Michigan Law Review

Volume 92 | Issue 2

1993

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Recommended Citation
Martin J. LaLonde, *Allocating the Burden of Proof To Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act*, 92 MICH. L. REV. 438 (1993).
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Allocating the Burden of Proof To Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act

Martin J. LaLonde

Winding its way along 95,000 miles of beaches, inlets, estuaries, harbors, and ports, the U.S. coastline is one of America's most diverse and valuable assets.[1] It contains a rich supply of marine and mineral resources as well as abundant natural beauty. These very features, however, have led to increasing population along the coast and accelerating demands for coastal development, both of which increase pressure on this fragile ecosystem.[2]

Congress passed the Coastal Zone Management Act of 1972 (CZMA)[3] to address the problems associated with degradation of marine estuaries and coastal areas.[4] The Act implements a unique cooperative management scheme between the federal and coastal state governments that accounts for both national and local interests in coastal resources[5] and seeks to accommodate both preservation and development concerns.[6] Congress intended that the effective management of the coastal areas and resolution of conflicts between competing uses would help protect this national asset for future generations.[7]

The CZMA encourages states to implement coastal management programs (CMPs) to protect their portions of the coastal zone[8] and to

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1. 1 DEPT. OF COM., BIENNIAL REP. TO THE CONGRESS ON COASTAL ZONE MANAGEMENT 1 (1992).

2. *Id.*

3. Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1990 & Supp. I 1991)).

4. Congress found:

> The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.

16 U.S.C. § 1451(c) (1990).

5. 136 CONG. REC. H8101 (daily ed. Sept. 26, 1990) (statement of Rep. Pallone) ("It is clear that under the CZMA, the whole idea is to have cooperation between the States and the Federal Government.").

6. Congress declared the policy of the Act was, in part, "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. § 1452(1) (1990).

7. 16 U.S.C. § 1452(1) (1990).

8. The CZMA defines the coastal zone as:

> the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in the proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends in-

require that development projects take into account coastal environmental effects.[9] In return for enacting a CMP meeting CZMA standards,[10] a state receives federal funding to implement and administer its program.[11] More importantly, pursuant to section 307(c)(1) of the Act, federal agencies' actions must be consistent with federally approved state CMPs to the "maximum extent practicable."[12]

When proposing an activity that could affect the coastal zone,[13] a federal agency must provide a written statement to the appropriate state agency describing why the activity is consistent with a state's CMP.[14] The reviewing state agency may object to the federal determination.[15] If the federal agency proceeds with the proposed activity despite a state objection, the state may seek mediation with the Secretary of Commerce.[16] Alternatively, the state may bring suit in federal court without having first exhausted the mediation process.[17]

When a party seeks judicial resolution of a consistency dispute, the

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land from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

16 U.S.C. § 1453(1) (1990).

9. The management program is "a comprehensive statement . . . setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. § 1453(12) (1990). In addition to other considerations, the state program must "adequately consider" both the "national interest" and "the views of Federal Agencies principally affected by such programs." 16 U.S.C. §§ 1455-1456 (1990). The state management program is subject to approval by the Secretary of Commerce. 16 U.S.C. § 1455 (1990).

10. These standards (Program Requirements) are set out in 16 U.S.C. § 1454(b) (1988).

11. 16 U.S.C. § 1455 (1990).

12. 16 U.S.C. § 1456(c) (1988); *see also infra* Part I. Congress has recognized that this requirement represents the "single greatest incentive for State participation in the coastal zone management program." S. REP. No. 277, 94th Cong., 1st Sess. 9 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1768, 1776.

13. Numerous federal agency activities affect the coastal zone. Disputes over the consistency provision, however, have primarily arisen over federal leasing of tracts on the outer continental shelf (OCS) for oil or gas development. Such development can lead to increased tanker traffic, building of deep sea ports, and the risk of oil spills. *See generally* Jeffrey A. Zinn, *Hightide — Energy in the Coastal Zone: A Question of Risk*, 7 COASTAL ZONE MGMT. J. 123 (1980) (discussing the risks to the coastal zone associated with energy development). The Outer Continental Shelf Lands Act of 1953, Pub. L. No. 83-212, 67 Stat. 462 (codified as amended at 43 U.S.C. §§ 1331-1356 (1988 & Supp. II 1990)), grants the Secretary of the Interior the authority to lease the outer continental shelf (OCS) for oil and gas exploration and drilling. The OCS is the submerged land subject to U.S. jurisdiction that lies beyond the states' "lands beneath navigable waters" as defined in 43 U.S.C. § 1301(a)(2) (1988). A state's "lands beneath navigable waters," also called the territorial sea of each state, includes "all lands permanently or periodically covered by tidal waters . . . seaward to a line three geographical miles distant from the coast line of each such state." 43 U.S.C. § 1301(a)(2) (1988). States own the land beneath the territorial sea, 43 U.S.C. § 1311 (1990), but the federal government owns the land of the outer continental shelf. 43 U.S.C. § 1302 (1988).

14. *See infra* section I.B.

15. *See infra* note 41 and accompanying text.

16. 16 U.S.C. § 1456(h) (1988).

17. 15 C.F.R. § 930.116 (1991).

court needs to know which party bears the burden of proof[18] on the issue of consistency so that it may properly rule on certain motions, decide the merits, or instruct the jury. The CZMA provides no explicit guidance on who bears the burden. In addition, few courts have addressed the burden of proof issue in a consistency dispute, and those that have faced the question have reached different conclusions. For example, the Massachusetts District Court, in *Conservation Law Foundation v. Watt,*[19] stated: "It is plain from the language of the Act and regulations that the burden of establishing compliance with a state program is on the federal agency proposing the contemplated action, and not on the state."[20] Other cases, however, suggest that the state bears the burden. For example, in *California v. Watt,*[21] the Ninth Circuit concluded that the federal agency makes the final consistency determination, implying that the state bears the burden of proving that the determination was incorrect.[22] Likewise, in *Louisiana v. Lujan,*[23] the Louisiana District Court held that the state had to prove that the federal consistency determination was arbitrary or otherwise not in accordance with law.

The Supreme Court has recognized that the allocation of the burden of proof "is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation."[24] The burden of proof allocation in a CZMA consistency dispute has consequences beyond the outcome of a particular case; resolution of the division within the courts over the CZMA burden allocation will influence the balance between state and federal control of the coastal zone and between preservation and development interests under the Act.[25] An improper allocation of the burden of proof on the issue of consistency could undermine Congress's intent regarding these balances.[26]

Primarily due to policy considerations, this Note argues that courts should allocate to the federal agency proposing an activity that

18. The term *burden of proof* encompasses both the burden of production and burden of persuasion. *See infra* note 75.

19. 560 F. Supp. 561 (D. Mass.), *affd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

20. 560 F. Supp. at 576.

21. 683 F.2d 1253 (9th Cir. 1982), *revd. sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

22. 683 F.2d at 1263-67; *see infra* note 94 and accompanying text.

23. 777 F. Supp. 486 (E.D. La. 1991).

24. Lavine v. Milne, 424 U.S. 577, 585 (1976).

25. *See infra* section III.C.

26. Courts can easily and unobtrusively affect congressional policy through the allocation of the burden of proof. As one commentator noted, "burden rules seldom touch 'the major prejudices of the age.' They are quiet, bland, unspectacular. As a result, juggling them in favor of one interest or another tends to go unheeded — and uncriticized. Policies can be promoted or stifled smoothly, quietly, and without controversy." James E. Krier, *Environmental Litigation and the Burden of Proof, in* LAW AND THE ENVIRONMENT 105, 108 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970).

may affect the coastal zone the burden of proving consistency with a state CMP. This allocation effectuates Congress's intent to vest states with primary control to preserve the coastal zone. Part I provides a general background of the Act's consistency requirement for federally conducted activities. Part II examines the various factors that courts traditionally consider when allocating burdens of proof in litigation. Part III evaluates these factors as applied to the consistency issue under the CZMA. Part IV concludes that courts should assign the initial burden of production to the state contesting a federal agency's consistency determination; the ultimate burden of proving that the activity *is* consistent with a state CMP, however, belongs with the federal agency.

I. CZMA CONSISTENCY DETERMINATIONS

This Part explains the CZMA's section 307(c)(1) consistency determination process for federally conducted or supported activities.[27] Section I.A outlines the federal activities for which the statute requires a consistency determination. Section I.B surveys the procedural steps required to obtain a consistency determination and the dispute resolution mechanism.

A. *Federal Activities That Require Consistency Determinations*

From the 1980s until the passage of the CZMA amendments in 1990, the most controversial issue under the Coastal Zone Management Act was how to define the scope of the consistency requirement for federally conducted activities. Although the amendments have conclusively resolved the issue, an examination of this past controversy serves as important background for understanding the current operation of the consistency provision.

As originally enacted, the CZMA consistency provision stated: "Each Federal agency conducting or supporting activities *directly affecting* the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."[28] Initial cases broadly interpreted this provision to apply to federal activities that affected the

27. Different consistency requirements also arise under § 1456(c)(3) when privately conducted coastal activities require a federal license or permit. Private parties conducting federally permitted or licensed activities must provide to "the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456(c)(3)(A) (1990). Each applicant for a federal license or permit must also submit a copy of the certification to the appropriate state agency. 16 U.S.C. § 1456(c)(3)(A) (1990). Because different dispute resolution mechanisms exist for federally permitted or licensed activities, this Note deals exclusively with consistency requirements for federally conducted activities arising under § 1456(c)(1).

28. 16 U.S.C. § 1456(c)(1) (1990) (emphasis added). The CZMA regulations define "maximum extent practicable" as "fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations." 15

coastal zone whether within or outside its physical limits.[29]

In 1984, the Supreme Court limited the scope of the consistency doctrine in *Secretary of the Interior v. California.*[30] The Court restricted the consistency requirement to activities within a certain geographical area,[31] concluding that "[s]ection 307(c)(1)'s 'directly affecting' language was aimed at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone."[32] As a result, the Court excluded from the consistency requirement any federally conducted activities on federal land outside the coastal zone, such as in the OCS.[33] In addition, the Court narrowly construed the "directly affecting" language of CZMA section 307(c)(1) by finding an insufficient causal connection between the chal-

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C.F.R. § 930.32 (1993). See *infra* notes 161-62 and accompanying text for discussion of approval of states' coastal management plan.

29. *See* Conservation Law Found. v. Watt, 560 F. Supp. 561, 574-76 (D. Mass.), *aff'd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); California v. Watt, 520 F. Supp. 1359, 1368-82 (C.D. Cal. 1981), *modified,* 683 F.2d 1253 (9th Cir. 1982), *revd. sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

30. 464 U.S. 312 (1984). As in most § 307(c)(1) consistency disputes, this case involved a state challenge to the Department of Interior's leasing of OCS tracts for oil and gas exploration and development. *See supra* note 13.

31. In the early 1980s, the executive branch also restricted the consistency doctrine, and threatened the very existence of the CZMA program. The Reagan administration suggested eliminating CZMA funding and sought to increase OCS leasing. *See* OFFICE OF THE PRESIDENT, AMERICA'S NEW BEGINNING: A PROGRAM FOR ECONOMIC RECOVERY 4-36 to 4-37 (1981); Proposed 5-Year OCS Oil and Gas Leasing Program, 46 Fed. Reg. 39,226 (1981) (proposed July 28, 1981); Phoebe A. Eliopoulos, *Coastal Zone Management: Program at a Crossroads,* 13 Envt. Rep. (BNA) Monograph No. 30 (Sept. 17, 1982); Edward A. Fitzgerald, *Outer Continental Shelf Revenue Sharing: A Proposal To End the Seaweed Rebellion,* 5 UCLA J. ENVTL. L. & POLY. 1, 18 (1985). Congress initially assented to the administration's overtures but reestablished funding for the program in 1983. *Id.* at 19. On a different front, the White House instructed the National Oceanic & Atmospheric Administration (NOAA) — the Department of Commerce agency responsible for overseeing the Act, 15 C.F.R. §§ 923, 930 (1991)—to review state CMPs to ensure that the plans accounted for the national interest in energy development. Tim Eichenberg & Jack Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14 ECOLOGY L.Q. 9, 12-13 & n.12 (1987). The NOAA rejected a number of local coastal plans that were to be incorporated into state CMPs, and it contested the implementation of certain approved CMPs on the grounds that they restricted energy development. *See* Eichenberg & Archer, *supra,* at 12-13 & n.14. Federal agencies further encroached on the CZMA through their efforts to limit delegation of extensive consistency control to the states. *Id.* at 12 & n.8.; *see* [15 Current Developments] Envtl. Rep. (BNA) 416 (July 13, 1984) (House Oceanography Subcommittee criticizing the NOAA for ignoring and attempting to obliterate the CZMA).

32. 464 U.S. at 330.

33. 464 U.S. at 330. In his dissent, Justice Stevens concluded that no sensible distinction can be drawn "between activities that take place outside the coastal zone and those that occur within the zone; it is the *effect* of the activities rather than their location that is relevant." 464 U.S. at 345 (Stevens, J., dissenting) (emphasis added); *see also* Eichenberg & Archer, *supra* note 31, at 17-19; Sarah Armitage, Note, *Federal "Consistency" Under the Coastal Zone Management Act — A Promise Broken by* Secretary of the Interior v. California, 15 ENVTL. L. 153, 165-69 (1984); Eric Esler, Note, *CZMA Consistency Review: The Supreme Court's Attitude Toward Administrative Rulemaking and Legislative History in* Secretary of the Interior v. California, 13 ECOLOGY L.Q. 687, 695-96 (1986).

lenged federal activity and the potential effects to the coastal zone.[34]

After extensive hearings in the late 1980s and early 1990s,[35] Congress responded to the Supreme Court decision by enacting the Coastal Zone Management Act Reauthorization Amendments of 1990.[36] The amendments changed the language relating to consistency requirements of federal agency activities. The amended section states that "[e]ach Federal agency activity *within or outside the coastal zone that affects* any land or water use or natural resource of the coastal zone shall be carried out in a manner that is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."[37] This provision mandates that the effect rather than the location determines whether federal activities require a consistency determination. The amendment broadens the "directly affecting" standard of the prior CZMA and expressly overturns *Secretary of the Interior v. California.*[38] Thus, whenever a fed-

34. 464 U.S. at 331-43. The lease sale, the Court reasoned, made up only one of four steps that could lead to oil or gas production in the OCS. 464 U.S. at 337. According to the Court, the steps required by the 1978 amendments to the Outer Continental Shelf Lands Act of 1953 for developing offshore oil include: "(1) formulation of a 5-year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and production." 464 U.S. at 337. The Court reasoned that only in the final two stages do activities occur that may directly affect the coastal zone. 464 U.S. at 338-41. This point drew substantial criticism from the dissenting opinion and later from commentators. Justice Stevens's dissent noted that:

> The sale of OCS leases involves the expenditure of millions of dollars. If exploration and development of the leased tracts cannot be squared with the requirements of the CZMA, it would be in everyone's interest to determine that as early as possible. . . . It is directly contrary to the legislative scheme not to make a consistency determination at the earliest possible point.

464 U.S. at 357-58 (Stevens, J., dissenting) (citation omitted). Therefore, according to Stevens, the link between the lease sales, which the majority exempted from consistency review, and later exploration, which the majority would subject to consistency review, is close enough to justify a finding that the lease sales directly affected the coastal zone. *See also* Steven R. Schell, *Living with the Legacy of the 1970's: Federal/State Coordination in the Coastal Zone*, 14 ENVTL. L. 751, 756-57 (1984).

35. *See, e.g., Coastal Zone Improvement Act of 1989: Hearing on S. 1189 Before the National Ocean Policy Study of the Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. (1990); *Coastal Environmental Monitoring: Hearings Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the House Comm. on Science, Space, and Technology*, 101st Cong., 2d Sess. (1990); *Coastal Zone Management Act, Part II: Hearings on H.R. 4030 Before the Subcomm. on Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 2d Sess. (1990); *Coastal Zone Management: Hearings on Coastal Zone Management Before the National Ocean Policy Study of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989); *Coastal Zone Management Act Reauthorization: Hearings on Discussion of Various Aspects of the Reauthorization of the Coastal Zone Management Act Before the Subcomm. on Oceanography and the Great Lakes of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. (1989).

36. Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388-299 to 1388-319 (codified at 16 U.S.C. §§ 1451-1464 (Supp. III 1991)).

37. 16 U.S.C. § 1456(c)(1)(A) (Supp. III 1991) (emphasis added).

38. H.R. 4450 amends "the 'federal consistency' provisions to overturn the Supreme Court's 1984 decision in *Secretary of the Interior v. California.* This would clarify that all federal agency activities, whether in or outside of the coastal zone, are subject to the consistency requirements of section 307(c)(1) of the CZMA." 136 CONG. REC. H8068 (daily ed. Sept. 26, 1990). "The Committee's principal objective in amending [section 307] is to overturn the decision of the Supreme

eral agency proposes or conducts an activity that will affect a state's coastal zone, it must follow the procedural requirements for conducting a consistency determination, regardless of where the activity is located.

B. *Procedural Requirements and Dispute Resolution*

To ensure that existing or proposed federal activities affecting the coastal zone are consistent with a state's CMP, each federal agency conducting, supporting, or planning such an activity "shall provide a consistency determination to the relevant State agency."[39] The determination provides a "detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement."[40] If the applicable state agency disagrees with the federal agency's consistency determination, the state agency must explain its objections and propose alternative measures that would allow the federal agency to meet the consistency requirement.[41]

Consistency disputes arise when the federal government decides to proceed with the activity as originally planned despite the state's objection. Parties may pursue two methods of dispute resolution when a disagreement arises. First, the parties may agree to submit voluntarily to mediation conducted by the Secretary of Commerce.[42] Alternatively, either party may seek judicial resolution.[43] In addition, after the final judgment of a court and certification by the Secretary that mediation is not likely to resolve the dispute, the President may over-

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Court in *Secretary of the Interior v. California* and to make clear that outer Continental Shelf oil and gas lease sales are subject to the requirements of section 307(c)(1)." *Id.* at H8075 (citation omitted). In essence, the amendment validates Justice Stevens's interpretation of the CZMA.

39. 16 U.S.C. § 1456(c)(1)(C) (Supp. IV 1992). The consistency determination is provided at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of sufficient information to determine reasonably the consistency of the activity with the State's management program, but before the Federal agency reaches a significant point of decisionmaking in its review process. 15 C.F.R. § 930.34(b) (1993).

40. 15 C.F.R. § 930.39(a) (1993). The statement must take into full account the "enforceable, mandatory policies of the management program" and must also consider the recommendations, rather than mandatory dictates, of the state program. 15 C.F.R. § 930.39(c) (1993).

41. 15 C.F.R. § 930.42(a) (1993). For instance, as exhibited in Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass.), *aff'd. sub nom.* Massachusetts v. Watt, 716 F.2d 947 (1st Cir. 1983), Massachusetts had responded to the Department of the Interior's consistency determination for offshore oil lease sales by noting that the oil and gas exploration, development, and production that would flow from the lease sale would be inconsistent with the policy of its CMP to minimize impacts on the marine environment and would conflict with maritime-dependent uses. The state suggested deleting certain tracts from the lease sale as a method of making the activity consistent with the CMP. 560 F. Supp. at 574, 576-78.

42. *See* 16 U.S.C. § 1456(h) (1988). *But see* Eichenberg & Archer, *supra* note 31, at 33 (indicating that mediation has seldom been used and when used has been unsuccessful).

43. 15 C.F.R. § 930.116 (1993). Parties need not first exhaust the mediation process before seeking judicial review. 15 C.F.R. § 930.116 (1993).

ride CZMA consistency requirements when the national interest in the activity is sufficiently compelling.[44]

A brief example highlights the significance of burden allocation when a consistency dispute requires judicial resolution. Suppose the Department of the Interior seeks to lease oil and gas exploration rights in the OCS off the coast of California.[45] The federal agency provides the state's coastal commission with a consistency determination declaring, in detail, how the lease sale is consistent with California's CMP. The coastal commission disagrees and informs the Department of the Interior why the proposed activity is inconsistent and what the agency can do to meet the state's consistency requirements. The federal agency stands by its consistency determination and prepares to go ahead with the sale. The state files a claim in federal district court seeking a preliminary injunction to preserve the status quo between the parties pending a full hearing on the controversy's merits. The state then seeks injunctive relief on the merits to prohibit the lease sale until the federal agency has made its lease sale plans consistent with California's CMP. The allocation of the burden of proof on the consistency determination may affect the court's decision concerning both the preliminary injunction and relief on the merits.

Because the state must establish a likelihood of success on the merits to obtain a preliminary injunction,[46] the allocation of the burden of

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44. 16 U.S.C. § 1456(c)(1)(B) (Supp. III 1991) (the President may waive compliance for inconsistent activities if they are "in the paramount interest of the United States"); *see also infra* notes 98-100 and accompanying text. In an analogous provision, the Secretary of Commerce may override on national security grounds a state's "veto" of a consistency certification for private activities that require a federal license or permit. 16 U.S.C. § 1456(c)(3) (1988 & Supp. III 1991); *see also* Eichenberg & Archer, *supra* note 31, at 33-34.

45. In addition to deciding disputes over OCS leasing, federal courts have resolved consistency disputes over a number of different federal activities that implicate various state programs. *See, e.g.*, Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3d Cir. 1983) (federal sewer grants); Save Lake Washington v. Frank, 641 F.2d 1330 (9th Cir. 1981) (construction of federal docking facilities); New York v. United States Gen. Servs. Admin., 823 F. Supp. 82 (N.D.N.Y. 1993) (sale of land by federal agency); Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R.) (relocating refugees), *vacated sub nom.* Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981).

46. Traditionally the party seeking a preliminary injunction must in addition establish three other criteria: (1) a substantial threat of irreparable injury in the absence of injunctive relief; (2) a balance of hardships favoring the state; and (3) the advancement of some discernible public interest by entering injunctive relief. *See, e.g.*, Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994, 997-98 (11th Cir. 1991); Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974). The state should be able to meet these additional criteria. First, the state may show a substantial threat of irreparable injury in the absence of injunctive relief by indicating the loss of control over its coastal zone and by indicating the likely adverse environmental effects from the federal activity. *See, e.g.*, Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."); California v. Mack, 693 F. Supp. 821, 828 (N.D. Cal. 1988) ("The potential loss of control over the regulation of its coastline entails a serious risk of irreparable injury . . . ."). Second, the state may show a balance of hardships favoring the state by emphasizing the extent of the likely injury to the coastal zone. *See, e.g., Amoco Prod. Co.*, 480 U.S. at 545 ("If [environmental injury] is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment."). Finally,

proof may be critical at this stage. In *Louisiana v. Lujan*,[47] for example, the court denied the plaintiff's request for a preliminary injunction to prohibit an OCS lease sale until the federal agency demonstrated consistency with Louisiana's CMP. The court rejected the plaintiff's argument that the federal agency had the burden of proving consistency, and consequently the plaintiffs could not establish a likelihood of success on the merits.[48]

In adjudicating the merits, the burden allocation may, in a close case, determine who succeeds. Furthermore, the allocation defines the parties' respective roles in the litigation; for example, the allocation determines who must present evidence to support claims of consistency or inconsistency. The allocation will also determine the order of presentation of evidence.[49]

In addition to affecting the litigation process, the burden allocation may influence each party's settlement position and willingness to compromise. The party bearing the burden of proof may be more amenable to reaching an agreement to avoid litigation. The burdened party may also modify its behavior to avoid disputes.

Because of the issue's multifaceted importance, an explanation of the proper allocation of the burden of proof mandated under the CZMA requires a thorough understanding of factors affecting courts' burden allocation decisions.

II. Allocating Burdens of Proof

This Part examines how courts allocate burdens of proof and how the burden may shift during the course of a trial. Section II.A analyzes factors that courts typically consider when allocating the burden of proof. Occasionally Congress mandates the burden allocation by statute.[50] Usually, however, Congress fails to do so.[51] When burden allocation is not mandated by statute, as with the CZMA, courts must themselves decide how to allocate the burdens. Although the ultimate test is congressional intent,[52] when no intent appears, courts have common law power to allocate the burdens by considering other factors, including the parties' relative ease of access to pertinent evidence, the probability that the situation occurred, which party seeks to

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the state can show the injunction will advance some discernible public interest by emphasizing the purposes of the CZMA. *See infra* section III.C.

47. 777 F. Supp. 486, 488-89 (E.D. La. 1991). See *infra* notes 106-08 and accompanying text for discussion of this court's holding.

48. 777 F. Supp. at 488.

49. For other "desirable goals" of the burden of proof, see Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239, 244-46 (1988).

50. *See, e.g.*, 8 U.S.C. §§ 1361, 1429 (1988); 11 U.S.C. § 362(g) (1988).

51. *See* Martinez, *supra* note 49, at 254.

52. *See infra* notes 53-56 and accompanying text.

change the status quo, and whether a certain allocation will effectuate the policy of the underlying law. Section II.B discusses the elements of the burden of proof: the burdens of production and persuasion. As the section explains, courts may in certain circumstances shift these components to different parties.

A. *Factors Considered in Allocating the Burden of Proof*

When a statute creates a cause of action, a court deciding who bears the burden of proof will initially determine whether Congress has spoken on the issue.[53] Because Congress possesses plenary authority over evidentiary rules in the federal court, its intent is binding.[54] Thus, a court will examine the explicit language of the statute[55] and the legislative history to learn where the burden of proof should lie.[56] If the legislature's intent is unclear, regulations promulgated by the administering executive agency may indicate that the burden of proof lies with a particular party.[57] For example, regulations implementing section 404 of the Federal Water Pollution Control Act, which regulates dredge and fill activities in wetlands,[58] place the burden on the party proposing the activity to show "that the benefits of the proposed

53. *See* Steadman v. SEC, 450 U.S. 91, 95-96 (1981) ("Where Congress has spoken, we have deferred to 'the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts' absent countervailing constitutional constraints." (quoting Vance v. Terrazas, 444 U.S. 252, 265 (1980))).

54. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1975) ("Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts.").

55. *See, e.g.*, Voinovich v. Quilter, 113 S. Ct. 1149, 1156 (1993) (relying on the statutory language to allocate the burden of proof under the Voting Rights Act in an apportionment case); Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 652-53 (1980) (interpreting the Occupational Safety and Health Act of 1970 to allocate the burden of proving risk of exposure to benzene); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 747-48 (8th Cir. 1986) (evaluating the language and the statutory scheme of the Comprehensive Environmental Response, Compensation, and Liability Act to hold that potentially responsible parties bear the burden of proving the inconsistency of the government's response costs), *cert. denied*, 484 U.S. 848 (1987); *cf.* 14 WIGMORE ON EVIDENCE § 2486 (Chadbourn rev. ed. 1981); Tim Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 8-9 (1959); Martinez, *supra* note 49, at 254.

56. *See, e.g.*, Bowen v. Yuckert, 482 U.S. 137, 145-48 (1986) (reviewing language and legislative history of the Social Security Amendments Act to uphold Secretary of Health's allocation of burden of showing medical impairment); Lindahl v. Office of Personnel Mgmt., 776 F.2d 276, 279-80 (Fed. Cir. 1985) (reviewing the Civil Service Reform Act and its legislative history to uphold the allocation of the burden of proof to a party seeking disability benefits); Zurn Indus. v. NLRB, 680 F.2d 683, 689-93 (9th Cir. 1982) (examining the legislative history of the National Labor Relations Act to uphold the allocation of the burden of proof to the employer to show legitimate cause for discharge of the employee); Environmental Def. Fund, Inc. v. EPA, 548 F.2d 998, 1004 (D.C. Cir. 1976) (relying in part on the legislative history of the Federal Insecticide, Fungicide, and Rodenticide Act to place on the applicant the burden of establishing the product safety required for compliance with the Act's labeling requirements).

57. *See, e.g.*, Mullins Coal Co. v. Director, Office of Worker's Compensation Program, 484 U.S. 135, 139 n.5, 158-60 (1987) (upholding Secretary of Labor's allocation of burden of proof under the Federal Coal Mine Health and Safety Act of 1969).

58. Federal Water Pollution Control Act, Pub. L. No. 92-500, § 404, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

alteration outweigh the damage to the wetlands resource."[59]

If the statute, regulations, and legislative history do not allocate the burden of proof, courts will turn to other factors to assign the burden.[60] First, a court may appraise the "convenience" of placing the burden on a particular party. Thus, the court may require the party who possesses superior "access to knowledge" of the contended fact to bear the burden;[61] a debtor must prove, for example, payment or discharge in bankruptcy.[62] Similarly, if a person alleges that a state official deprived him of a constitutional right, the official will have to plead and prove good faith conduct in her actions because the official has peculiar knowledge of her conduct that is the basis of the plaintiff's claim.[63]

Additionally, courts often estimate the probabilities of the occurrence of a situation or event in order to allocate the burden.[64] The court will normally assign the burden to the party whose case depends on the occurrence of the more unusual event.[65] For example, because

59. 33 C.F.R. § 320.4(b)(4) (1992). In addition, the applicant seeking a National Pollutant Discharge Elimination System (NPDES) permit "always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift." 40 C.F.R. § 124.85(a)(1) (1992); *see also* Oklahoma v. EPA, 908 F.2d 595, 629 n.49 (10th Cir. 1990) (reading the NPDES permit regulations to say "it is the proponent of a permit who bears the burden of showing that a discharge *will comply with* all applicable standards, not the opponent of a permit who must show that a discharge *will violate* applicable requirements").

60. Commentators have discounted three tests traditionally utilized by courts because they provide little guidance in the allocation decision. First, the court may allocate the burden of proof to the party who must establish the affirmative proposition on the issue. However, a party may cast any issue as either a negative or affirmative proposition. For example, in a negligence case the defendant might argue that she acted with care while the plaintiff contends that the defendant acted negligently. Second, courts often place the burden on the party to whose case the issue is essential. But to whom is the fact most essential? In any given case the positive or negative of the fact may be equally important to each party. Finally, the burden of proof is often allocated to the party with the burden of pleading the issue. The same problems in determining the allocation of the burden of persuasion may arise with respect to the burden of pleading. The court simply examines the factors determining the allocation at an earlier point in the proceedings. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.8 (3d ed. 1985); MCCORMICK ON EVIDENCE § 337 (Edward W. Cleary ed., 3d ed. 1984); 14 WIGMORE ON EVIDENCE, *supra* note 55, § 2486.

61. JAMES & HAZARD, *supra* note 60, § 7.8; MCCORMICK ON EVIDENCE, *supra* note 60, § 377; 14 WIGMORE ON EVIDENCE, *supra* note 55, § 2486; *see also* Selma Rome & Dalton R.R. v. United States, 139 U.S. 560, 568 (1891) (burden of proof on party possessing relevant account books); Lindahl v. Office of Personnel Mgmt., 776 F.2d 276, 280 (Fed. Cir. 1985) (burden of proof on party with disability to prove inability to work); Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir. 1947) (burden of proof on party with knowledge rather than on plaintiff).

62. MCCORMICK ON EVIDENCE, *supra* note 60, § 337.

63. *See, e.g.*, Gomez v. Toledo, 446 U.S. 635, 640-41 (1980).

64. *See* MCCORMICK ON EVIDENCE, *supra* note 60, § 337.

65. JAMES & HAZARD, *supra* note 60, § 7.8; MCCORMICK ON EVIDENCE, *supra* note 60, § 337; Cleary, *supra* note 55, at 12-13 (the court makes an "estimate of the probabilities of the situation, with the burden being put on the party who will be benefitted by a departure from the supposed norm"); *see also* Caulfield v. AC & D Marine, Inc., 633 F.2d 1129, 1135 & n.2 (5th Cir. Unit A Jan. 1981) (allocating the burden of proof to the party contending that the event occurred because it was not logical — that is, not probable — that the asserted event took place); Fire-

the gratuitous performance of services in a business setting is unlikely, the party asserting the existence of free services should bear the burden of proof to rebut a contract claim.[66] To determine a situation's probabilities the court could examine how often the situation occurs as a part of everyday life. Under a more exacting approach the court would consider past judicial experience with particular contentions by determining how often parties making an unusual claim have succeeded in proving the contention in court.[67]

A court may also consider which party desires a change in the status quo. Because the plaintiff brings a case to change the present state of affairs, that party generally bears the burden of proof.[68] For example, the tort plaintiff who seeks to enjoin the defendant from continuing to behave in a way that causes the plaintiff injury should bear the risk of failing to persuade the judge or jury because she desires to change the status quo.[69] This reasoning, however, presupposes a preference for the status quo over change. In some situations, particularly in suits to enjoin a disfavored activity, public policy considerations may embrace change rather than the current state of affairs.[70] To determine whether public policy embraces change, courts should turn to the final factor: examining the policy of the underlying substantive law.

Courts often do not hesitate to allocate the burden to realize the purposes of the substantive law and to promote public policy goals.[71]

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man's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1328 (E.D. Mich. 1988) (placing burden on insurance policyholders who contend that they come within the "sudden and accidental" exception to a pollution exclusion clause because they are arguing that the more unusual event occurred); *In re* Max Sugarman Funeral Home, Inc., 130 B.R. 119, 121-22 (Bankr. D.R.I. 1991); *cf.* Basic, Inc. v. Levinson, 485 U.S. 224, 245-47 (1988) (relying, in part, on "common sense and probability" to uphold presumption of investor reliance on public material misrepresentations based on fraud-on-the-market theory); International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977) (utilizing evaluations of probabilities in creating rebuttable presumption of discriminatory pattern and practice). *But see* V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof,* 14 VAND. L. REV. 807, 817-18 (1961) (arguing that courts should not use probabilities to allocate the burden of proof because this would set the probabilities against the party twice — the party alleging the least probable event would have to bear the more onerous burden).

66. MCCORMICK ON EVIDENCE, *supra* note 60, § 337; *cf.* Cleary, *supra* note 55, at 13.

67. *See* Cleary, *supra* note 55, at 12-13 ("The litigated cases would seem to furnish the more appropriate basis for estimating probabilities."); Martinez, *supra* note 49, at 252-53.

68. *See* Brown v. Armstrong, 949 F.2d 1007, 1012 (8th Cir. 1991); Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1226 (8th Cir. 1987); Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, 762 F.2d 1124, 1133 (1st Cir. 1984); MCCORMICK ON EVIDENCE, *supra* note 60, § 337. *But see* Oddi v. Ayco Corp., 947 F.2d 257 (7th Cir. 1991) (placing burden on defendant who sought to prove a tax rate different from the status quo).

69. MCCORMICK ON EVIDENCE, *supra* note 60, § 337.

70. *See* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 346 (1989). Shreve and Raven-Hansen argue that the change of the status quo is not a proper consideration for allocating the burden of proof because "[i]t is often the defendant who disturbed the status quo outside court." *Id.* This argument apparently presumes that the "status quo" test always leads to the plaintiff bearing the burden of proof.

71. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring);

Accordingly, when the legislative intent disapproves of certain claims or defenses,[72] courts should allocate the burden to the party advancing the disfavored claim or defense in order to uphold the approved policy of the law. For example, to uphold the Bankruptcy Act's congressional policy of giving the debtor a fresh start, creditors must bear the burden of proving the disfavored claim that a debt is excepted from discharge under bankruptcy.[73]

As the Supreme Court has stated, ultimately "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of *policy* and fairness based on experience in the different situations.' "[74] Thus, the factors listed above offer significant discretion to courts to make the allocation, but courts will likely pay particular attention to the policy and fairness issues implicated by the allocation.

B. *Burdens of Production and Persuasion*

Courts and commentators typically bifurcate the burden of proof into the burden of going forward with evidence, or production, and the burden of persuasion.[75] Ordinarily, the burdens of production and persuasion attach to the party that has the burden of pleading a certain claim or defense.[76] Occasionally, however, the court may shift either one or both of the burdens. The plaintiff may have the burden of producing evidence regarding the claim, but, once the plaintiff has met an initial burden — for example, establishing a prima facie case[77] — the ultimate burden of persuasion may rest with the defendant. For

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In re Atta, No. 87-0551-M, 1988 WL 66866, at *6 (E.D.N.Y. June 17, 1988) ("Allocations of burdens of production, burdens of proof and standards of proof in American jurisprudence have consistently been used to achieve policy goals with a view toward elementary fairness and furthering the purpose of the underlying substantive law.") (quoting *In re* Mackin, unpublished S.D.N.Y. Aug. 13, 1981); MCCORMICK ON EVIDENCE, *supra* note 60, § 337; Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions — An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. U. L. REV. 892, 898 (1982).

72. The disfavored claim or defense could presumably be one that is upholding a status quo that the legislature wishes to change. Put differently, Congress, in enacting certain legislation, could be seen as putting its imprimatur on a new vision of the status quo. Those parties opposing this new status quo should bear the burden of proof.

73. *See, e.g., In re* Rahm, 641 F.2d 755, 756 (9th Cir.), *cert. denied* 454 U.S. 860 (1981); In re Furimsky, 40 B.R. 350, 354 (Bankr. D. Ariz. 1984).

74. Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973) (quoting 9 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2486, at 275 (3d ed. 1940) (emphasis added)); *see also* Philadelphia v. Stepan Chem. Co., 713 F. Supp. 1484 n.11 (E.D. Pa. 1989) (emphasizing the policy of the Comprehensive Environmental Response, Compensation and Liability Act in allocating the burden of proof).

75. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 60, § 336.

76. Both the substantive law and rules of procedure often set out the burden of pleading an issue. *Id.* § 337.

77. A prima facie case in this sense means that the plaintiff has produced evidence sufficient to go to the jury. In other words, the party is no longer liable to a nonsuit or to a directed verdict for the party's opponent. 14 WIGMORE ON EVIDENCE, *supra* note 55, § 2491. In contrast, *Black's Law Dictionary* defines a prima facie case as one in which the submission of evidence by

example, in cases determining whether the National Environmental Protection Act requires an Environmental Impact Statement (EIS), courts have adopted a burden-shifting rule. The party challenging an agency's decision not to prepare an EIS must first demonstrate that the proposed project would have a substantial environmental impact. The burden then shifts to the federal agency, which must prove that its decision not to prepare an EIS was reasonable.[78]

Courts have employed burden-shifting rules for different reasons. For example, in *Welsh v. United States,*[79] a federal circuit court employed such a rule because the defendant had easier access to evidence than the plaintiff. In *James v. River Parishes Co.,*[80] the court allocated the burden of disproving negligence to the defendant due to probability considerations. In other cases, courts have shifted burdens because of policy concerns.[81]

In evaluating the allocation of the burden of proof under the consistency provision of the CZMA, a court should consider the different considerations discussed in section II.A. Moreover, as section II.B reveals, a court may allocate an initial burden to one party and subsequently shift the burden of persuasion to the other to achieve a proper balance among the different considerations.

III. THE BURDEN OF PROOF AND THE CZMA CONSISTENCY PROVISION

Courts that have allocated the burden of proof under the CZMA consistency provision have done so in a cursory manner and relied on

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one party leads to a certain decision unless the other party rebuts the evidence. BLACK'S LAW DICTIONARY 1071 (5th ed. 1983).

78. In Missouri Coalition for the Envt. v. Corps of Engrs., 866 F.2d 1025 (8th Cir.), *cert. denied,* 493 U.S. 820 (1989), the court stated:

> The initial burden of proof is upon the challenging party to demonstrate that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment. If such facts are established, and they are of sufficient significance to warrant shifting the burden of proof, the agency must then demonstrate that its negative determination was reasonable under the circumstances.

866 F.2d at 1032 (citations omitted); *see also* Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co., 687 F.2d 732, 742 n.24 (3d Cir. 1982); Winnebago Tribe v. Ray, 621 F.2d 269, 271 (8th Cir.), *cert. denied,* 449 U.S. 836 (1980); Pokorny v. Costle, 464 F. Supp. 1273, 1275-76 (D. Neb. 1979).

79. 844 F.2d 1239 (6th Cir. 1988).

80. 686 F.2d 1129 (5th Cir. 1982). The case involved an action brought for damages caused by a drifting vessel. The court found that when a drifting vessel causes damage, an inference of negligence arises that places on the custodian of the vessel the burden of disproving the inference. 686 F.2d at 1132-33.

81. *See, e.g.,* York v. Benefits Review Bd., 819 F.2d 135, 138-39 (6th Cir. 1987) (reasoning that, because the federal black lung program was enacted to expand disability coverage for those disabled by black lung disease, after plaintiff establishes his injury the defendant carries the burden of persuading the court that other factors caused the disease).

different factors. For example, in *Louisiana v. Lujan,*[82] the court interpreted the CZMA implementing regulations to allocate the burden of proof to the state. In *Conservation Law Foundation v. Watt,*[83] the court relied on an interpretation of the CZMA's policy to allocate the burden of proof to the federal agency. No court has explictly considered more than a single factor in allocating the burden.

This Part applies each of the factors traditionally utilized by courts in allocating the burden of proof in other contexts[84] to the question of consistency raised under section 307(c)(1) of the CZMA. Section III.A evaluates the guidance on the allocation issue arising from the language, the implementing regulations, and the legislative history of the CZMA and the 1990 amendments. This section concludes that these sources suggest, but do not mandate, that the burden should lie with the state. Finding no clear congressional intent regarding the allocation of the burden of proof, however, this Part next considers the other factors courts utilize in allocating burdens. Section III.B examines two traditional factors for allocating the burden — access to evidence and probabilities — and finds them unhelpful in this instance. Section III.C evaluates the policy behind the statute, including how changing perspectives of the status quo of coastal development affected that policy, and concludes that the federal agency should bear the burden of persuasion regarding a federal activity's consistency.

A. *Language, Regulations, and Legislative History*

When a court turns to the CZMA's language, regulations, and legislative history, it will find meager guidance for resolving the allocation issue. Nevertheless, these sources indicate that Congress may have sought to limit the coastal states' ability under the CZMA to prevent a federal activity from proceeding. This indication, in turn, may affect the decision of who should bear the burden of proof.

Section III.A.1 examines the single explicit statement regarding the allocation of the burden of proof that occurs in the language, regulations, or legislative history of the CZMA. The statement, made by a single congressman during floor debates, does not provide significant guidance to the decision but does reflect a concern that may indirectly affect the allocation issue. The statement suggests that the state should bear the burden of proof to avoid giving states a practical veto power over federal decisions to conduct certain activities.[85]

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82. 777 F. Supp. 486, 488-89 (E.D. La. 1991).

83. 560 F. Supp. 561, 576 (D. Mass.), *aff'd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

84. *See supra* section II.A.

85. Members of Congress, judges, and commentators refer to limits to state control in terms of avoiding a "state veto" of federal activities. In this context, a state veto is not an official veto power granted by the CZMA, but a state's practical ability to block a federal activity through the

Section III.A.2 examines the veto concern raised by the legislator's statement introduced in section III.A.1. The objective of avoiding the grant of a state veto power indicates that Congress did not intend the CZMA to allow a state to halt a federal activity unilaterally by declaring the activity inconsistent with the state CMP. This section examines the ways the CZMA avoids granting a state veto power and concludes that mechanisms other than placing the burden of proof on the state — such as placing the final authority to make a consistency determination with the federal agency — adequately address the concern over state veto power.

Section III.A.3 examines the ramifications on the burden of proof allocation decision arising when the federal agency has the final authority to make the consistency determination. Normally, an agency making a determination under the delegated authority of the law — such as a finding of fact — need not persuade the court that its determination is correct. Thus, courts may justifiably defer to some extent to the federal agency's final CZMA consistency determination and may, as a result, place the burden of proof on the state contesting it. Nevertheless, as this section concludes, certain unique features of the CZMA suggest that courts do not owe the "final" federal decision deference and in fact may owe state coastal agencies deference. Thus, courts should not allocate the burden of proof to the state on this ground.

1. *Explicit Statements in the Language, Regulations, and Legislative History*

The language and implementing regulations provide no explicit allocation of the burden of proof. Moreover, only one statement in the CZMA's legislative history mentions the burden of proof; during the House floor debates on the 1990 amendments, Representative Leon Panetta stated that:

> First, this bill will not give States a veto power over Federal agency activities. Even if a State disagreed with a Federal agency activity, the activity would go forward unless the parties agreed to submit to mediation by the Secretary of Commerce or unless the State *succeeded in persuading* a court to overturn the Federal agency's action.[86]

Although revealing his view that the state bears the burden of proof, Panetta's statement is hardly dispositive, and only slightly persuasive, regarding congressional intent on this issue. As a general rule of statutory construction, the statements of a single legislator should

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exercise of its role under the Act. Because one may argue that the state should bear the burden of proof to avoid a state veto, this section addresses the state-veto issue.

86. 136 CONG. REC. H8081 (daily ed. Sept. 26, 1990) (statement of Rep. Panetta) (emphasis added).

not control the court's interpretation of legislative intent.[87] In addition, Panetta's statement only indirectly relates to the allocation of the burden of proof; his statement is primarily concerned with pointing out that the CZMA stops short of granting coastal states an absolute veto power over federal activities. Other statements regarding congressional intent, discussed in the next section, show that allocation of the burden of proof to states is unnecessary to avoid state veto power.

2. *Avoiding State Veto Power Over Federal Activities*

Most observers conclude that section 307(c)(1) does not provide the states with a veto power over federal activities.[88] When addressing the state veto power concern, legislators and courts speak of the state's practical power to halt a federal activity unilaterally by declaring it inconsistent with the state CMP.[89] The "veto concern" thus serves as shorthand for discussing the limits of state control and influence granted in the CZMA over federal activities.[90]

Legislators and courts have discussed four ways in which the CZMA may avoid granting a practical veto power to the states. Each method recognizes a different degree of control that the states may exercise under the CZMA. These methods include allocating to the state the burden of persuading a court that the activity is inconsistent; giving the final authority to make the consistency determination, prior to litigation, to the federal agency; limiting the circumstances in which the federal agency must comply with the state CMP; or providing the

87. *See, e.g.*, Brock v. Pierce County, 476 U.S. 253, 263 (1986) (holding that statements of individual legislators do not control statutory interpretation, although they provide evidence of congressional intent); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

88. *See, e.g.*, 136 CONG. REC. H8080 (daily ed. Sept. 26, 1990) (statement of Rep. Panetta) (§ 307(c)(1) "does not give the State a veto power"); 136 CONG. REC. H8101 (daily ed. Sept. 26, 1990) (statement of Rep. Tauzin) (It has been "asserted that the original amendment creates a veto authority. It does not."); 136 CONG. REC. E543 (daily ed. Mar. 6, 1990) (statement of Rep. Jones) (§ 307(c)(1) "will not result in the veto of vital national projects or activities"); *see also* California v. Watt, 683 F.2d 1253, 1264-65 (9th Cir. 1982) (examining the structure of the CZMA and the CZMA's interaction with the Outer Continental Shelf Lands Act, another statute involving federal activities on the OCS, to conclude that § 307(c)(1) does not grant a state veto power over federal activities on the OCS), *revd. on other grounds sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984); Conservation Law Found. v. Watt, 560 F. Supp. 561, 576 (D. Mass.) ("Congress [did not] intend[ ] to give the states an absolute 'veto power' over federal action in the coastal zone."), *affd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); California v. Watt, 520 F. Supp. 1359, 1375 (C.D. Cal. 1981) ("No absolute veto power has been bestowed upon plaintiffs by § 307(c)(1)."), *modified*, 683 F.2d 1253 (9th Cir. 1982), *revd. sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

89. *See* California v. Watt, 683 F.2d at 1264.

90. *See, e.g., Conservation Law Found.*, 560 F. Supp. 561. The court stated:

> Though I reject the notion that Congress intended to give the states an absolute "veto power" over federal action in the coastal zone, I believe it is manifest from the fact of the statute that Congress did intend to cede some authority in matters of coastal development to the affected states in order to achieve cooperative and coordinated development of scarce natural resources.

560 F. Supp. at 576.

executive branch an override ability to reverse judgments that favor states to the detriment of the national interest.

Representative Panetta is the only individual who has pointed to the assignment of the burden of proof to the states as necessary to avoid a state veto. In *Conservation Law Foundation v. Watt,*[91] the Massachusetts District Court reached a contrary conclusion. The court did not find that placing the burden of proving consistency on the federal agency would give the states a veto power.[92]

The Ninth Circuit, in *California v. Watt,*[93] discussed the second way the CZMA avoids a state veto. The court determined that veto-power concerns mandated that the federal agency have the final authority to make a consistency determination.[94] In other words, a state disagreement with a federal consistency determination does not halt the federal activity because the federal activity may proceed over a state objection unless the state seeks mediation or sues to prevent the activity from progressing. By comparison, if the state *did* possess the ability to halt the federal activity by objecting to the consistency determination, the federal agency would have to seek administrative or judicial permission to proceed with the activity, a result that has not occurred in practice.[95] The veto concern thus implicates the question of who has to pursue mediation or judicial review, rather than who bears the burden of proof once the party has proceeded to court.

Representative Walter B. Jones, a cosponsor of the 1990 amendments to the CZMA, raised the final two ways in which a state veto may be avoided. He stated that section 307(c)(1):

> will not result in the veto of vital national projects or activities. This is true for two reasons. First, agency activities under section 307(c)(1) must be consistent "to the maximum extent practicable." Under existing Department of Commerce regulations this means that an agency must be fully consistent where that [a]gency has discretion; however, where the [a]gency is acting subject to a nondiscretionary statutory duty, full con-

91. 560 F. Supp. 561 (D. Mass.), *affd. sub nom.* Massachusetts v. Watts, 716 F.2d 946 (1st Cir. 1983).

92. 560 F. Supp. at 576. The role of the judge also mitigates the risk that placing the burden of proof on the federal agency might give the state a veto power. The state cannot be said to have the power to halt the federal activity unilaterally when a single federal judge can ensure that the project proceeds.

93. 683 F.2d 1253 (9th Cir. 1982), *revd. on other grounds sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

94. After noting that "[t]he Act is not explicit with respect to the location of final authority to determine whether the required consistency exists," the court proceeded to hold that the federal agency must possess final authority; otherwise the interests of the nation would play second fiddle to state interests. 683 F.2d at 1264. The Supreme Court declined to decide this issue upon appeal, noting that "[i]n view of our conclusion that a lease sale is not subject to § 307(c)(1)'s consistency review requirements, we need not decide who holds final authority to determine when sufficient consistency has been achieved." Secretary of the Interior v. California, 464 U.S. 312, 320 n.5 (1984).

95. *See infra* notes 102-03 and accompanying text.

> sistency is not required. Second, the bill provides for the President to exempt activities which he finds are in the paramount interest of the United States. . . . It will not be frequently used, but this exemption is an additional safety valve.[96]

Thus, Jones suggests two reasons why section 307(c)(1) does not allow a state veto, neither of which involves allocation of the burden of proof to the state. First, when other legal obligations are placed on the federal agency's operations, the state cannot insist on full consistency with the state CMP.[97] In this manner, the state's control, and thus de facto veto power, is limited. Second, section 307(c)(1)(B), added in the 1990 amendments to the CZMA, undermines state veto power.[98] This section provides a federal override for federally conducted activities. Upon written request from the Secretary of Commerce, the President may exempt inconsistent federal activities from compliance with the CMP if the activity is of paramount interest to the United States.[99] This provision prevents a state veto[100] because the state cannot unilaterally stop the federal activity through section 307(c)(1).

The different methods that allay the threat of a state veto leave the state with different levels of control over the federal agencies and over the state's coastal zone. At one end, allowing the agency to proceed with an activity over a state objection, unless the state seeks mediation or proves to a court that the activity is inconsistent, envisions limited state influence. At the other end, allowing the agency to proceed after a state objection only if the President overrides a judicial decision in the state's favor envisions substantial state influence.[101] To determine the appropriate level of control, and thus an appropriate method to avoid a state veto, one must have a better understanding of how much state control Congress intended the CZMA to give to the states.

As explained in section III.C.2, the CZMA's overarching policy is to give coastal states primary control of the coastal zone. Thus, the last two methods should reflect the appropriate level of state control and should provide ample protection from states that would exert unchecked authority over federal activities. Allocating the burden of proof to the state or granting to the federal agency the final authority

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96. 136 CONG. REC. E543 (daily ed. Mar. 6, 1990) (statement of Rep. Jones).

97. To be consistent to the maximum extent practicable with a state's CMP, the activity must be "fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations." 15 C.F.R. § 930.32 (1991).

98. 16 U.S.C. § 1456(c)(1)(B) (Supp. 1991).

99. 16 U.S.C. § 1456(c)(1)(B) (Supp. 1991).

100. 136 CONG. REC. H8101 (daily ed. Sept. 26, 1990) (statement of Rep. Tauzin); *see also* 136 CONG. REC. H8081 (daily ed. Sept. 26, 1990) (statement of Rep. Panetta) ("[T]he bill contains a new national security exemption which allows the President to override a State's objection.").

101. The CZMA would grant the states the most control, and a clear veto, if the federal agency had to go to court and carry the burden of proof to overturn a state objection to a federal consistency determination in order to proceed with the activity.

to make a consistency determination is unnecessary to avoid a state veto power. Nevertheless, because parties to consistency disputes have conceded,[102] and courts have agreed,[103] that federal agencies make the final prelitigation consistency determination, it is necessary to consider how the federal agency's final consistency authority affects the allocation of the burden of proof.

3. *The Final Prelitigation Determination of Consistency*

Placing the burden of proof on the agency to justify its decision would seem to contradict the mandate of the Administrative Procedure Act (APA).[104] When the state challenges a federal agency's consistency determination in a federal court, the court will likely consider what level of deference to give the agency decision. Because the CZMA provides no standard for judicial review, the APA governs agency actions under the CZMA. Pursuant to the APA, a court will generally defer to an agency decision clearly within the agency's statutory authority, particularly on a factual issue.[105]

The court for the District of Louisiana so held. In *Louisiana v. Lujan,*[106] the state sought a preliminary injunction against the Department of the Interior's plans to lease offshore oil and gas exploration and development rights. The state disagreed with the Department of the Interior's consistency determination and contended that this activity was inconsistent with the state CMP. The court determined that the plaintiffs could not show a likelihood of success on the merits because they could not prove that the federal agency's consistency determination was arbitrary or otherwise not in accordance with law.[107] The court confined its review to determining whether the agency had provided sufficient information to support its determination and thus rejected the state's contention that the federal agency should bear the

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102. *See, e.g.,* Brief of Respondent County of Humboldt et. al. at 19, Secretary of the Interior v. California, 464 U.S. 312 (1984) (No. 82-1326); Brief of Respondents Natural Resources Defense Council et. al. at 18, Secretary of the Interior v. California, 464 U.S. 312 (1984) (No. 82-1326).

103. *See* California v. Watt, 683 F.2d 1253, 1263-65 (9th Cir. 1982) (analyzing whether federal agency or state has final authority to make consistency determination), *revd. on other grounds sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984); Louisiana v. Lujan, 777 F. Supp. 486, 488-89 (E.D. La. 1991); Conservation Law Found. v. Watt, 560 F. Supp. 561, 576 (D. Mass.) (finding that agency properly fulfilled CZMA procedural requirements by filing consistency determination), *affd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

104. Pub. L. No. 89-554, 80 Stat. 392 (codified at 5 U.S.C. §§ 551-559, 701-706 (1988)).

105. 5 U.S.C. §§ 701-706 (1988) (judicial review); *see Conservation Law Found.,* 560 F. Supp. at 567; *cf.* National Wildlife Fedn. v. National Park Serv., 669 F. Supp. 384, 391 (D. Wyo. 1987). A court may not set aside an agency action unless the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (1988); *see also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-17 (1971) (discussing judicial review of agency action).

106. 777 F. Supp. 486 (E.D. La. 1991).

107. 777 F. Supp. at 488-89.

burden of proving consistency.[108]

Because the CZMA presents a unique situation calling for abandonment of standard deference to a federal agency consistency determination, this Note contends that the decision in *Louisiana v. Lujan* was poorly reasoned. The judiciary traditionally defers to an agency decision because Congress delegated authority to an agency to implement and enforce a particular statute and the agency has expertise in the particular field.[109] Under the CZMA, however, Congress did not grant any new authority to federal agencies. Instead, Congress mandated that federal agencies must act in a manner consistent with state CMPs.[110] Thus, the CZMA arguably restricts agency authority, rather than granting new authority. Moreover, Congress has indicated that the state agency overseeing the state CMP, not the federal agency, possesses the expertise in local coastal management.[111] Finally, because different federal agencies will need to conduct consistency determinations, courts may achieve uniform interpretation and application of a state's CMP only by deferring to the single state view regarding its coastal program. Because the traditional reasons justifying deference to federal agencies do not obtain, no deference should be given to the federal agency under the CZMA.[112] Indeed, the same reasons calling for no deference to federal agencies under the act suggest granting deference to the state agency overseeing the state CMP.[113]

In summary, the language, regulations, and legislative history of

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108. 777 F. Supp. at 489.

109. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 792-94 (3d ed. 1991).

110. *See supra* notes 28, 97 and accompanying text.

111. *See* William C. Banks & Kirk M. Lewis, *Federalism Disserved: The Drive for Deregulation*, 45 MD. L. REV. 141, 162 (1986) (citing S. REP. NO. 753, 92d Cong., 2d Sess. 2-6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4776-81); *see also infra* section III.C.2.a (discussing the policy of allowing state control of the coastal zone).

112. In another context, the Seventh Circuit faced the dilemma of having two agencies offering competing conclusions under their statutory authority. In Chicago Mercantile Exch. v. SEC, 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990), the court stated: "When the agency is the addressee of the statutory command, it takes the leading role in giving structure to the statute. . . . When two agencies *claim to be* the addressees, though, this allocation breaks down." 883 F.2d at 547 (emphasis added). In such a case, "a court could say that because the agencies disagree, neither is entitled to deference." 883 F.2d at 547.

113. Some courts facing two agencies offering competing findings or interpretations have determined which agency deserves deference by examining the statute delegating authority. In Martin v. Occupational Safety and Health Review Commn., 499 U.S. 144 (1991), the Supreme Court examined the regulatory structure of the Occupational Safety and Health Act to determine whether courts should defer to the opinion of the Secretary of Labor or the Occupational Safety and Health Review Commission regarding the meaning of OSHA. The Court inferred from the structure and history of the Act that, because the Secretary was "to develop the expertise relevant to assessing the effect of a particular regulatory interpretation," Congress had "intended to invest interpretive power" in the Secretary of Labor. 499 U.S. at 152-53. As this Note explains in section III.C.2.a, the CZMA intended to place the state, and thus the state agency, in a position of control over the coastal zone. Thus, under *Martin*, the court should defer to the state agency.

the CZMA do not allocate the burden of proof. In addition, the veto concern raised by legislators and courts interpreting the CZMA may suggest that the federal agency should possess final authority to make a consistency determination, but the veto concern does not mandate placing the burden of proof on the state because other mechanisms avoid a state veto power. Finally, placing the final authority to make a consistency determination with the federal agencies does not require — as the APA might suggest — that the courts defer to the federal agency's determination by placing the burden of proof on the states to show the determination was arbitrary or capricious.

Because these textual sources do not provide clear guidance for resolving the allocation question, this Note next addresses other factors courts utilize to allocate burdens of proof.

B. *Access to Evidence and Probabilities*

Neither the federal agency nor the state has a clear advantage in access to evidence necessary for adjudicating a consistency dispute. The federal agency initially has superior access to evidence because it possesses the information regarding its own project that the determination requires. When provided to the state, the consistency determination gives the state the germane information as well.[114] In addition, a federal activity affecting the coastal zone would likely require the federal agency to prepare a comprehensive environmental impact statement (EIS) under the National Environmental Policy Act.[115] An EIS, which would be available to the state, includes extensive information about environmental conditions in the affected area, thus further equalizing the access to knowledge of the federal activity.[116]

An example of a dispute illustrates why each party has roughly equivalent access to important information.[117] Assume the Department of Interior provides a consistency determination for an offshore oil tract leasing program. The consistency determination would contain "a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement."[118]

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114. *See supra* note 40 and accompanying text.

115. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370 (1988 & Supp. 1990)). Section 102 of NEPA requires agencies to consider environmental factors and consequences by requiring the preparation of an environmental impact statement whenever an agency proposes "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988).

116. One might argue, however, that the federal agencies have an incentive to omit damaging information from consistency determinations and EISs.

117. This example mirrors the factual setting of actual cases. *See* Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass.), *affd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981), *modified,* 683 F.2d 1253 (9th Cir. 1982), *revd. sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

118. 15 C.F.R. § 930.39(a) (1991).

Suppose the lease sale includes 100 tracts, 50 of which are "deep-sea tracts," for which the depth of the water exceeds 2000 feet. An oil rig in such a tract would require special drilling technology. Assume the state disagrees with the consistency determination, contending the activity is inconsistent with a provision of the state CMP that requires offshore oil exploration, development, and production to minimize impacts on the marine environment. In particular, the state contends that the Department of the Interior should abandon the deep-sea tracts because the necessary drilling technologies are unproven and impose an inordinate risk on important fishery resources. If the parties do not resolve the disagreement and the state seeks judicial relief, assessing the relative access to evidence would not assist the court in allocating the burden of proof. Each party would likely have equal access to pertinent information and expertise regarding the effectiveness of the drilling technology, information that presumably would be available in the market and not under the exclusive domain of either party. Because both parties have sophisticated knowledge of the relevant evidence, this factor sheds little light on the allocation decision arising under the consistency provision of the CZMA.

The factor that maintains that the burden of proof should be assigned to the party seeking to establish the improbable[119] also provides little guidance; parties and courts have had too little experience with consistency disputes to be able to establish whether consistency or inconsistency is the improbable contention. The types of disputes that arise with respect to the consistency determination occur infrequently.[120] Moreover, only one case has reached the merits to determine whether an activity was consistent with a state CMP.[121] Therefore, little data is available for judges to determine whether a contention is unusual.

In summary, neither the "access to evidence" nor "probability" tests help resolve the issue of allocating the burden of proof.

C. *CZMA Policy Review*

Because other factors fail to provide definitive guidance concerning the burden of proof allocation, courts should evaluate the policies un-

119. *See supra* notes 64-67 and accompanying text.

120. Cases addressing this provision include Secretary of the Interior v. California, 464 U.S. 312 (1984); Clark v. California, 464 U.S. 1304 (1983); Cross-Sound Ferry Serv., Inc. v. ICC, 934 F.2d 327 (D.C. Cir. 1991); Shanty Town Assocs. Ltd. Partnership v. EPA, 843 F.2d 782 (4th Cir. 1988); Friends of the Earth v. United States Navy, 841 F.2d 927 (9th Cir. 1988); New York v. United States Gen. Servs. Admin., 823 F. Supp. 82 (N.D.N.Y. 1993); Louisiana v. Lujan, 777 F. Supp. 486 (E.D. La. 1991); Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass.), *affd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

121. Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass), *affd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

derlying the CZMA to illuminate the allocation decision.[122] Two themes arise from an examination of the language and legislative history of the Act. First, the Act balances development and use of the coastal zone[123] against preservation concerns. Second, the CZMA balances federal and state control in managing the coastal zone. Both themes are critical to an understanding of the consistency provision and to allocating the burden of proof. This section analyzes each theme first by examining the original policy of the CZMA, the congressional reaffirmation of the original policy in the 1990 amendments, and judicial decisions construing the policy, and, second, by considering how each theme guides the allocation decision.

1. *Balancing Preservation and Development Interests*

a. Policy review: 1972 Act, 1990 Amendments, and judicial decisions. In the congressional findings of the 1972 Act, Congress noted that the fundamental need for the CZMA arises from the "national interest in the effective management, beneficial use, protection, and development of the coastal zone."[124] This statement indicates that the Act is foremost a balancing scheme; Congress sought to accommodate a number of competing concerns to ensure optimal use of the coastal zone resources. Examination of additional findings and legislative history, however, indicates that Congress intended the balance to favor protection.

During consideration of coastal zone legislation, Congress learned of the danger the growing population of the U.S. coast posed to this resource.[125] By the mid-1950s, development pressures on the coast had destroyed twenty-five percent of the nation's coastal wetlands.[126] Increasing recreational and commercial demands endangered biological organisms, and the deteriorating coastal water and wetlands quality threatened fish spawning grounds and nursery areas.[127] The Act's congressional findings addressed these concerns.[128]

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122. *See supra* note 74 and accompanying text.

123. This Note refers to these two factors simply as development.

124. 16 U.S.C. § 1451(a) (1990).

125. An estimated 106 million people — 53% of the U.S. population — lived within 50 miles of the coast in 1971. S. REP. NO. 753, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4777. Estimates predicted that this population could reach 80% of the U.S. population by the year 2000. *Id.* More recent estimates indicate that the coastal population in 1990 remained between 45 and 50% of the U.S. population and that this population will increase 15% by the year 2010. 1 U.S. DEPT. COM. BIENNIAL REP. TO THE CONGRESS ON COASTAL ZONE MGMT. 1 (1992); COASTAL OCEAN POLICY ROUNDTABLE, 1992, THE 1992 COASTAL STATUS REPORT: A PILOT STUDY OF THE U.S. COASTAL ZONE AND ITS RESOURCES 6 (1992) [hereinafter COASTAL OCEAN POLICY ROUNDTABLE].

126. S. REP. NO. 753, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N 4776, 4777.

127. *Id.*

128. In pertinent part, the congressional findings stated:

(c) The increasing and competing demands upon the lands and waters of our coastal zone

In addition to the political pressures these physical realities created, a large and increasingly organized preservationist constituency influenced passage of the Act. During the 1960s, membership in the environmental movement grew rapidly.[129] As one commentator noted, "the cumulative impact of scientific and poetic insights . . . made ecology an everyday word, helped to elevate environmental protection to political respectability, and contributed to the eventual adoption of the Coastal Zone Management Act."[130]

On the other hand, prodevelopment interests also exercised leverage over the passage of the Act. The influential "Stratton Report"[131] favored resource development, stating:

> the key to more effective use of our coastland is the introduction of a management system permitting conscious and informed *choices among development alternatives,* providing for proper planning, and encouraging recognition of the long-term importance of maintaining the quality of this productive region in order to ensure both its enjoyment and the *sound utilization of its resources.*[132]

The CZMA addressed development concerns in several ways. First, Congress weakened the mandate of the Act by making state participation optional.[133] Second, Congress assigned the program to the National Oceanic and Atmospheric Administration under the oversight of the business-oriented Department of Commerce.[134] Third, the Act did not set substantive environmental performance standards.[135]

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occasioned by population growth and economic development . . . have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.
(d) The habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.
(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.

. . .

(g) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values.

16 U.S.C. § 1451 (1988 & Supp. II 1990).

129. *See* PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 111-48 (1993); Fitzgerald, *supra* note 31, at 4-5.

130. Zigurds L. Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972,* 1 COASTAL ZONE MGMT. J. 235, 241 (1974).

131. COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA (1969) [hereinafter STRATTON REPORT]. Section 5 of the Marine Resources and Engineering Development Act of 1966, Pub. L. No. 89-454, 80 Stat. 203 (1966), established this commission, known as the "Stratton Commission." The report the commission produced "perhaps most directly contributed to the conception and passage of the Coastal Zone Management Act of 1972." Zile, *supra* note 130, at 256.

132. STRATTON REPORT, *supra* note 131, at 49 (emphasis added).

133. *See, e.g.,* 16 U.S.C. §§ 1451(i), 1452(2), 1454(a), 1455(a) (1988); 136 CONG. REC. E542 (daily ed. March 6, 1990) (statement of Rep. Jones) (emphasizing voluntary nature of program).

134. H. REP. NO. 1544, 92d Cong., 2d Sess. 12-13 (1972); 15 C.F.R. §§ 923, 930 (1991); *see also* Zile, *supra* note 130, at 271, 273.

135. *See, e.g.,* Save Our Dunes v. Pegues, 642 F. Supp. 393, 401 (M.D. Ala. 1985) noting the

Instead of emphasizing such performance requirements, Congress designed the Act primarily to create a management scheme to control various coastal zone uses.[136] Finally, Congress required states seeking approval of a CMP to show that they had considered the national interest "in the siting of facilities . . . necessary to meet requirements which are other than local in nature."[137]

Although prodevelopment interests exerted some influence, Congress did not lose sight of the fact that ill-managed development and recreation had led to unimpeded degradation of the coastal zone.[138] The CZMA sought to change this status quo of unchecked harmful coastal activity by emphasizing effective state management of coastal activities. Congress also specifically called for the inclusion of procedures for designating specific areas "for the purpose of preserving or restoring them for their conservation . . . ecological . . . or esthetic values."[139]

In the 1990 Amendments, Congress endorsed the original preservation policy of the Act: the "CZMA should continue to be a balancing statute which recognizes alternative uses of coastal zone resources, but at the same time . . . all uses should be sensitive to the *priority* for maintaining natural systems in the coastal zone."[140] The amended congressional findings underscored the coastal zone's fragile nature and susceptibility to human influence.[141] Additionally, Congress added a section to the CZMA's policy declaration to reflect the environmental-protection orientation of the legislation. The new section expressly declares that state CMPs must incorporate provisions to im-

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"Act is more procedural in nature, requiring that states make 'conscious and informal choices among various alternatives' through the development of coastal zone management programs" (quoting S. REP. No. 753, 92d Cong., 2d Sess. 2, 6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4781)), *revd. in part sub nom.* Save Our Dunes v. Alabama Dept. of Envtl. Mgmt., 834 F.2d 984 (11th Cir. 1987). Although the CZMA allows each state to tailor its own CMP to meet particular state needs, the Act sets some minimum content standards including "identification of the boundaries of the coastal zone subject to the [CMP]," 16 U.S.C. § 1454(b)(1) (1988); definition of the permissible land and water uses within the coastal zone, 16 U.S.C. § 1454(b)(2) (1988); designation of the ways the state will regulate different uses of the coastal zone, 16 U.S.C. § 1454(b)(4) (1988); and a "description of the organizational structure proposed to implement [the CMP]." 16 U.S.C. § 1454(b)(6) (1988).

136. Nevertheless, states may develop substantive policies in their management schemes that are adverse to development interests. *See infra* notes 155-60 and accompanying text.

137. 16 U.S.C. § 1455(c)(8) (1988); *see infra* notes 162-63 and accompanying text. "Siting of facilities" presumably would be development oriented.

138. *See* Randele Kanouse, *Achieving Federalism in the Regulation of Coastal Energy Facility Siting*, 8 ECOLOGY L.Q. 533, 568 (1980); *supra* notes 125-28 and accompanying text.

139. 16 U.S.C. § 1455(d)(9) (Supp. IV 1992). For an explanation of approval requirements for Coastal Management Plans, of which this condition is a part, see also *infra* notes 161-62.

140. 136 CONG. REC. H8073 (daily ed. Sept. 26, 1990) (statement of Rep. Jones) (emphasis added).

141. Section 1451(d) states: "[t]he habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." 16 U.S.C. § 1451(d) (Supp. IV 1992).

prove, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters.[142]

The few courts that have interpreted the CZMA have generally emphasized the preservation goals of the Act. In *American Petroleum Institute v. Knecht,*[143] the court for the Central District of California denied the plaintiff oil trade association's suit to enjoin the grant of "final approval" of the California Coastal Zone Management Program. The court stated:

> The CZMA was enacted primarily with a view to encouraging the coastal states to plan for the management, development, preservation, and restoration of their coastal zones by establishing rational processes by which to regulate uses therein. Although sensitive to balancing competing interests, it was first and foremost a statute directed to and solicitous of environmental concerns.[144]

In *California v. Watt,*[145] the District Court for the Central District of California enjoined the Department of Interior from conducting lease sales of OCS tracts off the California coast. The court supported its holding by referring to the purposes of the Act: "Special emphasis was placed on the objective of preserving the natural resources" within the coastal zone.[146] On appeal, the Ninth Circuit indicated that the consistency provision should be broadly construed to comply with the purposes of the Act, including "promot[ing] the preservation of natural resources in the coastal zone."[147]

The CZMA plays primarily a protection role for the U.S. coastal

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142. 16 U.S.C. § 1452(2)(C) (Supp. IV 1992). In addition to general statements emphasizing the increasing need for protection of the coastal zone, the congressional conference concluded that specific coastal environmental threats included the insidious problems of nonpoint pollution and greenhouse warming that could lead to frequent coastal flooding. Coastal Zone Reauthorization Amendments of 1990, Pub. L. No. 101-508, tit. VI, subtit. c, § 6202(a), 104 Stat. 1388-299 to 1388-319 (1990); 16 U.S.C. § 1451(k) (Supp. IV 1992) ("Land uses in the coastal zone, and the uses of adjacent lands which drain into the coastal zone, may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved."); 16 U.S.C. § 1455(b) (Supp. IV 1992) (adopting a provision *requiring* states to develop programs to protect coastal waters from nonpoint pollution from adjacent coastal land uses); 16 U.S.C. § 1451(l) (Supp. 1991) ("Because global warming may result in a substantial sea level rise with serious adverse effects in the coastal zone, coastal states must anticipate and plan for such an occurrence.").

143. 456 F. Supp. 889 (C.D. Cal. 1978), *affd.,* 609 F.2d 1306 (9th Cir. 1979).

144. 456 F. Supp. at 919.

145. 520 F. Supp. 1359 (C.D. Cal. 1981), *modified,* 683 F.2d 1253 (9th Cir. 1982), *revd. sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

146. 520 F. Supp. at 1369.

147. California v. Watt, 683 F.2d 1253, 1260 (9th Cir. 1982), *revd. on other grounds sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984); *see also* Cross-Sound Ferry Servs., Inc. v. ICC, 934 F.2d 327, 334 (D.C. Cir. 1991) ("The [CZMA] seeks to protect the land and water resources of the nation's coastal zone . . . ."); Shanty Town Assocs. Ltd. Partnership v. EPA, 843 F.2d 782, 793 (4th Cir. 1988) (the CZMA was "designed to encourage states to develop land-use planning programs that will preserve, protect, and restore the environment of their coastal zones").

resources. Courts should recognize this protection-oriented balance in making burden of proof allocation decisions.

b. Implications for the allocation decision. Effectuating Congress's preservation goal requires federal agencies to bear the burden of proof in any disputes arising over a section 307(c)(1) consistency determination.[148] An examination of how courts allocated the risk of nonpersuasion during the unabashed prodevelopment period preceding the enactment of the CZMA, and how the courts modified burden allocation after the beginning of the environmental era, underscores this conclusion.[149] When the courts interpreted law to sanction industrial progress at the expense of resource protection, a plaintiff seeking to enjoin or limit a development activity, typically on a nuisance theory, had to overcome the prodevelopment status quo to succeed.[150] Accordingly, the plaintiff would bear the burden of proof. Prior to the "environmental era" courts and litigants accepted this situation.

In the 1960s and 1970s, increased environmental consciousness led Congress's preferences away from seeking unimpeded development and toward recognizing the dangers of pollution and depletion of natural resources.[151] The status quo became one in which development interests had to account for the adverse environmental effects of their activities; the new status quo valued guardianship over the nation's natural resources.[152] Furthermore, statutes suggested that those pursuing *unchecked* progress advanced a disfavored proposition.[153] Thus, parties seeking to conduct developmental activities had to show that

148. This contention assumes that federal agencies conduct development-oriented activities. Disputes have not arisen when the state, under the auspices of the CZMA, calls into question protection-oriented federal activities. If such a dispute were to arise, the courts would have to balance the proprotection aspects of the Act with the state-control aspects. *See infra* section III.C.2. Congress apparently intended the CZMA primarily as a proprotection Act that grants states control over the coastal zone, rather than a state-control statute that happens to take protection concerns into account. The legislative history indicates that Congress grappled with a number of options to protect coastal resources, including a federal land-use act, but finally settled on vesting primary responsibility with the states. *See* Eichenberg & Archer, *supra* note 31; *infra* notes 156-60 and accompanying text. Therefore, a state should bear the burden of proving that a proprotection federal activity is inconsistent with the state CMP.

149. *Cf.* Martin H. Belsky, *Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof*, 12 ECOLOGY L.Q. 1 (1984); Krier, *supra* note 26, at 107. Belsky discusses three eras of environmental law with different allocations of burdens of proof: in the years preceding the 1960s, the burden of proof rested with those who sought to inhibit development; in the 1960s and 1970s an environmental era developed resulting in several statutes that shifted the burden to those utilizing or polluting natural resources; and in the 1980s there was a shift back to prodevelopment interests and a resulting movement of the burden of proof onto those seeking protection of natural resources. Belsky, *supra*.

150. *See* Belsky, *supra* note 149, at 5-12; Krier, *supra* note 26, at 107.

151. *See* SHABECOFF, *supra* note 129, at 129; Belsky, *supra* note 149, at 12-36.

152. *See* SHABECOFF, *supra* note 129, at 110, 129-34.

153. *Cf.* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4370a (1982)); Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

they had accounted for environmental effects.[154]

The CZMA extended this policy to the management of coastal resources; the 1990 amendments to the CZMA reaffirmed this policy. Courts should acknowledge Congress's perception of the status quo as one in which states shall protect the coastal zone, and courts should recognize that those who seek to develop the coastal zone pursue an activity disfavored by the CZMA's policy. Consequently, because the federal agency seeking to exploit undeveloped coastal resources counters the status quo and opposes the CZMA's primary preservation goal, it should bear the burden of proof.

2. *Balancing State and Federal Control*

a. Policy review: 1972 Act, 1990 Amendments, and judicial decisions. Although Congress propounded an environmental protection goal in the 1972 Act, it intended to give primary responsibility to the states to make the specific decisions regarding protection.[155] Congress determined that state control, rather than a national regulatory scheme, would best effectuate the purposes of the Act. Because of the national interest in coastal management, however, Congress determined that some federal input was necessary.

Prior to the Act, national, state, and local political bodies exercised varying degrees of control over the coastal zone with considerable dominion lying with local jurisdictions.[156] Congress found this joint exercise of authority "too diffuse in focus, neglected in importance and inadequate in the regulatory authority needed to do the job."[157] The Act sought to remedy these inadequacies by "adopt[ing] the States as the *focal point* for developing comprehensive plans and implementing management programs for the coastal zone."[158] Congress viewed the

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154. *See, e.g.*, Oklahoma v. EPA, 908 F.2d 595, 629 n.49 (10th Cir. 1990).

155. 16 U.S.C. § 1452(2) states the policy objective as:

> to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development . . . .

See also S. REP. No. 753, 92d Cong., 2d Sess. 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4776 ("The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.").

156. Congress found "the coastal zone is a politically complex area, involving local, state, regional, national, and international political interests. At present, local governments do possess considerable authority in the coastal zone. However, frequently their jurisdiction does not extend far enough to deal fully and effectively with the . . . problems of that zone." S. REP. No. 753, 92 Cong., 2d Sess. 5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4779.

157. S. REP. No. 753, 92d Cong., 2d Sess. 6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4781.

158. S. REP. No. 753, 92d Cong., 2d Sess. 5-6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4780 (emphasis added). The report also noted: "It is believed that the States do have the re-

states as the appropriate midpoint between federal and local control[159] because national interests could be accommodated while states could attend to the local nature of coastal decisions.[160]

Although the Act leaves to the state the development of a CMP, the approval stage of a state's CMP takes into account federal interests. The state must show the Secretary of Commerce that it has consulted federal agencies fully in developing the plan,[161] and that the

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sources, administrative machinery enforcement powers, and constitutional authority on which to build a sound coastal zone management program." *Id.*

In the mid-1960s, a debate raged over the proper extent of national control over the management of the coastal zone. *See* Zile, *supra* note 130, at 241-67. Early drafts of the Estuary Protection Act of 1968, Pub. L. No. 90-454, 82 Stat. 625 (codified at 16 U.S.C. §§ 1221-1226 (1988)), gave substantial powers to the federal government to protect the coastal zone. *See* H.R. 11236, 89th Cong., 1st Sess. (1965); H.R. 15770, 89th Cong., 2d Sess. (1966); H.R. 13447, 89th Cong., 2d Sess. (1966); H.R. 25, 90th Cong., 1st Sess. (1967). Versions of the bill favoring extensive federal involvement met strong opposition from states asserting federalism concerns. *See* Zile, *supra* note 130, at 248-49. By 1970, Congress displayed "a newly proclaimed faith in the good intentions of the states" arising from the "perception of politically feasible congressional action"; Congress could not circumvent or ignore state concerns regarding control of their coastal resources. *Id.* at 261. In addition, "[t]he fact that . . . federal studies . . . had stressed state sovereignty, undoubtedly influenced the legislators." *Id.*; *see also* SECRETARY OF THE INTERIOR, THE NATIONAL ESTUARINE POLLUTION STUDY, S. DOC. NO. 58, 91st Cong., 2d Sess. (1970) (emphasizing a state role in management of the coastal zone with federal assistance provided to the states to develop and implement the states' management programs); 1 BUREAU OF SPORT FISHERIES & WILDLIFE AND BUREAU OF COMMERCIAL FISHERIES, U.S. DEPT. OF THE INTERIOR, NATIONAL ESTUARY STUDY 76 (1970) (finding that "the Coastal and Great Lakes States are the keys to successful estuary preservation and restoration"); STRATTON REPORT, *supra* note 131, at 56 (indicating that the states should be "the focus of responsibility and action" in a coastal management system).

159. Local authorities were denied exclusive control because the local governmental bodies were too beholden to economic influences. *See* S. REP. NO. 753, 92d Cong., 2d Sess. 4 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4779-80.

160. The application of states' CMPs on a case-by-case basis "provides a reasonable framework for decision making, given the breadth of the geographic area covered by state coastal programs and the complexity and number of factors that need to be taken into consideration." Robert W. Knecht, *Coastal Zone Management: The First Five Years and Beyond*, 6 COASTAL ZONE MGMT. J. 259, 265 (1979). "The states were selected as the 'key' participants . . . because of their 'considerable constitutional authority' over land and water resources and uses." Jack Archer & Joan Bondareff, *Implementation of the Federal Consistency Doctrine — Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115, 117 (1988).

161. The Act states:

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that: (1) The state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this chapter. . . .

16 U.S.C. § 1455(c) (1988), *amended by* 16 U.S.C. § 1455(d) (Supp. IV 1992). In addition, "[t]he Secretary shall not approve the management program . . . unless the views of Federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b) (1988); *see also* H.R. REP. NO. 1049, 92d Cong., 2d Sess. 18 (1972), *reprinted in* SENATE COMM. ON COMMERCE, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, at 321 (Comm. Print 1976) ("[I]f the program as developed is to be approved and thereby enable the State to receive funding assistance under this title, the State must take into account and must accommodate its program to the specific requirements of various Federal laws which are applicable to its coastal zone.").

CMP considers the national interest in siting energy facilities on the coast.[162] In addition, after approval of a CMP, the Secretary of Commerce may review the CMP and the performance of the state.[163] If the state does not adhere to the approved program, the Secretary may terminate financial assistance granted to the state under section 306 of the CZMA.[164] Aside from this limited federal control, the state is free to regulate its coastal areas as it wishes.

In the 1990 Amendments, Congress reaffirmed the original policy of the Act to vest control of the coastal zone with the states. Congress emphasized that the increasing stress placed on the coastal zone was "creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters."[165] Although Congress indicated it favored protection of the coastal zone over development of this resource,[166] it did not attempt directly to resolve the "conflicts" within the CZMA. Rather, Congress entrusted to the coastal states the role of resolving specific conflicts due to their proximity to and economic reliance upon the coastal zone.[167]

Additionally, the adoption of new provisions in the 1990 Amendments to assist and guide states in conducting effective management programs supports the conclusion that Congress intended coastal states to play the primary role in coastal zone management. The amendments provide funds for administration of management plans,[168] grant additional CMP development funds to promote state participation,[169] and provide "Coastal Zone Enhancement Grants" to improve states' CMPs in areas of national interest.[170]

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162. 16 U.S.C. § 1455(d)(8) (1988).

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

H.R. REP. NO. 1049, *supra* note 161, at 18.

163. 16 U.S.C. § 1458 (Supp. II 1990).

164. 16 U.S.C. §§ 1455, 1458 (Supp. II 1990).

165. 16 U.S.C. § 1451(f) (Supp. IV 1992).

166. *See supra* notes 140-42 and accompanying text.

167. The Act states:

> Because of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by development of state ocean resource plans as part of their federally approved coastal zone management programs.

16 U.S.C. § 1451(m) (Supp. IV 1992).

168. 16 U.S.C. § 1455(a) (Supp. IV 1992).

169. 16 U.S.C. § 1454 (Supp. IV 1992).

170. 16 U.S.C. § 1456(b) (Supp. IV 1992). The areas of national interest included protecting and managing coastal wetlands, managing natural hazards such as sea level rise, improving public access to the coast, assessing the impacts of coastal growth and development, and siting of coastal energy facilities in an environmentally sound manner. 16 U.S.C. § 1456(b) (Supp. IV 1992).

The amended consistency provision also establishes Congress's intent to vest control over the coastal zone in the states. The Supreme Court in *Secretary of the Interior v. California,*[171] by removing a large class of federal activities from consistency review, restricted states' ability vis-à-vis federal activities to protect and manage the coastal zone.[172] Congress responded to this restriction by indicating clearly that federal activities affecting the coastal zone are subject to the requirements of state CMPs. As stated in the conference report accompanying the new legislation, the provision

> amends the "federal consistency" provisions to overturn the Supreme Court's 1984 decision in *Secretary of the Interior v. California.* This would clarify that all federal agency activities, whether in or outside of the coastal zone, are subject to the consistency requirements of section 307(c)(1) of the CZMA if they affect natural resources, land uses, or water uses in the coastal zone.[173]

Thus, a federal agency would no longer easily subvert a state's control over the coastal zone by claiming that the federal activity fell outside the purview of the consistency provision.

Statements by supporters of the House bill further demonstrate that the new consistency provision served to reassert the states' key position under the Act. As stated by Representative Hertel, cosponsor of the House bill, "any Federal agency activity in the coastal zone is subject to consistency review, as long as that activity can conceivably have an effect on the coastal zone. This includes OCS lease sales and any other Federal activity that may have an effect on the coastal zone."[174] This clarifies the "congressional intent regarding State review of Federal actions in coastal waters."[175] Moreover, Representative Studds, a ranking member of the Committee on Merchant Marine and Fisheries that sponsored the bill, stated that the amended consistency provision

> sweeps aside a misguided attempt by this administration and the last to shackle the ability of States to protect their coastlines from Federal agencies that may — or may not — care about how their activities affect State coastal zones. . . . [T]he issue boils down to a very simple proposition: That Federal agencies should be required to tailor their activities to mesh as much as possible with State efforts to protect the coast.[176]

This statement further suggests that Congress decided to place power over the coastal resources into the hands of the states because of a sense that federal agencies do not take into consideration the effects—

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171. 464 U.S. 312 (1984); *see supra* notes 30-34 and accompanying text.

172. Eichenberg & Archer, *supra* note 31, at 67; Fitzgerald, *supra* note 31, at 18.

173. OMNIBUS BUDGET RECONCILIATION ACT OF 1990, H.R. CONF. REP. NO. 5835, 101st Cong., 2d. Sess. 968 (1990), *reprinted in* 136 CONG. REC. H12694 (daily ed. Oct. 26, 1990).

174. 136 CONG. REC. H8081 (daily ed. Sept. 26, 1990) (statement of Rep. Hertel).

175. *Id.*

176. 136 CONG. REC. at H8083 (daily ed. Sept. 26, 1990) (statement by Rep. Studds).

that is, the costs—borne by coastal states when development projects affect coastal areas. Indeed, as Studds suggests, although the federal agencies may understand the benefits of the activities from a national perspective, they are apt to ignore or underestimate the local costs. Requiring the federal agencies to consider state CMPs through the consistency provisions forces agencies to consider local costs.

Courts also have recognized the Act's focus on state control over coastal areas. In *American Petroleum Institute v. Knecht,*[177] the District Court for the Central District of California explained that "the primary focus of the legislation [is] the need for a rational planning process to enable *the state* . . . to be able to make 'hard choices.' "[178] The court recognized that Congress considered the states best suited to make the difficult balancing decisions between developing and protecting the coast.

In *Cross-Sound Ferry Service, Inc. v. I.C.C.,*[179] the Circuit Court for the District of Columbia stated that Congress sought to protect the nation's coastal zone "through a cooperative governmental effort in which states are given primary responsibility for developing coastal resource management programs."[180] Similarly, in *California v. Watt,*[181] the Ninth Circuit noted that each coastal state has "[primary] authority over the lands and waters in [its] coastal zone . . . to be exercised 'in cooperation with Federal and local governments and other vitally affected interests.' "[182]

The CZMA gives states the primary role in managing the coastal

177. 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd.,* 609 F.2d 1306 (9th Cir. 1979).

178. 456 F. Supp. at 919 (emphasis added).

179. 934 F.2d 327 (D.C. Cir. 1991).

180. 934 F.2d at 334.

181. 683 F.2d 1253 (9th Cir. 1982), *revd. sub nom.* Secretary of the Interior v. Watt, 464 U.S. 312 (1984).

182. 683 F.2d at 1260 (quoting 16 U.S.C. § 1451(i)); *see also* California v. Watt, 520 F. Supp. 1359, 1369 (C.D. Cal. 1981) ("[P]rimary authority in the management scheme is to be bestowed upon those coastal states which develop and implement comprehensive management programs . . . ."), *modified,* 683 F.2d 1253 (9th Cir. 1982), *revd. sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984). The district court in *Watt* maintained that the consistency provision provided the foremost incentive for states to adopt coastal management programs. A quid pro quo was intended in the CZMA: "the state agencies are to participate actively in designing the state management program, and, in return, the federal agencies 'shall conduct' their activities 'in a manner which is, to the maximum extent possible, consistent' with the state's program." 520 F. Supp. at 1370 (emphasis omitted) (quoting 16 U.S.C. § 1456(c)). The federal interest is protected through federal agencies' power to influence in the approval stage the policy choices that become part of a CMP. 520 F. Supp. at 1369. Once the federal government has exercised this power, however, control over the coastal zone, via the consistency requirements, passes to the states. *See* California v. Watt, 683 F.2d at 1260; *see also* California v. Mack, 693 F. Supp. 821, 826 (N.D. Cal. 1988) (stating that "NOAA's regulations implementing the CZMA reflect the sense that the states shall have primary control over their programs"); Save Our Dunes v. Pegues, 642 F. Supp. 393, 401 (M.D. Ala. 1985) (finding that the "CZMA's 'intent . . . is to enhance state authority,' not 'diminish' it through federal regulation and control" (quoting S. REP. No. 753, 92d Cong., 2d Sess. 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4776)).

zone. Courts should recognize this state-control balance in making burden of proof allocation decisions.

b. Implications for the allocation decision. To further Congress's policy of vesting control over the coastal zone with the states, federal agencies should bear the burden of proof in consistency disputes. This section first explains that this solution would accord appropriate respect to the value judgments the CZMA requires states to make. It then demonstrates that the solution would not hinder federal interests in the coastal zone because such interests are protected during the approval stage of states' CMPs, and, in certain instances, through a presidential override of state interests.

Congress supported the idea of protecting the coastal zone but placed the specific case-by-case management of development versus protection conflicts in the hands of the state governments.[183] The states are to manage the coastal zone to protect their resources *and* to allow for development.[184] Obviously these demands on the coastal zone might conflict,[185] thus requiring the states to decide between the competing merits of protecting or exploiting the coastal zone. But, as long as state management plans meet minimum standards for approval,[186] the states have significant discretion to balance the conflicting claims on the coast.

Under the CZMA scheme, states measure the costs and benefits of coastal protection against the costs and benefits of activities that threaten the coast.[187] States have discretion to decide how much their citizens value preserving pristine coastal areas for future generations, confining residential development to areas removed from the beach, or mandating consideration of alternative energy sources in lieu of offshore oil drilling in certain tracts. The states may also determine costs incurred in protecting the coast, such as the costs of forgoing economic development. Because it is difficult to quantify many costs and benefits in monetary terms,[188] the state may make conceptual value

183. Certainly, Congress weighted the scale it gave to the states—that is, the CMP approval guidelines—in favor of consideration of protection of the coastal resource. Thus, Congress ensured that its own interest in protection was considered. 16 U.S.C. §§ 1455(d)(9)-(11) (1990).

184. *See supra* note 124 and accompanying text.

185. *See supra* notes 124-39 and accompanying text.

186. *See* 16 U.S.C. § 1455(d) (1990); *supra* notes 135, 161.

187. One may view Congress's mandate to the states to formulate coastal plans in a slightly different way. Congress enacted coastal zone legislation because of the risks posed by unimpeded development, yet Congress did not assess the risks involved. Instead, Congress may have decided that states were better able to make judgments regarding the relevant risks along their coastal zones. If a state perceives a greater risk from nondevelopment than might the federal government, then the state would incorporate this judgment into a more lenient CMP. If the risk to the environment appears as a greater threat than the risks of nondevelopment, then the state would adopt a more stringent CMP.

188. EDWARD M. GRAMLICH, A GUIDE TO BENEFIT-COST ANALYSIS 4 (1990).

judgments. For instance, a state may find it difficult to quantify the local costs of accepting the risk of an oil spill from offshore development. Thus, the state may determine simply that its citizens place a high value on minimizing the risk of such oil spills but also value the benefits of energy development. To reconcile these competing values, the state may place certain risk-minimizing restrictions on offshore oil production to allow safer energy development.[189]

Different states may strike different balances between protection and development when they incorporate their value judgments into CMPs.[190] Congress both expects and desires this result; one purpose of the CZMA is to allow the cost-benefit analyses to reflect the difference in circumstances between the coastal states.[191] Once states incorporate these diverse judgments into CMPs, the consistency provisions ensure that the federal government respects them.

The consistency requirement forces federal agencies to consider costs federal activities impose on states, as recognized by state CMPs.[192] States largely, if not exclusively, bear the costs of certain federal government activities affecting the coastal zone.[193] States identify these costs in the process of formulating and seeking approval of CMPs.[194] In contrast, the nation often receives a larger portion of the benefits from the exploitation of the coastal zone, especially with respect to energy production that benefits the nation by lessening dependence on foreign sources.[195] In such cases, federal agencies will tend

189. *See* Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass.), *aff'd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

190. Kanouse, *supra* note 138, at 560-61; Kenneth W. Swenson, Note, *A Stitch in Time: The Continental Shelf, Environmental Ethnics, and Federalism*, 60 S. CAL L. REV. 851, 864 (1987).

191. Congress did not ignore interests that extended beyond the confines of a particular state. The Act takes national interests into account when the state's plan is developed and then approved. If certain conditions are not met, such as allowing federal agency input, 16 U.S.C. § 1455(d)(1) (1990), the state plan will not be approved. Because an approved state plan, by definition, does take national interests into account, this strengthens the argument that deference should be afforded to the state's judgment concerning the expected benefits of protecting the coast, or the costs of allowing development.

192. *See infra* note 196. In other words, the CZMA accounts for externalities by allowing state governments to exert some control over the federal government. This trade-off is similar to the federal government's interfering with the free market in order to account for externalities. *See generally* GRAMLICH, *supra* note 188, at 18.

193. In some instances, of course, the nation bears the cost of losing valuable coastal resources. However, coastal states disproportionately bear the cost of activities affecting the coastal zone. *See* COASTAL OCEAN POLICY ROUNDTABLE, *supra* note 125, at 53 (discussing environmental costs of oil and gas exploration); Fitzgerald, *supra* note 31, at 1-2, 30, 34-35, 39, 41; Richard Grosso, *Federal Offshore Leasing: States' Concerns Fall on Deaf Ears*, 2 J. LAND USE & ENVTL. L. 249, 249, 280 (1986); Daniel S. Miller, Comment, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401, 414 (1984); *supra* note 176 and accompanying text.

194. Even though the states may not in reality be the best cost identifiers, Congress nevertheless gave them the opportunity to make that value judgment — to weigh how the citizenry perceives the importance of coastal zone protection. Kanouse, *supra* note 138, at 560-61.

195. In addition to decreasing dependence on foreign oil and gas supplies, the federal government receives a direct benefit from leasing OCS tracts. Between 1971 and 1990, the U.S. Treas-

to favor national benefits to the detriment of local interests.

Because state CMPs have encoded the states' consideration of development costs, courts should not force further justification of this assessment. Rather, courts should require the federal agency to show that the benefits of the activity in question outweigh the costs as expressed in the CMP.[196] If a federal agency contends that its activities

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ury received over $89.3 billion from offshore leasing. COASTAL OCEAN POLICY ROUNDTABLE, *supra* note 125, at 52; *see also* Swenson, *supra* note 190, at 864.

196. State value judgments and perceptions of cost determine the types of restrictions on coastal activities a CMP will impose. For example, Florida's CMP—a compilation of state statutes and rules that existed before the implementation of the state's CMP, FLA. STAT. ch. 380.21(2) (1987)—reveals the state's concern over costs resulting from federal activity harming sensitive coastal and marine environments and recreation resources. The CMP requires federal agencies to consider effects on the many reefs and other coastal and marine environments that are considered sensitive environmental areas. Telephone Interview with Jasmin Raffington, Florida Federal Consistency Coordinator (Sept. 23, 1993); *see also* FLA. STAT. ch. 380.05 (1987) (defining the process for designating areas of critical state concern). Most Florida coastal areas that could be used for federal activities, such as OCS oil and gas leasing, are in close proximity to such sensitive areas, and therefore the federal agency must take special precautions to ensure consistency with the provisions protecting these resources. Telephone Interview with Jasmin Raffington, *supra*. In addition, because of the many submerged historic shipwrecks off the Florida coast, federal agencies must show consistency with historic preservation provisions. *See* FLA. STAT. ch. 267 (1992). Florida's CMP also takes into account such issues as recreation and coastal pollution. *See, e.g.*, FLA. STAT. chs. 258-259, 375-376, 403 (1992). For an examination of the different issues Florida has raised in consistency disputes over federal OCS leasing, see MALCOLM M. SIMMONS & GEORGE A. COSTELLO, CONSISTENCY REVIEW OF OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALES: SELECTED CASE STUDIES, 1982-1984, at 43-44, 48-50 (Congressional Research Service No. 85-960 ENR, 1985). *See generally* Daniel W. O'Connell, *Florida's Struggle for Approval Under the Coastal Zone Management Act*, 25 NAT. RESOURCES J. 61 (1985) (discussing Florida's difficulty in developing a CMP).

The primary concern Oregon's CMP addresses is habitat preservation. Telephone Interview with Emily S. Toby, Coastal Specialist, Oregon Department of Land Conservation and Development (Sept. 23, 1993). Under Oregon's CMP, federal agencies conducting activities must consider Oregon's Statewide Planning Goals, approved local government plans, and other state statutory authorities. OREGON COASTAL MANAGEMENT PROGRAM 2 (undated, available from the Oregon Department of Land Conservation and Development). The federal activity receiving the most attention in Oregon—OCS leasing activity is nonexistent off Oregon's coast—is the Bureau of Land Management's plans, which must be consistent with, among other Oregon enforceable policies, habitat preservation goals. Telephone Interview with Emily S. Tody, *supra*. *See generally* OREGON COASTAL MANAGEMENT PROGRAM, *supra*, at 31-33; OREGON LAND CONSERVATION & DEV. COMMN., OREGON'S STATEWIDE PLANNING GOALS, Goals 5, 16-17, 19 (1993). In addition to habitat preservation, which implicitly addresses the cost of harming salmon and other species, Oregon's CMP recognizes that not protecting the coast threatens the state's increasingly important tourism industry. *See* OREGON COASTAL MANAGEMENT PROGRAM, *supra*, at 3.

The Massachusetts CMP recognizes the value of tourism but also places heavy emphasis on ensuring that the state's coastal fisheries are protected from the effects of federal activities, primarily OCS oil and gas leasing. *See, e.g.*, MASS. COASTAL ZONE MGMT., COMMONWEALTH OF MASS., CZM ON OFFSHORE OIL: A SHORT HISTORY OF CZM'S INVOLMENT IN ISSUES RELATED TO OFFSHORE DRILLING (undated); MASS. COASTAL ZONE MGMT., COMMONWEALTH OF MASS., COASTAL BRIEF, MCZM: A COMPREHENSIVE TOOL TO PROTECT MARINE RESOURCES 2 (1991). Concern over effects on the state's fisheries prompted the consistency dispute that culminated in Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass.), *aff'd. sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983). That case considered policy number nine of the Massachusetts Coastal Zone Management Program, which states that federal agencies must be consistent with the state's policy to:

a. Accommodate exploration, development and production of offshore oil and gas resources

will be consistent over the objections of states, the court should require the federal agency to show that it properly accounted for the state costs. Courts can effect this result by allocating the burden of proof regarding consistency to the federal agencies.

Placing the burden of proof on federal agencies does not unduly burden them. The legislative scheme provides for cooperation between states and federal agencies at the CMP approval stage and, in some cases, allows a presidential override.[197] In routine conflicts, however, the most plausible reading of the statute suggests the state interest should take precedence. In the context of a typical dispute, therefore, the burden of proof should lie with the less favored interest: that which the federal agency advances. Once a CMP is approved — implying that the states have made a well-reasoned judgment on how to manage a coast and have taken national interests into account — the federal government should be required to respect the judgments in the plan it has approved or to prove why such respect should not be accorded in a particular situation.

In short, because control over the coastal zone is vested in the states and federal interests are otherwise protected, the courts should defer to state judgments by placing the burden of proof on federal agencies. Otherwise, by placing the burden of proof on the states to prove inconsistency, courts would undermine the balancing decisions that the states are entitled and encouraged to make. Such an allocation would weaken the primary incentive for state participation: required federal consistency.[198]

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while minimizing impacts on the marine enviroment, especially on fisheries, water quality and wildlife, and on the recreational values of the coast . . . .

b. Evaluate indigenous or alternative sources of energy . . . and offshore mining to minimize adverse impacts on the marine environment, especially with respect to fisheries, water quality, and wildlife, and on the recreational values of the coast.

MASSACHUSETTS COASTAL ZONE MANAGEMENT PROGRAM POLICIES, Policies 9(a)-9(b) (1978).

This limited appraisal of three state CMPs indicates that states face different costs from coastal development and accordingly emphasize different concerns in their CMPs. Similar variations certainly occur in other state CMPs. *See* Kanouse, *supra* note 138, at 560-61; Kem Lowry et al., *Federal-State Coordination in Coastal Management: An Assessment of the Federal Consistency Provision of the Coastal Zone Management Act,* 19 OCEAN & COASTAL MGMT. 97, 100 (1993); Michael A. Wolf, *Accommodating Tensions in the Coastal Zone,* 25 NAT. RESOURCES J. 7, 14-15 (1985) (quoting Gladwin Hill, *Federal Law on Coastal Land Use, After 12 Years, Is Having Wide Impact,* N.Y. TIMES, Sept. 16, 1984, at A36). Courts should require federal agencies to take into account the coastal resource issues each state regard as important. For additional examples of state consistency concerns, see SIMMONS & COSTELLO, *supra.*

197. The act "encourage[s] the participation and cooperation of the public, state and local governments . . . as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter." 16 U.S.C. § 1452(4) (Supp. II 1990); *see also* 136 CONG. REC. H8101 (daily ed. Sept. 26, 1990) (statement of Rep. Pallone) ("It is clear that under the CZMA, the whole idea is to have cooperation between the States and the Federal Government."); *supra* notes 44, 95-97 and accompanying text (discussing presidential override).

198. *See supra* notes 12, 182.

IV. ALLOCATING THE BURDEN OF PROOF TO THE FEDERAL AGENCY

No single factor that courts use to allocate burdens of proof indisputably points to the appropriate allocation in a section 307(c)(1) consistency dispute. Ultimately, to resolve the issue properly courts must consider the CZMA's policy,[199] which convincingly points toward allocating the burden to the federal agency. Allocation to the federal agency would help effectuate the CZMA's policy of granting to states control over the coastal zone and favoring protection over development interests in the coastal zone.[200]

Other issues raised in Part III's analysis of the factors courts use in allocating the burden of proof, however, suggest that the allocation solution needs fine tuning. The examination of the language, regulations, and legislative history revealed the concern that granting states too much control over the coastal zone would enable them unilaterally to halt—that is, to veto—federal activities.[201] Moreover, this examination indicated that the federal agency makes the final prelitigation consistency determination that would normally require deference by the courts.[202] This Note considered and disposed of arguments arising from these issues that pointed toward allocating the burden of proof to the states.[203] Nevertheless, the arguments have some merit. It is possible, though, to alleviate the concerns over the veto issue and to give due respect to the federal agency's determination while keeping the ultimate burden of proof on the federal agency. Courts should require the state to make some initial showing — meet some initial burden of production — that demonstrates that the federal agency's activity is inconsistent with the state CMP.[204] The court should require the state to present the federal consistency determination and the state's official response objecting to the determination and indicating reasonable alternatives that would make the federal activity consistent.[205] Upon

199. *See supra* note 74 and accompanying text.

200. *See supra* section III.C.

201. *See supra* section III.A.2.

202. *See supra* section III.A.3. The factors considering ease of access to evidence and who must prove the improbable provided no guidance to the allocation decision.

203. *See supra* notes 87, 91-92, 110-13 and accompanying text.

204. One easily imagined initial showing would be to make out a prima facie case that the federal activity is inconsistent. The state would advance sufficient evidence regarding why it found the federal agency activity inconsistent with its coastal management plan. If the judge decides that a reasonable jury could find in the state's favor, the state has met its prima facie burden and creates a presumption of inconsistency. After the state establishes a prima facie case, the federal agency would then have the responsibility to rebut the state's allegations, the ultimate burden of persuasion remaining with the federal agency. Accordingly, the state should prevail if the agency does not advance evidence to rebut the prima facie case, or if the agency evidence is not sufficient to meet the ultimate burden of persuasion. *See supra* note 77 and accompanying text.

205. *See supra* notes 39-41 and accompanying text. Such a presentation should be sufficient

this showing, the federal agency should have the responsibility to rebut the state's allegations with the ultimate burden of persuasion lying with the federal agency.[206]

Placing an initial burden of production on the state prevents it from controlling federal agency activities too easily. If the state is not encumbered by this burden, it will merely have to plead that the agency activity is inconsistent to shift the burdens of production and persuasion to the federal agency. Moreover, to avoid a system of incentives encouraging the states to seek judicial resolution of even the most minor consistency disputes, the state should bear some evidentiary costs to lay out a reasonable disagreement with the federal agency.

Allocating the initial burden of production to the state, but shifting the ultimate burden of persuasion to the federal agency, best achieves the overall policies of the Act. This rule upholds the protection interests of the CZMA and vests primary control with the states without giving them a wholesale veto power over federal activities. The burden-shifting solution also discourages states from bringing weak claims to the federal courts.

CONCLUSION

The coastal resources of the United States will likely continue to face a barrage of environmentally detrimental attacks. The population near the coast will expand, thus prompting additional development pressures. The national need for recreation, energy, and sustenance will also lead to further demands to exploit coastal resources. Such pressures will likely lead to more frequent conflicts between states and the federal government, resulting in more numerous consistency disputes between federal agencies and coastal states under the Coastal Zone Management Act.

Currently, no sources clearly indicate who bears the burden of proof when such consistency disputes come before a court. The CZMA does not explicitly allocate the burden of proof,[207] and courts are divided on who bears the burden.[208] To determine the proper allocation, this Note examined methods that courts use in allocating burdens of proof[209] and considered their application to litigation under CZMA section 307(c)(1).[210] No single method unequivocally indi-

for establishing a likelihood of success on the merits to obtain a preliminary injunction. *See supra* notes 45-48 and accompanying text.

206. This solution is equivalent to that found in certain disputes under the National Environmental Policy Act. *See supra* note 78 and accompanying text.

207. *See supra* section III.A.1.

208. *See supra* notes 19-23 and accompanying text.

209. *See supra* Part II.

210. *See supra* Part III.

cated who should bear the burden of proof in a consistency dispute. Guidance gleaned from the language, regulations, and legislative history of the CZMA weighed only slightly in favor of allocating the burden to the state.[211] Ease of access to evidence did not tip the scale in either direction.[212] Considering probabilities was equally inconclusive.[213] In the end, the policy of the CZMA most clearly indicated who should bear the burden.[214] To effectuate the policy of the statute, which favors preservation over development interests and vests primary control over the coastal zone with the states, the federal agency should bear the ultimate burden of persuasion in a consistency dispute. To prevent the state from exercising excessive influence over federal activities, however, the states should bear an initial burden of producing evidence to show that a legitimate dispute exists.[215]

Placing the risk of nonpersuasion on the federal agency will best allow the states to account for the demands placed on their coastal zone by the federal government. Assigning the initial burden of production to the states, by requiring an initial showing of inconsistency, will amply protect federal interests while preventing overzealous interference by the states.

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211. *See supra* section III.A.

212. *See supra* section III.B.

213. *See supra* section III.B.

214. *See supra* section III.C.

215. *See supra* Part IV.