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COASTAL ZONE MANAGEMENT AND THE SEARCH FOR INTEGRATION

Ronald J. Rychlak*

INTRODUCTION

The American coast is a vital, thriving economic force of great importance to the nation. Although it comprises less than ten percent of the land mass of the United States, more than seventy-five percent of the population now lives within fifty miles of coastal areas, and that percentage is growing.¹ As a natural resource, the coast is "richer than the Rocky Mountains, [and] more biologically important than even the wildlife of Alaska."² Common law has long recognized coastal waters as corridors for water-borne commerce and as areas where the public is free to fish.³ The Supreme Court has held that rights in the coast are so important that without their free availability this nation never could have developed.⁴ Congress has repeatedly recognized the "[i]mportant ecological, cultural, historic and esthetic values in the coastal zone which are essential to the well-being of all citizens."⁵ The executive branch has also expressed great concern for the nation's coast, and went so far as to declare 1980 "The Year of the Coast."⁶

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1. Morganthau, Hager, Brown, Kenney & Drew, *Don't Go Near the Water*, NEWSWEEK, Aug. 1, 1988, at 42, 47 [hereinafter Morganthau]; O'Dell & Howorth, *Alabama Tidelands After Phillips Petroleum v. Mississippi: Time to Reinvent the Public Trust*, 20 CUMB. L. REV. 365, 365 (1989-90).

2. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 405 (1988).

3. See, e.g., *Packer v. Bird*, 137 U.S. 661, 667 (1891) ("It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [coastal waters]"). See generally Rychlak, *Thermal Expansion, Melting Glaciers, and Rising Tides: The Public Trust in Mississippi*, 11 MISS. C.L. REV. 95 (1991) (in press) (discussing the history of the public trust doctrine). For this reason, it has been held "inconceivable" that any person should claim a private property interest in the navigable waters of the United States. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913).

4. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842). This is the rationale underlying the public trust doctrine as it applies to coastal property. See Rychlak, *supra* note 3, at 114-19.

5. 16 U.S.C. § 1451(e) (1988); see also *id.* § 1452(2)(B) (announcing the congressional policy to encourage and assist programs to provide for "the management of coastal development to minimize the loss of life and property caused by improper development").

6. President Carter made this proclamation in the last year of his term in office. Environmental

The environmental health of the coastal zone, however, is not sound. The Council on Environmental Quality estimates that twenty-four percent of the nation's 85,240 shoreline miles is "significantly eroding."⁷ Development, water pollution, air pollution, toxins, and other matters all threaten this critical habitat.⁸ The federal government took steps to protect the coast by, *inter alia*, enacting the Coastal Zone Management Act of 1972 ("CZMA").⁹ CZMA is premised on the belief that, with coordination between various levels of government and various agencies within any one level, coastal development can be controlled and environmental damage to the coast can be limited.¹⁰

Priorities and Programs, Message to the Congress, 1979 PUB. PAPERS 1353, 1362 (Aug. 2, 1979). President Reagan, who embraced the concept of federalism, saw a much smaller role for the federal government in the protection of the coast. *See generally* Archer & Knecht, *The U.S. National Coastal Zone Management Program—Problems and Opportunities in the Next Phase*, 15 COASTAL MGMT. 103, 107-08 (1987) (analyzing coastal zone management programs at the state and federal levels).

7. 1988 COUNCIL ON ENVTL. QUALITY 18TH & 19TH ANN. REP. 105-06. This erosion includes about one-third of the Great Lakes shorelines and 43% of the conterminous oceanic coastline. *Id.*; *see also* Houck, *supra* note 2, at 369 (describing the rapid erosion of the Louisiana coastline). Perhaps the most dramatic examples of severe coastal problems are in Louisiana. Louisiana is losing approximately 50 square miles of coastline, an area the size of the District of Columbia, each year. *Id.* at 359 n.6. This rate of loss is expected to double over the next ten years. *Id.*

8. Morganthau, *supra* note 1, at 43 ("[R]esponsible environmentalists say [it] is now a full-blown national crisis: the wholesale contamination of U.S. coastal waters by millions of tons of sewage, garbage, toxic chemicals and other contaminants.").

9. 16 U.S.C. §§ 1451-1464 (1988). CZMA has been amended several times. The 1976 amendments, Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013, were largely prompted by the 1973 Arab oil embargo and efforts to accelerate development of the Outer Continental Shelf ("OCS"). *See* 16 U.S.C. § 1456a(h) (1988). The 1978 amendments dealt mainly with oil exploration on the OCS. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, 690. The 1980 amendments require "protection of natural resources, including wetlands, flood plains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone." Coastal Zone Improvement Act of 1980, Pub. L. 96-464, 94 Stat. 2060. The 1986 amendments reduced federal funding of certain programs from 80% to 50%, changed the way in which state coastal programs were evaluated and modified, and revised the estuarine sanctuary provisions of CZMA. Coastal Zone Management Reauthorization Act of 1985, Pub. L. No. 99-272, 100 Stat. 124 (1986). The 1990 amendments, among other things, make clear that CZMA applies to offshore oil exploration, establishes grants for continued improvement of state plans, authorizes awards for coastal protection, and requires protection of coastal resources from nonpoint source water pollution. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6201, 104 Stat. 1388 [hereinafter CZMA 1990 Amendments] (Statutes at Large page breaks are not available for this act; citations to CZMA 1990 Amendments in this Article are to the appropriate section of the Omnibus Budget Reconciliation Act of 1990). For a general review of CZMA 1990 Amendments, see Howorth, *Coastal Zone Management Act: Highlights of the 1990 Amendments*, 10 WATER LOG 11, 12 (1990) (calling these amendments "the most significant mandate for the continued administration of the nation's only comprehensive coastal management program since the passage of the original Act").

10. Of course, the concept of governmental protection of the coast has not gone without criticism.

[T]he planning elite will be in a position to allocate coastal resources in the "right" way; no more motels, trailer parks, small beach cottages, apartments, condominiums,

Effective protection of the coast requires consideration of the many ways that coastal resources are damaged. Over the past decade it has become increasingly clear that pollution in one medium can have implications in another. For example, the combustion of fossil fuels releases gases that can return to earth in the form of acid rain, harming aquatic life and damaging soil fertility. Similarly, heavy metals, such as cadmium and lead, which are emitted through combustion, can return to the land or sea and work their way into the food chain. For this reason, effective environmental protection requires integration. Every decision affects later options. To illustrate: In the 1970s, many areas stopped burning trash and outlawed the burning of leaves because of concern about air pollution. That increased the amount of waste being taken to the dump. Today, many landfills are filling up, and waste disposal has become a serious problem. Thus, the solution of one problem has added to a new problem. The only way to avoid this quandary is to develop an integrated environmental plan that focuses on solutions that have the least net adverse impact on the environment as a whole.

It is appropriate to consider CZMA as one studies the concept of integrated environmental protection, because it is the federal government's first major experiment with an integrated environmental program.¹¹ Unlike other environmental statutory schemes, CZMA does not focus on one specific type of pollution (for example, air or water pollution). Instead, it sets forth a plan to protect an entire region from the effects of development and pollution in all their various forms. To do this, CZMA calls on local, state, and federal governmental units each to play a role. Unfortunately, this experiment in integration has not been altogether smooth. CZMA has been called a "complex and not wholly integrated piece of legislation."¹² The Act has, however, been amended

or restaurants—those awful developments created by the common man exercising his vulgar tastes in the unrestricted marketplace. Instead, the "priceless" marshes, bird refuges, fragile cliffs, and majestic views will be preserved. The superior tastes of the common man. As [a] Coastal Commissioner . . . said, "It's never a pleasant task to save someone from themselves [sic]."

Johnson, *Some Observations on the Economics of the California Coastal Plan*, 49 S. CAL. L. REV. 749, 756 (1976) (footnote omitted). For a discussion of coastal management programs prior to enactment of CZMA, see D. BROWER & D. CAROL, *COASTAL ZONE MANAGEMENT AS LAND PLANNING* 1-2 (1984).

11. The meaning of integration is a "universal question." Guruswamy, *Integrating Thoughtways: Re-Opening of the Environmental Mind?*, 1989 WIS. L. REV. 463, 496 n.165. The term "internal integration" should be understood as a sort of internal consistency within a given program (in this case, CZMA). A program must be consistent internally before it can be integrated with other environmental protection laws.

12. F. ANDERSON, D. MANDELKER & D. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 846 (1984); see also W. ALLAYAUD, *INTEGRATED PLANNING FOR WATER QUALITY MANAGEMENT: THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 AND COASTAL ZONE MANAGEMENT* 81-82 (1979) (noting inconsistencies within CZMA); Archer & Knecht, *supra* note 6, at 117 (referring to the current "fragmented approach"); Wolf, *Accommodating Tensions in the Coastal Zone: An Introduction and Overview*, 25 NAT. RESOURCES J. 7, 10 (1985) ("[Administrators] have often found themselves mired in a morass of territorial jealousy, confusion, overburdening red tape, and frustrating litigation."). By contrast, the Toxic Substances Con-

several times, and coastal zone management has been on a twenty-year march toward internal integration.¹³ As long as an individual statutory scheme is not internally consistent and integrated, a completely integrated plan of environmental protection is impossible. The study of this statute and its "micro-integration" problems should be of interest as one considers integration on a larger scale.¹⁴

This Article points out the problems associated with coordinating and integrating a coastal environmental protection program and focuses on lessons that can be applied to other matters as integrated environmental protection is pursued. The Article begins with an outline and discussion of CZMA. It then moves to problems of intergovernmental coordination and internal integration that have been encountered under CZMA, including issues that affect decisionmaking by various governmental units at the federal, state, and local levels. The Article concludes by reviewing the lessons taught by the CZMA experience as to the proper roles that must be played by different levels of government, and suggesting that these lessons be adopted as the nation moves toward a more fully integrated approach to environmental protection. The only approach capable of truly protecting the environmental health of the nation is a fully integrated environmental program that is cognizant of special matters of particular relevance to local areas, but which does not limit its focus to any specific geographical area or any specific type of environmental concern. The first step toward that end is the internal integration of various environmental acts, such as CZMA.

I. THE LEGISLATIVE SCHEME OF CZMA

States have been managing coastal areas since this nation was formed.¹⁵ The federal government's role in coastal protection dates back at least to 1829, when Fort Moultrie, in South Carolina, was threatened by erosion.¹⁶ Modern federal coastal protection, however, traces back to the Marine Resources and Development Act of 1966¹⁷ and the establishment of the Commission on Marine Science, Engineering and Resources, commonly known as the Stratton Commission.¹⁸ The Stratton Commission focused national attention on the

Act of 1976, 15 U.S.C. §§ 2601-2671 (1988), has been identified as a well integrated act. Guruswamy, *supra* note 11, at 522-25.

13. See *supra* note 9 (listing the various amendments to CZMA); see also Pelham, Hyde & Banks, *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U.L. REV. 515, 517 (1985) (noting that Florida has tried to integrate coastal management since 1971).

14. For a very informative account of how the environmental movement began with an integrated ideal, only to become fragmented along the way (and why it needs to be reintegrated), see Guruswamy, *supra* note 11, at 476-92.

15. See Kinsey, *CZM from the State Perspective: The New Jersey Experience*, 25 NAT. RESOURCES J. 73, 73 (1985).

16. 1988 COUNCIL ON ENVTL. QUALITY 18TH & 19TH ANN. REP. 93.

17. Pub. L. No. 89-454, 80 Stat. 203 (codified as amended at 33 U.S.C. §§ 1101-1131 (1988)).

18. CENTER FOR OCEAN MANAGEMENT STUDIES, *THE NEWEST FEDERALISM: A NEW FRAME-*

value of coastal resources and the dangers of unplanned development. The need for a federal coastal protection program was established based on findings that, by the early 1970s, over twenty-five percent of the nation's salt marshes had been destroyed; population was becoming more concentrated in and about coastal areas; the nation's commercial fishing industry was dependent on coastal waters, estuaries, and marshlands for the growth and development of sealife; increased commercial and recreational use of the coast was endangering aquatic life; and fragmented, uncoordinated state and local regulation was exacerbating pressure caused by economic development.¹⁹ These findings led to passage of CZMA,²⁰ which was "aimed at saving the waters of our coasts and the land whose use has a direct, significant, and adverse impact upon that water."²¹

CZMA is primarily concerned with development in the coastal zone,²² but it also deals with air, water, and land-based pollution. Many decisions concerning water use are intricately bound up in decisions and outcomes regarding land use. For this reason, effective coastal management requires an integrated approach to environmental protection. The very term "coastal zone"²³ implies

WORK FOR COASTAL ISSUES ix (T. Galloway ed. 1982) [hereinafter *NEWEST FEDERALISM*]; J. KALO, *COASTAL AND OCEAN LAW* 327 (1990); see also COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, *OUR NATION AND THE SEA* (1969) (the Stratton Commission's report).

19. SENATE COMM. ON COMMERCE, 94TH CONG., 2D SESS., *LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, AS AMENDED IN 1974 AND 1976*, at 194-98 (Comm. Print 1976) [hereinafter *CZMA LEGISLATIVE HISTORY*]. CZMA's legislative history expressly notes the importance of the work done by the Stratton Commission. *Id.* at 1-2.

20. 16 U.S.C. §§ 1451-1464 (1988).

21. *CZMA LEGISLATIVE HISTORY*, *supra* note 19, at 249 (remarks of South Carolina Senator Ernest Hollings). The legislative history of CZMA indicates that, "[t]he key to more effective use of the coastal zone in the future is introduction of management systems permitting conscious and informed choices among the various alternatives. The aim of this legislation is to assist in this very critical goal." *Id.* at 198. However, some early cases placed the development goal above coastal protection. See *Billings v. California Coastal Comm'n*, 103 Cal. App. 3d 729, 163 Cal. Rptr. 288 (1980).

22. "Unlike 'pure' environmental or 'pure' energy development interest legislation, the CZMA's chief focus is on the planning side, as suggested by the term 'management.'" Wolf, *supra* note 12, at 9; see also D. BROWER & D. CAROL, *supra* note 10, at 13 (comparing CZMA to land use planning law).

23. The Act defines coastal zones as "coastal waters . . . and the adjacent shorelands . . . strongly influenced by each other." 16 U.S.C. § 1453(1) (1988); see also 15 C.F.R. § 923.30-.32 (1990) (describing the elements of coastal zone boundaries). The reach of the zone is defined as follows:

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 state title and ownership under the Submerged Lands Act (43 U.S.C. §§ 1301-1315). The zone shall extend inland from the shorelands to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters.

16 U.S.C. § 1453(1) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6204(a). This definition leaves much discretion to the states to determine the jurisdiction of their own CMP. Accordingly, various coastal states have interpreted the vague jurisdictional declarations of CZMA differently. Consequently, individual state programs vary a great deal in scope. See F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 12, at 846 (noting how states have de-

the need for integration of at least land and water programs.²⁴ Coastal damage comes not only from physical construction and development, but also from water pollution that is carried to the coast,²⁵ toxins that make their way to the coast, offshore oil exploration (especially accidents), air pollution, greenhouse gases,²⁶ river channelization and canals, and a wide variety of other activities.²⁷

In drafting CZMA, Congress recognized the "special need to relate air, land and water planning" in the effort to combat environmental problems in the coastal zone.²⁸ Because coastal protection requires consideration of pollu-

fining their coastal zones differently); Finnell, *Intergovernmental Relationships in Coastal Land Management*, 25 NAT. RESOURCES J. 31, 43-44 (1985) (noting that the proper area to be regulated will vary from urban areas to rural areas). In California, the inward reach of the zone varies from under 1000 yards up to five miles. T. SCHOENBAUM, ENVIRONMENTAL POLICY LAW: CASES, READINGS AND TEXT 493 (1985).

24. See CZMA LEGISLATIVE HISTORY, *supra* note 19, at 198 ("Coastal zone management must be considered in terms of the two distinct but related regimes of land and water."). Standards embodied in the Clean Air Act and the Clean Water Act are expressly made applicable under CZMA. 16 U.S.C. § 1456(f) (1988); 15 C.F.R. § 923.45 (1990).

25. Nonpoint source water pollution has been identified as a major problem for coastal areas. CZMA 1990 Amendments, *supra* note 9, § 6202(a)(5) ("Nonpoint source pollution is increasingly recognized as a significant factor in coastal water degradation."); Houck, *supra* note 2, at 375 ("Approximately 70 percent of all sediment, 90 percent of fecal and all other coliforms, 80 percent of nitrogen, and 50 percent of all phosphorous pollution comes from nonpoint sources."); Morgenthau, *supra* note 1, at 45-47 ("Nonpoint pollution is now a problem in virtually every bay and estuary in the United States, and it is certain to get worse."). In 1990 Congress attempted to deal with the nonpoint source pollution problem by establishing a Coastal Nonpoint Pollution Control Program. CZMA 1990 Amendments, *supra* note 9, § 6217. This program provides federal funds and technical assistance and requires each state with an approved CMP to develop a "Coastal Nonpoint Pollution Control Protection Program" and to implement coastal land use management measures for controlling nonpoint source pollution within four years. *Id.* The new state programs are to be coordinated with water quality plans developed under the Water Pollution Control Act, 33 U.S.C. §§ 1288, 1313, 1329, 1330 (1988), and CZMA. CZMA 1990 Amendments, *supra* note 9, § 6217.

This program will help, but it is designed to handle nonpoint source water pollution only from coastal areas. The source of nonpoint water pollution that affects coastal areas is not limited to these areas. Thus, this nonintegrated approach will not provide maximum protection to the coast.

26. See Rychlak, *supra* note 3, at 95-97 (discussing rising coastal waters due to the greenhouse effect); see also 16 U.S.C. § 1451(l) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, §§ 6202(a)(7), 6203(a)(3) (recognizing the greenhouse effect as a potential problem and requiring states to begin planning for it).

27. One of the primary problems in the coastal zones is increased inflow of nutrients, especially phosphate and nitrogen, which leads to increased growth of algae and depletion of dissolved oxygen in the water. See Morgenthau, *supra* note 1, at 47 ("Curbing nutrient pollution is now a primary focus of government and private efforts to save the Chesapeake."); *Growing Harm Seen to Key Fish Source*, N.Y. Times, Aug. 17, 1987, at 1, col. 1 (National ed.), reprinted in J. KALO, *supra* note 18, at 7, 9.

28. W. ALLAYAUD, *supra* note 12, at 4; see also CZMA LEGISLATIVE HISTORY, *supra* note 19, at 198 ("Coastal zone management must be considered in terms of the two distinct but related regimes of land and water."). As early as 1975, various federal agencies noted the need to coordinate their efforts to protect the coast. W. ALLAYAUD, *supra* note 12, at 78-79 (citing the Joint Letter of EPA and OCZM, Aug. 26, 1975). In fact, at the time CZMA was enacted, there was

tion in the air, land, and water, CZMA, more than any other federal statute, must focus on an integrated approach to total environmental protection, not just traditional "coastal" issues. To accomplish this, the Act divides responsibility for coastal protection among local, state, and federal governments. This has been called "a 'layered cake' federalism, with non-overlapping responsibilities between levels of government."²⁹ Because of differences in topography, soil conditions, and hydrology, as well as local commerce and aesthetic needs, only local governments can properly assess and decide certain issues, such as land use and city planning.³⁰ Moreover, at least some observers believe that "state and local governments are inherently more equitable and efficient in their distribution of public resources."³¹ However, state and federal involvement is needed to muster the substantial resources necessary for matters such as research into acid rain and global warming.³² Therefore, CZMA proposes a joint venture.

CZMA relies on agreements between coastal states and the federal government and offers financial assistance to states that develop a Coastal Management Plan ("CMP"). As the name implies, a CMP is a comprehensive plan designed to protect coastal resources and prevent environmental degradation within the state. States are not required to develop CMPs, but there are substantial incentives.³³ CZMA provides for grants that pay states up to eighty percent of the cost of developing a program and fifty percent of the cost of administering a CMP.³⁴ Moreover, once a state has developed an approved plan, there is a "consistency" provision that requires any federal agency activity or any federally sponsored activity that affects the relevant area to be "con-

some consideration given as to whether coastal zone management legislation should be enacted separately or as part of a comprehensive land use law. *Id.* at 37-38. While it may have been necessary to separate the coastal zone out for special treatment to initiate programs in 1972, the articles in this symposium indicate that movement toward integration is needed today. As recently as 1990, Congress amended CZMA to try, among other things, to combat problems of internal integration. *See, e.g.*, CZMA 1990 Amendments, *supra* note 9, §§ 6203(b)(6), 6208 (amending 16 U.S.C. § 1452 so as to add a new subsection dealing with coordination and cooperation between state and federal agencies).

29. NEWEST FEDERALISM, *supra* note 18, at 1.

30. *Id.* at 44, 71; Finnell, *supra* note 23, at 54, 58; *see also infra* notes 121-60 and accompanying text (providing a detailed outline of the responsibilities of each level of government).

31. Finnell, *supra* note 23, at 58 (quoting Thomas Kostos).

32. NEWEST FEDERALISM, *supra* note 18, at 7; Finnell, *supra* note 23, at 59 (noting that state and local governments have been unwilling or unable to handle issues such as placement of critical energy facilities and protection of wetlands); Pelham, Hyde & Banks, *supra* note 13, at 519 (noting the inability of local governments' to implement planning programs without state money).

33. If states do not develop a CMP, there is no federal agency to step in and fill the gap. J. KALO, *supra* note 18, at 327; *compare* Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1387 (1988) (minimum federal water quality standards govern in the absence of state standards).

34. 16 U.S.C. §§ 1454-1455 (1988), *as amended by* CZMA 1990 Amendments, *supra* note 9, §§ 6205, 6206; 15 C.F.R. §§ 923.90-.100, 926.1-.7, 927.8 (1990). The 1990 amendments also provide grants to encourage states with existing plans to continue to improve them. CZMA 1990 Amendments, *supra* note 9, § 6210(d) (revising 16 U.S.C. § 1456b (1988)).

sistent to the maximum extent practicable" with the state's CMP.³⁶ These incentives have convinced most states to develop their own CMP.³⁶

In order to receive federal money, state CMPs must comply with CZMA standards³⁷ and be approved by the Secretary of Commerce.³⁸ Those standards permit states to develop plans that differ greatly from one another,³⁹ but all

35. 16 U.S.C. § 1456(c) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6208; see also *infra* notes 55-75 and accompanying text (discussing the federal consistency requirement). At least one author has noted symbolism as another advantage to developing a state plan. Kinsey, *supra* note 15, at 74.

36. D. BROWER & D. CAROL, *supra* note 10, at 14 (concluding that all eligible states have participated to some degree); T. SCHOENBAUM, *supra* note 23, at 492 ("Almost all of the eligible states had received program approval by 1980."); Archer & Knecht, *supra* note 6, at 107 (noting that all but six coastal states have approved plans). The number of approved plans is subject to fluctuation, because approval can be withdrawn. See 16 U.S.C. § 1458(d) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6212. Additionally, the number of coastal states may be confusing because that term includes states bordering on the Great Lakes as well as United States territories. *Id.* § 1453(4); 15 C.F.R. § 923.2(f) (1990).

37. Those standards require the CMP to establish specific boundaries for the coastal zone, define permissible land and water uses, identify areas of particular concern, identify a means to control land and water uses, establish guidelines for priority of uses in certain areas, describe the organization that will manage the program, and contain a planning process to address problems such as beach access and protection, energy siting, and coastal erosion. The planning process must include an organizational structure for decisionmaking, including opportunities for the involvement of a wide variety of interest groups. 16 U.S.C. § 1455 (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6206; 15 C.F.R. § 923.1-105 (1990). States can also single out important areas, such as the San Francisco Bay, for special treatment. See 15 C.F.R. § 923.30 (1990). See generally Chasis, *The Coastal Zone Management Act: A Protective Mandate*, 25 NAT. RESOURCES J. 21, 26 (1985) (providing a discussion of the objectives and requirements of the CZMA); Note, *Shifting Sands—A Comparison of English and American Coastal Zone Management Programs*, 12 HASTINGS INT'L & COMP. L. REV. 495, 501 (1989) (same).

38. Responsibility for administering CZMA is assigned to the Secretary of Commerce, 16 U.S.C. §§ 1453(16), 1454(a), 1455(a), 1456(a) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, §§ 6205, 6206, 6208. The Secretary of Commerce designated the National Oceanic and Atmospheric Administration ("NOAA") as the agency to administer and interpret CZMA. 15 C.F.R. § 923.2(b) (1990). There has been some criticism of the federal approval process of state plans. See, e.g., O'Connell, *Florida's Struggle for Approval Under the Coastal Zone Management Act*, 25 NAT. RESOURCES J. 61, 65 (1985) (calling federal approval a "moving target"); Wolf, *supra* note 12, at 10. The General Accounting Office ("GAO") has also been highly critical of the implementation efforts. The GAO found that federal regulations were continually shifting and often confusing and that federal program evaluations often were unreliable and were not based on adequate evaluation criteria. F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 12, at 860 (citing U.S. General Accounting Office, *Problems Continue in the Federal Management of the Coastal Zone Management Program* (1980)); see also Archer & Knecht, *supra* note 6, at 113-14 (suggesting ways to improve federal evaluations of state programs). An interesting question and answer format discussing the requirements for federal approval, prior to the 1990 amendments, is set forth in Kinsey, *supra* note 15, at 79-83.

39. See Hildreth & Johnson, *CZM in California, Oregon, and Washington*, 25 NAT. RESOURCES J. 103, 112 (1985) (discussing plans for the states of California, Oregon, and Washington and a local plan for San Francisco); see also Owens, *Land Acquisition and Coastal Resource Management: A Pragmatic Perspective*, 24 WM. & MARY L. REV. 625, 645-50 (1983) (discussing North Carolina's plan); Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code*, 18 URB. L. ANN. 3 (1980) (questioning the viability of Florida's plan); Pelham,

states are required to consider the national interest as well as "local, areawide, and interstate plans" affected by the program.⁴⁰ The purpose of this consideration is to achieve the Act's "spirit of equitable balance between State and national interests."⁴¹ In commenting upon the requirements for state consideration of federal concerns, the Committee Report that accompanied the legislation states:

This new policy underscores the importance for states to consult and coordinate with, and give adequate consideration to the federal agencies in the implementation of their management programs. States are encouraged to provide federal agencies with the opportunity to participate and consider federal agency views. This does not, however, imply that a state must comply with these views.⁴²

Thus, states must consider federal interests as they draft their CMPs. The federal government must consider state and local concerns as activities are undertaken or approved, as mandated by the consistency requirement of CZMA.⁴³ Thus, CZMA clearly contemplates the need for integration and coordination between various governmental entities.⁴⁴

After the state has promulgated its CMP, the federal government delegates most enforcement authority to the state, though the federal government does review performance and may withhold federal funds and withdraw federal approval if the state fails to meet national standards.⁴⁵ Once in place, most

Hyde & Banks, *supra* note 13 (discussing Florida's plan); Schell, *Living with the Legacy of the 1970's: Federal/State Coordination in the Coastal Zone*, 14 ENVTL. L. 751, 765-73 (1984) (discussing Oregon's plan).

40. 16 U.S.C. §§ 1455(d)(3)(A), 1455(d)(8) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6206; 15 C.F.R. §§ 923.51-.52(c), 930.122 (1990). However, it may be that "the truth of the matter is, nobody knows what the concept of 'national interest' means as it is used [under CZMA]." D. BROWER & D. CAROL, *supra* note 10, at 14 (quoting Dr. Evelyn Murphy).

41. *American Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 924 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979).

42. H.R. REP. NO. 1012, 96th Cong., 2d Sess. 40, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4362, 4388.

43. See *infra* notes 55-75 and accompanying text.

44. See 16 U.S.C. §§ 1451(i), 1452(2)(I), 1452(4), 1452(5), 1456(a) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6203; 15 C.F.R. § 923.50 (1990); see also Schell, *supra* note 39, at 752 ("[T]here is a need, as never before, for more efficient and effective government—government that does not duplicate or delay.").

45. 16 U.S.C. § 1458(d) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6211(c); 15 C.F.R. §§ 923.41(b), 928.1-.5 (1990). The federal government provides funds to support states as they operate their CMPs and may assess sanctions, in limited circumstances, where states have failed to comply with CZMA requirements. Federal officials are authorized to withdraw approval of and financial assistance from any state that has failed to take the actions required under CZMA. 16 U.S.C. § 1458(d) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6212(c). These penalties were the only relevant sanctions for noncompliance by the state with CZMA prior to the 1990 amendments. See *Save Our Dunes v. Pegues*, 642 F. Supp. 393, 401 (M.D. Ala. 1985). Prior to the 1990 amendments, Congress had expressly "considered and rejected several different proposals for penalties and sanctions for noncompliance,"

CMPs rely on a permit system to control development on the coast.⁴⁶ Anyone who proposes any significant activity or development must obtain the requisite permits, often from several different agencies, at several different levels of government.⁴⁷ These permits are supposed to assure that the proposal will not cause environmental harm beyond that permitted under the state CMP.⁴⁸ Only after each permit has been obtained and each requirement has been met may the proposed activity proceed.

II. DECISIONMAKING PROBLEMS UNDER CZMA

Although CZMA has been called "a success,"⁴⁹ the effectiveness of the Act in protecting coastal resources is difficult to measure.⁵⁰ There are few studies

and concluded that "[u]ntil experience dictates the need for greater sanctions than termination of financial assistance, . . . this sanction will suffice." *Id.* (quoting S. REP. NO. 753, 92d Cong., 2d Sess. 14-15, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4776, 4789). Apparently experience did dictate otherwise, because Congress recently modified CZMA so as to allow interim sanctions (for not more than three years) to supplement final (permanent) sanctions. CZMA 1990 Amendments, *supra* note 9, § 6212(b) (amending 16 U.S.C. § 1458(c) (1988)). Perhaps a less draconian sanction will motivate states that do not seriously think that their CMP risks losing approval.

46. See 16 U.S.C. § 1456(c)(3)(A) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6208(b)(2). However, the permit concept has some built-in problems that make it less than ideal for protecting the coast. For instance, once a person has received a permit to conduct certain activity, there typically is no incentive to reduce pollution further. Guruswamy, *supra* note 11, at 502. The 1990 amendments to CZMA have attempted to deal with this problem by establishing a Coastal Zone Enhancement Grants Program that is designed to encourage states to continually improve their CMPs in one or more of eight identified areas: coastal wetlands management and protection, natural hazards management (including potential sea and Great Lake level rise), public access improvements, reduction of marine debris, assessment of cumulative and secondary impacts of coastal growth and development, special area management planning, ocean resource planning, and siting of coastal energy and governmental facilities. CZMA 1990 Amendments, *supra* note 9, § 6210(a) (amending 16 U.S.C. § 1456b (1988)).

47. Because CMPs vary from state to state, it is impossible to identify one procedure that is applicable in every situation.

48. Federal agencies generally are not permitted to issue a permit unless the activity is consistent with the relevant state's CMP. See *infra* notes 55-75 and accompanying text.

49. F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 12, at 845; see also W. ALLAYAUD, *supra* note 12, at 41 (calling early results under CZMA "very encouraging"); F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 12, at 860 (concluding that the "primary achievement" of CZMA may be in better coordination of existing coastal programs); Archer & Knecht, *supra* note 6, at 107 (calling CZMA "successful"); Morgenthau, *supra* note 1, at 44 (noting that "the quality of many coastal and inland waterways—notably the Great Lakes—has improved substantially").

50. Archer & Knecht, *supra* note 6, at 107; Note, *supra* note 37, at 502. Not all early reviews of CZMA procedures were favorable.

The message is as clear as it is repugnant: under our so-called federal system, the Congress is constitutionally empowered to launch programs the scope, impact, consequences and workability of which are largely unknown, at least to the Congress, at the time of enactment; the federal bureaucracy is legally permitted to execute the congressional mandate with a high degree of befuddlement as long as it acts no more befuddled than the Congress must reasonably have anticipated; if ultimate execution

attempting to figure the impact of CZMA,⁵¹ but even with more data, it would be hard to isolate activities that would have taken place but for CZMA, or to determine whether mitigation-type activities would have taken place even without the Act.⁵² Moreover, because of the large part played by the state and local government, "success" in one geographic area would not necessarily indicate success in another. Nevertheless, it is probably fair to say that CZMA has slowed the rate of environmental damage that was being done to coastal areas,⁵³ but CZMA has not been able to completely curtail the degradation. Assuming that current trends prevail, there will be more demand for coastal development well into the future.⁵⁴ Unless coastal protection programs improve, the environmental degradation will continue. Three areas, in particular, are of great concern as one views CZMA's experiment with integration: the federal "consistency" requirement, coordination between various governmental agencies, and compensation for regulations that are found to constitute takings.

A. The Federal Consistency Requirement

CZMA's federal "consistency" requirement has proved to be one of its most controversial provisions.⁵⁵ Once states have an approved CMP, federal programs (and projects that require federal permits) must be "consistent to the maximum extent practicable" with the state CMP.⁵⁶ This requirement is

of the congressional mandate requires interaction between federal and state bureaucracy, the resultant maze is one of the prices required under the system.

American Petroleum Inst. v. Knecht, 456 F. Supp. 889, 931 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). "In other words, for the high purpose of improving and maintaining felicitous conditions in the coastal areas of the United States, the Congress has undertaken a legislative solution, the application of which is so complex as to make it almost wholly unmanageable." *Id.* at 896; *see also* Archer & Knecht, *supra* note 6, at 104 (calling CZMA "increasingly ineffective and lacking in direction" since 1982); Houck, *supra* note 2, at 404 ("Either we act more forcefully to save America's most important ecosystem, or we should stop spending the money and effort on halfway measures that simply forestall the inevitable, in the fashion of cut flowers.").

51. Archer & Knecht, *supra* note 6, at 107; Note, *supra* note 37, at 502.

52. Kinsey, *supra* note 15, at 79.

53. Perhaps the lack of coordination in the permitting process, *see infra* notes 76-103 and accompanying text, has been a blessing in disguise in that the difficulties in obtaining permits delayed or even prevented some potentially destructive projects.

54. *See* CZMA 1990 Amendments, *supra* note 9, § 6202(a)(1) ("Growing human pressure on the coastal ecosystem will continue to degrade this resource . . ."); Congressional Research Service, *Major Legislation of the Congress* MLC-104 (Summary Issue, 101st Cong., Dec. 1990) (noting "[i]ncreasing population concentration near the coasts . . . [and] increasing coastal use").

55. F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 12, at 857 (CZMA's consistency requirement has proved "controversial"); Archer & Knecht, *supra* note 6, at 106 (same).

56. 16 U.S.C. § 1456(c) (1988), *as amended by* CZMA 1990 Amendments, *supra* note 9, § 6208; 15 C.F.R. § 930.1-.145 (1990); *see* Cape May Greene, Inc. v. Warren, 698 F.2d 179, 192 (3d Cir. 1983) (holding that the Environmental Protection Agency's decision was arbitrary where the Agency refused to abide by the state determination that the federal action was not consistent with the state CMP). Some commentators have criticized this aspect of CZMA as inviting delay, litigation, and inefficiency. Kuersteiner & Sullivan, *Coastal Federalism: The Role of the Federal*

designed to achieve better coordination between federal and state agencies.⁵⁷ Federal agencies may not approve proposed projects that are inconsistent with a CMP, except on a finding by the Secretary of Commerce that the program is consistent with the purposes of CZMA or necessary in the interest of national security.⁵⁸ Under CZMA:

(a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program.⁵⁹

Thus, CZMA promises states veto power over nondiscretionary federal projects that are inconsistent with their CMP. However, "[c]onflict, rather than cooperation" seems to have been the result of the consistency requirement.⁶⁰

Although CZMA's " 'intent . . . is to enhance state authority,' not 'diminish'

Supremacy Doctrine in Federal and State Conflict Resolution, 33 JAG J. 39, 39-41 (1984); see also 15 C.F.R. § 930.39(d) (1990) (permitting the federal government to enforce its regulations when they are more strict than the state's regulations); Archer & Knecht, *supra* note 6, at 120 n.48 (discussing a rule proposed by the Army Corps of Engineers that would allow federal preemption of the consistency requirements in the case of ocean disposal activities).

57. Kanouse, *Achieving Federalism in the Regulation of Coastal Energy Facility Siting*, 8 *ECOLOGICAL L.Q.* 533, 550 (1980) (citing H.R. CONF. REP. NO. 1544, 92d Cong., 2d Sess. 14 (1972)).

58. 16 U.S.C. § 1456(c)(3)(B)(iii) (1988). This consistency requirement, however, is not the equivalent of subordination to state management programs, such as that mandated by the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1387 (1988). That Act, like several others that affect environmental protection, explicitly waives both sovereign immunity and federal supremacy with respect to federal agency activities and places federal agencies under state environmental control authority to the same extent as any "non-governmental entity." 33 U.S.C. § 1323(a) (1988). Under CZMA, state regulation is not preempted, except in the case of actual conflict between federal and state law. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987).

59. 15 C.F.R. § 930.32(a) (1990). The Supreme Court has expressly avoided construing the term "to the maximum extent practicable." *Secretary of the Interior v. California*, 464 U.S. 312, 320 n.5 (1984).

60. Comment, *The Seaweed Rebellion Revisited: Continuing Federal-State Conflict in OCS Oil and Gas Leasing*, 20 *WILLAMETTE L. REV.* 83, 91 (1984). Conflicts have also arisen between state and local governmental units. See *infra* notes 122-29 and accompanying text. For a discussion of the state's ability to condition a finding of consistency on mitigation measures being undertaken, see Archer & Bondareff, *Implementation of the Federal Consistency Doctrine—Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 *HARV. ENVTL. L. REV.* 115, 127-36 (1988).

it,"⁶¹ the federal consistency provision gives states less authority over federal actions than they originally had been promised.⁶² A state's authority to protect its environment comes from its police powers, which are subject only to state and federal constitutional limitations. Thus, even without CZMA, the state has great powers in terms of coastal protection.⁶³ CZMA may not add much to those powers. For instance, federal activities are not subject to the consistency requirement if the national interest outweighs the state's concerns.⁶⁴ Moreover, the consistency requirement does not apply unless the state already has an applicable, enforceable policy in place.⁶⁵ Even if such a state policy does exist, it is unclear what additional power the state obtains that it would not otherwise possess under its police powers.⁶⁶

The value of federal consistency has been further diluted by federal agencies' refusal to cooperate with the states.⁶⁷ The issue came to a head in *Secretary of the Interior v. California*.⁶⁸ In that case, despite a Department of Justice opinion to the contrary,⁶⁹ the Interior Department argued that its prelease

61. *Save Our Dunes v. Pegues*, 642 F. Supp. 393, 401 (M.D. Ala. 1985) (quoting S. REP. NO. 753, 92d Cong., 2d Sess. 1, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4776, 4776); D. BROWER & D. CAROL, *supra* note 10, at 37 (quoting the same language).

62. Chasis, *supra* note 37, at 29; see also Finnell, *supra* note 23, at 58-59 ("The ultimate question for state and local governments is not whether they can retain most of their regulatory authority in the coastal zone. Rather it is whether they can keep any at all.")

63. For a general discussion of state power to protect the coast in the absence of CZMA, see Marcel & Bockrath, *Regional Governments and Coastal Zone Management in Louisiana*, 40 LA. L. REV. 887, 891-96 (1980).

64. If a federal court has determined that federal activity is not consistent with a state's CMP, "the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity . . . if the President determines that the activity is in the paramount interest of the United States." 16 U.S.C. § 1456(c)(1)(B) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6208(a).

65. See 16 U.S.C. § 1456(c)(1)(A) (1988), as amended by CZMA 1990 Amendments, *supra* note 9, § 6208(a) ("Each Federal agency activity . . . shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved state management programs" (emphasis added)); see also *Quinones Lopez v. Coco Lagoon Dev. Corp.*, 562 F. Supp. 188 (D.P.R. 1983) (upholding the Army Corps of Engineers' activity where a state had no existing procedure).

66. Chasis, *supra* note 37, at 29; see also Archer & Knecht, *supra* note 6, at 106 (stating "the federal consistency doctrine allows national interests to prevail over state interests"). Prior to the CZMA 1990 Amendments, federal activities that occurred outside of the coastal zone were not subject to the consistency requirement unless their effects spilled over and "significantly" affected the coastal zone. 15 C.F.R. § 923.33(c)(1) (1990). This test has been substantially changed by the 1990 amendments, so that the consistency requirement now applies to any federal activity that affects the coastal zone. CZMA 1990 Amendments, *supra* note 9, § 6208(a) (amending 16 U.S.C. § 1456(c)(1)).

67. Mediation procedures are provided for serious disagreements between coastal states and federal agencies. 16 U.S.C. § 1456(h) (1988); 15 C.F.R. §§ 923.54, 930.110-116 (1990). A party can resort to the judicial process, however, without having first exhausted mediation procedures. 15 C.F.R. § 930.116 (1990).

68. 464 U.S. 312 (1984). For a more detailed account of the agency maneuvering and political backdrop leading up to this decision, see Comment, *supra* note 60, at 112-40.

69. 44 Fed. Reg. 37,142 (1979).

sales activities on the Outer Continental Shelf ("OCS") were not reviewable for consistency with the California CMP.⁷⁰ The Supreme Court agreed with the Interior Department and held that the sale of oil and gas leased on the OCS did not "directly affect" the coastal zone.⁷¹ Although environmentalists were outraged at the decision, and there were immediate calls for congressional action,⁷² other federal agencies viewed this case as controlling precedent in the development of their regulations.⁷³ The ruling remained in force until Congress overruled it in CZMA Amendments of 1990.⁷⁴ With this background, it is not surprising that states have a basic distrust of the federal government's willingness to comply with the consistency provisions of CZMA.⁷⁵

B. Problems of Redundancy and Conflicting Requirements

An integrated environmental protection program requires that authority be divided among various levels of government so that local matters can be adequately addressed and national resources can be tapped.⁷⁶ The intended advantages of an integrated program with divided authority include: avoiding duplication of effort (each local government need not "re-invent the wheel"); assuring that the requisite expertise is available (experts might not be available for each locality, but the federal government can hire one set of experts); assurance of financial resources (each local government need only contribute a fair share, not shoulder the whole burden); and due consideration of matters of local, state, and regional importance.⁷⁷ The disadvantages of an integrated

70. *Secretary of the Interior*, 464 U.S. at 318-19.

71. *Id.* at 315. Justice O'Connor, author of the majority opinion, based her decision on legislative history and the statutory framework governing OCS activities. She concluded that the phrase "directly affecting" was intended to reach activities on the federal lands within the coastal zone but not OCS lands outside the coastal zone. *Id.* at 330. The statutory test was substantially modified by the 1990 amendments, so that the consistency requirement now applies to any federal activity that affects the coastal zone, not just to those that directly or significantly affect it. CZMA 1990 Amendments, *supra* note 9, § 6208(a) (amending 16 U.S.C. § 1456(c)(1)).

72. *See, e.g.*, Comment, *supra* note 60, at 140 ("Congress needs to restore the federal consistency authority of coastal states.")

73. *See* Howorth, *U.S. Army Corps of Engineers' Ocean Dredging Policy and Its Relationship with the Coastal Zone Management Act*, (in press) (1990) (both the Army Corps of Engineers and the EPA have taken the position that consistency is not required when the federal activity takes place outside of the coastal zone).

74. CZMA 1990 Amendments, *supra* note 9, § 6208(a) (amending 16 U.S.C. § 1456(c)(1)). CZMA provided special treatment for OCS development even before the 1990 amendments. *See* 16 U.S.C. § 1456a (1988), *as amended by* CZMA 1990 Amendments, *supra* note 9, § 6209; 15 C.F.R. § 930.70-.86 (1990).

75. *See* Archer & Knecht, *supra* note 6, at 108 (concluding that "conflicts between the federal office and the coastal states over the review of both major and minor program changes have created a climate of uncertainty in the state programs and considerable distrust between federal and state officials"); *see also* Schell, *supra* note 39, at 774 (arguing that the federal government should be forced to comply with CMPs).

76. *See supra* notes 30-32 and accompanying text.

77. *See* Kanouse, *supra* note 57, at 556 ("Allowing each state to develop its coastal management program independently of federal agencies would result in thirty sub-national energy policies

program with divided authority include the following risks: inconsistent obligations and requirements; duplication among various levels of governments; less public participation; and increased costs (as opposed to having one level of government handle the entire project).⁷⁸

The problem with providing roles for several different governmental units is that each tends to develop tunnel vision, acting independently of the others. The state of Alabama recently undertook a study to determine how coastal environmental programs were working in that state. The conclusions reached by the study were that

the existing coastal program has not been able to deal effectively with development problems facing the area. It does nothing to facilitate appropriate growth while protecting important natural resources. Additionally, *because the responsibility of resource management is split among various agencies, resolution of conflicts becomes time consuming and complicated.* . . . [T]he Alabama Environmental Protection Plan has proposed that Alabama establish a *comprehensive* evaluation and protection strategy in order to identify both existing and potential problems.⁷⁹

Looking at coastal protection on a larger scale, the Conservation Foundation found that national and state roles in the program were not clearly defined and that federal control was limited.⁸⁰ The report noted a tension between achieving substantive results in coastal protection and improving management and institutional capabilities at the state level.⁸¹ Similar problems, which affect the decisionmaking capabilities of governmental agencies, are prevalent in several state plans.⁸²

The difficulty of implementing an integrated system lies in trying to maximize the advantages and minimize the disadvantages of divided authority.⁸³ If

competing in part and overlapping in part with national energy policy.”)

78. NEWEST FEDERALISM, *supra* note 18, at 7-8, 21, 42-43, 72-73; Hildreth & Johnson, *supra* note 39, at 112.

79. O'Dell & Howorth, *supra* note 1, at 379 n.94 (emphasis added).

80. F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 12, at 860 (citing CONSERVATION FOUNDATION, COASTAL ZONE MANAGEMENT 1980—A CONTEXT FOR DEBATE (1980)). A limited federal role, of course, is at the heart of CZMA's "new federalism." See generally NEWEST FEDERALISM, *supra* note 18 (a symposium focusing on the role of federal, state, and local government in coastal zone management).

81. F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 12, at 860 (citing CONSERVATION FOUNDATION, COASTAL ZONE MANAGEMENT 1980—A CONTEXT FOR DEBATE (1980)). One court put it more bluntly, referring to CZMA as a:

morass of problems between the private sector, the public sector, the federal bureaucracy, the state legislature, the state bureaucracy, and all of the administrative agencies appurtenant thereto. Because the action taken gives rise to claims public and private which must be adjudicated, this matter is now involved in the judicial process.

American Petroleum Inst. v. Knecht, 456 F. Supp. 889, 896 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979).

82. See, e.g., Hildreth & Johnson, *supra* note 39, at 112 (discussing three state plans).

83. This is not easy to do. See Schell, *supra* note 39, at 752 ("Coordination requires consistency, accommodation of both public and private interests, predictability, simplicity, and speed.").

each level of government imposes its own requirements, without due regard for the other levels of government, conflicting and redundant requirements are likely to result and the entire process can become unworkable. Permit seekers may find, and taxpayers may pay for, inconsistent or redundant requirements.⁸⁴ Connecticut's Director of Environmental Planning told this story:

There was a man who wanted to build a floating restaurant and found he needed 13 permits—local, state and federal (there is no county government in Connecticut). When this gentleman embarked on the permit process, he found out it was a sort of vicious circle. When he got permit number 11, number eight had expired. Now, this gentleman died before he ever got all his permits. . . . If you are going to cut budgets and transfer responsibilities, where does it leave the poor ghost of this gentleman and the floating restaurant?⁸⁵

As inconvenient as this process may be to permit seekers, developers often have the resources to muddle their way through, or the clout to successfully obtain their permits. A more serious problem may be the impact that conflicting regulations have on coastal protection. Conflicting and redundant requirements can create disharmony between the different governmental units and agencies that are charged with protecting the environment, leading to less uniformity, less integration, "turf wars" between agencies, and ultimately less protection for the coastal environment.⁸⁶

84. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987) (holding that compliance with federal regulation did not immunize a mining company from state regulation over activity to be conducted on federal land). The problem is especially acute with regard to siting of industrial facilities.

Major new industrial facilities face a bewildering array of siting requirements on the local, state and federal levels of government. Applicable regulatory laws vary depending on the type of facility, the jurisdiction, and the site chosen, but they include air and water pollution requirements, NEPA and state environmental policy counterparts, as well as state and local land use and development permits.

T. SCHOENBAUM, *supra* note 23, at 511; see also 33 C.F.R. § 320.3 (1990) (identifying federal laws related to CZMA).

85. NEWEST FEDERALISM, *supra* note 18, at 78; see also 1986 COUNCIL ON ENVTL. QUALITY 17TH ANN. REP. 90 (discussing permitting problems under wetlands protection legislation).

86. J. KALO, *supra* note 18, at 274 (noting the "occasional interagency warfare" between the EPA and the Army Corps of Engineers); Wolf, *supra* note 12, at 10 (noting that "intragovernmental disputes, often based on envy and mistrust, have made the road to efficient coastal management a rocky one in several instances"); *id.* at 12 (noting "friction among different branches of the same level of government" (emphasis in original)). The EPA has, on at least one occasion, used its power to veto a permit issued by the Army Corps of Engineers. 53 Fed. Reg. 16,469 (1988). The permit had been issued after-the-fact, as permitted by 33 C.F.R. § 326.3(e) (1990). Often, however, the EPA can accomplish its objectives merely by threatening a veto. See, e.g., 21 Env't Rep. (BNA) 1622 (Jan. 4, 1991) (Florida developers agreed to preserve mangrove swamps around Biscayne Bay in face of threatened veto). The Army Corps of Engineers' difficulty with the EPA may be explained because, due to its civil works program, the Army Corps of Engineers "historically was viewed as a major contributor to environmental degradation and destruction." J. KALO, *supra* note 18, at 167; see also Archer & Knecht, *supra* note 6, at 120 n.48 (discussing a rule proposed by the Army Corps of Engineers that would allow federal preemption of the consis-

A fragmented and piecemeal approach to environmental protection simply cannot provide the type of protection fragile ecosystems, like those along the coast, need. Instead, there must be a well-coordinated plan, providing integrated protection. Professor Houck of Tulane explained the problem with the current lack of integration:

There is no identifiable decision to develop the coast. The development is cumulative and case-by-case. And this is exactly where the regulatory programs fail. Each proposal seems so reasonable. How can a proposed development plan be denied on the grounds of what has already been done, by entirely different parties, some time before? Even more problematic, how can it be denied on the basis of what others will do, or may do, in the future?⁸⁷

Thus, effective environmental legislation requires not only participation at various levels of government, it also requires planning, coordination, and integration of the requirements among those levels.

Integrated environmental protection requires advance planning, as opposed to *ad hoc* decisions. This is needed not simply to make the permitting process easier for applicants, but to provide adequate environmental protection. Permits should not be handed out simply because a prior applicant received one. One dock on a small bay probably has no serious adverse impact. Does the second? The tenth? The twenty-fifth? Yet, without a plan, there is no more reason to deny the last applicant than there was to deny the first. The perils of uncoordinated and unplanned development in coastal areas have been well documented.⁸⁸ Advance planning, however, requires coordination between the

tency requirements in certain cases); Houck, *supra* note 2, at 362 (referring to the "construction-minded Corps"). Similar problems exist between state and local governmental units. D. BROWER & D. CAROL, *supra* note 10, at 14; Marcel & Bockrath, *supra* note 63, at 887-88.

87. Houck, *supra* note 2, at 361. Similar to various other federal regulations, such as the National Environmental Policy Act, 42 U.S.C. §§ 4331-4347 (1988) ("NEPA"), and the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988), CZMA requires consideration of cumulative effects. 15 C.F.R. § 923.11(c)(2) (1990). This consideration is normally limited to directly related and nearly imminent actions. Houck, *supra* note 2, at 361 n.15 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 408-15 (1987)). Consideration of these impacts may be further limited by analyzing only the effects of the activity permitted, such as construction of a pier, instead of the associated development, such as operation of a manufacturing plant. *Id.* (citing Baldwin, *EPA Refers Proposed Corps NEPA Procedures to CEQ*, NAT'L WETLANDS NEWSL., May-June 1985, at 3, 4). Once consideration is reduced to such a minimal level, permit approval is almost certain. *Id.*; *cf.* *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (holding that, under NEPA, consideration of environmental impact may not be limited to construction of an intersection, but must include "inevitable industrial development").

88. One commentator has described the decline of the wetlands as follows:

[U]nplanned and uncoordinated development in coastal regions during the past forty years has jeopardized the "fragile and complex systems of estuaries, lagoons, beaches, bays, harbors, islands and wetlands that are habitats for thousands of varieties of birds, fish, shellfish, reptiles, and mammals." An estimated forty-percent of our nation's wetlands have been damaged or destroyed in our haste to develop these areas and they continue to be damaged at a rate of 300,000 acres per year.

Comment, *supra* note 60, at 87 (footnotes omitted). It is now estimated that 50% of the nation's wetlands have been destroyed. CZMA 1990 Amendments, *supra* note 9, § 6202(a)(4); Morgan-

various permitting agencies at different levels of government.⁸⁹

Several attempts have been made to better integrate and coordinate different requirements under CZMA.⁹⁰ Unfortunately, it is not an easy matter.⁹¹ The Environmental Protection Agency ("EPA") made a "striking move" towards permit integration in the early 1980s, when it adopted consolidated permit regulations, which were hoped to synthesize separate permit systems and provide a more comprehensive environmental evaluation of industrial projects.⁹² The regulations were aimed at governing the hazardous waste management program under the Resource Conservation and Recovery Act,⁹³ the Underground Injection Control program of the Safe Drinking Water Act,⁹⁴ portions of the Clean Water Act,⁹⁵ and portions of the Clean Air Act.⁹⁶ The purpose of the regulations was to integrate the permitting process.⁹⁷ Industry groups opposed the regulations, claiming that they imposed additional burdens on industry.⁹⁸ After a very short life, the regulations were "de-consolidated" (essentially repealed).⁹⁹

Although the EPA attempted to do what must eventually be done, it may be that the agency tried to do too much too soon. A macro-integration problem

thau, *supra* note 1, at 46; see also Sumi & Hanayama, *Existing Institutional Arrangements and Implications for Management of Tokyo Bay*, 25 NAT. RESOURCES J. 167 (1985) (discussing problems encountered due to lack of planning in the development of Tokyo Bay).

89. The "key to the marked success, even survival," of CZMA is coordination of needs and requirements among the various levels and branches of government. Wolf, *supra* note 12, at 12; see also W. ALLAYAUD, *supra* note 12, at 204 (recommending integrated water and land planning); R. BAILEY, *The Wet Side of Coastal Zone Management in Oregon*, in COASTAL ZONE '87: PROCEEDINGS OF THE FIFTH SYMPOSIUM ON COASTAL AND OCEAN MANAGEMENT 5248, 5257 (1987) (noting the "need for interagency coordination in the management of ocean resources"); Guruswamy, *supra* note 11, at 516-18 (recommending an integrated approach to environmental protection).

90. In fact, certain regulations specifically deal with this issue, but they are limited in scope and set forth proposals in the form of suggestions rather than requirements. See 15 C.F.R. § 923.13 (1990) (dealing with energy facility siting).

91. As Richard Brooks explained:

I am reminded of having appeared before the U.S. House Merchant Marine and Fisheries Committee and being asked the question, "Well, you environmentalists, you want to strengthen the Coastal Zone Management Act (CZMA), tell us what the proper balance is between federal, state, and local government in this area;" and as I recall, about that time, I figuratively, if not literally, crawled under the table since I did not have an answer!

NEWEST FEDERALISM, *supra* note 18, at 20-21.

92. See 45 Fed. Reg. 33,290 (1980).

93. 42 U.S.C. §§ 6901-6991i (1988).

94. *Id.* §§ 300f-300j.

95. 33 U.S.C. §§ 1251-1387 (1988).

96. 42 U.S.C. §§ 7401-7642 (1988).

97. The most important environmental benefit was identified as "more comprehensive management and control of wastes." 45 Fed. Reg. 33,291 (1980).

98. Guruswamy, *supra* note 11, at 532.

99. *Id.* (citing President's Task Force on Regulatory Relief, 13 Env't Rep. (BNA) 2205 (1983)).

involving five statutes is far more complex than a micro-integration problem involving a single statutory scheme. If internal integration can be achieved within a given statutory scheme, coordinating it with other statutes should be less difficult. However, if statutes are not internally integrated, the very idea of coordinating separate statutory schemes is unrealistic. The Toxic Substances Control Act of 1976¹⁰⁰ has been identified as a well-integrated Act,¹⁰¹ but clearly CZMA is not yet fully coordinated.¹⁰² Efforts to internally integrate and coordinate the requirements of CZMA must continue, and regulators must consider the mistakes and the successes of these efforts as they work toward integration in other environmental protection schemes.¹⁰³

C. *The Takings Issue*

Effective environmental protection requires that decisions be based on environmental concerns, not economic matters. However, governmental decisionmakers may sometimes be influenced by budgetary limitations. If the government "takes" private property for public uses, the prior owner is entitled to compensation.¹⁰⁴ As early as 1921 the Supreme Court held that regulations could be so intrusive as to constitute a taking.¹⁰⁵ More recent Supreme Court decisions have been called "ominous."¹⁰⁶ Thus, decisionmakers might fear that a court will consider regulation to constitute a taking and require that payment be made. That fear could certainly cause decisionmakers to be reluctant

100. 15 U.S.C. §§ 2601-2671 (1988).

101. Guruswamy, *supra* note 11, at 522-25.

102. *See supra* note 12 and accompanying text.

103. Limited, integrated permitting programs are also a good initial step. Over twenty states have enacted "one-stop" siting laws for thermal electric generating facilities. T. SCHOENBAUM, *supra* note 23, at 511; *see, e.g.*, WASH. REV. CODE § 80.50.010-.902 (1977). A few states have enacted siting legislation for all large industrial developments. *See* MONT. CODE ANN. § 75-20-102 (1989); WYO. STAT. § 35-12-102 (Supp. 1990); *see also* Graybill, *Environmental Compatibility and Public Need: A Case Study of Montana's Major Facility Siting Act*, 1 HARV. ENVTL. L. REV. 458 (1976) (analyzing Montana's siting legislation); Van Vaalen, *Industrial Siting Legislation: The Wyoming Industrial Development Information and Siting Act—Advance or Retreat*, 11 LAND & WATER L. REV. 27 (1976) (analyzing Wyoming's siting legislation). Siting laws have received some favorable reviews. *See, e.g.*, Murray & Seneker, *Industrial Siting: Allocating the Burden of Pollution*, 30 HASTINGS L.J. 301, 302-03 (1978) ("[Siting legislation] has achieved laudable progress in conserving the environment . . ."). However, they are also controversial and have been the subject of litigation. T. SCHOENBAUM, *supra* note 23, at 512 (citing *In re* Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973)).

104. U.S. CONST. amend V; *see* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) ("[A] use restriction on real property may constitute a 'taking' . . ."); 33 U.S.C. § 595a (1988) (compensation for the taking of real property above the high water mark by the United States shall include the fair market value based upon all reasonable uses to which the property may be put).

105. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1921) (holding that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

106. Houck, *supra* note 2, at 364; *see also* *Kaiser-Aetna v. United States*, 444 U.S. 164, 174-75 (1979) (discussing the Court's inability to develop a set formula as to when compensation is required).

to impose strict regulations.

In 1985, while reaffirming broad federal jurisdiction under section 404 of the Clean Water Act, the Supreme Court raised and reserved the question of whether the regulation at issue constituted a taking.¹⁰⁷ In 1987, while again reserving the takings claim, the Court declared that local governments would be liable in money damages for temporary regulations that are subsequently adjudicated to be takings.¹⁰⁸ In its most recent proclamation, *Nollan v. California Coastal Commission*,¹⁰⁹ the Supreme Court declared that coastal use mitigation requirements, which required landowners to provide public access in return for permission to tear down and rebuild a dilapidated house located on beachfront property, constituted impermissible takings of private property, thus entitling the owners to compensation.¹¹⁰ These concerns about regulatory takings will, at the very least, discourage regulators from freely exercising their authority based solely upon environmental concerns.

A regulator might logically conclude that since permit denials can be construed as takings that subject the government to expensive damage awards, it might be better not to impose the regulation. In fact, the office of the President issued Executive Order Number 12,630 in 1988, entitled "Government Actions and Interference with Constitutionally Protected Property Rights," which seems to invite such restraint.¹¹¹ That order requires federal departments and agencies to review their actions so as to avoid "unnecessary takings of private property interests."¹¹² It expressly directs federal decisionmakers to consider "the risk of undue or inadvertent burdens on the public fisc."¹¹³ Some commentators have expressed concern that this order represents "a drastic shift away from the regulatory emphasis on environmental outcomes to an emphasis on the property rights of private landowners and developers."¹¹⁴ It may be however, that this order represents nothing more than an "increased sensitivity" to constitutionally granted property rights.¹¹⁵ It is too early to assess

107. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126-29 & n.6 (1985).

108. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320-21 (1987). Prior to this case, if a regulation was determined to constitute a taking, the government could pay compensation and continue to enforce the regulation or simply rescind its action without paying damages. The *First English* case requires damages for the temporary taking in the case where the government rescinds its action. *Id.* *First English* did not offer any new guidelines for determining when a regulation exceeds the limits of the Constitution, but merely spoke to the issue of the appropriate remedy for invalid regulations. See Note, *supra* note 37, at 509.

109. 483 U.S. 825 (1987).

110. *Id.* at 838-39. This holding was based on the Court's determination that the mitigation measures required to obtain the permit (the easement) did not logically relate to or serve to lessen the perceived problem (protecting the public view of the beach). *Id.* This has been called an "unprecedented step of strictly scrutinizing a legitimate police-power regulation." Fisher, *Executive Order 12630 and the Wetlands "Takings" Issue*, 8 WATER LOG 6, 7 (1988).

111. 53 Fed. Reg. 8,859 (1988).

112. *Id.*

113. *Id.*

114. Fisher, *supra* note 110, at 8.

115. *Id.*

the impact of this order, or the new administration's willingness to enforce it.

These recent Supreme Court cases may have profound implications for the nation's land use planning system. Environmental regulation is already an expensive proposition.¹¹⁶ If development interests convince decisionmakers that regulations may increase those costs,¹¹⁷ it is not hard to envision regulatory agencies compromising their programs in order to avoid financial liability.¹¹⁸ Effective environmental protection requires that regulators be able to consider the environmental impact of their actions without undue concern about potential financial liability.¹¹⁹ This remains an emerging problem under CZMA.¹²⁰

III. INTEGRATION AND THE PROPER ROLES OF GOVERNMENTS

CZMA experience indicates that integration is needed to protect the environment most effectively, that integration requires the various levels of government each to play important roles, and that integration requires advance planning. There has been a serious failing under CZMA, however, in developing an overall advance plan for coastal management, beyond the scope of any individual state's CMP. Since the creation of the Stratton Commission, it has been recognized that coastal protection is not something that can be accomplished exclusively at any one level of government,¹²¹ but there have been

116. For instance, the New Orleans District of the Army Corps of Engineers operates its permit review program at a cost of \$2.5 million a year. Houck, *supra* note 2, at 361-62. This figure does not include the costs of operating the Louisiana coastal permit program, the EPA program; nor does it include the costs associated with employing personnel from the U.S. Fish and Wildlife Service, National Marine Fisheries Service, Louisiana Department of Environmental Quality, Louisiana Department of Wildlife and Fisheries, and Louisiana parish (county) coastal programs. *Id.* at 361-62.

117. Development interests have been quick to allege "takings" and threaten governmental liability in a wide range of local zoning matters. Houck, *supra* note 2, at 364 n.33.

118. Although CZMA was set up to provide funding for state coastal programs, this funding was not intended to cover compensation to landowners for losses in property values due to excessive regulation. Moreover, coastal regulatory systems were not constructed to absorb the potential costs if regulations are found to constitute takings. *See* Note, *supra* note 37, at 510 (discussing the California plan).

119. Environmental concerns are often subject to influence by economic concerns, but in most cases courts and legislators have made clear that economic concerns should not override environmental concerns. *See, e.g.,* Union Elec. Co. v. EPA, 427 U.S. 246 (1976) (recognizing that economic or technological infeasibility is not an excuse for failure to comply with the Clean Air Act).

120. Federal decisionmakers may also be affected by concerns about takings. *See* Florida Rock Indus. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) ("If the instant case . . . results in a substantial award against the government, the Army engineers probably would want to consider whether the continued protection of 1,560 acres of wetlands was worth the damage to the public fisc."); *see also* Exec. Order No. 12,630, 53 Fed. Reg. 8,859 (1988) (entitled "Government Actions and Interference with Constitutionally Protected Property Rights"; attempting to restructure federal wetlands programs so as to avoid "takings" under the recent standards laid down by the Supreme Court).

121. *See* Archer & Knecht, *supra* note 6, at 110 ("The nature of ocean development projects virtually ensure [sic] that they involve multiple jurisdictions. . . . Ocean development systems, therefore, almost invariably require the positive cooperation of the local, state, and federal governments to be successful.").

problems in defining the proper role for each level of government and for the various agencies at any one level. The study of this history can lead to a better understanding of the appropriate roles for each of the different levels of government in an integrated environmental protection scheme.

A. Governmental Roles Under CZMA

The Stratton Commission believed that primary responsibility for coastal protection should be placed on the state, and this is how CZMA was originally structured.¹²² The idea was that major state responsibility would allow consideration of local issues, while still drawing upon significant resources. The limited federal role was reflected in the concept of a consistency requirement.¹²³ The federal government, however, has not willingly complied with its limited role. "The ultimate question for state and local governments is not whether they can retain most of their regulatory authority in the coastal zone. Rather it is whether they can keep any at all."¹²⁴ The battle for power has led to disharmony between states and the federal government, and has impacted on the quality of protection provided to the coast.¹²⁵

Local governments have been displeased with the way CZMA has been applied. Although local units are typically in charge of land use planning and zoning issues,¹²⁶ they have sometimes been seen as "push-overs" for development interests.¹²⁷ For that reason, local entities have not received primary responsibility for coastal protection under the Act.¹²⁸ In fact, the whole legislative approach to coastal zone management has been called a "battleground for conflicting philosophies over the distribution of powers between the state and its local government subdivisions."¹²⁹ This, of course, has led to less cooperation and coordination between different levels of government. Nonetheless, CZMA has been amended several times¹³⁰ and has achieved a degree of coordination between the various levels. Although CZMA may not yet have achieved the proper balance of powers, its history has helped define the proper role for each level of government in a well-integrated environmental protection scheme.

122. See NEWEST FEDERALISM, *supra* note 18, at ix.

123. See *supra* notes 55-75 and accompanying text.

124. Finnell, *supra* note 23, at 58-59.

125. See *supra* note 75.

126. See D. BROWER & D. CAROL, *supra* note 10, at 16 (noting that "[l]and-use planning has traditionally been the responsibility of local government"); Finnell, *supra* note 23, at 40 (land use planning is a field "traditionally subject mainly to state and local control"). For this reason, local governments objected to the concept of a centralized process for handling "zoning matters." Hildreth & Johnson, *supra* note 39, at 113-14.

127. Hildreth & Johnson, *supra* note 39, at 113. Distrust of local governments was at the heart of many efforts to centralize coastal protection laws. *Id.* at 115.

128. *Id.* Still, almost all states have given local governments a large role to play in the coastal management program. T. SCHOENBAUM, *supra* note 23, at 493.

129. Marcel & Bockrath, *supra* note 63, at 887-88.

130. See *supra* note 9.

B. *The Local Role Under an Integrated Plan*

Integration requires advance planning, and advance planning usually causes one to think of "centralized (that is, federal) planning." However, local aesthetic, economic, and environmental needs are not uniform. Because coastal protection is essentially a matter of land use planning, any integrated environmental protection program requires the local government to take the lead, with assistance, direction, and encouragement from the state and federal governments.¹³¹

Local permitting boards must develop an idea as to what is needed by the local economy and as to how much development can be allowed, not on a piecemeal basis, but with a true eye toward the future. That plan should conform to local environmental and cultural characteristics, giving due consideration to state, regional, and federal needs and should provide clear rules and regulations. If plans are developed and discussed beforehand, then the permit application process should be less difficult on the applicant, and the local environment will be better protected.¹³² In this manner, environmental resources can be protected, permit seekers can know what is permitted and what is forbidden, and taxpayers will not pay for redundant services. Advance planning requires an active permitting board, not merely a reactive one. The federal government could spur such activity by making grants dependent upon this type of planning, and perhaps by sanctioning those localities that do not comply. Ultimately, however, success or failure will depend on the efforts of local planning boards.¹³³ This clearly seems to be the answer for coastal protection, and it would seem to be appropriate for any integrated environmental protection scheme.

The local government should make most of the decisions that are likely to affect people seeking to conduct activity in or about the local area, even though these decisions must be in keeping with broad state and federal policies. Local governments are closer to the people affected by local activities and are better able to assess local needs and desires. It is also logical for the local government to administer the permitting process in large part and to initiate the enforcement investigations and proceedings, immediately informing viola-

131. The American Law Institute, as well as the state of California, put the primary responsibility for management of the coast at the local level. See Finnell, *supra* note 23, at 42-43; see also Pelham, Hyde & Banks, *supra* note 13, at 542-43 (discussing how Florida law requires local planning).

132. See *supra* notes 76-103 and accompanying text. An established plan might also alleviate the risk of "takings" claims, see *supra* notes 104-120 and accompanying text, as purchasers of land would have a record to refer to before they invested their money in the real estate.

133. Of course, local governments will still face problems such as lack of resources and potential susceptibility to development interests. This must be recognized, and localities must be provided with necessary state or federal resources to handle the projects. Moreover, the locally prepared advance plans must be sufficiently well defined so as to prevent a developer from forcing a project past a local board. This will require difficult planning and preparation at all levels of government, but such planning is warranted in the interest of integrated environmental protection.

tors and suspected violators of their transgressions.¹⁸⁴ Finally, the local government should provide annual reports to the state, the federal government, and the public. In that way, there is oversight to assure that the local plans are in keeping with the broader federal, regional, and state plans.

C. *The State Role Under an Integrated Plan*

The state must play an important role in any integrated environmental protection program. The state is already deeply involved in air and water pollution issues and, hence, it is in a good position to work toward integration.¹⁸⁵ The state also has many interrelated interests, such as housing, energy, and transportation, which must be considered and should not be divorced from coastal management decisions.¹⁸⁶ States also have more resources than local governments, but do not create the same resentment that sometimes accompanies federal action.¹⁸⁷ For these reasons, it is reasonable to rest significant power and authority to protect the environment at the state level, including the right to deny federal development that is not consistent with the state's plan. Legislators should recognize the importance of this feature in any integrated environmental protection plan.¹⁸⁸

States must also have a role in ironing out any difficulty between neighboring localities, just as the federal government must help out with interstate disputes.¹⁸⁹ Geographic concerns do not always conform to jurisdictional boundaries. At the same time, the state can serve as a type of clearinghouse for the

134. CZMA regulations require that where local governments take a lead in enforcement, the state must retain oversight responsibility. 15 C.F.R. § 923.42 (1990).

135. W. ALLAYAUD, *supra* note 12, at 205-06. According to the 1990 Amendments:

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 the development of state ocean resource plans as part of their federally approved coastal zone management programs.

CZMA 1990 Amendments, *supra* note 9, § 6208(a) (amending 16 U.S.C. § 1451(m)).

136. See Finnell, *supra* note 23, at 44-45 (concluding such a divorce would be "counterproductive").

137. See W. ALLAYAUD, *supra* note 12, at 52 ("[T]he appropriateness of state-level action is reinforced by the fear of federal planning at the local level").

138. Consistency is, after all, one of the important "carrots" that was set forth to encourage states to actively participate in coastal protection. D. BROWER & D. CAROL, *supra* note 10, at 6 (calling the consistency requirement a "major incentive"); Comment, *Federal Consistency Under the Coastal Zone Management Act*, 7 U. HAW. L. REV. 135, 136 (1985) (calling consistency a "perhaps more enticing" benefit); Comment, *supra* note 60, at 113 (calling the consistency requirement "the Act's most important incentive for states to develop" a CMP). The 1990 CZMA amendments purport to grant states more power in this area. CZMA 1990 Amendments, *supra* note 9, § 6208 (amending 16 U.S.C. § 1456). Hopefully, courts will recognize this intent.

139. States' failure to handle this problem has been identified as a major problem under CZMA. Lemonick, *Shrinking Shores*, TIME, Aug. 10, 1987, at 38, 47, *reprinted in* J. KALO, *supra* note 18, at 1, 6.

exchange of information between counties within the state.¹⁴⁰ Finally, the state should have a role in the oversight of local activity.¹⁴¹ Local planning boards may lack the expertise or commitment to handle the job effectively.¹⁴² As such, the state can play an important role in seeing that the counties are implementing and conducting the local plans in accordance with the federal and state management schemes.

D. *The Federal Role Under an Integrated Plan*

Although land use planning and zoning matters are usually handled at the local level,¹⁴³ the commerce clause and the supremacy clause of the United States Constitution empower Congress, if it so chooses, to preempt local land management entirely.¹⁴⁴ In the case of coastal management, some commentators have suggested a federal requirement that a certain percentage of coastal property be set aside or protected.¹⁴⁵ However, environmental resources vary from locality to locality, as do the economic and aesthetic needs. Accordingly, a centralized national plan would not be in the best interest of all localities.¹⁴⁶ Nevertheless, without an effective national program, there can be no truly effective integrated environmental protection.¹⁴⁷

The federal government must conduct or fund¹⁴⁸ the comprehensive research, provide technical assistance, and supply the data base that can be used for decisionmaking across the country.¹⁴⁹ Rather than superimposing a plan

140. NEWEST FEDERALISM, *supra* note 18, at 74.

141. *Id.*

142. *Id.* at 21.

143. *See supra* note 126.

144. Finnell, *supra* note 23, at 32-37. The federal government has in fact assumed much of the states' responsibility under CZMA. W. ALLAYAUD, *supra* note 12, at 53.

145. *See* D. BROWER & D. CAROL, *supra* note 10, at 14; Houck, *supra* note 2, at 405.

146. Of course, some coastal matters, such as issues that touch on national defense or critical energy facilities, must be viewed from a national perspective, even though local concerns should be considered. Finnell, *supra* note 23, at 55.

147. Archer & Knecht, *supra* note 6, at 117.

148. It is appropriate to call upon the federal government for funding. Kinsey, *supra* note 15, at 100. Even though not all states (or, for that matter, all areas within a given state) are equally affected by the coast, the coast is a national asset that provides benefits to all. CALIFORNIA COASTAL ZONE CONSERVATION COMMISSIONS, CALIFORNIA COASTAL PLAN 16-17 (1975) (discussing the national interest in the California coast). The public interest in the coastal zone includes: its use for national defense, its timber and other minerals, electric power generated along the shore, shipping ports, fish and other food products, aquatic life, and recreational purposes. *Id.* at 18; *see also* Archer & Knecht, *supra* note 6, at 117 (noting that the "federal government receives national benefits from CZM far exceeding its financial contribution to state programs").

149. NEWEST FEDERALISM, *supra* note 18, at 72; Archer & Knecht, *supra* note 6, at 109 (calling for "serious study and research at the national level"); Kinsey, *supra* note 15, at 100. CZMA already authorizes Research and Technical Assistance Grants for this purpose and offers technical assistance to the states. 16 U.S.C. §§ 1455a, 1456a, 1456b (1988), *as amended by* CZMA 1990 Amendments, *supra* note 9, §§ 6207, 6209, 6210; 15 C.F.R. § 933.1-.33 (1990). *But see* Archer & Knecht, *supra* note 6, at 108, 115 (complaining that the "important and promising service[]" of providing technical assistance to the states was largely curtailed after 1982).

which is incapable of dealing with site specific needs, the federal government should serve as a clearinghouse for local land use information.¹⁵⁰ This will avoid duplication and decrease the costs that would be involved if each state or locality were required to handle these matters separately. In playing this role, it is reasonable for the federal government to structure the broad agenda for environmental protection, outlining goals and defining objectives, as well as informing states and localities specifically what is required "in the national interest."¹⁵¹ The federal government should also monitor the conditions that exist and review state programs to make certain that state and local governments are protecting the national interest.¹⁵² Additionally, it is reasonable for the federal government to provide enforcement assistance in cases where a state or local governmental unit has requested assistance.¹⁵³

The federal government must also provide guidance about legal matters, such as the possibility of states or local governments being found liable for a taking. As long as decisionmakers carefully comply with the requirements set forth in *Nollan*, state and local governments should be able to minimize the risk of a taking.¹⁵⁴ Strict guidelines issued by the federal government that are drafted to meet the requirements of *Nollan*, and that localities can follow, should ease concerns that permits will be granted out of fear or under economic duress.¹⁵⁵ Such guidelines would also put buyers on notice, reducing their claims that "investment-backed expectations" require compensation.¹⁵⁶ Federal programs could also be written so as to support local governments that

150. See CZMA 1990 Amendments, *supra* note 9, § 6211 (amending CZMA by creating a new section that deals with the dissemination of technical information). This has been identified as one of the most important roles that the federal government has played under CZMA. Archer & Knecht, *supra* note 6, at 107, 108.

151. Kinsey, *supra* note 15, at 101. The federal government has been criticized for not having done this in the recent past. Archer & Knecht, *supra* note 6, at 104; see also *supra* note 40 (discussing how "the national interest" has not been well defined).

152. This review could also serve as part of the data base that the federal government would maintain for use by states and localities that have similar problems. If a program has worked well in one area of the country, it might work in a similar geographic area. Moreover, it is important to know whether a type of program has failed elsewhere. See NEWEST FEDERALISM, *supra* note 18, at 72-73. For a suggestion on how federal oversight can be more beneficial to state planning agencies, see Archer & Knecht, *supra* note 6, at 113-14.

153. NEWEST FEDERALISM, *supra* note 18, at 73. Some matters may simply be too difficult to handle at the local or state level. Federal enforcement assistance would also mesh well with the monitoring role for the federal government.

154. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 862 (1987) (Brennan, J., dissenting) (arguing that coastal commissions should have "little difficulty" in the future relating the connection between the mitigation measure and the perceived public interest).

155. Executive Order 12,630 may be seen as an early effort along these lines, but it is too early to assess its impact. See *supra* notes 111-15 and accompanying text.

156. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). See generally Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U.J. URB. & CONTEMP. L. 3 (1987) (reviewing the meaning of "investment backed expectations" and examining its applications).

are found liable for a taking.¹⁵⁷

The federal government must take the lead in developing coordination and cooperation between the various levels of governments.¹⁵⁸ In general, the federal government should be aggressive in defending the environment from dangers.¹⁵⁹ If states see more federal concern about local environmental protection, their trust in the federal government will be bolstered. This should improve cooperation and coordination between the various levels of government. By assuring that all three levels of government are coordinated, it should be possible to develop integrated plans, provide permit seekers with information as to what is and what is not permitted, and generally provide better protection for environmental resources.

IV. CONCLUSION

It is increasingly clear that effective environmental protection requires a well-integrated statutory scheme. CZMA is the only major federal environmental program that has adopted such an approach. Although it has not yet ironed out all of its problems, CZMA has been marching toward internal integration for twenty years.¹⁶⁰ This Article has identified many of the problems that have been encountered, and suggested a few solutions. One clear lesson is that planners must be active at all levels of government, and recognition of the proper role for each level is crucial. Each level of government has specific strengths and weaknesses as they relate to integrated environmental protection. An integrated plan must take advantage of those strengths and avoid unnecessary redundancy and interagency disputes.

The lessons learned from the CZMA experience should be applied to other environmental protection statutes as the goal of a completely integrated scheme is pursued. The goal of a totally integrated environmental program may still be far in the distance, but this long journey can begin with a single CZMA.

157. This would seem particularly appropriate where the state is required to regulate the activity in order to satisfy a federal statute. See J. KALO, *supra* note 18, at 34 (posing this as a question).

158. Archer & Knecht, *supra* note 6, at 113.

159. Archer and Knecht have argued:

[T]he primary national CZM policy requires competent federal managers who can work successfully with state officials, who understand coastal management, who will advocate its principles and defend the program within the Executive and Legislative branches of government, and who will act and be recognized as national program leaders.

Id. at 109.

160. Professor Houck has suggested several "beginning principles" for coastal protection, including: zoning or buying undeveloped coastline, developing new technologies for harvesting coastal resources and for disposing of waste, upgrading water quality, and rebuilding the coast. Houck, *supra* note 2, at 405; see also Archer & Knecht, *supra* note 6, at 116-17 (containing a list of suggestions, including outside evaluations of state plans, advance planning by states, continued federal financing, caution with oil exploration, and development of a national ocean policy commission).

