals.[29]

In general, the appeals process has been a success.[30] Many disputes were resolved without the Secretary having to issue a written decision. For example, from 1976 to 1987, twenty-two appeals had been filed with the Secretary. During this period only six written decisions were issued, five were stayed pending further negotiations, six

were withdrawn by mutual consent, two were dismissed on procedural grounds and three were pending review.[31] Another indicator of the success of the appeal process is that the number of appeals has steadily been increasing. This indicates that potentially-affected parties are increasingly relying on this administrative process instead of judicial remedies. It also indicates that state CZM programs are using the federal consistency process as a tool to ensure intergovernmental coordination. The expanding use of this dispute resolution process can be attributed to the maturation of the appeals process and its past success in resolving conflicts. The appeal to the Secretary between South Carolina and Georgia illustrates the complexity of the issues raised in the appeals process and the important precedent this can establish.

One issue surrounding the use of the federal consistency provisions is whether a state CZM program has the authority to review a federal license and permit activity that affects its coastal zone even if the activity takes place entirely within another state's jurisdiction. This legal question was at the center of a dispute concerning an appeal to the Secretary by L.J. Hooker Development, a Georgia-based land development company. It was also the central issue of the appeal to the Secretary by VEPCO.

Appeal to the Secretary of Commerce By L.J. Hooker Development

In 1988, L. J. Hooker Development applied for a dredge and fill permit from the U.S. Army Corps of Engineers (COE) to develop an area on Hutchinson Island in Georgia just across the Savannah River from South Carolina. On May 24, 1988, the South Carolina Coastal Council (SCCC) received notice from the Savannah District of the COE that it was undertaking a review of Hooker's application. The SCCC told the Corps that the project would have both direct and significant impacts on South Carolina's coastal zone and would have unacceptable water quality impacts. On October 18, 1988, the SCCC found that the project was inconsistent with the South Carolina Coastal Management Program (SCCMP).[32] In addition, the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and the Environmental Protection Agency (EPA) all objected to the project.

Hooker appealed South Carolina's inconsistency ruling to the Secretary on November 18, 1988. On March 28, 1989, Hooker withdrew the consistency appeal because the project was addressing some of the impacts with which South Carolina was concerned. South Carolina, in turn, dropped all but one of its objections.

This controversy involved several federal agencies, the States of South Carolina and Georgia, and a private developer. South Carolina and NOAA both argued that the federal consistency provisions, the legislative history, and NOAA's regulatory rulemaking all support the position that a state may review a project regardless of its location even if it is entirely outside of the coastal zone and is located within another state's jurisdiction. They argued that the threshold inquiry is merely whether the activity affects land or water uses or natural resources in the state coastal zone. Hooker, Georgia officials, the United States Justice Department (USDOJ) and the Army Corps of Engineers argued that the 1984 Supreme Court ruling in *Secretary of Interior v. California* sets precedent for denying South Carolina the right to review this project.[33]

Even though the appeal was dropped, this controversy highlighted two major legal questions concerning the use of the federal consistency provisions. The first is whether an approved state CZM program is entitled to review federal license and permit activities which occur outside of its coastal zone. And the second is whether a state has the authority to review federal license and permit activities outside of its coastal zone if the activity occurs entirely within another state's boundaries.[34] As a result of this dispute, NOAA's General Council issued a written opinion which addressed these issues. This opinion concluded that approved state CZM programs could review federal license and permit activities located outside of its coastal zone even if they are located entirely within another state's boundaries provided that the activities affects a land or water use or natural resources of a state's coastal zone.[35] However, since South Carolina withdrew its objections, these issues remained unresolved and subsequently formed the basis for the dispute which resulted in VEPCO's appeal to the Secretary.

Appeal to the Secretary of Commerce by the Virginia Electric and Power Co. (VEPCO) from an Objection by the State of North Carolina

In 1986, VEPCO and the City of Virginia Beach, Virginia developed a proposal to the Federal Energy Regulatory Commission (FERC) to construct, operate, and maintain a municipal water supply project and withdraw up to 60 million gallons of water per day from Lake Gaston.[36] Lake Gaston bisects the North Carolina-Virginia border and is a dammed portion of the Roanoke River which flows from Virginia into North Carolina's coastal zone. The consumptive withdrawal would be made by and for the benefit of Virginia Beach. The entire project as proposed will consist of certain easements and facilities to be constructed entirely within the boundaries of the Commonwealth of Virginia.[37] In view of the potential impacts, North Carolina requested and received a consistency certification. After a review of the proposed FERC permit amendment, North Carolina objected to the water withdrawal because of its

Virginia Beach's rapid growth has significantly increased the the area's water supply requirements.

downstream effects on important fisheries, wetlands, and the hydrology of the Roanoke River and Albermarle Sound.[38]

Based on North Carolina's objection, VEPCO filed an appeal with the Secretary. On December 3, 1992, based on a March 12, 1992 legal opinion issued by the USDOJ, the Secretary terminated the appeal. In reaching its decision the Secretary ruled that: 1) the project as proposed takes place entirely within the borders of Virginia; and 2) North Carolina was without jurisdiction because the CZMA does not allow states to review projects located wholly within another state.[39] In early 1993, NOAA asked the USDOJ to reconsider its decision. USDOJ rejected this request and stood by its opinion. North Carolina has decided that it will judicially appeal the Secretary's decision. This litigation will focus on the opinion of the USDOJ and the earlier opinion of NOAA's General Counsel.

The Opinion of the Department of Justice

USDOJ based its opinion on both the statutory construction of the CZMA and its legislative history. USDOJ argued that the legislative history indicates that the focus of Section 307 (c)(3)(A) was to entitle states to review federal license and permit activities located "in" the coastal zone and that neither the statute nor the legislative history discuss potential interstate conflicts. This silence is in stark contrast to the elaborate mechanisms created to resolve interstate conflicts in other federal-state cooperative programs.[40]

One relevant example that USDOJ cited is Section 401 of the Clean Water Act (CWA) as amended. Section 401 of the CWA creates a similar consistency review process in that all applicants for activities requiring federal licenses and permits that result in a discharge of pollutants into the waters of the U.S. must obtain a certificate from the state where the discharge is located which certifies that the discharge meets the state's water quality standards. If the Administrator of EPA determines that the discharge may affect the waters of another state, that state is notified and may object on the grounds that its water quality regulations will be violated. Because there was no recognition of interstate conflicts and no directive to the federal executive to resolve conflicts between states, USDOJ argued that there was clearly no Congressional intent to expand the Section 307 authority beyond the boundaries of one state. As further evidence of the statute's limitations to federal consistency review within state boundaries, USDOJ pointed out that the CZMA always refers to state in the singular and not in the plural.

In its opinion, USDOJ also relied on the legislative history of the 1990 federal consistency amendments, pointing out that the legislative history contains proposed amendments which would have broadened the mediation authority to include the mediation of disputes between states.[41] Because these provisions failed to become law, USDOJ argued that Congress was apparently unwilling to involve the Secretary even in the

mediation of interstate disputes.

Finally, in support of its opinion, USDOJ relied on the following statement from the conference report on the federal consistency amendments:

> [N]one of the changes made to section 307 (c)(3)(A)(B), and (d) change existing law to allow a state to expand the scope of its consistency review authority. Specifically, these changes do not affect or modify existing law or enlarge the scope of consistency review authority ... with respect to the proposed project to divert water from Lake Gaston to the City of Virginia Beach, Virginia.[42]

While this does not state that North Carolina cannot review the activity, it appears to indicate that Congress did not believe that federal consistency authority spanned state boundaries. The interpretation of this paragraph will be at the heart of North Carolina's legal challenge as will the legislative history of the CZMA.

The Opinion of NOAA's General Counsel

The Secretary's decision to defer to the Department of Justice opinion and dismiss North Carolina's objections contradicts NOAA's General Council opinion issued as a result of the Hooker appeal. In this opinion, NOAA relies on the legislative history of the CZMA as well as its prior rulemaking activities and past administration of Section 307 (c)(3)(A). NOAA argues that it has consistently interpreted Section 307 (c)(3)(A) as applying to activities landward or seaward of the coastal zone. As a result, the threshold for review used by NOAA has always been the effect of an activity on the land and water uses of the coastal zone and not the location of the activity. NOAA arguments also rely heavily on its past rulemaking activities that permit a state to review activities located outside of its coastal zone as long as the general geographic area where the state wishes to review activities is described in its approved program. These regulations also permit a state to review federal license and permit activities even if the activity occurs entirely within another state's borders.[43]

To further support its arguments, the NOAA opinion refers to numerous instances where it has already permitted states to review federal license and permits activities located outside of the state's coastal zone. These examples may include several activities located entirely within another state. Examples cited include: South Carolina's review of a coal port in Georgia; Maryland's review of the Chem Waste research burn; a marina project located in New York but landward of the coastal zone; and NOAA's acceptance of Massachusetts's review of a sewage treatment plant located in Seabrook, New Hampshire.[44]

Because NOAA has long interpreted and administered the federal consistency provisions in a manner which permits interstate consistency reviews, its General Counsel opinion relies heavily on arguments related to the degree of deference that should be accorded to an agency's interpretation of its statute. The NOAA opinion argues that past legal decisions support its contention that it has reasonably interpreted its statute.

The final issue that NOAA's General Counsel raises to support its argument is that the CZMA does have provisions to administratively address interstate consistency conflicts. Secretarial mediation pursuant to Section 307 (h) and appeals to the Secretary of Commerce pursuant to Sections 307 (c)(3) and (d) can be used to resolve interstate consistency disputes. NOAA points out that the federal consistency process in no way serves as a control over another state's land use. Moreover, the sovereign rights of a non-objecting state are not lessened by a neighboring state. The non-objecting state is in no way enjoined from issuing any state or local permit as a result of an adverse federal consistency decision. Rather the objection is directed to the federal licensing or permitting authority and thus the actual location of the project is irrelevant. In other words, interstate consistency reviews do not impinge another state's land use regulation. This position is further supported by NOAA's own regulations which require other federal agencies to consider the policies contained in approved state CZM programs as supplemental requirements to be used by the federal agency in making its license and permit decisions.[45]

Summary and Conclusions

The VEPCO dispute raises several legal issues which will be subject to further litigation. First, the courts will have to decipher the contradictions in the legislative history. Congress stated that these amendments were designed to maintain the status quo and the NOAA's present administration of the CZMA allows interstate federal consistency reviews. However, Congress also indicated that it did not believe interstate federal consistency review to be lawful. Second, if interstate consistency reviews are not permitted, what are the geographic limitations? For example, if a state is not entitled to review federal license and permit activities which take place outside of its state jurisdiction, can it review activities located beyond the limits of the state territorial sea (normally three miles) or inland of its coastal zone? Third, do interstate federal consistency reviews intrude on state sovereignty over land use issues? Fourth, are the mediation procedures and Secretarial appeals process sufficient to resolve interstate disputes? Finally, has the NOAA correctly interpreted and administered Section 307 (c)(3) and (d) in the past?

The resolution of these issues will have a profound impact on the use of the federal consistency provisions. Unless a court reverses the Secretary's decision, the new

limitations imposed on state CZM programs will curtail each state's use of the federal consistency provisions. In particular, federal consistency can no longer be used as a means of resolving interstate disputes. Ultimately, amendments to Section 307 of the CZMA may be required to ensure that state CZM programs regain the authority lost as a result of the VEPCO decision. This authority is the only means of ensuring that all federal license and permit activities that affect any land or water use or natural resource of a state's coastal zone are consistent with the enforceable policies of that program. If state CZM programs do not regain this authority, the long standing incentive for participation in the federal coastal zone management program will be severely weakened.CP

Notes

[1]16 USCS Ch. 33 § 1451-1464

[2]16 USCS Ch. 33 § 1452

[3]National Oceanic and Atmospheric Administration. 1988. "Coastal-Management: Solutions to Our Nation's Coastal Problems." U.S. Commerce. *Technical Assistance Bulletin No. 101*. December, 1988.

[4]Matuszeski, William. 1985. "Managing the Federal Coastal Program: The Planning Years." *APA Journal*. Summer 1985. pp. 266-274.

[5]Lowry, Kem. 1985. "Assessing the Implementation of Federal Coastal Policy." *APA Journal*. Summer 1985. pp.288-298.

[6]Archer, Jack H. 1988. *Coastal Management in the United States: A Selective Review and Summary*. International Coastal Resources Management Project. Coastal Resources Center. University of Rhode Island.

[7]Dean, Lillian F. 1979. "Planning for Environmental Management: New Directions and Initiatives." *Coastal Zone Management Journal*. Vol. 5, No. 4, pp. 285-306.

[8]Center for Urban and Regional Studies of the Department of City and Regional Planning. 1991. *Evaluation of the National Coastal Zone Management Program*. University of North Carolina at Chapel Hill.

[9]16 USCS § 1456 (c)(1)(A).

[10]16 USCS 1456 (c)(3)(A) and (d).

[11]15 CFR Ch. IX (1-1-90) Edition) § 930.120.

[12]16 USCS § 1451

[13]Archer, Jack H. and Robert W. Knecht. 1987. "The U.S. National Coastal Zone Management Program - Problems and Opportunities in the Next Phase." *Coastal Management*. Vol. 15. pp. 103-120.

[14]It should be noted that federal financial assistance is reviewed through the Executive Order 12372 "Intergovernmental Review of Federal Programs." Its provisions are similar to those governing federal license and permit activities.

[15]15 CFR Ch. IX (1-1-90 Edition) §930.39.

[16]15 CFR Ch. IX (1-1-90 Edition § 930.41.

[17]15 CFR Ch. IX (1-1-90 Edition) § 930.42

[18]15 CFR Ch. IX (1-1-90 Edition) § 930.36 and 15 CFR Ch. IX (1-1-90 Edition) § 930.43.

[19]15 CFR. Ch. IX (1-1-90 Edition) § 930.53.

[20]15 CFR Ch. IX (1-1-90 Edition) § 930.58.

[21]15 CFR Ch. IX (1-1-90 Edition) § 930.54

[22]15 CFR Ch. IX (1-1-90 Edition) § 930.63.

[23]15 CFR Ch. IX (1-1-90 Edition) § 930.63.

[24]15 CFR Ch. IX (1-1-90 Edition) § 930.36 anf 15 CFR Ch. IX (1-1-90 Edition) § 930.43.

[25]Eichenberg, Tim and Jack Archer, 1987. "The Federal Consistency Doctrine: Coastal Zone Management and New Federalism." *Ecology Law Quarterly* 14:33.

[26]16 USCS§ 1456 (c)(3)(A); 16 USCS § (c)(3)(B); 16 USCS § 1456 (d); and 15 CFR Ch. IX (1-1-90 Edition) § 930.120.

[27]15 CFR Ch. IX (1-1-90 Edition) § 930.122.

[28]15 CFR Ch. IX (1-1-90 Edition) § 930.121.

[29]Saurenman, John A. and Katherine A. Pease, 1991. "CZMA Consistency Opinions: An Undiscovered Body of Law," in *Coastal Zone '91*, Proceedings of the Seventh Symposium on Coastal and Ocean Management (New York, NY: American Society of Civil Engineers).

[30]For conflicting interpretations of appeal process (and the federal consistency process in general) see: Scott C. Whitney, George R. Johnson, Jr., and Steven R. Perles, "State Implementation of the Coastal Zone Management Consistency Provisions: Ultra Vires or Unconstitutional," *Harvard Environmental Law Review 12* (1988): 67; and Jack Archer and Joan Bondareff, "Implementation of the Federal Consistency Doctrine-Lawful and Constitutional: A Response to Whitney, Johnson & Perles," *Harvard Environmental Law Review 12*(1988): 115.

[31]Eichenberg and Archer, "The Federal Consistency Doctrine," 34.

[32]Jack Archer and Tim Eichenberg, "State Review of Federally Permitted Activities Outside the Coastal Zone: NOAA Takes on the Corps," in *Territorial Sea: Legal Developments in the Management of Ocean and Coastal Resources*, 9 (no. 1, Spring 1989): 13-15.

[33]Ibid.,13.

[34]Ibid., 15.

[35]Opinion Dated May 2, 1989 by Timothy R. E. Keeney, General Counsel, National Oceanic and Atmospheric Administration (Hereafter NOAA GC Opinion, May 2, 1989).

[36]North Carolina's first attempt to review this proposal was in 1986 when it asked to review a decision by the Army Corps of ENgineers to issue permits to Virginia Beach, VA under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. North Carolina subsequently withdrew its request after a settlement was reached. (See *North Carolina v. Hudson* 665 F. Supp. 428).

[37]Letter from Barbara Hackman Franklin, Secretary of Commerce to Alan S. Hirsch, Special Deputy Attorney General, North Carolina Department of Justice dated December 3, 1992.

[38]Ibid.

[39]Ibid.

[40]Letter from Barry M. Hartman, acting Assistant Attorney General, Environment and Natural Resources Division, US Department of Justice to Thomas A. Campbell, General Counsel, NOAA dated March 12, 1992 (hereafter cited as *Justice Opinion* March 12, 1992).

[41]HR. REP. No. 101-535, 101st Congr.,2d Sess., at 23 (1990).

[42]HR CONF. REP. No. 101-964, 101st Cong., 2d Sess., at 972 (1990).

[43]NOAA GC Opinion, May 2, 1989, at 7, 9 and 11.

[44]NOAA GC Opinion, May 2, 1989, at 13.

[45]NOAA GC Opinion, May 2, 1989, at 18.