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The Coastal Barrier Resources Act and the Expenditures Limitation Approach to Natural Resources Conservation: Wave of the Future or Island Unto Itself?

Robert R. Kuehn

INTRODUCTION

Considered by some environmentalists the most significant federal land protection legislation since the 1968 Wild and Scenic Rivers Act, the recently enacted Coastal Barrier Resources Act (CBRA) represents the first comprehensive attempt to link federal fiscal policy with natural resource conservation. CBRA attempts to minimize loss of human life, wasteful expenditures of federal revenues, and damage to natural resources associated with development on coastal barriers along the Atlantic and Gulf Coasts. Noted for their natural beauty, wildlife habitat, and recreation opportunities, the coastal barriers also are prized as sites for intensive residential development. The barriers are becoming urbanized at about twice the national rate, in part because of massive aid from numerous federal programs for development and redevelopment. Federal aid, by encouraging development, often has...
contributed to degradation and destruction of natural resources of the barriers and to increased risk to human life.

Alarmed by the loss of important natural resources and the unwise expenditures of federal funds, the Ninety-Seventh Congress reacted in a unique way. The Congress first moved to prohibit federal flood insurance for new structures on the undeveloped, unprotected coastal barriers along the Atlantic and Gulf states, as designated by the Secretary of the Interior during a one-year study period. Then, with the insurance prohibition about to take effect on a large number of areas identified by the Secretary, Congress compromised by reducing the geographical area covered by the legislation but expanding the types of government financial assistance prohibited.

The resulting Coastal Barriers Resources Act limits new federal expenditures or financial assistance within the designated coastal barrier areas. Subject to certain limited exceptions for activities unrelated to development, CBRA prohibits federal financial assistance for the construction or purchase of structures, roads, bridges, facilities, and related infrastructure. Congress intended the elimination of the federal development assistance to shift the financial risk and burden of development from the federal government and the taxpayer back to the developer and the consumer of coastal barrier property. Shifting the costs of development back to those who build and live on coastal barriers furthers two objectives: the conservation of natural resources of the coastal barriers and the efficient use of limited government funds.

CBRA hence marks a departure from past techniques for natural resource conservation as it employs a nonregulatory, nonacquisition, market approach. In contrast to traditional methods of protecting resources, the expenditure ban used in CBRA attempts to deter resource-destructive activities by making them more expensive. As a blend of environmentalism and fiscal conservatism, the approach embodied in CBRA offers a model for the protection of other areas of national and state interest. Indeed, several recent federal and state proposals have relied on the expenditure limitation approach as a means of conserving threatened natural resources.

This article focuses on the unique fiscal approach to natural resource conservation employed in CBRA and its possible application in other areas. The first part of the article examines the background and

States and Draft Environmental Statement 118 (1979) [hereinafter cited as 1979 DEIS], reprinted in Hearings on S.2686 Before the Subcomm. on Parks, Recreation and Renewable Resources of the Senate Comm. on Energy, and Natural Resources, 96th Cong., 2d Sess. 28 to 283 (1980) [hereinafter cited as Senate Hearings—96th Congress].


development of federal involvement on coastal barriers, traces the history of CBRA, and analyzes the purpose of a number of CBRA provisions. The second part takes a broader look at the philosophy and methodology of the technique employed in CBRA and similar federal and state proposals, and discusses the advantages, disadvantages, and possible effects of limitations on government expenditures and assistance as a technique for natural resource conservation.

I

THE COASTAL BARRIER RESOURCES ACT: THE LEGISLATIVE PROTOTYPE OF RESOURCE CONSERVATION THROUGH LIMITATIONS ON GOVERNMENT EXPENDITURES AND FINANCIAL ASSISTANCE

A. Coastal Barriers and Development

Coastal barriers, commonly known as barrier islands, are the long, narrow, low-lying coastal landforms, partially or almost entirely surrounded by water, that generally parallel the mainland coast; the Atlantic and Gulf coastal barriers form an irregular chain from Maine to Texas. Although some coastal barriers connect with the mainland,


The barriers range in size from less than a mile long and less than fifty acres in land area, usually in New England, to large structures often exceeding thirty miles in length and 100,000 acres in size, in North Carolina, Florida, and Texas. See 1979 DEIS, supra note 4, at 63, reprinted in Senate Hearings—96th Congress, supra note 4, at 111; NPS Report, supra, at 5. Commonly referred to as barrier islands, coastal barriers also include bay barriers, tombolos, and barrier spits that directly attach to the mainland. REPORT TO CONGRESS,
barriers are readily distinguishable from mainland beaches. A coastal barrier protects landward aquatic habitats, such as estuaries, salt marshes, and lagoons, from the direct attack of waves. The name coastal barrier reflects this characteristic, for the barriers buffer both coastal wetlands and the mainland from the direct forces of ocean waves and storms.

The combination of the rising sea level, the routine and constant movement of the unconsolidated sands that constitute the barriers, and the vulnerability of barrier landforms to hurricanes and other storms led Congress to conclude that the coastal barriers, in varying degrees, are hazardous for development. Hurricanes can be espe-

8. REPORT TO CONGRESS, supra note 7, at 4.
11. A gradual rise in the sea level of one foot per century has increased the threat of coastal flooding and has contributed to the general landward migration of the islands. H.R. REP. NO. 841, 97th Cong., 2d Sess. 7 (1982) [hereinafter cited as CBRA HOUSE REPORT]; WORK GROUP REPORT, supra note 7, at 13; REPORT TO CONGRESS, supra note 7, at 4. Longshore transport and violent hurricanes and storms shift huge quantities of sand. These hurricanes and storms often open new inlets and cause overwash that inundates entire sections of the barrier and transports sand across the landform, resulting in the landward migration of the coastal barrier unit. 1983 FEIS, supra note 3, at A-22, A-23, A-27 to A-28; see also Hearings on H.R. 3981 Before the Subcomm. on National Parks and Insular Affairs of the House Comm. on Interior and Insular Affairs, 96th Cong., 2d Sess. 106 (1980) [hereinafter cited as House Hearings—96th Congress] (testimony of Orrin Pilkey, Jr., Prof. of Geology, Duke University); Dolan, Hayden & Lins, Barrier Islands, 68 AM. SCIENTIST 16, 17 (1980) (in recent decades the movement of shorelines on the Atlantic Coast usually has been landward at a rate of about 1.5 meters per year).
12. CBRA SENATE REPORT, supra note 10, at 1-2, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3212-13; CBRA HOUSE REPORT, supra note 11, at 7. Many opponents of CBRA argued that the stability of barriers vary dramatically from region to region and, therefore, that not all coastal barriers are hazardous and unsuitable for development. See, e.g., Scott, Coastal Development and Federal Policy: A Case Study, URB. LAND, MAR. 1982, at 20, 21; Senate Hearings—96th Congress, supra note 4, at 374 (testimony of Fred Napoli- tano, Vice President and Treasurer, Nat'l Ass'n of Home Builders); House Hearings—97th Congress, supra note 7, at 348 (testimony of Lawrence Young, Nat'l Ass'n of Realtors); id. at 170 (testimony of Harley W. Snyder, Nat'l Ass'n of Realtors). The definitions and designations of coastal barriers in CBRA, however, do not differentiate between vulnerable and safe coastal barriers and appear to presume that instability and vulnerability to storms make all coastal barriers generally unsuitable for development. See 128 CONG. REC. S12,603 (daily ed. Sept. 23, 1982) (statement of Sen. Chafee). It often was stated in Congress that lands now considered safe for development may become extremely hazardous or simply disappear within a few years. CBRA SENATE REPORT, supra note 10, at 2, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3213; CBRA HOUSE REPORT, supra note 11, at 7; 127 CONG.
cially devastating. Winds exceeding 175 miles per hour and storm surges 20 feet high often sweep across the barriers, on occasion wiping out years of development and resulting in the death and injury of residents. Yet evacuation of developed coastal barriers in the threat of a major storm poses a serious problem for local authorities. The erratic course of hurricanes may give insufficient warning time for complete evacuation, low-lying escape routes may become flooded or congested, and bridges and causeways to the mainland may become jammed.

Attempts to stabilize coastal barriers to protect development and reduce erosion, migration, or the effect of storms and hurricanes actually may cause greater instability by upsetting the natural equilibrium between the barrier landform and ocean energies. A coastal barrier artificially stabilized for years and seriously out of equilibrium with natural forces can be damaged severely by a major storm, or even completely and permanently destroyed. Efforts to stabilize a beach in one area may affect the supply of sediment to another and accelerate erosion of that area. Left alone, however, coastal barriers react to the forces of the sea by changing shape and moving landward, at the same time absorbing the full shock of wind and waves and acting as a barrier to the mainland.

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13. REPORT TO CONGRESS, supra note 7, at 6; CBRA HOUSE REPORT, supra note 11, at 8.
14. See REPORT TO CONGRESS, supra note 7, at 6; 1983 FEIS, supra note 3, at A-105 to A-106. Hurricane experts warned that unless Congress acted to protect the human resources on coastal barriers, as well as the economic and physical resources, there could be a repeat of the 1900 hurricane that struck Galveston Island, Texas, killing 6,000 people. House Hearings—97th Congress, supra note 7, at 37 (testimony of Gerald A. Peterson, Assoc. Director, Nat'l Weather Service); Senate Hearings—96th Congress, supra note 4, at 256-59 (testimony of Dr. Neil Frank, Director, Nat'l Hurricane Center, Miami, Fla.).
15. REPORT TO CONGRESS, supra note 7, at 7.
16. 1983 FEIS, supra note 3, at IV-5; see also House Hearings—97th Congress, supra note 7, at 39 (testimony of Dr. Al Hine, Assoc. Prof., Dep't of Marine Sciences, University of So. Fla.). Some geologists maintain that storms and the rise in sea level make any stabilization attempts futile in the long run and argue that efforts to hold back the ocean can only generate short-term solutions at great cost in energy and natural resources. House Hearings—96th Congress, supra note 11, at 110 (testimony of Paul J. Godfrey, Assoc. Prof., Dep't of Botany, University of Mass., Amherst); Pilkey & Evans, Rising Seas, Shifting Shores, OCEANS, Jan. 1982, at 65. But cf. M. O'Brien, Memorandum Covering a Document Entitled "Saving the American Beach: A Position Paper by Concerned Geologists," reprinted in 128 CONG. REC. S2957-58 (daily ed. Mar. 30, 1982).
17. REPORT TO CONGRESS, supra note 7, at 7. The movement of beach sediment in the littoral drift can be interrupted by groins or jetties, causing sand starvation in the adjacent downdrift area. For example, rapid erosion and landward displacement of the northern end of Assateague Island National Seashore in Maryland has resulted from efforts to stabilize the beach at Ocean City, Maryland. 1983 FEIS, supra note 3, at IV-5.
Although the dynamic nature of coastal barriers may make permanent human habitation difficult or impossible, barriers create and maintain important habitats for many species of fish, birds, and other wildlife. The protected intertidal zone of the backside is a shallow, low-energy, productive nursery ground for numerous marine species. The wetlands and estuaries created and protected by the coastal barriers nurture finfish and shellfish stocks vital to commercial and recreational fishing. Large populations of migrating and wintering waterfowl and other birds depend upon the coastal barriers and adjacent wetlands for food and shelter. Many endangered and threatened species similarly depend on coastal barrier beaches, uplands, and wetlands.

The natural resources on coastal barriers also afford important open space and opportunities for public recreation. With one out of every four Americans living within one hundred miles of the Atlantic and Gulf Coasts, coastal barriers provide extensive opportunities for clamming, crabbing, shell collecting, fishing, waterfowl hunting, birdwatching, and nature observation, as well as beach recreation.


20. 1979 DEIS, supra note 4, at 60, reprinted in Senate Hearings—96th Congress, supra note 4, at 60.

21. CBRA HOUSE REPORT, supra note 11, at 8. More than 80% of the shellfish and finfish caught by sport fishermen on the Atlantic and Gulf Coasts depend upon coastal barrier estuaries during some stage of their life cycles. Id.; CBRA SENATE REPORT, supra note 10, at 2; REPORT TO CONGRESS, supra note 7, at 8. Species dependent on coastal barrier habitat comprise over 90% of the U.S. commercial catch in the Gulf of Mexico and more than 80% of the commercial catch on the Atlantic Coast; the dockside value of the catch of species dependent on coastal barrier habitat exceeded one billion dollars in 1980. CBRA HOUSE REPORT, supra note 11, at 8. CBRA SENATE REPORT, supra note 10, at 2, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3213.

22. A large percentage of the Atlantic Flyway black duck and Central Flyway waterfowl populations depend on the marshes created by the coastal barriers. CBRA HOUSE REPORT, supra note 11, at 8; CBRA SENATE REPORT, supra note 10, at 2, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3213.

23. CBRA HOUSE REPORT, supra note 11, at 8-9; CBRA SENATE REPORT, supra note 10, at 2, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3213; REPORT TO CONGRESS, supra note 7, at 8. These species include sea turtles, the Eastern brown pelican, the whooping crane, the bald eagle, and the American crocodile. The specialization necessary to adapt to the harsh environmental conditions of coastal barriers make the plant and animal species that depend on the barriers particularly sensitive to human modification of their habitat. House Hearings—97th Congress, supra note 7, at 26 (statement of James W. Pulliam, Deputy Assoc. Director, Nat'l Wildlife Refuge Sys., U.S. Fish and Wildlife Serv.).

24. CBRA HOUSE REPORT, supra note 11, at 9; REPORT TO CONGRESS, supra note 7, at 8-9.

25. House Hearings—97th Congress, supra note 7, at 379 (statement of James Watt, Secretary, Dep't of the Interior); see also CBRA HOUSE REPORT, supra note 11, at 9.
The abundant natural resources of the coastal barriers have led many to overlook the risks posed by permanent human habitation. Prior to World War II, coastal barriers were largely inaccessible to the public and about ninety percent undeveloped. However, beginning in the urbanized Northeast in the 1950's and 1960's, and intensifying in the 1970's in Florida, North Carolina, and Texas, coastal barriers underwent rapid and extensive residential development. At present, 5,000 to 6,000 acres of barriers are developed each year, with roughly one third of the developable land acreage and over one third of the shoreline already developed.

Testimony before Congress revealed that the federal government has subsidized much of this development. A study by the Department of the Interior identified approximately thirty federal programs, administered by twenty different federal agencies, that affect the barrier islands. By far the largest government expenditures on coastal barri-

26. Id.; 1983 FEIS, supra note 3, at A-76.
27. 1982 DEIS, supra note 18, at 58. At present, nearly all coastal barriers of the Atlantic and Gulf Coasts, except for the most isolated and unstable areas, are subject to intense development. Id.; see H. LINS, PATTERNS AND TRENDS OF LAND USE AND LAND COVER ON ATLANTIC AND GULF COAST BARRIER ISLANDS (U.S. Geological Survey Professional Paper No. 1156, 1980).
28. CBRA SENATE REPORT, supra note 10, at 2, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3214; see 1982 DEIS, supra note 18, at A-77, A-80. About 46% of the total coastal barrier acreage is undeveloped and not considered protected from development by public agencies or private conservation organizations. 1979 DEIS, supra note 4, at 118, reprinted in Senate Hearings—96th Congress, supra note 4, at 166. "A substantial amount of this land is considered undevelopable because of susceptibility to flooding or frequent overwash, high erosion factors, wetland areas, or other natural conditions." Id. At the present rate of development, the developable, upland portions of the coastal barriers could be developed completely by the year 1995. Miller, Federal Policies in Barrier Island Development, OCEANUS, Winter 1980-81, at 47, 48.
29. See, e.g., House Hearings—97th Congress, supra note 7, at 378 (statement of James Watt, Secretary, Dep't of the Interior); id. at 53-54 (testimony of H. Crane Miller, Vice President and General Counsel, Sheaffer & Roland, Inc.); Senate Hearings—97th Congress, supra note 19, at 216 (statement of James Watt, Secretary, Dep't of the Interior).
30. 1979 DEIS, supra note 4, at vi, reprinted in Senate Hearings—96th Congress, supra note 4, at 35. Over one half of the agencies administer expenditure or permit programs which assist in development or stabilization activities on the barriers, about one fourth administer property, insurance, and relief programs that encourage or perpetuate unwise use of the islands, and the remaining one fourth manage programs that provide protection for coastal barriers. Id. The Department of the Interior estimated in 1979 that the twenty agencies involved in coastal barrier activities committed nearly $500 million to barrier island development projects between 1976 and 1978. Id. at vii, reprinted in Senate Hearings—96th Congress, supra note 4, at 35. The figures of the Department have been criticized as being conservative for failing to consider the impact of development on natural and human resources, Rockefeller, The Great Barrier Island Bailout, NAT'L PARKS & CONSERVATION MAG., July 1980, at 18-21, and attacked as exaggerating the amount of aid to undeveloped areas because the estimates include funds committed to already developed areas. Senate Hearings—97th Congress, supra note 19, at 177 (testimony of James Scott, Nat'l Ass'n of Home Builders).

For a more detailed discussion of federal programs affecting coastal barriers, see 1983 FEIS, supra note 3, at app. B; Kuehn, The Shifting Sands of Federal Barrier Islands Policy, 5
ers go toward assisting development. Not including flood insurance expenditures, the federal government spent at least $800 million over a recent six-year period to assist private construction on coastal barriers. Taxpayers underwrote $80-90 million of grants for coastal barrier highway and bridge construction, much of which aided creation of mainland access necessary for profitable coastal barrier development. Where access already has been secured, federal grants and guaranteed loans provide funding for other projects that promote development, such as water supply and wastewater treatment systems. The federal government also has supported costly stabilization projects designed to protect coastal barrier buildings, roads, and utilities from the natural forces at work on the barriers. Government stabilization projects may encourage still further development on high-hazard coastal barriers by lending a false sense that development is secure from ocean waves and storms.

In addition to offering assistance for development of coastal barri-
ers, the federal government has provided flood insurance and disaster assistance programs to reduce the financial risk of developing and to ensure that private development can be reconstructed in the event of damage by storms or hurricanes. Federal flood insurance, with $10 to $15 billion in coverage on coastal barriers, is perceived by some as encouraging development by eliminating one of the major financial risks to coastal barrier construction. Disaster assistance programs administered by the Federal Emergency Management Agency, the Small Business Administration, the Farmers Home Administration, and the Army Corps of Engineers afford additional help for cleanup and reconstruction after a storm.

Thus, the federal government subsidizes development of coastal barriers, and, after a hurricane or major storm sweeps the area, encourages rebuilding with disaster assistance and subsidized flood insurance, creating a continuing cycle of government subsidized development and redevelopment. Estimates place the federal subsidy of the initial construction of coastal barrier structures at over $25,000 per acre, with re-

36. CBRA HOUSE REPORT, supra note 11, at 10; REPORT TO CONGRESS, supra note 7, at 10-12.


38. CBRA HOUSE REPORT, supra note 11, at 10; REPORT TO CONGRESS, supra note 7, at 12-13. Expenditures for disaster relief to coastal barriers between 1972 and 1979 by the Small Business Administration and Federal Emergency Management Agency are estimated to have averaged $82 million annually. House Hearings—96th Congress, supra note 11, at 398 (statement of John R. Sheaffer and Lee Rozaklis, Sheaffer & Roland, Inc.); Senate Hearings—96th Congress, supra note 4, at 397-98 (statement of John R. Sheaffer, H. Crane Miller, and Lee Rozaklis, Sheaffer & Roland, Inc.).

placement costs exceeding $53,000 per acre. 40 Without a change in policy, federal expenditures on undeveloped coastal barriers are projected to cost American taxpayers from $5.5 billion to $11 billion during the next twenty years. 41

Besides the financial costs to the federal government from involvement in coastal barrier development, government-assisted development contributes to the loss of coastal barrier resources. 42 Development-related activities such as disposing of sewage effluents, dredging channels, filling wetlands, clearing vegetation, and stabilizing beaches and inlets often severely harm barrier ecosystems, with consequent reduction in the aesthetic and economic value of natural resources. 43

Although particular development projects differ in their impacts on coastal barriers, 44 aid from the federal government to barrier development diminishes the productivity of estuaries and wetlands, increases risks to life and property, reduces the capacity of the barriers to protect adjacent wetlands and the mainland from storms, and decreases the availability of coastal barrier land for conservation and public recreation purposes. 45

40. CBRA House Report, supra note 11, at 10; Report to Congress, supra note 7, at 13; House Hearings—97th Congress, supra note 7, at 54 (statement of H. Crane Miller, Vice President and General Counsel, Sheaffer & Roland, Inc.). Federal expenditures to assist the reconstruction of Dauphin Island, Alabama, after Hurricane Frederick devastated the island, amounted to $50,000 for each resident. Id. at 204 (statement of Sharon Newsome, Nat'l Wildlife Fed'n).

Two to six times as much government spending is required to provide infrastructure and services on barrier islands as on the mainland because more energy must be expended to counteract the natural constraints to developing barrier landforms. See Senate Hearings—97th Congress, supra note 19, at 241 (statement of Jay D. Hair, Executive Vice President, Nat'l Wildlife Fed'n); S. Davenport, Development on Texas Barrier Islands. Does It Cost the Taxpayer More?, reprinted in House Hearings—96th Congress, supra note 11, at 364; see also Work Group Report, supra note 7, at 4.


44. See Scott, supra note 12, at 21.

B. Emergence of Federal Concern

Congressional recognition of the coastal barriers as a unique yet fragile resource threatened by government-encouraged development emerged only after years of studies and reports on the federal role in encouraging coastal barrier development and after intensive lobbying efforts by environmental organizations. President Carter's Environmental Protection Message of May 23, 1977 contained the first expression of federal concern. The President ordered the development of an effective plan for protecting the islands from unwise development and directed the Secretary of the Interior to recommend actions to achieve this purpose. The Secretary's task force, the Barrier Islands Work Group, issued a report that made no specific recommendations but documented poor coordination among agencies; the report found that agency programs often worked at cross purposes, encouraging both development and conservation of barrier island resources, and resulted in confusion, wasted tax dollars, and lost resources.

The Work Group released a Draft Environmental Impact Statement (EIS) in December, 1979, that identified and surveyed the Atlantic and Gulf Coast barrier islands and discussed three alternative levels of federal effort to protect the islands. Like the Barrier Islands

46. 13 WEEKLY COMP. OF PRES. DOC. 782, (May 30, 1977). The President declared that many barrier islands on the Atlantic and Gulf Coasts "are unstable and not suited for development, yet in the past the federal government has subsidized and insured new construction on them. Eventually, we can expect heavy economic losses from this shortsighted policy." Id. at 789. The impetus behind the President's Statement can be traced to a 1976 barrier islands workshop. See Conservation Foundation Letter, August 1976, at 10. As an outgrowth of the workshop, a coalition of scientists, citizens, and private conservation organizations formed the Barrier Islands Coalition to seek fundamental changes in the treatment of the islands. See id.; WORK GROUP REPORT, supra note 7, at 8.


48. WORK GROUP REPORT, supra note 7, at 80.

49. 1979 DEIS, supra note 4, reprinted in Senate Hearings—96th Congress, supra note 4.

50. Id. at 1-3, reprinted in Senate Hearings—96th Congress, supra note 4, at 49-51. A final impact statement was to have been completed by the end of 1980. See Senate Hearings—96th Congress, supra note 4, at 17-18 (statement of Robert L. Herbst, Assistant Secretary for Fish and Wildlife and Parks, Dept' of the Interior); N.Y. Times, Mar. 18, 1980, at Cl, col. 2. However, the Reagan administration abandoned plans to prepare a final statement. Congressional Research Service, Coastal Barrier Protection—Archived Issue Brief No. IB800057 at 4 (Nov. 15, 1982).

The Department of the Interior subsequently prepared two coastal barriers environmental statements in response to congressional action regarding coastal barriers. In May 1982, the Department of the Interior issued Draft Environmental Impact Statement: Undeveloped Coastal Barriers and Federal Flood Insurance, which analyzed the environmental impacts of actions taken by the Secretary of the Interior pursuant to the Omnibus Budget
Work Group Report, the Draft EIS found that a lack of coherent federal policy contributed to the destruction of important coastal barrier resources. It attributed the situation not to any direct federal policy to encourage development, but to a general lack of knowledge and understanding of the barrier islands as a unique resource warranting special attention. A systematic study of agency programs and policies discovered that while some agencies strive to protect the islands, other agencies provide permit authority and financial assistance that, even though not intended primarily to promote harmful development, result in the development of the islands and the loss of important natural resources.

While the two studies indicated that, in general, federal activities on barrier islands reflect a lack of knowledge and concern, in response to the President’s Message and the results of the studies, some agencies had begun to recognize both the importance of conserving barrier resources and the role the federal government plays in encouraging development. For many years the Fish and Wildlife Service and the National Park Service have aggressively purchased barrier island acreage for wildlife refugees or national parks, monuments, and recreation areas. In the mid-seventies, the National Park Service established a new shoreline policy for its coastal barrier parks; the policy stated that natural shore line processes, such as erosion, deposition, dune formation, and inlet formation, would be allowed to take place naturally, unless control measures are necessary to protect life and property in neighboring areas. Similarly, in response to growing concern over the

Reconciliation Act of 1981 (OBRA). 1982 DEIS, supra note 18. The Department of the Interior released Final Environmental Statement: Undeveloped Coastal Barriers in July 1983. 1983 FEIS, supra note 3. The Final Environmental Statement addressed the alternatives discussed in the 1979 Draft Environmental Statement, the definitional criteria embodied in the August 16, 1982, Department of the Interior rule implementing OBRA, the alternatives considered in developing these criteria, and the Secretary of the Interior’s recommendations to Congress regarding the implementation of OBRA. Id. at II-4.

51. The study stated “[t]he belief that Federal programs are encouraging and assisting development of barrier islands with resulting losses of natural, cultural, fish and wildlife, and recreational values is well founded.” 1979 DEIS, supra note 4, at vi, reprinted in Senate Hearings—96th Congress, supra note 4, at 35.

52. Id. at A-1, reprinted in Senate Hearings—96th Congress, supra note 4, at 191. One commentator concluded after studying federal programs toward barrier island development that a “witless system” of policy and action, derived from federal programs based on differing rationales, stimulates barrier island development. Siffin, Bureaucracy, Entrepreneurship, and Natural Resources: Witless Policy and the Barrier Islands, 1 CATO J. 293 (1981).

53. 1979 DEIS, supra note 4, at A-1, reprinted in Senate Hearings—96th Congress, supra note 4, at 191.

54. Id. at A-9 to A-21, reprinted in Senate Hearings—96th Congress, supra note 4, at 199-211; 1982 DEIS, supra note 18, at A-76 to A-79, B-37. The National Park Service presently administers almost 276,000 acres of coastal barriers, while the Fish and Wildlife Service administers over 440,000 acres of such lands. 1982 DEIS, supra note 18, at A-77, B-40.

55. National Park Service, Management Policy for Shoreline Processed in Areas of the
role of agency grants in encouraging development, agencies such as the Environmental Protection Agency\(^5\) and the Farmers Home Administration\(^6\) proposed new policies toward coastal barriers that limited future financial assistance for any projects that would lead to increased development.

Despite growing awareness of the need to limit development assistance to coastal barriers, many agencies continued to finance projects with potentially harmful development impacts. One particularly controversial project was the Dauphin Island bridge project.\(^5\) In 1979, when Hurricane Fredrick destroyed the bridge to Dauphin Island, Alabama, the Federal Highway Authority authorized funds for the bridge’s reconstruction at a cost of $32 million, a subsidy of $26,000 for each of the island’s 1,600 permanent residents.\(^6\) The Dauphin Island example reinforced the conclusion of the Department of the Interior studies that the failure of the federal government to formulate a consistent policy toward coastal barriers was costly and harmful. In addition, conservationists and some members of Congress became convinced that executive measures alone were insufficient to reduce government investment in coastal barrier development. As the 1979 Draft EIS concluded, "new legislative initiatives specifically directed toward barrier island preservation will be required to achieve the highest level of protection."\(^6\)

C. Legislative Proposals

1. Ninety-Sixth Congress

As a result of the growing concern over the federal role in barrier island development, two bills aimed at protecting coastal barriers were

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59. House Hearings—96th Congress, supra note 11, at 523 (statement of William Painter, Exec. Director, Coast Alliance). Two conservation groups brought suit against the Federal Highway Administration to prevent federal funding of the Dauphin Island bridge. They alleged that the agency had failed to comply with the National Environmental Policy Act and the executive orders on flood plains and wetlands, but the decision of the agency was upheld. Sierra Club v. Hassell, 636 F.2d 1095 (5th Cir. 1981).

60. 1979 DEIS, supra note 4, at iii, reprinted in Senate Hearings—96th Congress, supra note 4, at 32.
introduced in the Ninety-Sixth Congress. On November 28, 1979, Representative Phillip Burton (D.-Cal.) and twenty-three co-sponsors introduced House Bill 5981, "A Bill to Establish Barrier Islands National Parks, and for other Purposes." 61 Senator Dale Bumpers (D.-Ark.) and three co-sponsors introduced on May 9, 1980, a second bill, Senate Bill 2686, entitled "A Bill to Direct the Secretary of the Interior to Provide for the Protection of the Barrier Islands, and for other Purposes." 62 Both bills sought to protect undeveloped and unprotected barrier island units on the Atlantic and Gulf Coasts as depicted on maps to be drafted by the National Park Service. 63 The National Park Service identified 183 undeveloped, unprotected units totalling over 485,000 acres, 64 then submitted a revised survey developed in conjunction with Senate Bill 2686 which identified only 129 units covering 277,000 acres. 65

The House bill authorized the Secretary of the Interior to acquire and administer land for the creation of the Barrier Island National Parks, consisting of undeveloped, unprotected barrier islands identified on the National Park Service maps. 66 The bill also prohibited federal financial assistance, licensing, or permit approval for the construction of any structure, road, or facility on any barrier island unit, for any access facility to any unit where such access would be contrary to the purposes of the legislation as determined by the Secretary of the Inte-

61. H.R. 5981, 96th Cong., 1st Sess. (1979), reprinted in House Hearings—96th Congress, supra note 11, at 2. The bill was referred to the Committee on Interior and Insular Affairs. The original barrier islands legislation introduced by Congressman Burton, like the President's 1977 Environmental Message on barrier islands, was due in large part to the efforts of the Barrier Islands Coalition. The coalition had suggested the need for such legislation to Congressman Burton and the staff of the House Committee. Interview with Dale Crane, Professional Staff, Comm. on Interior and Insular Affairs of the House of Representa-

62. S. 2686, 96th Cong., 2d Sess. (1980). For the remarks of Senator Bumpers upon introduction of the bill, see 126 CONG. REC. 10,748 (1980). The bill was referred jointly to the Committees on Energy and Natural Resources and Environment and Public Works. Both 126 CONG. REC. 10,750 (1980) and Senate Hearings—96th Congress, supra note 4, at 3, reproduce the bill as introduced prior to amendment by the two committees. Unless otherwise noted, all references are to the amended version of the bill as reported by the Committees.


64. NPS Report, supra note 7, at A-6.

65. See 1982 DEIS, supra note 18, at 75; Miller, supra note 28, at 53; Miller, supra note 32, at 42 n.4. The Service deleted almost 150,000 acres because the lands did not fully satisfy the barrier structure definition, about 45,000 acres because the lands already were protected, and over 4,000 acres because the lands exceeded the acceptable density limit of less than one structure per five acres of fast land. Miller, supra note 28, at 53.

The National Park Service surveys in conjunction with H.R. 5981 and S. 2686 became the bases for the maps later developed by the Department of the Interior for OBRA and adopted by Congress in CBRA. See R. Peoples, Jr. & W. Gregg, Jr., Applications and Limitations of Science in the Definition and Delineation of Coastal Barriers to Support Formulation of Government Policy 11 (1983) (paper prepared for presentation at Coastal Zone 83: The Third National Symposium on Coastal and Ocean Management).

rior, or for any shoreline or inshore stabilization project. The bill also forbade financial assistance for the replacement, reconstruction, or repair of property within a system unit that is damaged or destroyed by a natural disaster.

The Senate bill shared many features of the House bill, but differed in several respects. Although the Senate bill prohibited federal expenditures or financial assistance and federal licenses or permits for construction, it also specifically prohibited flood insurance policies for structures on which construction had not commenced. The Senate bill, rather than calling for the purchase of lands to create the Barrier Island National Parks, limited the Secretary of the Interior to accepting donations of barrier islands land. Finally, the Senate bill also provided an exception to allow the continued issuance of permits to individuals under section 10 of the Rivers and Harbors Act of 1899 or section 404 of the Clean Water Act for the "reasonable noncommercial use" of the property or for activities that would not lead to increased development of the islands.

At hearings on House Bill 5981 and Senate Bill 2686, most witnesses testified in favor of the bills, arguing that existing law was inadequate to protect the islands. Proponents favored acquisition as the best way to ensure protection of the islands and noted that purchasing all the undeveloped, unprotected acreage would cost the federal government about one fifth or one sixth as much as assisting development to just one half of the capacity of the barriers. The major opponents of the bill, the National Association of Realtors and the National Association of Home Builders, contended that a blanket cutoff of financial assistance to all the undeveloped islands was unwarranted given the differing degrees of hazard on individual coastal barriers.

67. Id. § 3(d).
68. Id. § 3(e).
70. Id. § 4.
73. S. 2686, 96th Cong., 2d Sess. § 2(c) (1980).
74. See, e.g., House Hearings—96th Congress, supra note 11, at 137-38 (statement of Laurence Rockefeller, Chairman, Barrier Islands Coalition); id. at 118 (statement of Dery Bennett, Exec. Director, American Littoral Society); Senate Hearings—96th Congress, supra note 4, at 404 (statement of William Painter, Exec. Director, Coast Alliance).
75. Senate Hearings—96th Congress, supra note 4, at 382 (statement of H. Crane Miller, Vice President and General Counsel, Sheaffer & Roland, Inc.); House Hearings—96th Congress, supra note 11, at 102 (statement of John R. Sheaffer, President, Sheaffer & Roland, Inc.). The National Taxpayers Union supported reducing federal subsidies but opposed acquisition, fearing that acquisition would eliminate the savings from reduced subsidies. House Hearings—96th Congress, supra note 11, at 514 (statement of David L. Keating, Director of Legislative Policy, Nat'l Taxpayers Union).
76. See, e.g., House Hearings—96th Congress, supra note 11, at 619 (statement of Mer-
The Carter administration, which had enthusiastically supported preservation of the barriers at the time of the President's 1977 Environmental Message, refused to support the legislation. The administration argued that the government already had taken strong steps toward barrier islands protection through the enactment of flood plain and wetlands executive orders and recommended against any legislative action until the final EIS on barrier islands issued and the costs of acquisition were better understood.\(^77\) The House took no further action on the legislation after the hearings;\(^78\) opposition prevented the Senate version from reaching the floor for a vote.\(^79\)

Although the Ninety-Sixth Congress did not pass any barrier islands legislation, its legislative initiatives were important to the later passage of coastal barrier legislation in the Ninety-Seventh Congress for a number of reasons. First, the bills in the Ninety-Sixth Congress prompted the Department of the Interior to draft the first maps of undeveloped coastal barrier areas and drew attention to the problems and issues involved in defining and delineating the areas to be protected. Second, the bills increased congressional and public awareness of the financial and natural resource issues involved in barrier islands development. Finally, the two bills introduced the approach to barrier islands preservation that the Ninety-Seventh Congress ultimately adopted in CBRA: the limitation of federal expenditures and assistance.

2. Ninety-Seventh Congress

Legislative action in the Ninety-Seventh Congress regarding coastal barriers began with the reintroduction of the House and Senate bills that failed to pass in the Ninety-Sixth Congress.\(^80\) Both bills were
referred to committee, but no further action was taken on either.81

In April, 1981, however, two Republicans introduced legislation that moderated the Bumpers and Burton proposals. On April 27, Representative Thomas Evans (R.-Del.) introduced House Bill 3252, the "Coastal Barrier Resources Act."82 The next day, Senator John Chafee (R.-R.I.) introduced Senate Bill 1018, with the same title.83 The bills were identical in purpose and nearly identical in content. Both sought to establish a Coastal Barrier Resources System, consisting of the undeveloped and unprotected coastal barriers located on the Atlantic and Gulf Coasts.84 Unlike the Burton and Bumpers legislation, the Chafee-Evans bills defined the term coastal barrier,85 specified the bases for designating property as undeveloped or unprotected,86 and identified the System property through 125 maps based on the ongoing inventory undertaken by the Department of the Interior.87

The Chafee-Evans legislation prohibited new federal expenditures or financial assistance for the construction or purchase of any structure, appurtenance, facility, or related infrastructure, for access or transportation facilities on or to System units, for nonemergency stabilization projects, and for the sale of federal flood insurance to protect new or

81. H.R. 857 was referred to the House Committee on Interior and Insular Affairs and subsequently to that committee's Subcommittee on Public Lands and National Parks, while S. 96 was referred to the Senate Committee on Energy and Natural Resources. The results of the 1980 congressional and presidential elections partly explain the failure in the Ninety-Seventh Congress of the two Democratic bills. The election of a Republican president, the mood of fiscal conservatism in both Houses of Congress, and the Republican control of the Senate meant that environmental legislation advocating expensive land acquisition programs or restricting the rights of private landowners to use their property found even less support than in the previous session of Congress. See generally N.Y. Times, May 17, 1981, § 11, at 16, col. 3.


substantially improved structures.\(^8\) The legislation exempted from the financial assistance ban activities related to energy production that must be located in coastal waters, maintenance of existing channels and related structures, military activities essential to national security,\(^9\) and certain other activities if consistent with the goals of the Act.\(^10\) The House bill included an exemption for the maintenance, reconstruction, replacement, or repair, but not the expansion, of publicly owned or operated roads, structures, or facilities that are essential links in a larger network.\(^9\) The Senate bill in addition required that such activities accord with the purposes of the legislation.\(^9\)

In contrast to the Burton and Bumpers legislation, the Chafee-Evans proposal neither restricted the issuance of federal permits or licenses,\(^9\) nor authorized acquisition of barrier lands.\(^9\) Instead, the Chafee-Evans legislation relied solely on the prohibition of federal expenditures or financial assistance for coastal barrier development. The resource conservation theory underlying the Chafee-Evans proposal was simple, but untested. Because studies had shown that federal sub-


\(^10\) S. 1018, 97th Cong., 1st Sess. § 6(a)(4) (1981) (as introduced); H.R. 3252, 97th Cong., 1st Sess. § 5(b)(E) (1981) (as introduced). These exemptions included air and navigation aids, certain land acquisition projects, projects for fish and wildlife protection, scientific research activities, and assistance for emergency actions to protect lives and property.

\(^93\) Senator Bumpers unsuccessfully urged amendment of S. 1018 to prohibit the issuance of federal permits and licenses on the undeveloped barriers protected by the bill. \(\text{Senate Hearings—97th Congress, supra note 19, at 141.}\) An aide to Senator Chafee has suggested three possible reasons for Senator Chafee's rejection of permit restrictions. First, prohibition of section 404 Clean Water Act permits could have created opposition to and damaged the entire section 404 program. Second, although it generally was believed that the proposed denial of permits by the Bumpers legislation was constitutional, permit denial raises difficult legal issues. Third, denial of permits conflicted with the spirit of the legislation, which was to allow landowners to do what they wish with their land; the Bumpers proposal thus would have evoked political arguments over the propriety of federal land use planning. Interview with Robert Hurley, Legislative Assistant to Sen. Chafee, in Washington, D.C. (Feb. 25, 1983).

\(^94\) Both Senator Chafee and Representative Evans favored acquisition of all undeveloped coastal barriers, but given the reality of fiscal austerity, believed that other means of protection must be employed. \(\text{127 CONG. REC. S4031 (daily ed. Apr. 28, 1981); Chafee \\& Evans, The Importance of Barrier Beaches, SIERRA, Sept.-Oct. 1981, at 83.}\)
sidies encouraged coastal barrier development, prohibition of federal assistance for commercial and residential development would eliminate federal subsidies and deter development, protecting barrier resources.

This approach furthered two objectives: the protection of coastal barrier resources and the conservation of limited government funds. The approach thus appealed to the often divergent interests of both environmentalists and fiscal conservatives. Indeed, it sounded like an ideal piece of environmental legislation: a money saving measure that protected lives, property, and valuable natural resources without government regulation or intervention, without restricting or prohibiting any activity by private landowners, without additional spending for acquisition, and without any loss of government tax revenues.

D. Omnibus Budget Reconciliation Act (OBRA)

During the summer of 1981, the bills gathered co-sponsors, and backers prepared for hearings. Before either the Senate or House committees considered the legislation, however, the House Banking Committee cut off federal flood insurance to undeveloped coastal barriers. This decisive move set the stage for the battle over the Coastal Barrier Resources Act.

1. Federal Flood Insurance

A brief description of the federal flood insurance program helps to place in context the OBRA flood insurance ban. Congress enacted the federal flood insurance program in 1968 to provide flood insurance at reasonable rates for structures in communities identified as having flood hazards and which volunteer to participate in the program. The purpose of the program was to "encourage state and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses" and to "guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards." Thus, the program attempts to reduce individual exposure to flood loss for those already residing in flood prone areas, to encourage residents to leave the flood plain if their homes are damaged, or at least encourage them to repair their homes in a manner


capable of withstanding future floods, and to discourage new construction in flood prone areas.97

Notwithstanding widespread participation by flood-prone communities,98 the original goal of the program of reducing flood losses by discouraging new construction in flood prone areas, such as coastal barriers,99 has not been achieved.100 Indeed, some feel that flood insurance has accelerated development of the barriers by removing a financial obstacle to habitation.101 Moreover, the costs of the flood


98. Community eligibility for the original flood insurance program hinged on the completion of the technical studies necessary to identify flood hazard areas. When studies proved to be more difficult than anticipated, Congress amended the program in 1969 to create an emergency phase that allowed structures located in participating communities to be insured before completion of the detailed studies and maps identifying hazard areas. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, 83 Stat. 397 (1969); see 42 U.S.C. § 4056 (1976 & Supp. V 1981); FCPR, supra note 30, at 16. During the emergency phase, the federal government provides limited amounts of flood insurance coverage at heavily subsidized rates, with subsidies estimated to range between 72% and 90%. See Miller, supra note 37, at 2, 3; FCPR, supra note 30, at 17. Once studies have identified the flood areas, the community enters the regular phase and can obtain increased limits of insurance coverage at actuarial rates. Id. at 18; Federal Ins. Admin., Background Paper on the Federal Emergency Management Agency’s National Flood Insurance Program—Prepared for the President’s Commission on Housing (1981). Any building in existence at the time the community enters the regular program is forever eligible for the highly subsidized rates of the emergency program. 1982 DEIS, supra note 18, at B-28.

A major defect in the early flood insurance program allowed voluntary community participation in the program, yet denied insurance coverage to homeowners unless the community participated. Congress eliminated this feature in the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 982 (1973), which required communities with special flood hazard areas to enter the program and maintain eligibility or risk denial to residents or local governments of federal financial assistance for construction or acquisition of structures in the hazard areas; this prohibition of assistance included not only direct financial aid from federal agencies but also mortgage loans from federally regulated or insured lending institutions. 42 U.S.C. § 4106 (1976); see FCPR, supra note 30, at 16. Congress amended these stiff sanctions in 1977 to permit federally insured or regulated lending institutions to make mortgage loans for structures located in nonparticipating communities. The Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1145 (1977). Nevertheless, the prohibition against federal financial assistance for acquisition or construction purposes remains for both participating and nonparticipating communities, and owners of structures within participating communities still must obtain flood insurance as a condition for obtaining mortgage loans. 42 U.S.C. § 4106 (1976 & Supp. V 1981); see FCPR, supra note 30, at 16; Federal Ins. Admin., supra. This combination of sanctions and incentives has induced virtually all communities with coastal barriers to participate in the National Flood Insurance Program. Of the 267 communities surveyed with coastal barriers, all but 3 participate in the program. 1982 DEIS, supra note 18, at B-30. Two hundred and five of the communities are in the regular program, while fifty-nine are still in the emergency program. Id.

99. Up to 85% of coastal barrier land is within the boundaries of flood plains. 1982 DEIS, supra note 18, at B-30.


101. See id. at 198-201 (testimony of Peter Mott, President, Fla. Audubon Society); House Hearings—96th Congress, supra note 11, at 98, 104 (testimony of Sally Davenport,
insurance program to taxpayers have proven to be enormous. In the first twelve years of the program, the federal government paid more than $1.1 billion in claims but collected only $675 million in premiums. Although the Flood Insurance Administration recently has adjusted premiums upward to reflect the cost of claims in coastal areas, the annual subsidy per policy in the special wave-impact V-zones commonly located on coastal barriers has been estimated as high as $432 per policy; further, in 1978 and 1979, claims and expenses for coastal high hazard zones exceeded premiums by a ratio of more than three to one.

2. Enactment of OBRA

In June of 1981, Congress moved to address the issue of flood insurance and coastal barrier development. During deliberation of the Omnibus Budget Reconciliation Act of 1981 by the House Banking, Finance and Urban Affairs Committee, Chairman Fernand St. Germain (D.-R.I.) introduced an amendment to the reconciliation bill that would deny flood insurance coverage for new construction on undeveloped coastal barriers. After Representative Evans added language from his proposed Coastal Barrier Resources Act defining undeveloped coastal barriers, the Committee accepted the amendment on voice vote; the House later adopted the measure as part of the House reconciliation bill. The House provision prohibited the sale of federal flood insurance for new construction or substantial improvements of structures located on undeveloped coastal barriers as designated by the Secretary of the Interior within ninety days of the date of enactment of the legislation. The Senate version of the budget act

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104. N.Y. Times, supra note 102; Miller, supra note 32, at 36. These estimates apparently relied on data from a table reproduced in House Hearings—97th Congress, supra note 7, at 209.
contained no comparable provision. The Conference Committee reconciled the House and Senate versions by deferring the effective date of the prohibition until October 1, 1983, and by calling for the Secretary to prepare a study and report on the coastal barriers within one year. In Congress adopted the compromise measure as section 341(d) of the Omnibus Budget Reconciliation Act of 1981 (OBRA).

In response to OBRA, the Secretary's Coastal Barriers Task Force submitted its report and maps on August 13, 1982. The Secretary's Report discussed the nature of coastal barriers and the adverse consequences of barrier development and praised the OBRA expenditures limitation approach. Draft maps in the report included over 680 miles of beach front and over 736,000 acres, of which 182,000 acres was fast land with the rest "associated aquatic habitats." Although the OBRA maps never became effective, the Secretary's proposed OBRA maps became the basis for the CBRA maps of undeveloped coastal barriers.

E. Enactment of the Coastal Barrier Resources Act (CBRA)

While the Department of the Interior labored with the OBRA designation process, the Senate Committee on Environment and Public Works and the House Merchant Marine and Fisheries Committee proceeded with deliberations on the proposed Chafee-Evans Coastal Barrier Resources Act. The committees eventually held five days of

109. See Nat'l Wildlife Fed'n, Barrier Islands Newsletter, Aug. 1981. In Bostic v. United States, 581 F.Supp. 254 (E.D.N.C. 1984) appeal docketed, No. 84-1344 (4th Cir. Mar. 30, 1984), plaintiffs challenged the action of the Secretary of Interior in proposing their property for designation as an undeveloped coastal barrier. Id. at 255. The plaintiffs argued that the designation contravened the criteria articulated by the agency for determining whether or not an area is an undeveloped coastal barrier. Id. at 257. They further claimed that the designations became final before the expiration of the ninety-day comment period and that the Department of the Interior failed to provide for a forty-five day appeal period, contrary to its notice in the Federal Register. Id. The district court held that the enactment of CBRA mooted the designation of undeveloped coastal barriers by the Secretary. Id. The court therefore concluded that it would be improper to address plaintiffs' claims. Id.


111. REPORT TO CONGRESS, supra note 7.

112. Id.

hearings.\footnote{114} 

1. Support and Opposition

The overwhelming majority of witnesses at the hearings testified in favor of the legislation. Proponents continued to represent the bill as saving limited government funds and protecting lives, property, and natural resources.\footnote{115} Although many supporters of the legislation encouraged Congress to add acquisition authority or a provision to prohibit federal licenses and permits as a means of further protecting the barrier resources,\footnote{116} the sole protective mechanism employed by the legislation remained the prohibition on expenditures and assistance.\footnote{117} Senator Chafee and Representative Evans reasoned that to protect the coastal barriers, the current political climate demanded an alternative to acquisition or permit restrictions.\footnote{118} Acquisition seemed economically infeasible and permit restrictions violated the thesis of the legislation, to end government subsidization of development without interfering with land use decisions of private property owners or state

\footnote{114. Senate Hearings—97th Congress, supra note 19; House Hearings—97th Congress, supra note 7.}

\footnote{115. See, e.g., House Hearings—97th Congress, supra note 7, at 349-51 (testimony of Patrick Parenteau, Vice President, Nat’l Wildlife Fed’n); id. at 211 (testimony of Laurence Rockefeller, Chairman, Americans for the Coast and Barrier Islands Coalition); Senate Hearings—97th Congress, supra note 19, at 168 (testimony of Jay D. Hair, Executive Vice President, Nat’l Wildlife Fed’n). The American Red Cross, the National Taxpayers Union, the Coastal States Organization, and numerous conservation organizations also supported the legislation. See Statement on Signing S. 1018 into Laws, 18 WEEKLY COMP. OF PRES. Doc. 1340, 1341 (Oct. 18, 1982) [hereinafter cited as President’s Statement].}

\footnote{116. See, e.g., Senate Hearings—97th Congress, supra note 19, at 261 (testimony of Eric R. Jankel, Executive Director Narragansett Bay Water Quality Management District Comm’n) (acquisition); id. at 139 (testimony of Sen. Dale Bumpers) (permits or licenses); House Hearings—97th Congress, supra note 7, at 137 (testimony of H. Crane Miller, Vice President and General Counsel, Sheaffer & Roland, Inc.) (permits and acquisition). Proponents suggested a number of additions to the legislation other than acquisition authority and permit restrictions, including: inclusion of areas which become undeveloped after a storm, expansion to include developed areas, expansion to cover coastal barriers other than those on the Atlantic and Gulf Coasts, making the flood insurance cutoff date effective immediately, excluding financial assistance through revenue sharing, clarifying statutory language to exclude tax benefits through casualty loss or mortgage interest deductions, and narrowing or eliminating many of the proposed exemptions. See, e.g., id. at 372-75 (statement of Sharon Stewart, Nat’l Advisory Comm. on Oceans and Atmosphere); Senate Hearings—97th Congress, supra note 19, at 23-25 (statement of Richard Delaney, Chairman, New England/N.Y. Coastal Zone Task Force); id. at 47-48 (statement of Kenneth Hoffman, Attorney, Conservation Law Foundation); id. at 58 (statement of Gaytha Langlois, Ecology Action for R.I.); id. at 355-56 (statement of Sharon Stewart, Nat’l Advisory Comm. on Oceans and Atmosphere).}

\footnote{117. See H.R. 3252, 97th Cong., 1st Sess. § 5 (1981); S. 1018, 97th Cong., 1st Sess. § 5 (1981).}

\footnote{118. See generally Senate Hearings—97th Congress, supra note 19, at 138-39 (statement of Sen. Chafee); House Hearings—97th Congress, supra note 7, at 148 (statement of Rep. Evans).}
and local governments.119

The National Association of Realtors and the National Association of Home Builders spearheaded opposition to the Chafee-Evans legislation; these two groups had also been the chief opponents of the Burton-Bumpers legislation in the Ninety-Sixth Congress, as well as of the OBRA flood insurance provisions.120 As two of the primary beneficiaries of development subsidies, the realtors and developers feared not only the cutoff of assistance to coastal barriers, but also the precedent for the withdrawal of government development subsidies from other areas that the bill might set.121

The opponents' arguments, vigorously rebutted by proponents, focused on three main points. First, opponents argued that the Chafee-Evans legislation unfairly failed to distinguish among the coastal barriers as to their suitability for development and their degree of hazard.122 Foes of the legislation suggested that expenditure restrictions are justified only if an individual examination of each proposed unit demonstrates that the barrier landform is hazardous, has significant resources, and cannot support structures that could withstand storm surges.123 Numerous government and nongovernment witnesses refuted this argument, testifying that although coastal barriers varied in their degree of stability, all are dynamic, interdependent land forms which may

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120. See generally, e.g., House Hearings—96th Congress, supra note 11, at 619 (statement of Merrill Butler, Nat'l Ass'n of Home Builders); Senate Hearings—96th Congress, supra note 4, at 366 (statement of David Jones, Nat'l Ass'n of Realtors); id. at 374 (statement of Fred Napolitano, Vice President and Treasurer, Nat'l Ass'n of Home Builders); House Hearings—97th Congress, supra note 7, at 167 (statement of Harley Snyder, Nat'l Ass'n of Realtors); id. at 346 (statement of Lawrence Young, Nat'l Ass'n of Realtors); Senate Hearings—97th Congress, supra note 19, at 173 (statement of James Scott, Nat'l Ass'n of Home Builders); id. at 235 (statement of Laurence Rockefeller, Americans for the Coast). In addition to the realtors and developers, some communities that were to be affected also opposed the legislation. See, e.g., House Hearings—97th Congress, supra note 7, at 240 (statement of Fletcher Willey, Bd. of Comm'r's, Dare County, N.C.). Similarly, the State of Louisiana opposed application of the legislation to Louisiana coastal barriers. Id. at 234-38 (testimony of Vernon Behrhorst, representing the State of La.); Senate Hearings—97th Congress, supra note 19, at 263-65 (testimony of Gerald Bordelon, Chairman, La. Coastal Comm'n).
121. See, e.g., House Hearings—97th Congress, supra note 7, at 169 (testimony of Harley Snyder, Nat'l Ass'n of Realtors).
122. See, e.g., id. at 175 (testimony of W. Allen Ball, Vice President of Dev., Kiawah Island Co.); id. at 170 (testimony of James Scott, representing the Am. Land Dev. Ass'n); id. at 348 (testimony of Lawrence Young, Nat'l Ass'n of Realtors); Senate Hearings—97th Congress, supra note 19, at 174 (testimony of James Scott, Nat'l Ass'n of Home Builders); see also Scott, supra note 12, at 21.
suddenly erode and which are uniquely hazardous due to the inevitability of destructive hurricanes.\textsuperscript{124}

Second, opponents maintained that studies and testimony had greatly projected savings from the legislation, particularly from the flood insurance ban.\textsuperscript{125} Nevertheless, although the extent of anticipated governmental savings was indeed uncertain, the projected savings offered an attractive means to narrow the budget deficit in an era of massive budget deficits and cutbacks on government largesse.\textsuperscript{126}

Third, the realtors, in particular, characterized the legislation as a federal land use bill that masqueraded as fiscal conservatism and established a discriminatory public policy against coastal areas while denying landowners the reasonable use of their property.\textsuperscript{127} Secretary of the Interior James Watt, who the previous year had received the National Association of Realtors’ American Eagle Award for his “commitment to private property rights,” countered the emotional rhetoric of this argument, denying that the bill infringed private property rights or constituted land use planning.\textsuperscript{128}

In addition to trying to prevent the enactment of CBRA, realtors and developers continued to question the wisdom of the OBRA flood insurance provision, even though no further congressional action was necessary for the prohibition to take effect.\textsuperscript{129} They urged the repeal of OBRA, contending that the flood insurance ban would result in the government paying increased disaster assistance and recognizing increased tax deductions for casualty losses.\textsuperscript{130} The administrator of the

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\item \textsuperscript{124} See, e.g. \textit{House Hearings—97th Congress, supra} note 7, at 378 (statement of James G. Watt, Secretary, Dep’t of the Interior); \textit{id.} at 221 (testimony of Sharon Newsome, Nat’l Wildlife Fed’n).
\item \textsuperscript{125} See \textit{id.} at 347 (testimony of Lawrence Young, Nat’l Ass’n of Realtors); \textit{Senate Hearings—97th Congress, supra} note 19, at 177 (testimony of James Scott, Nat’l Ass’n of Home Builders).
\item \textsuperscript{126} Senator Chafee estimated savings at between $200 to $500 million a year. \textit{id.} at 249; \textit{compare id. with House Hearings—97th Congress, supra} note 7, at 138-39 (testimony of H. Crane Miller, Vice President and General Counsel, Sheaffer & Roland, Inc.) (savings estimated to range from $5.56 billion to $10.77 billion over 20 years).
\item \textsuperscript{127} \textit{See House Hearings—97th Congress, supra} note 7, at 346-48 (testimony of Lawrence Young, Nat’l Ass’n of Realtors).
\item \textsuperscript{128} \textit{See Senate Hearings—97th Congress, supra} note 19, at 151 (statement of James Watt, Secretary Dep’t of the Interior); \textit{see also House Hearings—97th Congress, supra} note 7, at 378, 381-82.
\item \textsuperscript{129} \textit{See, e.g., Senate Hearings—97th Congress, supra} note 19, at 174 (testimony of James Scott, Nat’l Ass’n of Home Builders); \textit{House Hearings—97th Congress, supra} note 7, at 349 (testimony of Lawrence Young, Nat’l Ass’n of Realtors).
\item \textsuperscript{130} \textit{See House Hearings—97th Congress, supra} note 7, at 347, 349 (testimony of Lawrence Young, Nat’l Ass’n of Realtors); \textit{Senate Hearings—97th Congress, supra} note 19, at 164 (testimony of James Scott, Nat’l Ass’n of Home Builders). Opponents contended that through a combination of tax deductions and federal disaster assistance, an individual with uninsured flood losses could pay as little as 5% to 10% of the cost of the loss. \textit{See, e.g., id. at 174 (testimony of James Scott, Nat’l Ass’n of Home Builders). Proponents believed that this assertion was unfounded. Interview with Sharon Newsome, supra note 79. Opponents re-
Federal Flood Insurance Agency testified, however, that the inherent risks and resulting costs to the government of barrier development militate against continuing to provide such insurance.131

Although Secretary Watt testified favorably towards the legislation and indicated his personal support for the approach embodied in the Chafee-Evans proposal, the Reagan administration was unwilling to support the legislation until the Department of the Interior issued its proposed OBRA maps.132 In contrast, the twin objectives of budgetary restraint and environmental protection appealed to fiscal conservatives and liberal environmentalists and gathered widespread congressional support for the measure. By the time of enactment, fifty-eight Senators co-sponsored Senate Bill 1018, and 129 Representatives co-sponsored House Bill 3252.133 The legislation proved an easy measure for non-coastal legislators to support as it reduced the budget and helped preserve natural resources of national significance, with no ostensible impacts on their own districts other than the precedent the legislation could set for future federal subsidy cutoffs in other areas. With the November, 1982, elections approaching, representatives of coastal areas were in a much more difficult position because both environmentalists and developers are politically important constituencies in coastal areas. Notwithstanding vigorous lobbying by developers and some local communities to defeat the legislation or to get areas excluded from its effect, the proposal enjoyed widespread popular support in most

lied on a General Accounting Office study which concluded that federal flood insurance provided disaster assistance more efficiently than loans or grants. General Accounting Office, Federal Disaster Assistance: What Should the Policy Be? 25 (1980). Opponents in addition suggested that the report implicitly concluded that restricting the availability of federal flood insurance will not help reduce the deficit, but will lead to increased federal costs for disaster assistance. In contrast, another GAO report found that:

those suffering uninsured losses in these [coastal barrier] high risk areas could seek benefits under the disaster relief program and provisions of the tax code which, in the end, could cost taxpayers more than the current costs of flood insurance in these areas. For this reason, the Congress, at the time it considers whether flood insurance should be available to these areas, must also consider whether to continue to provide other Federal financial assistance for acquisition and construction purposes, disaster assistance, and tax benefits.

General Accounting Office, supra note 37, at 21.


132. See Senate Hearings—97th Congress, supra note 19, at 147 (testimony of James Watt, Secretary, Dep't of the Interior); House Hearings—97th Congress, supra note 7, at 375-77 (testimony of James Watt, Secretary, Dep't of the Interior). Even after the proposed OBRA delineations were released on August 13, 1982, the administration did not announce its support for CBRA. Interview with Robert Hurley, supra note 93; see also R. Peoples, Jr. & W. Gregg, Jr., supra note 65, at 16. Budget reductions from the bill should have appealed to the Administration's fiscal conservatism, but the legislation threatened to reduce coastal growth and adversely affect the economic well-being of developers and realtors with strong Republican ties. Washington Post, Jan. 26, 1982, at A17, col. 13.

133. Legislative Information Status Office, Office of the Clerk of the House of Representatives, United States Congress.
coastal areas.134

2. Congressional Deliberations on CBRA

On April 28, 1982, the Subcommittee on Environmental Pollution of the Senate Committee on the Environment and Public Works convened to mark up Senate Bill 1018. The Subcommittee approved a revised set of maps and made technical and clarifying amendments.135 On May 13, the Committee adopted the bill as amended and ordered it reported to the Senate.136

The Senate bill subsequently ran into trouble, however, when four Southern coastal Senators put "holds" on the bill because of disagreements over the maps.137 These holds delayed action on the legislation until late in the Ninety-Seventh Congress, but on September 23, 1982, the full Senate finally proceeded to consider the bill. Senators offered eleven amendments; the Senate adopted ten of these on the floor.138 After statements by numerous Senators in praise of the legislation, Senate Bill 1018, as amended, passed by voice vote.139

Meanwhile, the House Merchant Marine and Fisheries Committee had completed its second and final hearing on House Bill 3252 but delayed markup pending the Secretary of the Interior’s OBRA Report to Congress.140 Developers, realtors, landowners, and some coastal communities lobbied intensively before the Department of the Interior to get areas excluded from the OBRA maps. Yet when the Secretary’s Report was issued in August, 1982, it included an expansive list of 188 areas covering almost 750 miles of beachfront,141 more than either the original Chafee-Evans proposal or the Department’s January, 1982, draft maps.142


138. 128 CONG. REC. S12,065-72 (daily ed. Sept. 23, 1982).

139. Id. A new set of maps, SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., COASTAL BARRIER RESOURCE SYSTEM—MAPS (Comm. Print 1982), replaced the Subcommittee version.


141. See REPORT TO CONGRESS, supra note 7.

142. Compare figures in text accompanying supra note 141 with those referred to in supra note 87 and text accompanying supra note 113.
Largely unsuccessful in influencing the Department of Interior to limit the scope of OBRA, and concerned that the flood insurance prohibitions would apply widely, opponents of the coastal barrier legislation turned their lobbying efforts toward Congress.¹⁴³ Widespread support of coastal barriers legislation in Congress, however, made unlikely the repeal of OBRA to prevent the Department of Interior designations from becoming final. Although opponents perhaps could have blocked consideration of the Chafee-Evans legislation by the full House or Senate during the Ninety-Seventh Congress, the designation process helped to reduce objections to CBRA. Opponents faced a Hobson's choice between accepting the OBRA limited flood insurance restriction and expansive coverage of coastal barrier areas and permitting the CBRA expansive expenditure limits to become law while seeking to restrict the number of affected areas. Apparently more threatened by the flood insurance prohibition, opponents such as the National Association of Realtors dropped their opposition to the Chafee-Evans legislation and focused instead on excluding individual areas from the bill.¹⁴⁴

The focus of the battle thus shifted to Congress and the Chafee-Evans maps, with lobbyists descending on both the House and Senate to argue that their area was not a coastal barrier, that it had sufficient structures or infrastructure to be excepted from coverage, or similarly, that it was part of a phased development.¹⁴⁵ The mapping controversy was particularly acute in the House, which had a larger number of legislators representing affected coastal areas than did the Senate.¹⁴⁶

Finally, members of the House of Representatives resolved their differences over the maps, and the Merchant Marine and Fisheries Committee reported House Bill 3252 to the floor.¹⁴⁷ The House maps

¹⁴⁶. In addition, unlike their colleagues in the Senate, some House committee members were unhappy with the bill. See House Hearings—97th Congress, supra note 7, at 51 (statement of Rep. Tauzin); id. at 230 (statement of Rep. Breaux); id. at 385 (statement of Rep. Hughes).
¹⁴⁷. CBRA House Report, supra note 11, at 6-7; see also Transcript of Markup Session on H.R. 3252 Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment and the Subcommittee on Oceanography, 97th Cong., 2d Sess. (Sept. 15, 1982) (on file with the Clerk of the House of Representatives) [hereinafter cited as H.R. 3252 Subcommittee Markup Transcript]. Prior to consideration by the full House, H.R. 3252 was sequentially referred for consideration on September 21, 1982, to the Committee on Banking, Finance and Urban Affairs and to the Committee on Public Works and Transportation
differed considerably from both the Department of Interior proposed maps and the Senate maps adopted a week later during the debate on Senate Bill 1018. The difficulty of the House in arriving at acceptable maps in part explains these differences. The maps adopted by the subcommittees represented a compromise based on the language in the bill and the Department of the Interior's mapping process, but also sought to "correct inequities that would result from a narrow reading of the legislation." In some situations, legislators deleted areas from the House maps to thwart possible changes in the language of the legislation or to prevent attempts to block passage. The mapping process thus became the means, in the House as well as the Senate, to placate opponents and maintain support for the legislation.

On September 28, 1982, just three days prior to adjournment for the 1982 elections, the House considered House Bill 3252 under a suspension of rules; the House passed the bill as reported by the Merchant Marine Committee, 399 to 4. On October 1, 1982, the Senate voted to disagree with the House amendments but approved the House request for a conference.

3. Enactment of CBRA

In the rush before adjournment, the conferees quickly agreed to a substitute bill composed of parts from both the House and Senate bills. The conference report included a controversial House provision that for a period ending not later than September 22, 1982. The Committees on Banking and Public Works discharged H.R. 3252 and referred it to the full House on September 22, 1982. The mapping process of the House Subcommittees used the August 13, 1982, Department of the Interior maps as a foundation. When a disagreement arose over an area, the subcommittee staff obtained blank maps and, using Department of the Interior aerial photographs and other available information, sought to create a consensus. H.R. 3252 Subcommittee Markup Transcript, supra note 147, at 13; see 128 CONG. REC. H7641 (daily ed. Sept. 28, 1982) (statement of Rep. Evans); id. at H7643 (statement of Rep. Jones).

Interview with Sharon Newsome, supra note 79.

Id. For a discussion of how the mapping process influenced one Congressman to support the bill, see Baker, *List of Coastal Barriers Remains Controversial*, Env'tl & Energy Study Conf. Update, May 12, 1982, at 4. See also Washington Post, supra note 143. In addition, the Louisiana delegation obtained a significant concession, the addition of a specific exemption for erosion control and stabilization projects on Louisiana coastal barriers. See H.R. 3252 Subcommittee Markup Transcript, supra note 147, at 25; H.R. 3252, 97th Cong., 1st Sess. § 5(a)(3) (1981).


exempted general revenue sharing from the federal expenditure prohibition, and added a Senate provision that permitted landowners to opt into the System. The final agreement on the maps included 186 coastal barrier units covering 656 miles of ocean-facing shoreline. In the late hours on the day of recess, the Senate and House agreed to the Conference Report and passed the Coastal Barrier Resources Act.

President Reagan signed the legislation into law on October 18, 1982, praising it as "a major step forward in the conservation of our magnificent coastal resources. . . . precisely the sort of imaginative environmental legislation this administration encourages—legislation that solves real problems in the stewardship of our natural resources." The President pledged to take immediate steps to implement the act.

F. The Coastal Barrier Resources Act

The following section summarizes the provisions of the CBRA to provide an overview of purposes and applications of the act. Part II considers the concept of expenditures limitations as a technique for encouraging conservation and discouraging development in scarce or fragile resource areas. Because CBRA is the salient example of the approach as applied, Part II relies heavily on examples and illustrations drawn from CBRA provisions.

1. Findings and Purposes of the Coastal Barrier Resources Act

Section 2 of CBRA clearly outlines the findings and purposes of

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156. Id. at 13, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3223. The report also contained House exemptions for programs under the Coastal Zone Management Act and stabilization and erosion control projects on Louisiana coastal barriers, and a Senate amendment giving a limited consultation role to state coastal zone management agencies in boundary modifications and in the preparation of a report to Congress on the System. Id. at 10-13, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3222-25.
157. 1983 FEIS, supra note 3, at F-14. Of the sixty-four map areas that occasioned disagreements, legislators resolved twenty-three by accepting the Senate maps, twenty-seven by choosing the House maps, four by determining new boundaries, three by accepting the Department of Interior proposed maps, and seven by deleting areas. CBRA CONFERENCE REPORT, supra note 155, at 10-12, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3222-24. The press severely criticized Congress' handling of the legislative maps. See Anderson, Shoreland Law Saves Subsidies for Developers, Washington Post, Oct. 15, 1982, at E11, col. 4; Washington Post, supra note 143; USA Today, supra note 1. These accounts suggested that legislators deleted many areas for political expediency, not because the areas failed to meet the designation criteria in the legislation.
160. President's Statement, supra note 115, at 1341.
the Act.\textsuperscript{161} First, the section sets forth Congress' findings that coastal barriers and adjacent associated areas provide habitats essential as spawning, nursery, nesting, and feeding areas for commercially and recreationally important species of fish and other aquatic organisms and for migratory birds and other wildlife.\textsuperscript{162} Second, the section states that coastal barrier resources of extraordinary scenic, scientific, recreational, natural, historic, archaeological, cultural, and economic importance are being damaged and lost because of development on, among, and adjacent to the barriers.\textsuperscript{163} Third, the section declares that coastal barriers serve as natural storm protective buffers which are generally unsuitable for development due to vulnerability to hurricane and other storm damage and because shore line recession and the movement of unstable sediments undermine manmade structures.\textsuperscript{164} Fourth, the section codifies Congress' findings that certain actions and programs of the federal government subsidize and permit coastal barrier development, resulting in the loss of barrier resources, threats to life, health, and property, and the expenditure of millions of tax dollars each year.\textsuperscript{165} Finally, the section contains Congress' conclusion that coordinated action by federal, state, and local governments is critical to more appropriate use and conservation of coastal barriers.\textsuperscript{166}

Section 2(b) declares that "it is the purpose of this Act to minimize the loss of human life, wasteful expenditure of Federal revenues, and the damage to fish, wildlife and other natural resources associated with coastal barriers along the Atlantic and Gulf coasts."\textsuperscript{167} Congress designed CBRA to accomplish these purposes by restricting future federal expenditures that effectively encourage development of coastal barriers, by establishing the Coastal Barrier Resources System, and by considering the means and measures by which the long-term conservation of these fish, wildlife, and other natural resources may be achieved.\textsuperscript{168}

The House Committee Report thoroughly documents the background and need for CBRA.\textsuperscript{169} The report explains the resources coastal barriers provide, the threats that hurricanes and the dynamic nature of the barrier landform pose to life and property, and the adverse impacts of intense development and human use on coastal barri-

\begin{itemize}
  \item \textsuperscript{161} Coastal Barrier Resources Act § 2(a), 16 U.S.C. § 3501 (1982); see also CBRA House Report, supra note 11, at 12.
  \item \textsuperscript{162} Coastal Barrier Resources Act § 2(a)(1), 16 U.S.C. § 3501(a)(1) (1982).
  \item \textsuperscript{163} Id. § 2(a)(2), 16 U.S.C. § 3501(a)(2).
  \item \textsuperscript{164} Id. § 2(a)(3), 16 U.S.C. § 3501(a)(3).
  \item \textsuperscript{165} Id. § 2(a)(4), 16 U.S.C. § 3501(a)(4).
  \item \textsuperscript{166} Id. § 2(a)(5), 16 U.S.C. § 3501(a)(5).
  \item \textsuperscript{167} Id. § 2(b), 16 U.S.C. § 3501(b).
  \item \textsuperscript{168} Id.
  \item \textsuperscript{169} CBRA House Report, supra note 11, at 7-12.
\end{itemize}
ers, detailing the extent of coastal barrier development and the role of federal expenditures in promoting development. Significantly, the findings provision of the Act did not provoke controversy in either the House or Senate Committee meetings or during floor debates. As an unequivocal statement of congressional intent, the findings and purposes set out in section 2 give clear guidance in the interpretation and application of CBRA.

2. Affected Areas: The Coastal Barrier Resources System

The Coastal Barrier Resources System consists of those undeveloped coastal barriers located on the Atlantic and Gulf Coasts that are depicted on the congressional maps entitled “The Coastal Barrier Resources System.” The mapped boundaries of the System are of great importance because the CBRA government expenditures and assistance prohibition applies only to projects and activities within the mapped System.

a. “Undeveloped Coastal Barriers”

The maps that identify System units were based on the congressional interpretation of the definition of “undeveloped coastal barrier” that appears in section 3 of CBRA and on the final proposed maps prepared by the Department of the Interior pursuant to OBRA. Both the House and Senate Reports emphasize that CBRA defines the

170. *Id.* at 9-11.

171. In addition, the Conference Committee merely adopted the findings provisions appearing in the House bill without any change in the language. CBRA CONFERENCE REPORT, *supra* note 155, at 9, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3222. The purpose provision of CBRA comprises provisions appearing in both the Senate and House bills. *Id.*

172. Of course, the statutory meaning of any particular provision is to be determined against the congressional policies and objectives expressed in CBRA. See Richards v. United States, 369 U.S. 1, 11 (1962); Don’t Tear It Down, Inc., v. Pennsylvania Ave. Dev. Auth., 642 F.2d 527, 533 (D.C. Cir. 1980). If there is any possibility that an expenditure could directly or indirectly stimulate development, the policies and objectives expressed in CBRA suggest that the expenditure should be precluded. Only such a liberal view of the scope of CBRA will promote Congress’ clear objective of halting financial aid for coastal barrier development.


term only for information purposes, not as a means of identifying areas included in the System. The definition provides a rational basis for identification of the units and forced landowners seeking to exclude property from the ambit of the Act to show specifically that the area did not fit the CBRA definition. Moreover, the inclusion of the statutory definition requires Congress to base future additions to or deletions from the System on the criteria set forth in the Act, unless Congress repeals the provision. Nonetheless, the maps alone identify areas included within the Coastal Barrier Resources System.

Congress borrowed the CBRA definition of a coastal barrier from OBRA; both acts define the term as a depositional geologic feature, such as a bay barrier, tombolo, barrier spit, or barrier island, that consists of unconsolidated sedimentary materials subject to wave, tidal, and wind energies, and that protects landward aquatic habitats from direct wave attack. CBRA classifies a coastal barrier area as undeveloped only if it contains few structures and these structures and

176. CBRA HOUSE REPORT, supra note 11, at 12; CBRA SENATE REPORT, supra note 10, at 5, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3215. In Bostic v. United States the plaintiffs argued that in mapping their land as an undeveloped coastal barrier, Congress disregarded the criteria set out in section 3 of CBRA, thus violating plaintiffs' substantive due process rights. 581 F.Supp. at 257-58. They contended that Congress intended the Act to apply only if an area met the definition of an undeveloped coastal barrier and was designated on the congressional maps. Supplemental Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss 5-7; see generally 581 F.Supp. at 259. The court held that the definition provision is merely informational, and that the legislative maps control any determination of which areas are within the Coastal Barriers Resources System. 581 F.Supp. at 257. The court added, "[i]f any criteria set forth by Section 3 has been disregarded, such disregard provides no basis for due process claims." Id. at 259.

177. See id. at 259-60; CBRA HOUSE REPORT, supra note 11, at 13; CBRA SENATE REPORT, supra note 10, at 5, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3215.

178. Interview with Robert Hurley, supra note 93; Interview with Jeff Curtis, supra note 145.

179. During a colloquy at the House Subcommittees' markup of H.R. 3252, Representative Breaux observed in regard to recommendations in the Secretary of the Interior's report under section 10: "I guess the Congress would always be the final arbitrator based on the criteria that is established in this bill. We would have to follow the criteria that the legislation has adopted or change the criteria three years down the road." H.R. 3252 Subcommittee Markup Transcript, supra note 147.


182. Both the House and Senate Reports state that a threshold of approximately one structure per five acres of fast land was used in determining if a coastal barrier was developed. CBRA HOUSE REPORT, supra note 11, at 11; CBRA SENATE REPORT, supra note 10, at 6, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3215. The House Report explains that development exceeding the threshold level, one structure per five acres, tends to interfere with the natural processes and change the essential nature of the coastal barrier. CBRA
other human activities on the barrier do not significantly impede geomorphic and ecological processes.  

Congress excluded developed areas from the scope of CBRA for two reasons. First, many legislators and witnesses believed that denying federal assistance to already developed areas was inequitable if these benefits were continued for areas outside the coastal barrier system. Second, banning federal expenditures in developed areas would have created insurmountable political problems because areas affected by the legislation, and hence the number of individuals affected, would have increased dramatically. Political concerns also precluded automatic inclusion of coastal areas after a storm or natural disaster obliterates development within the area, although Congress could add such areas by amending the Act.

CBRA also excludes areas protected from development from the expenditure prohibition and other provisions. For an area to qualify as protected, the geologic features and associated aquatic habitats of the barrier must be held primarily for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes and must be included within the boundaries of an area established under federal, state, or local law, or held by qualified organizations defined by reference to the Internal Revenue Code. The Act thus allows both protected areas and developed areas to remain eligible for federal financial assistance.

b. Boundary Modifications

To ensure the accuracy of the maps adopted by Congress, subsec-
tion 4(c) of CBRA allowed the Secretary to make minor and technical modifications to the boundaries of the System units within 180 days of the enactment of the Act.188 All such modifications must have accorded with the purposes of the Act and been necessary to clarify the boundaries of the unit.189 Congress intended the provision only to allow the Secretary to clarify boundaries, not to add or delete areas, or to open up the maps for renewed debate.190 The Secretary completed the map modifications on April 18, 1983, adopting twenty-seven of the fifty-five suggested changes.191

CBRA also directs the Secretary to make minor and technical modifications to the boundaries of the units at least once every five years to reflect changes caused by the dynamic nature of coastal barriers and the continual process of erosion and accretion.192 Congress intended this provision solely to provide a means to make minor adjustments to the boundaries of existing units, not as a means to make substantive changes by adding new areas to the System.193

189. Id. The Act required the Secretary to provide written notice of proposed modifications to a variety of congressional committees, state executive officers, and state coastal zone management agencies. Id. § 4(c)(1)(A), (c)(2), (c)(4), 16 U.S.C. § 3503(c)(1)(A), (c)(2), (c)(4); 128 Cong. Rec 12,069, 12,071 (daily ed. Sept. 23, 1982) (statement of Sen. Hollings); see also CBRA HOUSE REPORT, supra note 11, at 14, CBRA CONFERENCE REPORT, supra note 155, at 15, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3227.
190. CBRA HOUSE REPORT, supra note 11, at 14; CBRA CONFERENCE REPORT, supra note 155, at 12, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3225.
191. Dep't of the Interior, Minor and Technical Boundary Modifications to the Coastal Barrier Resources System Maps (P.L. 97-348) (1983); see 48 Fed. Reg. 17,406 (1983). Of the changes, 17 expanded areas, 2 narrowed areas, and 8 were merely clerical. Dep't of the Interior, supra, at 1. The Department rejected a number of changes that would have required major modifications beyond the scope of the Secretary's authority under section 4(c). The Secretary will consider the major changes requests in its three-year report required by section 10, id., but any such changes to the System would require congressional amendment of CBRA to become effective. CBRA CONFERENCE REPORT, supra note 155, at 12-13, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3225.
193. Congress also included a procedure to allow owners of parcels excluded from the System to opt this land into the System within one year of enactment. Coastal Barrier Resources Act § 4(a)(2), 16 U.S.C. § 3503(a)(2) (1982); see CBRA CONFERENCE REPORT, supra note 155, at 13, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3225; 128 Cong. Rec. S12,068 (daily ed. Sept. 23, 1982) (statement of Sen. Thurmond). Not surprisingly, no landowners exercised the option. Without some financial inducement, landowners have little incentive to reduce the marketability of their property; the extent of local property tax savings due to reduction in fair market value, moreover, would be difficult to predict. It was rumored that the Department of the Interior would recommend owners of System property be offered federal tax concessions, but CBRA does not confer favored tax treatment. See id.
3. The Protective Mechanism of CBRA: Limitations on New Expenditures and New Financial Assistance

CBRA employs the expenditures limitation mechanism as the sole means of achieving Congress' purposes of minimizing loss of human life, wasteful expenditure of federal funds, and damage to natural resources. Subsection 5(a) states that "[e]xcept as provided in [the exceptions to section 6], no new expenditures or new financial assistance may be made available under authority of any Federal law for any purpose within the Coastal Barrier Resources System."194 The Act classifies expenditures or financial assistance as "new" in three situations. First, for projects requiring specific congressional appropriations, funds for construction or purchase purposes are new if appropriated after the October 18, 1982, enactment date.195 Second, for government loans or contracts, expenditures are new if no legally binding commitment was made before the enactment date.196 Third, for federal flood insurance, coverage for construction or substantial improvements is new if provided after October 1, 1983, which also had been the OBRA conferees' compromise date.197

Section 5(a) states that the projects within the ambit of the expenditures limitation include but are not limited to:

1. the construction or purchase of any structure, facility, or related infrastructure;
2. the construction or purchase of any road, airport, boat landing facility, or other facility on, or bridge or causeway to, any System unit;
3. the carrying out of any project to prevent the erosion of, or to otherwise stabilize, any inlet, shoreline, or inshore area, except that any such assistance and expenditures may be made available on units designated pursuant to section 4 on maps numbered S01 through S08 [Louisiana units] for purposes other than encouraging development and, in all units, in cases where an emergency threatens life, land, and property immediately adjacent to that unit.198

CBRA does not require demonstration that an expenditure stimulates development for the expenditure ban to apply.199 Similarly, that a par-

197. See Coastal Barrier Resources Act § 3(3), 16 U.S.C. § 3502(3); see also National Flood Insurance Act § 1321(a), 42 U.S.C.A. § 4028(a) (West Supp. 1984) (codified as amended by Coastal Barrier Resources Act § 11(a)).
ticular project is designed to benefit an area outside the System does not exempt the project from the ban, unless the project is for emergency stabilization.200

The conference report notes that the prohibitions in the Act extend to structures or facilities within the System as well as other facilities, such as bridges or causeways, that may extend into a System unit.201 Expenditures outside the System, even if they may have impacts within the System, are not affected by the Act.202 Moreover, the expenditures limitation does not prohibit private financial transactions or the construction of facilities and structures with private funds or funds provided by state and local governments;203 similarly, federally insured financial institutions can continue to make loans for construction within the System so long as the loans themselves are not federally insured or federally guaranteed.204

4. Exemptions from the CBRA Expenditures and Assistance Prohibition

Section 3 broadly defines “financial assistance” as “any form of

200. Id. One provision of the Act grants an exemption to the prohibition on stabilization and erosion control projects “in cases where an emergency threatens life, land, and property immediately adjacent to that unit.” Coastal Barrier Resources Act § 5(a)(3), 16 U.S.C. § 3504(a)(3) (1982). A stabilization project in a System unit other than in Louisiana thus is permissible only if an emergency threatens a nonsystem coastal barrier or mainland area and the area to be protected is “immediately adjacent” to the unit. Id. A second exemption addresses the serious erosion problem along the Louisiana coast. CBRA HOUSE REPORT, supra note 11, at 15; CBRA CONFERENCE REPORT, supra note 155, at 13, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3225-26. Stabilization and erosion control projects may be carried out in Louisiana units for any purpose other than encouraging development. Coastal Barrier Resources Act § 5(a)(3), 16 U.S.C. § 3504(a)(3) (1982).


203. CBRA HOUSE REPORT, supra note 11, at 15; CBRA SENATE REPORT, supra note 10, at 7, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3216. Section 8 contains a priority of laws clause, stating that the Act shall not be interpreted to interfere with the right of a state to protect, rehabilitate, preserve, and restore lands within its established boundaries, to preempt local or state laws unless there is a direct and irreconcilable conflict between the two, or to relieve any person of any obligation imposed by any state or local law. Coastal Barrier Resources Act § 8, 16 U.S.C. § 3507 (1982). Moreover, the clause indicates that Congress did not intend to disturb the current delicate balance between other federal laws and state or local laws, and thus addresses concerns that the Act might be interpreted to affect the federal-state relationship under existing laws such as the Coastal Zone Management Act. See id.; CBRA CONFERENCE REPORT, supra note 155, at 14-15, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3227; CBRA SENATE REPORT, supra note 10, at 8, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3218.

loan, grant, guaranty, insurance, payment, rebate, subsidy, or any other form of direct or indirect federal assistance." CBRA nevertheless explicitly excludes from its prohibition some forms of assistance that legislators apparently perceived as either unrelated to development or not politically appropriate for denial.

The section 3 definition of assistance excludes general revenue-sharing grants to state and local governments that allow recipients use of these funds free of federal restrictions. The revenue-sharing exemption may allow coastal barrier communities to circumvent the thrust of CBRA because communities may continue to use federal funds for the construction of development-related projects such as highways, sewerage, and utility systems. The definition of "financial assistance" also excludes "deposit or account insurance for customers of banks, savings and loan associations, credit unions, or similar institutions." Similarly, the Act permits the purchase of mortgages or loans by the Government National Mortgage Association (Ginnie Mae), the Federal National Mortgage Association (Fannie Mae), or the Federal Home Loan Mortgage Corporation (Freddie Mac). Nor does the Act prohibit assistance for "environmental studies, planning, and assessments that are required incident to the issuance of permits or other authorizations under Federal law," such as activities required by the National Environmental Policy Act or the issuance of permits such as those required under section 404 of the Clean Water Act or section 10 of the Rivers and Harbors Act of 1899.

206. Id. § 3(3)(A), 16 U.S.C. § 3502(3)(A). General revenue-sharing grants are those grants made under section 102 of the State and Local Assistance Amendments of 1972, id.
210. Id. § 3(3)(C), 16 U.S.C. § 3502(3)(C).
211. Id. § 3(3)(D), 16 U.S.C. § 3502(3)(D).
212. CBRA House Report, supra note 11, at 13; CBRA Senate Report, supra note
explicitly preserves “assistance pursuant to programs entirely unrelated to development, such as any Federal or Federally assisted public assistance program or any Federal old-age survivors or disability insurance program.”\(^{213}\) This exemption includes student loans, Social Security, Medicare and Medicaid, Food Stamps, and other similar social programs.\(^{214}\)

Section 6 enumerates a second category of exemptions from the expenditure prohibition for specific kinds of projects and actions within the System. These projects remain eligible for aid, after the agency proposing to grant assistance consults with the Secretary of the Interior,\(^{215}\) either because the activities proposed are consistent with the purposes of CBRA, or because the societal interest in permitting the actions outweighs the policies underlying CBRA.

Subsections 6(a)(1) through (a)(5) exempt five actions and projects from the requirements of the Coastal Barrier Resources Act even if these actions and projects conflict with the purposes of the legislation. The first exemption permits expenditures in or adjacent to the System for exploration, extraction, or transportation of energy resources.\(^{216}\) Congress narrowed the energy exemption to minimize the adverse impacts on coastal barrier resources by disallowing production or development activities, such as refineries, which pose significant dangers of oil and gas loss and damage to the barriers.\(^{217}\) The Conference Committee further limited the energy exemption to activities that require

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10, at 5, \textit{reprinted in} 1982 \textit{U.S. Code Cong. & Ad. News} 3215. The legislative history does not indicate whether or not other nonenvironmental studies or planning expenditures incident to the issuance of permits also would be excluded from the broad ban on financial assistance. All of the examples given in the Committee reports and during the Senate Subcommittee markup concerned activities pursuant to environmental statutes. \textit{See CBRA House Report}, supra note 11, at 13; \textit{CBRA Senate Report}, supra note 10, at 5, \textit{reprinted in} 1982 \textit{U.S. Code Cong. & Ad. News} 3215; \textit{S. 1018 Subcommittee Markup Transcript}, supra note 135, at 11.


215. Secretarial Order 3093 delegated responsibility for consultation to the Fish and Wildlife Service. \textit{Coastal Barrier Resources Act Advisory Guidelines}, 48 Fed. Reg. 45,664 (1983). When consulted on activities that may be inconsistent with the Act, the Service is to “provide technical information and register an opinion as to whether the activity is one which the clause allows.” \textit{Id}. at 45,668. The guidelines do not mandate any particular manner of consultation, but “leave it up to various Federal agencies to develop acceptable consultation procedures with the service that best fit their various programs.” \textit{Id}. at 45,665.


access to the coastal water body.  

The second exemption permits federal expenditures to aid maintenance of "existing channel improvements and related structures such as jetties." To qualify for an exemption, either the channel improvement or related structure must exist currently, or the money for its construction must have been appropriated before October 18, 1982, the enactment date of CBRA. Although projects within the System for new channels or enlargement of existing channels may not receive federal funds, relocation of existing channels made necessary by the unstable nature of barrier islands may be federally financed. Maintenance also encompasses complete reconstruction of existing jetties or other structures and disposal of dredge material produced by channel improvements.

The third exemption permits federal expenditures for the "maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly-owned or publicly-operated roads, structures, or facilities that are essential links in a larger network or system." To accord with the purposes of the Act, this exemption should be read to prohibit expenditure of federal funds to expand or enlarge the size or capacity of existing infrastructure such as roads, water lines, or sewers. A related exemption, found in subsection 6(a)(6)(F), permits expenditures or financial assistance for the maintenance, replacement, reconstruction, or repair, but not the expansion, of public roads which are not essential links in a larger network or system, but only if such public actions or projects are consistent with the purposes of CBRA. Both of the maintenance exemptions apply to public facilities whether or not they are essential links in a larger network or system.

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220. Id. § 6(b), 16 U.S.C. § 3505(b).
221. The Army Corps of Engineers sought, but failed to obtain, an exemption for new channel improvements consistent with the Act and designed to benefit commerce but not intended to promote development of the islands. CBRA House Report, supra note 11, at 28; Senate Hearings—97th Congress, supra note 19, at 162.
222. CBRA House Report, supra note 11, at 16.
224. Coastal Barrier Resources Act § 6(a)(2), 16 U.S.C. § 3505(a)(2) (1982). The disposal site need not have existed when Congress enacted CBRA, and there is no requirement that the location or use of the site be consistent with the purposes of the Act, so long as future sites within the System are related to and necessary for the maintenance of an existing project. See CBRA House Report, supra note 11, at 16; CBRA Senate Report, supra note 10, at 7, reprinted in 1982 U.S. Code Cong. & Ad. News 3217.
226. See generally CBRA House Report, supra note 11, at 17.
they were in existence when the Act was enacted. A developer, therefore, can build a road within the System, dedicate it to public use, and make the road eligible for federal assistance for maintenance or even replacement after a storm.228

A fourth exemption not requiring consistency allows expenditures for “military activities essential to national security.”229 Although the exemption is broadly drawn, the Department of Defense must consult with the Department of the Interior and must determine that the activities are indeed essential to national security.230 Similarly, the fifth and final exemption in this category permits federal expenditures for the “construction, operation, maintenance, and rehabilitation of Coast Guard facilities and access thereto,”231 such as search and rescue stations.

Seven additional exemptions to the CBRA expenditures prohibition are conditioned on consistency with the purposes of the Act and prior consultation with Department of the Interior.232 First, if these conditions are met, subsection 6(a)(6)(A) permits assistance for projects for the study, management, protection, and enhancement of fish and wildlife resources and habitats, including, where necessary, assistance for stabilization projects to protect valuable habitats.233

Second, subsection 6(a)(6)(B) exempts assistance for the establishment, operation, and maintenance of air and water navigation aids and devices.234 Airport terminals or runways, or boat landing facilities or marinas, however, would not qualify as navigational aids or devices.

Third, subsection 6(a)(6)(C)235 exempts projects under the Land and Water Conservation Fund236 and the Coastal Zone Management Acts.237 The Land and Water Conservation Fund Act provides for the acquisition of lands for federally administered parks, wildlife refuges, and recreation areas, and offers matching grants for state recreation planning and state and local land acquisition and development of pub-

228. The failure to require consistency for essential links may help eliminate community uncertainty regarding eligibility for federal funds and make it easier for communities to plan for the future. Telephone Interview with Stan Senner, supra note 106.
230. See CBRA HOUSE REPORT, supra note 11, at 17; see also Senate Hearings—97th Congress, supra note 19, at 48 (statement of Sen. Chafee); CBRA CONFERENCE REPORT, supra note 155, at 14, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3226.
232. Id. § 6(a)(6), 16 U.S.C. § 3505(a)(6).
233. Id. § 6(a)(6)(A), 16 U.S.C. § 3505(a)(6)(A); see CBRA HOUSE REPORT, supra note 11, at 16. This exemption does not sanction assistance for all forms of coastal barrier recreation, but only fish and wildlife recreation consistent with the Act. Id.
236. 16 U.S.C. §§ 460l-4 to 460l-11.
237. Id. §§ 1454-56a (1982).
lic outdoor recreation areas and facilities. The Coastal Zone Management Act branch of the exemption applies to all activities under that act, including grants for state development and administration and grants and loans under the coastal energy impact program.

Fourth, subsection 6(a)(6)(D) exempts scientific work such as atmospheric, space, geologic, marine, fish and wildlife research, development, and scientific applications.

Fifth, subsection 6(a)(6)(E) grants a limited exemption for emergency actions essential to the saving of lives and the protection of property and the public health and safety, but only if such actions are performed under section 305 or 306 of the Disaster Relief Act of 1974 or section 1362 of the National Flood Insurance Act. A compromise provision adopted in conference limits emergency actions to those “necessary to alleviate the emergency.”

Sixth, as discussed above, subsection 6(a)(6)(F) exempts maintenance expenditures for roads that are nonessential links in a larger network. The seventh and final exemption under subsection 6(a)(6) allows assistance for nonstructural projects designed to mimic, enhance, or restore natural stabilization systems. This exemption includes activities such as planting dune grass or beach nourishment.

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238. Id. §§ 460l-8, 460l-9 (1982).
239. Id. §§ 1454-56a (1982). The coastal energy impact program provides financial assistance to meet the needs of coastal states and local governments resulting from energy development and includes grants to assist in providing new or improved public facilities, such as highways, water supply systems, or wastewater projects, which are required as a result of coastal energy activity. Id.
242. 42 U.S.C. §§ 5145, 5146 (1976 & Supp. V 1981). Section 305 authorizes the President, in a declared emergency, to provide such emergency services as the President deems necessary to save lives and protect public health and safety where a disaster either threatens or is imminent. Id. § 5145 (1976 & Supp. V 1981). Section 306 authorizes federal agencies, in a major disaster or emergency, to provide assistance on the direction of the President to state and local governments and to help distribute medicine, food, and other consumable supplies or emergency assistance. Id. § 5146 (1976 & Supp. V 1981).
245. See supra note 227 and accompanying text.
projects that attempt to reproduce natural processes through nonstructural means. Structural projects intended solely to protect unit property from erosion generally are not authorized under the Act, unless permitted under another exemption to protect fish and wildlife habitats or to meet an emergency that threatens lives or property.

5. Report to Congress

Section 10 requires the Secretary of the Interior to prepare and submit a report to Congress on the Coastal Barrier Resources System within three years of the enactment of CBRA. In preparing this report, the Secretary must consult with the governors and coastal zone management agencies of states affected by the legislation and provide an opportunity for public comment. The three-year report requirement adopted in CBRA focuses primarily on two aspects of the System: recommendations for the conservation of System natural resources, including a comparison of management alternatives, and recommendations for additions to, deletions from, or modifications to the System's units.

Recommendations of the Secretary for changes in the System are only advisory; the Secretary must submit any recommendations to a number of committees before Congress can consider amending the Act. The House Merchant Marine and Fisheries Committee and the Senate Committee on Environment and Public Works must consider all proposed changes. If the recommendation falls under section 10, the House Public Works and Transportation Committee also must receive any changes proposed. In addition, comments on the floor of the

247. CBRA HOUSE REPORT, supra note 11, at 17; CBRA SENATE REPORT, supra note 10, at 8, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3217.


249. See Coastal Barrier Resources Act § 10(b), 16 U.S.C. § 3509(b) (1982).

250. See id. § 10(c)(1), (c)(2), 16 U.S.C. § 3509(c)(1), (c)(2). Congress was concerned about the treatment of protected areas and also directed the secretary to identify the protected areas and report back to Congress. CBRA HOUSE REPORT, supra note 11, at 18; 128 CONG. REC. S12,072-73 (daily ed. Sept. 23, 1982) (statement of Sen. Chafee); see also Notice, 48 Fed. Reg. 54,542, 54,543 (1983). The Department of the Interior is in the process of identifying the protected areas and is also inventorying the coastal barriers and related landforms along the Great Lakes, Virgin Islands, Puerto Rico, Pacific Coast, and Alaska. Notice, 48 Fed. Reg. 54,543; see also A. Greene, Jr. & F. McGilvrey, New Directions for Expansion of the Coastal Barrier Resources System (1983) (paper prepared for presentation at Coastal Zone 83: The Third National Symposium on Coastal and Ocean Management); 1983 FEIS, supra note 3, at IV-26.


253. See id.
Senate and House during final deliberation on CBRA suggest that the House and Senate Banking Committees may review any attempts to delete areas from the System, and by that means narrow the geographical scope of the flood insurance prohibition.254

As the first federal legislation employing the expenditures limitation approach, CBRA is significant not only for its impact on undeveloped coastal barriers, but also as a model for other attempts to conserve resources through the removal of government subsidies that contribute to the destruction of natural resources. Part II, which follows, analyzes the components of resource protection measures incorporating the expenditures limitation approach.

II
THE GOVERNMENT EXPENDITURES LIMITATION APPROACH TO NATURAL RESOURCE CONSERVATION: THE CONCEPT AND ITS APPLICATION

The coastal barrier legislation presents a new approach to natural resource conservation.255 Past federal efforts aimed at resource conservation, as well as state and local initiatives, traditionally took one of three forms: land acquisition, regulation, or planning.256 Land acquisition programs, such as those establishing parks or wildlife refuges, seek to protect resources by placing the land and its resources in the public domain.257 Regulatory efforts, such as the section 404 wetlands


255. CBRA also presents a new approach to minimizing threats to human lives, which result from habitation of hazardous areas, through restrictions on future expenditures and financial assistance. The expenditures limitation technique also may provide additional protection for historic, archaeological, and other human or natural resources threatened by activities assisted or encouraged, in part, by government financial assistance. Indeed, only the necessity that government expenditures or financial assistance play a role in activities or programs that threaten resources limits use of the technique. For clarity, however, this article focuses on natural resources conservation through the use of expenditures and assistance limitations.

256. The federal government also influences development and resource conservation through taxation. For example, provisions such as section 260B of the Internal Revenue Code discourage destruction of historic sturctures, while Internal Revenue Code section 170(f)(3) encourages conservation through a charitable deduction for donation of interests in land for conservation purposes. In contrast, provisions such as the interest deduction on loans and mortgages, I.R.C. § 163 (1982), accelerated depreciation of real property, id. § 167, casualty loss deductions, id. § 165(c)(3), and capital gains tax rates on real estate transactions, id. § 1211, often encourage development and indirectly discourage resource conservation. See generally R. Coughlin & J. Keene, Land Use, Development, and the Internal Revenue Code (1981) (paper prepared for Humphrey Institute/ALI Forum, May 12-13, 1981), reprinted in in SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 97TH CONG., 1ST SESS., WORKSHOP ON PUBLIC LAND ACQUISITION AND ALTERNATIVES 795 (Comm. Print 1981).

program of the Clean Water Act, and state and local land use controls, attempt to curtail activities harmful to resources by controlling the uses to which certain property may be dedicated. Finally, planning requirements, such as those embodied in the National Environmental Policy Act or the Coastal Zone Management Act, attempt to ensure that actions that may affect natural resources are undertaken only after deliberation and consideration of the impacts of such actions on resources.

Conservation efforts through these three traditional tools have not always met with success. Champions of fiscal austerity and limited government often find government acquisition and control unpalatably expensive and intrusive. Many individuals regard regulation as an unacceptable attempt to dictate the use of private property. In addition, regulations frequently evoke legal challenges, subjecting conservation efforts to the vagaries of litigation. Planning has proved

land acquisition programs also can involve acquisition of less than a fee simple interest if the government purchases only the development potential of the property, such as a conservation easement. See generally Coughlin & Plaut, Less-Than-Fee Acquisition for the Preservation of Open Space: Does It Work?, 44 J. AM. INST. PLANNERS 452 (1978).


259. See, e.g., MODEL LAND DEV. CODE (1975).


263. See, e.g., SENATE COMM. ON ENERGY AND NATURAL RESOURCES, WORKSHOP ON PUBLIC LAND ACQUISITION AND ALTERNATIVES 8-9 (Comm. Print 1981) (statement of James Watt, Secretary of the Interior):

Business as usual, Mr. Chairman, as you pointed out, can no longer be afforded by Americans, so as we talk about acquisition policies, we are talking about adding to the Federal estate which is already one-third of America, and taking from the tax rolls privately owned land that has served America so very well and so productively. There has been an apparent resistance on the part of many citizens to further increased Federal acquisition of private lands. There is need to curtail excessive Federal spending and reduce inflation.


ineffective in some instances in preventing loss of resources;\textsuperscript{266} critics also have attacked federal land use planning, in particular, as an unwarranted intrusion by the federal government into state and local affairs.\textsuperscript{267}

The government expenditures limitation approach used in CBRA offers a new tool for resource conservation in cases where the threats to resources stem in part, directly or indirectly, from government spending programs. Requiring all agencies to spend their financial resources in a manner consistent with resource conservation goals removes government economic incentives for development or other resource destructive activities. Moreover, unburdened by acquisition costs, regulatory constraints, and planning intervention, the expenditures limitation approach avoids many of the political and legal pitfalls of more traditional government efforts to conserve natural resources.

The expenditures limitation technique nevertheless is not without difficulties. Discontinuing government benefits to some areas while providing the same benefits to others may create inequities. Further, the expenditures limitation approach is untested; it is yet to be seen whether limiting government expenditures will result in protection of natural resources or whether supplementary regulatory or acquisition efforts must follow. The following sections discuss the concept and application of the promising, but unproven, conservation technique employed in CBRA and similar federal and state initiatives.

\textit{A. The Expenditures Limitation Concept}

The expenditures limitation technique rests upon the premise that government financial assistance and expenditures encourage certain activities that damage or destroy resources. For example, Congress drafted CBRA with the assumption that government funds encourage the development or redevelopment of coastal resources areas that deserve protection. Although the degree of financial assistance to resource threatening activities undoubtedly varies from location to location, the studies on barrier islands development documented extensive federal government involvement in development activities. The Department of the Interior found that federal financial assistance to coastal barrier development and redevelopment amounted to between

\textsuperscript{266} The National Environmental Policy Act (NEPA), for example, merely mandates a procedure to ensure that agencies consider environmental consequences before acting on major federal projects; if agencies comply with this procedure NEPA does not prohibit actual destruction of resources. Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).

$100 to 200 million per year. The federal government subsidizes the costs of bridges, roads, sewer and water supply systems, flood insurance, and disaster assistance. State and local assistance plays an equally, if not more important, role in initial development, although exact figures on the extent of state and local subsidies are unavailable. Coastal barrier development thus illustrates that taxpayers often underwrite an enormous portion of the costs of activities that result in degradation and loss of natural resources.

268. See Report to Congress, supra note 7, at 11; 1979 DEIS, supra note 4, at vii, reprinted in Senate Hearings—96th Congress, supra note 4, at 36; see also President's Statement, supra note 115, at 1341. Costs of subsidies include not only direct, budgeted outlays, but also expenses to administer the subsidy programs and to levy taxes needed to pay for the programs; the taxes used to fund subsidy programs exact an additional cost by altering the presumably efficient use of private sector resources. Jasinowski, The Economics of Federal Subsidy Programs, in Government Spending and Land Values 3, 13 (1973).

269. See Report to Congress, supra note 7, at 10-11; House Hearings—97th Congress, supra note 7, at 361-63 (statement of Patrick Parenteau, Vice President, Nat'l Wildlife Fed'n); Miller, supra note 28, at 48.

Economists often define a “subsidy” as a government induced income transfer to the private sector, designed to encourage or discourage specific private market behavior; they refer to goods or services distributed without such a purpose as “welfare payments.” See Jasinowski, supra note 268, at 3. The studies on barrier islands did not restrict the term “subsidy” to its economic definition. Instead, the studies used the term broadly to refer to both benefits conditioned on the recipients taking certain actions, as in the federal flood insurance program, and “welfare payments” unaccompanied by restrictions, such as disaster assistance. See, Work Group Report, supra note 7; 1979 DEIS, supra note 4, reprinted in Senate Hearings—96th Congress, supra note 4, at 28; Sheaffer & Roland, Inc., supra note 32, at 63-65. Studies and discussions related to the barrier islands legislation appear to implicitly adopt a lay understanding of the term subsidy, as found, for example, in the dictionary: “A grant of funds or property from a government . . . to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public.” G & C. Merriam Co., Webster's Third New International Dictionary (1961).

270. One case study on barrier island development showed that private interests or state or local governments bore the initial costs of building access and infrastructure, while the federal government typically subsidized later expansion, improvement, repair, rehabilitation, or replacement of existing access or infrastructure necessary for community growth. Sheaffer & Roland, Inc., supra note 32, at 55.

271. The expenditures limitation approach applied in CBRA rests on the premise that development can lead to destruction of important resources, and hence generally conflicts with resource conservation goals. See CBRA House Report, supra note 11, at 10-11; CBRA Senate Report, supra note 10, at 3, reprinted in 1982 U.S. Code Cong. & Ad. News 3214. Some developers vigorously attacked this premise, asserting that development and resource conservation can be compatible if landowners plan development with adequate attention to the natural amenities of the site. See Scott, supra note 12. It is beyond the scope of this paper to resolve whether or not one can develop an area yet also conserve its natural resources. For present purposes, it is enough to note that a consensus has formed that views government assisted development as inconsistent with resource conservation goals, and to observe that in discussions of the expenditures limitation approach, participants usually equate absence of development with resource conservation. See, e.g., Coastal Barrier Resources Act § 2, 16 U.S.C. § 3501 (1982); 128 Cong. Rec. H7648 (daily ed. Sept. 28, 1982) (statement of Rep. Schneider); id. at S12,062-63 (daily ed. Sept. 23, 1982) (statement of Rep. Chafee).
1. The Impact of Government Subsidies

Federal, state, and local subsidies for development activities shift substantial portions of the costs of building bridges, roads, water supply systems, and wastewater treatment facilities from the developer and consumer to the government and taxpayers. In short, developers and purchasers of developed property impose part of their costs on the government, and ultimately, on taxpayers. Subsidies reduce usual market influences on buyer behavior, discourage sound economic decisions, and result in market inefficiency. The artificially low cost of developing property creates a market bias in favor of development. Moreover, development subsidies discourage preservation of property in its natural state. Subsidies inflate the value and increase the marketability of developed land, increasing pressures on landowners to build on their undeveloped land.

Besides increasing demand for developed property and encouraging development that otherwise might not occur, government assistance promotes development in high risk areas. Disaster assistance payments and subsidized flood insurance protect and even reward persons who exercise poor judgment by building in hazardous areas where disasters may destroy investments. Subsidies therefore may encourage people to live in areas otherwise financially unsuitable for development.

2. The Effect of Removing Government Subsidies

Government subsidies, then, result in over-investment in natural areas where the true costs and financial risks might otherwise discour-
The expenditures limitation approach to resource conservation posits that if the government eliminates the subsidies, market forces will effectively protect the environment. By removing the government as a financial partner in development, the price of land reflects the full cost of access and infrastructure. Developers and purchasers must bear the entire cost and risk of private development in resource areas protected by expenditures limitations.

Withdrawal of government subsidies also lessens economic pressure for owners of undeveloped property to sell their land for development and therefore deters development and fosters preservation of land. Government withdrawal of subsidies should discourage people from developing and living in areas where assistance is unavailable and indirectly prompt them to develop and live elsewhere where governmental assistance is available. Changing government policy toward natural resource areas thus in itself fosters environmental protection. The success of this technique will depend upon the extent of previous governmental involvement in promoting the destructive activity, the degree of the withdrawal of government assistance, the availability of alternative sources of financing or economic support, and the

275. For example, one congressional witness estimated the costs of developing infrastructure on barrier islands as two to six times greater than on the mainland. See House Hearings—97th Congress, supra note 7, at 354 (statement of Patrick Parenteau, Vice President, Nat'l Wildlife Fed'n). Theoretically, if the government denies development assistance to the coastal barrier areas but continues to assist mainland development, the cost of development on barrier islands should increase and development should be deferred while less costly development on mainland sites should become comparatively more attractive. Even if the government denies development assistance to both mainland and barrier island sites, the comparatively higher costs of development on the islands should channel development investment away from the coastal barriers and toward less expensive mainland sites.

276. A subsidy resembles a reduction in the price of the subsidized good or service, usually increasing consumer purchases of the subsidized product. J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 118 (1980). The buyer and seller of property benefited by a government subsidy divide those benefits between themselves; the amount of benefit going to each depends on the elasticity of the supply and demand curves for such property. Jasnowski, supra note 268, at 9. Removal of only federal subsidies should “make the development that does occur considerably more expensive.” Miller, supra note 28, at 52. The 1983 Final Environmental Impact Statement on coastal barriers estimated that withdrawal of federal assistance could increase the cost of development by as much as 15% to 20%. 1983 FEIS, supra note 3, at IV-58 to IV-59. Removal of state and local subsidies also should increase significantly the price of development because state and local assistance plays an especially important role in financing initial development. See Shaef er & Roland, Inc., supra note 32; House Hearings—97th Congress, supra note 7, at 139 (statement of H. Crane Miller, Vice President and General Counsel, Shaef er & Roland, Inc.).


278. The 1983 Final Environmental Impact Statement on coastal barriers concluded that eliminating flood insurance would reduce development-related loss of natural resources and would spur sales of real estate for conservation, recreational, or educational purposes. 1983 FEIS, supra note 3, at II-17, IV-29.

strength of demand for the product resulting from the destructive actions.\textsuperscript{280}

In addition to returning private development decisions to the market, the expenditures limitation approach helps governments save money. For example, the coastal barrier studies clearly illustrate that government programs often work at cross purposes.\textsuperscript{281} While some programs finance protection of environmental resources, others assist development.\textsuperscript{282} Taxpayers thus pay to protect and to subsidize the destruction of the same resources.\textsuperscript{283}

Wasteful even in the best of times, counterproductive public expenditures are indefensible in a period of government austerity and budget deficits.\textsuperscript{284} The expenditures limitation approach, by eliminating "countervailing government subsidies,"\textsuperscript{285} reconciles government policy toward an area and ensures that any government expenditure programs within the area accord with that policy.\textsuperscript{286} Consistent cross-agency policy eliminates wasteful expenditures and also may conserve revenues, although the extent of government savings depends on whether or not the government redirects money saved to other areas.\textsuperscript{287}

\textsuperscript{280} For example, if the federal government withdraws subsidies for development but state and local governments continue to assist development, or if private insurance programs with comparable premiums replace government insurance programs, a subsidy withdrawal will have little effect. Indeed, state and local governments probably will come under increased pressure to assume some of the risks and costs formerly borne by the federal government. See 1983 FEIS, supra note 3, at IV-3; see also supra note 276. A Department of Interior study found a reasonable probability that the growing market demand for coastal property will overcome the effects of a withdrawal of federal flood insurance and result in a return, or perhaps even an increase, in the existing rate of development of coastal barriers. 1983 FEIS, supra note 3, at II-31; see also infra notes 444-47 and accompanying text.

\textsuperscript{281} See WORK GROUP REPORT, supra note 7, at 79-80; 1979 DEIS, supra note 4, at iii-vii, reprinted in Senate Hearings—96th Congress, supra note 4, at 32-36; see also supra notes 51-52 and accompanying text.

\textsuperscript{282} See WORK GROUP REPORT, supra note 7, at 80; 1979 DEIS, supra note 4, at iii-vii, reprinted in Senate Hearings—96th Congress, supra note 4, at 32-36.

\textsuperscript{283} Interview with Dale Crane, supra note 61; Interview with Pete Raynor, Office of the Solicitor, Dep't of the Interior, in Washington, D.C. (Mar. 16, 1983); Interview with Ric Davidge, Chairman, Coastal Barrier Task Force & Special Ass't to the Ass't Secretary for Fish & Wildlife & Parks, Dep't of the Interior, in Washington, D.C. (Mar. 18, 1983).


\textsuperscript{285} Interview with Ric Davidge, supra note 283; Interview with Pete Raynor, supra note 283; see also 1983 FEIS, supra note 3, at I-1.


\textsuperscript{287} See infra note 413 and accompanying text; Interview with Pete Raynor, supra note 283. Not all development subsidies are ill advised. Nonetheless, because subsidies take money from all taxpayers and distribute it to a small group of recipients, the subsidies should promote the good of society as a whole. Subsidies such as tax deductions for gifts of conservation property under section 170(f)(3) of the Internal Revenue Code advance the general interest of society in preservation of natural resources. Subsidies that destroy natural resources, however, ill serve the public unless a compelling collateral social purpose justi-
Hence, the limitation approach helps accomplish two objectives: resource conservation and fiscal responsibility.

B. Application of the Concept

Although still in a nascent stage, the expenditures limitation approach currently is used, or proposed for use, to protect resources in a number of different areas. Of course, the best example is the Coastal Barrier Resources Act. Before the enactment of CBRA, however, Governor King of Massachusetts issued an executive order on barrier beaches.\(^{288}\) The August 8, 1980, order prohibits the use of state funds or federal grants for construction projects which encourage growth and development in hazard-prone barrier beach areas.\(^{289}\) Similarly, on September 4, 1981, Governor Graham of Florida issued an executive order that forbids use of state funds to subsidize growth or aid post-disaster redevelopment in hazardous barrier areas.\(^{290}\)

Recent legislative proposals also employ the concept embodied in CBRA. Former Interior Secretary James Watt submitted a draft bill to Congress that applied the expenditures limitation approach to wetlands. Entitled the “Protect Our Wetlands and Duck Resources Act of 1983” (POWDR), the legislation would establish a resource system, to be identified by the Secretary of the Interior, comprising undeveloped wetlands of five acres or more that provide significant wildlife, fisheries, or water purification benefits.\(^{291}\) POWDR would prohibit new federal expenditures within the system, subject to a broad array of exceptions that exceed even the extensive exceptions in CBRA.\(^{292}\)

ies the subsidy and consequent destruction of resources. Development assistance no doubt has stimulated the real estate market and construction industry and has made the American dream of homeownership more attainable. To maximize both the preservation of resources and budgetary savings, however, government decisionmakers should limit development subsidies to areas where the general interest in stimulating development does not conflict with the equally compelling need of society to preserve resources. Cf. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1981 at 18: “The [Council on Environmental Quality] feels that, if the marketplace is to operate effectively in defense of the environment, the majority of [federal subsidies intended to encourage economic activity or to provide relief from economic disaster] probably should be eliminated.”

289. Id.
second piece of federal legislation introduced in similar form in the Senate\textsuperscript{293} and House of Representatives\textsuperscript{294} would deny government price supports and other farm benefits to persons who produce agricultural commodities on newly-plowed land highly susceptible to erosion. This proposal is known as the "sodbuster bill" because it seeks to discourage the practice of plowing up sod in a futile attempt to grow crops.

Senator Chafee recently introduced an amendment to POWDR, entitled the "Wildlife and the Parks Act of 1984," that seeks to protect the native fish and wildlife resources found in the National Park System and contiguous federally managed areas of ecological significance to the parks.\textsuperscript{295} The legislation would prohibit federal agencies from spending funds on projects within these "wildlife resource habitat areas" unless the Secretary of the Interior determines that the project will not be detrimental to native fish and wildlife species found within these areas.\textsuperscript{296} Similarly, Representatives Chaney (R.-Wyo.) and Udall (D.-Az.) introduced the Colorado River Floodway Protection Act.\textsuperscript{297} The act would restrict future federal expenditures and financial assistance which have the effect of encouraging development within the floodway of the Colorado River.\textsuperscript{298} The Colorado River legislation seeks to discourage encroachments on the floodway because encroachments could interfere with the basic purpose of the river reservoir system.\textsuperscript{299}

Finally, the Florida Senate\textsuperscript{300} and House of Representatives\textsuperscript{301} are considering bills to further limit expenditures on coastal barriers by


\textsuperscript{295} 130 CONG. REC. S2919 (daily ed. Mar. 20, 1984).


\textsuperscript{298} \textit{Id.} § 5(a).


\textsuperscript{300} S.B. 791, Fla. (1984).

\textsuperscript{301} H.B. 1096, Fla. (1984). Bills patterned on CBRA also were introduced in the Florida House of Representatives in 1982 and 1983. The 1983 bill, House Bill 1318, was nearly identical to the legislation introduced in the Florida House of Representatives in 1984. Although the bill was reported out of the Select Committee on Growth Management and the Appropriations Committee, it never went to the House floor for a vote. Telephone Interview with Dana Minerva, Staff Attorney, Select Comm. on Growth Management (Apr. 2, 1984).

In 1982, Representative George Sheldon introduced H.B. 863, which imposed stringent construction standards for new development on Florida's undeveloped coastal barriers and stated a legislative intent that no state funds be made available to subsidize growth or postdisaster redevelopment within the subsidized areas. A later draft of the bill actually prohibited state funds for growth or postdisaster redevelopment. The bill never was reported out of the House Natural Resources Committee. Telephone Interview with Steve Paikowsky, Staff, Natural Resources Comm., Fla. House of Representatives (Jan. 17, 1983).
prohibiting the expenditure of state funds for building or maintaining transportation, water, or sewer projects on undeveloped Florida coastal barriers, excepting bridge projects necessary for evacuation purposes.

Implementation of the expenditures limitation approach in the above examples involves two principal steps: explicit identification of the areas in need of protection and prohibition of government assistance and expenditures that contribute to resource destruction within the areas identified.

I. Identification of the Affected Areas

The expenditures limitation approach prohibits subsidies only to circumscribed locations; areas not classified as ineligible for assistance continue to receive the full panoply of government aid. Use of the approach therefore requires clear and careful delineation of affected areas. Decisionmakers employing the limitations approach must first fix the criteria that determine whether or not the areas fall within the unsubsidized zone, and second, decide whether the legislative or executive branch will designate the specific areas affected by the expenditure prohibition and whether maps or merely a definition will delineate such areas.

a. Criteria for Designation

It is possible to designate any number of areas possessing natural resources as "subsidy-free zones" within which government expenditures or financial assistance should be prohibited to prevent the destruction of resources. Coastal areas, flood plains, prime farmland, riverine areas, wetlands, parks, and wildlife refuges all are areas where government subsidies may encourage the destruction of important resources. Perhaps the best example is the Coastal Barrier Resource System, which consists of certain undeveloped Atlantic and Gulf Coast coastal barriers that are depicted on special congressional maps. Only projects and activities within the mapped System units are barred from receiving government financial assistance.

302. See, e.g., the expenditures prohibition in CBRA, discussed in supra notes 174, 202 and accompanying text.

303. Interview with Ric Davidge, supra note 283; Interview with Pete Raynor, supra note 283.

304. Areas with significant natural resources that merit preservation through the expenditures limitation approach have been termed by some as "Areas of National Importance," or "ANI's." See, e.g., Davidge, supra note 286, at 1. A congressional staff person even has suggested that Congress could apply the expenditures limitation approach concept to recreation and conservation areas authorized for acquisition, but not yet acquired because of a shortage of funds. Congress, Interior Working to Expand Ban on Federal Subsidies Promoting Development, [14 Current Dev.] ENV'T REP. (BNA) No. 6, at 238 (June 10, 1983).

305. See supra note 173 and accompanying text.

306. See supra note 174 and accompanying text.
Provided that it is possible to delineate the areas covered by the expenditure cutoff, only politics limits the geographical scope of the approach. For example, CBRA affects only the Atlantic and Gulf Coast states and less than one third of the barrier shoreline of these coastal states. The narrow coverage of CBRA eased concerns about its potential adverse effects and also meant that the legislation directly affected only Senators and Representatives from seventeen states; similarly, the geographic limitation narrowed the number of interest groups and landowners concerned about the possible loss of existing sources of assistance. Persons involved in the passage of CBRA suggest that the success of the legislation rested in part on this limited geographic scope, especially because passage depended upon gaining a consensus as to the areas to be included in the Act.

Nevertheless, if an issue is important enough to engender widespread agreement on the need to act, the geographical scope of the expenditures limitation legislation need not be as limited as it was in CBRA. Moreover, if the expected effect of the subsidy denial on individual landowners is minimal, less opposition probably will de-

307. This article has focused primarily on the use of the expenditures limitation approach to conserve resources. CBRA also sought to minimize threats to human life from habitation of storm-prone coastal barrier areas. During deliberations on the Chafee-Evans legislation, opponents of the proposal argued that because other areas also are prone to natural disasters, it was inappropriate to single out coastal areas for discriminatory treatment. See, e.g., Senate Hearings—97th Congress, supra note 19, at 177 (testimony of James Scott, Nat'l Ass'n of Home Builders). Proponents of the legislation argued that unlike tornados, earthquakes, and other natural disasters, one easily can define areas threatened by hurricanes. See, e.g., id. at 259 (testimony of Dr. Neil Frank, Director, Nat'l Hurricane Center). Deliberations on the coastal barrier legislation suggest that it may be insurmountably difficult to delineate the large, not readily defined areas needed to apply the approach to protect against loss of lives from unpredictable disasters such as tornados or earthquakes. See generally House Hearings—97th Congress, supra note 7, at 250 (statement of Rep. Evans); Senate Hearings—97th Congress, supra note 19, at 172 (testimony of Laurence Rockefeller, Americans for the Coast).


309. Interview with Robert Hurley, Legislative Assistant to Senator Chafee, in Washington, D.C. (Mar. 17, 1983); Interview with Sharon Newsome, Legislative Representative, Nat'l Wildlife Fed'n, in Washington, D.C. (Mar. 17, 1983). Implementation of the expenditure ban by executive order lessens difficulties with mollifying legislators whose constituencies will be adversely affected by an expenditure and assistance ban, but an executive order of broad geographical impact also may encounter strong political resistance from landowners and interest groups affected.


311. Interview with Sharon Newsome, supra note 309. In addition, as the expenditures and assistance limitation approach is employed more widely, concerns about discriminatory treatment of certain areas may ease and the designation of areas to be denied subsidies may become less controversial.
develop to legislation affecting a broad geographical area. Perhaps all that can be concluded from the coastal barrier legislation experience is that limiting the geographical scope of legislation makes passage more likely, but that nothing inherently restricts use of the approach to areas of limited geographical and political impact.

Before actually identifying specific areas, a proposal must establish how to treat existing or ongoing development or similar activity. OBRA, CBRA, POWDR, the Massachusetts executive order, and the proposed Florida legislation are all limited in application to undeveloped resource areas. Similarly, the proposal to deny government benefits to highly erodible land, the "sodbuster bill," applies only to land not yet devoted to producing an agricultural commodity. This limitation of the expenditures prohibition probably stems from an assumption that denial of assistance to areas already committed to the use sought to be discouraged is not only inequitable, but also politically infeasible.

Although legislators may be understandably reluctant to cut off aid to areas where substantial investment already has been made, and fairness may require that those with existing investment receive some protection, no justification exists for government subsidies that encourage rebuilding or similar activities after an area within an expenditures prohibition is swept by a natural disaster. One alternative to government subsidization of rebuilding in such areas is the offering of indemnity or compensation on the condition that the recipient use the financial assistance to relocate outside the hazardous area. In this way, the government can phase-out subsidy expenditures and avoid the illogical recurring cycle of subsidizing construction and then subsidizing reconstruction after investments are destroyed.

312. For example, applying the approach to areas already protected from development, such as the National Park System or the National Wildlife Refuge System, would affect most landowners only minimally, even though these areas are quite large; hence, application of the expenditures limitation approach in areas already protected may arouse little controversy among most legislators and constituents. See generally supra note 295 and accompanying text, discussing Chafee Amendment No. 2807. Widespread exceptions to the expenditures ban similarly would lessen the impact of a subsidy ban, and, consequently, opposition to the cutoff.

313. The Florida executive order on coastal barriers is not explicitly limited to undeveloped coastal barriers but has been interpreted not to apply to developed coastal barriers, except with respect to postdisaster redevelopment. Interagency Management Comm., Interagency Management Comm. Recommendations on the Implementation of Executive Order 81-105 (1984).


Although an expenditures prohibition can prevent further development in already developed areas, or prevent redevelopment after a disaster returns land to an undeveloped state, there apparently is little legislative support for denying subsidies to areas already altered by human intervention. Establishment of subsidy-free zones therefore requires distinguishing between undeveloped areas and areas already committed to development.

Deliberations on the OBRA flood insurance prohibition addressed this question in the context of coastal barrier protection. OBRA, and CBRA, specified that a coastal barrier, or any portion thereof, shall be treated as undeveloped only if there are few man-made structures and these structures and human activities on the barrier do not "significantly impede geomorphic and ecological processes." This density threshold, generally one structure per five acres of fast land, was based on the level of human activity that tends to interfere with the geological and ecological processes sought to be protected. A proposed Florida coastal barrier bill designates areas based on a scientific classification of barrier areas that fall into land use categories of rangeland, forestland, water, wetland or barren land.

Although the Florida legislation mentioned above and CBRA focus on the present, physical impacts of human activity on an area and its resources, both measures exempt areas in the process of being developed. The Florida legislation, in particular, exempts areas with a full complement of infrastructure as well as undeveloped areas part of a larger phased development.

Both equitable and political reasons underlie the exclusion of areas with ongoing development. Some argue that land that is under development and upon which sizeable investments have been made should not suddenly lose the eligibility for government assistance; landowners may have relied on that assistance in deciding to invest in the property. Although equity may require some deference to the considerable investment made in those areas, the true difficulty lies in determining how much investment and how much commitment to development should be required before an area is considered vested as

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319. See supra notes 182, 185 and accompanying text; infra notes 320-21 and accompanying text.
a developed area.\textsuperscript{323} Although allowing areas to vest as developed on the basis of a "full complement of infrastructure" or a partially completed phased development may protect those who have relied on government largesse in investing in coastal barrier development, this inquiry opened up CBRA to political manipulation and greatly reduced the scope of the bill.\textsuperscript{324} Recognition of building permits as evidence of development can only lead to greater abuse because landowners can obtain permits without capital expenditure in order to vest their property yet can postpone construction indefinitely.

Assuming that some vesting or grandfathering provision for ongoing development is necessary, executive or legislative enactments employing the expenditures limitation approach should address clearly the extent of such exceptions and seek to keep them within narrow, defined limits. If the vesting provision is intended to protect those with substantial investment in development who have shown a financial commitment to complete the development, only on-the-ground evidence of such commitment, such as extensive infrastructure, should be recognized. Mere documentary proof, such as contracts, permits, or phased development plans, should not be considered sufficient because these are only marginal evidence of a true commitment to develop and potentially may eviscerate the effective scope of any subsidy limitation.\textsuperscript{325} For example, the lack of any clear guidance in OBRA regarding the scope of the term "developed" led to threats of litigation over the Department of the Interior interpretation of legislative intent concerning nonstructural development.\textsuperscript{326} Somewhat analogously, the lack of a clear statement in CBRA regarding what constituted ongoing development led to charges of political favoritism.\textsuperscript{327}

The proposed Florida legislation offers a good example of a procedure for determining whether development has "vested," although the scope of the exception is quite extensive, recognizing permits and

\textsuperscript{323} For a discussion of the issues involved in determining the development status of coastal barriers, see R. Peoples, Jr. & W. Gregg, Jr., \textit{supra} note 65, at 30-33, 35-37.

\textsuperscript{324} \textit{See generally} Baker, \textit{supra} note 152; \textit{supra} note 157. By ignoring infrastructure and determining development status strictly on the basis of number of structures, the geographical coverage of CBRA could have been increased by about 25\% to 30\%. \textit{See} 1983 FEIS, \textit{supra} note 3, at IV-28 (ignoring infrastructure would result in the designation of an additional 193 miles of ocean-facing shoreline). The phased development exception resulted in the exclusion of some 20,000 acres from CBRA. \textit{See} 128 CONG. REC. S12,073 (daily ed. Sept. 23, 1982) (statement of Sen. Proxmire).

\textsuperscript{325} "Development of an area is not inevitable and permanent until direct private investment and construction begins in earnest — but, once this occurs, development is likely to continue regardless of hazard or storm damage." R. Peoples, Jr. & W. Gregg, Jr., \textit{supra} note 65, at 36.


phased developments as ongoing development. The Florida bills would allow a landowner to petition the state land planning agency to review the factual basis for the classification of her or his land.\(^{328}\) The landowner would have the burden of proving that his or her land, as of a certain date, fits within the legislatively defined exemptions for infrastructure, permits, or phased development, or that the land did not fall within the appropriate land use classification.\(^{329}\) Although the Florida proposal delegates the vesting determination to a state agency, it clearly indicates the criteria for vesting. It also offers an alternative to requiring the legislature or agency to address the factual unit-by-unit issue of ongoing development prior to enactment of the expenditure prohibition: the initial identification of areas need only look to existing structures, land use classifications, or maps, because a landowner can later petition for review of the designation based on specific vesting criteria.

An alternative to allowing exceptions for ongoing development is to allow the expenditures prohibition to take effect at a future date, permitting those in the process of development to continue to receive government benefits until the delayed effective date.\(^{330}\) A disadvantage of this alternative is that postponing the effective date encourages development in the interim between the enactment and the effective date of the spending ban.\(^{331}\) Nevertheless, postponement would avoid the practical and political problems surrounding the treatment of partially developed property.

Future legislation using the subsidy ban approach should not emulate the CBRA exemption of areas considered protected by virtue of existing regulation or protective ownership by a government or private conservation organization. First, even if such areas truly are protected,


\(^{330}\) In a sense, the delayed effective dates in OBRA and CBRA for the ban on flood insurance use this approach, because they permit a transition period within which landowners can begin construction and qualify their property for insurance. See 127 CONG. REC. H5792 (daily ed. July 31, 1981) (statement of Rep. Evans). Unfortunately, OBRA and CBRA combined a delayed effective date for the flood insurance cutoff with an exception for ongoing development, creating an even greater opportunity to vest the property and avoid the insurance ban. Delaying the effective date of the expenditures prohibition should be distinguished from delaying the date on which the development status of an area is determined. Under the alternative suggested here, the date used to establish the status of an area would not be delayed and, as in the OBRA, CBRA, and Florida coastal barrier legislation examples, generally would correspond to the date of enactment of the expenditures ban. A delayed effective date allows property targeted as an area within which no future funds may be made available to continue to receive assistance for some specified time period after the enactment of the spending prohibition. Thus, when used to determine development status, the delayed effective date approach ignores ongoing development.

\(^{331}\) The 1982 Draft EIS on the flood insurance ban predicted that the October 1, 1983, cutoff date would create limited short-term stimulation of construction as developers accelerate construction schedules to qualify structures before the effective date. 1982 DEIS, supra note 18, at 64; see infra note 439 and accompanying text.
a determination that often is difficult to make, there is no reason to allow subsidies for activities that conflict with the preservation purposes of the expenditures limitation approach. In addition, allowing protected areas to be eligible for subsidies increases the pressure on conservation organizations to sell unrestricted property for development or other resource-threatening activities, as the demand for scarce, non-subsidy-free property increases.332 Excluding the protected areas may limit the geographical scope of any subsidy ban and make proposed expenditures prohibitions appear less pervasive, but these political considerations do not justify the threats which continuation of subsidies pose to protected conservation areas.

b. Method of Designation

A description of scientific methods for delineating the boundaries of natural resource areas not yet adversely affected by human activities is beyond the scope of this article,333 but there remain the political and practical decisions of whether the executive or legislative branch should specify the subsidy-free areas and whether those areas should be identified merely by a definition or also by detailed maps.

In CBRA, areas were designated by legislative maps, based on a legislative definition of the resource areas. The maps allowed legislators to consider the actual effects of the legislation and to know in advance of enactment the geographical impact of the Act on their own political districts.334 Using maps to delineate the scope of the Act also helped sponsors to mollify opposition to the Act335 by manipulating map boundaries and excluding controversial areas in exchange for support for the legislation; proponents thus struck deals and created the consensus necessary for passage of the Act.336 Maps also permitted the

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332. For example, a wilderness preserve on Dog Island, Florida, was excluded from the Coastal Barrier Resources System because the Nature Conservancy lobbied successfully that it was a protected area under their ownership and control. See Nat'l Wildlife Fed'n, Barrier Islands Newsletter, Apr. 1983; Interview with Robert Hurley, supra note 93. Shortly after Congress enacted CBRA, the Nature Conservancy announced that it was going to sell the property under terms which would allow for construction of forty single-family units within the preserve. Nat'l Wildlife Fed'n, supra. Development of these forty dwellings would be eligible for federal assistance since they are within an undeveloped area which was specifically excluded from CBRA.

333. For an excellent discussion of this topic, see R. Peoples, Jr. & W. Gregg, Jr., supra note 65.

334. Interview with Jeff Curtis, supra note 310.

335. Id.; Interview with Robert Hurley, supra note 309.

336. Id.; Interview with Sharon Newsome, supra note 309; Interview with Jeff Curtis, supra note 310. For example, the National Wildlife Federation Barrier Islands Newsletter reported in August of 1982 that Representative Jones (D-N.C.), chairman of the House Merchant Marine and Fisheries Committee, became a co-sponsor of the legislation after several areas in his district were deleted. Nat'l Wildlife Fed'n, Barrier Islands Newsletter, Aug., 1982.
sponsors of CBRA to avoid changes in the substantive language of the legislation by removing specific geographic areas that created problems.\textsuperscript{337} In this way, proponents protected the language of the Act and used the geographical scope of the legislation as a mechanism for resolving disputes.\textsuperscript{338}

Although the mapmaking process facilitated political compromises necessary to gather political support, the definition in CBRA of undeveloped coastal barriers offered a logical, nonpolitical basis for the designation of areas to be included within the expenditures prohibition. The definition in CBRA thus forced legislators to justify the exclusion of an area based on the definition and tempered any temptation to exclude areas to curry political support on the eve of the 1982 Congressional elections.\textsuperscript{339} The definition also ensured that future additions to or deletions from the System will be based upon a consideration of the criteria stated in the Act.

The use of legislative maps also has disadvantages. The substantial impact of an expenditures cutoff on some areas may discourage consensus among legislators regarding areas to be included in the expenditures prohibition. The need for a consensus on each affected area may produce less geographically extensive maps because to prevent individual legislators from blocking passage of an entire measure, sponsors may be forced to delete areas that meet the literal definition of the subsidy-free area and clearly need protection. In addition, as with CBRA, the legislative mapping process may be very time consuming and may embroil legislators in scientific issues better left to agencies with expertise in such matters. Presumably, agency designation also would be less susceptible to political pressure, and hence would produce more objective designations.\textsuperscript{340}

In contrast to the wholly legislative mapmaking process employed

\begin{itemize}
\item \textsuperscript{337} Interview with Robert Hurley, \textit{supra} note 309; Interview with Sharon Newsome, \textit{supra} note 309. Legislators manipulated and interpreted the definition in CBRA in an "equitable" manner to justify changes in the maps proposed by the Department of the Interior. \textit{See generally supra} notes 150-51 and accompanying text.
\item \textsuperscript{338} For example, the removal of the Louisiana barriers from the CBRA prohibition of funding or assistance for stabilization projects placated the Louisiana congressional delegation, and only slightly altered the language of the legislation. \textit{See supra} note 152 and accompanying text. In the same vein, an aide to Senator Chafee noted that conservationists gave away 5% of the eligible areas to protect the other 95% under the CBRA expenditure and assistance prohibition. \textit{USA Today}, \textit{supra} note 1.
\item \textsuperscript{339} \textit{See Interview with Jeff Curtis, \textit{supra} note 310. See also the attempts of Senators Heflin and Tower to delete areas. \textit{128 Cong. Rec.} S12,071-72 (daily ed. Sept. 23, 1982) (statement of Sen. Heflin); \textit{id.} at S12,074 (statement of Sen. Tower).
\item \textsuperscript{340} Although the Department of the Interior OBRA designations were fairly extensive and ostensibly objective, the agency made a controversial and possibly political decision on the issue of phased development. \textit{See Notice of Proposed Action, 47 Fed. Reg.} 35,698 (1982); \textit{128 Cong. Rec} S12,073 (daily ed. Sept. 23, 1982) (statement of Sen. Proxmire); \textit{Washington Post}, Jan. 26, 1982, at A17, col. 3.
\end{itemize}
in CBRA, the process used in OBRA combined a legislative definition of undeveloped coastal barriers with an administrative determination by the Department of the Interior of areas within the ambit of the expenditures prohibition. POWDR similarly contemplates delegation of designation authority, but does not even provide a legislative definition of the areas the legislation will protect, that is, undeveloped wetlands. The Wildlife and the Parks Act applies to existing units of the National Park Service greater than 5000 acres but also delegates authority for the Secretary of the Interior to designate the boundaries of contiguous federal lands that also will be affected by the expenditures prohibition. The Colorado River Floodway Protection Act similarly directs the Secretary to establish geographic boundaries for inclusion in its subsidy ban to accommodate a target maximum flood control release from Hoover Dam.

A serious drawback of agency designation is that it often evokes extensive litigation over the maps produced. Many legislators and staff anticipated that both opponents and proponents of the OBRA flood insurance cutoff would challenge the maps proposed by the Department of the Interior; these challenges would have created uncertainty among government agencies and landowners over the scope of the cutoff and would perhaps have impeded both development and protection of coastal barriers. Uncertainty regarding the criteria for defining the term development as well as the degree of agency discretion to fix the boundaries of the expenditures prohibition contributed to the controversy over the OBRA maps. Although detailed legislative criteria for designation of protected areas may deter some legal challenges to maps prepared by administrative agencies, it probably is impossible to eliminate all such challenges. Any delegation of the designation process therefore risks engendering litigation because the boundaries of the affected areas are administrative interpretations of legislative intent and thus are subject to judicial review.

Delegation of the identification process also creates uncertainty for lawmakers, because they cannot predict with complete accuracy future administrative interpretations of legislative intent and, therefore, cannot divine at the time of enactment the true scope of proposed legisla-
Delegation requires legislators to trust the ability and desire of administrative agencies to develop a resource system consistent with legislative intent. This trust in some instances may be unwarranted; for example, unhappy experiences with delegation in OBRA probably taught some legislators to avoid delegation.\(^3\)^4\(^5\)

To avoid delegation to administrative agencies of responsibility for defining areas within the scope of an expenditures prohibition, legislators can define a subsidy-free area without requiring any specific agency to develop comprehensive maps and leave determination of whether or not a proposed expenditure is within the ambit of the legislation to individual agencies that authorize assistance, and ultimately, the courts. The Massachusetts and Florida executive orders on barrier islands have used an analogous procedure of definition of areas affected unaccompanied by maps. Yet failure to map affected areas in advance creates enormous uncertainty for government agencies and landowners regarding the applicability of any prohibitions, frustrating implementation of the cutoff, interfering with government and landowner planning, and encouraging extensive litigation.\(^3\)^4\(^6\)

In future applications of the expenditures limitation approach, federal legislators probably will insist on keeping control of the identification process to control the effect of such legislation. For example, during CBRA deliberations, several legislators noted that a decision with such substantial effects should be made directly by Congress.\(^3\)^4\(^7\)

Similarly, some Senators opposed the initial sodbuster bill because of uncertainty regarding the classification scheme and the difficulty of knowing which lands would be restricted by the crop subsidy cutoff.\(^3\)^4\(^8\)

The strategy employed in OBRA, combining legislative and agency-drawn maps, presents another alternative. Under this strategy, legislators develop a definition of affected areas and then instruct an

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The uncertainty created by delegation should concern both proponents and opponents of subsidy cutoffs. Although the agency maps in OBRA resulted in rather expansive designations of affected areas, proponents can not assume that this always will be the case. Indeed, the Department of the Interior maps completely satisfied neither opponents nor proponents. Thus, both proponents and opponents of legislation incorporating the subsidy cutoff technique should resist vesting an administrative agency with broad, undefined discretion to decide which areas no longer will be eligible for funds.

\(^3\)^46. For example, an analysis by a task force assigned to examine the effect of the Florida executive order noted the difficulty of implementing the order; this difficulty stemmed from uncertainty over the exact scope of the definition of affected areas. Memorandum from Mike Garretson to Members of the Interagency Management Comm.: Findings of the Interagency Management Committee’s Subcommittee on Exec. Order 81-105, at 1 (Mar. 17, 1983) [hereinafter cited as Florida Memorandum from Mike Garretson].

\(^3\)^47. See supra note 345.

agency to devise maps which the legislators later review. Agency maps under OBRA automatically became effective after the legislative review period unless altered by subsequent legislation.\textsuperscript{349} Giving the maps automatic effect, however, creates exactly the same delegation of authority problems outlined above. A variation on the OBRA approach would make maps proposed by the agency effective only if ratified by the legislature.\textsuperscript{350} This approach allows legislators to draw on agency expertise, while avoiding many of the concerns raised by delegation.

A final alternative that avoids some of the difficulties of delineating areas within an expenditure ban would be inclusion by reference to existing maps. For example, the sodbuster bill relies on a previous land classification scheme used by the Department of Agriculture.\textsuperscript{351} Lawmakers similarly could use boundaries of areas already mapped, such as National Parks, to designate the geographic scope of proposed expenditures prohibitions.\textsuperscript{352} Using existing maps or classification schemes helps to eliminate the difficulties of developing new maps and establishing clear definitions of areas to be included. On the other hand, the reference approach limits the ability of legislators to manipulate boundaries to avoid inclusion of areas likely to create political problems.

c. Other Identification Issues

Procedures for boundary modification and post-enactment addition and deletion of areas also merit attention. Boundary modifications seldom will be necessary if, at the time of enactment, maps are sufficiently detailed.\textsuperscript{353} Minor on-the-ground boundary adjustments may be appropriate, however, if a thorough mapping process had not been completed at the time of enactment.\textsuperscript{354} Further, maps of the boundaries of an evolving landform, such as a coastal barrier or a riverbank, may need adjustment to reflect natural changes.\textsuperscript{355} Congress should

\textsuperscript{349} See supra note 108.
\textsuperscript{350} Under a proposal drafted for consideration by the Natural Resources Committee of the Florida House of Representatives, the Florida Department of Natural Resources would recommend areas to be included within the expenditures prohibition to the Governor and Florida Cabinet. The Cabinet then would recommend areas that the Florida legislature would approve, modify, or reject. Untitled Draft of H.B. 863, Fla. (1982); see supra note 300.
\textsuperscript{352} See, e.g., Chafee Amendment No. 2807, § 603(c), (e) (1984), reprinted in 130 CONG. REC. S2920 (daily ed. Mar. 20, 1984).
\textsuperscript{353} See Interview with Robert Hurley, supra note 309.
\textsuperscript{354} Id.
delegate to the responsible administrative agency only narrowly confined authority to make such adjustments, however. For example, the Alaska National Interest Lands Conservation Act, though not an expenditures limitation act, imposes size ceilings on adjustments.\footnote{16 U.S.C. §§ 3101, 3103(b) (1982).} Similarly, CBRA and the Colorado River Floodway Protection Act require minor boundary modifications to accord with legislative intent.\footnote{See Coastal Barrier Resources Act § 4(c), 16 U.S.C. § 3503(c) (1982); CBRA CONFERENCE REPORT, supra note 155 at 12, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3226-27; H.R. 5055, 98th Cong., 2d Sess. § 4(c)(1) (1984).}

Procedures for post-enactment additions and deletions may be desirable to maintain some level of flexibility. For example, during deliberations on CBRA, legislators devoted considerable attention to a procedure that allowed landowners to add their lands voluntarily to the Coastal Barrier Resources System.\footnote{See Coastal Barrier Resources Act § 4(a)(2), 16 U.S.C. § 3503(a)(2) (1982); supra note 193 and accompanying text. See also S. 978, 98th Cong., 1st Sess. § 104 (1983); H.R. 2268, 98th Cong., 1st Sess. § 104 (1983).} Allowing property to be included within the expenditures prohibition of legislation is a politically useful concept that promotes the resource conservation purposes of the approach. In the absence of some financial incentive for landowners to join, however, such a procedure is of marginal utility and indeed may be an unwarranted administrative expense.

If legislation originally designates the areas to be included within an expenditures prohibition, only legislation should determine future additions to or deletions from areas protected by the prohibition, although minor boundary changes might be left to an administrative agency. Allowing an agency to add areas which become eligible for inclusion because of a change in the use of the land would promote the objectives of the approach, but may raise the same delegation of authority issues discussed earlier. More importantly, automatic inclusion of developed areas that a natural disaster reduces to an undeveloped state probably will encounter serious political opposition because it theoretically can expand the scope of the prohibition to every presently developed area.\footnote{See generally supra notes 186, 315 and accompanying text.}

Conversely, an administrative procedure for removal of areas from the scope of an expenditures prohibition, because of later human alteration of the area to be removed, conflicts with the philosophy of the expenditures limitation approach. Those who choose to carry out activities that threaten resources in areas protected by an expenditures prohibition must bear the risks of doing so.\footnote{See CBRA HOUSE REPORT, supra note 11, at 18.} POWDR includes an especially abusive provision of this type; the bill would give the Secretary of the Interior authority to delete from protection wetlands, origi-
nally within the POWDR resource system, apparently even if the wetlands are purposefully drained and altered for development.\textsuperscript{361} Just as an addition of an area should satisfy the criteria used to designate the original areas protected, removal of an area from an expenditure prohibition is appropriate only if it was originally included within the prohibition erroneously, not if subsequent human activity has degraded the natural resources of the protected area.

In sum, because the expenditures limitation approach targets areas within which subsidies will be denied, identification of areas to be protected plays an important role. From a political standpoint, the best procedure for identifying areas is to enact language clearly designating the criteria for inclusion, using legislative maps based on that criteria. Although in many circumstances the expertise of an administrative agency, time constraints, or political expediency may favor delegation of identification of areas, the legislative body delegating the responsibility for identification should carefully circumscribe the scope of any delegation to avoid agency abuse and minimize litigation related to agency interpretation of legislative intent. If an executive order employs the expenditures limitation approach, the executive authority issuing the order should take similar care to define and even map the areas affected by the order.

2. The Implementation Mechanism: Limitations on Government Expenditures and Financial Assistance

The second principal step in applying the expenditures limitation approach is to specify the government financial assistance and expenditures to be prohibited within the areas identified previously. Policy-makers must identify the types of activities that contribute to the destruction of resources and then enumerate and prohibit the government subsidies that promote these destructive activities. With CBRA, for example, studies revealed that development threatened coastal barrier resources and that certain federal programs encouraged development.\textsuperscript{362} CBRA, therefore, sought to selectively restrict those expenditures that encourage development.\textsuperscript{363} Similarly, the sponsors of the sodbuster legislation believe that the plowing of lands not suitable

\textsuperscript{361} S. 978, 98th Cong., 1st Sess. § 103(c) (1983); H.R. 2268, 98th Cong., 1st Sess. § 103(c) (1983). An early draft of POWDR permitted removal based upon a cost/benefit test by the Department of the Interior. POWDR Draft, § 104(a)(1) (Jan. 1983). The POWDR draft submitted to Congress dropped this test in favor of a procedure that would require only that the wetland no longer meet the original requirements for designation into the system. S. 978, 98th Cong., 1st Sess. § 103(c) (1983); H.R. 2268, 98th Cong., 1st Sess. § 103(c) (1983).

\textsuperscript{362} See supra notes 48-56 and accompanying text.

for cultivation is causing excessive erosion and the destruction of fragile grasslands. The authors of the bill, therefore, attempt to eliminate government subsidies that encourage the plowing of unsuitable land. Thus, the sodbuster legislation does not attempt to curtail nonagricultural uses of land; and the expenditures prohibition in the legislation is limited to those subsidies that encourage inappropriate agricultural uses.364

Studies play an important role in developing a successful limitation on government expenditures and financial assistance. Consistent with the discussion above, studies should identify the activities that threaten resources and the extent to which they are encouraged by government expenditures.365 In addition to documenting the existence of a problem and helping to create a consensus that a solution is needed, studies facilitate informed decisions on which expenditures to prohibit and whether the problem identified warrants resource conservation measures beyond the limitation of government expenditures that contribute to resource destruction.366

With counter-productive government expenditures identified, policymakers can implement appropriate restrictions on expenditures and assistance, either through legislation or executive order. Legislation is preferrable to an executive order for four reasons. First, executive orders often rest on an uncertain legal basis and hence are open to


365. Interview with Robert Hurley, supra note 309; Interview with Sharon Newsome, supra note 309. It is also important to have information that identifies the value and location of the resources being threatened, both to build the consensus necessary to support the imposition of the restrictions and to provide the basis for identifying resources to be protected and areas to be included within any expenditures prohibition. Id.

366. See supra notes 48-56 and accompanying text. Most of the detailed information on the economic effect of government subsidies on coastal barrier development was developed after the introduction of federal coastal barrier legislation, and one observer has argued that all that is needed initially is some basic information on the geographical scope of any proposed expenditures limitation legislation and the threats to the resources that are the focus of the legislation. Interview with Sharon Newsome, supra note 309. A lack of background information has hampered passage of POWDR. A committee report accompanying a House wetlands bill stated that "the notable lack of information regarding not only the environmental benefits to be attained by eliminating or restricting some future federal expenditures or financial assistance [that have a significant impact on the destruction and degradation of wetlands, but the economic impacts, including local impacts, on property values and community economic bases, preclude a reasonable assessment of which programs should be modified and which should be allowed to remain. H.R. REP. No. 440, 98th Cong., 1st Sess. 24 (1983); see also S. REP. No. 349, 98th Cong., 2d Sess. 15 (1984). To obtain this needed information, two wetlands bills offered to replace POWDR direct the Secretary of the Interior to continue the ongoing inventory of national wetlands, and to prepare a report on the causes of wetlands destruction, identifying and analyzing the federal expenditures and financial assistance that have direct or indirect effects on the destruction or degradation of wetlands. H.R. 3082, 98th Cong., 1st Sess. §§ 301, 302 (1983); S. 1329, 98th Cong., 1st Sess. §§ 401-02 (1983).
attack on the grounds that the executive lacks statutory or constitutional authority to restrict agency expenditures. Second, if an executive order conflicts with an express legislative directive to fund a project, the order must give way. Third, substantive limits on the power of the executive branch to alter existing legislation seriously impairs the design of a comprehensive, coherent spending ban. Finally, an executive order is a temporary measure that any subsequent administration may repeal at will.

a. Types of Restricted Expenditures and Financial Assistance

A number of methods exist to curtail government spending that encourages harmful activities. For example, in the Massachusetts executive order, the Governor simply stated, "State funds shall not be used to encourage growth and development in hazard prone barrier beach areas." The Florida executive order and proposed legislation similarly prohibit the use of state funds for development purposes. The Massachusetts and Florida efforts, however, fail to specify the scope of the term "state funds" and hence create unnecessary uncertainty regarding the status of some state assistance. It is unclear, for instance, whether the ban would prevent an indirect state subsidy such as the lending of the full faith and credit of the state to local jurisdictions for bond issues to be used for development purposes. Because these efforts do not define what constitutes "state funds," units of state and local governments cannot be certain of the legality of assistance they receive or provide. This in turn may impede attempts to implement the expenditures prohibition.

367. For discussions of the legal bases of power to issue executive orders, see Note, Gubernatorial Executive Orders As Devices for Administrative Direction and Control, 50 IOWA L. REV. 78, 85-97 (1964); Comment, Executive Orders and the Development of Presidential Power, 17 VILL. L. REV. 688, 693-711 (1972); HOUSE COMM. ON GOVT' OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWER (Comm. Print 1957). Where the order finds no express authority in statutes but only inferential authority in the applicable constitution, questions of the order's legal authority may arise. See A. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 88 (1977).

368. House Hearings—96th Congress, supra note 11, at 547 (statement of Laurence Rockefeller, Chairman, Barrier Islands Coalition).

369. A tax subsidy is a good example of the limits of an executive order, because it would be beyond the power of an executive order to deny tax benefits that are granted under existing tax legislation.

370. Florida Memorandum from Mike Garretson, supra note 346.


374. Florida Memorandum from Mike Garretson, supra note 346.

375. Future state executive orders or legislation should address the intended treatment of such guarantees not only to aid implementation, but also because withdrawal of the state
In contrast to the state examples, federal proposals clearly elaborate the types of subsidies to be prohibited. The sodbutter bill details five government subsidy programs that designated lands would be ineligible to receive.\textsuperscript{376} Similarly, CBRA, POWDR, and the Colorado River Floodway Protection Act prohibit new federal expenditures or new financial assistance for any purpose within the areas of the resource system.\textsuperscript{377} These latter three acts define financial assistance and federal expenditures as any loan, grant, guaranty, insurance, payment, rebate, subsidy, or any other form of direct or indirect federal assistance.\textsuperscript{378}

\textit{b. Exempted Forms of Assistance}

Attempts to implement the expenditures limitation technique also should define clearly which types of assistance will not be curtailed. For example, CBRA and POWDR both explicitly exempt certain forms of government assistance apparently perceived as being either unrelated to development or politically inappropriate for denial. Similarly, CBRA exempts general revenue-sharing grants from its definition of financial assistance.\textsuperscript{379} This latter exemption undermines the purposes of the expenditures limitation legislation, however, because state and local governments are free to use general revenue-sharing funds for development projects or other activities harmful to resources.\textsuperscript{380} An exemption for general revenue sharing should be avoided, therefore, or, if politically necessary, the revenue-sharing programs that qualify for exemption should be narrowly defined.\textsuperscript{381}
Present and past federal legislative proposals that employ the expenditures limitation approach also have exempted financial assistance related to the issuance of permits or other authorizations. Because many government permits issue for activities that harm resources, an exemption for financial assistance for permits would seem to conflict with the purposes of the expenditures limitation approach. Nevertheless, it may be possible to reconcile such an exemption by noting that the expenditures limitation approach seeks to avoid interfering with existing permit or regulatory procedure. The permit assistance exemption therefore may be viewed as an attempt to prevent the expenditure ban from indirectly increasing the regulation of areas possessing natural resources.

Three other exemptions found in federal expenditures limitation legislation apply to assistance unrelated to development and thus consistent with the approach: deposit or account insurance for bank customers, the purchase of mortgages or loans by government associations, and assistance for social programs unrelated to alteration of resources.

resources, a broad exemption for special revenue sharing should be avoided. Instead, legislation or executive orders using the expenditures limitation approach should weigh each program individually to determine whether or not an exemption should be provided.


383. See, e.g., Coastal Barrier Resources Act § 3(3)(B), (C), (E), 16 U.S.C. § 3502(3)(B), (C), (E) (1982); S. 978, 98th Cong., 1st Sess. § 101(2)(B), (C), (E) (1983); H.R. 2268, 98th Cong., 1st Sess. § 101(2)(B), (C), (E) (1983); H.R. 5055, 98th Cong., 2d Sess. §§ 3(2)(b), (c), (e) (1984); Chafee Amendment No. 2807, §§ 603(a)(2), (3), (4) (1984), reprinted in 130 Cong. Rec. S2920 (daily ed. Mar. 20, 1984). POWDR also exempts agricultural commodity loan and purchase programs and expenditures for water resources development activities. S. 978, 98th Cong., 1st Sess. § 101(2)(F), (G) (1983); H.R. 2268, 98th Cong., 1st Sess. § 101(2)(F), (G) (1983). The agricultural commodity expenditures exemption may be justified to encourage farming, if the money paid under exempted programs does not encourage resource destruction. Thus, information on the positive and negative effects of the subsidy is vital to determining whether or not the exemption is needed. However, there would seem to be little justification, other than political, for broadly exempting federal water resource development activities; environmental groups testifying at the hearings on POWDR criticized the legislation for containing exemptions for activities that have been identified as having the greatest impact on wetlands. See, e.g., Hearings on S. 978 and 1329 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Energy and Natural Resources, 98th Cong., 1st Sess. 40 (testimony of Dr. William Brown, Envtl. Defense Fund) [hereinafter cited as POWDR Senate Hearings]. One Senator maintained that POWDR contains so many exceptions from its ban on federal aid that "the exceptions in effect swallow up the prohibition." Id. at 18 (statement of Sen. Mitchell). Congressman Breaux stated that the House Merchant Marine and Fisheries Subcommittee on Fisheries and Wildlife Conservation and the Environment
The treatment of two major forms of federal assistance remains uncertain. First, the question of whether indirect financial assistance applies to tax benefits is unresolved. For example, witnesses at the congressional hearings on CBRA warned that tax incentives such as the casualty loss, capital gains, depreciation, business, or mortgage or loan interest deductions help make ownership of coastal barrier property an attractive investment. They suggested that Congress clarify its intent towards favorable tax treatment, but the legislation was not amended nor was any mention made of indirect tax assistance in either the congressional reports or the floor debate. Nevertheless, because elimination of tax incentives would promote conservation and discourage investment in development by removing one of the financial benefits of real estate investment, the expenditures limitation legislation should at the very least clarify the intended treatment of tax subsidies.


384 See Senate Hearings—97th Congress, supra note 19, at 25 (testimony of Richard Delaney, Chairman, New England/ N.Y. Coastal Zone Task Force); id. at 76-77 (statement of Gov. Edward King, Commonwealth of Mass.); House Hearings—97th Congress, supra note 7, at 141, 155 (statement of H. Crane Miller, Vice President and General Counsel, Sheaffer & Roland, Inc.).

385 See, e.g., House Hearings—97th Congress, supra note 7, at 155 (statement of H. Crane Miller, Vice President and General Counsel, Sheaffer & Roland, Inc.).

386 The reasons given for not specifically addressing the tax issue were jurisdictional and political. If the issue of taxes had been directly addressed, the House Ways and Means Committee and the Senate Finance Committee would have sought jurisdiction over the legislation. It was also felt that specifically addressing the issue would have raised opposition to the bill and made passage of the legislation more difficult. Interview with Robert Hurley, supra note 93; Telephone Interview with Stan Senner, supra note 106; Interview with Sharon Newsome, supra note 79. The only suggestion of a congressional understanding on the issue arose during the House hearings when Representative Oberstar observed that the suggestion of precluding benefits should be investigated. House Hearings—97th Congress, supra note 7, at 221. He added that the legislation “still might not prevent development if people are looking for tax shelter and a hurricane were to come along and make that shelter pay off.” Id. The Department of Interior general statement of policy and advisory guidelines on CBRA assert “[t]here is absolutely no indication in the legislative history of CBRA that Congress had any intention of affecting such change in the tax treatment of activities within the System.” Coastal Barrier Resources Act Advisory Guidelines, 48 Fed. Reg. 45,664 (1983).

On the day Congress passed CBRA, Rep. Peter Stark (D-Cal.) introduced a bill to amend the Internal Revenue Code to deny the deduction for interest on loans for new dwelling units in the Coastal Barrier Resources System. H.R. 7286, 97th Cong., 2d Sess. (1982). His administrative assistant explained that the bill was introduced because Congressman Stark was concerned that CBRA was not going to pass and thought that an alternative measure may be needed. Telephone Interview with Bill Vaughn, Administrative Assistant to Rep. Stark (Mar. 15, 1983). The Wall Street Journal reported that environmentalists intend to seek additional measures beyond CBRA for protecting the coastal barriers: “It’s speculated that their next move will be to seek legislation that would eliminate deductability of mortgage interest payments for new structures built on coastal barrier islands.” Wall St. J., supra note 326. Nonetheless, no legislators have introduced legislation in the Ninety-Eighth Congress to deny tax deductions for new dwellings built on undeveloped coastal barriers.
Also unresolved is the issue of technical assistance to undeveloped areas. None of the bills before Congress addresses the status of technical assistance.\textsuperscript{387} CBRA and POWDR arguably would prohibit technical assistance because even the transfer of information or expertise requires government expenditures.\textsuperscript{388} On the other hand, the examples of financial assistance referred to in the legislative history of CBRA all involved monetary subsidies.\textsuperscript{389} As with the issue of tax incentives, policymakers should address squarely the status of technical assistance, perhaps by specifying that nondevelopment or nonresource destructive forms of technical assistance should be continued or by making technical assistance available only if consistent with the purposes of the particular piece of legislation employing the expenditures limitation approach.

c. Exempted Forms of Actions or Projects

Another method to eliminate only those subsidies that may harm resources is to create exemptions for particular government actions or projects. For example, the Massachusetts and Florida executive orders decree that state funds are not to be used for growth and, under the Florida order, post-disaster redevelopment.\textsuperscript{390} Yet just as these two state executive orders fail to identify explicitly the types of funds included within the expenditures prohibitions, they also omit any description of the types of projects or activities that may be included in or excluded from the prohibition. Both executive orders, then, leave the precise scope of the expenditures prohibition for agency or court determination.\textsuperscript{391}

\textsuperscript{387} An early POWDR draft, however, included technical assistance within the meaning of the term "financial assistance." POWDR Draft, § 101(3) (Jan. 1983).

\textsuperscript{388} However, in comments to the Department of the Interior concerning implementation of the Act, the U.S. Army Corps of Engineers stated that the Corps does not believe CBRA prohibits technical assistance concerning flood plain management. Letter from William Giannelli, Assistant Secretary of the Army (Civil Works) to Coastal Barriers Task Force, Dep't of the Interior (March 9, 1983). The Corps focused on the definition of financial assistance and the nature of the prohibited activities specifically identified under section 5, but did not explain why money spent for technical assistance would not constitute an "expenditure," also specifically prohibited under section 5. \textit{Id}.


\textsuperscript{391} The Massachusetts Executive Office of Environmental Affairs issued guidelines for implementation of Executive Order No. 181; the guidelines identify those activities which do not contribute to growth and development. Executive Office of Environmental Affairs, Commonwealth of Mass., Guidelines for Implementing Executive Order No. 181 Barrier Beaches. These exceptions resemble the exemptions in the original Chafee-Evans legislative proposals. \textit{See supra} notes 89-92 and accompanying text. Guidelines recently adopted for implementation of the Florida executive order simply state that the affected agencies should
The better approach attempts to state the exact scope of the expenditures prohibition by proscribing specified types of spending programs and activities and by enumerating the programs or activities to be exempted from the expenditures prohibition. As with CBRA, the language outlining the expenditures prohibition should be as broad as possible to encompass all programs and activities that may adversely affect resources protected by the prohibition. Exemptions, in contrast, should be drawn narrowly to prevent incremental erosion of the impact of the prohibition and frustration of the resource conservation purposes of the expenditures limitation approach. Further, itemizing prohibitions and exemptions encourages agency compliance with the mandate of resource protection measures, facilitates attainment of the objectives of such measures, and eases concerns regarding unintended effects of expenditures prohibitions on existing programs and activities.

That a program or activity does not encourage resource destruction or that it furthers an overriding social interest may justify a particular exemption. For example, CBRA and POWDR exempt energy and military activities even though these may contribute to resource destruction. If grounds other than resource conservation justify an exemption, however, the scope of the exemption should be narrowly limited to minimize possible adverse affects. Other activities, such as fish and wildlife projects and government acquisition programs, actually may help conserve resources and should be exempted specifically. Still other activities or programs may have minor impacts on resources, but further some public need that justifies continued expenditures but only under narrow circumstances consistent with resource protection goals.

Exemptions from expenditures prohibitions for public facilities and structures also raise troublesome questions. Resource conservation measures employing the limitation approach should not exempt new construction of facilities or structures, public or private, because the consider developing rules to govern the denial or conditioning of state funds, as well as for any exceptions to the executive order's restrictions. Interagency Management Comm., supra note 313.


393. For example, CBRA and POWDR exempt fish and wildlife resource projects and programs for the acquisition of public lands for recreation and conservation purposes. See Coastal Barrier Resources Act § 6(a)(6)(A), (C), 16 U.S.C. § 3505(a)(6)(A), (C) (1982); S. 978, 98th Cong., 1st Sess. § 106(A), (B), (C) (1983); H.R. 2268, 98th Cong., 1st Sess. § 106(7)(A), (B), (C) (1983).

394. For instance, CBRA exempts air and water navigation aids and devices, scientific research, and certain emergency assistance programs essential to the saving of lives and property and the protection of public health and safety, but requires that the expenditures or assistance be consistent with the purposes of the Act. Coastal Barrier Resources Act § 6(a)(6)(B), (D), (E), 16 U.S.C. § 3505(a)(6)(B), (D), (E) (1982).
very purpose of such measures is to prevent government encouragement of development that destroys resources. Determining how to treat existing development is a more complicated question, which can be answered only by considering the objectives of the particular legislation employing the limitation approach. For example, to the extent that Congress intended CBRA to discourage growth or new construction, federal expenditures for maintenance or reconstruction generally would accord with Congress' objectives, while expansion or other activities that accommodate new growth would not.

In this regard, a discussion of the "in existence" issue is important. An exemption may apply either to facilities in existence, under construction, or for which funds have been appropriated or legally committed by the effective date of the relevant legislation, or to facilities constructed after the effective date. Limiting an expenditures prohibition to existing facilities furthers the goals of such measures because requiring the assumption by the owner of future maintenance and reconstruction costs may discourage the initial construction of the facility or structure. The Florida coastal barriers legislation and CBRA evidence two different approaches to the "in existence" issue. The Florida proposals allow expenditure of state funds for the maintenance of transportation, sewer, or water facilities but only if the facilities existed, were under construction, or had a bid accepted for construction by a stated date. CBRA, in contrast, limits the exemption for facilities to maintenance, replacement, reconstruction, or repair, but not expansion of existing facilities or the construction of new facilities or structures. Unlike the Florida legislation, then, CBRA also would permit the maintenance and reconstruction of facilities constructed after the effective date.

As the discussion above illustrates, both political compromise and the purposes of legislation employing the expenditures limitation approach shape exemptions to any ban on government funding or aid.

d. Controlling Abusive Exemptions

Because exemptions from an expenditures prohibition undercut

395. See, e.g., H.B. 1096, Fla. § 161.66(4)(a), (4)(b) (1984); S.B. 791, Fla. § 161.66(1)(a), (1)(b) (1984); Coastal Barrier Resources Act § 5(b), 16 U.S.C. § 3504(b) (1982). Because facilities may be in various stages of planning, design, excavation, or construction, care should be taken to clarify the meaning of the term "existence."


398. The barrier islands legislation proposed by Senator Bumpers would have allowed expenditures for the replacement, reconstruction, or repair of any structure, facility, road, or related infrastructure, but only if the structure or facility was in existence prior to the passage of the act. See S. 96, 97th Cong., 1st Sess. (1981).
the purposes of legislation employing the limitation approach, exemp-
tions must be limited to projects or activities that do not conflict with
resource protection or that another, stronger public policy justifies. Re-
quiring all exemptions to be consistent with protection of resources fur-
thers the effectiveness of such an approach, although it precludes some
projects that may be in the national interest. Such a requirement also
may make some long-range government and private planning more
difficult because it may be impossible to predict whether or not assist-
ance would be available.399 Decisionmakers, however, should restrict
exemptions for projects or activities inconsistent with resource protec-
tion to situations in which the public need clearly justifies any destruc-
tion of resources.400

One way to avoid overly broad exemptions to an expenditures and
assistance ban would be to exempt activities, even activities inconsis-
tent with resource protection, only if no feasible and prudent alterna-
tives exist and the government body providing assistance as well as the
person or body responsible for the activity plan to the greatest extent
possible to minimize harm to the resources.401 Although such a re-
quirement arguably introduces elements of regulation into the expendi-
tures limitation approach, this requirement merely conditions the types
of activities which are eligible for funding. Actions or projects that fail
this additional test may still proceed, but without government
assistance.

Another technique to control abuse of exemptions is to give the
legislature or supervising agency veto power over or at least a consulta-

399. Telephone Interview with Stan Senner, supra note 106.
400. For example, CBRA limits the energy exemption to certain activities which can
only be carried out on, in, or adjacent to coastal water areas because the use or facility
requires access to the coastal water body. Coastal Barrier Resources Act § 6(a)(1), 16 U.S.C.
§ 3505(a)(1) (1982). Military activities exempted from CBRA must be essential to national
security. Id. § 6(a)(4), 16 U.S.C. § 3505(a)(4) (1982). Public facilities inconsistent with the
purposes of CBRA may receive funding only if they are essential links in a larger network or
401. See POWDR Senate Hearings, supra note 383, at 40-41 (testimony of Dr. William
Brown, Envtl. Defense Fund). Under section 4(f) of the Department of Transportation Act,
the Secretary of the Department of Transportation may not approve any program or project
that requires the use of any publicly-owned park land or any land from a historic site unless
there is no feasible and prudent alternative to the use of such land and the program includes
all possible planning to minimize harm resulting from such use. 49 U.S.C. § 1653(f) (1976).
Proposed legislation to protect historic landmarks contained similar language. See H.R.
6804, 96th Cong., 2d Sess. § 247(a) (1980); H.R. 6805, 96th Cong., 2d Sess. § 11 (1980); H.R.
Department of the Interior guidelines for implementing the consultation requirement under
CBRA stated that actions or projects that are required to be consistent with CBRA must
seek to minimize harm to coastal barrier resources. Dep't of Interior, Proposed Interpreta-
tive Rule—Coastal Barrier Resources Act: Guidelines and Interpretation 18 (1983). The
general statement of policy and advisory guidelines the agency published in the Federal
tion role in any expenditure authorized through an exemption. For example, the Wildlife and the Parks Act prohibits assistance for nonexempted activities and projects unless the Secretary of the Interior determines that the assistance will not have a detrimental effect on native fish and wildlife species. Similarly, CBRA requires that agencies consult with the Secretary of the Interior before making any expenditures or financial assistance available within the Coastal Barrier Resource System. An earlier federal coastal barrier proposal would have given the Secretary authority to veto a proposed expenditure if he or she determined it to be contrary to the purposes of the legislation; under CBRA, however, the Secretary cannot prevent assistance to a project that he or she believes is beyond the scope of the exemptions. The comments of the body entrusted with consultation authority, however, could influence an agency to reconsider its proposal and hence abandon or reformulate the project to be assisted to minimize adverse impacts to the coastal barriers. Moreover, views on the propriety of an exemption given by the body with consultation authority, while not binding, may be of some persuasive value in judicial review of funding or assistance alleged to be authorized under an exemption.

As with the choice of means to implement the expenditures limitation approach, political reality may dictate the mechanism to control abuse of expenditures exemptions. Some procedure nevertheless should be employed. A consistency requirement enforced by the veto power of an agency or the legislature would promote protection, but vesting veto power in one agency may create opposition from other agencies. Consultation also may help curb abuse and may be partic-

402. Chafee Amendment No. 2807, § 604(a) (1984), reprinted in 130 Cong. Rec. 2920 (daily ed. Mar. 20, 1984). The Secretary shall make any determination concerning the detrimental effect of a new expenditure or new financial assistance after public notice and an opportunity for public comment. Id.


405. Recent federal park protection legislation proposed a similar technique, requiring notification and an opportunity for the Secretary to respond with recommendation for changes, if agency actions may adversely affect areas within or adjacent to any unit of the national park system. National Park System Protection and Resources Management Act of 1982, H.R. 5162, 97th Cong., 2d Sess. § 11(b)-(c) (1982). In some situations, the agency must comply with the Secretary's recommendations, and in others the agency must comply unless it concludes the public interest in the proposed action is greater than the public interest in avoiding the adverse effects; if the Secretary and the agency disagree, the appropriate legislative committees must be notified and the proposed action cannot be implemented until thirty days after the date the committees are notified. Id. § 11(f).

406. If legislation gives an agency a consultation or a veto role, the agency should be delegated specific authority to prescribe rules and regulations to carry out its task. See generally, e.g., S. 978, 98th Cong., 1st Sess. § 503 (1983); H.R. 2268, 98th Cong., 1st Sess. § 503 (1983). The lack of any explicit grant of authority under CBRA for the Department of
ularly helpful if the consulted agency can recommend ways to minimize any adverse effects. Requiring an agency proposing to assist an activity to consider or even comply with comments and recommendations before proceeding would further guard against projects that abuse exemptions.

Notification to the public and the legislature prior to authorizing expenditures for activities that may adversely affect resources also can help curb improper expenditures. Unfortunately, the CBRA consultation procedure does not provide for notice. This makes monitoring by the public of proposed expenditures difficult, and makes compliance with the act dependent, in part, on aggressive enforcement by the Secretary of the Interior. Notification also allows the public or the legislature to comment on the proposed action or, if necessary, to take appropriate legal or legislative action to prevent the expenditure.

A requirement that all agencies certify in writing that they are complying with relevant expenditures limitations enables the legislature to exercise additional oversight of agency actions and also promotes good faith compliance by agencies. For example, section 7 of CBRA requires the Director of the Office of Management and Budget (OMB) to certify annually on behalf of federal agencies that each federal agency concerned has complied with the Act during the fiscal year. OMB must submit the certification to the House of Representatives and Senate pursuant to a schedule set by the Congressional Budget and Impoundment Control Act of 1974. By requiring OMB to certify agency compliance, Congress gains additional oversight pow-

407. For example, the Fish and Wildlife Coordination Act requires that before the waters of any stream or other body of water are impounded, diverted, or controlled, federal agencies shall consult with the Fish and Wildlife Service with a view to preventing loss of and damage to wildlife resources. 16 U.S.C. § 662(a) (1982). That act does not require that the project correspond to the recommendations of the Fish and Wildlife Service, but merely requires that such views be given serious consideration before proceeding with the proposal. Sierra Club v. Alexander, 484 F.Supp. 455 (N.D.N.Y.), aff’d, 633 F.2d 206 (2d Cir. 1980).


ers and forces OMB and all agencies to consider carefully their expend-
itures or assistance to activities or programs within the Coastal Barrier
Resources System.412

In conclusion, legislation employing the expenditures limitation
approach must clarify the expenditures and assistance prohibitions to
tie the prohibitions to conservation goals. Financial assistance and
funding of actions or projects entirely unrelated to the activity intended
to be discouraged should be exempted from any prohibition. Other
exemptions may be appropriate if the overriding public interest in
funding or assisting certain activities outweighs possible results that
conflict with the goals of the expenditures limitation legislation. Ex-
empted actions and projects should be required, whenever possible, to
accord with resource conservation goals. To promote compliance and
proper implementation, the measures incorporating the limitation ap-
proach should condition funds or assistance on some combination of
veto, consultation, and public and legislative notice.

C. Advantages and Disadvantages

The expenditures limitation approach can promote resource con-
servation without evoking many of the political and legal problems that
beset other conservation approaches. The approach merely reduces
government benefits and neither requires government expenditures nor
imposes restrictions on use of the land. It simply ends government sub-
sidization of resource degradation and destruction, allowing the market
to determine the final degree of environmental protection. This lim-
ited-government, pro-market emphasis of the expenditures limitation
approach constitutes both its greatest strength and its greatest
weakness.

1. Political, Fiscal, and Legal Advantages

An important benefit of the expenditures limitation technique is
that it saves limited government funds. A nonacquisition technique
aimed at reducing government largesse, the expenditures limitation ap-
proach results not only in resource conservation, but also in savings of
finite government resources. Although the amount of savings possible
from the approach is uncertain,413 it is clear that the approach can help
to reduce government budgets and to lower taxes by eliminating spend-
ing for resource destructive activities. The approach hence encourages

412. Telephone Interview with Stan Senner, supra note 106.
413. If demand exceeds the ability of the government to supply subsidies, making some
areas ineligible for such benefits may only result in the benefits being redirected to other
locations, not in immediate budgetary savings. See Senate Hearings—96th Congress, supra
note 4, at 16 (testimony of Robert Herbst, Assistant Secretary for Fish and Wildlife and
Parks, Dep't of the Interior); supra note 287 and accompanying text.
an unusual coalition between those concerned with the protection of
the natural environment and those interested in the efficient use of
scarce governmental resources. This unique blend of fiscal conserva-
tism and environmental protection garnered broad-based support for
CBRA and may spur other, similar legislative measures.

The absence of restrictions on the use of the resources also should
make the expenditures limitation concept less controversial than regu-
latory approaches to resource conservation. Individual landowners
continue to be able to use their land in accordance with existing land
use controls. Nor will federal subsidy decisions interfere with state and
local government land use efforts; the approach, hence, effectively de-
centralizes decisionmaking in land use. The absence of restrictions
on the private use of land should appeal to those who dislike govern-
ment involvement in such decisions, and mollifies opposition to conserv-
ation goals. The absence of acquisition authority and regulatory
restrictions thus counters fears that environmental protection always
results in government infringement upon private land use decisions.

Because the limitation approach seeks to protect resource goals
solely through a change in government spending policy, it avoids many
of the legal controversies that accompany regulatory efforts to resource
conservation. Denial of government subsidies does not interfere with
the use or enjoyment of property and, hence, cannot constitute a taking
of property for public use without just compensation in violation of the
fifth or fourteenth amendments. A property owner denied government
benefits has no traditional property right acquired by the government;
no physical invasion has taken place, and the government has imposed
no restriction on the use of the property. Landowners may use their
property in any manner otherwise allowed under federal, state, and lo-
cal law. Although denying benefits may decrease some property val-
ues, that reduction only adjusts property values to actual value, by
subtracting the increment of value previously created by the govern-

415. Support for CBRA spanned the entire political spectrum; supporters included the
National Audubon Society, William F. Buckley, Art Buchwald, Howard Jarvis of Proposi-
tion 13 fame, the American Red Cross, the National Taxpayers Union, the National Wild-
416. Malcom Baldwin, former acting chairman of the Council of Environmental Qual-
ity, noted that by subsidizing and encouraging development the federal government “is also
making and distorting local land use decisions.” Baldwin, supra note 273, at 25, 28. An
opponent claimed, however, that the approach in CBRA overrides state and local land use
planning and management, apparently because the denial of subsidies prevents growth that
many communities desire. House Hearings—97th Congress, supra note 7, at 347-48 (testi-
mony of Lawrence Young, Nat’l Ass’n of Realtors).
(1978).
Any limitations on the use of nonsubsidized property result from the true market value and true financial risk of varied uses of the property.

Although the absence of restrictions helps the expenditures limitation approach avoid the usual "taking" issues that accompany land use regulations, the approach may be vulnerable to attack on equal protection or substantive due process grounds. The power of government to decide the allocation of limited financial resources is quite broad, especially the constitutional authority of Congress to authorize expenditures of public money to promote the general welfare. Nevertheless, if the government distributes benefits unequally, the distinctions it makes in doing so are subject to scrutiny under the equal protection or due process clauses of the United States and state constitutions.

To survive scrutiny under the equal protection clause of the fourteenth amendment, or the equivalent due process requirement of the the fifth amendment, an expenditures limitation must serve legitimate government purposes, and the classifications made by the approach must be rationally related to achievement of those purposes. Legislation adjusting the benefits and burdens of economic life carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. Thus, if expenditures legislation elaborates purposes of resource protection and efficient use of government resources, there should be little question that the

419. See United States v. Fuller, 409 U.S. 488, 492 (1973) (fifth amendment does not require the government as condemnor to compensate a condemnee for elements of value that the government has created).

420. The taking issue, however, is more than a legal question. Opponents of the approach may contend that the denial of benefits causes an equitable taking of property, because the absence of government funding may prevent landowners from making any reasonable commercial use of their land. See House Hearings—97th Congress, supra note 7, at 167 (testimony of Harley W. Snyder, Nat'l Ass'n of Realtors).

421. Mathews v. De Castro, 429 U.S. 181, 185 (1976). ("Governmental decisions to spend money to improve the public welfare in one way and not another are not confined to the courts.").

422. See Zobel v. Williams, 457 U.S. 55, 60 (1982); Flemming v. Nestor, 363 U.S. 603, 611 (1960). The language of the fifth amendment does not explicitly guarantee equal protection, but it is well settled that the due process clause of the fifth amendment encompasses equal protection principles; the fifth amendment thus imposes on the federal government the same standard of conduct required of state actions under the equal protection clause of the fourteenth amendment. Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981); Mathews v. De Castro, 429 U.S. 181, 182 n.1 (1976); Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975).

423. The test of whether or not the federal government has violated equal protection rights under the fifth amendment is the same as that for whether or not a state has violated rights under the equal protection clause of the fourteenth amendment. Richardson v. Belcher, 404 U.S. 78, 81 (1971).


purposes of the legislation are legitimate. \(^{426}\)

There remains, then, the question of whether or not the classifications used by the approach are rationally related to achieving these purposes. The expenditures limitation approach discriminates between landowners eligible to receive government subsidies and owners of lands identified as no longer eligible to receive benefits. For example, with CBRA the issue would be whether or not the distinction between undeveloped coastal barriers and developed coastal barriers or noncoastal barriers is rationally related to legitimate government purposes of minimizing risk to human life, wasteful expenditures of federal revenues, and damage to natural resources.

If the classification identifying the areas no longer eligible to receive benefits is an exercise of legislative judgment, and not merely an assertion of arbitrary power, government decisions regarding distribution of benefits under a limitation approach will not be disturbed. \(^{427}\) A ban on expenditures in certain areas to protect resources is not unlawful because it does not protect areas facing an equivalent or greater threat to natural resources. \(^{428}\) Indeed, it is irrelevant whether or not the expenditures limitation approach in fact will conserve resources or save the government money. \(^{429}\) So long as the legislature, applying the limitation approach, could have decided rationally that the ban on subsidies might foster resource conservation, courts will uphold its judgment. \(^{430}\)

\(^{426}\) When performing equal protection analysis, reviewing courts assume that the objectives articulated by the legislature are the actual purposes of statute unless an examination of the circumstances forces the court to conclude that the stated purposes could not have been the goal of the legislation. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981).

\(^{427}\) See generally Helvering v. Davis, 301 U.S. 619, 640 (1937).


\(^{430}\) In Bostic v. United States, 581 F. Supp. 254 (E.D.N.C. 1984), appeal docketed No. 84-1344 (4th Cir. Mar. 30, 1984), a federal district court in North Carolina recently dismissed a suit brought by landowners and developers alleging that CBRA violated the plaintiffs' substantive due process rights. Id. at 254-60. Plaintiffs sought to prove that their land did not meet the CBRA definition of an undeveloped coastal barrier and, therefore, that inclusion of their land in the Coastal Barrier Resources System did not rationally relate to the admittedly legitimate goals of the statute. The court refused to compare the criteria set out in section 3 of CBRA with the status of plaintiffs' land. Id. at 259. Instead, the court held that because the maps alone determine if property is within the System, the government need show only that the means of restricting future federal expenditures to undeveloped areas rationally related to the goals of the Act. Id. at 259-60. The court held that Congress
Although it is not inconceivable that some applications of the expenditures limitation approach may be struck down as unconstitutional, particularly of state measures under state law, the approach does avoid many of the legal issues that plague regulatory approaches to environmental protection because it merely adjusts government financial benefits without regulating private land use decisions.

2. Political and Practical Disadvantages

The expenditures limitation approach, however, neither is immune from controversy nor dispenses with the need for other methods of protecting threatened natural resources. Although the conservation and budget-saving aspects of the approach help to elicit broad support and to avoid many legal and political controversies, denial of government benefits to specific geographic areas also will inevitably evoke political opposition from those who stand to lose direct or indirect subsidies. Thus private landowners, developers, realtors, local governments, and even state governments that benefit from federal subsidies in such locations probably will resist any efforts to impose spending limitations. Similarly, some agencies that administer government subsidy programs affected by such legislation may oppose efforts to reduce their programs or object to having their spending decisions scrutinized or controlled by another agency carrying out oversight responsibilities under subsidy cutoff legislation.

It also is likely that some legislators will oppose attempts to cut off government funds, either because their constituents stand to lose economically, or because they disagree philosophically with denying benefits to certain geographical areas while continuing to provide full benefits elsewhere. In addition, some legislators may perceive ex-
penditures limitation legislation as an attempt by the committee that drafts the legislation to control the programs and actions of other committees. Concerns over committee jurisdiction may lead to outright opposition or to referrals of proposed legislation to many different committees, leading to indefinite delay and defeat or to the addition of amendments that defeat or dilute the effectiveness of the legislation. CBRA was fortunate to avoid myriad referrals and the delays and amendments that referrals often bring. Earlier barrier islands legislation did not fare so well; future attempts to implement the cross-agency expenditures approach also may fall prey to jurisdictional disputes.

The most serious disadvantage of the expenditures limitation approach is not political, but practical: the cutoff of government funding or assistance may prove ineffective to protect natural resources. Activities destructive to resources may persist if financed privately or through nonrestricted government sources, and valuable resources may continue to be lost. It is to be hoped that withdrawal of governmental financial assistance deters destructive practices and promotes protection of resources. Yet because under the limitation approach the market, not government regulation, determines the ultimate level of protection for resources, the effectiveness of the approach is uncertain.

Current experiments with the approach have contributed little to resolving this uncertainty. The Massachusetts executive order has been in effect for almost three years, and the Florida order for almost two, but the precise impact of the orders on resource conservation has not been documented. It is obviously much too early to evaluate the effectiveness of CBRA.


435. See, e.g., S. REP. No. 975, supra note 434, at 9 (views of Sen. Hollings); see also supra note 79 and accompanying text.

436. A jurisdictional dispute prevented the Bumpers barrier islands bill in the Ninety-Sixth Congress from reaching the Senate floor. See supra note 79 and accompanying text.

437. Actions by certain committees during deliberations on CBRA suggest that future legislation in Congress may be referred to numerous committees. See supra notes 252, 254 and accompanying text.

438. Telephone Interview with Jeff Benoit, Executive Office of Environmental Affairs, Commonwealth of Mass. (Apr. 2, 1984); Telephone Interview with James Quinn, Fla. Dep’t of Veteran and Community Affairs (Apr. 3, 1984). Although no studies have been done, a Massachusetts official opined that the order has affected both the rate and type of development on the state’s barrier beaches. Telephone Interview with Jeff Benoit, supra. In Florida, officials denied state funds for a bridge to Hutchinson Island after the Florida Department of Transportation determined that assistance would violate the executive order. Telephone Interview with James Quinn, supra.
Observers nevertheless have made a number of attempts to predict the effect of CBRA. For example, some expected developers and owners of coastal barrier units to rush to erect structures prior to the October 1, 1983, cutoff date for flood insurance. Opponents argued before Congress that the Act would halt development on undeveloped coastal barriers, maintaining that the denial of flood insurance would prevent access to mortgage loans because no private companies would insure barrier property and no institutions would lend to uninsured barrier property. Yet after the passage of CBRA, one developer asserted that the loss of flood insurance "will have no effect on the development of the barrier islands." Other opponents now suggest that building will continue after CBRA but that development will tend toward higher density, multi-family units.

A 1981 study predicted that the effect of the federal development subsidies ban would vary depending on whether or not the coastal barrier adjoined a developed area. For coastal barriers without automobile access and not adjoining developed areas, the high costs of bridge construction would make most proposed development impossible without federal assistance to projects providing access. In units of the Coastal Barrier Resources System adjacent to developed areas, however, removal of federal subsidies may inhibit or curtail development for a time but probably will not prevent eventual development, particularly as the nearby developed areas approach full development and market demand and rising land values make development of adjacent System units economically profitable even without federal assistance. The only prohibition that may significantly affect new development is the flood insurance ban because it reduces the availa-

440. See, e.g., House Hearings—97th Congress, supra note 7, at 188 (statement of James Scott, Am. Land Dev. Ass'n: "So make no mistake about it, development will stop as a direct result of this legislation.").
441. See, e.g, id. at 347-48 (statement of Lawrence Young, Nat'l Ass'n of Realtors); Senate Hearings—97th Congress, supra note 19, at 175 (statement of James Scott, Nat'l Ass'n of Home Builders).
442. Miami Herald, Aug. 29, 1981, at D 1; see U.S.A. Today, supra note 1 ("The word here in Florida is that developers aren't worried', said Sanibel Island Mayor Porter Goss. 'They can self-insure, and they don't rely too much on the federal government anyway.' ").
443. See Wall St. J., supra note 327: "Mr. James Scott, the consultant, believes development will occur but is likely to be in other than single family homes."
444. Sheaffer & Roland, Inc., supra note 32.
445. Id at 114; see also Miller, supra note 32, at 38.
446. The Department of the Interior Final Environmental Statement concluded that there is a reasonable probability that the growing market demand for coastal property will overcome the impediments created by the unavailability of government assistance and that there "may be a return, perhaps even an increase, in the existing rate of development of undeveloped coastal barriers." 1983 FEIS, supra note 3, at II-31.
bility of mortgage loans and may lessen the demand for property within the System. 447

Removal of federal financial assistance for public services and facilities such as sewerage, water supply, and roads and bridges also will alter the behavior of local communities. The Department of the Interior's final environmental impact statement on coastal barriers predicted that because the affected communities now must supply services without federal assistance, an "urbanization penalty" falls on those local communities that previously allowed progressive development of presently undeveloped coastal barriers. 448 "This penalty would be expressed in the form of some combinations of higher local taxes, reduced local services, and more stringent controls of land use and development, as well as severe economic disruption in the event of a major storm disaster." 449 Accordingly, by increasing the costs and risks of development to developers, consumers, and state and local governments, CBRA encourages state and local governments to reduce both the rate and amount of development and to improve building codes and land use regulations to reduce the hazards to life and property from major storms. 450

The denial of government benefits and consequent increase in the private costs of coastal barrier development should delay some development and thus prevent some destruction of resources. 451 Market demand for coastal barrier lands nevertheless may overcome higher prices caused by loss of government benefits through CBRA and make

447. The Final Environmental Statement observed that the flood insurance prohibition probably would shift residential construction toward luxury residences, built by people not requiring financing, and toward inexpensive housing, for which losses could be absorbed by people of modest means. 1983 FEIS, supra note 3, at II-17; accord House Hearings—97th Congress, supra note 7, at 245 (testimony of Fletcher Willey, Bd. of Comm's, Dare County, N.C.). Richard Delaney of the New England/New York Coastal Zone Task Force suggested that after CBRA the only real threats to major undeveloped barrier beaches would come from highly capitalized operations. Senate Hearings—97th Congress, supra note 19, at 24.


449. Id. at II-25. Many believed that withdrawal of government financial assistance and the anticipated concomitant decrease in home construction will harm the economies of local communities. See, e.g., Senate Hearings—97th Congress, supra note 19, at 145 (statement of Sen. Thurmond). The Final Environmental Statement, however, suggested that the result may be otherwise: "Although we are not aware of convincing economic analyses to document this point, it is possible, if not likely, that the long-term economic benefits of maintaining the natural functions of undeveloped coastal barrier ecosystems exceeds the long-term economic benefits to be obtained from urbanizing these ecosystems—particularly if the economic impacts of development on these functions are taken into account." 1983 FEIS, supra note 3, at IV-33.

450. See 1983 FEIS, supra note 3, at IV-61 to IV-62.

activities destructive to resources once again economically feasible.\textsuperscript{452} In contrast, sodbuster legislation may be successful in halting most of the destructive plowing of fragile grasslands, because government subsidies constitute the main financial incentive for plowing.\textsuperscript{453} The effectiveness of expenditures limitation legislation thus depends on somewhat unpredictable factors such as the strength of the demand for the property, the degree of previous dependence upon government subsidies, and the availability of alternative sources of assistance.\textsuperscript{454} Most proponents of the expenditures limitation approach understand its limits as a resource conservation device. The sponsor of the sodbuster legislation noted that denial of subsidies for plowing will not halt all soil erosion, or even completely stop the conversion of fragile grasslands to crop acreage.\textsuperscript{455} Sponsors of CBRA described the legislation as merely a “first step” in protecting coastal barrier resources.\textsuperscript{456} The danger of the expenditures limitation approach lies in that it may create a false illusion that resources are adequately protected. The mere withdrawal of some government funding must not perpetuate a mistaken belief that an area is thereby fully protected, or that the traditional measures of protecting resources should be abandoned.\textsuperscript{457} The approach is best viewed as complementary to existing conservation techniques, or perhaps with new incentives for preservation, in areas where government subsidies have contributed to the destruction of resources.\textsuperscript{458}

\textsuperscript{452} See Miller, supra note 28, at 55; 1982 DEIS, supra note 18, at 25; see also 1983 FEIS, supra note 3, at II-31, IV-58.


\textsuperscript{454} See supra note 280 and accompanying text.


\textsuperscript{456} Chafee & Evans, supra note 94, at 83.

\textsuperscript{457} An unfortunate consequence of CBRA is that Region IV of EPA has abandoned plans to finalize its draft barrier islands statement, even though the draft statement was broader than CBRA in its geographical scope. See supra notes 56, 57 and accompanying text.

\textsuperscript{458} Interview with Robert Hurley, supra note 309. The expenditures limitation approach should not be used to justify the dismantling of existing regulatory programs. It is possible that in some areas government subsidies may provide the leverage needed to justify government land use controls. For example, the former administrator of the Federal Flood Insurance Administration claimed that without federally subsidized insurance as an incentive, land use controls probably would not exist in coastal barrier communities. House Hearings—96th Congress, supra note 11, at 37 (statement of Gloria Jimenez). Opponents of CBRA contended that if Congress removed flood insurance, floodplain management and hazard mitigation measures adopted by communities would lapse. House Hearings—97th Congress, supra note 7, at 193 (testimony of James Scott, Am. Land Dev. Ass’n). A proponent of the bill refuted this argument, asserting that all of the areas covered by CBRA are within larger communities with other areas and buildings that still would be covered by
In conclusion, although the expenditures limitation approach enjoys many political and legal advantages over traditional means of resource conservation, it is not a panacea. As a resource protection technique it is untested. In some circumstances it may provide a high degree of resource protection; in others it may only postpone eventual destruction. Use of the limitation thus does not completely solve the problem of protecting the natural resources of an area, but instead serves as an important first step or an additional layer of protection.

CONCLUSION

The Coastal Barrier Resources Act incorporates a new technique for resource protection, applicable where government expenditures and financial assistance contribute to the destruction of natural resources. Prior to the passage of CBRA, studies of coastal barrier development revealed that government financial assistance subsidized activities that destroy natural resources. Through assistance such as grants, loans, and subsidized insurance, the government and ultimately taxpayers assume part of the costs of actions and programs that threaten barrier resources, in effect, encouraging the destruction of these resources.

Expenditures limitation approaches such as those employed in CBRA and similar initiatives prohibit the government from providing financial assistance for destructive activities in areas where natural resources have been identified as in need of protection. Decisionmakers using the limitation approach should carefully draft laws to proscribe only assistance for harmful activities, not activities that promote the flood insurance. *Id.* at 202 (testimony of Sharon Newsome, Nat’l Wildlife Fed’n). Thus, according to proponents, the communities would continue flood management measures so as to maintain flood insurance eligibility for the other structures in the community. *Id.* In some areas, however, the withdrawal of government benefits may reduce government options to regulate destructive activities. Because the expenditures limitation approach affords only a limited measure of resource protection, if removal of the government “carrot” also may remove a government “stick,” decisionmakers seeking to implement the approach should weigh the advantages of withdrawing subsidies against the possible loss of effective regulatory measures.

In addition, a recent case raises the spectre that the limitation approach may undermine agency efforts to regulate destructive growth in nondesignated areas. In *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983), the court held that EPA had acted beyond its authority under the floodplain executive order by restricting sewer hookups to lots in floodplain and environmentally critical areas of Cape May County, New Jersey; the areas were not designated as part of the Coastal Barrier Resources System. *Id.* at 192-93. The Third Circuit observed that CBRA demonstrates that when Congress intends to adopt a zero-growth approach for an area by withdrawing all financial incentives to development, it does so expressly, as in CBRA. *Id.* at 189 n.14. The court further stated that where Congress has not made its desire to prohibit environmentally harmful development perfectly clear, agencies are without authority to impose restrictions which effectively prevent growth. *Id.* The court thus not only misread CBRA as a zero-growth approach by the federal government, but also mistakenly viewed CBRA as supplanting existing regulatory efforts rather than supplementing agency efforts to curb development. *Id.*
resource objectives of the area or that neither encourage nor discourage resource destruction. In theory, withdrawal of government subsidies increases the cost of the destructive activity to reflect the actual economic cost of an activity. Increased cost in turn discourages destruction and encourages resource conservation.

The unique intertwining of purposes such as minimizing threats to human life and harm to natural resources and curtailing extensive government financial involvement in development made CBRA extremely popular politically. Widespread support for CBRA suggests that CBRA may herald other federal and state efforts to conserve natural resources through selective limitations of government expenditures and financial assistance.

It is premature, however, to imply either that CBRA will lead to a wave of similar legislation or that the expenditures limitation approach is an appropriate solution for all problems of environmental regulation. It should be remembered that over five years of studies preceded passage of CBRA. These studies carefully defined areas affected by government spending policies and chronicled the role of the government in financing resource destructive activities within those areas. As a result of these studies, a consensus emerged that development threatened coastal barriers and that government subsidies contributed to this threat. In contrast, the lack of similar studies has hampered POWDR. Boundaries of affected wetlands have yet to be clearly delineated, and little documentation exists of government financial assistance in encouraging wetland destruction. As a result, conservationists interested in wetlands conservation have hesitated to embrace the expenditures limitation approach used in POWDR over the more traditional approaches of acquisition and regulation. Similarly, private development interests remain concerned about the unknown geographical scope and uncertain fiscal impacts of the legislation.

Furthermore, although CBRA ultimately enjoyed broad support, this support may have resulted from the desire of senators and representatives to compromise on the the geographically broader OBRA flood insurance ban. The extensive geographic scope of the OBRA insurance ban made CBRA appear to be a moderate proposal. Thus, CBRA may not be a wholehearted congressional endorsement of widespread application of the expenditures limitation approach.

Uncertainty regarding the efficacy of the expenditures limitation approach urges caution against using the technique as an independent means of protecting natural resources. Because the approach does not stop destructive activities but merely makes them more expensive, destruction of natural resources by private development interests will continue. Although it is to be hoped that increased costs will decrease
the rate of resource destruction, the ultimate result depends upon mar-
ket forces.

Nevertheless, the approach may prove invaluable in many cases as an adjunct to existing conservation techniques, especially in those areas where government assistance has played a major role in financing de-
structive activities and alternative sources of funding for these activities are unavailable. If the enactment of a spending and assistance ban does not lessen conservation efforts or perpetuate a mistaken belief that the limitation approach fully protects the resources of an area, there is no reason to resist implementation of the approach in areas targeted for resource conservation. It simply is senseless for taxpayers to finance the destruction of America’s natural resources.

Neither conservationists nor private, development-oriented inter-
ests have fully endorsed the limitation on government expenditures and financial assistance for use in other areas. Conservationists fear the technique may decrease efforts to protect resources through aquisition or regulation. Although private interests such as developers usually dislike and distrust regulation, they are concerned by the unforeseen effects of such an approach and also by the possibility that laws applying the approach will entail not only limits on government subsidies but also regulations.

What is needed is convincing evidence that CBRA or some other example of the approach protects and conserves natural resources while curtailing government intervention and expenses. Until the success of the limitation approach is demonstrated, traditional measures for pro-
tection of endangered resources should continue to be employed. Only time will tell if the limitation approach embodied in federal coastal barriers legislation is the wave of the future or merely an island unto itself.