The Federal Consistency Doctrine: Coastal Zone Management and New Federalism

Tim Eichenberg
Jack Archer

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38Q24P

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
The Federal Consistency Doctrine: Coastal Zone Management and “New Federalism”*

Tim Eichenberg**  
Jack Archer***

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>11</td>
</tr>
<tr>
<td>I. The Federal Consistency Doctrine</td>
<td>13</td>
</tr>
<tr>
<td>A. Federal Activities</td>
<td>15</td>
</tr>
<tr>
<td>1. Defining “Directly Affecting”</td>
<td>15</td>
</tr>
<tr>
<td>a. Legislative History of the CZMA</td>
<td>16</td>
</tr>
<tr>
<td>b. Secretary of the Interior v. California</td>
<td>17</td>
</tr>
<tr>
<td>c. NOAA’s Rulemaking Record</td>
<td>19</td>
</tr>
<tr>
<td>2. “Consistent to the Maximum Extent Practicable”</td>
<td>23</td>
</tr>
<tr>
<td>a. Legislative History of the CZMA</td>
<td>23</td>
</tr>
<tr>
<td>b. NOAA’s Rulemaking Record</td>
<td>24</td>
</tr>
<tr>
<td>B. Federally Permitted Activities</td>
<td>25</td>
</tr>
<tr>
<td>1. Defining “Affecting”</td>
<td>25</td>
</tr>
<tr>
<td>a. Legislative History of the CZMA</td>
<td>25</td>
</tr>
<tr>
<td>b. NOAA’s Rulemaking Record</td>
<td>26</td>
</tr>
<tr>
<td>2. “Land Uses” and “Water Uses”</td>
<td>26</td>
</tr>
<tr>
<td>a. Legislative History of the CZMA</td>
<td>27</td>
</tr>
<tr>
<td>b. NOAA’s Rulemaking Record</td>
<td>28</td>
</tr>
<tr>
<td>3. Defining “Consistent”</td>
<td>28</td>
</tr>
<tr>
<td>C. Summary</td>
<td>28</td>
</tr>
<tr>
<td>II. The Resolution of Consistency Conflicts</td>
<td>30</td>
</tr>
<tr>
<td>A. Mediation</td>
<td>33</td>
</tr>
</tbody>
</table>

Copyright © 1987 by ECOLOGY LAW QUARTERLY

* The authors would like to thank the J.N. Pew, Jr., Charitable Trust and the Marine Policy and Ocean Management Center of the Woods Hole Oceanographic Institution for supporting the research for this Article.

** Fellow, Marine Policy and Ocean Management Center, Woods Hole Oceanographic Institution; 1982-85, Energy Counsel, California Coastal Commission; J.D. 1972, Washington University; B.A. 1967, Earlham College.

B. Appeals to the Secretary ........................................ 33
   1. Standards Required to Override a State Objection ... 33
   2. The Secretary's Decisions ................................. 34
      a. Union Oil Appeal .................................. 37
      b. Gulf Oil Appeal .................................. 37
      c. Exxon Santa Rosa Unit Appeal .................... 38
      d. Exxon Santa Ynez Unit Appeal .................... 39
      e. Southern Pacific Appeal ......................... 40
      f. Worthy Appeal ................................ 40
   3. Trends .................................................. 41
      a. Competing National Objectives Are Construed
         Broadly Against the States ...................... 41
      b. National Interest Benefits of OCS Energy
         Development Outweigh Adverse Environmental
         Impacts ........................................... 42
      c. The Secretary Has Improperly Delegated His
         Authority to Determine Compliance with the
         Clean Air Act (CAA) and the Clean Water Act
         (CWA) ........................................... 43
      d. The States' Best Argument Is the Reasonable
         Available Alternative .......................... 44
      e. The Secretary Has Avoided Relying on National
         Security and Defense Interests to Override State
         Decisions ....................................... 44

C. Consistency and the Courts .................................... 46
   1. Federal Activities ........................................ 46
      a. Lease Sales ...................................... 46
      b. Other Federal Activities .......................... 47
   2. Federally Permitted Activities ........................... 49
   3. OCS Oil and Gas Exploration, Development and
      Production ......................................... 51
   4. Summary of the Cases ................................... 54

III. Consistency, the National Interest, and Federal-State
     Relations ................................................ 55
    A. Adoption and Review of State CMP's: Adequate
       Protection of the National Interest ................... 57
    B. Reviewing Defense-Related Projects ..................... 58
    C. Federal Preemption .................................... 59
    D. Commerce Clause ..................................... 60
    E. The Effect of Section 307(e) ........................... 62

Conclusion ..................................................... 64
INTRODUCTION

The federal government and the states cooperate in many programs to manage natural resources and to protect this nation's environment. In these programs, which exemplify the principles of "new federalism" or "cooperative federalism," federal agencies and state governments jointly manage resources and development once exclusively managed by the federal government. Despite joint federal-state management, these federal programs typically subordinate the interests of the states to the interests of the federal government. As a result, federal agencies generally take the lead in overseeing and administering the programs.

But in the Coastal Zone Management Act (CZMA), Congress created a more equal partnership between the federal government and the coastal states. The CZMA delegates substantial authority to the coastal states to manage, protect, and develop the resources of the nation's coastal areas. To exercise this authority, the coastal states must develop and implement coastal management programs (CMP's) that meet the CZMA's standards. Once the federal government approves a state's CMP, the CZMA's "federal consistency doctrine" requires that activities conducted or permitted by federal agencies that affect state coastal zones be consistent with state coastal management policies.


4. Kuersteiner & Sullivan, supra note 2, believe that Congress delegated too much authority to the coastal states. See id. passim.

5. 16 U.S.C. § 1454. Coastal management programs are comprehensive statements prepared and adopted by states "setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." Id. § 1453(12).

6. Id. § 1456(c). The concept of federal consistency originated in the national land-use
This "new federalist" program faces challenges on many fronts. First, the Reagan administration has sought to eliminate federal funding for state implementation of CMP's. Second, many federal agencies, including the Department of the Interior's Minerals Management Service (MMS), have opposed delegating broad consistency authority to the states. Third, the oil and gas industry has contested state CMP policies and decisions that restrict offshore energy development, particularly in California. Fourth, the Reagan administration has sought to diminish the authority of coastal states over federal activities that lie outside the coastal zone but affect coastal resources, uses and activities, and has urged the federal courts to limit the scope of the federal consistency doctrine. In this regard, the White House recently instructed the Secretary of Commerce (Secretary) to review state CMP's to determine whether they adequately address the national security interest in increased offshore energy development. As a result, the National Oceanic and At-

---

legislation proposed, but never enacted, in the early 1970's by the Nixon administration. See President's Statement on Signing The Coastal Zone Management Act of 1972, in CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, at 459 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY]. There are cooperative federal-state programs similar to the national coastal zone management program, but none goes as far as the CZMA's consistency doctrine in delegating authority to states over federal and federally permitted activities. See, e.g., Skil- lern, supra note 2, at 584; see also statutes cited supra note 1; infra note 326.


8. See, e.g., infra text accompanying notes 64 & 67 (the position of the Department of the Interior in opposing state review of OCS lease sales under the CZMA); infra note 52 (position of the Department of the Interior in Secretary of the Interior v. California, 464 U.S. 312 (1984), arguing for a narrow reading of § 307(c)(1) of the CZMA). Also, MMS has vigorously opposed the implementation of California's consistency authority over OCS oil and gas activities. See infra notes 165-72 and accompanying text.

9. See infra notes 156-72 & 278-82 and accompanying text.


11. For instance, in Secretary of the Interior v. California, 464 U.S. 312 (1984), the Department of the Interior advocated reading the CZMA in a manner that would limit the authority of the states under the Act. See id. at 321 (quoting Brief for Petitioners at 20); see also infra note 52. The Reagan administration's opposition to state authority under the federal consistency provisions of the CZMA is indeed ironic. As one commentator noted, "[w]ith its declared emphasis on management and planning, as opposed to specific action and results, the federal CZM structure fits well with the Reagan Administration's view of the most beneficial role of the central government." Wolf, supra note 10, at 9 (footnote omitted). Wolf quotes from the Reagan Inaugural Address in 1981, where President Reagan stated:

It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the power granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.

Id. at n.17 (quoting 1981 PUB. PAPERS 1, 2 (Jan. 20, 1981)).

12. Office of the Press Secretary, the White House, Statement by Principal Deputy Press Secretary (June 6, 1984) [hereinafter Press Statement].
mospheric Administration (NOAA)—the Department of Commerce agency responsible for administering the CZMA—has disapproved local coastal plans as part of state CMP's and challenged the implementation of previously approved CMP's because they allegedly restrict oil and gas development.

This Article examines the federal consistency doctrine and recent challenges to the authority of the coastal states. Part I describes the CZMA's consistency requirements—the "concept" of federal consistency, the legislative history behind the statute, and NOAA's rulemaking record. Part II considers the "practice" of federal consistency—major consistency conflicts, administrative appeals under the CZMA and the consistency regulations, and decisions by federal courts. Part III reviews the impact of the CZMA's consistency provisions upon national interest concerns and federal-state relations. The Article concludes by examining current issues in federal consistency practice.

I

THE FEDERAL CONSISTENCY DOCTRINE

The passage of the CZMA in 1972 marked the first serious and comprehensive effort by the states and the federal government to protect this nation's coastal zone. Congress identified substantial threats to coastal zone resources and values posed by a growing population and increasing development in coastal areas, including offshore development in the territorial sea and the "outer continental shelf" (OCS).

14. NOAA disapproved the incorporation of local coastal management plans as part of the Alaska and California CMP's on the grounds that they were overly protective of coastal resources and inadequately promoted offshore gas and oil exploration and development. Letters from Peter Tweedt, Director, Office of Ocean and Coastal Resources Management, NOAA, to Peter Douglas, Executive Director, California Coastal Commission (Feb. 6, 1986, Apr. 24, 1986, Sept. 18, 1986) (all on file with authors) (rejecting the incorporation of seven Local Coastal Programs into the California CMP); see also Coastal Zone Management Newsletter No. 35, at 2-3 (Sept. 19, 1986) (regarding the rejection of Alaska's CMP modifications for policies viewed as too protective of the environment to promote adequately oil and gas development). NOAA also opposed the implementation of Delaware's CMP in Norfolk S. Corp. v. Oberly, 632 F. Supp. 1225 (D. Del. 1986). See infra note 331 and accompanying text.
15. As defined by the CZMA, the coastal zone includes the three nautical-mile territorial sea and "extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on coastal waters." 16 U.S.C. § 1453(1). The CZMA excludes from the coastal zone "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." Id.
16. See id. § 1451(c).
17. This development included offshore energy and mineral development; marine transportation; fishing; industrial and commercial activities, such as the siting of major facilities in the shorelands of the coastal zone; recreational boating; marina construction; and residential development. See id. § 1451(c), (f).
18. Id. § 1451(f). Congress has defined the OCS as the submerged lands beyond those
In view of these powerful threats and the difficulties of centralized federal management of approximately 95,000 miles of United States coastline,\textsuperscript{19} Congress proposed a unique federal and state partnership to protect coastal resources and values and to manage development affecting coastal areas.\textsuperscript{20} Congress determined that state action is the "key" to effective coastal protection and management\textsuperscript{21} and encouraged states to exercise their "full authority" over the coastal zone by developing coastal management programs to deal with activities of regional or national importance.\textsuperscript{22}

State participation in the program is voluntary; states may choose to develop CMP's that meet statutory national coastal zone management standards.\textsuperscript{23} The federal consistency provisions, however, provide a major incentive to states to enter into partnership with the federal government.\textsuperscript{24} The CZMA requires that once the Secretary approves a state CMP, federal activities and projects affecting the coastal zone, as well as activities and projects that require federal permits, be consistent with approved CMP's.\textsuperscript{25}

Distinct sets of consistency standards and procedures apply to (1) federal agency activities\textsuperscript{26} and (2) private activities that require federal licenses or permits, including oil and gas exploration, development and production on the OCS.\textsuperscript{27} Section 307(c)(1) of the CZMA requires

\begin{itemize}
  \item 20. \textit{See 16 U.S.C. § 1451(h), (i).}
  \item 21. \textit{Id.} § 1451(i). Congress concluded:
  \begin{quote}
    The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.
  \end{quote}
  \textit{Id.}
  \item 22. \textit{See id.}
  \item 23. \textit{See id.} § 1454(b), (c).
  \item 24. The CZMA provides another major incentive for states to participate in the partnership: financial support to defray the costs of developing and administering state CMP's. \textit{See id.} § 1455.
  \item 25. \textit{Id.} § 1456.
  \item 26. \textit{See id.} § 1456(c). Similar standards apply to federal development projects. \textit{See id.} § 1456(d).
  \item 27. \textit{See id.} Similar standards apply to federal assistance projects to state and local governments. \textit{See id.}
\end{itemize}
federal agency activities that directly affect the coastal zone to be consistent "to the maximum extent practicable" with approved state CMP's. The federal agency that conducts or supports the activity makes the consistency determination, and the states may concur or object. In the event of serious disagreement between a state and a federal agency, a state can pursue mediation with the Secretary or seek in federal court to enjoin the federal activity.

Section 307(c)(3) of the CZMA requires that federally permitted activities, including OCS oil and gas exploration, development and production, be conducted in a manner consistent with approved state CMP's. Applicants for federal permits and licenses must "certify" that the proposed activity will be conducted in a manner consistent with the affected state's CMP policies. States may review the certification in noticed public hearings and may concur or object. If a state objects to the proposed activity on consistency grounds, a federal agency may not issue the necessary permits unless, on appeal, the Secretary of Commerce overrides the state objection. The Secretary may override a state objection, even if the activity is inconsistent with a state CMP, by finding that the activity is consistent with the objectives of the CZMA or is necessary in the interest of national security.

A. Federal Activities

Section 307(c)(1) of the CZMA provides that "[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." This Section examines interpretations of the two key phrases of this mandate: "directly affecting" and "consistent to the maximum extent practicable."

1. Defining "Directly Affecting"

The plain language of section 307(c)(1) indicates that if a federal activity "directly affects" the coastal zone, regardless of the location of the activity, the federal consistency provisions apply. However, a contro-
versy has arisen since the United States Supreme Court decision in *Secretary of the Interior v. California*\(^{38}\) whether section 307(c)(1) applies to federal activities on the OCS or whether it applies only to federal activities in the coastal zone. This Section explores the meaning of the phrase "directly affecting" in light of the legislative history of the CZMA, the Supreme Court decision, and NOAA's rulemaking record. It concludes that, despite the Court's recent decision, federal activities "directly affecting" the coastal zone may be reviewed by the states pursuant to the federal consistency doctrine regardless of their location.

**a. Legislative History of the CZMA**

The 1972 House and Senate versions of section 307(c)(1) required only that federal activities "in the coastal zone" be consistent with federally approved state CMP's.\(^{39}\) The conferees, however, deleted "in the coastal zone" and added to section 307(c)(1) the phrase "directly affecting."\(^{40}\) They explained in the report that "as to Federal agencies involved in any activities directly affecting the state coastal zone and any Federal participation in development projects in the coastal zone, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management programs."\(^{41}\) Both chambers then adopted the conference version without further discussion.\(^{42}\)

Changing the geographically restrictive phrase "in the coastal zone" to the causal phrase "directly affecting" expanded state consistency authority over federal activities, regardless of the location of such activities. An examination of the differences between the Senate and House versions strongly supports this interpretation. First, the House bill required that federal activities be consistent with state CMP's "to the maximum extent practicable;"\(^{43}\) the Senate bill, on the other hand, simply required that federal activities be "consistent" except in cases of "overriding national interest as determined by the President."\(^{44}\) Second, the Senate and House bills disagreed over the geographic extent of the "coastal zone." While the House bill included federal lands within the boundaries of the coastal zone,\(^{45}\) the Senate bill explicitly excluded federal lands from the

---

41. Id.
45. H.R. 14146, 92d Cong., 2d Sess. § 304(a) (1972).
Third, the House bill proposed additional federal resource management programs for ocean areas beyond state coastal zones, in which the activities of federal agencies would be governed by the coastal management policies of the adjacent state's CMP.

In reconciling these differences, the conferees adopted the Senate's position excluding federal lands from the coastal zone and adopted the House standard "consistent to the maximum extent practicable." They also deleted the two House provisions extending state estuarine sanctuaries beyond the coastal zone and establishing the federal contiguous zone management program. As a compromise, the conferees expanded the scope of section 307(c)(1) to allow state consistency review of federal agency activities outside the coastal zone by dropping the limiting word "in" and substituting the causal phrase "directly affecting" the coastal zone.

b. Secretary of the Interior v. California

In a five-to-four decision, the United States Supreme Court held that the consistency provisions of section 307(c)(1) do not apply to the Department of the Interior's sale of oil and gas leases on the OCS. According to the majority, the conferees added the phrase "directly affecting" as part of a compromise in which they adopted the Senate's definition of "coastal zone," which excluded federal lands, but allowed state consistency review of federal activities on those federal lands. In dictum, the majority stated that Congress did not employ the term "directly affecting" in its plain sense—to denote a causal relationship between an act and its effects. The Court construed "directly affecting"

---

46. S. 3507, 92d Cong., 2d Sess. § 304(a) (1972).
47. Section 312 of the House bill authorized the Secretary to extend the boundaries of any state estuarine sanctuary "seaward beyond the coastal zone" to achieve the purposes for which the sanctuary was established. H.R. 14146, 92d Cong., 2d Sess. § 312(b) (1972). Section 313 required the establishment of a "management program for the contiguous zone of the United States" for the area of ocean waters outside the coastal zone and within 12 miles of shore. The contiguous zone management plan was required to apply the adjacent state coastal zone management policies to any activities occurring within these waters "to the maximum extent practicable." Id. § 313.
49. H.R. CONF. REP. NO. 1544, 92d Cong., 2d Sess. 7 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 450.
51. Id. at 322-24.
52. Id. at 322. It is noteworthy that both parties to the litigation construed "directly affecting" to indicate a causal relationship. California proposed a definition derived from the legislative history of the CZMA that was endorsed by the federal district court and the Ninth Circuit Court of Appeals: "directly affecting meant [in]itiating a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence." Id. at 321 (quoting Brief for Respondents at 12). The Department of the Interior argued that "directly affecting" meant "[h]aving a [d]irect, [i]dentifiable
to mean "in" and implied that section 307(c)(1) applies only to federal activities in federal enclaves that are physically situated "in" but excluded by definition from the coastal zone. The majority decision rests largely upon this improbable geographic interpretation of "directly affecting." The four dissenters sharply disagreed with the majority on the grounds that the plain language of section 307(c)(1) and its legislative history indicate a congressional intent to enlarge the scope of the consistency provisions to cover federal activities outside as well as inside the coastal zone.

The decision has provoked strong criticism. It also has inspired the Reagan administration to claim that state consistency authority

53. Id. at 330. The Court's holding has created confusion whether federal activities on the OCS other than oil and gas lease sales are subject to state consistency review. This confusion stems from ambiguities in the opinion: the Court stated that "Congress deliberately and systematically insisted that no part of CZMA was to reach beyond the three-mile territorial limit," id. at 324, while also stating that "[w]e need not, however, decide whether any OCS activities other than oil and gas leasing might be covered by § 307(c)(1), because further investigation reveals that in any event Congress expressly intended to remove the control of OCS resources from CZMA's scope," id. This sweeping and imprecise language is clearly contradicted by the consistency provisions of § 307(c)(3)(B) of the CZMA, which explicitly subject OCS resources to state consistency review authority. See 16 U.S.C. § 1456(c)(3)(B).

54. Justice Stevens wrote the dissent, in which Justices Brennan, Marshall, and Blackmun joined.

55. See Secretary of the Interior, 464 U.S. at 355 (Stevens, J., dissenting). Justice Stevens concluded that the plain meaning of "directly affecting" indicates that Congress chose the phrase "to enlarge the coverage of § 307(c)(1) to encompass activities conducted outside as well as inside the [coastal zone]." Id. at 346. The dissenters noted:

Not much is said, however, about the plain language of § 307(c)(1) in the opinion of the Court, and no wonder. The words "activities directly affecting the coastal zone" make it clear that § 307(c)(1) applies to activities that take place outside the zone itself as well as to activities conducted within the zone. . . . In light of this language it is hard to see how the Court can hold, as it does, that federal activities in the OCS can never fall within the statute because they are outside the outer boundaries of the coastal zone.

Id. at 345-46.

The dissent disagreed with the Court's assessment of the legislative history, noting that "the Court is simply wrong to say both versions of the CZMA sent to conference displayed no interest in regulating federal activities occurring outside of the exterior boundaries of the coastal zone. The Conferees' adoption of the 'directly affecting' language merely clarified the scope of the consistency obligation." Id. at 352-53.

under the CZMA only applies to federal and federally permitted activities conducted within the coastal zone.\footnote{57} This claim goes too far. Even the Supreme Court, despite the logic of its decision, refrained from deciding whether activities on the OCS other than oil and gas leasing are covered by section 307(c)(1).\footnote{58}

c. NOAA's Rulemaking Record\footnote{59}

Before Secretary of the Interior v. California, NOAA consistently stressed that "directly affecting" described the causal relationship between a federal agency's activity and the activity's effects on the coastal zone, irrespective of the activity's location. For example, in the commentary to its 1976 proposed rule, NOAA stated that "the language of the proposed regulations will adopt the 'causal' terms of the Act ['directly affecting' and 'affecting']."\footnote{60}

In its 1977 proposed rule, NOAA proposed separate definitions for "directly affecting" and "affecting" that would have distinguished the terms, defining "affecting" to cover a broader range of effects than "directly affecting."\footnote{61} Both terms utilized a test that focused on the "significance" of an activity's effects on the coastal zone.\footnote{62} In its 1978 proposed
rule, however, NOAA deleted the separate definitions for "directly affecting" and "affecting" and substituted the term "significantly affecting the coastal zone" with regard to both federal activities and federally permitted activities.63

When the Department of the Interior objected to state consistency review of OCS oil and gas lease sales under section 307(c)(1), the dispute was submitted to the Department of Justice.64 Justice rejected NOAA's

930.32 Directly affecting the coastal zone.
(a) The term "directly affecting the coastal zone" describes the coastal zone effect caused by a Federal activity which is sufficient to trigger Federal agency responsibility for making a consistency determination and notifying the State agency of such determination.
(b) A Federal activity will directly affect the coastal zone if the activity causes significant (i) changes in the manner in which waters, lands or other coastal zone resources are used, (ii) limitations on the range of uses of coastal zone resources, or (iii) changes in the quality of coastal zone resources. The significance of the effect on the coastal zone shall be considered in terms of the primary, secondary and cumulative consequences of the activity. A Federal activity which causes significant changes in or limitations on coastal zone resources directly affects the coastal zone even when the activity causes both beneficial and detrimental effects, and on balance the Federal agency determines that the effect will be beneficial.

930.53 Affecting the coastal zone.
(a) The term "affecting the coastal zone" describes the coastal zone effect caused by a Federal license or permit activity which will trigger the applicant's responsibility for complying with the Federal consistency procedures of this Subpart. The criteria set forth within Section 930.32 for determining whether a Federal activity "directly affects the coastal zone" apply to this determination. In addition, State agencies have the option of using a more expansive definition of "significant effect" to cover a broad range of resource, social and economic effects which are considered in the management program to be significant.

930.73 Affecting the coastal zone.
The term "affecting the coastal zone" describes the coastal zone effect caused by a Federal license or permit activity described in detail within an OCS plan which will trigger the person's responsibility for complying with the Federal consistency procedures of this Subpart. The criteria referenced and described within Section 930.53 apply to this determination.

930.93 Affecting the coastal zone.
The term "affecting the coastal zone" describes the effect caused by a Federal assistance project which will trigger the applicant agency's responsibility for complying with the Federal consistency procedures of this Subpart. The criteria referenced and described in Section 930.53 apply to this determination.

63. 43 Fed. Reg. 10,510, 10,511 (1978) ("In light of the similarity among the various definitions [in the 1977 proposed rules], and in view of the legislative history which supports the 'significance' test, NOAA has adopted a uniform definition which is applicable to all types of Federal actions.").

64. The Departments of Commerce and the Interior jointly requested that the Department of Justice determine whether OCS oil and gas lease sales were subject to review by the states under the CZMA consistency provisions. In an opinion issued April 20, 1979, the Department of Justice concluded that OCS oil and gas lease sales were subject to the consistency review procedures of the CZMA; Justice, however, found that the CZMA did not authorize the Secretary to employ only one triggering test based on the significance of effects applicable to each of the separate consistency provisions. See Department of Justice Advisory Opinion (Apr. 20, 1979) [hereinafter Justice Advisory Opinion].
“significance of effects” language. In response, NOAA dropped the “significance test” from its regulations and substituted, without definition, the phrases “directly affecting the coastal zone” with respect to federal activities and the term “affecting the coastal zone” with respect to federally permitted activities.

In 1981, the oil and gas industry, and newly appointed officials in the Departments of Commerce and the Interior, pressed for a restrictive definition of “directly affecting” that would preclude state review of OCS oil and gas lease sales. As a result, NOAA’s 1981 rule stated that a federal activity would “directly affect” the coastal zone only if it produced “an identifiable physical alteration in the coastal zone” or initiated “a chain of events . . . reasonably certain to result in such alterations

65. See id. at 13-14. The Department of Justice contended that the circumstances under which a federal activity “directly affects” a state’s coastal zone is essentially a factual determination, id. at 2, and it concluded that the “directly affecting” standard of § 307(c)(1) should not be diluted first to “significantly” and then to “primarily, secondarily and cumulatively” affecting the coastal zone, id. at 14.

66. 44 Fed. Reg. 37,142 (1979) (codified at 15 C.F.R. § 930.32(a), .50). The Department of Justice’s opinion that Congress intended different consistency standards to apply to federal activities and federally permitted activities and its objection to the “significance of effects” test to define “directly affecting” puts the Secretary in a difficult position—how may the two standards be distinguished? NOAA decided to provide no clarifying definitions and instead to rely on case-by-case determinations.

The Department of Justice’s 1979 opinion is less persuasive today. First, the Department abandoned its view that OCS oil and gas lease sales are subject to § 307(c)(1) and argued before the Supreme Court in Secretary of the Interior v. California that the sales are not subject to the provision. See 464 U.S. at 321. Also, contrary to the Department’s view, the use of the “significance of effects” test is well-supported by the language of the CZMA itself, see 16 U.S.C. §§ 1454(b)(2), 1455(c)(8), and the legislative history, see, e.g., LEGISLATIVE HISTORY, supra note 6, at 201, 317. Further, NOAA’s 1977 proposed rule, which incorporated the “significance of effects” language, distinguished the two standards in a reasonable manner. See 42 Fed. Reg. 43,586, 43,598 (1977) (proposed Aug. 24, 1977). Finally, the Department of Justice objected to the 1978 Final Rule, which deleted separate consistency standards, but the Department did not object to the 1977 Proposed Rule, which retained the separate standards. A reasonable, clarifying amendment to the consistency rules would be to return to the Secretary’s 1977 proposed definitions of the terms “directly affecting” and “affecting the coastal zone.” See supra note 62. These definitions clarify in what circumstances the states’ consistency authority applies.


67. See, e.g., 46 Fed. Reg. 35,253-54 (1981). The Department of the Interior and the oil and gas industry might have been spurred by the Department of Justice’s findings that OCS oil and gas lease sales may “directly affect” the coastal zone, that the “directly affecting” standard may not be replaced by a “significance of effects” standard, and by NOAA’s 1979 decision not to propose another definition. Also contributing to this pressure was the failure of the attempted mediation between the State of California and the Department of the Interior over the necessity of determining the consistency of OCS oil and gas lease sales with the California CMP.
without further required agency approval." 68 "Direct effects" would not include effects "identified by the federal agency as uncertain, speculative, remote, or subject to further required agency approval." 69 The new rule made clear that OCS oil and gas leasing activities would not "directly affect" the coastal zone "to the extent that any of these activities do not in and of themselves require a physical alteration in the coastal zone." 70

Despite its narrow interpretation of "directly affecting," the new rule, like NOAA's earlier definition, stressed the causal relationship between a federal activity and its effects on the coastal zone without requiring that the federal activity take place within the coastal zone. This new definition, however, was as short-lived as the first; NOAA withdrew it in the face of congressional disapproval of the explicit exclusion of OCS oil and gas lease sales from consistency review under section 307(c)(1). 71

Following Secretary of the Interior v. California, NOAA commenced yet another round of rulemaking. 72 Concurrently, it undertook a comprehensive study of state implementation of the CZMA's consistency provisions to determine whether the consistency review process needed "improvements" to "increase the efficiency and effectiveness of coastal zone management." 73 After a detailed examination of review experience and practice in fiscal year 1983, the Agency concluded that the consistency process worked well and did not require improvements. 74 Accordingly, NOAA strictly limited Secretary of the Interior v. California in a new rule, which excludes only OCS oil and gas lease activities from consistency review under section 307(c)(1) and requires consistency review of all other federal activities "outside the coastal zone." 75

68. Id. at 35,257.
69. Id.
70. Id. In Secretary of the Interior v. California, 464 U.S. 312, 321 (1984), the Department of the Interior and the oil and gas industry urged the Supreme Court to adopt this interpretation.
71. See Withdrawal of Final Rule, 47 Fed. Reg. 4231 (1982). Resolutions disapproving the rule were introduced in the House and Senate pursuant to the "legislative veto" provisions of 16 U.S.C. § 1463a.
73. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEP'T OF COMMERCE, FEDERAL CONSISTENCY STUDY—DRAFT I-5 (1985) [hereinafter NOAA DRAFT STUDY]. This three-volume study assembles and analyzes information and data on the application by the states of their consistency authority during fiscal year 1983.
74. See 50 Fed. Reg. 35,210, 35,211 (1985) (codified at 15 C.F.R. § 930.33). NOAA limited changes to those "clearly necessitated by the Supreme Court's decision," noting that "[m]ost commenters supported the narrow scope of the proposed rulemaking." Id.
“Directly affecting” is a key term in determining the application of the consistency doctrine to federal activities and in defining the changed relationship between federal and state governments in managing ocean and coastal resources and activities. In the relationship established by the CZMA, Congress delegated substantial authority to the states to manage and protect the coastal zone. In the Authors’ view, the plain meaning of the phrase, its legislative history, and NOAA’s rulemaking record demonstrate that “directly affecting” expresses the fundamental causal relationship between a federal activity and its effects on the coastal zone. Thus, if a federal activity “directly affects” the coastal zone, states may review the activity under the federal consistency doctrine regardless of its location. But this straightforward interpretation of “directly affecting” has been considerably clouded as a result of Secretary of the Interior v. California. The Court based its decision on a narrow geographic interpretation of “directly affecting,” defining it as “in the coastal zone”—an interpretation that neither the parties to this dispute nor anyone else argued. The decision has been limited so far to its narrow holding that OCS oil and gas lease sales are excluded from state consistency review. But already efforts are underway to extend it to exclude other federal activities outside the coastal zone. Such extensions threaten to undermine the federal-state partnership to manage and protect the coastal zone.

2. “Consistent to the Maximum Extent Practicable”

The CZMA requires that federal activities “directly affecting” the coastal zone be consistent with state CMP’s “to the maximum extent practicable.” Because this phrase establishes for federal activities the standard of compliance with state CMP’s, its definition is critical.

a. Legislative History of the CZMA

In 1972, the House version of the CZMA required that federal activities be consistent with state CMP’s “to the maximum extent practica-

---

Although the decision destroys states’ rights to review OCS oil and gas lease sales under § 307(c)(1), it supports the right of coastal states under § 307(c)(3) to review oil and gas exploration, development and production outside the coastal zone, and it affirms the congressional delegation of authority to the coastal states to “veto” federally permitted projects that are inconsistent with state CMP’s. See Secretary of the Interior, 464 U.S. at 340.

76. See supra note 37 and accompanying text.
77. See supra notes 39-49 and accompanying text.
78. See supra notes 60-75 and accompanying text.
79. See supra note 53.
80. 464 U.S. at 321-22.
81. See supra note 52.
82. See supra note 57.
83. 16 U.S.C. § 1456(c)(1).
ble." The accompanying report indicated that the House intended a high standard of compliance. Deviations from "complete adherence to the approved [state coastal zone management] program" were allowed only when "circumstances not foreseen at the time of [program] approval" prevented full compliance.

The language in the Senate bill and report established an equally rigorous standard of compliance. Both the Senate and the House reports stated that federal agencies must participate in or at least be given the opportunity to participate in the process of approving state CMP's. Problems of coordination between federal agencies and coastal states were expected to be raised and resolved during the approval process. The House legislative history declared that once state CMP's received federal approval and the federal consistency provisions became effective, state management policies were not to be evaded because federal agencies subsequently found it inconvenient or "impractical" to conform their activities to approved state CMP's.

b. NOAA's Rulemaking Record

NOAA's definition of the term "consistent to the maximum extent practicable" has remained essentially the same since its formulation in 1976. During the comment and review period of the 1977 proposed consistency regulations, the oil and gas industry and a number of federal agencies urged NOAA to broaden the discretion of federal agencies "to deviate from the provisions of approved coastal management programs." NOAA rejected these recommendations. The resulting rule

85. See H.R. REP. No. 1049, 92d Cong., 2d Sess. 20 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 323.
86. Id.; see also S. REP. No. 753, 92d Cong., 2d Sess. 18-20 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 210-11.
88. See LEGISLATIVE HISTORY, supra note 6, at 210-11; H.R. REP. No. 1049, 92d Cong., 2d Sess. 19-20 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 323-24.
89. H.R. REP. No. 1049, 92d Cong., 2d Sess. 20 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 324. In California v. Watt, 683 F.2d 1253 (9th Cir. 1983), where the Ninth Circuit Court of Appeals affirmed the district court's ruling that OCS oil and gas lease sales are subject to the consistency provisions of the CZMA, the federal appellate court suggested that federal officials may have greater discretion than private parties seeking federal permits to act inconsistently with state CMP's. See id. at 1264-65. The court's statement, however, is dictum; the matter was neither briefed nor argued by the parties, and the court did not consider the sharply contradictory legislative history and rulemaking record. See supra notes 39-49 & 59-75 and accompanying text. The Supreme Court reversed on other grounds. See supra notes 50-58 and accompanying text.
relied upon the plain language of the CZMA and the Act's legislative history; it required that federal activities "directly affecting the coastal zone" be "fully consistent" with state programs "unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations."92

The 1978 final rule permits a federal agency to deviate from "full consistency" with a state CMP when circumstances that arise after the approval of the CMP, which were unforeseen by the agency at the time of program approval, present a "substantial obstacle" that prevents "complete adherence" by the agency.93 In formulating this rule, NOAA adopted specific language from the legislative history.

B. Federally Permitted Activities

The CZMA also applies to private activities that require federal permits or licenses.94 Section 307(c)(3)(A) requires that when such activities "[affect] land or water uses in the coastal zone," they must be "consistent" with approved state CMP's.95 Section 307(c)(3)(B), adopted by Congress in 1976, imposes the same consistency requirement on federally permitted oil and gas exploration, development and production on the OCS that affects any land or water use in the coastal zone.96

1. Defining "Affecting"

Although federal activities must "directly affect" the coastal zone to trigger the consistency provisions of the CZMA, federally permitted activities need only "affect" land and water uses in the coastal zone as a prerequisite for the consistency requirements.97 The plain meaning of the term "affecting" as used in the 1972 CZMA describes the causal relationship between federally permitted activities and their effects upon land or water uses in the coastal zone, not the geographical location of such activities.98

---

93. 15 C.F.R. § 930.32(b) (1986); see 44 Fed. Reg. 37,146 (1979) (codified at 15 C.F.R. § 930); Comment to Final Rule, 43 Fed. Reg. 10,519 (1978); supra note 86.
94. See 16 U.S.C. § 1456(c)(3). This discussion also applies to federal assistance projects. See id. § 1456(d).
95. Id. § 1456(c)(3)(A).
96. Id. § 1456(c)(3)(B).
97. See id. § 1456(c)(3).
98. The logic of the majority opinion in Secretary of the Interior v. California, which rejected any causal meaning of the phrase "directly affecting" and argued that the phrase must be understood in a geographic sense only, breaks down when applied to the term "affecting" as used in § 307(c)(3) because of the majority's reliance on the qualifying term "directly." See 464 U.S. at 421-30.
a. Legislative History of the CZMA

The 1976 amendments to section 307(c)(3) and the relevant legislative history confirm this causal interpretation of the term "affecting." In 1976, both the Senate and House committees proposed, and the Senate passed, amendments to section 307(c) that treated all OCS oil and gas activities—i.e., lease sales, exploration, development and production—as federally permitted activities. Such activities occur both within the coastal zone (pipelines and onshore facilities) and beyond the zone (OCS platforms). The conferees, however, deleted the term "lease" and applied the consistency provisions of section 307(c)(3)(B) to the remaining steps in the OCS leasing process (exploration, development and production both in and beyond the coastal zone). In section 307(c)(3)(B), Congress applied the same causal terms of the existing section ("affecting land or water uses in the coastal zone"), which it renumbered as section 307(c)(3)(A) and applied to federally permitted activities other than oil and gas activities on the OCS. Thus, Congress simply adopted the same term—"affecting"—to apply to oil and gas activities on the OCS that it had already applied to other federally permitted activities "affecting" the coastal zone, regardless of their location.

b. NOAA's Rulemaking Record

The current regulations do not define the term "affecting." The explanation for this lack of a definition lies in the sequence of events, recounted above, in which NOAA sought to define the "triggering" test for consistency applicable to all federal actions covered by the CZMA. That test, had it been adopted, would have considered the "significance of effects" flowing from all federal actions.

2. "Land Uses" and "Water Uses"

The oil and gas industry has argued that the consistency provisions of the CZMA apply only when federally permitted activities affect the

101. H.R. CONF. REP. No. 1298, 94th Cong., 2d Sess. 7, 30-31 (1976), reprinted in LEGISLATIVE HISTORY, supra note 6, at 1057, 1080-81. This history is closely examined in Justice Stevens' dissenting opinion in Secretary of the Interior v. California. Justice Stevens concluded that the conferees deleted the term "lease" from the amendment to § 307(c)(3) because "they saw no need to amend the CZMA since everyone agreed that it already applied to OCS oil and gas leasing." 464 U.S. at 685 (Stevens, J., dissenting).
103. See supra notes 60-75 and accompanying text.
104. See supra note 63 and accompanying text.
natural or physical resources of the coastal zone.\textsuperscript{105} Section 307(c)(3), however, addresses effects on "land uses" and "water uses" of the coastal zone, terms defined by the CZMA to include a diverse range of activities occurring on the shores and in the waters of the coastal zone.\textsuperscript{106} Section 302 gives examples of land and water uses and activities in the coastal zone: industrial and commercial activities, residential development projects, recreational activities, mining, transportation and navigation, waste-disposal activities, and fishing.\textsuperscript{107} Further, Congress has declared in the CZMA a national policy to achieve the "wise use of the land and water resources of the coastal zone" by considering "ecological, cultural, historic and esthetic values as well as the needs for economic development . . . .\textsuperscript{108} Therefore, coastal states may review federally permitted activities not only for their effects upon the natural and physical resources of the coastal zone but also for their effects upon a broad class of economic, social, cultural, historic, and esthetic values inherent in the multitude of land and water activities that occur or may occur in the coastal zone.\textsuperscript{109}

\textit{a. Legislative History of the CZMA}

The legislative history of both the Senate and House versions demonstrates that the CZMA covers a broad range of activities and the effects of those activities upon the whole spectrum of land and water uses of the coastal zone.\textsuperscript{110} The conferees adopted broad definitions in 1972 to facilitate the anticipated coordination of the land-use aspects of the CZMA and yet-to-be-enacted national land-use legislation and to ensure

\begin{itemize}
\item 105. See, e.g., Exxon Corp. v. Fischer, No. 84-2362 PAR (C.D. Cal. Oct. 11, 1985), rev'd on other grounds, No. 85-6572 (9th Cir. Jan. 7, 1987).
\item 106. See 16 U.S.C. § 1453(10), (18).
\item 107. Id. § 1451(c), (f).
\item 108. Id. § 1452(1), (2). But see Exxon Corp. v. Fischer, No. 84-2362 PAR (C.D. Cal. Oct. 11, 1985), rev'd on other grounds, No. 85-6572 (9th Cir. Jan. 7, 1987) (interpreting this language to apply only to natural resources and to exclude the economic effects of OCS oil and gas drilling operations on the commercial fishing industry).
\item 109. See 16 U.S.C. § 1453(10) ("land use"), 1453(18) ("water use"). The Secretary always has recognized that the consistency provisions apply broadly to effects upon land and water uses and activities in the coastal zone as well as upon coastal resources. See, e.g., Secretary of Commerce, Decision and Findings in the Consistency Appeal of Exxon Co., U.S.A. to an Objection from the California Coastal Commission 7-8 (Nov. 14, 1984), summarized at 50 Fed. Reg. 324 (1985) [hereinafter Exxon Santa Rosa Unit Appeal].
\item 110. Specifically identified activities are:
\begin{itemize}
\item recreation, transportation, housing, fishing, power, communication, industrial, and mineral resource needs; protective requirements for water quality, fish and wildlife habitats, open space, and esthetic values; present and long-range use requirements which will not foreclose all options for future generations; flood control and shoreline erosion prevention; and all other matters impinging upon coastal zone resource conservation . . . .
\end{itemize}
\end{itemize}

H.R. REP. NO. 1049, 92d Cong., 2d Sess. 17 (1972), \textit{reprinted in Legislative History, supra} note 6, at 320; see also S. REP. NO. 753, 92d Cong., 2d Sess. 11 (1972), \textit{reprinted in Legislative History, supra} note 6, at 203.
that there would be no conflict between state water and air quality regulations under the CZMA and the federal Clean Air and Clean Water Acts.\textsuperscript{111}

\textbf{b. NOAA's Rulemaking Record}

Although the current regulations do not define "the land or water uses of the coastal zone," they provide examples of the activities governed by these terms.\textsuperscript{112} The regulatory history, however, makes clear that NOAA intends the term "affecting the coastal zone" to encompass the phrase "affecting land or water uses in the coastal zone."\textsuperscript{113} Further, the 1978 final regulations clarify that the term "affecting the coastal zone" includes land and water uses as well as natural or physical resources in the coastal zone.\textsuperscript{114}

\textbf{3. Defining "Consistent"}

The standard of compliance for federally permitted activities\textsuperscript{115}—including OCS oil and gas exploration, development and production—is more exacting than the standard of compliance for activities by federal agencies. The CZMA requires federally permitted activities to be "consistent" with approved state CMP's.\textsuperscript{116} In contrast, federal activities need only be consistent "to the maximum extent practicable."\textsuperscript{117} According to the Supreme Court, section 307(c)(3) gives a state the power to "veto" federally permitted activities that are inconsistent with the state's CMP.\textsuperscript{118} If the state objects, no federal permits may be issued and the proposed activity is prohibited unless the Secretary overrides the objection.\textsuperscript{119}

The consistency regulations do not specifically define the term "consistent with the [state CMP]." The regulatory standard of compliance, however, is "full consistency" with state CMP's.\textsuperscript{120} Unlike federal activities, the regulations provide no exception for federally permitted activities; no "deviations" are allowed.\textsuperscript{121}


\textsuperscript{112} See, e.g., 15 C.F.R. §§ 930.53(b), 930.58(a), 930.77(b)(3) (1986).

\textsuperscript{113} Id.


\textsuperscript{115} Id.

\textsuperscript{116} See 16 U.S.C. § 1456(c)(3).

\textsuperscript{117} Id.; see supra notes 90-97 and accompanying text.

\textsuperscript{118} See Secretary of the Interior, 464 U.S. at 333-35.

\textsuperscript{119} Id.

\textsuperscript{120} See 15 C.F.R. § 930.65 (1986).

\textsuperscript{121} 15 C.F.R. § 930.32(a) (1986); see supra note 92.
C. Summary

The CZMA's federal consistency doctrine arises from the federal-state partnership to manage threatened coastal and ocean uses and resources. As discussed above, the CZMA designates the states as the "key" to effective coastal management.122 Once the Secretary approves a state CMP, federal consistency authority is delegated to the states and both federal and federally permitted activities that affect coastal uses and resources must be consistent with the requirements of the state CMP.123 Federal activities are held to the standard of full compliance with state CMP's unless the requirements of federal law or "unforeseen circumstances" prohibit full compliance by federal agencies.124 Federally permitted activities must be fully consistent with state CMP's.125 The Secretary, however, may override state objections to federally permitted activities if the activities are consistent with the objectives of the CZMA or are necessary in the interest of national security.126

The legislative history and regulatory record of the consistency provisions strongly support the view that state consistency authority under the CZMA applies to federal or federally permitted activities that "directly affect" or "affect," respectively, the coastal zone, regardless of their location. Unfortunately, the lack of statutory or regulatory definitions of the key consistency terms—"directly affecting" and "affecting"—has created uncertainties and controversies surrounding state review of federal and private activities located outside the coastal zone. NOAA's attempts to define these terms in 1977 and 1978 were unsuccessful.127 In the Authors' view, the language of the CZMA and its legislative history amply justify definitions that incorporate the "significance of effects" caused by federal and federally permitted activities on the coastal zone, regardless of the geographic location of the activities.128

Unfortunately, regulatory definitions that focus on the causal effect of the activity are unlikely to be forthcoming. The Supreme Court concluded in Secretary of the Interior v. California that the phrase "directly affecting" imposes a geographic limitation on the scope of state review under section 307(c)(1), at least with respect to OCS oil and gas lease sales.129 In addition, the Court refused to attribute a causal meaning to the phrase;130 this refusal makes it practically impossible for NOAA to define "directly affecting" in a reasonable manner or to provide useful

122. 16 U.S.C. § 1451(i).
123. Id. § 1456(c).
124. See supra notes 90-93 and accompanying text.
125. See supra notes 115-21 and accompanying text.
127. See supra notes 60-75 and accompanying text.
128. See supra notes 39-49 and accompanying text.
129. See supra notes 50-53 and accompanying text.
130. See supra note 52 and accompanying text.
guidance about how the term should be interpreted and applied. Were NOAA to explicitly limit the scope of section 307(c)(1) to federal activities conducted on federal enclaves within the coastal zone, as suggested by the Court, it might provoke Congress to take corrective action. On the other hand, rulemaking to clarify the causal relationship between federal activities and their effects on the coastal zone would run afield of the Reagan administration's policy to oppose coastal state consistency authority.\textsuperscript{131}

In light of this dilemma, NOAA has chosen to limit the Court's decision in Secretary of the Interior to OCS oil and gas lease sales and has declined to define "directly affecting" and "affecting."\textsuperscript{132} NOAA's actions are commendable under the circumstances but only postpone the resolution of these crucial issues until the next serious controversy arises.

II

THE RESOLUTION OF CONSISTENCY CONFLICTS

Since the enactment of the CZMA in 1972, twenty-nine of the thirty-five eligible states and territories have received federal approval of their CMP's.\textsuperscript{133} These twenty-nine states cover over 88,000 of the 95,000 miles of United States coastline.\textsuperscript{134} Because the Secretary has approved their CMP's, the states may review for consistency with the mandatory policies of their CMP's: federal activities; federally permitted activities, including OCS oil and gas exploration, development and production plans; and federal assistance projects.\textsuperscript{135} It is not known how many consistency reviews have been conducted since the approval of the first state CMP in 1976, but the draft consistency study prepared by NOAA provides the following information concerning state reviews conducted during fiscal year 1983.\textsuperscript{136}

\begin{itemize}
  \item[131.\hspace{1em}]See supra notes 7, 8 & 10-14 and accompanying text.
  \item[132.\hspace{1em}]See supra note 74 and accompanying text.
  \item[134.\hspace{1em}]Id.
  \item[135.\hspace{1em}]See 16 U.S.C. § 1456(c), (d).
  \item[136.\hspace{1em}]NOAA Draft Study, supra note 73 (the authors organized the table from information in the study).
\end{itemize}
**TABLE I†**

**FEDERAL PROGRAMS REVIEWED UNDER THE CONSISTENCY PROVISIONS DURING FISCAL YEAR 1983**

<table>
<thead>
<tr>
<th>Federal Agency</th>
<th>Program</th>
<th>Number of Reviews (Percent of Total)</th>
<th>Number of Objections (Unresolved)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Army COE</td>
<td>Wetland Dredge &amp; Fill</td>
<td>4891 (63%)</td>
<td>948 (55)**</td>
</tr>
<tr>
<td></td>
<td>Harbor Construction</td>
<td>130 (1.5%)</td>
<td>4 (1)</td>
</tr>
<tr>
<td>HUD</td>
<td>Federal Assistance Grants</td>
<td>1416 (18%)</td>
<td>0</td>
</tr>
<tr>
<td>Minerals Management Service (DOI)</td>
<td>OCS Oil &amp; Gas Exploration &amp; Development</td>
<td>432 (5.5%)</td>
<td>4 (2)**</td>
</tr>
<tr>
<td></td>
<td>Geophysics Surveys</td>
<td>40 (0.5%)</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>OCS Lease Sales*</td>
<td>29 (0.5%)</td>
<td>10 (5)**</td>
</tr>
<tr>
<td>Federal Highway Administration</td>
<td>Federal Assistance</td>
<td>234 (3%)</td>
<td>2 (1)</td>
</tr>
<tr>
<td></td>
<td>Licenses &amp; Construction</td>
<td>59 (1%)</td>
<td>3 (2)</td>
</tr>
<tr>
<td>Environmental Protection Agency</td>
<td>Discharge Permits &amp; Site Designations</td>
<td>254 (3%)</td>
<td>1 (1)</td>
</tr>
<tr>
<td>Navy, Air Force, Coast Guard</td>
<td>Military Operations/Construction</td>
<td>157 (2%)</td>
<td>3 (1)</td>
</tr>
<tr>
<td>NOAA</td>
<td>Fisheries Management Plans</td>
<td>49 (0.5%)</td>
<td>4 (3)**</td>
</tr>
<tr>
<td>Others</td>
<td>EPA Grants; ICC RR</td>
<td>71 (1%)</td>
<td>5 (1)**</td>
</tr>
<tr>
<td></td>
<td>Abandonments; BLM Plans &amp; Acquisitions; National Park</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Service Projects &amp; Grants;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>GSA Projects; National Forest</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Service Sales &amp; Construction</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>7762</strong></td>
<td></td>
<td><strong>984 (71)</strong></td>
</tr>
</tbody>
</table>

† Adapted by Authors from NOAA DRAFT STUDY, supra note 68.

* Lease sales are no longer reviewed by states for consistency under the CZMA (as of 1984).

** Reported by NOAA as resolved but required litigation to settle outstanding issues.

*** 800 of these objections were reported as conditional concurrences by the State of Louisiana.
Table I shows that in fiscal year 1983, Army Corps of Engineers (COE) wetland dredge and fill permits accounted for the largest number of both state consistency reviews (4891 or 63%) and state objections (948 or 96%).137 The second most frequently reviewed federal program was the Department of Housing and Urban Development (HUD) block-grant program, which accounted for approximately 18% of the state consistency actions. There were no reported objections filed to any HUD grants. Other programs frequently reviewed for consistency were OCS oil and gas exploration and development permits issued by the Minerals Management Service (MMS) within the Department of the Interior (5.5%), ocean-discharge permits issued by EPA (3%), Federal Highway Administration grants (3%), and military construction projects undertaken by the United States Navy, Air Force, and Coast Guard (2%).

NOAA's data indicate that most projects were ultimately found to be consistent with state CMP's; fewer than one percent remained unresolved. When problems arose, however, administrative and judicial assistance was often required.138

The CZMA provides two formal administrative mechanisms for resolving disputes as to whether activities satisfy the CZMA's consistency requirements: mediation and administrative appeals.139 Section A discusses the sparse experience with mediation, and Section B examines

---

137. Of the 948 objections reported by COE, 800 were concurrences with conditions imposed by the states to assure consistency. All but 55 of the objections were ultimately resolved. Id. at II-89.

138. Of the 28 OCS oil and gas lease sales reviewed in fiscal year 1983, 10 objections were raised and 5 lawsuits were filed based on the CZMA issues. States filing objections included: Alaska (Sales 57 and 70), California (Sale 73), Florida (Sale 78), Maryland (Sale 76), Massachusetts (Sale 52), New Jersey (Sale 76), New York (Sales 52 and 76), and North Carolina (Sale 78). Id. at II-39.


In addition to lawsuits, lease sales also have generated four memoranda of understanding between the objecting state and the Department of the Interior; the memoranda settled the outstanding issues, and ultimately all sales were held except for Lease Sale 52, which was renumbered 82 and later cancelled for lack of industry interest. See NOAA DRAFT STUDY, supra note 73, at II-39 to -40.

Similarly, review of the 49 fishery management plans resulted in four objections and two lawsuits, all in Florida. The two lawsuits were eventually settled and dismissed. See Florida v. Baldrige, Nos. 83-771, 83-783 (N.D. Fla. 1983).

139. 16 U.S.C. § 1456 (c)(3), (h). The CZMA and its regulations also encourage the use of informal negotiations to resolve differences that arise between federal, state, local, and/or private interests. See, e.g., NOAA DRAFT STUDY, supra note 73, at III-60 to -70 (giving exam-
the growing body of administrative appeals. Section C then discusses relevant federal court decisions.

A. Mediation

The CZMA authorizes mediation by the Secretary of Commerce (Secretary) "in case of serious disagreement between any Federal agency and a coastal state."140 NOAA has developed regulatory procedures for the secretarial mediation of disputes involving the development and administration of CMP's,141 disagreements between state and federal agencies concerning the consistency of federal activities,142 federal licenses and permits,143 and federal grants and assistance.144 Participation in the mediation procedure is voluntary and is not a prerequisite to pursuing judicial remedies.145

Secretarial mediation is requested infrequently and, so far, has been unsuccessful. In five of the six cases where states sought mediation, the federal agency involved refused to participate.146 In the one dispute that was mediated, the parties failed to agree, and the issue was ultimately resolved by the Supreme Court in Secretary of the Interior v. California.147

B. Appeals to the Secretary

The CZMA also provides for appeals to the Secretary to resolve state objections to federally permitted activities, including OCS oil and gas exploration, development and production.148

1. Standards Required to Override a State Objection

Even if an activity is inconsistent with a state CMP, the Secretary may override a state objection if he finds that the activity is either (1) necessary in the interest of national security or (2) consistent with the
objectives or purposes of the CZMA.¹⁴⁹

To override on national security grounds, the Secretary must find that the project "directly supports" national defense or other essential national security objectives, or that such objectives would be "significantly impaired" if the activity were not permitted to go forward as proposed.¹⁵⁰ So far, the Secretary has not relied on the national security criterion to override a state objection.¹⁵¹

To override on the basis of consistency with the objectives or purposes of the CZMA, the Secretary must find that a project satisfies all of the following conditions.¹⁵² First, the activity or project must further one or more of the "competing national objectives" listed in sections 302 and 303 of the CZMA.¹⁵³ Second, the contributions of the activity to the national interest must outweigh its adverse individual and cumulative environmental impacts. Third, the project or activity must not violate the Clean Air Act or the Clean Water Act. Fourth, there must be no reasonable alternatives available that would allow the activity or project to be conducted in a manner consistent with the state CMP.

2. The Secretary's Decisions

Table II depicts the disposition of appeals that have been filed with the Secretary since the enactment of the CZMA.¹⁵⁴ Of the twenty-two filed appeals, the Secretary has rendered six written decisions, overriding three state objections, upholding two, and staying one (see map following Table II for oil and gas related appeals). Of the sixteen remaining appeals, five were stayed pending further negotiations, six were withdrawn by mutual consent, two were dismissed on procedural grounds, and three currently are pending review. The decisions have produced significant interpretations of the regulatory criteria governing appeals, and they have further delineated the federal-state relationship in the management of ocean and coastal resources, particularly with respect to OCS oil and gas activities. The following subsections briefly describe the Secretary's six written decisions.

¹⁴⁹. Id. § 1456(c)(3), (d). Disagreements over the state's application of its CMP policies, as a matter of state law, must be litigated in state court, not via the federal CZMA appeals process. See Hoe v. Alexander, 483 F. Supp. 746 (D.C. Haw. 1980). State CMP's are not federalized under the CZMA, and actions taken by the states under their CMP's are state rather than federal actions. See Skillern, supra note 2, at 614-18.

¹⁵⁰. 15 C.F.R. § 930.122 (1986).

¹⁵¹. See infra notes 202-10 and accompanying text.

¹⁵². 15 C.F.R. § 930.121(a)-(d) (1986).


¹⁵⁴. Adapted from NOAA DRAFT STUDY, supra note 73, and the Federal Register. The NOAA DRAFT STUDY reports that during fiscal 1983 the coastal states reached agreement with federal agencies and applicants for most activities. There were few unresolved objections. Id. at 11-3.
<table>
<thead>
<tr>
<th>APPELLANT</th>
<th>STATE</th>
<th>TYPE OF PROJECT</th>
<th>SECRETARIAL ACTION</th>
<th>RESULT</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACME Fill Corp.</td>
<td>California</td>
<td>COE/Landfill</td>
<td>Stayed (1984)</td>
<td>Litigation Pending</td>
</tr>
<tr>
<td>Southern Pacific RR</td>
<td>California</td>
<td>COE/Bridge Construction</td>
<td>Sustained (1985)</td>
<td>Bridge Constructed</td>
</tr>
<tr>
<td>Florida RR</td>
<td>Florida</td>
<td>COE/Road</td>
<td>Stayed (1985)</td>
<td>Objection Withdrawn</td>
</tr>
<tr>
<td>Northwest Pacific &amp; Eureka South RR</td>
<td>California</td>
<td>ICC/RR Acquisition</td>
<td>Dismissed (1985)</td>
<td>Litigation Pending</td>
</tr>
<tr>
<td>EXXON Co. USA</td>
<td>California</td>
<td>MMS/OCS Development</td>
<td>Stayed (1985)</td>
<td>Appeal Reopened</td>
</tr>
<tr>
<td>Union Oil Co.</td>
<td>California</td>
<td>MMS/OCS Exploration</td>
<td>Sustained (1985)</td>
<td>Oil Exploration</td>
</tr>
<tr>
<td>EXXON Co. USA</td>
<td>California</td>
<td>MMS/OCS Exploration</td>
<td>Denied (1984)</td>
<td>Litigation Pending</td>
</tr>
<tr>
<td>Gulf Oil Co.</td>
<td>California</td>
<td>MMS/OCS Exploration</td>
<td>Sustained (1985)</td>
<td>Oil Exploration</td>
</tr>
<tr>
<td>Cities Service Oil</td>
<td>California</td>
<td>MMS/OCS Development</td>
<td>Withdrawn (1986)</td>
<td>Plan Revised</td>
</tr>
<tr>
<td>City of Hudson</td>
<td>New York</td>
<td>HUD/UDAG Grant</td>
<td>Stayed (1986)</td>
<td>Appeal Withdrawn</td>
</tr>
<tr>
<td>Civil Designs, Inc.</td>
<td>Massachusetts</td>
<td>Marina/Wetland Fill</td>
<td>Withdrawn (1986)</td>
<td>Plan Revised</td>
</tr>
<tr>
<td>Ronald Lafferty</td>
<td>New Jersey</td>
<td>COE/Bulkhead</td>
<td>Stayed (1986)</td>
<td>Pending</td>
</tr>
<tr>
<td>Chevron USA</td>
<td>California</td>
<td>MMS/OCS Development</td>
<td>Withdrawn (1986)</td>
<td>Plan Revised</td>
</tr>
</tbody>
</table>

† Adapted by Authors from NOAA DRAFT STUDY, supra note 68, and the Federal Register (up to Jan. 1987).
Location of Oil and Gas activities appealed to the Secretary of Commerce:

Exxon Santa Ynez Unit Appeal
Exxon Santa Rosa Unit Appeal
(Thresher Shark Case)
Union Oil Appeal
Gulf Oil Appeal
a. Union Oil Appeal

In 1983, the Secretary overturned an objection by the California Coastal Commission (Commission) to an OCS “plan of exploration” (POE) proposed by the Union Oil Company. The Commission objected to Union’s plan to drill an exploratory oil well within the boundaries of the Santa Barbara Channel Islands National Marine Sanctuary and the buffer zone of the northbound shipping lanes because of possible adverse impacts upon an endangered species, and vessel traffic safety concerns. The Secretary found that the likelihood of an oil spill resulting from exploratory drilling was so remote that there was minimal risk of damage to the endangered California Brown Pelican, whose breeding grounds are located in the Marine Sanctuary. The Secretary also found that temporary drilling operations posed no significant safety hazards to vessel traffic in adjacent shipping lanes.

b. Gulf Oil Appeal

In 1986, the Secretary overturned another objection by California to a POE proposed by Gulf Oil in the northern Santa Maria Basin. The State’s objection sought to postpone OCS oil and gas activities until additional information could be made available and further planning could be performed. The Secretary, however, held that delaying exploration pending further studies was unreasonable. He narrowly construed the

---

155. 43 U.S.C. § 1331(k) defines “exploration” as:

the process of searching for minerals, including (1) geophysical surveys where magnetic gravity, seismic, or other systems are used to detect or imply the presence of such minerals, and (2) any drilling, whether on or off known geological structures, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery which is needed to delineate any reservoir and to enable the lessee to determine whether to proceed with development and production.


157. The International Maritime Organization has established five-hundred-meter buffer zones adjacent to the northbound and southbound vessel traffic lanes in the Santa Barbara Channel. While no permanent structures are permitted in the traffic lanes, in some circumstances temporary structures have been placed in the buffer zones.

158. Secretary of Commerce, Decision and Findings in the Consistency Appeal of Union Oil Company of California to an Objection from the California Coastal Commission 13 (Nov. 9, 1984) [hereinafter Union Oil Appeal]. Although oil and gas drilling is prohibited in new leases within the Channel Islands Marine Sanctuary, Union had obtained its lease prior to the enactment of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1439 (1982 & Supp. III 1985), and the company therefore received federal approval for its drilling operations within the Sanctuary.

159. Union Oil Appeal, supra note 158, at 14.


161. Id. at 23; see infra note 163.
"cumulative impacts"\textsuperscript{162} from oil-related projects to include only those impacts from an adjoining six-tract area\textsuperscript{163} and discounted the state's concern about extensive development projected in the Santa Barbara Channel and the Santa Maria Basin.\textsuperscript{164}

c. Exxon Santa Rosa Unit Appeal

In 1985, the Secretary upheld an objection by the State of California to a POE proposed by Exxon Company, U.S.A.\textsuperscript{165} The State, which objected because the POE interfered with commercial fishing operations in the Santa Barbara Channel, specifically permitted drilling from Novem-

\begin{footnotes}
\footnote{162. In Gulf Oil Appeal, \textit{supra} note 160, the Secretary defined "cumulative impacts" as: the effects of an objected-to activity when added to the baseline of other past, present, and reasonably foreseeable future activities occurring \textit{in the area of, and adjacent to}, the coastal zone in which the objected-to activity is likely to contribute to adverse effects on the natural resources of the coastal zone. \textit{Id.} at 8 (emphasis added).

In contrast, California's approved CMP defines "cumulative effects" to mean that "the incremental effects of an individual project shall be reviewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." \textit{CAL. PUB. RES. CODE} \textsection{} 30105.5 (West 1986). Similarly, the NEPA regulations define "cumulative impact" as:
The impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. \textit{40 C.F.R.} \textsection{} 1508.7 (1986).

163. Due to the Secretary's narrow construction, only the adverse cumulative impacts of oil and gas related activities from an adjoining six-tract area in the northern Santa Maria Basin were considered. See \textit{supra} note 160 and accompanying text. This construction eliminated from consideration the extensive impacts of new oil discoveries and related development in the Santa Barbara Channel and southern Santa Maria Basin, where, during the next five years, the number of platforms are expected to increase from 16 to 29 and production is expected to increase from 138,000 barrels per day (BPD) to 550,000-600,000 BPD. Response by the California Coastal Commission to Appeal by Gulf Oil Co. of Objection to Consistency Certification CC-31-84, Plan of Exploration on OCS-P-0505, May 31, 1985, at 21.


165. See Exxon Santa Rosa Unit Appeal, \textit{supra} note 109. In Exxon Corp. v. Fischer, No. 85-6572 (9th Cir. 1986), the Ninth Circuit Court of Appeals recently reversed a district court judgment invalidating California's objection. See infra notes 250-53 and accompanying text.}

ber to May (the "drilling window"), when conflicts with the drift-net thresher shark fishery would be minimized. The Secretary held that the "drilling window" was a reasonable available alternative and upheld the state's objection. 166

d. Exxon Santa Ynez Unit Appeal

In 1984, Exxon appealed an objection by the State of California to a "development and production plan" (DPP)167 in the Santa Barbara Channel.168 The DPP called for the construction of four offshore platforms, pipelines to shore, and two transportation options. The first transportation option (Option A) expanded an existing offshore storage and treatment facility (OS&T) located just outside state waters. The second option (Option B) proposed a nearshore marine terminal and an onshore treatment facility.

The California Coastal Commission objected to expanding the OS&T in Option A because of inadequate information pending the completion of both the required Environmental Impact Statement (EIS)169 and a study on the feasibility of using a cross-country crude oil pipeline as an alternative to transporting the oil to Gulf Coast refineries by marine tankers through the Panama Canal. The Secretary made partial findings,170 but stayed the appeal pending completion of the studies. The

---

166. Exxon Santa Rosa Unit Appeal, supra note 109, at 15.
167. 43 U.S.C. § 1331(f) defines "development" as "those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered."
169. The OCSLA regulations provide that preparation of an EIS "shall not" extend the six-month deadline for consistency reviews. 30 C.F.R. § 250.34-2(e)(3) (1986). The CZMA regulations, however, require that applicants for federal permits, including OCS plans, "furnish the State agency with necessary data and information along with the consistency certification." 15 C.F.R. § 930.58(a), .77(b)(1) (1986). The Secretary's decision in Exxon Santa Ynez Unit Appeal, supra note 168, supports the Commission's position that an EIS is necessary information that must be furnished before a state can properly act on the consistency certification.
170. The Secretary's partial findings held that: (1) the activity furthered one or more of the competing objectives or purposes of the CZMA; (2) that the production of oil and gas from the Santa Ynez Unit (SYU) was in the national interest; (3) that the project as proposed would not violate Clean Air Act or Clean Water Act requirements; and (4) that the production of oil and gas from the SYU would directly support national defense objectives. The Secretary delayed determining: (1) whether the adverse effects of Option A outweighed its contribution to the national interest; (2) whether a reasonable alternative existed; and (3) whether national defense and security interests would be significantly impaired if Exxon could not develop SYU under Option A. See Public Comments Solicited, 51 Fed. Reg. 39,778 (1986).
parties subsequently agreed to an additional stay pending action on Option B by the County of Santa Barbara.

In September 1986, Exxon rejected the permit issued by the County of Santa Barbara for its Option B onshore treatment facility because the permit required Exxon to offset the project's air emissions to the extent that they adversely affected the County's air quality. Exxon subsequently petitioned the Secretary to reopen its appeal and to override California's objection to Option A, on the ground that Option B was no longer a reasonable alternative. In October 1986, the Secretary resumed processing the appeal and conducted a public hearing.

e. Southern Pacific Appeal

In 1985, the Secretary overruled an objection by California to a proposal by the Southern Pacific Transportation Company to reconstruct a railroad bridge across the Santa Ynez River on the Vandenberg Air Force Base. The project required a COE dredge and fill permit under section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act. The California Costal Commission objected to: the filling of an unchannelized stream; the loss of lagoon, salt marsh, and mudflat habitat; and the permanent armoring of the channel. The Secretary, however, held that the environmental benefits of redesigning the bridge to eliminate channelization and to improve river circulation did not justify the added costs and, therefore, was not a "reasonable alternative."

f. Worthy Appeal

In 1984, the Secretary upheld an objection by North Carolina to a COE permit issued to Ford S. Worthy, a private developer, who proposed to construct a marina in North Carolina's coastal zone. The Secretary found that the adverse impacts on water quality from illicit sewage discharges and increased runoff outweighed any national interest benefits derived from the proposed marina.

171. Exxon told the County of Santa Barbara, "You can stick by your agreements or you can stick it in your ear." N.Y. Times, Sept. 7, 1986, § I, at 26.
173. See Secretary of Commerce, Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Co. to an Objection from the California Coastal Commission (no date), summarized at 50 Fed. Reg. 41,722 (Dep't Comm. 1985) [hereinafter Southern Pacific Appeal].
177. See Secretary of Commerce, Decision in the Consistency Appeal of Ford S. Worthy, Jr., to an Objection from the North Carolina Department of Natural Resources and Community Development (May 9, 1984), summarized at 49 Fed. Reg. 23,906 (1984) [hereinafter Worthy Appeal].
178. Id. at 8-11.
3. **Trends**

In acting on these appeals, the Secretary has comprehensively reviewed the impacts of coastal and ocean related development. Public hearings have been held, when requested, and federal agency comments have been solicited on the proposed activities' impacts on the national interest and security. The number of appeals pending, stayed, dismissed (on procedural grounds), or withdrawn (seventeen of twenty-two filed)\(^{179}\) indicates that the Secretary is inclined to avoid decisions on substantive grounds where procedural or political solutions are available. Nevertheless, the Department of Commerce's consistency appeals mechanism has emerged as an important method of resolving state-federal conflicts that involve significant ocean and coastal resource issues.

The Secretary's six decisions constitute a modest but compelling body of precedent. The decisions demonstrate that state objections to OCS oil and gas activities may be upheld when alternative development scenarios are available.\(^{180}\) Thus far, the Secretary has refused to override objections on national security grounds. The Secretary, however, has determined that the potential economic benefits derived from such activities as OCS oil exploration and railroad construction generally outweigh their adverse environmental impacts on coastal uses and resources. The following subsections explore the trends emerging from these decisions.

**a. Competing National Objectives Are Construed Broadly Against the States**

The first requirement of the four-part test to determine whether a project is "consistent with the objectives or purposes of the Act"\(^ {181}\) is that the project further one or more of the "competing national objectives" of the CZMA contained in sections 302 and 303.\(^ {182}\) To date, the Secretary has found in every appeal that one or more of the CZMA's "competing national objectives" is furthered. The Secretary has reasoned that "because Congress has broadly defined the national interest in coastal management to include both protection and development of coastal resources, this element will 'normally' be found to be satisfied on appeal."\(^ {183}\) This all-encompassing statement makes it difficult to envision a state objection that would be upheld because a project did not further one or more of the competing national objectives or purposes of the CZMA.\(^ {184}\)

---

179. See supra Table II.
180. See, e.g., Exxon Santa Rosa Unit Appeal, supra note 109.
182. 15 C.F.R. § 930.121(a) (1986); see supra notes 152-53 and accompanying text.
184. In the Gulf Oil Appeal, supra note 160, the California Coastal Commission argued that the Secretary had incorrectly construed §§ 302 and 303 of the CZMA "and render[ed]
b. **National Interest Benefits of OCS Energy Development Outweigh Adverse Environmental Impacts**

The second requirement of the four-part test is that the project's national interest contributions outweigh its adverse individual and cumulative environmental impacts. Only once, where the Secretary found little evidence that the proposed marina in the *Worthy Appeal* would promote the national interest, did the Secretary determine that the adverse environmental effects of a project were substantial enough to outweigh national interest considerations.

When states have challenged OCS oil and gas activities, however, the Secretary has determined that the national interest benefits accruing from the potential increase in domestic oil and gas production have outweighed the adverse environmental impacts upon an endangered species, navigational safety, and commercial fishing operations. For example, in the *Union Oil Appeal*, the Secretary determined that the risks of a spill from oil and gas exploration were so low that they posed no substantial threat to the environment, even when conducted in the sensitive Santa Barbara Channel Islands National Marine Sanctuary. Even Southern Pacific's proposal for reconstructing a railroad bridge was found to provide national interest benefits outweighing the adverse environmental impacts upon a stream and lagoon habitat.

---

[the first] element meaningless in deciding appeals on oil and gas projects." Commission's Response, *supra* note 163, at 5. The Commission also argued that:

it was not the intent of Congress, in enacting the CZMA, to promote energy self-sufficiency or the exploration and development of OCS oil and gas resources. This is a worthy goal and is promoted by other federal statutes, such as [the OCSLA]. But Congress intended the CZMA to provide a mechanism to assure that OCS activities are conducted in a manner consistent with state coastal management programs. This is the essence of the Act. . . . In fact, the purposes and objectives of the CZMA, as established in Sections 302 and 303, chiefly deal with the protection of coastal resources.

*Id.* at 7-8.

185. See 15 C.F.R. § 930.121(b) (1986).
186. See *Worthy Appeal, supra* note 177.
187. See *Union Oil Appeal, supra* note 158; *Gulf Oil Appeal, supra* note 160; *Exxon Santa Rosa Unit Appeal, supra* note 109.
188. The Secretary found that:

While I have little doubt that a major oil spill resulting from Appellant's exploratory activities . . . would threaten injury to the endangered California brown pelican and to its breeding, nesting and feeding grounds, I am persuaded by the information in the record of this appeal (particularly, the oil spill risk analysis submitted by the Appellant and the MMS) that the risk of a spill occurring during the Appellant's proposed exploratory drilling is very low, and, therefore, that the risk of injury to the endangered brown pelican and its habitat and to the other natural resources of the coastal zone is also very low . . .

*Union Oil Appeal, supra* note 158, at 13. The Secretary also was persuaded to override the objection and to permit the exploratory activities in the sanctuary because Union proposed mitigation measures and agreed to install a production platform outside the sanctuary, if such an action was commercially viable. *Id.* at 20.

189. See *Southern Pacific Appeal, supra* note 173, at 15.
Moreover, the Secretary has narrowly construed the requirement to assess adverse "cumulative" effects.\textsuperscript{90} His interpretation minimizes the consideration of potentially significant adverse impacts from extensive OCS oil and gas activities, particularly in the Santa Barbara Channel and the Santa Maria Basin. Thus, the Secretary's balancing of adverse individual and cumulative environmental effects is unlikely to result in a decision to uphold a state objection intended to protect the environment, especially where OCS oil and gas resources are concerned.

c. The Secretary Has Improperly Delegated His Authority to Determine Compliance with the Clean Air Act (CAA) and the Clean Water Act (CWA)

The third override requirement is that an activity must not violate any requirements of the CAA or the CWA.\textsuperscript{91} In two appeals, states objected to proposed activities for fear that OCS oil and gas activities would violate onshore ambient air quality standards established under the CAA.\textsuperscript{92} In both cases, the Secretary delegated his authority under the CZMA consistency regulations to the Department of the Interior, which regulates emissions from OCS oil and gas activities not under the CAA but under the OCSLA.\textsuperscript{93} Similarly, when states raised concerns about the effects of discharges from drilling muds and cuttings, the Secretary delegated his authority to determine CWA compliance to EPA, which issues National Pollution Discharge Elimination System (NPDES)

\textsuperscript{90} See supra notes 162-63.

\textsuperscript{91} See 15 C.F.R. § 930.121(c) (1986).

\textsuperscript{92} See, e.g., Gulf Oil Appeal, supra note 160; Exxon Santa Ynez Unit Appeal, supra note 168.

\textsuperscript{93} See Gulf Oil Appeal, supra note 160, at 20; Exxon Santa Ynez Unit Appeal, supra note 168, at 13. In both appeals, the Secretary cited California v. Kleppe, 604 F.2d 1187 (9th Cir. 1979), in which the court held that EPA air emission regulations were inapplicable to OCS oil and gas activities because, under the OCSLA, Congress granted authority to the Department of the Interior to regulate OCS air emissions. Although the court held that "simultaneous jurisdiction by the EPA over the OCS would impair or frustrate the authority which Section 1334 [of the OCSLA] grants to the Secretary," id. at 1193-94, it also noted that the Secretary of the Interior must "assure that offshore operations do not prevent attainment of air quality standards," id. at 1196.

The court in Kleppe, however, did not hold that the Secretary of the Interior should determine the onshore air quality impacts from OCS oil and gas activities. Such impacts are regulated under the CAA, 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985), and, according to the CZMA, the requirements of the CAA as well as the CWA "shall be incorporated in any [state CMP program] and shall be the water pollution control and air pollution control requirements applicable to such program." 16 U.S.C. § 1456(f). The Secretary reasoned that because OCS activities must comply with the Department of the Interior's regulations, and because those regulations must assure the attainment of onshore air quality, by necessity such activities also will comply with state air quality standards. See Exxon Santa Ynez Unit Appeal, supra note 168, at 13. The Secretary failed to consider whether the Department of the Interior's regulations did in fact assure the attainment of onshore air quality standards under the CAA, thus abdicating his responsibilities under the CZMA regulations to determine CAA compliance. See 15 C.F.R. § 930.121(c) (1986).
permits for all OCS discharges.\textsuperscript{194}

Although the CZMA consistency regulations require the Secretary to determine CAA and CWA compliance independently, the Secretary has apparently delegated his authority in order to avoid possible conflicts with Interior and EPA. The County of Santa Barbara, environmental organizations, and the State of California have challenged the propriety of these delegations in the \textit{Santa Ynez Appeal}.\textsuperscript{195}

d. \textit{The States' Best Argument Is the Reasonable Available Alternative}

The fourth override requirement is that there be no reasonable alternatives available (such as modifications in project location or design) that would permit the activity to be conducted in a manner consistent with state CMP policies.\textsuperscript{196} Thus far, the only decision to uphold an objection to OCS oil activities was based upon the finding that a "drilling window" provided Exxon with a "reasonable available alternative" to conduct its exploratory drilling operations.\textsuperscript{197}

The Secretary has determined that a reasonable alternative "may involve major changes in the 'location' or 'design' of a proposed project."\textsuperscript{198} The Secretary rejected arguments that the alternative must be "immediately available" without further action by federal, state, or local agencies.\textsuperscript{199} An applicant, however, will not be required to adopt an "unreasonable" alternative, and the costs of the alternative will be weighed against its benefits to determine reasonableness.\textsuperscript{200} Nevertheless, the Secretary's consideration of alternatives provides states with significant latitude in structuring conditions necessary to assure consistency with management program policies.

e. \textit{The Secretary Has Avoided Relying on National Security and Defense Interests to Override State Decisions}

Even if state objections satisfy the four requirements noted above, the objections may be overridden if the Secretary finds that a project is "necessary in the interest of national security."\textsuperscript{201} The regulations define this test as follows:

A national defense or other national security interest would be signifi-

\textsuperscript{194} 33 U.S.C. §§ 1311(a), 1342 (1982).
\textsuperscript{195} \textit{See} Statement of County of Santa Barbara in Opposition to Exxon Santa Ynez Unit Appeal, December 31, 1986, at 18; Comments of the Natural Resources Defense Council and Greenpeace in Support of the California Coastal Commission's Consistency Objection to Exxon Santa Ynez Unit, December 31, 1986, at 26-27.
\textsuperscript{196} 15 C.F.R. § 930.121(d) (1986).
\textsuperscript{197} Exxon Santa Rosa Unit Appeal, \textit{supra} note 109.
\textsuperscript{198} Exxon Santa Ynez Unit Appeal, \textit{supra} note 168, at 14.
\textsuperscript{199} \textit{Id.} at 15.
\textsuperscript{200} \textit{See} Southern Pacific Appeal, \textit{supra} note 173.
\textsuperscript{201} 16 U.S.C. § 1456(c)(3)(A).
cantly impaired if the activity were not permitted to go forward as proposed. . . . The Secretary will seek information to determine whether the objected-to-activity directly supports national defense or other essential national security objectives.202

The Secretary has not yet overridden an appeal on national security or defense grounds. In each case, the Secretary has sought the advice of the Department of Defense and other interested federal agencies.203 Many of these agencies, along with the oil and gas industry, have urged the Secretary to override objections to all OCS oil and gas activities on national security grounds. They have argued that there are broad national security benefits inherent in securing domestic energy resources and alleviating future energy-supply disruptions.204

Although the Secretary must seek advice from other federal agencies, the final decision requires his independent judgment.205 The Secretary has noted that it has not been shown how the national security would be "significantly impaired" by the disapproval of a single plan of exploration.206 He has looked to the nature of the project and the size of the resource, and found that proposals to explore areas of limited oil potential have less national security benefit than plans to develop large oil and gas fields.207

Conversely, the development and production of large oil and gas fields can "directly support" national security objectives of peacetime military readiness and "warfighting sustainability."208 In such circum-

203. See, e.g., Exxon Santa Rosa Unit Appeal, supra note 109; Exxon Santa Ynez Unit Appeal, supra note 168; Southern Pacific Appeal, supra note 173.
204. For example, the Department of the Interior and the Department of Energy (DOE) consistently have argued this position when asked by the Secretary to comment on appeals. See Letter from Danny J. Boggs, Deputy Secretary, DOE, to Anthony J. Calio, Deputy Administrator, NOAA (Aug. 5, 1985); Letter from J. Steven Griles, Deputy Assistant Secretary, Land & Minerals Management, to Anthony J. Calio, Deputy Administrator, NOAA (Aug. 7, 1985); see also Gulf Oil Appeal, supra note 160, at 25.
206. In the Union Oil Appeal, the Secretary found that:
Interior commented that failure to develop the appellant's oil reserves of approximately 31 million barrels would 'significantly impair' the national security interest but the Department of Defense, the agency principally concerned with national security, and none of the other Federal agencies submitting comments identified any national security interest directly supported by Appellant's exploratory drilling that would suffer significant impairment if the project could not be carried out as proposed.

Union Oil Appeal, supra note 158, at 24. The Secretary made similar findings in the Exxon Santa Rosa Unit Appeal, supra note 109, at 17, and the Gulf Oil Appeal, supra note 160, at 24-25.
207. See Exxon Santa Ynez Unit Appeal, supra note 168. Exxon's DPP for the Santa Ynez Unit (SYU) called for the production of 300-400 million barrels of oil and 600-700 billion cubic feet of gas.
208. Id. at 26. But the Secretary deferred determining whether such objectives would be "significantly impaired" until completion of the necessary environmental studies and state and local permit actions. Id.
stances, the Secretary will determine whether there are alternatives to the proposed project that meet national security objectives and that are consistent with a state’s CMP. Thus, an objection to a large development plan would probably have to include some alternative proposal for developing the resources to be upheld by the Secretary. By balancing national and state interests, and by requiring the consideration of alternatives that are consistent with both the state CMP and national security interests, the Secretary has narrowed the focus of the national security grounds for overriding state objections in accordance with his duty “to reconcile national security needs and the State [CMP] in the case of conflicts.”

C. Consistency and the Courts

When the administrative process cannot settle federal consistency conflicts, they often require resolution in the courts. As a result, courts are redefining the scope of state authority under the CZMA consistency provisions.

I. Federal Activities

a. Lease Sales

As discussed above, in Secretary of the Interior v. California the Supreme Court held that the Department of the Interior’s OCS oil and gas leasing program was not subject to state consistency review because lease sales are not a federal activity “directly affecting” the coastal zone within the meaning of section 307(c)(1) of the CZMA. Although the

209. See id. at 26-27.
210. Id. at 26 (citing S. REP. No. 753, 92d Cong., 2d Sess. 19 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 211).
211. See supra notes 50-53 and accompanying text. Prior to Secretary of the Interior v. California, 464 U.S. 312 (1984), 28 federal OCS oil and gas lease sales were reviewed by states for consistency with the states’ approved CMP’s. See supra Table I. Ten objections were raised and, as a result, five lawsuits were filed. See supra note 138.

In Secretary of the Interior v. California, the Court did not address contradictory findings by district and appellate courts regarding the scope of the proposed activity’s effects that the state is authorized to consider. For example, in Kean v. Watt, No. 82-2420 (D.N.J. Sept. 7, 1982) (Proposed Resale No. 2), vacated as moot, No. 82-5679 (3d Cir. 1984), the district court held that although lease sales must be consistent with state CMP policies under the CZMA, the state’s review is confined to the effects of leasing activities on the natural resources of the coastal zone; therefore, effects on the state’s commercial fishing industry could not be considered. The district court, however, in Conservation Law Found. v. Watt, 560 F. Supp. 561 (D. Mass. 1983) (Sale 52), aff’d, 716 F.2d 946 (1st Cir. 1983), took the opposite view. The court found that Congress intended a broad definition of the term “directly affecting” and that “not only the ecological but also the social and economic effects of a proposed Federal agency action are included in the scope of the Act.” Id. at 575. Both cases have played prominent roles in the pleadings to Exxon Corp. v. Fischer, No. 84-2362 PAR (C.D. Cal. Oct. 11, 1985), rev’d on other grounds, No. 85-6572 (9th Cir. Jan. 7, 1987). See supra notes 105-10 and accompanying text; infra notes 244-50 and accompanying text.
Court relied primarily on its reading of the legislative history of the term “directly affecting,” it also noted that states may provide comments to the Secretary of the Interior on lease sales under the OCSLA and its 1978 amendments and may review subsequent OCS exploration or development and production plans under their CZMA federal consistency authority. Therefore, the Court reasoned, Congress intended to “postpone consistency review until the two later stages of OCS planning, and to rely on less formal input from the State Governors and local governments” for lease sales. Although the Court implied in dictum that Congress intended to exclude all federal activities on the OCS from state consistency review, the decision has thus far been limited to excluding only federal OCS oil and gas lease sales.

b. Other Federal Activities

Federal courts have reviewed a number of federal activities within the coastal zone to determine whether the activities satisfy the consistency provisions of section 307(c)(1). The results are somewhat conflicting, but several trends have emerged.

The threshold inquiry is whether the federal activity directly affects the coastal zone. Based on this test, courts have required a diverse and growing number of federal activities to be consistent with state CMP's. These activities have included: the relocation of refugees, the con-

216. See id. at 324.
217. See supra notes 72-75 and accompanying text.
219. See, e.g., Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R.), vacated sub nom. Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981), in which the court found that a federal plan to transfer Cuban and Haitian refugees from Florida to Fort Allen, Puerto Rico, would have “a direct effect on the designated coastal zone” and required the plan to be consistent with Puerto Rico's CMP. Id. at 1060. The court held that the consistency requirements applied because of the federal plan’s effect on the coastal zone (resulting from construction and waste discharges), despite the fact that the activity would take place on federal lands. The First Circuit Court of Appeals vacated the district court’s injunction after a consent agreement, between the federal government and the Commonwealth of Puerto Rico, in which the United States agreed to operate Fort Allen in compliance with various requirements. Marquez-Colon v. Reagan, 668 F.2d 611, 613 (1st Cir. 1981).

The same district court had previously held that naval training maneuvers on federal lands and waters located in and adjacent to the coastal zone were not subject to state consistency review. See Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979), rev’d on other grounds, 456 U.S. 305 (1982) (1st Cir. 1980), rev’d sub nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982). There, the district court held that the maneuvers had a “negligible” impact on the coastal zone and that activities on Navy-owned lands fell within the CZMA’s “defense establishment” exclusion. Id. at 683.

The district court in Puerto Rico v. Muskie distinguished Barcelo v. Brown on two grounds. First, “the issue of applicability of the CZMA” had not been decided in Barcelo.
struction of federal docking facilities, federal highway projects, and federal sewer grants.

Conversely, when courts have determined that federal activities do not directly affect the coastal zone, they have not required the federal agencies involved with those activities to comply with state consistency requirements. For example, a court upheld a decision of the General Services Administration not to file a consistency determination for the transfer of federal land (two Nike missile sites on Oahu) to private ownership because the "mere transfer of title does not directly affect the coastal zone or the State's management program. It does not change the way in which the land is being utilized." A different court, however,

Second, Fort Allen, where the Cuban and Haitian refugees were relocated, did not qualify for the same "defense establishment" exclusion. See infra notes 284-88 and accompanying text.

220. See Save Lake Wash. v. Frank, 641 F.2d 1330 (9th Cir. 1981). In this case, NOAA undertook the construction of docking facilities in Lake Washington. NOAA had complied with the CZMA requirements by submitting a consistency determination to several state agencies. The court required consistency with Washington's CMP because the project directly affected the coastal zone, but it held that NOAA was entitled to rely on approval by state agencies despite their mistaken assumption that the CZMA was inapplicable. See id. at 1338-39.

221. See Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149 (D. Haw. 1982). In Rankin v. Coleman, 394 F. Supp. 647 (E.D.N.C. 1975), the court refused to apply state CMP standards to a federal highway project because North Carolina had neither designated nor adopted standards to implement "areas of special environmental concern" in its CMP. Id. at 660. North Carolina's federal consistency authority under the CZMA, however, was not at issue in Rankin. See id. Instead, the opinion was based upon the Federal-Aid Highway Act, 23 U.S.C. § 128 (1982), which requires states to certify that plans for federal highway assistance are consistent with the goals and objectives of urban planning promulgated by the community.

222. See Cape May Greene v. Warren, 698 F.2d 179 (3d Cir. 1983), in which the court held that an EPA grant to construct a sewage treatment plant under the CWA cannot prohibit development that is consistent with an approved state CMP. The court found that state policies allow the construction of housing in floodplains under certain reasonable conditions—i.e., elevation of all structures one foot above the base-flood level. EPA's policies prohibiting such development were not directly related to its authority under the CWA but were based upon the NEPA, 42 U.S.C. §§ 4321-4370 (1982 & Supp. III 1985), and Executive Order 11,988, 42 Fed. Reg. 26,951 (1977). Therefore, by not acting in accordance with state management program policies, EPA demonstrated that its actions were "arbitrary" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). Cape May Greene, 698 F.2d at 189-92. The court also held that while federal standards could be stricter than state standards in approving federal activities under § 307(c)(1), the same standards do not apply for federal assistance under § 307(d). See id. at 191.

A somewhat contrary result was reached in Loveladies Harbor, Inc. v. Baldwin, 20 Env't Rep. Cas. (BNA) 1897 (D.N.J. 1984), in which the court upheld a COE denial of a CWA permit to fill a wetland, even though New Jersey had approved the project under its CMP. Despite the state approval, the court found that the fill actually violated the state CMP and was approved only to settle litigation. See id. at 1902. The court distinguished Cape May Greene on the ground that, unlike EPA in Cape May Greene, COE appropriately exercised its CWA authority to protect wetlands. See id. at 1901.

223. Ono v. Harper, 592 F. Supp. 698, 700 (D.C. Haw. 1983). The court, however, affirmed the requirement for a consistency determination when any federal activity directly affects the coastal zone, even though the CZMA excludes federal property from the definition of the coastal zone. See id. The court also observed that the conveyance was subject to any
FEDERAL CONSISTENCY DOCTRINE

held that leasing a naval shipyard (Hunters Point on the San Francisco Bay) to a private lessee may have detrimental economic and environmental effects on the surrounding coastal zone and, therefore, "fall[s] within the zone of interests sought to be protected by the CZMA."224

The application of the federal consistency provisions will continue to evolve as states attempt to extend their CZMA consistency authority to other federal activities, such as the adoption of fishery management plans under the Fisheries Conservation and Management Act,225 or the acquisition, by condemnation, of land by the Department of the Navy.226

2. Federally Permitted Activities

Federal courts have reviewed a number of federally permitted activities to determine whether the consistency requirements of section 307(c)(3)(A) apply. Several cases involve COE wetland dredge and fill permits issued under the Clean Water Act227 and the Rivers and Harbors Appropriation Act of 1899.228 COE sued in United States v. Ciam...
to enjoin the filling of a coastal wetland for residential development. The CZMA was raised as a defense on the grounds that the New Jersey CMP preempted COE jurisdiction and that state and local permits had been received. The court, however, found that the CZMA recognizes that federal standards may be more restrictive than state standards. More significantly, the court held that the CZMA provisions do not arise until the applicant has applied for a consistency certification. State consistency authority, therefore, does not negate the requirement that a COE permit be obtained prior to filling a wetland.

In *Loveladies Harbor, Inc. v. Baldwin*, COE denied a permit to fill a wetland despite state approval of the project. The court found that the wetland fill violated state CMP policies and was only approved to settle litigation. Therefore, COE's denial was upheld as consistent with the state's CMP.

In *Southern Pacific Transportation Co. v. California Coastal Com-

---

231. *Id.* at 496. In *Ciampiti*, the developer's project had not yet been specifically approved, nor was it even specifically authorized by the New Jersey management program. In fact, the State prohibited filling wetlands without a permit. Citing *Secretary of the Interior v. California*, the court observed that COE's effort to enjoin the defendant's private activities was not a federal activity, development, or permit subject to state consistency provisions under the CZMA. *Id.* at 497.
232. 15 C.F.R. § 930.39(d) (1986) provides that, when Federal agency standards are more restrictive than standards or requirements contained in the State's management program, the Federal agency may continue to apply its stricter standards.” Note, however, that this provision was not applied to federal assistance in *Cape May Greene*. See infra note 222 and accompanying text.
233. *Id.* at 1897, 1902. Procedural issues predominated in several cases involving consistency review of COE permits. In Quinones Lopez v. Coco Lagoon Dev. Corp., 562 F. Supp. 188 (D.P.R. 1983), a COE permit to deposit fill on wetlands was challenged on the ground that COE had not required the applicant to file a consistency certification. The court noted that the state's CMP did not establish procedures for approving consistency certifications. The court held that, given the absence of more formal certification procedures in the CMP, COE had complied with the spirit of the CZMA by notifying the appropriate state agency of its permit decision and subsequently receiving a positive reply. *Id.* at 194. The court also found that the COE permit neither required an EIS under the NEPA nor a public hearing under COE regulations. *Id.* at 192-93.

A California Court of Appeal recently ruled that the issuance of a COE permit for the expansion of landfill operations inland of the coastal zone required a consistency certification. See *Acme Fill Corp. v. San Francisco Conservation and Dev. Comm'n*, No. A 032318 (Cal. Ct. App. Dec. 11, 1986). The court held that state consistency review is required “for any activity, wherever located, which will have consequences for the [coastal zone] . . . . Consistency is measured by looking at the effect an activity has in the coastal zone and seeing if that effect is consistent with the state's management program.” *Id.* slip op. at 20 (emphasis added). The State's CMP designated the proposed fill-site for water-related industry; because the permit to expand the landfill was incompatible with that designation, the court upheld the State's objection. See *id.* at 6.
mission. The court held that railroad abandonment permits issued by the Interstate Commerce Commission (ICC) must be reviewed for consistency with the California CMP because removing tracks and dismantling the right of way constitutes "development" under California's CMP. Nonetheless, the court in No Oilport! v. Carter ruled that the failure to obtain a consistency certification for a right-of-way permit issued for the Northern Tier Pipeline under the Mineral Lands Leasing Act was "harmless error." The parties agreed that consistency, if required, could be subsequently determined under the State's Energy Facility Site Evaluation Council (EFSEC) permit. Therefore, the court declined to void the right-of-way permit.

3. OCS Oil and Gas Exploration, Development and Production

The CZMA requires that OCS oil and gas exploration, development and production activities be consistent with state CMP's. This requirement played a prominent role in Secretary of the Interior v. California, in which the Supreme Court justified exempting OCS oil and gas lease sales in part on the ground that Congress intended to postpone con-

236. Id. at 803. The court also held that the California Coastal Commission had not waived its right to review the abandonment permit for consistency with the state CMP by failing to notify ICC within 30 days of publication of the notice in the Federal Register because actual notice is required to trigger the state's 30-day review period required under 15 C.F.R. § 930.54(a) (1986). Id. at 807. The court, however, refused to enjoin the ICC abandonment proceedings, because under the Interstate Commerce Act, 28 U.S.C. § 2321(a) (1982), only federal courts of appeals have the authority to review an ICC order. Id. at 808. But see Hoe v. Alexander, 483 F. Supp. 746 (D. Haw. 1980), where the court found that questions related to COE compliance with state CMP policies should be deferred to the state court under the doctrine of federal abstention because the interpretation of state statutes constituting a state CMP is a matter for the state courts. Id. at 749. Because the state's CMP was not adopted prior to the approval, however, a consistency certification was not required. See id.; see also City and County of San Francisco v. United States, 443 F. Supp. 1116 (N.D. Cal.), aff'd, 615 F.2d 498 (9th Cir. 1980).
239. 520 F. Supp. at 369.
240. See id. EFSEC is the body that promulgates and enforces the state standards. Thus, securing a permit from EFSEC assures that all of the state standards have been satisfied. See id.
241. Id. The court also noted that, because the State of Washington had not yet prepared a list of permits for which consistency certifications were required, under 15 C.F.R. § 930.53(b) and (d), the Secretary of the Interior could have overlooked the consistency requirement prior to issuing the right-of-way permit for the project. Id. Regardless of whether this excused the failure to certify consistency, it was "harmless error" under the Administrative Procedure Act, 5 U.S.C. § 706 (1982), because the project could subsequently be certified. Id. at 370. The court also found that the President's selection of the Northern Tier Pipeline Company proposal under the Public Utility Regulatory Policies Act, 43 U.S.C. §§ 2001-2012 (1982 & Supp. III 1985), did not require a consistency certification because neither a license nor a permit was granted by the President. See id. at 369 n.12.
sistency review of OCS oil and gas activities until the exploration, development and production stage, when “[s]tates with approved CZMA plans retain considerable authority to veto inconsistent exploration or development and production plans put forward in those later stages.”

This “considerable” state authority was the subject of recent litigation in Exxon Corp. v. Fischer, the so-called “thresher shark case.” The case arose when the California Coastal Commission (Commission) objected to Exxon’s consistency certification submitted for an OCS plan of exploration in the Santa Barbara Channel on the ground that exploratory drilling would adversely affect commercial thresher shark fishing operations. Exxon appealed to the Secretary, who upheld the Commission’s objection because he found that there was a “reasonable alternative available” (i.e., the drilling window).

Exxon then filed suit in the Central District of California, asserting that the impact on commercial fishing operations caused by OCS exploratory drilling “does not affect a land use or water use in the coastal zone but only has a ‘perceived economic impact.’” The district court agreed. Holding that “only natural resources actually located within the coastal zone” are governed by the CZMA, the court invalidated the Commission’s objection.

The district court narrowly construed the Secretary’s role in reviewing appeals to state objections. The court held that Exxon was not

243. 464 U.S. at 341.
244. No. 84-2362 PAR (C.D. Cal. Oct. 11, 1985), rev’d on other grounds, No. 85-6572 (9th Cir. Jan. 7, 1987). For a complete history and analysis of the case and its administrative record before the California Coastal Commission and Secretary, see Eichenberg, The Thresher Shark Case: Another Challenge to State Coastal Management Authority, 6 TERRITORIAL SEA 1 (1986).
245. See Exxon Santa Rosa Unit Appeal, supra notes 109 & 165-66 and accompanying text.
246. See id. at 15. 15 C.F.R. § 930.121(d) (1986) requires the Secretary to uphold a state objection if there is a “reasonable alternative available.” See supra notes 196-200 and accompanying text.
247. See Exxon Corp. v. Fischer, No. 84-2362 PAR, slip op. at 29 (C.D. Cal. Oct. 11, 1985), rev’d on other grounds, No. 85-6572 (9th Cir. Jan. 7, 1987) (quoting Exxon Santa Rosa Unit Appeal, supra note 109, at 8).
248. Id. at 35. The district court’s decision unduly restricts the statutory terms “land use” and “water use,” which are intended to cover a broad range of economic, industrial, commercial, and social activities occurring in the waters and on the shorelands of the coastal zone. See supra notes 105-14 and accompanying text.

The CZMA itself is laced with economic issues and concerns, and balanced economic development is a major goal of the Act. In § 303(2) of the CZMA, 16 U.S.C. § 1452(2), Congress asserts a national policy to assist the states in developing and implementing CMP’s “giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development.” In § 302(b), 16 U.S.C § 1451(b), Congress describes the coastal zone as a “rich variety of natural, commercial, recreational, industrial and esthetic resources.” A good discussion of the treatment of economic concerns in the CZMA is contained in Conservation Law Found. v. Watt, 560 F. Supp. 561, 575 (D. Mass.), aff’d, 716 F.2d 946 (1st Cir. 1983).
obliged to exhaust its administrative remedies by challenging the Secretary's administrative decision, because the Secretary could not decide whether oil exploration affected the land or water uses of the coastal zone.\textsuperscript{249} The court found that the Secretary's review "is confined to a relatively narrow set of policy considerations which differ significantly from the issue presented in this action—whether the Commission acted within the scope of its authority under substantive provisions of the CZMA."\textsuperscript{250}

The Ninth Circuit Court of Appeals recently reversed the district court's ruling. The court held that the Secretary, acting in a judicial capacity, actually litigated the issue of the coastal zone effects of the activity and the propriety of the objection, resolving the dispute adversely to Exxon.\textsuperscript{251} The court stated that because the Secretary had determined that Exxon's drilling operations affected "land uses and water uses in the coastal zone," Exxon could not "relitigate the issue in a collateral proceeding. . . . Exxon's proper course was to seek judicial review pursuant to the [Administrative Procedure Act]."\textsuperscript{252} The court, however, left open the question whether the Commission was acting to protect state economic interests or whether Exxon could have bypassed secretarial review by going directly to the district court.\textsuperscript{253}

In a similar case, after the Commission objected to Exxon's Santa Ynez Unit OCS development and production plan, Exxon simultane-

\textsuperscript{249} Exxon Corp. v. Fischer, No. 2362 PAR, slip op. at 21-22 (C.D. Cal. Oct. 11, 1985). However, NOAA regulations provide that "the decision of the Secretary shall constitute final agency action for the purposes of the Administrative Procedure Act." 15 C.F.R. § 930.130(d) (1986).

\textsuperscript{250} Exxon, No. 2362 PAR, slip op. at 21-22. The "narrow set of policy considerations" that the court referred to is the Secretary's override criteria found at 15 C.F.R. § 930.121, .122 (1986). See supra note 152 and accompanying text. The court held that these criteria prevent the Secretary from reaching the question whether land or water uses within the coastal zone are affected. Exxon, No. 2362 PAR, slip op. at 21. These criteria, however, explicitly require the Secretary to consider the effects of the activity on the resources and land or water uses of the coastal zone. See 16 U.S.C. § 1456(c)(3)(B). Therefore, in sustaining California's objection, the Secretary found that Exxon's exploratory activities on the OCS would affect coastal uses protected by the California CMP. See Exxon Santa Rosa Unit Appeal, supra note 109, at 7-10.

\textsuperscript{251} See Exxon Corp. v. Fischer, No. 85-6572, slip op. at 8 (9th Cir. Jan. 7, 1987).

\textsuperscript{252} Id. at 9. The court also held: "The Secretary's weighing process necessarily rested on a determination that the State's objection was valid under the CZMA and that the interests it sought to protect were encompassed by the statute. Otherwise there was nothing to which the Secretary could have legitimately subordinated Exxon's interest." Id.

\textsuperscript{253} A California Court of Appeal recently found that a dissatisfied party must appeal to the Secretary before resorting to the courts, even if the Secretary did not decide the precise issue being litigated. The court stated:

[It is manifest that a favorable decision by the Secretary would provide [the party] with the relief it seeks in this action. A ruling by the Secretary in favor of [the party] renders [the] consistency objection ineffective and permits the landfill expansion—exactly what [the party] hoped to accomplish by this litigation.

ously challenged the objection in the Northern District of California and pursued an appeal before the Secretary. The court held that “the administrative proceedings pending before the Secretary . . . must be finally resolved prior to a decision on the merits of Exxon’s claims . . . .” The court refused to act until Exxon exhausted its administrative remedies with the Secretary, stating:

Judicial intervention at this juncture would severely disrupt these ongoing administrative proceedings. In addition, relaxation of the exhaustion requirement in these circumstances would weaken the effectiveness of the Secretary’s mandate and encourage the deliberate bypass of the statutory administrative appeal process . . . . [A] proper decision in this manner can be rendered only through the development of a full record by the Secretary . . . .

4. Summary of the Cases

A growing number of lower court decisions have applied the CZMA’s federal consistency provisions to a diverse number of federal and federally permitted activities. The fate of the federal consistency doctrine, however, is still far from certain.

The Reagan administration and the oil and gas industry have urged the courts to extend the holding in Secretary of the Interior v. California to activities other than OCS oil and gas leasing. They advocate an illogical and unduly restrictive interpretation of the phrases “directly affecting” and “affecting” to exclude such activities as ocean incineration of toxic material, the disposal of nuclear wastes, ocean mining, and the management of fishery resources.

Several important cases, currently in litigation or on appeal, will decide how broadly the consistency doctrine may be applied. Exxon Corp. v. Fischer, the thresher shark case, tests both the authority of states to consider the economic impacts of OCS activities under the federal consistency doctrine and the appropriate role of the secretarial appeal process in resolving consistency disputes. Another action by Exxon challenges

---


255. Exxon Santa Ynez Unit Appeal, supra note 168.


257. Id. at 11. Growing impatient with requests for delays, Judge Samuel Conti of the Northern District of California recently set the matter for trial.


259. See supra notes 52 & 57 and accompanying text.

260. See supra notes 244-52 and accompanying text.
state CMP policies that enforce environmentally preferable oil-transportation policies.\textsuperscript{261}

Finally, the scope of state consistency authority is also likely to be affected by two cases that do not involve consistency provisions. State coastal development permit authority on federal lands is being reviewed by the Supreme Court in \textit{Granite Rock Co. v. California Coastal Commission},\textsuperscript{262} and the ability of states to prohibit marine facilities for offloading coal shipments is currently on appeal in \textit{Norfolk Southern Corp. v. Oberly}.\textsuperscript{263} These cases are discussed in Part III.

\section*{III

\textbf{CONSISTENCY, THE NATIONAL INTEREST, AND FEDERAL-STATE RELATIONS}}

As discussed above, the CZMA's consistency provisions delegate substantial authority to states to review matters of national interest that were previously subject to exclusive federal control. Accordingly, there is controversy over the appropriate scope of state authority, especially over OCS oil and gas exploration, development and production.

The CZMA provides three mechanisms for checking state consistency authority over matters of national concern. First, the Act requires states to "provide for adequate consideration of the national interest" in adopting their CMP's.\textsuperscript{264} NOAA regulations explain in detail how states are to consider the national interest to satisfy this statutory mandate.\textsuperscript{265} The CZMA provides federal agencies with substantial opportunity to review proposed state CMP's and to raise and resolve any issues of national

\begin{itemize}
  \item \textsuperscript{261} See supra notes 254-57 and accompanying text.
  \item \textsuperscript{262} 768 F.2d 1077 (9th Cir. 1985), cert. granted, 54 U.S.L.W. 3508 (U.S. Mar. 31, 1986) (No. 85-1200).
  \item \textsuperscript{263} 632 F. Supp. 1225 (D. Del. 1986).
  \item \textsuperscript{264} 16 U.S.C. § 1455(c)(8) ("[State CMP's shall provide] for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature.").
  \item \textsuperscript{265} 15 C.F.R. § 923.52(c) (1986) requires that in developing, reviewing, and implementing state CMP's, states:
    \begin{enumerate}
      \item Describe the national interest in the planning for and siting of facilities considered during program development.
      \item Indicate the sources relied upon for a description of the national interest in the planning for and siting of the facilities.
      \item Indicate how and where the consideration of the national interest is reflected in the substance of the management program. In the case of energy facilities in which there is a national interest, the program must indicate the consideration given any interstate energy plans or programs, developed pursuant to section 309 of the Act, which are applicable to or affect a State's coastal zone.
      \item Describe the process for continued consideration of the national interest in the planning for and siting of facilities during program implementation, including a clear and detailed description of the administrative procedures and decisions points where such interest will be considered.
    \end{enumerate}
\end{itemize}
interest before the Secretary approves the CMP. Second, the CZMA authorizes the Secretary to periodically evaluate the implementation of state CMP's and to review claims that a state has failed to adequately consider the national interest. If the Secretary determines that the state has not adhered to its CMP and that its deviations are unjustified, the Secretary may withdraw federal funding and approval, thereby revoking the state's federal consistency authority. Third, the CZMA requires the Secretary to consider the national interest and security in reviewing appeals from state objections to federally permitted activities. If activities serve important national interests, the Secretary may allow them to proceed even if they are inconsistent with a state's CMP.

Proponents of limiting the consistency authority of states have sought to impose other checks on state power under the CZMA. They argue that, under the supremacy clause of the United States Constitution, overriding federal interests or legislation other than the CZMA may preempt state consistency authority; under the commerce clause, specific state policies may violate the Constitution if they unduly burden interstate commerce; and some argue that section 307(e) of the CZMA prohibits coastal states from exercising their statutory consistency authority.

These checks on state consistency authority have been asserted in both administrative and judicial review of state objections to federal and federally permitted activities that adversely affect the coastal zone. The remainder of Part III discusses these national interest and constitutional issues. Section A examines the adoption and review of state CMP's with respect to the national interest. Section B discusses the treatment of defense-related federal activities. Sections C and D consider constitutional challenges under the supremacy and commerce clauses, respectively. Fi-

266. See 16 U.S.C. § 1456(c)(3).
267. See id. § 1458.
268. See id. The Secretary, however, may not withdraw federal funding and approval merely because he disagrees with the state's application of its approved CMP policies in specific cases. See id. § 1456(c)(3).
269. See 15 C.F.R. § 903.122 (1986); see also supra notes 149-53 & 202-10 and accompanying text.
270. U.S. CONST. art. VI.
272. U.S. CONST. art. I, § 8, cl. 3.
273. See, e.g., Chemical Waste Management, Inc. v. United States Dep't of Commerce, No. 86-624 (D.D.C. March 6, 1986); see also infra notes 299-315 and accompanying text.
274. 16 U.S.C. § 1456(e) provides in part: "Nothing in this chapter shall be construed . . . (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters . . . (2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies . . . ."
275. See infra notes 317-23 and accompanying text.
nally, Section E explores the impact of section 307(e) of the CZMA on state consistency authority.

A. Adoption and Review of State CMP's: Adequate Protection of the National Interest

An essential element of the CZMA's federal-state partnership to manage and protect coastal uses and resources is its requirement that state CMP's include reasonable policies, standards, and procedures for dealing with land and water use decisions of more than local concern.276 The Secretary has not yet disapproved the adoption of a CMP or withdrawn his approval of a CMP on the ground that state policies fail adequately to consider the national interest.277

The oil and gas industry, however, challenged the Secretary's approval of the California CMP, arguing that the CMP did not "adequately consider the national interest" in accommodating energy development.278 The district court found that the national interest does not require state CMP's to expressly accommodate energy interests. It is sufficient that the "development and decision-making process occur in a context of cooperative interaction, coordination, and sharing of information," and that states consult with appropriate federal agencies.279 The court also found that state CMP's must adequately consider the national interest in the case of energy facilities, such as oil and gas development, in a manner similar to all other uses.280

The Ninth Circuit Court of Appeals affirmed the trial court's decision. It held that because the Secretary administers the CZMA, his decision to approve a state CMP must be given due deference.281 The court also stated that his decision will be upheld if there is a rational basis for the Secretary's findings on the treatment of the national interest by the

---

277. NOAA has, however, recently reprimanded three states, California, Florida, and New Jersey, for failing to approve projects that NOAA believed promoted the national interest in energy development. Coastal Zone Management Newsletter No. 35, at 1-2 (Sept. 19, 1986); see Press Statement, supra note 12; see also infra notes 334-36 and accompanying text.
278. American Petroleum Inst. v. Knecht, 456 F. Supp. 889, 922 (C.D. Cal. 1978), aff'd, 609 F.2d 1306 (9th Cir. 1979). The American Petroleum Institute (API) alleged that California's CMP failed to make an "affirmative commitment" to the national interest because its general lack of specificity and overall antipathy to energy development gave the California Coastal Commission a "blank check" to veto oil and gas exploration and development. Id. at 922. The court rejected API's argument. See infra notes 310-14 and accompanying text.
279. Id. at 923-24.
280. Id. The court also quoted from the CZMA's legislative history, where Congress noted that it "in no way wishes to accelerate the location of energy facilities in the coasts; on the contrary, it feels a disproportionate share are there now. . . . There is no intent here whatsoever to involve the Secretary of Commerce in specific siting decisions." Id. at 924 (quoting H.R. REP. No. 878, 94th Cong., 2d Sess. 45-46 (1976), reprinted in LEGISLATIVE HISTORY, supra note 6, at 931-32).
281. Knecht, 609 F.2d at 1310.
Thus, while the Secretary has the ability to protect the national interest by reviewing and approving state CMP’s, states are also afforded a good deal of flexibility as long as they have provided appropriate mechanisms to equitably consider national interests.

B. Reviewing Defense-Related Projects

A federal district court has interpreted section 304(1) of the CZMA as creating a “defense establishment” exclusion in the definition of the coastal zone that precludes state consistency review of naval maneuvers on a United States Navy base and in offshore waters. The same court, however, subsequently refused to apply the exclusion to an abandoned defense facility that was to be used to relocate Cuban and Haitian refugees. There, the court relied on the effects of the federal activity, not its location on federal lands, to trigger the consistency requirements.

The “exclusion” provided in the CZMA definition of the “coastal zone” undoubtedly limits direct state permitting authority over defense-related projects on federal lands, but it does not limit state review under the CZMA consistency provisions. It is the activity’s effect on coastal uses and resources and not its location that triggers consistency review.

---

282. Id. at 1315. The court held that the issue whether the state would use its federal consistency provisions to improperly halt energy development was not ripe for review. See id. at 1310. It also found that the California program had been properly adopted, contained the requisite degree of specificity, properly coordinated local planning, and assured that local regulations would not unreasonably restrict land and water uses of regional benefit. See id. at 1310-15.

283. 16 U.S.C. § 1453(1). That section provides in part: “[the] requirements [of the CZMA] do not . . . extend state authority to land subject solely to the discretion of the Federal Government such as . . . defense establishments.”

284. Barcelo v. Brown, 478 F. Supp. 646, 682 (D.P.R. 1979), rev’d on other grounds, 643 F.2d 835 (1st Cir. 1982). According to the district court, the “defense establishment” exclusion language of § 304(1) evidenced congressional intent not to “extend state authority to land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and defense establishments.” Id. at 681 (quoting S. REP. No. 753, 92d Cong., 2d Sess. 9 (1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4783) (emphasis added in court’s opinion). The court therefore precluded state consistency-review authority over naval maneuvers on the Island of Vieques and in its offshore waters.

The court could not reconcile this position with NOAA’s regulations providing that federal activities outside the coastal zone—e.g., on excluded federal lands—may be subject to state consistency review if they significantly affect the coastal zone, and it therefore found that the regulations seemed to be “ultra vires.” Id. The court, however, declined to decide the case on this issue. See id.


286. See id. at 1060.

287. In Washington v. United States, No. C-78223 V (W.D. Wash. Aug. 5, 1981), a federal district court held that although all federally owned lands are excluded from the definition of the coastal zone, this exclusion does not extend to federally leased lands unless the lease specifically subjects the lands to the sole discretion of the federal government.
even for defense-related projects. As the court emphatically stated in *Southern Pacific*: "Congress provided no automatic exemption for CZMA-mandated consistency review even in the sensitive area of defense projects." 288

C. Federal Preemption

When a state action is challenged as preempted under the supremacy clause, the Supreme Court generally inquires whether the action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 289 When state action directly contradicts the substance of a federal law, the federal law prevails and invalidates the state action. 290 Similarly, when Congress indicates that federal power exclusively "occupies the field" of regulation, state action that trespasses on the field is invalid even if it complies with the substance or purpose of the federal law. 291 In such cases, the states are "ousted" from the exercise of any authority that they might otherwise possess, and all regulation lies within the exclusive power and jurisdiction of the federal government. 292 Thus, state action may be preempted on both substantive and jurisdictional grounds.

Only one decision has considered whether state action under the CZMA consistency provisions is preempted by federal regulation. In *Southern Pacific Transportation Co. v. California Coastal Commission*, 293 a federal district court held that the Interstate Commerce Act (ICA) 294 does not preempt state consistency authority over railroad abandonments. 295 The court concluded that Congress, in enacting the CZMA, contemplated "a joint federal-state regulatory program;" 296 the court also concluded that there is no inherent conflict between the ICA and the CZMA. 297 Strongly endorsing the CZMA consistency provisions, the

---

288. 520 F. Supp. at 802.
295. 520 F. Supp. at 804.
296. *Id*.
297. *See id.* at 805. Not only may the two statutes coexist, but potential delays and added expense occasioned by state consistency reviews will not unduly burden interstate commerce because removal of the tracks is ancillary to the abandonment of unprofitable lines. *See id.* at 806-07.

court asserted:
Congress intended the consistency provision to play a crucial role in moti-
vating the states to cooperate with [the] federal government under the
CZMA. This enhancement of the power of the coastal states was to be
limited only by "matters of overriding national interest." . . . Given Con-
gressional intention to craft a broad statute, it is not the function of this
court to narrow it.298

D. Commerce Clause

State action regulating interstate commerce is preempted when it
conflicts substantively with federal law.299 Furthermore, Congress may
"occupy" a field of regulation, thereby "ousting" states from any author-
ity or jurisdiction to regulate in any manner.300 The Supreme Court has
stated, however, that "federal regulation of a field of commerce should
not be deemed preemptive of state regulatory power in the absence of
persuasive reasons—either that the nature of the regulated subject matter
permits no other conclusion, or that the Congress has unmistakably so
ordained."301

Congress may validate state action that, but for the congressional
validation, would otherwise infringe upon the commerce clause. The in-
tention of Congress must be clearly discernible or "explicitly intended,"
although the courts have never required that Congress announce, either
in legislation or legislative history, its consent to state action that other-
wise would violate the commerce clause.302

Although the CZMA, the source of the state consistency authority,
is itself a federal law, questions have been raised whether state consis-
tency authority may be preempted by other federal laws.303 In Southern
Pacific, the court noted that the CZMA sanctions a joint federal-state regulatory program, and therefore consistency does not present a preemption issue. In fact, while passing the bill that ultimately became the CZMA, the Senate Committee on Commerce specifically noted that "[t]here is no attempt to diminish State authority through Federal preemption." The court held that although one federal law may repeal, in whole or in part, another federal law, Congress never explicitly repealed any part of the CZMA. Indeed, with respect to both federal agency and federally permitted activities, Congress intended that no such activities affecting coastal resources, values, and uses be exempted from consistency review.

Federal courts will not readily find that a federal law is repealed by implication by another federal law. The courts generally will seek to give effect to both laws if the laws are capable of coexisting. Thus, challenges to state consistency review that are grounded upon repeal-by-implication arguments should be rejected. By enacting the CZMA and establishing and funding state CMP's, Congress has consented to state consistency actions affecting interstate commerce when such actions are necessary to protect and preserve coastal resources, values, and uses, as provided by the CZMA.

A federal district court has also recently held in Norfolk Southern Corporation v. Oberly that the commerce clause does not preempt the exercise of state coastal permitting authority. The state denied a permit for bulk product transfer facilities in Delaware Bay to "top off" partially loaded supercolliers with coal for shipment abroad. In denying the

---

for expedited abandonment proceedings—preempted the CZMA. Id. at 806. The court responded: "Whether the [California] Coastal Commission’s jurisdiction under the CZMA has been curtailed by the [railroad track] abandonment provisions [of the Interstate Commerce Act] is not in reality a preemption issue because the CZMA contemplates a joint federal-state regulatory program." Id. at 804 (citation omitted).

304. Id. at 804-05.
305. S. REP. NO. 753, 92 Cong., 2d Sess. 1 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 193.
307. See S. REP. NO. 753, 92d Cong., 2d Sess. 19 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 210. The report stated:
The [Senate Committee of Commerce] does not intend to exempt Federal agencies automatically from the provisions of [the CZMA]. Inasmuch as Federal agencies are given a full opportunity to participate in the planning process, the committee deems it essential that Federal agencies administer their programs, including development projects, consistent with the State's [CMP].

Id.

310. See id. at 1232. The case is currently on appeal before the Third Circuit Court of Appeals.
permit, the state relied on a provision of its CMP, approved by the Secretary, that prohibited the siting of major new energy facilities in its coastal zone.

The court upheld the permit denial, finding that the Secretary's CMP review and approval provided "a strong safeguard for the federal interest" and was entitled to judicial deference. According to the court, the Secretary's approval "translates" commerce clause powers into a set of congressionally mandated policies over the coastal zone that is evidence of Congress' consent to the State's authority. The court also noted that the Secretary's approval of the Delaware CMP ban on bulk transfer facilities could be challenged as contravening the national interest, thus providing adequate safeguards against such concerns.

The Southern Pacific and Norfolk Southern decisions affirm a significant role for states under both the CZMA federal consistency provisions and state permit authority, despite the preemption and commerce clause attacks. On the other hand, the federal appellate court in Granite Rock Co. found that federal mining laws preempt state coastal permit authority. Both the Granite Rock Co. and Norfolk Southern opinions are on appeal. Although neither decision directly involves the CZMA consistency authority, their outcome will affect the issue of federal-state relations and, therefore, will have serious implications for state consistency authority under the CZMA.

E. The Effect of Section 307(e)

Section 307(e) of the CZMA provides in part that the CZMA does not "diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters," and may not be interpreted as "su-

---

311. DEL. CODE ANN. tit. 7, § 7003 (1983) provides in part: "solid bulk product transfer facilities . . . are prohibited in the coastal zone, and no permit may be issued therefor."


313. Id. at 1250. The court stated:

Having been approved, Delaware's plan bears the imprimatur of Congress that the national interest in commerce has been accorded due consideration. At the time of continuing review, the Secretary is free, subject to constraints not applicable here, to withdraw approval from unsatisfactory state plans. The continuing review mechanism thus allows the Secretary to ensure that state administrative and judicial interpretations of the state statute remain consistent with national policy goals.

Id. at 1251.

314. See id. at 1252.


316. The Supreme Court recently held, in Maine v. Taylor, 106 S. Ct. 2440 (1986), that a state law banning the importation of live baitfish served a legitimate local purpose that could not reasonably be served by nondiscriminatory means. Therefore, there was no arbitrary discrimination against interstate commerce. See id. at 2455. The opinion may lend support to the states' position in cases involving state consistency and permitting authority under the CZMA.
perseding, modifying, or repealing existing laws applicable to the various Federal agencies . . . ."\(^{317}\) It has been argued recently that section 307(e) limits the coastal states to an advisory role in reviewing federal and federally permitted activities by revoking the substantive provisions of the CZMA that grant coastal states consistency review authority.\(^{318}\) Nonetheless, the plain language of the consistency provisions, the relevant legislative history, and NOAA's interpretation and application of section 307(e) contradict this argument.

Congress had modest intentions for section 307(e). The Senate report stated that "[section 307(e)] is a standard clause disclaiming intent to diminish Federal or State authority in the fields affected by the act; to change interstate agreements; to affect the authority of Federal officials; to affect existing laws applicable to Federal agencies; or to affect certain named international organizations."\(^{319}\) The House report language is essentially the same.\(^{320}\)

Respecting federal activities, NOAA's interpretation of section 307(e) is in accord with congressional intent. After careful analysis, NOAA determined that section 307(e) does not diminish the duty of federal agencies under sections 307(c)(1) and 307(c)(2) to act consistently with approved state CMP's. Instead, the CMP's are "supplemental requirements to be adhered to" in addition to the agencies' own mandates.\(^{321}\) The reach of section 307(e) over federally permitted activities is clearly limited by the substantive provisions of section 307(c)(3), which prohibit federal agencies from issuing permits for activities that a state finds to be inconsistent with its CMP, unless the Secretary overrides the

319. S. REP. NO. 753, 92d Cong., 2d Sess. 20 (1972), reprinted in LEGISLATIVE HISTORY, supra note 6, at 211.
321. 15 C.F.R. § 930.32(a) (1986) states that § 307(e) does not set aside the duty of federal agencies:

The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

NOAA also stated:

Thus the duty the [CZMA] imposes upon Federal agencies is not set aside by virtue of [§ 307(e)]. The [CZMA] was intended to effect substantive changes in the Federal agency decision-making within the context of the discretionary powers residing within such agencies. Accordingly, Federal agencies must, where possible, incorporate the policies and procedures set forth in the [CZMA] as a working part of all Federal decisions which affect the coastal zone.

In sum, the interpretation that section 307(e) relegates states to an advisory role in reviewing federal and federally permitted activities cannot be sustained. For federally permitted activities, such an interpretation would nullify the substantive requirements of section 307(c)(3). For federal activities, NOAA’s long-established interpretation and application of section 307(e) are entitled to substantial deference, unless shown to be arbitrary.\(^{323}\)

CONCLUSION

The CZMA’s federal consistency provisions have been heralded as a “significant opportunity for States to influence . . . federal activities in the coastal zone.”\(^{324}\) Congress intended the Act to “encourage the states to exercise their full authority over the lands and waters in the coastal zone”\(^{325}\) and included the consistency provisions as part of a “partnership principle” giving states a greater role in shaping ocean and coastal policy.\(^{326}\)

Initially, NOAA was the vital force behind the adoption of state CMP’s and the implementation of state authority under the federal consistency provisions. For example, until 1980, NOAA supported the

\[^{322}\text{See 16 U.S.C. § 1456(c)(3). The same is true for federal assistance projects. See id. § 1456(d).}\]


\[^{324}\text{S. Rep. No. 783, 96th Cong., 2d Sess. 10 (1980).}\]

\[^{325}\text{16 U.S.C. § 1451(i) (emphasis added).}\]


states' position in their dispute with the Department of the Interior that OCS lease sales were subject to state consistency review. To a large extent, NOAA's support was a function of its close relationship with states during program development, when the Agency provided planning grants and technical assistance to states adopting CMP's. Under former Administrator John V. Bryne, NOAA continued to support state coastal zone management.

There is, however, substantial evidence that NOAA's role is changing. Increasing internal political constraints on the Agency are curtailing the ability of states to influence the federal decisionmaking process. Evidence of NOAA's changing role includes: its support of legal challenges to the application of state program policies that were approved during initial program review, its recommendations to Congress that

328. For a good description of this process, see Matuszeski, Managing the Federal Coastal Program: The Planning Years, 51 J. AM. PLAN. A. 266 (1985).

329. In 1982, NOAA Administrator's Letter No. 37, from John V. Bryne, Administrator, NOAA, to Regional Fishery Management Councils and State Coastal Zone Agencies (Nov. 24, 1982) (on file with authors), adopted a broad interpretation of “directly affecting” and instructed federal agencies and state CMP's that Fishery Management Plans would normally require consistency determinations under § 307(c)(1). In 1984, NOAA issued a letter finding that EPA ocean incineration permits issued under the Ocean Dumping Act, 33 U.S.C. §§ 1401-1445 (1982), are subject to state consistency review under § 307(c)(3)(A) if the incineration activities affect land or water uses in the coastal zone. Letter from Robert McManus, NOAA General Counsel, to Charles A. Graddick, Attorney General, State of Alabama (Feb. 1, 1984) (on file with authors). Finally, in amending its regulations to conform to the decision in Secretory of the Interior v. California, NOAA excluded only the Department of the Interior's OCS oil and gas leasing program from review by states under the CZMA. See supra notes 72-75 & 217 and accompanying text.

330. As one commentator noted:

The CZM bubble burst quickly after the inauguration of President Reagan. In 1981, the first budget proposal sent to Capitol Hill by the new head of the Office of Management and Budget, David Stockman, proposed to end federal funding for CZM and CEIP (Coastal Energy Impact Program). At about the same time, Interior Secretary James Watt announced a five-year OCS program, based on the concept of areawide leasing, that would offer oil and gas development rights on some one billion acres. Kitsos, supra note 7, at 282.

331. The Department of Commerce, as amicus curiae, entered Norfolk S. Corp. v. Oberly, 632 F. Supp. 1225 (D. Del. 1986), to argue that Delaware's prohibition on “bulk product transfer facilities” contravened the national interest and violated the commerce clause. See id. at 1252. As the court noted, the Secretary had approved Delaware's CMP and the challenged prohibition in 1979 and subsequently reviewed the CMP in 1980, 1982, and 1984. See id. at 1250-51.

In February 1986, NOAA granted Maryland's request to review a proposal by Chemical Waste Management, Inc. (Chem Waste), which sought EPA approval to burn liquid hazardous wastes at an ocean incineration site located approximately 140 miles east of the Delaware Bay. Coastal Zone Management Newsletter No. 6, at 1 (Feb. 13, 1986). But when Chem Waste sued the Department of Commerce, challenging the application of the federal consistency provisions to its incineration activities, the Department of Commerce took the position that the Ocean Dumping Act preempted state regulation under the CZMA. Federal Defendants' Memorandum in Support of Their Motion to Dismiss and in Response to Plaintiff's Motion for Summary Judgement at 13, Chemical Waste Management, Inc. v. United States Dep't of Commerce, No. 86-624 (D.D.C. Mar. 6, 1986). On May 28, 1986, EPA denied Chem
state CMP's should not be funded and that the CZMA should not be reauthorized or supplemented through revenue sharing; and its challenges to the adoption of local coastal plans, the routine amendment of state CMP's, and the application of state CMP policies to a growing number of federal activities and permits.

President Reagan recently directed Commerce Secretary Malcolm Baldrige to "immediately begin a review of State coastal zone management programs to advance the 'national interest' in energy security . . . [and to] use his regulatory authority to minimize the overlap in judicial and administrative jurisdiction over coastal zone practices." In response, NOAA Administrator Anthony Calio drafted a memorandum directing the reexamination of the CZMA regulations to determine whether changes are necessary. He also is reviewing state CMP's and consistency decisions to determine whether NOAA should initiate the withdrawal of federal funds and program decertification. These actions have raised fears that NOAA is contemplating additional measures to limit the state role in the federal decisionmaking process for activities located in the coastal zone as well as on the OCS.

Thus, NOAA's former role as the developer and supporter of state CMP's is changing. NOAA is now more frequently viewed as opposed to state actions under the CZMA, if not hostile to coastal management itself. The lack of federal support for state CMP's threatens state authority, particularly when courts are considering important legal issues in coastal zone management.

---


332. See Kitsos, supra note 7, at 282-83.

333. See Coastal Zone Management Newsletter No. 10, at 1-3 (Mar. 13, 1986); see also Letter from Alan R. Pendleton, Executive Director, San Francisco Bay Conservation and Development Commission, to Peter L. Tweedt, Director of OCRM, NOAA (Mar. 3, 1986); Letter from Peter L. Tweedt, Director of OCRM, NOAA, to John R. Weingart, Department of Environmental Protection, State of New Jersey (Aug. 26, 1986); Letter from Peter L. Tweedt, Director of OCRM, NOAA, to Rodney Mack, Department of Ecology, State of Washington (July 28, 1986) (all on file with authors).


335. See Response to the President's Message on Preserving Our Nation's Energy Security, Draft Information Memorandum from Anthony J. Calio, Administrator, NOAA, to P.L. Tweedt, Director of OCRM, NOAA (no date) (on file with authors).

336. See, e.g., Coastal Zone Management Newsletter No. 26, at 2-3 (July 11, 1986).

337. Indeed, NOAA is standing aside in the face of attacks on state authority and, in some cases, is supporting such attacks. For example, the Secretary of Commerce and NOAA officials declined to enter Exxon Corp. v. Fischer to defend before the district court the Secretary's denial of Exxon's consistency appeal. In Chemical Waste Management, Inc. v. United States Dep't of Commerce, No. 86-624 (D.D.C. Mar. 6, 1986), the Secretary agreed that the Ocean Dumping Act preempted state consistency review under the CZMA. See Federal Defendants' Memorandum in Support of Their Motion to Dismiss and in Response to Plaintiff's Motion for Summary Judgment at 13, Chemical Waste Management, Inc. v. United States Dep't of Commerce, No. 86-624 (D.D.C. Mar. 6, 1986).
The states are facing major challenges in the courts. In *Secretary of the Interior v. California*,\(^3\) the Supreme Court restricted the ability of coastal states to protect and manage coastal uses, resources, and values by removing a significant class of federal activities—OCS oil and gas lease sales—from state consistency review. In *Exxon Corp. v. Fischer*,\(^3\) a federal district court ruling limited state consistency review of OCS oil and gas activities to effects on the physical resources of the coastal zone by excluding from consideration economic and social effects. Unless the Ninth Circuit Court of Appeals decision reversing the district court is upheld, the Secretary’s authority to review appeals will be undermined by permitting collateral attacks in federal court on state consistency objections in disregard of the Secretary’s decision and findings.

In several recent cases, the Departments of Commerce and Justice have argued that federal law preempts state consistency review and that states may not review federally permitted activities outside the state’s coastal zone regardless of their impact on the coastal zone.\(^4\) The latter argument directly contradicts the federal consistency regulations.\(^5\) Thus, adverse court decisions, supported by NOAA and the Department of Commerce, may weaken state consistency authority by: (1) restricting the range of federal activities to which the state may object under the CZMA, (2) limiting state consistency review to activities that occur only in the coastal zone, and (3) preempting state consistency actions entirely.

The Court’s opinion in *Secretary of the Interior v. California* already has significantly modified the concept of federal consistency. Further judicial or administrative weakening of the federal consistency mechanism, by excluding from state review major federal or federally permitted activities or by limiting the geographic reach of the consistency provisions, would seriously impair the ability of coastal states to manage their coastal zones as required by the CZMA.\(^6\) Such a weakening would confront coastal states and Congress with the failure of a major compo-

---

341. See 15 C.F.R. § 930.53(b) (1986); see also id. § 930.33(c)(1) (“Federal activities outside of the coastal zone [e.g., on excluded federal lands, the OCS, or landward of the coastal zone] . . . are subject to Federal agency review to determine whether they directly affect the coastal zone.”).
342. For example, in COE’s proposed rules governing the discharge of dredged material in United States and ocean waters, COE took the position that its dredge and fill disposal activities need only be consistent with state CMP’s when such activities occur “within the coastal zone.” 51 Fed. Reg. 19,694, 19,699 (1986) (to be codified at 33 C.F.R. § 336.1(a)(3)) (proposed May 30, 1986). The proposed rule also asserts that, with respect to disposal activities in ocean waters outside the territorial sea—i.e., federal waters—the CZMA consistency provisions are preempted by the Ocean Dumping Act. Id. at 19,702.
nent of our national coastal zone management policy and deny the coastal states an important check upon federal activities that affect their coastal zones. Moreover, an innovative concept in coastal federalism, in which the federal and state governments act as equal partners, will have failed. The states will be relegated to merely an advisory role in the management of their coastal areas—offering comments and recommendations and hoping for federal indulgence.