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THE FEDERAL CONSISTENCY REQUIREMENTS OF THE COASTAL ZONE MANAGEMENT ACT OF 1972: IT'S TIME TO REPEAL THIS FUNDAMENTALLY FLAWED LEGISLATION

*Bruce Kuhse**

I. INTRODUCTION

The Coastal Zone Management Act of 1972 (CZMA)¹ was one of many laws enacted during the “environmental decade”² spanning the late 1960s to the mid 1970s designed to bring a national focus on the protection and management of natural resources. In the case of the CZMA, the entire “coastal zone” of the United States, territories, and other island holdings was deemed worthy of this national interest.³ The CZMA was unlike the other environmental laws in two major respects: it relied on the voluntary program implementation by the coastal states, and it did not establish mandatory standards for compliance.⁴ Instead, the CZMA sought to

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1. Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. § 1451–1464 (West 1985 & Supp. 1999)) [hereinafter CZMA].

2. See DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION*, Preface (2d ed. 1992, release 7, Aug. 1999).

3. See 16 U.S.C. §§ 1451, 1453.

4. See Scott C. Whitney, et al, *State Implementation of the Coastal Zone Management Consistency Provisions—Ultra Vires or Unconstitutional?* 12 HARV. ENVTL. L. REV. 67 (1988).

“encourage” state participation through federal financial grants and the creation of a new “federal consistency” doctrine.⁵

The federal consistency doctrine generally requires federal agencies, applicants for federal permits, and applicants for federal project funds to be consistent with approved state management programs for activities affecting the coastal zone.⁶ Thus, a state may stall, or even stop, a federal agency activity far removed from the boundaries of the state by objecting that the activity is not consistent with the state’s management program and that the activity affects the state’s coastal zone. Although there are provisions for administrative appeal to the Secretary of Commerce to assert some exceptions to the consistency requirement,⁷ the doctrine serves as an inverse preemption of federal authority and an unnecessary burden on federal agencies and applicants.

This Article will discuss the provisions of the CZMA that focus on this fundamentally flawed consistency doctrine, the court decisions that have shaped the development of the doctrine, and the key 1990 amendments to the CZMA enacted in response to the court decisions. This will be followed by a discussion of the application of the consistency requirements, with cases and consistency appeals examples that illustrate the unnecessary, unfair, and costly administrative burden imposed on federal agencies and permit applicants. CZMA’s federal consistency doctrine will be examined in light of Constitutional Federalism and Supremacy doctrines, plus other federal environmental laws with mandatory regulatory standards, that render the doctrine not only obnoxious, but also superfluous. Finally, this article will note the Clinton administration’s proposals for CZMA amendments and the controversy concerning the 1999 reauthorization bill that was introduced but not passed by Congress.

II. THE CZMA AND FEDERAL CONSISTENCY

A. *The Background and Enactment of the CZMA*

The CZMA has been termed a “bold experiment in natural resource management and intergovernmental relations” designed with broad (and conflicting) national objectives and policies, setting a framework for

5. See Jack Archer & Joan Bondareff, *Implementation of the Federal Consistency Doctrine—Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115, 117–118 (1988).

6. 16 U.S.C. § 1456(c)(1)(A) (1994).

7. See *id.* §§ 1456(c)(3)(B), 1456(h).

“flexible, voluntary state responses” and a “state-federal partnership.”⁸ The original legislation grew out of the environmental activism of the 1960's and was spurred by the 1969 Stratton Commission report, *Our Nation and the Sea*, which is claimed to have first used the term “coastal zone” to identify the coastal areas as a unique environmental and resources management issue.⁹ A parallel legislation proposal (initially supported by President Nixon’s administration) to create a comprehensive national land use policy act failed because of the sheer volume of alternative proposals and lack of consensus.¹⁰ After three years of contentious hearings and power struggles in Congress, the CZMA was passed by Congress on October 12, 1972,¹¹ and signed into law by President Nixon on October 27, 1972, just days prior to his landslide reelection.¹²

The Senate Commerce Committee stated that the main purpose of the legislation was:

[T]he encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop, and whenever possible restore the resources of the coastal zone of the United States There is no attempt to diminish state authority through federal preemption. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.¹³

The Committee provided a litany of reasons from various reports to justify the legislation: “The problems of the coastal zone are characterized by burgeoning populations congregating in ever larger urban systems, creating growing demands for commercial, residential, recreational, and other development, often at the expense of natural values that include some of the most productive areas found anywhere on earth.”¹⁴ “The coast of the United States is, in many respects, the Nation’s most valuable geographic feature.”¹⁵ “The coastal zone presents one of the most perplexing

8. See David W. Owens, *National Goals, State Flexibility, and Accountability in Coastal Zone Management*, 20 COASTAL MGMT. 143 (1992).

9. See David R. Godschalk, *Implementing Coastal Zone Management: 1972–1990*, 20 COASTAL MGMT. 93, 97 (1992).

10. See *id.* at 98–99.

11. See Legislative History, Pub. L. 92-583, 1972 U.S.C.C.A.N. 4776.

12. See Godschalk, *supra* note 9, at 99.

13. S. REP. NO. 92-753, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776.

14. *Id.* at 1972 U.S.C.C.A.N. 4777.

15. *Id.* at 4778.

environmental management challenges. The thirty-one States which border on the oceans and the Great Lakes contain seventy-five percent of our Nation's population. The pressures of population and economic development threaten to overwhelm the balanced and best use of the invaluable and irreplaceable coastal resources in natural, economic and aesthetic terms."¹⁶ "The ultimate success of a coastal management program will depend on the effective cooperation of federal, state, regional, and local agencies."¹⁷ "[M]any of the biological organisms in the coastal zone are in extreme danger."¹⁸

The geographic diversity of some 94,000 miles of coastline, and cultural and economic diversity of the nation, made developing a comprehensive, centralized coastal management program difficult.¹⁹ One commentator has called a uniform national approach impractical, stating: "Effective coastal management requires both complex policy decisions and a sensitivity to local needs and opportunities that cannot easily be obtained in Washington."²⁰ The Senate Commerce Committee also recognized the diversity of the socio-economic and political divisions involved in coastal management:

The coastal zone also represents a sharp contrast with general land utilization when viewed from a social aspect. . . . the coastal zone is a politically complex area, involving local, state, regional, national and international political interests. . . . Until recently, local government has exercised most of the States' power to regulate land and water uses. But in the last few years a transition has been taking place, particularly as the States and the people have more clearly recognized the need for better management of the coastal zone. . . . It is the intent of the Committee to recognize the need for expanding state participation in the control of land and water use decisions in the coastal zone. . . . The Committee has adopted the State as the focal point for developing comprehensive plans and implementing management programs for the coastal zone.²¹

16. *Id.*

17. *Id.*

18. *Id.* at 4779.

19. *See* Owens, *supra* note 8, at 144-145.

20. *Id.* at 145.

21. 1972 U.S.C.C.A.N. 4776, 4779-80.

The coastal states strongly supported the focus of coastal management at the state level instead of the federal level.²² Others, such as environmental advocates, were less happy with the state focus, preferring “a stronger federal role to enforce substantive environmental performance standards and to require state participation under centralized coastal planning and management authority.”²³ One author quoted a critic that “described the act as ‘poorly drafted, deficient in substantive standards, vague on policy, and uncertain regarding agency responsibility’ and characterized the start as ‘shaky and uncertain.’”²⁴ Later court decisions, strong state political pressure for environmental action, and the President Reagan era of reduced federal support for environmental issues, would shift the environmentalist’s camps into states’ management supporters also.

B. The CZMA of 1972

The CZMA included eight Congressional findings that mirrored the concerns of the Senate Committee report, including the built-in conflict in stating the national interest as “effective management, beneficial use, protection, and development of the coastal zone.”²⁵ The findings also stated that “present state and local institutional arrangements for planning and regulating land and water use in such areas are inadequate”²⁶ and concluded with the necessity of encouragement, assistance, and cooperation:

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.²⁷

Section 303 of the Act next declared the national policy:

22. See Godschalk, *supra* note 9, at 99.

23. *Id.* at 100.

24. *Id.* (quoting Z.L. Zile, *A Legislative–Political History of the Coastal Zone Management Act of 1972*, 3 COASTAL ZONE MGMT. J. 235 (1974)).

25. 16 U.S.C. § 1451(a).

26. *Id.* § 302(h).

27. *Id.* § 302(i).

- (a) to preserve, protect, develop, and where possible, to restore or enhance, the resources. . .
- (b) to encourage and assist the states to exercise effectively their responsibilities. . .
- (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this title, and
- (d) to encourage the participation of the public, of Federal, state, and local governments. . . in the development of coastal zone management programs.²⁸

Thus the values and concerns of the CZMA were so broadly drawn as to include a consensus of the multitude of "stakeholders" with varied and conflicting interests in the coastal zone.²⁹

The vagueness of the CZMA was continued in the definition section, defining "coastal zone" to be "the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states."³⁰ The coastal zone was bounded seaward by the outer limit of the territorial sea but the inland boundary was not so definite. The inland boundary was set as "inland from the shorelines *only to the extent necessary* to control shorelands, the uses of which have a *direct and significant impact* on the coastal waters."³¹ Specifically excluded were "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government."³²

The details of the coastal zone boundaries were left to the individual coastal states in the development of their management programs.³³ This has allowed states to gain approval for their programs that have extreme variations of inland area boundaries.³⁴ California set a general inland boundary of 1,000 yards from the shoreline, while Alaska used the inland mark where the elevation of the land reached 1,000 feet. Connecticut used the political boundaries of thirty-six coastal towns plus 1,000 feet inland or the 100-year flood plain boundary, whichever is greater. Florida and

28. *Id.* § 1452.

29. *See* Godschalk, *supra* note 9, at 96.

30. 16 U.S.C. § 1453(1).

31. *Id.* (emphasis added).

32. *Id.*

33. *Id.* § 1454(b).

34. *See* William E. Guy, Jr., *Florida's Coastal Management Program: A Critical Analysis*, 11 COASTAL ZONE MGMT. J. 219, 223 (1983).

Hawaii take the extreme approach and include the entire state in the coastal zone. Florida's program has a split-level management plan, however, including only the coastal counties for federal funding and federal consistency review purposes.³⁵

The CZMA initially authorized \$9,000,000 for temporary annual federal funding assistance to the states in the form of management program development grants³⁶ and, after program approval by the Secretary of Commerce, authorized \$30,000,000 for annual administrative grants.³⁷ Program approval required a finding by the Secretary that the program was developed and adopted: (1) per Federal rules and regulations;³⁸ (2) after notice; (3) "with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private;" (4) was "adequate to carry out the purposes of [the CZMA];" and, (5) was "consistent with" the declared policies of the CZMA.³⁹ Programs were also required to include definitions of permissible uses that have "direct and significant impact on the coastal waters,"⁴⁰ "broad guidelines on priority of uses,"⁴¹ "adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature,"⁴² and assurances that local regulations "do not unreasonably restrict or exclude land or water uses of regional benefit."⁴³ At the Federal level, overall CZMA administration was assigned to the Office of Ocean and Coastal Resource Management (ORCM) within the National Oceanic and Atmospheric Administration (NOAA).⁴⁴

Providing financial incentives to states to develop or administer programs is not new or unique to the CZMA. Indeed, it is a classic method for Congress to exert influence on states without either running afoul of Constitutional restraints for federal-state separation of powers, or needing to become too creative by invoking workarounds, such as inventing Commerce Clause rationalizations.⁴⁵ However, the CZMA went beyond

35. *See id.*

36. 16 U.S.C. §§ 1454(a), 1464(a)(1).

37. *See id.* §§ 1455, 1464(a)(2).

38. CZMA Section 314 authorized the Secretary of Commerce to promulgate rules and regulations as necessary. *Id.* § 1463.

39. *Id.* § 1455(d)(1).

40. *Id.* § 1455(d)(2)(B).

41. *Id.* § 1455(d)(2)(E).

42. *Id.* § 1455(d)(8).

43. *Id.* § 1455(12).

44. *See* 15 C.F.R. §§ 923.40(c), 923.2(c) (2000).

45. *See* Carolyn M. Landever, *Whose Home On the Range? Equal Footing, The New*

financial incentives and brought forth the new, and flawed, requirement of the “federal consistency” doctrine.

C. *The Federal Consistency Requirement of the 1972 CZMA*

Section 307 of the CZMA was envisioned as the heart of the act, providing the principal incentive for states to develop coastal management programs.⁴⁶ The section charged the Secretary with the responsibility to consult, cooperate, and coordinate with other Federal agencies,⁴⁷ plus forbid the Secretary to approve any state program “unless the views of Federal agencies principally affected by such program have been adequately considered.”⁴⁸ Federal agency development projects and activities *directly affecting* the coastal zone were required to be conducted, “to the maximum extent practicable, consistent with approved state management programs.”⁴⁹ Applicants for Federal licenses or permits for activities “affecting any land or water use” in the coastal zone were required to certify to the permitting agency that the applicant complied with, and was consistent with, the state program.⁵⁰ Similarly, state and local government projects seeking Federal assistance from any other Federal programs were required to be consistent with the state’s plan.⁵¹

Some dispute mechanisms were included in the CZMA. The Secretary was authorized to mediate “serious disagreement between any Federal agency and the state in the development of the [state] program.”⁵² States could contest the consistency certification by permit applicants, halting the agency issuance of the permit. The Secretary was then authorized to hear

Federalism and State Jurisdiction On Public Lands, 47 FLA. L. REV. 557, 615–16 (1995) (discussing *New York v. United States*, 505 U.S. 144 (1992), “the Court pointed to ways Congress could ‘urge a State to adopt a legislative program consistent with federal interests.’” The government could use the spending power to influence the States, ‘attach[ing] conditions on the receipt of federal funds.’ Alternatively, the Court recognized that the government could give the States a choice between regulating activity in accordance with federal standards, or facing preemption by federal regulation.” *Id.* at 616 (citations omitted).).

46. See Richard M. Lattimer Jr., *Myopic Federalism: The Public Trust Doctrine and Regulation of Military Activities*, 150 MIL. L. REV. 79, 123 (1995). See also JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW CASES AND MATERIALS* 222 (1999).

47. 16 U.S.C. § 1456(a).

48. *Id.* § 1456(b).

49. *Id.* §§ 1456(c)(1)(A), (c)(2).

50. *Id.* § 1456(c)(3)(A) (emphasis added).

51. See *id.* § 1456(d).

52. Pub. L. No. 92-583 § 307(b), 86 Stat. 1280(1972). Later amendments also authorized mediation for disagreements over the administration of state programs. See 16 U.S.C. § 1456(h) (1994).

appeals to the objection, and override the state's objection only if finding "that the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security."⁵³ The Secretary was not authorized to decide the issue of whether the state's consistency determination was proper, but only whether or not to override the state's objection.

No specific dispute resolution was included for a state's objections to a Federal agency's activity or project. The legislative history on this issue indicates that the Senate Commerce Committee believed the Secretary would also resolve objections to Federal agency activities.⁵⁴ The Committee noted:

The Committee does not intend to exempt Federal agencies automatically from the provisions of this Act. Inasmuch as Federal agencies are given a full opportunity to participate in the planning process, the Committee deems it essential that Federal agencies administer their programs, including developmental projects, consistent with the States' coastal zone management program. If not, the ordinary course for a State would be to file a complaint with the Secretary . . . he shall make his own findings as to the consistency of the Federal developmental project with the State's management program.⁵⁵

This approach differed from the Secretary's role in permit applications in that it would require a decision not just as to whether to override the objection, but also to determine the correctness of the state's inconsistency determination. It was not until the 1990 amendments to the CZMA were enacted that a specific dispute resolution process for federal agency actions was identified, elevating the override authority to the President.⁵⁶

The House Conference report left the burden on the Federal agencies to make the consistency determinations and adopted the language of Section 307(e) to "make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights."⁵⁷ The key elements of Section 307 were twofold. First, it stated that: "Nothing in [the CZMA]

53. 16 U.S.C. § 1456(c)(3).

54. See S. REP. NO. 92-753 (April 19, 1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4793.

55. *Id.* 1972 U.S.C.C.A.N. 4776, 4793.

56. See 16 U.S.C. § 1456(c)(1)(B) (1994). For further discussion of the 1990 CZMA amendments, see *infra* Part II (E).

57. S. CONF. REP. NO. 92-1544 (Oct. 5, 1972), *reprinted in* 1972 U.S.C.C.A.N. 4822, 4824.

shall be construed--(1) to diminish either Federal or state jurisdiction, responsibility, or rights . . . (2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies."⁵⁸ Second, it also stated:

Notwithstanding any other provision of [the CZMA], nothing in [the CZMA] shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements *shall* be incorporated in any program developed pursuant to [the CZMA].⁵⁹

D. Evolution of the CZMA and the Consistency Doctrine

Implementation of the CZMA did not get off to a quick start. No funds were appropriated for the first fourteen months of the program.⁶⁰ The "Energy Crisis of 1973" intervened, causing an increased interest in offshore oil exploration and development, and leading to the CZMA Amendments of 1976 to deal with the offshore drilling concerns.⁶¹ The first state management program was not approved until 1976 (Washington State), which occurred *before* the program regulations were published in 1977-78.⁶²

The confusion over the implementation was readily apparent in one of the early court challenges to the approval of a state's program. In *American Petroleum Institute v. Knecht*,⁶³ the Institute, an oil and gas association and corporate members sought declaratory and injunctive relief to stop the Secretary from approving California's proposed Coastal Zone Management Program (CZMP).⁶⁴ They argued that the CZMP failed to meet the content requirements of the CZMA, that it had not been properly adopted by the state, and that the required environmental impact statement had also been improperly developed and adopted.⁶⁵ The court rejected the contentions

58. 16 U.S.C. § 1456(e)(1).

59. *Id.* § 1456(b) (emphasis added).

60. *See* Godschalk, *supra* note 9, at 101.

61. *See id.* at 101-102.

62. *See id.* at 103.

63. 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979).

64. *See id.* at 893.

65. *See id.*

and affirmed the CZMP approval,⁶⁶ but expressed its clear disdain for the CZMA processes:

The Court has before it for determination both preliminarily and for ultimate disposition questions of the highest importance, greatest complexity, and highest urgency. They arise as the result of high legislative purpose, low bureaucratic bungling, and present inherent difficulty in judicial determination. 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. In the course of the legislative process, there obviously came into conflict many competing interests which, in typical fashion, the Congress sought to accommodate, only to create thereby 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.⁶⁷

The court examined and accepted standing for the plaintiffs⁶⁸ and ripeness of the issue for judicial review.⁶⁹ However, the court declined to accept the contention that the standard of review should be *de novo*, instead conceding “considerable deference” to agency interpretation of the new law and regulations and applying the highly deferential “arbitrary and capricious” standard for review of the agency’s actions and decisions.⁷⁰ The legislative history of the CZMA was examined in depth, as was the development of California’s CZMP and the approval process; the court concluded that specificity of substantive requirements was not required by the CZMA and the balancing-of-interests decisions were not irrational.⁷¹ The decision ended with the court speaking frankly about the “befuddlement” of the CZMA:

The message is as clear as it is repugnant: under our so-called federal system, the Congress is constitutionally empowered to

66. *See id.* at 894.

67. *Id.* at 895–96.

68. *See id.* at 897.

69. *See id.* at 903.

70. *See id.* at 903, 907–908.

71. *See id.* at 912–31.

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 of the congressional mandate requires interaction between federal and state bureaucracy, the resultant maze is one of the prices required under the system.⁷²

The proponents of a strong CZMA program looking to rein in coastal development encountered more obstacles in the 1980's. The Executive branch, under the leadership of President Reagan, saw the federal support of individual state programs as unnecessary.⁷³ The Administration sought to eliminate Federal funding for the states' CZMA grants, believing that the state programs had matured and were successful.⁷⁴ Another explanation was that the Administration saw the misuse of the CZMA by the states and environmental groups as political opposition to Administration decisions to pursue greater national energy independence through offshore gas and oil development.⁷⁵ Florida, California, and Alaska were active in claiming inconsistency to oppose outer continental shelf (OCS) projects.⁷⁶ Others viewed the program as merely having the "bad fortune to enter its implementation period under the cloud of a hostile administration bent on deregulation of private enterprise in every area of public policy and of a president who had previously opposed coastal management as the governor of California."⁷⁷ Congress, however, continued to support the CZMA.⁷⁸

The second obstacle was the Supreme Court decision in 1984, *Secretary of the Interior v. California*,⁷⁹ that was seen as severely limiting the consistency requirements of the CZMA.⁸⁰ In that case, the Court evaluated California's claim that a decision by the Department of the

72. *Id.* at 931.

73. See Jack H. Archer & Robert W. Knecht, *The U.S. National Coastal Zone Management Program—Problems and Opportunities in the Next Phase*, 15 COASTALMGMT. 103, 104 (1987).

74. See *id.*

75. See *id.* at 108.

76. See *id.*

77. Godschalk, *supra* note 9, at 104.

78. See *id.* at 105.

79. 464 U.S. 312 (1984).

80. See Jack H. Archer, *Evolution of Major 1990 CZMA Amendments: Restoring Federal Consistency and Protecting Coastal Water Quality*, 1 TERR. SEA J. 191, 193 (1991).

Interior (DOI), to conduct the sale of oil and gas leases of submerged lands of the outer continental shelf, was an activity directly affecting the coastal zone, and thus a CZMA consistency determination should be required.⁸¹ California's specific concern was that one of the lease tracts was within twelve miles from a sea otter breeding area and that an oil spill would be harmful.⁸² It argued that the lease sale had a "direct affect" because it started a chain of events that could end in full-blown development and production.⁸³ DOI countered that the lease sale did not trigger the CZMA Section 307(c)(1) consistency determination requirements because the lease sale had no direct, identifiable impact.⁸⁴ Interestingly, both sides agreed that the preliminary exploration that would be authorized by the leases would have no significant effect on the zone.⁸⁵

The Court found the plain language of the CZMA ambiguous and proceeded to search the legislative history of the act for answers.⁸⁶ It concluded that Congress did not intend to extend the Section's consistency compliance to federal agency activities outside the territorial waters, but instead that: "Section 307(c)(1)'s 'directly affecting' language was aimed at activities conducted or supported by federal agencies on federal *lands* physically situated in the coastal zone but excluded from the zone as formally defined by the Act."⁸⁷ The Court continued its analysis and noted that Section 307(c)(1) was the incorrect section to apply anyway because the agency was not the "principal actor" of the activity, the agency was not conducting or supporting the oil or gas drilling of concern, only selling leases for others to do so.⁸⁸ Section 307(c)(3), which required consistency for licenses or permits affecting the coastal zone, was termed "the more pertinent provision."⁸⁹

Again, the Court reviewed the legislative history of the CZMA and its amendments, this time finding that the OCS lease sales, identified as the second stage of an administrative process established by a 1978 amendment to the Outer Continental Shelf Lands Act (OCSLA), were rejected by Congress for inclusion in Section 307(c)(3).⁹⁰ The Court noted however, that "states with approved CZMA plans retain considerable authority to

81. See *Secretary of the Interior v. California*, 464 U.S. 312, 317 (1984).

82. See *id.* at 318.

83. See *id.* at 321.

84. See *id.*

85. See *id.*

86. See *id.*

87. *Id.* at 330 (emphasis added).

88. See *id.* at 332.

89. *Id.* at 333.

90. See *id.* at 334-336.

veto inconsistent exploration or development and production plans put forward in those latter stages.”⁹¹ The four dissenting justices argued that the plain meaning of the “directly affecting” language was to enlarge the scope of federal activities subject to the consistency requirements of Section 307(c)(1).⁹² The dissent’s reading of legislative histories lead them to conclude that Congress intended OCS lease sales to have the federal consistency doctrine applied.⁹³ In 1990, Congress reauthorized and amended the CZMA to overturn the decision.⁹⁴

E. Consistency and the 1990 CZMA Amendments

The Court’s narrow interpretation of the consistency requirement outraged environmentalists and prompted calls for immediate action by Congress.⁹⁵ Numerous bills were introduced in Congress during the 1980’s, but for a variety of reasons, they all failed to pass.⁹⁶ 1990 saw a “well-organized coalition” of environmentalists, coastal states, academics, and Congressional members and staff, finally push through a reauthorization of the CZMA and its amendments.⁹⁷ The effort was aided by the legislative strategy of bundling the legislation into the bulky Omnibus Reconciliation Act to ensure passage and signature by President Bush.⁹⁸ The inclusion of the CZMA did not even gather a mention in the President’s signing statement in which he outlined the important aspects of the Omnibus Act.⁹⁹

Section 307(c)(1) was amended, with two subparts added, to ‘restore the consistency authority’ of the CZMA.¹⁰⁰ It now states:

91. *Id.* at 341.

92. *See id.* at 346, 355.

93. *See id.* at 375, 376.

94. *See* H.R. REP. NO. 101-964 at § 6208 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2675.

95. *See* Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DEPAUL L. REV. 981, 994 (1991) (citation omitted).

96. *See* Archer, *supra* note 80 at 195. (For a listing of these bills, *see* Archer and Bondareff, *The Role of Congress in Establishing U.S. Sovereignty Over the Territorial Sea*, 1 TERR. SEA J. 117, 140, n.120 (1990).

97. *See* Archer *supra* note 80; Joan M. Bondareff, *Congress, Reform, and Oceans Policy*, 22 COASTAL MGMT. 147, 154 (1994).

98. *See* Bondareff, *supra* note 97, at 154.

99. *See* Presidential Signing Statement, Pub. L. No. 101-508 (Nov. 5, 1990), 26 WEEKLY COMP. PRES. DOC. 1764 (Nov. 12, 1990), *reprinted in* 1990 U.S.C.C.A.N. 2930-1--2930-3.

100. *See* Archer, *supra* note 80, at 204.

Each Federal agency activity *within or outside* the coastal zone that *affects* any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable *with the enforceable policies* of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).¹⁰¹

Subpart B limited exemptions to inconsistency determinations, requiring a final Federal court judgment, certification by the Secretary of Commerce that mediation is not likely to achieve compliance, and a written request by the Secretary, before the President may grant an exemption for an activity that is in the *paramount* interest of the United States.¹⁰² Subpart C required the agency to provide the consistency determination to the appropriate state agency no later than ninety days prior to the final Federal activity approval.¹⁰³

The House Conference Report explained that the changes were to overturn the Supreme Court decision and “make clear that outer Continental Shelf oil and gas lease sales are subject to the requirements of section 307(c)(1).”¹⁰⁴ The Report continued: “The amended provision establishes . . . any federal agency activity (regardless of location) is subject to the CZMA requirement for consistency if it will affect . . . the coastal zone. No federal agency activities are categorically exempt.”¹⁰⁵ The federal agency’s consistency determination is to include any effects that it “may reasonably anticipate . . . including cumulative and secondary effects.”¹⁰⁶

The addition of the term “enforceable policies” to each of the consistency subsections and CZMA definitions was described as codifying the existing regulatory practice as set out in the Code of Federal Regulations.¹⁰⁷ Enforceable policies are now defined within the CZMA itself as “State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a state exerts control over private and public land and water uses and natural resources in the coastal zone.”¹⁰⁸ Thus, even the

101. 16 U.S.C. § 1456(c)(1)(A) (1994) (emphasis added).

102. See 16 U.S.C. § 1456(c)(1)(B) (emphasis added).

103. See *id.* § 1456(c)(1)(C).

104. H.R. Conf. Rep. No. 101-964, § 6208 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2675.

105. 1990 U.S.C.C.A.N. 2017, 2675 (emphasis in original).

106. *Id.*

107. See *id.* at 2674, 2677.

108. 16 U.S.C. § 1453(6a) (1994).

smallest of state and local government units and agencies may impose burdensome restrictions on federal government activities if the state's coastal management program provides for the incorporation of such local input.

While the Secretary is required not to approve state programs unless the national interests and views of Federal agencies are considered,¹⁰⁹ states may submit changes to modify their existing approved programs at any time, subject to conditions including the Secretary's approval.¹¹⁰ The Secretary has only a 30–120 day window to review the submission for approval or disapproval, or else the submission is “conclusively presumed as approved.”¹¹¹ Only a four-week window for review exists, before presumed concurrence, when the state identifies the submission as a “routine change.”¹¹² Thus a state with “networking”¹¹³ of state, county, city, and special district “enforceable policies” may overwhelm the designated reviewing authority (the Office of Ocean and Coastal Resource Management (OCRM)), and receive approval with only a cursory review.¹¹⁴

Florida has a typical “networked” coastal zone management program, incorporating at the state level alone twenty-three chapters of Florida Statutes, administered by eleven state agencies, and coordinated by the Department of Community Affairs.¹¹⁵ The program was initially approved in 1981 and is nestled within the general context of overall growth management programs.¹¹⁶ The legislative intent, as expressed in the Florida Coastal Management Act (FCMA),¹¹⁷ contains the conflicting sentiment “to protect, maintain, and develop these [coastal] resources,”¹¹⁸ which mirrors the conflict of the CZMA goals. The focus is generally on land use issues, specifically local government's role in growth management.¹¹⁹ Local

109. *See id.* §§ 1456(b), 1455(d).

110. *See id.* § 1455(e).

111. *Id.* § 1455(e)(2).

112. *See* 15 C.F.R. § 923.84(b)(3) (2000).

113. *See id.* § 923.43(b)(2).

114. *See* Owens, *supra* note 8, at 163 n.18.

115. *See* Fla. Dep't of Comm'y Aff., *Federal Consistency: Intergovernmental Coordination and Review* (last modified Nov. 17, 1999) <<http://www.dca.state.fl.us/ffcm/>>.

116. *See* Donna R. Christie & Paul Johnson, *State Ocean Policy Initiatives in Florida*, 18 COASTAL MGMT. 283, 284 (1990).

117. FLA. STAT. ANN. §§ 380.20–380.24 (West 2000).

118. *Id.* § 380.21(1)(b).

119. *See id.* § 380.21(1)(c); Christie & Johnson, *supra* note 116, at 284. Other included chapters in the program with direct application to the coastal zone include: Ch. 161, Beach and Shore Preservation; Ch. 186, State and Regional Planning; Ch. 380, Land and Water Management (Part I, Environmental Land and Water Management, with statutes governing development issues in areas of critical state concern (such as the Florida Keys) and

governments are required to develop comprehensive plans that must be "consistent" with regional plans and the state's plan.¹²⁰ Local government land use decisions must then be "consistent" with their comprehensive plans.¹²¹ Coastal governments are required to include a coastal management "element" in their plans to identify the policies and program implementation for, among other things, "quality of the coastal zone environment, [and] orderly and balanced utilization and preservation [of] resources."¹²² Thus, Florida's program requires local government to perform a balancing of conflicting policy goals similar to those of the CZMA. The startling disparity is that the local government is not tasked by Florida's growth management laws with consideration of national interests in their plans and decisions, nor to coordinate with federal agencies for input, even though local plans and decisions will be factors in CZMA consistency determinations as "enforceable policies of an approved program."

Supporters have hailed the 1990 CZMA amendments as a success for broadening the scope of consistency requirements and strengthening the powers of the coastal states.¹²³ They contend that federal agencies will be more restrained in their activities and take the consistency obligations more seriously than before.¹²⁴ Some supporters have focused on the availability of the "states veto power" to implement environmental programs and slow (or halt) development.¹²⁵ What seems to be missing is any concern for the other national interests identified in the CZMA (beneficial use and

Developments of Regional Impact. Part II is Coastal Planning and Management which contains the FCMA.); and Ch. 376, Pollutant Discharge, Prevention and Removal. Federal consistency review by the state is authorized in Section 380.23, *Florida Statutes*.

120. See FLA. STAT. ANN. § 163.3167 (West 2000). The primary growth management statutory authority is the Local Government Comprehensive Planning and Land Development Regulation Act found in Part II, Chapter 163, *Florida Statutes*. Interestingly, Florida's State Comprehensive Plan describes itself as a long-range policy guidance, direction-setting document that "does not create regulatory authority or authorize the adoption of agency rules, criteria, or standards not otherwise authorized by law." *Id.* § 187.101.

121. See *id.* § 163.3194.

122. *Id.* § 163.3177(6)(g). Florida's coastal zone management program has been criticized for its lack of attention to ocean resource management. See Christie & Johnson, *supra* note 116, at 283. For additional information on Florida's growth management and coastal regulation see: Richard Grosso, *Florida's Growth Management Act: How Far We Have Come, and How Far We Have Yet To Go*, 20 NOVA L. REV. 589 (1996); Donna R. Christie, *Growth Management In Florida: Focus On The Coast*, 3 J. LAND USE & ENVTL. L. 33 (1987); Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction In Florida*, 24 STETSON L. REV. 353 (1995).

123. See Archer, *supra* note 80, at 221.

124. See *id.*

125. See Rychlak, *supra* note 95, at 987, 992.

development).¹²⁶ Similarly notable is that the envisioned federal-state partnership and cooperation has been turned into federal government capitulation, without any satisfactory explanation as to why a balancing of national interests is best accomplished by local and state government agencies, instead of those federal institutions with Constitutionally derived powers.

III. CONSISTENCY IN OPERATION

A. Federal Activities

The regulations implementing the CZMA state: "The coordination requirements . . . are intended to achieve a proper balancing of diverse interests in the coastal zone. The policies of [the CZMA] require that there be a balancing of variety, sometimes conflicting, interests."¹²⁷ Federal activities are required to be "consistent to the maximum extent practicable" which is defined as *fully* consistent unless otherwise restricted by law.¹²⁸ Thus, federal agencies have no discretion to vary from the state programs as might be expected from the statutory term "practicable," which implies a reasoned decision process and not absolute compliance. Mediation or judicial review may be sought if the state disagrees with the consistency determination of the federal agency.¹²⁹ Only the President of the United States may exempt a Federal activity found inconsistent by a Federal court after a state's objection, and then only if finding that the activity meets the lofty standard of being "in the paramount interest of the United States."¹³⁰ One author described the process and made the observation that: "The onerous nature and political visibility of the exemption procedures make it unlikely that any federal agency will make use of the provision."¹³¹

The CZMA has been used to challenge a variety of Federal agency activities, ranging from the establishment of an international refugee camp on a military installation,¹³² the construction of new strategic homeport facilities for a Navy aircraft carrier battle group,¹³³ transfer of lands to the

126. See 16 U.S.C. § 1451(a) (1994).

127. 15 C.F.R. § 923.50(a) (2000).

128. See *id.* § 930.32.

129. See 15 C.F.R. 930.43, 930.116 (2001).

130. 16 U.S.C. § 1456(c)(1)(B) (1994).

131. Lattimer, *supra* note 46, at 124.

132. See *Commonwealth of Puerto Rico v. Muskie*, 507 F. Supp. 1035,1061 (D.P.R. 1981), *vacated as moot by* *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981).

133. See *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988).

Federal government,¹³⁴ and the government's sale of a river-front residence that was obtained in a drug forfeiture proceeding.¹³⁵ These actions are indicative of the states' intrusion into matters of purely Federal responsibility that is encouraged and permitted by the CZMA. Two of the cases will be reviewed to illustrate the folly of allowing CZMA consistency challenges to Federal activities.

In 1980, the United States was faced with handling over 131,000 Haitian and Cuban refugees.¹³⁶ President Carter declared an emergency pursuant to the Disaster Relief Act, issuing an Executive Order exempting compliance from several environmental protection acts and declaring the action to be "necessary 'in the paramount interest of the United States.'"¹³⁷ As part of the emergency efforts to process the refugees, Fort Allen, Puerto Rico, was selected to become one of the refugee camps.¹³⁸ The base was a fighter airfield during World War II and was in the process of being turned over to the Puerto Rico National Guard as a training center when it was selected for the refugee operation.¹³⁹

Environmental concerns over sewage and solid waste disposal were central to the siting selection challenge,¹⁴⁰ but the court also found that the CZMA consistency requirements were violated.¹⁴¹ First, a letter that simply asserted the operations were consistent with Puerto Rico's Coastal Zone Management Plan was deemed inadequate by the court because the letter did not fully detail the activity, facilities, effects, and supporting data.¹⁴² Next, the court decided that even if the letter was adequate notice to the Commonwealth, the Federal government could not commence its operations until after a 90-day period lapsed, to allow the Commonwealth adequate time to evaluate the consistency determination.¹⁴³ The government made a defense claim that the Fort Allen operations were exempt from the CZMA requirements because the CZMA excluded federal lands from the definition of the "coastal zone."¹⁴⁴ In a precursor to the Supreme

134. See *Sierra Club v. Marsh*, 692 F. Supp. 1210 (S.D. Cal. 1988).

135. See *State of New York v. United States General Services Administration*, 823 F. Supp. 82 (N.D.N.Y. 1993).

136. See *Commonwealth of Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1041.

137. *Id.* at 1039.

138. See *id.* at 1043, 1047.

139. See *id.*

140. See *id.* at 1044.

141. See *id.* at 1061.

142. See *id.* at 1059.

143. See *id.*

144. See *id.* at 1059-60.

Court decision in *California Coastal Commission v. Granite Rock Co.*¹⁴⁵ “Granite Rock” in 1987, the court rejected the defense, stating that the “spillover effects” of the federal activities on the federal lands triggered the CZMA consistency provisions.¹⁴⁶ The court then issued an injunction barring the refugee operations.¹⁴⁷ Thus, in the middle of emergency international refugee relief operations declared to be in the “paramount interest,” opponents were able to use the procedural requirements of the CZMA to judicially halt the operations.

The subsequent decision in *Granite Rock* was seen as a major victory for state regulatory power over federal activities.¹⁴⁸ The California Coastal Commission had demanded that Granite Rock Company apply for a state permit to conduct mining operations on federal lands within the coastal zone.¹⁴⁹ The company claimed that the state had no authority to require the permit because of CZMA preemption and the exclusion of federal lands from the coastal zone by the CZMA.¹⁵⁰ The Court held that “the CZMA does not automatically pre-empt all state regulation of activities on federal lands,” and that absent express conflict with federal laws, the state’s environmental permit requirements were not preempted.¹⁵¹ The Court declared its holding to be a “narrow” one, distinguishing “reasonable” state environmental regulations from land use regulations that would otherwise be preempted by the Property Clause of the Constitution.¹⁵² The majority opinion was authored by Justice O’Connor, joined by Rehnquist, Brennan, Marshall, and Blackmun, with Justices Powell, Stevens, Scalia, and White dissenting,¹⁵³ in unusual combinations of liberal and conservative political ideologies.¹⁵⁴

Justice Powell stated the decision was an “abdication of federal control over the use of federal land [that] is unprecedented.”¹⁵⁵ He noted that the federal permit system required the federal agency to balance important

145. 480 U.S. 572 (1987).

146. See *Puerto Rico v. Muskie*, 507 F. Supp. at 1060.

147. See *id.* at 1064.

148. See John D. Leshy, *Granite Rock and the States’ Influence Over Federal Land Use*, 18 ENVTL L. 99, 100 (1987).

149. See *California Coastal Commission v. Granite Rock Co.*, 480 U.S. at 576. Interestingly, California did not make a CZMA consistency objection to the federal mining permit and was held to have waived its right to do so. See *id.* at 591.

150. See *id.* at 582, 589.

151. *Id.* at 592–93.

152. See *id.* at 593–94.

153. See *id.* at 574.

154. See Leshy, *supra* note 148, at 100.

155. *California Coastal Commission v. Granite Rock Co.*, 480 U.S. at 604 (Powell, J., dissenting).

federal interests and astutely recognized that allowing the state agency to “strike a different balance necessarily conflicts with the federal system.”¹⁵⁶ Justice Scalia bluntly called the exercise of state power “land use control.”¹⁵⁷ He agreed with the majority that the CZMA did not change any state authority over federal lands, but asserted that the baseline was exclusive federal authority.¹⁵⁸ In his view, the CZMA required:

[F]ederal officials to coordinate and consult with the States regarding use of federal lands in order to assure consistency with state land use plans to the maximum extent compatible with federal law and objectives. Those requirements would be superfluous, and the limitation upon federal accommodation meaningless, if the States were meant to have independent land use authority over federal lands.¹⁵⁹

The “narrow distinction” between environmental and land use regulation made by Justice O’Connor for the majority has been noted as “slippery,” creating “a substantial opportunity to state and local governments, especially those who are willing to review and, if necessary, recharacterize their regulatory processes to shade them toward environmental regulation.”¹⁶⁰ This “negative power” of the states to obstruct federal activities was expanded by *Granite Rock* and hailed as a boon to “cooperative federalism.”¹⁶¹

The reach of *Granite Rock* was promptly expanded beyond federal permitted activities to actual federal agency activities in *Friends of the Earth v. United States Navy*.¹⁶² The Navy had been authorized, and funds appropriated, by Congress to construct a new homeport facility for an aircraft carrier battle group at Everett, Washington.¹⁶³ The project also required dredging in Everett Harbor and disposal of the dredge spoil material.¹⁶⁴ The dredging operations required both a permit from the Army Corps of Engineers and certification by the state under the terms of the Clean Water Act.¹⁶⁵ The Navy complied and received the permit and

156. *Id.* at 605.

157. *Id.* at 607 (Scalia, J., dissenting).

158. *See id.* at 613.

159. *Id.* at 612–13 (citing 16 U.S.C. §§ 1456(c)(3)(A), 1604(a); 43 U.S.C. § 1712(c)).

160. Leshy, *supra* note 148, at 103.

161. *See id.* at 104–105, 129.

162. 841 F.2d 927 (9th Cir. 1988).

163. *See id.* at 929.

164. *See id.*

165. *See id.* at 929–30.

certification.¹⁶⁶ However, the state also demanded that the Navy comply with Washington's Shoreline Management Act (SMA) and obtain a permit from the City of Everett.¹⁶⁷ The SMA was very similar to Florida's networked program stressing local government standards and decision making.¹⁶⁸ The Navy reluctantly applied for the city permit on March 2, 1987, and it was approved by the city on June 10, 1987.¹⁶⁹ The State reviewed the permit and approved it on July 8, 1987.¹⁷⁰ Opponents of the project then filed a state administrative agency appeal for review under the SMA and while the administrative action was ongoing, the Navy issued construction contracts for preliminary project work.¹⁷¹ The opponents then sought an injunction in federal district court to halt all activity, but the court denied their request.¹⁷² Upon appeal, the Ninth Circuit Court of Appeals reversed and granted the injunction.¹⁷³

The Navy argued that the SMA was primarily a land use regulation in the state's Coastal Zone Management Program, adopted under the auspices of the CZMA, and not applicable to the Navy activity.¹⁷⁴ The court, citing to the then recent *Granite Rock* decision, disagreed, calling the SMA "a mixed statute containing both land use and environmental regulations."¹⁷⁵ The court failed to distinguish between the federal activities in this case and the federally permitted activities at issue in *Granite Rock*, instead deciding that the SMA regulations were sufficiently "environmental" to require Navy compliance "regardless of whether that activity occurs on federal or non-federal lands."¹⁷⁶ Thus, even though the state did not challenge the Navy activity through the CZMA consistency provisions, those provisions opened the door for special interest group challenges at the local government level through the SMA, and the resulting quagmire of state and local law and administrative proceedings.

166. *See id.*

167. *See id.* at 930.

168. *See id.* at 935.

169. *See id.* at 930.

170. *See id.*

171. *See id.*

172. *See id.* at 930-31.

173. *See id.* at 937.

174. *See id.* at 935-36.

175. *Id.* at 936.

176. *Id.*

B. Federal Permit Activities

Applicants for federal licenses or permits have stricter consistency compliance requirements; they must certify in the application “that the proposed activity complies with and will be conducted in a manner consistent with the State’s approved management program.”¹⁷⁷ A broad definition is applied to the terms “license or permit” to mean “any required authorization, certification, approval, or other form of permission.”¹⁷⁸ All OCS activities that affect the coastal zone must also meet the license and permit consistency requirements.¹⁷⁹ The state has six months to express an objection to the consistency certification, in which case the federal agency is forbidden to issue the permit or license.¹⁸⁰

Appeals of consistency objections for permits and licenses may be made to the Secretary of Commerce.¹⁸¹ The Secretary may override the objection only if he finds the activity either consistent with the objectives of the CZMA or necessary for national security.¹⁸² To be found consistent with the objectives of the CZMA, each of the following requirements must be met:

- (a) The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner
- (b) The national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively.
- (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal.¹⁸³

The application of this process was illustrated in the consistency appeal of Jessie Taylor in 1997.¹⁸⁴ Mr. Taylor had purchased 0.62 acres of

177. 15 C.F.R. § 930.57(a) (2000).

178. *See* 15 C.F.R. § 930.51(a) (2001).

179. *See* 15 C.F.R. § 930.76 (2000).

180. *See* 15 C.F.R. § 930.63–64 (2001).

181. *See* 15 C.F.R. § 930.125 (2000).

182. *See id.* § 930.130.

183. *Id.* 15 C.F.R. § 930.121 (2001).

184. *See* In the Consistency Appeal of Jessie W. Taylor, *available in* 1997 NOAA

commercial property in a developed commercial area, planning to build a storage facility.¹⁸⁵ Adjacent lots had been filled to an elevation above his and his property developed “wetland characteristics.”¹⁸⁶ Mr. Taylor applied for a permit from the Army Corps of Engineers to fill his property and offered to mitigate the wetlands loss by purchasing mitigation credits from a wetlands mitigation bank equivalent to 2.85 acres of high quality wetlands.¹⁸⁷ He certified the activity as consistent with South Carolina’s CZMP, however the state did not agree and objected. Mr. Taylor appealed to the Secretary for override.¹⁸⁸

The Secretary evaluated the appeal in accordance with the criteria of the federal regulations, finding that: (1) the activity would foster development, recognized by the CZMA as one of the competing uses;¹⁸⁹ (2) the minimal adverse effects of the activity were more than offset by the mitigation measure to create a net beneficial effect;¹⁹⁰ (3) there was no violation of the Clean Water or Clean Air Act;¹⁹¹ and (4) the state proposed no alternative measures or reasonable alternatives to the activity to achieve consistency.¹⁹² The Secretary concluded that the proposed activity was consistent with the objectives of the CZMA and authorized the permit issuance.¹⁹³

The question that comes to mind is why did this small business project require the attention of the Secretary of Commerce? Unstated in the appeal is any reason why the local government or the state of South Carolina could not resolve the dispute with traditional land use, zoning, and planning processes. The CZMA does not diminish a state’s authority to use its police powers¹⁹⁴ and the terms of the CZMA require “an enforceable state policy” to apply the consistency requirement.¹⁹⁵ So, apparently the CZMA really adds nothing to the already existing powers of the state when it comes to permits and licenses for private applicants. Certainly, under Florida’s extensive growth management laws, sufficient statutory authority exists for denial of land use projects that are not consistent with the local,

LEXIS 19 (Dep’t Commerce, Dec. 30, 1997).

185. *See id.* at *9.

186. *See id.* at *10.

187. *See id.* at *30–31.

188. *See id.* at *13–14.

189. *See id.* at *25.

190. *See id.* at *36.

191. *See id.* at *37.

192. *See id.* at *39.

193. *See id.* at *40.

194. *See* Rychlak, *supra* note 95, at 993.

195. *See* 16 U.S.C. § 1456(c)(3)(A) (1994).

regional, and state comprehensive plans. Attacking a small project like Mr. Taylor's with a CZMA consistency objection appears to be a gross waste of federal agency time and resources, and patently unfair to the applicant.

Not all small projects fare as well with appeals of consistency objections. Indeed, the balancing test of a proposed project's contribution to the national interest against potential adverse environmental impacts is a difficult hurdle to overcome when the project is only for private use. This systemic bias in favor of large commercial development and against small, private projects is another major flaw of the CZMA consistency requirements process. The following appeals illustrate the issue.

Roger Fuller owned a small, unimproved lot bordering on a manmade lake in North Carolina.¹⁹⁶ The lot, bounded by the lake, a residential road, and a "residentially-improved lake-front lot," had been prone to erosion and flooding, allegedly caused by improper control of the water level for flood control operations.¹⁹⁷ Mr. Fuller proposed to restore his lot by filling the eroded area of shoreline and creating a four-foot wide grass buffer area.¹⁹⁸ His permit application to the Army Corps of Engineers was objected to by the state on the basis that the project was inconsistent with the state's Coastal Management Program (CMP), citing development restrictions on wetlands.¹⁹⁹ Mr. Fuller appealed to the Secretary for an override and lost.²⁰⁰

The Secretary outlined the analysis required by the regulations and declared the balancing element dispositive.²⁰¹ The Secretary accepted the state's position that the filling of approximately 0.2 acres would have an adverse effect, terming the results as "the loss of significant coastal fish and wildlife habitat."²⁰² He also accepted the state's contention that the lake's water quality would be reduced by the project because Mr. Fuller was unable to present any evidence that the grass buffer strip would retard sediment flow into the lake better than the "emergent palustrine wetlands" of the eroded shoreline.²⁰³ In evaluating the proposed project for its "contribution to the national interest," residential development was discounted as a policy goal of the CZMA in that it is not "economic development."²⁰⁴ The goal of restoring and protecting the property from

196. See In the Consistency Appeal of Robert W. Fuller, [hereinafter Fuller] available in 1992 NOAA Lexis 49, at *5 (Dep't Commerce, Oct. 2, 1992).

197. See *id.* at *4, *18.

198. See *id.* at *5-6.

199. See *id.* at *8-10.

200. See *id.* at *13, *38.

201. See *id.* at *16-17. The balancing element is that of 15 C.F.R. § 930.121(b).

202. Fuller, available in 1992 NOAA LEXIS 49, at *27.

203. See *id.* at *32-33.

204. See *id.* at *34-35.

further flood damage and erosion was seen as a valid CZMA objective, but the project's method was found to only "contribute minimally to the national objective . . ." ²⁰⁵ The balancing conclusion was obvious, the adverse outweighed the contribution, and the override appeal was denied. ²⁰⁶

The bias against private use projects can be further illustrated with the consistency appeal of Olga Velez Lugo. ²⁰⁷ Ms. Lugo owned an improved (residential) lot on Salinas Bay, Puerto Rico. ²⁰⁸ She proposed filling a portion of the property to correct flooding from runoff from adjoining properties, restore an existing boat ramp, and build a small (50-foot) wood pier. ²⁰⁹ Puerto Rico objected to her application for a permit from the Army Corps of Engineers, contending that the project would "adversely impact natural systems for private benefit and contribute to the degradation of . . . designated critical coastal wildlife areas." ²¹⁰ The Secretary denied Ms. Lugo's override appeal, again citing to the balancing element as the key analysis issue. ²¹¹

The arguments against the project were two-fold; the potential adverse effects of the project itself, and the cumulative effects of "the project in combination with other past, present and reasonably foreseeable future activities affecting the coastal zone." ²¹² The Secretary found that some fringe mangroves would be adversely impacted by the project, but more importantly, that there would be cumulative adverse effects. ²¹³ The cumulative effects would result from the project's contribution "to the boat congestion problem which already exists in the Bay" and the contention that "even small fill and construction projects will jeopardize the existing marine habitat." ²¹⁴ The other side of the balancing test, the contribution to the national interest, was again stated as "minimal, at best" because the project was for private benefit. ²¹⁵ Thus, since Ms. Lugo's project to build on the water came later than those of others who already had built in the area, she solely bore the burden of the cumulative adverse effects, and because it was a private use project instead of commercial development,

205. *Id.* at *37-38.

206. *See id.* at *38.

207. *See* In the Consistency Appeal of Olga Velez Lugo, *available in* 1994 NOAA LEXIS 32 (Dep't Commerce, Sept. 9, 1994).

208. *See id.* at *5.

209. *See id.*

210. *Id.* at *6-7.

211. *See id.* at *11, *24.

212. *Id.* at *11-12.

213. *See id.* at *19-20.

214. *Id.* at *13,*19.

215. *See id.* at *23.

she could not demonstrate a significant contribution to win a favorable balancing decision.

In stark contrast to the bias against small, private projects are the appeals of consistency objections made over offshore oil and gas projects. Florida has been particularly active in opposition to all phases of offshore leasing, exploration, and development beyond its territorial waters,²¹⁶ even though it has sold leases and made royalty agreements for large land tracts within its coastal waters.²¹⁷ Current opposition to the development of twenty production wells more than twenty-five miles south of Pensacola²¹⁸ has drawn national political attention.²¹⁹ However, Florida is not always successful in its opposition, as evidenced by the consistency objection override for Mobile Exploration in 1995.²²⁰

In 1989, Mobile proposed to drill six exploratory wells in lease tracts 10–20 miles south of Pensacola, Florida.²²¹ The Minerals Management Service of the Department of the Interior (DOI) approved the plan and, remarkably, Florida agreed with the consistency certification of the plan in 1990.²²² In September 1991, Mobile submitted a supplemental plan to drill one additional well first, located 13.5 miles offshore.²²³ This time Florida submitted a consistency objection in April 1992.²²⁴ Mobile promptly appealed to the Secretary of Commerce for an override.²²⁵

Florida's position on the threshold issue regarding the validity of its objection was that the possibility of an oil spill would conflict with its pollution control statutes and so its objection was based on "enforceable state policies" as required by the CZMA.²²⁶ Mobile argued that Florida's "buffer policy" to oppose all marine drilling within 100 miles was not an enforceable policy of the approved coastal management program.²²⁷ The

216. See, e.g., Christie & Johnson, *supra* note 116, at 287–88; Mobile Exploration & Producing U.S. Inc., 1993 NOAA LEXIS 4, *24 (Dep't Commerce, Jan. 7, 1993).

217. See *Coastal Petroleum v. Chiles*, 701 So. 2d 619, 622 (Fla. Dist. Ct. App. 1997).

218. See Bill Kaczor, *Foes: Drilling Puts State At Risk*, TALL DEM., Sept. 28, 1999, at A6.

219. See, e.g., John Harwood, *Gore Takes Aim at Offshore Oil Drilling As Bradley Unveils an Antipoverty Plan*, WALL ST. J., Oct. 22, 1999, at A20; Douglas Kiker, *Gore Says He Would Ban Offshore Oil Drilling*, TALL DEM., Oct. 22, 1999, at B1.

220. See generally, Mobile Exploration & Producing U.S. Inc., *available in* 1995 NOAA LEXIS 37 (Dep't Commerce, June 20, 1995).

221. See *id.* at *8–9.

222. See *id.* at *9.

223. See *id.* at *10.

224. See *id.* at *11.

225. See *id.* at *12.

226. See *id.* at *19.

227. See *id.* at *20.

Secretary opted to not consider the buffer policy issue, accepting as sufficient the objection based upon pollution control regulations.²²⁸

Mobile pleaded both override grounds in its appeal, consistency with the objectives of the CZMA, and necessary in the interest of national security.²²⁹ The national security argument was not persuasive and denied with only cursory review and comments.²³⁰ The Secretary devoted the vast majority of his decision to the balancing-of-interests element (Element Two) for the first ground of the appeal. He noted, but rejected, Florida's contention that Element One (the activity must further a national objective of the CZMA) required the activity to be protective of the environment also.²³¹ The plain text of the CZMA recognizes energy self-sufficiency as a national objective and the national interest was defined "to include both protection and development of coastal resources."²³² The balancing occurs in the consideration of Element Two.²³³

The discussion of adverse effects for this element included four substantive sections: (1) Impacts from routine operations; (2) Cumulative Effects; (3) Effects from mishaps such as oil spills; and (4) Impacts to coastal uses.²³⁴ The evaluation and conclusion stated:

I find that the exploration will have minimal adverse effects on the resources and uses of Florida's coastal zone, when conducted by itself or when its cumulative effects are considered. Further, I find that it is unlikely adverse impacts on the resources and uses of Florida's coastal zone will result from an oil spill occurring from Mobil's exploratory activities.²³⁵

The Secretary then evaluated the contribution to the national interest and found that the potential discovery and development of 900 billion cubic feet of natural gas furthered the national interest of energy self-sufficiency, although he declined to term it a "significant" contribution.²³⁶ On balance, he found that the general contribution outweighed the minimal and unlikely adverse impacts, while also noting Florida's previous agreement to the

228. *See id.*

229. *See id.* at *28.

230. *See id.* at *94-98.

231. *See id.* at *30-31.

232. *Id.*

233. *See id.* at *32.

234. *See id.* at *40.

235. *Id.* at *79.

236. *See id.* at *83-84.

exploration plans for the other six drilling wells.²³⁷ The Secretary also found no evidence of violation of the Clean Water Act and Clean Air Act requirements of Element Three,²³⁸ and rejected Florida's proposed alternative (to delay the project indefinitely) as unreasonable for Element Four.²³⁹ The ultimate conclusion was that Mobil's plan was consistent with the objectives and purposes of the CZMA, and so Florida's objection was overridden.²⁴⁰ Thus, a single exploratory oil and gas well in coastal waters, with the potential for massive future development, was able to succeed in the consistency appeals process, whereas small, private erosion control or boat pier construction projects could not.

IV. THE FLAWS OF CONSISTENCY REQUIREMENTS IN THE CZMA

As we have seen, a state can enforce its own environmental and land use policies within the state without using the CZMA. The Supreme Court has even gone so far as to approve of state permit requirements for activities on federal lands within the coastal zone,²⁴¹ even though those lands are excluded by the definitions of the CZMA.²⁴² The CZMA encourages redundancy in local, state, and federal agencies to develop regulations, evaluate applications, and "coordinate" actions.²⁴³ The divided, excessive authority is costly, inconvenient, and erodes public confidence in government.²⁴⁴ The consistency review and appeal process is unfair to individuals wishing to pursue small or private projects because of the inherent system bias for commercial development and environmental protection.

One commentator called the consistency doctrine a success because a study showed a 99% concurrence rate in a one year period (1983) and 97% in another (1987).²⁴⁵ A NOAA Consistency study of the 1983 federal fiscal year reported 984 state objections to 7,762 federal decisions, with the vast majority of the objections to license and permit applications.²⁴⁶ Even the State of Florida notes that of its approximately 4,000 reviews each year, it

237. *See id.* at *86.

238. *See id.* at *86-91.

239. *See id.* at *91-93.

240. *See id.* at *98.

241. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

242. *See* 16 U.S.C. § 1453(1) (1995).

243. *See* Rychlak, *supra* note 95, at 998.

244. *See id.* at 995-996.

245. *See* Godschalk, *supra* note 9, at 109.

246. *See* Whitney et al., *supra* note 4, at 83.

agrees with 99% of the consistency determinations.²⁴⁷ Should valuable taxpayer resources of time, people, and money be wasted in these types of routine, redundant reviews?

Would anything be lost, or the environment harmed, if the CZMA consistency requirements were repealed? No; other laws provide more specific and detailed standards that are still applied, such as the Clean Water Act²⁴⁸ and the Clean Air Act,²⁴⁹ that are mandated by the CZMA. Other applicable statutes include the Endangered Species Act,²⁵⁰ Marine Mammal Protection Act,²⁵¹ Marine Protection Research and Sanctuaries Act,²⁵² National Environmental Policy Act,²⁵³ and the Outer Continental Shelf Lands Act.²⁵⁴ Many of these already contain mandatory "consultation and coordination" provisions that could apply to reviews of coastal zone activities and permit applications without giving states and local governments near veto authority over federal agency decisions. Additionally, the Administrative Procedure Act can be used to challenge agency decisions through a formal hearing process and avenues for judicial review.²⁵⁵

Even supporters of the CZMA have noted problems of inconsistent, conflicting, and redundant requirements imposed by the multiple levels of government involvement in the decision process.²⁵⁶ This comes at a cost that taxpayers must ultimately pay.²⁵⁷ The "layered federalism" of the CZMA creates inequities between the states and jeopardizes the achievement of national norms.²⁵⁸ Critics have claimed the burdens of the CZMA to be unconstitutional,²⁵⁹ and called for the development of a Federal Public Trust Doctrine to "put the onus of balancing the interests in our nation's

247. See Florida Dep't. of Comm. Affairs, (visited Sept. 17, 2000) <<http://www.dca.state.fl.us/ffcm/>>.

248. 33 U.S.C. §§ 1251-1387 (1994).

249. 42 U.S.C. §§ 7401-7671q (1994).

250. 16 U.S.C. §§ 1531-1544 (1994 & Supp. 2000).

251. *Id.* §§ 1361-1421(w).

252. *Id.* §§ 1431-1445b.

253. 42 U.S.C. §§ 4321-4370d (1994).

254. 43 U.S.C. §§ 1331-1356 (1994).

255. See 5 U.S.C. §§ 551-706 (1994).

256. See Rychlak, *supra* note 95, at 995-996.

257. See *id.* at 996.

258. See Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models From Other Laws Save Our Public Lands?* 3 HASTINGS W.-N.W. J. ENVT. L. & POL'Y 193, 207 (1996).

259. See Whitney et al., *supra* note 4, at 68. This article is noteworthy because the contention of unconstitutionality was written while the "directly affecting" was still subject to the strict construction of *Secretary of the Interior v. California*, 464 U.S. 312 (1984) and before the expansive CZMA amendments of 1990.

coastal waters where it belongs—with the federal government.”²⁶⁰ The illustrated fundamental flaws of the CZMA federal consistency requirements support those criticisms.

V. CONCLUSIONS AND RECOMMENDATIONS

Thirty-three of thirty-five eligible states and territories have approved coastal management programs;²⁶¹ the consistency “carrot” is no longer required to stimulate the development of those programs. The CZMA was due for reauthorization from Congress in 1999 but has been held up over two controversial amendments pertaining to protection of private property rights and nonpoint source pollution control programs.²⁶² No changes to the consistency provisions were included in the proposed reauthorization bill,²⁶³ nor in the Clinton administration’s reauthorization proposal.²⁶⁴ The proposals provide for renewed grant funding, mandate an evaluation of the effectiveness of CZMA programs, and emphasize support for coastal communities.²⁶⁵

Congress should eliminate the federal consistency requirements from the CZMA while the legislation is still pending and before any reauthorization of new funding. A system of basic national standards should be developed as a baseline for all coastal activities, with consultation and coordination encouraged, but ultimate decision authority retained by the appropriate federal agency tasked with the balancing of national interests involved in the activity. States should be granted standing to pursue administrative appeals of final agency actions under the APA to ensure their valued input to the decision process. Specific, localized concerns could be addressed by state initiated petitions for federal rules and regulations development by federal agencies. The states would retain their sovereign police powers to regulate land use within their borders, but those

260. Lattimer, *supra* note 46, at 164.

261. See National Oceanic and Atmospheric Administration, *The Coastal Management Enhancement Act of 1999*, (last modified Aug. 29, 2000) <<http://www.ocrm.nos.noaa.gov/czm>> [hereinafter 1999 CZMA Proposal].

262. See H.R. REP. NO. 106-485 (1999).

263. H.R. 2669, 106th Cong. (1999).

264. See 1999 CZMA Proposal, *supra* note 261.

265. See *id.* The budget for the CZMA grants to the states is remarkably small. The total amount authorized for FY99 was only \$57 million (Florida’s share was \$2,795,000), with modest increases proposed by the Clinton administration and H.R. 2669. Savings from the repeal of consistency review requirements could be channeled into state grant increases for enhanced coastal management and coastal property acquisitions for preservation and public use. See *id.*

powers should not continue to be extended to federal lands or waters. The result would be a more efficient system of administration of coastal management without the breach of basic separation of powers between the states and the federal government.

The "management" in the Coastal Zone Management Act has been nearly destroyed by the capitulation of federal authority imposed by the federal consistency requirements. It is time for Congress to reassert the federal authority, and insist that the coastal resources be managed instead of being held captive to the environmental special interest groups. The fundamentally flawed federal consistency provisions of the CZMA should be abolished and replaced with a rational, efficient system of coastal resources management that can realistically balance competing state and local interests while maintaining the supremacy of national policy interests.